11–25–97
Vol. 62 No. 227
Pages 62687–62944

federal register

Tuesday
November 25, 1997

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Contents

Federal Register

Vol. 62, No. 227

Tuesday, November 25, 1997

Agriculture Department
See Animal and Plant Health Inspection Service
See Commodity Credit Corporation
See Farm Service Agency
See Food Safety and Inspection Service
See Forest Service
See Grain Inspection, Packers and Stockyards Administration

Animal and Plant Health Inspection Service
PROPOSED RULES
Export certification:
Non-government facilities; accreditation for laboratory testing or phytosanitary inspection services, 62699–62707

Census Bureau
NOTICES
Meetings:
African American Population Census Advisory Committee et al., 62756–62757
American Indian and Alaska Native Populations Census Advisory Committee, 62757

Centers for Disease Control and Prevention
NOTICES
Committees; establishment, renewal, termination, etc.:
National Center for Infectious Diseases Scientific Counselors Board, 62772
Meetings:
HIV and STD Prevention Advisory Committee, 62772

Children and Families Administration
NOTICES
Agency information collection activities:
Submission for OMB review; comment request, 62772–62773

Coast Guard
PROPOSED RULES
Anchorage regualtions:
California, 62734–62736
Regattas and marine parades:
U.S. National Waterski Racing Championship, 62733–62734
Vocational rehabilitation and education:
Veterans education—
Election of education benefits, 62736–62739

Commerce Department
See Census Bureau
See International Trade Administration
See National Oceanic and Atmospheric Administration
NOTICES
Reports and guidance documents; availability, etc.:
Critical foundations; protecting America's infrastructures; comment request, 62754–62756

Committee for the Implementation of Textile Agreements
NOTICES
Cotton, wool, and man-made textiles:
China, 62759–62760

Commodity Credit Corporation
RULES
Loan and purchase programs:
Noninsured crop disaster assistance program provisions; aquacultural species, etc.
Correction, 62693
Price support levels—
Peanuts, 62689–62693
NOTICES
Agency information collection activities:
Proposed collection; comment request, 62752

Community Development Financial Institutions Fund
NOTICES
Grants and cooperative agreements; availability, etc.:
Bank enterprise award program, 62802–62803

Defense Department
PROPOSED RULES
Vocational rehabilitation and education:
Veterans education—
Election of education benefits, 62736–62739
NOTICES
Federal Acquisition Regulation (FAR):
Agency information collection activities—
Proposed collection; comment request, 62760–62761

Drug Enforcement Administration
NOTICES
Applications, hearings, determinations, etc.:
Curry, Edward B., M.D., 62785–62786

Education Department
RULES
Postsecondary education:
Student assistance general provisions—
Compliance audits and financial responsibility standards, 62830–62887

Energy Department
See Federal Energy Regulatory Commission
NOTICES
Environmental statements; availability, etc.:
Rocky Flats Environmental Technology Site, CO—
Plutonium residues and scrub alloy storage, 62761–62763

Environmental Protection Agency
RULES
Air quality implementation plans; approval and promulgation; various States; air quality planning purposes; designation of areas:
Tennessee, 62695–62698
PROPOSED RULES
Air quality implementation plans; approval and promulgation; various States; air quality planning purposes; designation of areas:
Tennessee, 62739–62740
Hazardous waste:
Hazardous waste transportation; uniform manifest tracking system strategies, 62740

NOTICES
Meetings:
Endocrine Disruptors Screening and Testing Advisory Committee, 62768

Executive Office of the President
See Presidential Documents
See Trade Representative, Office of United States

Farm Service Agency
RULES
Farm marketing quotas, acreage allotments, and production adjustments:
Peanuts, 62689–62693

Federal Aviation Administration
RULES
Aircraft products and parts; certification procedures:
Primary category seaplanes; weight limit increase, 62806–62808
PROPOSED RULES
Airworthiness directives:
Aeromot-Industria Mecanico Metalurgica Ltda., 62725–62726
Airbus, 62721–62725
Boeing, 62708–62721, 62726–62728
Lockheed, 62728–62732
VOR Federal airways; withdrawn, 62732

Federal Communications Commission
NOTICES
Agency information collection activities:
Submission for OMB review; comment request, 62768–62770
Common carrier services:
Local multipoint distribution services—
Auction no. 17; minimum opening bid formula; comment request, 62770

Federal Deposit Insurance Corporation
NOTICES
Meetings; Sunshine Act, 62770–62771

Federal Energy Regulatory Commission
NOTICES
Applications, hearings, determinations, etc.:
Florida Gas Transmission Co., 62763–62764
Kansas Pipeline Co., 62764
Koch Gateway Pipeline Co. et al., 62764
NorAm Gas Transmission Co., 62765
PECO Energy Co., 62765–62766
Peoples Gas Light & Coke Co., 62767
Texas Eastern Transmission Corp., 62767–62768
Trailblazer Pipeline Co., 62768

Federal Maritime Commission
NOTICES
Agreements filed, etc., 62771
Freight forwarder licenses:
J.E.S. Forwarding Inc. et al., 62771–62772

Financial Management Service
See Fiscal Service

Fiscal Service
NOTICES
Agency information collection activities:
Proposed collection; comment request, 62803

Food and Drug Administration
NOTICES
Agency information collection activities:
Proposed collection; comment request, 62773–62775
Submission for OMB review; comment request, 62775
Biological product licenses:
Intermountain Health Care, Inc., 62776
Harmonisation International Conference; guidelines availability:
Pharmaceuticals—
Nonclinical safety studies for conduct of human clinical trials, 62922–62925
Specifications; test procedures and acceptance criteria for new drug substances and products; chemical substances, 62890–62910
Meetings:
Biological Response Modifiers Advisory Committee, 62776–62777
Medical Devices Advisory Comittee, 62777
Medical Devices Advisory Committee, 62777–62778

Food Safety and Inspection Service
NOTICES
Meetings:
HACCP Implementation, 62752–62753

Forest Service
NOTICES
Meetings:
California Coast Province Advisory Committee, 62753

General Services Administration
NOTICES
Federal Acquisition Regulation (FAR):
Agency information collection activities—
Proposed collection; comment request, 62760–62761

Grain Inspection, Packers and Stockyards Administration
NOTICES
Stockyards; posting and deposting:
B&B Sales, GA, 62753–62754
Centerton Livestock Auction, AR, et al., 62754
Concordia Livestock Auction, KS, et al., 62754

Health and Human Services Department
See Centers for Disease Control and Prevention
See Children and Families Administration
See Food and Drug Administration
See National Institutes of Health

Housing and Urban Development Department
RULES
Community development block grants:
New York small cities program, 62912–62920
PROPOSED RULES
Public and Indian housing:
Ceiling rents on total tenant payments for public housing projects, 62928–62931
NOTICES
Agency information collection activities:
Proposed collection; comment request, 62782–62783

Interior Department
See Minerals Management Service
See National Park Service

International Trade Administration
NOTICES
Antidumping:
Fresh and chilled Atlantic salmon from—
Norway, 62757–62758
Welded carbon steel pipe and tube from—
Turkey, 62758–62759

International Trade Commission
NOTICES
Meetings; Sunshine Act, 62785

Justice Department
See Drug Enforcement Administration
See Justice Programs Office

Justice Programs Office
NOTICES
Agency information collection activities:
Submission for OMB review; comment request, 62786

Labor Department
See Mine Safety and Health Administration
See Pension and Welfare Benefits Administration

Merit Systems Protection Board
RULES
Practices and procedures:
Exclusion from proceedings because of misconduct; judges' exercise of authority, 62689

Minerals Management Service
NOTICES
Environmental statements; availability, etc.:
Central Gulf of Mexico OCS—
Lease sales, 62783–62784
Outer Continental Shelf operations:
Central Gulf of Mexico—
Lease sales, 62784

Mine Safety and Health Administration
PROPOSED RULES
Coal mine safety and health:
Underground coal mines—
Self-rescue devices; use and location requirements, 62732–62733

National Aeronautics and Space Administration
NOTICES
Federal Acquisition Regulation (FAR):
Agency information collection activities—
Proposed collection; comment request, 62760–62761

National Credit Union Administration
NOTICES
Meetings; Sunshine Act, 62786–62787

National Highway Traffic Safety Administration
NOTICES
Motor vehicle safety standards; exemption petitions, etc.:
Ford Motor Co., 62798–62799
Kolcraft Enterprises, Inc., 62799–62800
Motor vehicle theft prevention standards; exemption petitions, etc.:
BMW of North America, Inc., 62800–62801

National Institutes of Health
NOTICES
Meetings:
Advisory Committee to Director, 62778
National Cancer Institute, 62778–62779
National Center for Research Resources, 62779
National Eye Institute, 62779
National Heart, Lung and Blood Institute, 62779–62780
National Institute of Arthritis and Musculoskeletal and Skin Diseases, 62780
National Institute of Diabetes and Digestive and Kidney Diseases, 62780
Scientific Review Center special emphasis panels, 62780–62781
Patent licenses; non-exclusive, exclusive, or partially exclusive:
GenVec, Inc., 62781–62782

National Oceanic and Atmospheric Administration
RULES
Ocean and coastal resource management:
Marine sanctuaries—
Monterey Bay National Marine Sanctuary, CA, 62693–62694
PROPOSED RULES
Marine mammals:
Designated critical habitats—
Central California Coast and Southern Oregon/Northern California Coast coho salmon, 62741–62751
NOTICES
Meetings:
North Pacific Fishery Management Council, 62759

National Park Service
NOTICES
National Register of Historic Places:
Pending nominations, 62784–62785

Northeast Dairy Compact Commission
RULES
Over-order price regulations:
Compact over-order price regulations—
Class I fluid milk route distributions in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont, 62810–62827
Producer referendum results, 62827–62828

Nuclear Regulatory Commission
NOTICES
Agency information collection activities:
Submission for OMB review; comment request, 62787
Environmental statements; availability, etc.:
Maine Yankee Atomic Power Co., 62788
Meetings; Sunshine Act, 62788–62789

Office of United States Trade Representative
See Trade Representative, Office of United States

Pension and Welfare Benefits Administration
RULES
Employee Retirement Income Security Act:
Plan assets; participant contributions, 62934–62936

Presidential Documents
PROCLAMATIONS
Special observances:
Family Caregivers Week, National (Proc 7055), 62943–62944

Family Week, National (Proc. 7054), 62941–62942
Farm-City Week, National (Proc. 7053), 62939
Thanksgiving Day (Proc. 7052), 62687–62688

Public Debt Bureau
See Fiscal Service

Public Health Service
See Centers for Disease Control and Prevention
See Food and Drug Administration
See National Institutes of Health

Research and Special Programs Administration
NOTICES
Reporting and recordkeeping requirements, 62801

Securities and Exchange Commission
PROPOSED RULES
Securities:
Shareholder proposals, 62732
NOTICES
Self-regulatory organizations; proposed rule changes:
American Stock Exchange, Inc., 62795–62796
Applications, hearings, determinations, etc.:
Cash Accumulation Trust et al., 62789–62791
Public utility holding company filings, 62791–62793
UAM Funds, Inc., et al., 62793–62795

Small Business Administration
PROPOSED RULES
Disaster loan program:
Physical disaster and economic injury loans; increase request requirements, 62707–62708

State Department
RULES
Nationality and passports:
Passports; denying, revoking, or canceling procedures, 62694–62695
NOTICES
Meetings:
Shipping Coordinating Committee, 62796–62797

Textile Agreements Implementation Committee
See Committee for the Implementation of Textile Agreements

Trade Representative, Office of United States
NOTICES
Caribbean Basin Economic Recovery Act:
Beneficiary country designations—
Anguilla, 62797–62798

Transportation Department
See Coast Guard
See Federal Aviation Administration
See National Highway Traffic Safety Administration
See Research and Special Programs Administration

Treasury Department
See Community Development Financial Institutions Fund
See Fiscal Service
NOTICES
Meetings:
Customs Service Commercial Operations Advisory Committee, 62801–62802

United States Information Agency
NOTICES
Agency information collection activities:
Proposed collection; comment request, 62803–62804

Veterans Affairs Department
PROPOSED RULES
Vocational rehabilitation and education:
Veterans education—
Election of education benefits, 62736–62739
NOTICES
Committees; establishment, renewal, termination, etc.:
Special Medical Advisory Group, 62804
Meetings:
Structural Safety of VA Facilities Advisory Committee, 62804

Separate Parts In This Issue

Part II
Department of Transportation, Federal Aviation Administration, 62806–62808

Part III
Department of Agriculture, Northeast Dairy Compact Commission, 62810–62828

Part IV
Deoartment of Education, 62830–62887

Part V
Department of Health and Human Services, Food and Drug Administration, 62890–62910

Part VI
Department of Housing and Urban Development, 62912–62920

Part VII
Department of Health and Human Services, Food and Drug Administration, 62922–62925

Part VIII
Department of Housing and Urban Development, 62928–62931

Part IX
Department of Labor, Pension and Welfare Benefits Administration, 62934–62936

Part X
The President, 62939–62944

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR

Proclamations:

7052.....62687
7053.....62939
7054.....62941
7055.....62943

5 CFR

1201.....62689

7 CFR

Ch. XIII.....62827
729.....62689
1301.....62810
1304.....62810
1305.....62810
1306.....62810
1307.....62810
1421.....62689
1437.....62693
1446.....62689

Proposed Rules:

353.....62689

13 CFR

Proposed Rules:

123.....62707

14 CFR

21.....62806

Proposed Rules:

39 (6 documents) 62708, 62721, 62723, 62725, 62726, 62728
71.....62732

15 CFR

922.....62693

17 CFR

Proposed Rules:

240.....62732

22 CFR

51.....62694

24 CFR

570.....62912

Proposed Rules:

5.....62928

29 CFR

2510.....62934

30 CFR

Proposed Rules:

75.....62732

33 CFR

Proposed Rules:

100.....62733
110.....62734

34 CFR

668.....62830

38 CFR

Proposed Rules:

21.....62736

40 CFR

52.....62695
81.....62695

Proposed Rules:

52.....62739
81.....62739
262.....62740
263.....62740

50 CFR

Proposed Rules:

226.....62741

Federal Register
Vol. 62, No. 227
Tuesday, November 25, 1997

Presidential Documents

Title 3—

The President

Proclamation 7052 of November 21, 1997

Thanksgiving Day, 1997

By the President of the United States of America

A Proclamation

Another year has passed on our American journey. The seasons have completed another cycle, and it is harvest time in America. Once again, millions of us will gather with family and friends to give thanks to God for the many blessings that He has bestowed upon us.

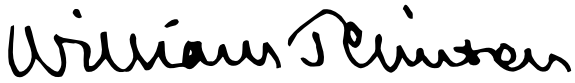
This Thanksgiving Day, as every day, we are grateful for the gift of freedom, for the vision made real by our Nation's founders and preserved by the courage, vigilance, and sacrifice of generations of Americans. We are thankful for the bounty and beauty of this great land, which has welcomed so many to its shores across the years. We cherish the love of our families and friends. We value the opportunity to provide for our children's future with the fruits of our honest labor. And, like the Pilgrims who celebrated Thanksgiving more than 300 years ago, we thank God for bringing us safely to the threshold of a new world, full of exhilarating challenge and promise.

In this new world, our children are growing up free from the shadows of the Cold War and the threat of nuclear holocaust. Nations once held captive by communism are learning the lessons of liberty and democracy. A revolution in technology has brought the world closer together and holds the prospect of greater knowledge and prosperity for people across the globe.

More than three centuries of change and growth separate us from the Pilgrims and their Native American friends who sat down together for their Thanksgiving meal. But the example and experience of those early Americans still hold great meaning for us today. They remind us that God's love strengthens and sustains us, both as individuals and as a Nation. They remind us that everyone has something to contribute, and that we are all richer when we learn to share. They teach us a simple but powerful lesson that each new generation of Americans must learn and pass on: we need one another. Like the Pilgrims, if we are to flourish in our new world, we must do so not as isolated individuals, but as members of a family, one America, sharing our gifts and leaving no one behind.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim Thursday, November 27, 1997, as a National Day of Thanksgiving. I encourage all Americans to assemble in their homes, places of worship, or community centers to share the spirit of goodwill and prayer; to express heartfelt thanks to God for the many blessings He has bestowed upon us; and to reach out in true friendship to our brothers and sisters across this land who, together, comprise our great American family.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of November, in the year of our Lord nineteen hundred and ninety-seven, and of the Independence of the United States of America the two hundred and twenty-second.



[FR Doc. 97–31112
Filed 11–24–97; 8:45 am]
Billing code 3195–01–P

Rules and Regulations

Federal Register
Vol. 62, No. 227
Tuesday, November 25, 1997

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

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

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Interim rule; request for comments.

SUMMARY: The Merit Systems Protection Board is amending its rules of practice and procedure to provide notice that a judge may exclude a party or representative from all or any portion of a Board proceeding before him or her because of misconduct. The intent of this amendment is to inform parties and their representatives that MSPB judges have this authority and will exercise it when necessary to ensure that adjudication of cases proceeds expeditiously and without undue disruption.

DATES: Effective date November 25, 1997. Submit written comments on or before January 26, 1998.

ADDRESSES: Send comments to Robert E. Taylor, Clerk of the Board, Merit Systems Protection Board, 1120 Vermont Avenue, NW, Washington, DC 20419. Comments may be sent via e-mail to mspb@mspb.gov.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, (202) 653–7200.

SUPPLEMENTARY INFORMATION: The Board's current rule at 5 CFR 1201.41(b) provides notice that a judge ''will take all necessary action to avoid delay in all proceedings'' and ''will have all powers necessary to that end unless those powers are otherwise limited by law.'' It further provides explicit notice of a judge's authority to ''maintain decorum, and exclude any disruptive persons from the hearing,'' [§ 1201.41(b)(6)], ''[e]xclude any person from the hearing for good reason'' [§ 1201.41(b)(7)], and ''[i]mpose sanctions as provided under § 1201.43 of this part'' [§ 1201.41(b)(11)]. Section 1201.43 permits a judge to ''impose sanctions upon the parties as necessary to serve the ends of justice.''

These provisions in the Board's current rules are sufficient to permit a judge to exclude a party or representative from a proceeding when the person engages in misconduct. The Board is amending its regulations to provide explicit notice that a judge may exercise such authority at a hearing or at any other point in a proceeding, such as a settlement conference or prehearing conference.

The Board is amending its rule at 5 CFR 1201.31 (''Representatives'') by adding a new paragraph (d) to make clear that misconduct by representatives, as well as parties or other persons, may result in exclusion by a judge from the Board proceeding before him or her. The new paragraph (d) also requires that the reasons for an exclusion be documented in the record and that, where a representative is excluded, the party be given a reasonable time to obtain new representation. The new provision also states that the Board, when considering a petition for review, is not bound by a judge's decision to exclude a person from the proceeding below.

The Board also is amending its rule at 5 CFR 1201.41 (''Judges'') by revising subparagraph (b)(7) to provide for exclusion from ''all or any part of the Board proceeding before him or her'' rather than from ''the hearing.''

The Board is publishing this rule as an interim rule pursuant to 5 U.S.C. 1204(h).

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Board amends 5 CFR part 1201 as follows:

PART 1201—[AMENDED]

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 4331, unless otherwise noted.

2. Section 1201.31 is amended by adding a new paragraph (d) at the end, as follows:

§ 1201.31 Representatives.

* * * * *

(d)(1) A judge may exclude a party, a representative, or other person from all or any portion of the proceeding before him or her for contumacious misconduct or misbehavior that obstructs the hearing.

(2) When a judge excludes a person from participation in a proceeding, the judge shall document the reasons for the exclusion in the record.

(3) A proceeding will not be delayed because the judge excludes a person from the proceeding, except that where the judge excludes a party's representative, the judge will give the party a reasonable time to obtain another representative.

(4) The Board, when considering a petition for review of a judge's initial decision under subpart C of this part, will not be bound by any decision of the judge to exclude a person from the proceeding below.

3. Section 1201.41 is amended by revising paragraph (b)(7) to read as follows:

§ 1201.41 Judges.

* * * * *

(b) * * *

(7) Exclude any person from all or any part of the proceeding before him or her for good reason;

* * * * *

Dated: November 19, 1997.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 97–30831 Filed 11–24–97; 8:45 am]
BILLING CODE 7400–01–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 729

Commodity Credit Corporation

7 CFR Parts 1421 and 1446

RIN 0560–AFO1

1997-Crop Peanuts; National Poundage Quota; National Average Support Level for Quota and Additional Peanuts; and Minimum Commodity Credit Corporation Export Edible Sales Price for Additional Peanuts

AGENCIES: Farm Service Agency and Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: The purpose of this final rule is to codify determinations made by the Secretary of Agriculture (Secretary) with respect to the 1997 peanut crop: the national poundage quota for quota peanuts is established at 1,133,000 short tons (st); the national average support level for quota peanuts is $610 per st; the national average support level for additional peanuts is set at $132 per st; and the minimum Commodity Credit Corporation (CCC) export edible sales price for price-support loan-inventory additional peanuts is $400 per st. The poundage quota is established pursuant to statutory requirements contained in the Agricultural Adjustment Act of 1938, as amended (the 1938 Act). The determination of the national average support levels for quota and additional peanuts was made pursuant to the statutory requirements of the Federal Agriculture Improvement and Reform Act of 1996 (the 1996 Act). The determination and announcement of the minimum export edible sales price for additional peanuts is a discretionary action made to facilitate the negotiation of private contracts for export edible peanuts. This rule also codifies the additional peanut price support determinations for the 1996 crop and the minimum CCC price for loan inventory additional peanuts from the 1996 crop.

EFFECTIVE DATE: November 25, 1997.

FOR FURTHER INFORMATION CONTACT: Kenneth M. Robison, USDA, Farm Service Agency, STOP 0514, 1400 Independence Avenue, S.W., Washington, DC 20250–0514, telephone 202–720–9255. Copies of the cost-benefit assessment prepared for this rule can be obtained from Mr. Robison.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This final rule has been determined to be significant for purposes of Executive Order 12866 and, therefore, has been reviewed by OMB.

Federal Assistance Program

The title and number of the Federal Assistance Program, as found in the Catalog of Federal Domestic Assistance, to which this rule applies, are Commodity Loans and Purchases—10.051.

Executive Order 12988

This final rule has been reviewed in accordance with Executive Order 12988. The provisions of this final rule do not preempt State laws, are not retroactive, and do not involve administrative appeals.

Paperwork Reduction Act

These amendments do not contain information collections that require clearance by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this final rule because the Farm Service Agency (FSA) is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject of these determinations.

Unfunded Federal Mandates

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandate Reform Act (UMRA), for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Background

A. Announcement of the Quota

Section 358–1(a)(1) of the 1938 Act as amended by the 1996 Act, requires that the national poundage quota for peanuts for each of the 1996 through 2002 marketing years (MYs) be established by the Secretary at a level that is equal to the quantity of peanuts (in tons) that the Secretary estimates will be devoted in each MY to domestic edible (excluding seed) and related uses. As to seed, section 358–1(b)(2)(B) of the 1938 Act provides that a temporary allocation of quota pounds for the MY only shall be made to producers for each of the 1996 through 2002 MYs and that the temporary seed quota allocation shall be equal to the pounds of seed peanuts planted on the farm as may be adjusted and determined under regulations prescribed by the Secretary. The MY for 1997-crop peanuts runs from August 1, 1997, through July 31, 1998. Poundage quotas for the 1996 and 1997 crops of peanuts were approved by 97 percent of peanut producers voting in a referendum conducted December 11–14, 1995.

The national poundage quota for the 1997 MY was established at 1,133,000 st, based on the following data.

Estimated Domestic Edible and Related Uses for 1997-Crop Peanuts

Item	Farmer stock equivalent (short tons)
Domestic edible—Domestic production:	
For domestic food use	913,000
On-farm and local sales	9,000
Related uses:	
Crushing residual	120,500
Shrinkage and other losses	36,500
Segregation 2 and 3 loan:	
Transfers to quota loan	5,000
Under production	49,000
Total	1,133,000

The estimate of MY 1997 domestic food use of peanuts was developed in two steps. First, the farmer stock equivalent of 1,062,500 st was estimated by the USDA Interagency Commodity Estimates Committee (ICEC). Second, this estimate was reduced by 149,500 st to exclude peanut imports, peanut butter imports, and peanut butter exports. Although estimates of domestic edible utilization typically include product exports, peanut butter exports are generally either made from, or may otherwise be credited under section 358e of the 1938 Act as being made from additional peanuts. MY 1997 farm use and local sales were estimated at 1 percent ICEC's MY 1997 production estimate. This percentage reflects the average difference between USDA production data and Federal-State Inspection Service inspection data. About one-half of farm use and local sales is allocated to food use and the remainder to seed, and seed is excluded from quota determinations under amendments to the 1938 Act by the 1996 Act.

The crushing residual represents the farmer stock equivalent weight of crushing grade kernels shelled from quota peanuts. In any given lot of farmer stock peanuts, a portion of such peanuts is only suitable for the crushing market. The quota consists of the edible and crushing content of the farmer stock weight of quota peanuts. The crushing residual identified above reflects the assumption that crushing grade peanuts will be about 12 percent, on a farmer stock basis, of the total of MY 1997 domestic production.

The allowance for shrinkage and other losses is an estimate of reduced kernel weight available for milling as well as for kernel losses due to damage, fire, and spillage. These losses were estimated by multiplying a factor of 0.04 times domestic food use. The utilized factor is a FSA estimate equal to the

minimum allowable shrinkage used in calculating a handler's obligation to export or crush additional peanuts as set forth in Section 359e(d)(2)(iv) of the 1938 Act. Excessive moisture and weight loss due to foreign material in delivered farmer stock peanuts were not considered since such factors are accounted for as inspection factors at buying points and do not impact quota marketing tonnage.

The adjustment for Segregation 2 and 3 loan transfers represent transfers of Segregation 2 and 3 peanuts from additional price support loan pools to quota loan pools. Such transfers occur when quota peanut producers have insufficient Segregation 1 peanuts to fill their quotas yet have Segregation 2 and 3 peanuts in additional loan pools which would have been eligible to be pledged as collateral for price support at the quota loan rate, if it were not for quality problems. In such cases, for price support purposes only, these peanuts may be pledged as collateral for price support loans at a discounted quota loan rate. Subject to a national limit of 5,000 st, individual producers can transfer up to 25 percent of their effective farm poundage quota from the additional loan pool and receive 70 percent of the quota loan rate. Regarding the disposition of such peanuts, the CCC will ensure that they are crushed for oil.

In addition, an allowance has been made for underproduction. Historically, only 92 percent of the quota has been marketed. Since the 1996 Act eliminated the carryover of unmarketed quota pounds, any quota pounds not marketed will be a loss of potential income for producers. It is expected that somewhat more than 92 percent will be marketed. It was assumed, based on a consideration of all factors, that 95.5 percent of the 1997 quota will be marketed. This assumption, together with expected growth in domestic consumption of peanut products through new uses and a small increase in demand because of lower peanut support prices resulted in the setting of a national peanut poundage quota of 1,133,000 st for the 1997 MY. This determination followed the publication of a proposed rule on November 25, 1996, in the **Federal Register** (61 FR 59840), which set forth a proposed MY 1997 national poundage quota level, an additional price support level and a minimum CCC sales price for export edible peanuts for sales of price support loan peanuts of the 1997 crop.

There were 169 letters received comprising 63 separate comments in response to the notice during the comment period that ended on December 10, 1996. The 63 comments addressing these issues represent 29 manufacturers, 18 Associations, five Members of Congress, four producers, four shellers, and the three producer owned cooperatives that administer the loan program. The manufacturers and their associations were concerned with adequate supplies and stock levels. Manufacturers and their associations mostly recommended quota levels ranging from 1,400,000 to 1,500,000 st for MY 1997. Shellers and their associations were concerned with adequate supplies and competitive prices for export edible peanuts. Producers and their associations were concerned with supplies, stock levels and program costs. The Congressional letters counseled the Secretary to be thorough and cautious in setting the 1997 national peanut poundage quota.

A significantly larger quota recommended by most peanut product manufacturers would lower the price received by first buyers and could slightly reduce cost to consumers for peanut products. Furthermore, a substantial increase in quota would lower the average producer price to a level near the average national support price. A quota of 1,400,000 to 1,500,000 st would likely result in sufficient qualities and quantities of peanuts delivered at the right time and place such that the average price would be only slightly higher than $610 per st. Since the demand for greater supplies of peanuts is small, this level of quota would likely result in a surplus and a loss on loan placements for more than 300,000 st of peanuts. These peanut losses would be around $400 per st. Losses of up to $120 million could occur and result in producer assessments of over $100 per st the following year. This level of assessment could lower the effective price received by producers for quota peanuts in MY 1998 to near $500 per st. In any event, the quota formula is set by statute and the determined quota was calculated using that formula.

B. Additional Peanut Support Level

Section 155(b)(2) of the 1996 Act provides that price support shall be made available for additional peanuts at such level as the Secretary determines will ensure no losses to CCC from the sale or disposal of such peanuts, taking into consideration the demand for peanut oil and peanut meal, expected prices of other vegetable oils and protein meals, and the demand for peanuts in foreign markets.

The MY 1997 price support level for additional peanuts was announced at $132 per st on February 14, 1997. The national average price support rate for quota peanuts, for each of the 1996 through 2002 crops, is set at $610 per st by the 1996 Act and is codified at 7 CFR section 1446.103. So that both prices may be codified in the same regulations, this final rule moves the regulation setting out the additional peanut price from 7 CFR part 1421 to 7 CFR part 1446.

The MY 1997 price support level for additional peanuts was established at $132 per st to ensure no losses to CCC from the sale or disposal of additional peanuts. Peanuts are pledged as collateral for price support loans. The peanuts are then sold in order to recoup the loan principal, interest and related costs. The statutory factors have been analyzed as set out below. Based on those factors, it is anticipated that while the current oil market is strong, there is enough uncertainty in the market to suggest caution.

In making this determination, the following market information was considered:

1. The domestic use of peanut oil during MY 1997 is forecast to be 92,500 st, unchanged from MY 1996 projected domestic use. MY 1997 peanut oil beginning stocks are expected to be 18,500 st, down 44 percent from MY 1996. The MY 1997 average peanut oil price is expected to be $0.380 per pound, down $0.015 per pound from MY 1996.

2. The domestic use of peanut meal during MY 1997 is forecast to be 140,000 st, up 5,000 st from MY 1996 projected domestic use. MY 1997 peanut meal beginning stocks are expected to be 4,000 st, unchanged from MY 1996. The MY 1997 average peanut meal price is expected to be $174.50 per st, down $60.50 per st from MY 1996.

3. The domestic disappearance of soybean oil during MY 1997 is forecast to be 6,850,000 st, up 1.1 percent from projected MY 1996 domestic disappearance. MY 1997 soybean oil beginning stocks are expected to be 1,117,500 st, up about 11.2 percent from MY 1996. The MY 1997 average soybean oil price is expected to be $0.220 per pound, down $0.005 per pound from MY 1996.

4. The domestic disappearance of cottonseed oil during MY 1997 is forecast to be 517,500 st, up 2 percent from projected MY 1996 domestic disappearance. MY 1997 cottonseed oil beginning stocks are expected to be 55,000 st, up 10 percent from MY 1996. The MY 1997 average cottonseed oil price is expected to be $0.260 per pound, down $0.0025 per pound from MY 1996.

5. The domestic disappearance of soybean meal during MY 1997 is

forecast to be 27,000,000 st, up 0.9 percent from projected MY 1996 domestic disappearance. MY 1997 soybean meal beginning stocks are expected to be 225,000 st, down about 12.5 percent from MY 1996. The MY 1997 average soybean meal price is expected to be $227.50 per st, down $7.50 per st from MY 1996.

6. The domestic disappearance of cottonseed meal during MY 1997 is forecast to be 1,690,000 st, up 0.9 percent from projected MY 1996 domestic disappearance. MY 1997 cottonseed meal beginning stocks are expected to be 40,000 st, unchanged from MY 1996. The MY 1997 average cottonseed meal price is expected to be $182.50 per st, down $7.50 per st from MY 1996.

7. The world use of peanuts for MY 1996 is expected to be 26.36 million metric tons, up slightly from MY 1995. World peanut production for MY 1996 is forecast to be 26.36 million metric tons, up 1.7 percent from MY 1995. Ending stocks for MY 1996 are forecast at 0.46 million metric tons, unchanged from 1995.

Discussion of Comments

During the comment period there were six comments received concerning the 1997 additional peanut price support level. One sheller association, two sheller firms, and the three producer-owned cooperatives made specific recommendations on the additional price support level. They recommended a range in the price support level from no-change ($132 per st for the 1996 crop) up to $200 per st. Strong prices in the oil seed complex were cited as the reason to increase the additional price support level. The final determination was made for the reasons given above. Based on the consideration of these same factors, the 1996-crop additional peanut support level was also $132 per st. An analysis of the data for that year is available from the contact person listed above. In the proposed rule it was indicated incorrectly that the 1996 additional peanut price had been codified previously in 7 CFR part 1421. Likewise, the 1996 price for sales by the CCC for export edible use of 1996-crop loan inventory peanuts had also not been codified. Both of these determinations are also codified in this rule and are given the new locations used for the 1997 determinations rather than the location for the corresponding determinations for the prior years. This change of location is the result of a reorganization of Departmental regulations following the 1996 legislation referred to earlier.

C. Announcement of CCC Sales Price for Additional Peanuts Sold for Export Edible Use

The establishment of a minimum price at which 1997-crop additional peanuts owned or controlled by CCC may be sold for use as edible peanuts in export markets is a discretionary action. The announcement of that price provides producers and handlers with information to facilitate the negotiation of private contracts for the sale of additional peanuts for export.

An overly high price may discourage private sales. If too low, the minimum price could have an unnecessary, adverse effect on prices paid to producers for additional peanuts. The minimum price at which 1997 crop additional peanuts owned or controlled by CCC may be sold for use as edible peanuts in export markets was established at $400 per st on April 30, 1997. This price should encourage exports while providing price stability for additional peanuts sold under contract. It will also assure handlers that CCC will not undercut their export contracting efforts with offerings of additional peanuts for export edible sales below the minimum sales price.

Discussion of Comments

During the comment period seven comments were received concerning the minimum export edible sales price. Four suggested keeping the price at $400 per st, and three suggested lowering it to between $300 and $375 per st. Producer groups preferred keeping the minimum price at $400 per ton while shellers preferred lowering it. The final price was set based on the factors set forth above. However, the Department plans to seek comments on this discretionary price for subsequent years to determine whether there should be a new method proposed for determining the price. As indicated, the 1996-crop CCC price was the same amount for the same reasons and that amount is also codified in this rule.

In addition, this rule provides a minor revision of the provisions of 7 CFR 1421.27 with respect to the listing of the minimum sales price for certain sales in situations where the farmer has a farm-stored price support loan. The current regulations have an unnecessary reference to the sales price for export edible use of 1996 crop farm-stored peanuts. The reference is removed in this final rule, which does not change the substance of the rule. The regulations in 7 CFR part 1421 will simply rely on the announcement of the general price or export edible use sales by CCC of loan peanuts which will now be codified in 7 CFR part 1446.

List of Subjects

7 CFR Part 729

Peanuts, Penalties, Poundage quotas, Reporting and recordkeeping requirements.

7 CFR Part 1421

Loan programs, Agriculture loan and loan deficiency payments, Peanuts, Reporting and recordkeeping requirements, Warehouses.

7 CFR Part 1446

Loan program—Agriculture, Peanuts, Price support programs, Reporting and recordkeeping requirements.

Accordingly, this final rule amends 7 CFR parts 729, 1421 and 1446 as follows:

PART 729—PEANUTS

1. The authority citation for 7 CFR part 729 continues to read as follows:

Authority: 7 U.S.C. 1301, 1357 *et seq.*, 1372, 1373, 1375, and 7271.

2. Section 729.216 is amended by revising paragraph (c) to read as follows:

§ 729.216 National poundage quota.

* * * * *

(c) Quota determination for individual marketing years (excluding seed):

(1) The national poundage quota for quota peanuts for marketing year 1996 is 1,100,000 short tons.

(2) The national poundage quota for quota peanuts for marketing year 1997 is 1,133,000 short tons.

PART 1421—GRAINS AND SIMILARLY HANDLED COMMODITIES

3. The authority citation for 7 CFR part 1421 continues to read as follows:

Authority: 7 U.S.C. 7231–7235, 7237; and 15 U.S.C. 714b and 714c.

4. Section 1421.27 is amended by: in paragraph ''(a)(2),'' adding the word ''and'' after the semicolon; removing paragraph ''(a)(3)'', and redesignating paragraph ''(a)(4)'' as paragraph ''(a)(3).''

PART 1446—PEANUTS

5. The authority citation for 7 CFR part 1446 continues to read as follows:

Authority: 7 U.S.C. 7271, 15 U.S.C. 714b and 714c.

§ 1446.103 [Amended]

6. Section 1446.103 is amended by adding the words ''as set out in § 1446.310'' after ''announced by the Secretary'' to the definition of ''Support rate'' in that section.

7. Two new sections, §§ 1446.310 and 1446.311, are added to subpart C to read as follows:

§ 1446.310 Additional peanut support levels.

(a) The national support rate for additional peanuts for the 1996 crop is $132 per short ton.

(b) The national support rate for additional peanuts for the 1997 crop is $132 per short ton.

§ 1446.311 Minimum CCC sales price for certain peanuts.

(a) The minimum CCC sales price for additional peanuts to be sold from the price support loan inventory for export edible use from the 1996 crop is $400 per short ton.

(b) The minimum CCC sales price for additional peanuts to be sold from the price support loan inventory for export edible use from the 1997 crop is $400 per short ton.

Signed at Washington, DC, on October 26, 1997.

Bruce R. Weber,

Acting Administrator, Farm Service Agency and Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. 97–30965 Filed 11–24–97; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1437

RIN 0560–AF23

Noninsured Crop Disaster Assistance Program; Correction

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Interim rule with request for comments; correction.

SUMMARY: In the interim rule published in the **Federal Register** on October 17, 1997 (62 FR 53929) the comment period was inadvertently omitted. This correction announces the comment period.

DATES: The interim rule was effective on October 17, 1997. Comments on this rule must be received on or before January 26, 1998 to be assured of consideration.

ADDRESSES: Comments should be mailed to Sean O'Neill, Chief, Noninsured Assistance Branch (NAB), Production, Emergencies, and Compliance Division (PECD), Farm Service Agency (FSA), United States Department of Agriculture, STOP 0517, 1400 Independence Avenue, SW, Washington, D.C. 20250–0526; telephone (202) 720–9003.

FOR FURTHER INFORMATION CONTACT: Sean O'Neill, Chief, Noninsured Assistance Branch (NAB), Production, Emergencies, and Compliance Division (PECD), Farm Service Agency (FSA), United States Department of Agriculture, STOP 0517, 1400 Independence Avenue, SW, Washington, D.C. 20250–0526; telephone (202) 720–9003.

Signed at Washington, DC, on November 18, 1997.

Keith Kelly,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 97–30966 Filed 11–24–97; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 971014243–7243–01]

Monterey Bay National Marine Sanctuary

AGENCY: Sanctuaries and Reserves Division (SRD), Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Final rule.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) is amending the regulations for the Monterey Bay National Marine Sanctuary (MBNMS or Sanctuary) to allow the delegation of the authority to object to or impose terms or conditions on the exercise of any valid lease, permit, license, approval or other authorization issued after January 1, 1993 (the effective date of the MBNMS designation) from the Director of the Office of Ocean and Coastal Resource Management (Director) to other Federal officials below the Director's level; for example, the Sanctuary Manager.

DATES: This rule will be effective on November 25, 1997.

FOR FURTHER INFORMATION CONTACT: Scott Kathey at (408) 647–4251 or Elizabeth Moore at (301) 713–3141 ext. 170.

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Regulatory Amendment

The MBNMS regulations at 15 CFR 922.132(a) prohibit a relatively narrow range of activities and thus make it unlawful for any person to conduct them or cause them to be conducted.

Under 15 CFR 922.49 (Notification and review of applications for leases, licenses, permits, approvals or other authorizations to conduct a prohibited activity), the MBNMS prohibitions do not apply to any activity authorized by any valid lease, permit, license, approval or other authorization issued after the effective date of the Sanctuary designation (i.e., January 1, 1993 for the MBNMS) by any Federal, State or local authority of competent jurisdiction, provided that the applicant for such authorization complies with the procedures of section 922.49. The Director is required to notify the applicant whether he or she has an objection to issuance of the authorization and what terms and conditions he or she deems necessary to protect Sanctuary resources or qualities.

Section 922.134(a) of the MBNMS regulations states ''The authority granted the Director under § 922.49 to object to or impose terms or conditions on the exercise of any valid lease, permit, license, approval or other authorization issued after January 1, 1993 may not be delegated or otherwise assigned to other Federal officials below the Director's level.'' This provision prevents the Director from delegating this authority to the Sanctuary Manager of the MBNMS or any other Federal official below the Director's level. The Sanctuary Manager currently has the delegated authority to issue Sanctuary permits. Further, the MBNMS is the only Sanctuary of the twelve in the National Marine Sanctuary Program in which the authority to object to or impose terms and conditions under § 922.49 cannot be and has not been delegated to the Sanctuary Manager. Consequently, this rule amends the MBNMS regulations to allow for the delegation to the Sanctuary Manager or any other Federal official below the Director's level of the authority to object to or impose terms or conditions on the exercise of any valid lease, permit, license, approval or other authorization issued after January 1, 1993, pursuant to § 922.49.

II. Miscellaneous Rulemaking Requirements

Executive Order 12866: Regulatory Impact

NOAA has concluded that this regulatory action is not significant within the meaning of section 3(f) of Executive Order 12866 because it will not result in:

(1) An annual effect on the economy of $100 million or more or adversely affect in a material way the economy, productivity, competition, jobs, the environment, or public health and safety;

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

(3) A material alteration of the budgetary impact of entitlement, grants, user fees, or loan programs or rights and obligations of such recipients; or

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

The Office of Management and Budget has concurred in this determination.

Executive Order 12612: Federalism Assessment

This regulatory action does not have sufficient federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

Paperwork Reduction Act

This rule would not impose an information collection requirement subject to review and approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3500 *et seq.*

Administrative Procedure Act

This rule is exempt from the rulemaking requirements of 5 U.S.C. 553 by paragraph (a)(2) of that section because it is a matter relating to agency management.

Regulatory Flexibility Act

Because this rule is not required to be issued with prior notice and opportunity for public comment by 5 U.S.C. 553 or by any other law, it is not subject to the Regulatory Flexibility Act requirement for preparation of a regulatory flexibility analysis, and none has been prepared.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Coastal zone, Education, Environmental protection, Marine resources, Natural resources, Penalties, Recreation and recreation areas, Reporting and recordkeeping requirements, Research.

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: November 13, 1997.

Nancy Foster,

Assistant Administrator for Ocean Services and Coastal Zone Management.

Accordingly, for the reasons set forth above, 15 CFR part 922 is proposed to be amended as follows:

PART 922—[AMENDED]

1. The authority citation for Part 922 continues to read as follows:

Authority: 16 U.S.C. 1431 *et seq.*

Subpart M—Monterey Bay National Marine Sanctuary

§ 922.134 [Amended]

2. Section 922.134 is amended by removing and reserving paragraph (a).

[FR Doc. 97–30367 Filed 11–24–97; 8:45 am]

BILLING CODE 3510–08–M

DEPARTMENT OF STATE

Bureau of Consular Affairs

22 CFR Part 51

[Public Notice 2632]

Passport Procedures—Amendment to Restriction of Passports Regulation

AGENCY: Bureau of Consular Affairs, Department of State.

ACTION: Interim final.

SUMMARY: This interim final rule would add one new ground for denying, revoking or canceling a passport. The interim final rule would require the Secretary of State to deny a passport to a person who has been certified by the Secretary of Health and Human Services upon receipt of a State Agency determination to be in arrears of child support by an amount exceeding $5,000.00, and would except from review adverse actions on that ground.

EFFECTIVE DATE: October 1, 1997.

COMMENTS: Interested persons are invited to submit written comments on or before December 26, 1997.

ADDRESSES: Director, Office of Passport Policy and Advisory Services, 1111 19th Street, N.W., Suite 260, Washington, D.C. 20524.

FOR FURTHER INFORMATION CONTACT: Sharon E. Palmer-Royston, Office of Passport Policy and Advisory Services, Bureau of Consular Affairs, Department of State (202) 955–0231.

SUPPLEMENTARY INFORMATION: Section 51.70(a) of the passport regulations in Title 22 of the Code of Federal Regulations provides the grounds other than noncitizenship which require the Secretary of State to refuse to issue a passport. Section 452(k) of the Social Security Act (Pub. L. 93–647, 42 U.S.C. 652) as added by Section 370 of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 (Pub. L. 104–193), effective October 1, 1997: (1) Requires that the Secretary of Health and Human Services shall transmit to the Secretary of State a certification by a State agency in accordance with the requirements of section 454(31) of the Act of a determination that an individual owes arrearages of child support in an amount exceeding $5,000.00; and, (2) requires that the Secretary of State shall, upon receipt of such certification by the Secretary of Health and Human Services, refuse to issue a passport to such individual, and authorizes the Secretary to revoke, restrict, or limit a passport previously issued to such an individual.

This interim final rule would amend the existing regulation at section 51.70(a) of Title 22 of the Code of Federal Regulations by the addition of a new section 51.70(a)(8) to require the Secretary of State to refuse to issue a passport, except one limited for direct return to the United States, to a person who has been certified by the Secretary of Health and Human Services to be in arrears of child support by an amount exceeding $5,000.00. The Department of State is already authorized by the provisions in § 51.72(a) of Title 22 of the Code of Federal Regulations to revoke or restrict or limit a passport where a national would not be entitled to the issuance of a new passport under section 51.70 of Title 22 of the Code of Federal Regulations.

The Department of State is required by the provisions in section 51.75 of Title 22 of the Code of Federal Regulations to notify any person, who is the subject of a passport denial or cancellation and revocation, in writing of the reasons for the adverse action. In this regard, subsection 452(k)(3) of the Social Security Act (Pub. L. 93–647), as added by section 370 of the PRWORA (Pub. L. 104–193), provides that the Secretary of State shall not be liable to an individual for any action with respect to certification by a State agency under this section; and, section 454(31)(A) of the Social Security Act (Pub. L. 93–647) requires that State agencies afford each individual concerned with notice of the determination of their arrearage of child support in an amount exceeding $5,000.00 and the consequences thereof, and an opportunity to contest the

determination. Therefore, the remedy of any individual who is the subject of a passport denial, revocation, restriction or limitation due to arrearages of child support in an amount exceeding $5,000.000 lies only with the State agency, and no administrative review by the Department of State under the provisions in §§ 51.81 through 51.89 of Title 22 of the Code of Federal Regulations will be performed. Section 51.80 of Title 22 of the Code of Federal Regulations is amended to exempt this reason for passport denial from entitlement to a hearing.

These changes to the regulations are not expected to have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act, 5 U.S.C. 605(b). In addition, they will not impose information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C., Chapter 35. Nor do these rules have federalism implications warranting the preparation of a Federalism Assessment in accordance with E.O. 12988. These rules are exempt form review under E.O. 12988 but have been reviewed and found to be consistent with the objectives.

For the reasons set forth in the preamble, part 51 to title 22 is amended as follows:

PART 51—PASSPORTS

1. The authority citation for part 51 is revised to read as follows:

Authority: 22 U.S.C. 211a, as amended; 8 U.S.C. 1104(d); 22 U.S.C. 2651a, 3926; sec. 122(d)(3), Pub. L. 98–164, 97 Stat. 1017; 31 U.S.C. 9701; E.O. 11295, 3 CFR, 1966–1970 Comp., p 570; Pub. L. 100–690; sec. 129, Pub. L. 102–138, 105 Stat. 661; sec. 503, Pub. L. 102–140, 105 Stat. 820; Title V, Pub. L. 103–317, 108 Stat. 1724; sec. 452(k) and sec. 454(31), Pub. L. 93–647, 42 U.S.C. 652, as amended by sec. 370, Pub. L. 104–193, 110 Stat. 2251–2252.

2. Section 51.70(a) is amended as follows:

a. Substitute ''; or'' for the period after paragraph (a)(7).

b. Add paragraph (a)(8) to read as follows:

§ 51.70 Denial of passports.

(a) * * *

(8) The applicant has been certified by the Secretary of Health and Human Services as notified by a State agency under 42 U.S.C. 652(k) to be in arrears of child support in an amount exceeding $5,000.00.

§ 51.80 [Revised]

3. Section 51.80 is revised to read as follows:

The provisions of §§ 51.81 through 51.89 shall not apply to any action of the Secretary of State taken on an individual basis in denying, restricting, revoking or invalidating a passport or in any other way adversely affecting the ability of a person to receive or use a passport by reason of:

(a) Noncitizenship.

(b) Refusal under the provisions of § 51.70(a)(8),

(c) Refusal to grant a discretionary exception under the emergency or humanitarian relief provisions of § 51.71(c), or

(d) Refusal to grant a discretionary exception from geographical limitations of general applicability. The provisions of this subpart shall otherwise constitute the administrative remedies provided by the Department to persons who are the subject of adverse action under § 51.70, § 51.71 or § 51.72.

Dated: November 6, 1997.

Mary A. Ryan,

Assistant Secretary for Consular Affairs.

[FR Doc. 97–30762 Filed 11–24–97; 8:45 am]

BILLIING CODE 4710–06–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[TN 86–1–9802a; TN 127–1–9803a; FRL–5923–2]

Designation of Areas for Air Quality Planning Purposes; Tennessee: Redesignation of the Polk County and New Johnsonville Sulfur Dioxide Nonattainment Areas to Attainment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving maintenance plans and requests for redesignation of the Polk County area and portions of Benton and Humphreys Counties, Tennessee, surrounding TVA's Johnsonville plant (New Johnsonville area) from nonattainment to attainment for the sulfur dioxide (SO_2) National Ambient Air Quality Standards (NAAQS), pursuant to requests submitted on January 6, 1988, July 12, 1990, December 17, 1993, and April 17, 1995, by the State of Tennessee, through the Tennessee Department of Environment and Conservation (TDEC).

DATES: This final rule is effective January 26, 1998 unless notice is received by December 26, 1997 that someone wishes to submit adverse or critical comments. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Written comments should be addressed to:

For the Polk County area: Scott M. Martin, Regulatory Planning Section, Air Planning Branch, Air, Pesticides & Toxics Management Division, Region 4 Environmental Protection Agency, 61 Forsyth Street, Atlanta, Georgia 30303.

For the New Johnsonville area: Steven M. Scofield, Regulatory Planning Section, Air Planning Branch, Air, Pesticides & Toxics Management Division, Region 4 Environmental Protection Agency, 61 Forsyth Street, Atlanta, Georgia 30303.

Copies of the documents relative 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.

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460.

Environmental Protection Agency, Region 4 Air Planning Branch, 61 Forsyth Street, Atlanta, Georgia 30303.

Tennessee Department of Environment and Conservation, Division of Air Pollution Control, 9th Floor L & C Annex, 401 Church Street, Nashville, Tennessee 37243–1531.

FOR FURTHER INFORMATION CONTACT:

For the Polk County area: Scott M. Martin, Regulatory Planning Section, Air Planning Branch, Air, Pesticides & Toxics Management Division, Region 4 Environmental Protection Agency, 61 Forsyth Street, Atlanta, Georgia 30303. The telephone number is 404/562–9036.

For the New Johnsonville area: Steven M. Scofield, Regulatory Planning Section, Air Planning Branch, Air, Pesticides & Toxics Management Division, Region 4 Environmental Protection Agency, 61 Forsyth Street, Atlanta, Georgia 30303. The telephone number is 404/562–9034.

SUPPLEMENTARY INFORMATION:

In a **Federal Register** document published March 3, 1978, (43 FR 8962) the Polk County and New Johnsonville areas were designated nonattainment for SO_2. On July 12, 1990, the State of Tennessee, through the TDEC, submitted a request for redesignation of the Polk County SO_2 nonattainment area to attainment. This request did not contain a maintenance plan, including contingency measures, as required in section 107(d)(3)(E) of the Clean Air Act (CAA). Subsequently, on April 17, 1995,

the State submitted a maintenance plan that completed the redesignation request. The State of Tennessee has met all of the CAA requirements for redesignation pursuant to Section 107(d)(3)(E).

On January 6, 1988, the State of Tennessee, through the TDEC, submitted a request for redesignation of the New Johnsonville SO_2 nonattainment area to attainment. The submittal was not approvable due to stack height issues that were affected by a January 22, 1988, court decision, which prohibited EPA from exempting stack height increases from demonstration requirements. Since the 1990 amendments to the CAA, it has been EPA's policy to approve redesignation requests affected by that court decision. However, this request did not contain a maintenance plan, including contingency measures, as required in section 107(d)(3)(E) of the CAA. Subsequently, on December 17, 1993, the State submitted a maintenance plan that completed the redesignation request. The State of Tennessee has met all of the CAA requirements for redesignation pursuant to Section 107(d)(3)(E).

Section 107(d)(3)(E)(i). The Administrator has determined that the area has attained the NAAQS.

Tennessee submitted air quality data demonstrating attainment with both the primary and secondary SO_2 NAAQS for the years 1988 and 1989 in the Polk County area and 1981 through 1993 in the New Johnsonville area. As required by the EPA for SO_2 redesignations, a nonattainment area must demonstrate attainment by showing no more than one exceedance annually for two complete, consecutive calendar years and must continue in attainment status until the final notice approving such redesignation is effective. During that period there were no exceedances in the Polk County area and one exceedance of each of the primary and secondary NAAQS during 1986 in the New Johnsonville area, and hence, no violations of the SO_2 NAAQS. Both areas have continued to monitor attainment of the SO_2 NAAQS to date.

Section 107(d)(3)(E)(ii). The Administrator has fully approved the applicable implementation plan for the area under Section 110(k).

The Tennessee SO_2 State Implementation Plan (SIP) is fully approved and meets all requirements under section 110(k) which are applicable to the Polk County and New Johnsonville areas. Additionally, Reasonably Available Control Technology (RACT) emission limits for sources located in the Polk County area are specified in Rule 1200–3–19–.19 of the Tennessee Air Pollution Control regulations and RACT limits for the New Johnsonville area are specified in Rule 1200–3–19–.14 of the Tennessee Air Pollution Control regulations. TDEC Rule 1200–3–19–.19 became federally enforceable after EPA approval and publication in the **Federal Register** on February 6, 1980 (45 FR 8004) and May 27, 1982 (47 FR 23160) and TDEC Rule 1200–3–19–.14 became federally enforceable after EPA approval and publication in the **Federal Register** on April 7, 1993 (58 FR 18011).

Section 107(d)(3)(E)(iii). The Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions.

The BIT Manufacturing, Inc. facility is the only significant source of SO_2 emissions located in or impacting the Polk County area. The TDEC submits that the present SIP is adequate and the RACT emission limitations contained in TDEC Rule 1200–3–19–.19 have resulted in permanent and enforceable reductions in emissions. TDEC Rule 1200–3–19–.19 became federally enforceable after EPA approval and publication in the **Federal Register** on February 6, 1980 (45 FR 8004), and May 27, 1982 (47 FR 23160).

For the New Johnsonville area, the State has demonstrated that the present SIP is adequate and the RACT emission limitations contained in TDEC Rule 1200–3–19–.14 have resulted in permanent and enforceable reductions in emissions. TDEC Rule 1200–3–19–.14 became federally enforceable after EPA approval and publication in the **Federal Register** on April 7, 1993 (58 FR 18011).

Section 107(d)(3)(E)(iv). The Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A.

Section 175A of Part D of the CAA requires maintenance and contingency plans for nonattainment areas before redesignation can occur. As required by section 175A the TDEC submitted to the EPA air dispersion modeling which demonstrated maintenance of the SO_2 NAAQS. The TDEC used EPA approved models ISC2 and COMPLEX1 (VALLEY screening mode) as their dispersion models. Additionally, for both areas, the TDEC will evaluate any permittable SO_2 emissions increases from existing sources, or any permittable SO_2 emissions from any new source that might locate in the area, with atmospheric dispersion modeling to ensure that compliance with the NAAQS for SO_2 is maintained. The maintenance plan is to be in effect for a ten year period after redesignation of the area. The State must also submit an additional plan, 8 years after redesignation of the area, for maintaining the NAAQS for 10 years after the expiration of the initial 10-year maintenance period. In the case of the Polk County area, attainment of both the primary and secondary NAAQS has been evident since 1988. The RACT standards in place have achieved the desired effect of a maintenance plan. Therefore, the maintenance plan for the Polk County area will also include continued implementation of the RACT standards specified in TDEC Rule 1200–3–19–.19. In the case of the New Johnsonville area, attainment of both the primary and secondary NAAQS has been evident since 1981. The RACT standards in place have achieved the desired effect of a maintenance plan. Therefore, the maintenance plan for the New Johnsonville area will also include continued implementation of the RACT standards specified in TDEC Rule 1200–3–19–.14.

Any violation of the NAAQS for SO_2 will trigger initiation of TDEC's contingency plan for the Polk County and New Johnsonville areas. TDEC regulations contained in Chapter 20 require companies to maintain logs for malfunctions and upsets. This includes production of records and log notes regarding operation of processes or fuel burning, control room data, and pollution control equipment data. In the event of exceedances of the NAAQS, a field visit within 30 days will be conducted by the TDEC and a field report shall be completed within 45 days concerning the findings and conclusions. The following three-fold approach shall be utilized based on the particular situation described below.

1. If current SIP emission limits are exceeded, then the TDEC will proceed with enforcement action according to the Tennessee EPA enforcement agreement. Corrective action measures will be required by the TDEC in a timely manner. The TDEC requires a form entitled APC–19, ''Proposed Schedule for Corrective Action'', to be returned which outlines specific measures and time frames for facilities to bring the violating source into compliance in a timely manner.

2. If no emission limits are exceeded and it is determined that the current SIP requirements are inadequate to maintain the NAAQS, within 60 days of issuance of the field report revised SIP permits

with more stringent emission limits will be formulated. A compliance schedule to achieve the revised emission limits will be incorporated in any new permits as part of the SIP.

3. If there is an exceedance of the SO_2 standard and no emission limit is violated and the TDEC has evidence that the ambient exceedance resulted from a permitted source or a non-permitted source due to an accidental release, the situation would be handled using one of the two following methods.

(1) If the source is permitted and is within the maintenance area, a plan of future action will be formulated within 90 days by the facility acceptable to the TDEC to either prevent and/or handle incidents of this nature.

(2) If the source is not permitted, the TDEC will contact the party and negotiate, if possible, a voluntary plan of action for the future.

Section 107(d)(3)(E)(v). The State containing such area has met all requirements applicable to the area under Section 110 and Part D.

Tennessee has complied with all requirements for section 110 of the CAA and part D. The implementation plan meets the requirements of section 110 of the CAA and the RACT plan in place provides specific emission limits to minimize SO_2 emissions. Part D entitled *Plan Requirement for Nonattainment Area* lists general plans for nonattainment areas which include attainment dates, incorporating RACT, tracking reasonable further progress (RFP), compiling periodic inventories, adopting enforceable measures, and permitting new and modified sources in accordance with section 173 while not interfering with RFP. All of the above measures have been adopted by the TDEC and approved in the SIP. Therefore, all of the requirements for section 107(d)(3)(E) have been satisfied.

Final Action

In this action, EPA is approving the Polk County area SO_2 maintenance plan submitted on April 17, 1995, and the New Johnsonville area SO_2 maintenance plan submitted on December 17, 1993, because both meet the requirements of section 175A. In addition, the Agency is approving the request to redesignate the Polk County and New Johnsonville SO_2 areas to attainment, because the State has demonstrated compliance with the requirements of section 107(d)(3)(E) for redesignation.

The SO_2 SIP is designed to satisfy the requirements of part D of the CAA and to provide for attainment and maintenance of the SO_2 NAAQS. This final redesignation should not be interpreted as authorizing the State to delete, alter, or rescind any of the SO_2 emission limitations and restrictions contained in the approved SO_2 SIP. Changes to SO_2 SIP regulations rendering them less stringent than those contained in the EPA approved plan cannot be made unless a revised plan for attainment and maintenance is submitted to and approved by EPA. Unauthorized relaxations, deletions, and changes could result in both a finding of non-implementation [section 173(b) of the CAA] and in a SIP deficiency call made pursuant to section 110(a)(2)(H) of the CAA.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this **Federal Register** publication, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective January 26, 1998 unless, by December 26, 1997 adverse or critical comments are received, or the areas fail to continue in attainment status until the final notice approving such redesignation is effective.

If the EPA receives such comments or the areas fail to continue in attainment status until the final action approving such redesignation is effective, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective January 26, 1998.

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.

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 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.

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

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 promulgated 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 requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

D. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the

U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

E. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 26, 1998. 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

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides.

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: October 10, 1997.

A. Stanley Meiburg,

Acting Regional Administrator.

Chapter I, title 40, Code of Federal Regulations, is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart RR—Tennessee

2. Section 52.2220 is amended by adding paragraphs (c)(159) and (160) to read as follows:

§ 52.2220 Identification of plan.

* * * * *

(c) * * *

(159) The maintenance plan and redesignation request for the Polk County area submitted by the Tennessee Department of Environment and Conservation on April 17, 1995, as part of the Tennessee SIP.

(i) Incorporation by reference. The following sections of the Tennessee Department of Environment and Conservation Board Order Number 95–24: VI. Maintenance and contingency plan adopted on April 12, 1995.

(ii) Other material. None.

(160) The maintenance plan and redesignation request for the New Johnsonville Area which includes that portion of Benton and that portion of Humphreys Counties, Tennessee, surrounding TVA's Johnsonville plant submitted by the Tennessee Department of Environment and Conservation on December 17, 1993, as part of the Tennessee SIP.

(i) Incorporation by reference. The following sections of the Tennessee Department of Environment and Conservation Board Order Number 93–25: I. Maintenance Plan; and II. Contingency Plan adopted on December 15, 1993.

(ii) Other material. None.

PART 81—[AMENDED]

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

Authority: 42.U.S.C. 7401–7671q.

Subpart C—Section 107 Attainment Status Designations

2. In § 81.343, the ''Tennessee-SO_2'' table is amended by revising the entries for ''That portion of Benton County surrounding TVA's Johnsonville plant'', ''That portion of Humphreys County surrounding TVA's Johnsonville plant'', and ''Polk County'' to read as follows:.

§ 81.343 Tennessee

* * * * *

TENNESSEE—SO_2

Designated area	Does not meet primary standards	Does not meet secondary standards	Cannot be classified	Better than national standards
That portion of Benton County surrounding TVA's Johnsonville plant				X
* * * * * * *				
That portion of Humphreys County surrounding TVA's Johnsonville plant				X
* * * * * * *				
Polk County				X
* * * * * * *				

* * * * *

[FR Doc. 97–30952 Filed 11–24–97; 8:45 am]

BILLING CODE 6560–50–U

Proposed Rules

Federal Register
Vol. 62, No. 227
Tuesday, November 25, 1997

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 353

[Docket No. 95–071–1]

RIN 0579–AA75

Export Certification; Accreditation of Non-Government Facilities

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the export certification regulations to provide for the establishment of a program under which non-government facilities could become accredited to perform specific laboratory testing or phytosanitary inspection services that could serve as the basis for the issuance of a Federal phytosanitary certificate, export certificate for processed plant products, or phytosanitary certificate for reexport. The accreditation criteria for particular laboratory testing and phytosanitary inspection services would be developed by the Animal and Plant Health Inspection Service in cooperation with other interested government, industry, academic, or research entities. Currently, only tests conducted by public laboratories or inspections carried out by Federal, State, or county inspectors or by agents may be used as the basis for the issuance of Federal certificates. The proposed accreditation program would provide a mechanism for qualified non-government facilities to become accredited to perform testing or inspection services that may be used as supporting documentation for the issuance of certificates for certain plants or plant products.

DATES: Consideration will be given only to comments received on or before January 26, 1998.

ADDRESSES: Please send an original and three copies of your comments to Docket No. 95–071–1, Regulatory Analysis and Development, PPD, APHIS, Suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 95–071–1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690–2817 to facilitate entry into the comment reading room.

FOR FURTHER INFORMATION CONTACT: Mr. Narcy G. Klag, Operations Officer, Port Operations, PPQ, APHIS, 4700 River Road Unit 139, Riverdale, MD 20737–1236; (301) 734–8537.

SUPPLEMENTARY INFORMATION:

Background

The export certification regulations contained in 7 CFR part 353 (referred to below as the regulations) set forth the procedures for obtaining certification for plants and plant products offered for export or re-export. Export certification is not required by the regulations; rather, it is provided by the Animal and Plant Health Inspection Service (APHIS) as a service to exporters who are shipping plants or plant products to countries that require phytosanitary certification as a condition of entry. After assessing the condition of the plants or plant products intended for export, relative to the receiving country's regulations, an inspector will issue an internationally recognized phytosanitary certificate (PPQ Form 577), a phytosanitary certificate for reexport (PPQ Form 579), or an export certificate for processed plant products (PPQ Form 578), if warranted.

Since 1975, APHIS has participated with State governments in the Cooperative Phytosanitary Export Certification Program, which allows certain State officials, as well as APHIS officials, to issue phytosanitary certificates, phytosanitary certificates for reexport, or export certificates for processed plant products. Because the number of Federal inspectors is limited, the use of State and county inspectors is a considerable service to exporters of plants and plant products in terms of both time and convenience.

In a final rule published in the **Federal Register** on April 8, 1996 (61 FR 15365–15371, Docket No. 90–117–3), we amended the export certification regulations to, among other things: (1) Revise the requirements for a person to qualify as an inspector; (2) allow county-level plant regulatory officials, in addition to State and APHIS officials, to qualify as inspectors; (3) allow persons other than inspectors—those persons being referred to as ''agents''—to perform phytosanitary field inspections; and (4) provide for an industry-based certification, under certain conditions, of certain low-risk plant products such as kiln-dried lumber offered for export. Those amendments were intended, in part, to provide additional qualified personnel and export certification options in order to relieve some of the demands placed upon the existing pool of inspectors by increasingly stringent foreign import requirements and dwindling Federal and State budgets.

In this document, we are proposing to further broaden the options for inspection and export certification by establishing regulations under which non-government facilities such as commercial laboratories and private inspection services could become accredited by APHIS to perform specific laboratory testing or phytosanitary inspection services that could serve as the basis for the issuance of a Federal phytosanitary certificate, phytosanitary certificate for reexport, or export certificate for processed plant products. This proposed approach is consistent with current international trends toward industry self-certification and is based upon the recent efforts of a working group within the North Atlantic Plant Protection Organization (NAPPO) to draft standards for the accreditation of laboratories performing phytosanitary and other export certification activities to ensure compliance with import requirements for products moving into or within the regional territories of the NAPPO member countries (Canada, Mexico, and the United States).

The regulations proposed in this document would establish a means by which non-government facilities could be accredited by APHIS to perform certain functions related to phytosanitary export certification. It is important to note, however, that these proposed regulations would only establish a template upon which accreditation programs for specific functions could be developed—these proposed regulations would not establish specific accreditation

standards for, by way of example, a private laboratory seeking to be accredited to perform virus testing on plant material intended for export. Rather, specific accreditation standards would be developed as demand dictates. If, for example, a private laboratory wishes to perform virus testing on plant material intended for export, APHIS would work with that laboratory, and any other similarly situated laboratory, as well as with any other appropriate and interested government, industry, academic, or research entity, to identify and develop the appropriate specific standards against which the private laboratory's ability and competence to perform that virus testing could be judged. Once completed, those standards would be reviewed by APHIS and its cooperators and published in the **Federal Register** for comment. Once approved and published as a final rule, they would become the standard for the accreditation of non-government facilities to perform virus testing of plant material intended for export. Such standards would be published in 7 CFR part 353.

We believe that this proposed approach is beneficial in two ways: First, it would be difficult, if not impossible, for APHIS to develop a single, one-size-fits-all set of standards for the numerous disciplines that play a role in phytosanitary export certification. Secondly, the proposed approach would allow APHIS to develop specific standards with the participation of those best able to recommend valid scientific criteria, i.e., the government, academic, and private-sector individuals who have the experience and expertise in the particular area for which specific standards are being developed.

Proposed Regulations

To establish this proposed accreditation program, we would first amend § 353.1 to add a definition of *non-government facility*, which we would define as ''laboratory, research facility, inspection service, or other entity that is maintained, at least in part, for the purpose of providing laboratory testing or phytosanitary inspection services and that is not operated by the Federal Government or by the government of a State or a subdivision of a State.'' We believe that laboratories, research facilities, or inspection services are the types of entities most likely to seek accreditation under the proposed regulations. By excluding facilities operated by Federal, State, county, or local governments, the intent is that the accreditation program is to apply only to private entities. The involvement of government-run facilities in phytosanitary export certification is already covered under the current regulations in part 353; it is not our intent to require facilities operated by any level of Federal or State government to become accredited.

The regulations in § 353.7 currently state, with regard to the issuance of certificates, that the Administrator of APHIS may authorize inspectors to issue phytosanitary certificates, phytosanitary certificates for reexport, or export certificates for processed plant products on the basis of inspections made by cooperating Federal, State, and county agencies. Therefore, to accommodate the proposed accreditation program, we are proposing to amend paragraphs (a), (b), and (c) of § 353.7 to further provide that the Administrator may also authorize inspectors to issue those certificates on the basis of a laboratory test or an inspection conducted by a non-government facility that has been accredited in accordance with § 353.8, which is a new section that we would add to the regulations to spell out the specific provisions of the proposed accreditation program.

The proposed new § 353.8 would be divided into three main paragraphs: Paragraph (a) would serve to describe the accreditation program, paragraph (b) would set out the criteria for accreditation, and paragraph (c) would discuss the fees related to the accreditation program. These three paragraphs are discussed in greater detail below.

Paragraph (a) of proposed § 353.8 would begin by stating that the Administrator may accredit a non-government facility to perform specific laboratory testing or phytosanitary inspection services if the Administrator determines that the facility meets the criteria for accreditation found in paragraph (b). (Note: The term ''Administrator'' is used in this document, as it is used throughout APHIS' regulations, to mean the Administrator of APHIS or any person authorized to act for the Administrator.) A list of accredited non-government facilities could be obtained by writing to APHIS.

To determine whether or not a facility meets the criteria for accreditation, APHIS would conduct an assessment of the facility and its fitness to conduct the testing or inspection services for which it is seeking accreditation. A description of the assessment process is found below in the discussion of the criteria for accreditation.

Paragraph (a)(2) of proposed § 353.8 describes the conditions under which the Administrator could deny accreditation to a non-government facility or withdraw the accreditation that had been previously granted to a facility. Clearly, a facility would have to be able to meet and comply with the standards identified as being necessary for the accurate and reliable execution of the testing or inspection services for which it has been, or is seeking to be, accredited. Therefore, the proposed regulations would provide that the Administrator could deny accreditation to a facility that APHIS determines, through its pre-accreditation assessment, does not meet the criteria for accreditation and has failed to take the remedial action recommended to correct identified deficiencies. Similarly, the Administrator could withdraw the accreditation of an accredited facility if APHIS determined that the facility was not adhering to the criteria for the maintenance of accreditation and had failed to take the remedial action recommended to correct the identified deficiencies.

If APHIS denied a facility's application for accreditation, the operator of the facility would be informed of the reasons for the denial and would be afforded the opportunity to appeal the decision to the Administrator. To ensure that there would be an informed and timely review of the appeal, the operator's appeal would have to be in writing and submitted within 10 days after receiving notification of the denial and would have to include all of the facts and reasons upon which the operator was relying to show that the facility had been wrongfully denied accreditation. The Administrator would then grant or deny the operator's appeal in writing as promptly as circumstances permitted, with the response stating the reasons for his or her decision. If there was a conflict as to any material fact regarding the denial or the reasons for the denial, a hearing would be held to resolve the conflict under rules of practice adopted by the Administrator.

The withdrawal of a facility's accreditation would be handled in much the same way. The operator of the facility would be informed of the reasons for the proposed withdrawal before any action was taken and given the opportunity to appeal the proposed withdrawal. The appeal would have to be in writing and submitted to the Administrator within 10 days after the operator was informed of the reasons for the proposed withdrawal. The appeal would have to include all of the facts and reasons upon which the operator of the facility was relying to show that the reasons for the proposed withdrawal

were incorrect or did not support the withdrawal of the facility's accreditation. The Administrator would grant or deny the appeal in writing as promptly as circumstances permitted and would state the reason for his or her decision. If there was a conflict as to any material fact regarding the proposed withdrawal or the reasons for the proposed withdrawal, a hearing would be held to resolve the conflict under rules of practice adopted by the Administrator. However, the proposed regulations would provide that the withdrawal of a facility's accreditation could become effective before a final determination was made regarding an appeal if the Administrator determined that an immediate withdrawal was necessary to protect the public health, interest, or safety. In such a case, the withdrawal would be effective at the time APHIS notifies the operator of the facility either orally or in writing. In the event of an oral notification, a written confirmation would be given to the operator as promptly as circumstances allowed. The withdrawal would continue in effect pending the completion of the withdrawal and appeal proceedings, and any subsequent judicial review of those proceedings, unless the Administrator ordered otherwise.

The proposed regulations also would provide that the Administrator would withdraw a facility's accreditation if the operator of the facility informed APHIS in writing that the facility wished to terminate its accredited status.

We would allow a non-government facility that has had its application for accreditation denied or its accreditation withdrawn to reapply for accreditation using the same application procedures provided for first-time applicants. However, if the facility's accreditation had been denied or withdrawn because it failed to meet or comply with the standards for accreditation, we would require the facility operator to include written documentation with the application that specified what actions had been taken to correct the conditions that led to the denial or withdrawal of the facility's accreditation. It is likely that a pre-accreditation assessment of a reapplying facility would place added emphasis on those areas in which the facility had been deficient, so the documentation describing the actions taken to correct those deficiencies would be useful when determining the scope and design of the assessment.

Because a facility may need to disclose confidential business information to APHIS during the course of its pre-accreditation assessment or during the term of its accreditation, paragraph (a) of proposed § 353.8 would conclude by stating that all information gathered by APHIS during its accreditation-related activities would be treated with the appropriate level of confidentiality. As set forth in the U.S. Department of Agriculture's (USDA's) administrative regulations in 7 CFR 1.11, the USDA is responsible for making the final determination with regard to the disclosure or nondisclosure of information submitted by a business, but the policy of the USDA is to obtain and consider the views of the submitter of any privileged or confidential business information and to provide the submitter the opportunity to object to the disclosure of such information.

Pre-Accreditation Assessment

Paragraph (b) of proposed § 353.8 would set out the criteria for the achievement and retention of accreditation. The paragraph would begin by stating that specific standards for accreditation in a particular area of laboratory testing or phytosanitary inspection could be obtained by writing to APHIS. However, as discussed previously in this document, specific standards have not yet been developed for any area of accreditation. Rather, it is our intention that specific standards would be developed in the future on an ''as needed'' basis when a non-government facility informs APHIS that it would like to become accredited in a particular area of laboratory testing or phytosanitary inspection. Once standards in a particular area have been developed and adopted by APHIS, those standards would be available to non-government facilities that may wish to become similarly accredited.

Because accreditation standards under the proposed regulations would, at least initially, have to be drafted and adopted before the assessment process could begin, the proposed regulations would provide for APHIS' development of standards. Therefore, paragraph (b)(1) would state that if specific standards for accreditation in a particular area of laboratory testing or phytosanitary inspection had not been identified by APHIS, the Administrator would develop the appropriate specific standards applicable to accreditation in that particular area. The regulations would further provide that APHIS would place a notice in the **Federal Register** to inform the public of the opportunity to participate in the development of those standards by submitting suggested criteria or recommending particular considerations that may need to be addressed in the standards. This proposed approach would ensure that APHIS' resources are focused on those areas in which facilities are interested in obtaining accreditation and allow for standards to be prepared through a collaborative, cooperative process that provides for the participation of all interested parties, including the operator of the non-government facility seeking accreditation and any other interested governmental, industry, academic, or research entity.

Once accreditation standards are promulgated, the operator of a non-government facility seeking accreditation would begin the accreditation process by submitting an application to APHIS. The first items on the application would be the legal name and full address of the facility and the name, address, telephone number, and fax number of the operator of the facility or his or her authorized representative. These items would enable APHIS to identify the facility for its records and contact the facility's operator or an authorized representative as the pre-accreditation assessment process begins and during the term of the facility's accreditation.

The application would then have to contain a description of the facility itself. This information would enable APHIS to understand the nature of the facility, i.e., whether the facility is a stand-alone building or is located within a larger office or laboratory building, what the facility's primary function is and the scope of operations within the facility, and, if applicable, the relationship the facility has to a larger corporate entity. This type of information would give APHIS a frame of reference as it considers the suitability of the facility for the type of work it is seeking to perform under the accreditation program and would provide a starting point for the design of a pre-accreditation assessment. The application would conclude with a description of the specific laboratory testing or phytosanitary inspection services for which the facility is seeking accreditation. The completed application would then have to be signed by the operator of the facility or his or her authorized representative.

After it had received the completed application, APHIS would review the application to identify the scope of the assessment that would be necessary to adequately review the facility's fitness to conduct the laboratory testing or phytosanitary inspection services for which it is seeking accreditation. Through that review, APHIS would determine the number of assessors needed for an assessment team, the fields of expertise that should be

represented on the team, and the means by which the facility's competence to conduct the applicable laboratory tests or phytosanitary inspections could be evaluated.

Once the scope of the assessment has been defined, APHIS could identify the individuals who would comprise the assessment team, determine the materials that would be needed for the assessment, and project the length of the assessment process, which would allow APHIS to develop an estimate of the expenses that would be incurred by the government in the course of the pre-accreditation assessment process. Those expenses would have to be reimbursed by the facility seeking accreditation, so APHIS would provide the estimate to the operator of the facility before embarking upon any activities that would result in costs being incurred.

Before the assessment of a facility could begin, the operator of the facility would have to agree, in writing, to allow the assessment team access to its facilities, supply the team with the information it needs to evaluate the facility, and to enter into a trust fund agreement with APHIS to pay the assessment fee regardless of the assessment's outcome (i.e., even if the assessment team recommends that the facility not be accredited), and, if accreditation is granted, to pay the charges related to the subsequent maintenance of the facility's accreditation, such as laboratory fees for the corroboration of check tests. (The specific provisions of the trust fund agreement are explained below under ''Fees and Trust Fund Agreement.'') Once the operator of the facility had agreed, in writing, to these terms, APHIS would assemble the assessment team and commence the assessment as soon as circumstances permitted.

The assessment itself would focus on four major areas: Physical plant, equipment, methods of testing or inspection, and personnel. The assessment team would compare the facility's performance in those areas against the specific accreditation standards that had been identified for the particular laboratory testing or phytosanitary inspection services for which the facility was seeking accreditation. The four areas are explained in greater detail below.

Physical Plant

The facility's physical plant would have to meet the criteria identified in the accreditation standards as necessary to properly conduct the laboratory testing or phytosanitary inspection services for which it seeks accreditation. For example, a facility that wished to be accredited to perform laboratory testing would have to have adequate laboratory space in which to perform the testing, storage space for holding samples and supplies, and office space for preparing reports and other documentation.

Equipment

The assessment team would determine whether the facility's personnel had unrestricted access to the equipment identified in the accreditation standards as necessary to properly conduct the laboratory testing or phytosanitary inspection services for which it seeks accreditation. To continue with the example in the previous paragraph, a facility seeking accreditation for laboratory testing would have to have the microscopes, computers, scales, analyzers, etc. that would be necessary for the facility to properly conduct that laboratory testing. The assessment team would also verify, where appropriate, that calibration and monitoring of the required equipment is documented and conforms to prescribed standards.

Methods of Testing or Inspection

To ensure that the facility was employing scientifically valid and up-to-date methodology to conduct its laboratory testing or phytosanitary inspection activities, the assessment team would review the facility's quality manual or other equivalent documentation that described the system in place at the facility for the conduct of the laboratory testing or phytosanitary inspection services for which the facility seeks accreditation. The assessors would verify that the manual was available to, and in use by, the facility personnel who perform the services and that the methods and procedures described in the manual were equal to those identified in the accreditation standards.

Personnel

The assessment team would also review the qualifications of the facility's personnel, both management and staff, who were responsible for the testing or inspection services for which the facility was seeking accreditation. Those personnel, who would have to be identified to the assessment team, would have to possess the training, education, or experience identified in the accreditation standards as necessary to properly conduct the testing or inspection services for which the facility was seeking accreditation, and that training, education, or experience would have to be documented. If the particular accreditation standards under which the facility was being reviewed allowed for the use of subcontractors, the assessment team would also review the qualifications of any subcontractors used by the facility in connection with its laboratory testing or phytosanitary inspection activities.

Retaining Accreditation

Once accredited, the non-government facility would have to observe several conditions to maintain its accreditation. First, the facility would have to continue to observe the specific standards applicable to its area of accreditation, i.e., the standards by which it was judged in its initial, pre-accreditation assessment. To give APHIS the ability to monitor the facility's compliance with those standards, the facility would have to agree to be assessed and evaluated on a periodic basis through proficiency tests or check samples and be able to demonstrate on request that it is able to perform the tests or inspection services for which it was accredited. If, in the course of an assessment or evaluation, APHIS identifies any deficiencies in the facility or in its conduct of testing or inspection activities, the operator of the facility would have to ensure that those deficiencies are resolved.

Because the facility's accreditation would have been based largely on APHIS' review and acceptance of specific elements in place at the facility at the time of the assessment, we would require that the facility notify APHIS when those elements changed. Specifically, we would require that the operator of the facility notify APHIS when there are any changes in key management personnel or facility staff accountable for the testing or inspection services for which the facility has been accredited. We would also require the operator of the facility to report any changes involving the location, ownership, physical plant, equipment, or other conditions that existed at the facility at the time accreditation was granted.

Fees and Trust Fund Agreement

To cover the costs of APHIS' involvement in the assessment process, the operator of the facility seeking accreditation would have to enter into a trust fund agreement with APHIS. Under the agreement, the operator of the facility would pay in advance all estimated costs that APHIS expected to incur through its involvement in the pre-accreditation assessment process and the maintenance of the facility's accreditation. Those costs would include administrative expenses incurred in those activities, such as laboratory fees for evaluating check test

results, and all salaries (including overtime and the Federal share of employee benefits), travel expenses (including per diem expenses), and other incidental expenses incurred by the APHIS in performing those activities. The agreement would require the operator of the facility to deposit a certified or cashier's check with APHIS for the amount of the costs, as estimated by APHIS. If the deposit was not sufficient to meet all costs incurred by APHIS, the agreement would further require the operator of the facility to deposit another certified or cashier's check with APHIS for the amount of the remaining costs, as determined by APHIS, before APHIS' services would be completed. After a final audit at the conclusion of the pre-accreditation assessment, any overpayment of funds would be returned to the operator of the facility or held on account until needed for future activities related to the maintenance of the facility's accreditation.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

This proposed rule would amend the export certification regulations to provide for the establishment of a program under which non-government facilities could become accredited to perform specific laboratory testing or phytosanitary inspection services that could serve as the basis for the issuance of Federal phytosanitary certificates, phytosanitary certificates for reexport, or an export certificates for processed plant products. The accreditation criteria for particular laboratory testing and phytosanitary inspection services would be developed by APHIS with the participation of other interested governmental, industry, academic, or research entities. Currently, only tests conducted by public laboratories or inspections carried out by Federal, State, or county inspectors or by agents may be used as the basis for the issuance of a Federal certificate. The proposed accreditation program would provide a mechanism for qualified non-government facilities to become accredited to perform the testing or inspection services that may be used as supporting documentation for the issuance of Federal certificates for the export or reexport of certain plants or plant products.

The regulations proposed in this document are intended only to provide a framework upon which accreditation programs for specific functions could be established, so they would not, in and of themselves, entail any costs to APHIS or any non-government facility. However, any specific accreditation program that would be established under these proposed regulations would entail costs to both the entities being accredited and the accrediting body, i.e., APHIS. Because the accreditation program is expected to be self-supporting, the costs to APHIS would be recouped through accreditation fees. The fees charged by APHIS in connection with the initial accreditation of a non-government facility and the maintenance of that accreditation would, therefore, have to be adequate to recover the costs incurred by the government in the course of APHIS' accreditation activities. We expect that the costs that would have to be reimbursed would be largely attributable to the cost of transportation for the assessors to travel to the site of the facility, lodging for the assessors, their salary and per diem, any laboratory fees charged for evaluating check test results, and administrative expenses. Costs for specific accreditation programs would vary depending on the range of activities for which a facility was seeking accreditation, the number of assessors needed to adequately conduct a pre-accreditation assessment, the type and number of any proficiency tests that would have to be conducted, and the frequency with which post-accreditation evaluation activities such as check tests and site visits would have to be conducted.

The proposed regulations would stipulate that APHIS would provide an estimate of its anticipated fees to the operator of the facility prior to undertaking any activities that would result in fees being charged to a facility. Participation in any accreditation program developed under these proposed regulations would be voluntary. At this time, we estimate that 15 individual non-government facilities would be likely to seek and maintain accreditation annually on about 82 accredited procedures, as long as the costs of participating in an accreditation program are lower than the benefits they receive from the program. As a result, this program would have to meet the test of the marketplace.

The domestic seed industry, through the American Seed Trade Association, has indicated its interest in establishing an accreditation program for seed health testing and field inspection of seed, so we have used the domestic seed industry to illustrate the potential benefits that could result from the establishment of specific accreditation programs.

The seed industry would likely benefit from the establishment of an accreditation program because domestic seed exporters routinely require the services of inspectors and agents in order to obtain the phytosanitary certification required by most, if not all, importing countries; the benefits would be realized in terms of more timely certifications, which in turn could lead to reduced costs as well as increased U.S. exports.

The value of seed exported from the United States to other countries continues to grow rapidly, from $665 million in 1994–95 (July to June), to $705 million in 1995–96, to more than $800 million projected for 1996–97. There has been a concomitant rise in demand for laboratory testing and phytosanitary inspection services to meet other countries' import requirements. The ability of Federal, State, and county testing and inspection services to meet this growing demand will be increasingly strained. Already there are instances in which the accreditation of non-government facilities would have prevented the loss of export sales.

For example, some seed export opportunities have been forfeited because the results of pre-harvest field inspections are usually not known until after harvest. It is common for seed from several fields to be blended before shipment. If the sample from one field is subsequently reported to contain an actionable pest, then none of the blended seed—which may have been harvested from as many as eight or nine fields—could be exported. In one case in which this occurred, the affected seed company lost foreign sales worth $250,000. Such losses would be much less likely to occur if there were more timely reporting of pre-harvest inspections; accredited non-government inspection facilities could make timely reporting a reality. In general, non-government testing and inspection services could be expected to be completed with minimal delay, leading to greater marketing flexibility and lower risk of lost sales.

Additional benefits, of even greater potential significance, would be gained through the standardization of testing and inspection protocols that would result from the establishment of accreditation standards, particularly when internationally recognized standards are used. Major seed trading partners of the United States, such as

Canada, France, and The Netherlands, have national seed health organizations that address seed health issues in part by employing laboratory accreditation protocols. The standards that would underlie accreditation of non-government facilities in the United States could help lead to the removal of discrepancies among foreign phytosanitary regulations, thereby expediting U.S. seed exports.

Accreditation of non-government facilities, by promoting more streamlined exports based on internationally recognized standards, could be expected to benefit other export sales besides those of the seed industry. As a self-supporting system, private firms that expect benefits in excess of costs of accreditation would participate. In addition to the net benefits received by these firms directly, society as a whole would benefit from enhanced trade.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

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

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. 95–071–1. Please send a copy of your comments to: (1) Docket No. 95–071–1, Regulatory Analysis and Development, PPD, APHIS, suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OIRM, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

This proposed rule would provide for the establishment of a program under which non-government facilities could become accredited to perform specific laboratory testing or phytosanitary inspection services that could serve as the basis for the issuance of a Federal phytosanitary certificate, export certificate for processed plant products, or phytosanitary certificate for reexport. This proposed accreditation program would provide a mechanism for qualified non-government facilities to become accredited to perform testing or inspection services that may be used as supporting documentation for the issuance of certificates for certain plants or plant products.

Launching this accreditation program would necessitate that APHIS use a number of information collection activities to ensure that non-government facilities participating or seeking to participate in the program possess the necessary qualifications. Therefore, we are seeking OMB approval to employ the following information collection activities in connection with the APHIS export certification program:

Application for accreditation: The operator of a non-government facility who wishes to be accredited in a particular area of laboratory testing or phytosanitary inspection must submit an application to APHIS. The application must contain the legal name and full address of the facility; the name, address, telephone, and fax number of the facility's operator; a description of the facility; and a description of the specific laboratory testing or phytosanitary inspection services for which the facility is seeking accreditation.

Agreement to fulfill accreditation procedure: Before APHIS will assess a non-government facility to determine whether it meets the standards for accreditation, the operator of the facility must sign an agreement with APHIS. Specifically, the operator must agree to supply any information needed for the evaluation of the facility, pay the fees charged for the assessment, and accept the charges related to the subsequent maintenance of the facility's accreditation.

Documentation of equipment: The equipment used in the non-government facility (microscopes, computers, etc.) must be calibrated and monitored to ensure that it conforms to the standards for accreditation. This calibration and monitoring must be documented by facility personnel.

Quality manual or equivalent documentation: The operator of a non-government facility is responsible for maintaining a quality manual or similar documentation at the facility that describes the system in place for conducting the laboratory testing or phytosanitary inspection services for which the faculty is accredited. The manual must be available to and used by facility personnel performing the work.

Identity of personnel and subcontractor's qualifications: The personnel employed at the non-government facility must be identified and possess the training, education, or experience necessary to perform the laboratory testing or phytosanitary inspection services for which the facility is accredited. The operator of the facility is responsible for acquiring and maintaining documentation concerning the training, education, and experience of facility personnel. If the non-government facility uses a subcontractor to perform some of its testing or inspection services, the qualifications of the subcontractor must be documented and made available to APHIS. The facility operator is responsible for acquiring and maintaining this documentation.

Notification of changes in personnel: The facility operator must notify APHIS whenever the facility undergoes any change in personnel. This notification may be written, communicated via telephone, or by any other means of communication convenient to the facility's operator.

Report changes in location or ownership: The facility operator must notify APHIS if the facility moves its operations to a new location, undergoes an ownership change, replaces equipment, or experiences any other changes in the conditions that existed at the time the facility received its accreditation. This notification may be written, communicated via telephone, or by any other means of communication convenient to the facility's operator.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. We need this outside input to help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's

functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, 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 information collection on those who are to respond (such as 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).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 3.609 hours per response.

Respondents: Operators of non-government facilities who wish to be accredited to perform laboratory testing or phytosanitary inspection services in connection with APHIS' export certification program and certain employees of such non-government facilities.

Estimated number of respondents: 15.

Estimated number of responses per respondent: 5.466.

Estimated annual number of responses: 82.

Estimated total annual burden on respondents: 296 hours.

Copies of this information collection can be obtained from Clearance Officer, OIRM, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250.

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.

Regulatory Reform

This action is part of the President's Regulatory Reform Initiative, which, among other things, directs agencies to remove obsolete and unnecessary regulations and to find less burdensome ways to achieve regulatory goals.

List of Subjects in 7 CFR Part 353

Exports, Plant diseases and pests, Reporting and recordkeeping requirements.

Accordingly, 7 CFR part 353 would be amended as follows:

PART 353—EXPORT CERTIFICATION

1. The authority citation for part 353 would continue to read as follows:

Authority: 7 U.S.C. 147a; 21 U.S.C. 136 and 136a; 44 U.S.C. 35; 7 CFR 2.22, 2.80, and 371.2(c).

2. In § 353.1, a definition of *non-government facility* would be added, in alphabetical order, to read as follows:

§ 353.1 Definitions.

* * * * *

Non-government facility. A laboratory, research facility, inspection service, or other entity that is maintained, at least in part, for the purpose of providing laboratory testing or phytosanitary inspection services and that is not operated by the Federal Government or by the government of a State or a subdivision of a State.

* * * * *

3. In § 353.7, paragraphs (a)(4), (b)(4), and (c)(4) would each be amended by adding a new sentence at the end of each paragraph to read as follows:

§ 353.7 Certificates.

(a) * * *

(4) * * * The Administrator may also authorize inspectors to issue a certificate on the basis of a laboratory test or an inspection performed by a non-government facility accredited in accordance with § 353.8.

* * * * *

(b) * * *

(4) * * * The Administrator may also authorize inspectors to issue a certificate on the basis of a laboratory test or an inspection performed by a non-government facility accredited in accordance with § 353.8.

* * * * *

(c) * * *

(4) * * * The Administrator may also authorize inspectors to issue a certificate on the basis of laboratory test or an inspection performed by a non-government facility accredited in accordance with § 353.8.

* * * * *

4. A new § 353.8 would be added to read as follows:

§ 353.8 Accreditation of non-government facilities.

(a) The Administrator may accredit a non-government facility to perform specific laboratory testing or phytosanitary inspection services if the Administrator determines that the non-government facility meets the criteria of paragraph (b) of this section.[1]

(1) A non-government facility's compliance with the criteria of paragraph (b) of this section shall be determined through an assessment of the facility and its fitness to conduct the laboratory testing or phytosanitary inspection services for which it seeks to be accredited. If, after evaluating the results of the assessment, the Administrator determines that the facility meets the accreditation criteria, the facility's application for accreditation will be approved.

(2) The Administrator may deny accreditation to, or withdraw the accreditation of, any non-government facility to conduct laboratory testing or phytosanitary inspection services upon a determination that the facility does not meet the criteria for accreditation or maintenance of accreditation under paragraph (b) of this section and has failed to take the remedial action recommended to correct identified deficiencies.

(i) In the case of a denial, the operator of the facility will be informed of the reasons for the denial and may appeal the decision in writing to the Administrator within 10 days after receiving notification of the denial. The appeal must include all of the facts and reasons upon which the person relies to show that the facility was wrongfully denied accreditation. The Administrator will grant or deny the appeal in writing as promptly as circumstances permit, stating the reason for his or her decision. If there is a conflict as to any material fact, a hearing will be held to resolve the conflict. Rules of practice concerning the hearing will be adopted by the Administrator.

(ii) In the case of withdrawal, before such action is taken, the operator of the facility will be informed of the reasons for the proposed withdrawal. The operator of the facility may appeal the proposed withdrawal in writing to the Administrator within 10 days after being informed of the reasons for the proposed withdrawal. The appeal must include all of the facts and reasons upon which the person relies to show that the reasons for the proposed withdrawal are incorrect or do not support the withdrawal of the accreditation of the facility. The Administrator will grant or deny the appeal in writing as promptly as circumstances permit, stating the reason for his or her decision. If there is a conflict as to any material fact, a hearing will be held to resolve the conflict. Rules of practice concerning the hearing will be adopted by the Administrator. However, withdrawal shall become effective pending final determination in the proceeding when the Administrator determines that such action is necessary to protect the public health, interest, or safety. Such withdrawal will be effective upon oral or written notification, whichever is earlier, to the operator of the facility. In the event of oral notification, written

[1] A list of accredited non-government facilities may be obtained by writing to Port Operations, PPQ, APHIS, 4700 River Road Unit 139, Riverdale, MD 20737–1236.

confirmation will be given as promptly as circumstances allow. This withdrawal will continue in effect pending the completion of the proceeding, and any judicial review thereof, unless otherwise ordered by the Administrator.

(3) The Administrator will withdraw the accreditation of a non-government facility if the operator of the facility informs APHIS in writing that the facility wishes to terminate its accredited status.

(4) A non-government facility whose accreditation has been denied or withdrawn may reapply for accreditation using the application procedures in paragraph (b) of this section. If the facility's accreditation was denied or withdrawn under the provisions of paragraph (a)(2) of this section, the facility operator must include with the application written documentation specifying what actions have been taken to correct the conditions that led to the denial or withdrawal of accreditation.

(5) All information gathered during the course of a non-government facility's assessment and during the term of its accreditation will be treated by APHIS with the appropriate level of confidentiality, as set forth in the U.S. Department of Agriculture's administrative regulations in § 1.11 of this title.

(b) *Criteria for accreditation of non-government facilities.* (1) Specific standards for accreditation in a particular area of laboratory testing or phytosanitary inspection are set forth in this part and may be obtained by writing to APHIS. If specific standards for accreditation in a particular area of laboratory testing or phytosanitary inspection have not been promulgated by APHIS, the Administrator will develop appropriate standards applicable to accreditation in the area for which the non-government facility is seeking accreditation and publish a notice of proposed rulemaking in the **Federal Register** to inform the public and other interested persons of the opportunity to comment on and participate in the development of those standards.

(2) The operator of a non-government facility seeking accreditation to conduct laboratory testing or phytosanitary inspection shall submit an application to the Administrator. The application must be completed and signed by the operator of the facility or his or her authorized representative and must contain the following:

(i) Legal name and full address of the facility;

(ii) Name, address, and telephone and fax number of the operator of the facility or his or her authorized representative;

(iii) A description of the facility, including its physical plant, primary function, scope of operation, and, if applicable, its relationship to a larger corporate entity; and

(iv) A description of the specific laboratory testing or phytosanitary inspection services for which the facility is seeking accreditation.

(3) Upon receipt of the application, APHIS will review the application to identify the scope of the assessment that will be required to adequately review the facility's fitness to conduct the laboratory testing or phytosanitary inspection services for which it is seeking accreditation. Before the assessment of the facility begins, the applicant's representative must agree, in writing, to fulfill the accreditation procedure, especially to receive the assessment team, to supply any information needed for the evaluation of the facility, and to enter into a trust fund agreement as provided by paragraph (c) of this section to pay the fees charged to the applicant facility regardless of the result of the assessment and to pay the charges of subsequent maintenance of the accreditation of the facility. Once the agreement has been signed, APHIS will assemble an assessment team and commence the assessment as soon as circumstances permit. The assessment team will measure the facility's fitness to conduct the laboratory testing or phytosanitary inspection services for which it is seeking accreditation against the specific standards identified by the Administrator for those services by reviewing the facility in the following areas:

(i) *Physical plant.* The facility's physical plant (e.g., laboratory space, office space, greenhouses, vehicles, etc.) must meet the criteria identified in the accreditation standards as necessary to properly conduct the laboratory testing or phytosanitary inspection services for which it seeks accreditation.

(ii) *Equipment.* The facility's personnel must possess or have unrestricted access to the equipment (e.g., microscopes, computers, scales, triers, etc.) identified in the accreditation standards as necessary to properly conduct the laboratory testing or phytosanitary inspection services for which it seeks accreditation. The calibration and monitoring of that equipment must be documented and conform to prescribed standards.

(iii) *Methods of testing or inspection.* The facility must have a quality manual or equivalent documentation that describes the system in place at the facility for the conduct of the laboratory testing or phytosanitary inspection services for which the facility seeks accreditation. The manual must be available to, and in use by, the facility personnel who perform the services. The methods and procedures used by the facility to conduct the laboratory testing or phytosanitary inspection services for which it seeks accreditation must be commensurate with those identified in the accreditation standards and must be consistent with or equivalent to recognized international standards for such testing or inspection.

(iv) *Personnel.* The management and facility personnel accountable for the laboratory testing or phytosanitary inspection services for which the facility is seeking accreditation must be identified and must possess the training, education, or experience identified in the accreditation standards as necessary to properly conduct the testing or inspection services for which the facility seeks accreditation, and that training, education, or experience must be documented. Any subcontractor utilized by the facility in connection with the testing or inspection services for which accreditation is sought must be identified to APHIS; the subcontractor's qualifications will be reviewed by APHIS as part of the facility's assessment.

(4) To retain accreditation, the facility must agree to:

(i) Observe the specific standards applicable to its area of accreditation;

(ii) Be assessed and evaluated on a periodic basis by means of proficiency testing or check samples;

(iii) Demonstrate on request that it is able to perform the tests or inspection services representative of those for which it is accredited;

(iv) Resolve all identified deficiencies;

(v) Notify APHIS as soon as circumstances permit of any changes in key management personnel or facility staff accountable for the laboratory testing or phytosanitary inspection services for which the facility is accredited; and

(vi) Report to APHIS as soon as circumstances permit any changes involving the location, ownership, physical plant, equipment, or other conditions that existed at the facility at the time accreditation was granted.

(c) *Fees and trust fund agreement.* The fees charged by APHIS in connection with the initial accreditation of a non-government facility and the maintenance of that accreditation shall be adequate to recover the costs incurred by the government in the course of APHIS' accreditation

activities. To cover those costs, the operator of the facility seeking accreditation must enter into a trust fund agreement with APHIS under which the operator of the facility will pay in advance all estimated costs that APHIS expects to incur through its involvement in the pre-accreditation assessment process and the maintenance of the facility's accreditation. Those costs shall include administrative expenses incurred in those activities, such as laboratory fees for evaluating check test results, and all salaries (including overtime and the Federal share of employee benefits), travel expenses (including per diem expenses), and other incidental expenses incurred by the APHIS in performing those activities. The operator of the facility must deposit a certified or cashier's check with APHIS for the amount of the costs, as estimated by APHIS. If the deposit is not sufficient to meet all costs incurred by APHIS, the operator of the facility must deposit another certified or cashier's check with APHIS for the amount of the remaining costs, as determined by APHIS, before APHIS' services will be completed. After a final audit at the conclusion of the pre-accreditation assessment, any overpayment of funds will be returned to the operator of the facility or held on account until needed for future activities related to the maintenance of the facility's accreditation.

Done in Washington, DC, this 19th day of November 1997.

Terry L. Medley,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 97–30944 Filed 11–24–97; 8:45 am]

BILLING CODE 3410–34–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 123

Disaster Loan Program

AGENCY: Small Business Administration (SBA).

ACTION: Proposed rule.

SUMMARY: Under this proposed rule, an SBA disaster loan borrower could request an increase in a disaster loan within two years after the loan was approved. The increase must be used to cover eligible damages resulting from events that occurred after the loan was approved and were beyond the borrower's control. Under the proposed rule, the SBA Associate Administrator for Disaster Assistance could waive the two year limit because of extraordinary circumstances.

DATES: Comments must be submitted on or before December 26, 1997.

ADDRESSES: Comments should be mailed to Bernard Kulik, Associate Administrator for Disaster Assistance, Small Business Administration, 409 Third Street, S.W., Washington, D.C. 20416.

FOR FURTHER INFORMATION CONTACT: Bernard Kulik, 202/205–6734.

SUPPLEMENTARY INFORMATION: SBA makes thousands of physical and economic injury disaster loans to repair or replace damaged property or to help a business recover from economic injury. Borrowers must use such loans only to help them recover from the effects of a specific disaster. Borrowers may request increases in their loans after the initial disaster loans were made and, where appropriate, SBA will approve the request. Under this proposed rule, SBA is defining the circumstances under which a borrower can request an increase and limiting the time period for the request to two years. The SBA Associate Administrator for Disaster Assistance (AA/DA) would have the authority to waive the two year limit for extraordinary and unforeseeable circumstances.

Under the proposed rule, a borrower of a disaster loan (whether physical or economic injury) could request an increase in the loan amount if the eligible cost of repair or replacement of damages increases because of events occurring after the loan approval that were beyond the borrower's control. For example, a borrower can request an increase of a physical disaster loan before the repair, renovation or reconstruction is completed if hidden damage is discovered or if official building codes changed since SBA approved the physical disaster loan. With respect to economic injury disaster loans, borrowers could request an increase in working capital if they could not resume business activity as quickly as planned because of events beyond their control. These examples, while not all inclusive, would support a borrower's request for an increase in the amount of a disaster loan. These kinds of events usually will be apparent within two years after SBA approves a disaster loan. However, in extraordinary circumstances, the proposed rule would permit the AA/DA to waive the two year limitation.

Compliance With Executive Orders 12612, 12778, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601, et seq.), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

SBA certifies that this proposed rule does not constitute a significant rule within the meaning of Executive Order 12866 and will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* It is not likely to have an annual economic effect of $100 million or more on the economy, result in a major increase in costs or prices, or have a significant adverse effect on competition or the United States economy.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this proposed rule contains no new reporting or recordkeeping requirements.

For purposes of Executive Order 12612, SBA certifies that this proposed rule has no federalism implications warranting the preparation of a Federalism Assessment.

For purposes of Executive Order 12778, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in section 2 of that Order.

(Catalog of Federal Domestic Assistance Programs, No. 59.012 and 59.008)

List of Subjects in 13 CFR Part 123

Disaster assistance, Loan programs-business, Small Businesses.

Accordingly, pursuant to the authority contained in section 5(b)(6) of the Small Business Act (15 U.S.C. 634(b)(6)), SBA proposes to amend part 123, chapter I, title 13, Code of Federal Regulations, as follows:

PART 123—DISASTER LOAN ASSISTANCE

1. The authority citation for Part 123 would continue to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(b), 636(c) and 636(f); Pub. L. 102–395, 106 Stat. 1828, 1864; and Pub. L. 103–75, 107 Stat. 739.

2. Sections 123.18, 123.19 and 123.20 would be added to read as follows:

§ 123.18 Can I request an increase in the amount of a physical disaster loan?

SBA will consider your request for an increase in your loan if you can show that the eligible cost of repair or replacement of damages increased because of events occurring after the loan approval that were beyond your control. An eligible cost is one which is

related to the disaster for which SBA issued the original loan. For example, if you discover hidden damage within a reasonable time after SBA approved your original disaster loan and before repair, renovation, or reconstruction is complete, you may request an increase. Or, if applicable building code requirements were changed since SBA approved your original loan, you may request an increase in your loan amount.

§ 123.19 Can I request an increase in the amount of an economic injury loan?

SBA will consider your request for an increase in the loan amount if you can show that the increase is essential for your business to continue and is based on events occurring after SBA approved your original loan which were beyond your control. For example, delays may have occurred beyond your control which prevent you from resuming your normal business activity in a reasonable time frame. Your request for an increase in the loan amount must be related to the disaster for which the SBA economic injury disaster loan was originally made.

§ 123.20 How long do I have to request an increase in the amount of a physical disaster loan or an economic injury loan?

You should request a loan increase as soon as possible after you discover the need for the increase, but not later than two years after SBA approved your physical disaster or economic injury loan. After two years, the SBA Associate Administrator for Disaster Assistance (AA/DA) may waive this limitation after finding extraordinary and unforeseeable circumstances.

Dated: November 14, 1997.

Aida Alvarez,

Administrator.

[FR Doc. 97–30847 Filed 11–24–97; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 95–NM–111–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–100, –200, –300, –400, and –500 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

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

SUMMARY: This document revises an earlier proposed airworthiness directive (AD), applicable to all Boeing Model 737–100, –200, –300, –400, and –500 series airplanes, which would have superseded an existing AD that currently requires either leak tests of the forward lavatory service system, and repair, as necessary; or draining the system and placarding the lavatory inoperative. That proposed AD would have provided an option for accomplishing terminating action for certain leak tests. It would have required leak tests of other lavatory drain systems; installation of a cap or vacuum break on the flush/fill line; and either periodic replacement of the seal for the cap and tank anti-siphon valve or periodic maintenance of the vacuum break in the flush/fill line. This action revises the proposed AD by removing the terminating action; requiring periodic changing of the seals of certain lavatory drain systems; replacing ''donut valves'' with other FAA-approved valves; revising certain leak test intervals; and revising the pressurization and fluid level requirements for testing. The actions specified by this proposed AD are intended to prevent damage to engines, airframes, and property on the ground that is associated with the problems of ''blue ice'' that forms from leaking lavatory drain systems on transport category airplanes and subsequently dislodges from the airplane fuselage.

DATES: Comments must be received by January 5, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 95–NM–111–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Don Eiford, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington; telephone (425) 227–2788; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 95–NM–111–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this supplemental NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 95–NM–111–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD), applicable to all Boeing Model 737–100, –200, –300, –400, and –500 series airplanes, was published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on November 2, 1995 (60 FR 55673). That NPRM proposed to supersede AD 89–11–03, amendment 39–6223 (54 FR 21933, May 22, 1989), applicable to certain Boeing Model 737–300 and –400 series airplanes. That proposal would have continued to require either repetitive leak tests on the forward lavatory service system, and repair, as necessary; or draining of the system and placarding the lavatory inoperative. It would have also added a requirement to

perform leak tests of other lavatory drain systems; provided for the option of revising the FAA-approved maintenance program to include a schedule of leak tests; required the installation of a cap or vacuum break on the flush/fill line; and required either a periodic replacement of the seal for the cap and tank anti-siphon valve or periodic maintenance of the vacuum break in the flush/fill line. That proposal also would have expanded the applicability of the rule to include all Model 737 series airplanes.

That NPRM was prompted by continuing reports of damage to engines and airframes, separation of engines from airplanes, and damage to property on the ground, caused by ''blue ice'' that forms from leaking lavatory drain systems on transport category airplanes and subsequently dislodges from the airplane fuselage. Such formation and dislodging of ''blue ice,'' if not corrected, could result in damage to the engine and potential separation of the engine from the airplane.

Actions Since the Issuance of Previous NPRM

Since the issuance of that previous NPRM, the FAA has received reports indicating that leakage of certain in-line valves of the lavatory waste drain systems has been detected. In consideration of this and other factors (a more detailed discussion of the other factors is presented later in this supplemental NPRM), the FAA has determined that the terminating action provided by the previous NPRM must be removed from this supplemental NPRM. In addition, the FAA has determined that certain additional changes to the previous NPRM are necessary.

Related AD's

On November 9, 1994, the FAA issued AD 94–23–10, amendment 39–9073 (59 FR 59124, November 16, 1994), which is applicable to Boeing Model 727 series airplanes. That AD contains numerous requirements that are similar to those proposed in this action, which is applicable to Model 737 series airplanes. In fact, several of the proposed requirements of this action are based on alternative methods of compliance that the FAA had approved previously for compliance with AD 94–23–10.

The FAA is currently considering additional rulemaking to address the problems associated with ''blue ice'' on other transport category airplanes.

General Changes to the Proposal: Revision of Optional Maintenance Program

As discussed previously, the FAA has received recent reports of leakage in certain in-line drain (ball) valves. In order to ensure that leak check results are uniformly reviewed before any extension of leak check intervals, the FAA has determined that the previously proposed optional terminating action provided for in paragraph (b) of the previous NPRM must be removed from this supplemental NPRM in order to maintain an adequate level of safety. The 5,000-hour leak test interval remains unchanged.

General Changes to the Proposal: Revised Leak Test Intervals for Certain Valves

Based on recently received new data submitted by various operators, the supplemental NPRM would revise the previously proposed leak test intervals for certain valves. These changes have been added to paragraphs (a) and (b) of this supplemental NPRM. (A more detailed discussion of those proposed changes in the leak test intervals is presented later in the preamble.)

General Changes to the Proposal: Requirement To Change Seals

One comment submitted to the Rules Docket in response to the previously issued NPRM, requests that a requirement to change the valve seals be added to paragraph (a) of the proposal. The commenter points out that if the seals are not changed periodically, they could fail and leak in between leak testing. The FAA concurs with the request, and has added a requirement to paragraph (a) of this supplemental NPRM to change the seals of valves at intervals similar to the proposed requirements of the valve seal changes in paragraph (b) of this supplemental NPRM.

General Changes to the Proposal: Requirement To Remove ''Donut'' Valves

Another comment submitted to the Rules Docket in response to the previously issued NPRM, requests that the FAA mandate the removal of ''donut'' style valves from the airplane and require replacement with one of the three service panel valves, as specified in the proposed rule. The commenter states that the ''donut'' valves have a long history of poor performance.

The FAA concurs that the ''donut'' style valves should be removed. ''Donut'' style valves have been involved in more cases of leakage and consequent formation of ''blue ice'' than any other valve design. In addition, cases of leakage of ''donut'' style valves that have been leak tested (as required by previous AD's) are still being reported. Therefore, the FAA has determined that the ''donut'' style valves should be removed.

However, the FAA finds that, rather than require replacement of the ''donut'' style valves with one of the three service panel valves listed in the previous NPRM, a requirement to replace the ''donut'' valves with ''an FAA-approved valve'' is more appropriate. This leaves an opportunity for operators to choose valves that may be ''FAA-approved,'' but that may not be specified in the rule. Paragraphs (a)(6)(iii) and (b)(2)(iv)(C) of this supplemental NPRM have been revised to reflect this change.

General Changes to the Proposal: Revised Pressurization Requirements

Several comments submitted to the Rules Docket in response to the previously issued NPRM included requests to revise the requirement to pressurize the airplane while performing leak tests to verify the integrity of in-line drain valves or service panel drain valves. The commenters state that applying a minimum pressure of 3 pounds per square inch differential pressure (PSID) across the line by using a leak test tool, such as a hand-held vacuum pump, would be just as effective as pressurizing the airplane, yet would provide a more economical method of accomplishing the leak test. Additionally, the commenters point out that using a 3 PSID differential pressure is consistent with the ''blue ice'' AD requirements for Boeing Model 727 series airplanes.

The FAA concurs. Paragraphs (a) and (b) of this supplemental NPRM have been revised to require the tests while applying a minimum 3 PSID differential pressure in the same direction as would occur during flight.

General Changes to the Proposal: Revised Requirement of Fluid Level

Several comments submitted to the Rules Docket in response to the previously issued NPRM included requests that the FAA revise the proposed leak test procedure to empty and refill the lavatory to within two inches of overflowing. The commenters state that the difference between that specified level of fluid and actual overflowing of the fluid is approximately only one gallon. Since overflow of the lavatory could cause damage to the airplane, the commenters consider that any fluid above normal level (10 gallons) is unnecessary.

Therefore, the commenters request that the required fluid level be reduced.

The FAA concurs that a lower fluid level is acceptable, except in the case of testing the anti-siphon valve. The FAA finds that fluid at the 10-gallon level is too low to result in fluid contacting the seals during the test of the anti-siphon valve; the lack of contact of the fluid with the seals would invalidate the test. Therefore, this supplemental NPRM has been revised to require that the lavatory be filled with a minimum of 10 gallons of fluid, except when testing the anti-siphon valve. However, operators should take precautions to ensure that the tank is not overfilled; a statement to this effect has been added to this supplemental NPRM.

Conclusion

Since the changes described above expand the scope of the previously issued proposed rule, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

Comments Received

Due consideration has been given to the comments received in response to the NPRM issued previously.

Support for the Proposal

One commenter supports the proposed rule.

Request To Withdraw the Proposal: Risk of Injury From ''Blue Ice'' Is Extremely Remote

The Air Transport Association (ATA) of America, on behalf of its members, requests that the proposed rule be withdrawn. The commenter considers that, from a statistical standpoint, the risk of injury to persons on the ground from falling ''blue ice'' is extremely remote.

The FAA does not concur that the proposed rule should be withdrawn. The FAA has responded to the commenter on this issue during previous rulemaking concerning ''blue ice'' on Boeing Model 727 series airplanes. As stated in the preamble of that final rule, the FAA pointed out that demographic studies have shown that population density has increased around airports, and probably will continue to increase. These are populations that are at greatest risk of damage and injury due to ''blue ice'' dislodging from an airplane during descent. Without actions to ensure that leaks from the aft lavatory drain systems are detected and corrected in a timely manner, ''blue ice'' incidents would go untested and eventually someone would be struck, perhaps fatally, by falling ''blue ice.'' To discount the unsafe condition to persons on the ground presented by falling ''blue ice'' would be a gross breach of the FAA's safety obligations and commitment to the public.

Request To Withdraw the Proposal: Issue an Advisory Circular in Lieu of an AD

This same commenter suggests that, if some type of action must be taken, a more manageable alternative to issuing an AD should be considered. The commenter suggests that such an alternative could be the development of an Advisory Circular (AC).

The FAA does not concur that issuance of an AC would provide a ''more manageable'' method of addressing the ''blue ice'' safety issue. In certain cases, the issuance of an AC is an appropriate first step to address a concern at a more informal level than an AD. In line with this approach, Advisory Circular 120–39, ''Hazards of Waste Water Ice Accumulation Separating from Aircraft in Flight,'' was issued on October 31, 1980. Paragraph 3. of that AC states, ''Each operator should initiate and accomplish inspections and maintenance of waste drain valves, caps, and heater systems to the extent necessary to ensure that these systems remain airworthy and function as designed, to prevent ice build-up from leaking waste water, and the resultant separation from the aircraft.'' The FAA concludes that the time elapsed since the issuance of that AC has given industry sufficient opportunity to make this approach work. The continuing problems with ''blue ice,'' however, demonstrate the need for a more definitive solution; this proposed rule is an appropriate approach.

Request To Revise Rulemaking Criteria To Ensure Level of Safety Is Cost Beneficial

The ATA requests that the FAA redefine the criteria used to determine an ''unsafe condition'' so that the cost of rulemaking (airworthiness directives) is commensurate with the risks associated with not correcting the identified safety concern. Additionally, the commenter states that in meetings between the ATA and FAA management, participants agreed to a definition of ''airworthiness.'' The ATA would like to see that definition adopted for use in determining the need for an airworthiness directive. ATA states that without specific criteria and definitions of these terms, the FAA's determination of an unsafe condition and compliance period for adoption of the proposed rule must be viewed as subjective and, therefore, deficient as rulemaking.

The FAA does not concur with the commenter's assertion that ''without further guidance, the FAA's determination of an unsafe condition must be viewed as subjective and, therefore, deficient as rulemaking.'' The legal question is whether the FAA has identified an unsafe condition that may exist or develop in other products of the same type design. The FAA's determination on this issue is legally appropriate (and the rulemaking is not ''deficient'') as long as the FAA has a reasonable basis for that determination. In this supplemental proposed rule, the FAA finds that there is an unsafe condition based on reports of damage to engines, airframes, and property on the ground that is associated with the problems of ''blue ice'' that forms from leaking lavatory drain systems on transport category airplanes and subsequently dislodges from the airplane fuselage. Although these reasons may be characterized as ''subjective'' because they are qualitative rather than quantitative, the FAA considers them to be appropriate and sufficient to establish the reasonableness of this proposed action.

Request To Consider the Cost Impact to Airline Operators

One commenter states that in order to standardize leak testing intervals at 1,000 and 4,500 flight hours, it will have to install a part in the aft drain system on its entire fleet, and in the forward drain system on airplanes that do not have Kaiser in-line ball valves installed in the forward drain system. The commenter requests that, since the annual cost for this will be $8,064, the FAA should reconsider that requirement.

Another commenter asserts that compliance with the proposed rule will force airlines with good maintenance programs and high levels of ''blue ice'' awareness to spend money accomplishing repetitive leak tests that will not add any additional levels of safety to the aircraft or to people on the ground. The commenter further states that the additional ground time required to perform these tests will also complicate scheduling and hamper efforts to increase aircraft utilization. The FAA infers that the commenter is requesting that the FAA reconsider the cost impact of the proposed action.

The FAA acknowledges that the obligation to maintain aircraft in an airworthy condition is vital, but sometimes expensive. ''Blue ice''

frequently is not traceable to the particular airplane, operator, and waste system that produced it. Incidents of leakage usually are not reported; only the relatively serious leakage incidents become known to the FAA. Previous attempts to rely solely upon increased maintenance while using lower reliability hardware have not proven to be successful. Therefore, a system to prevent incidents of ''blue ice'' in the fleet must be based upon reduction of the number of incidents of leakage by encouraging the use of more reliable equipment, and requiring that, if an incident of leakage does occur, it is detected and corrected in a timely manner.

In addition, because AD's require specific actions to address specific unsafe conditions, they appear to impose costs that would not otherwise be borne by operators. However, because of the general obligation of operators to maintain aircraft in an airworthy condition, this appearance is deceptive. Attributing those costs solely to the issuance of this proposal is unrealistic because, in the interest of maintaining safe aircraft, prudent operators would accomplish the proposed actions even if they were not required to do so.

Request To Distinguish Risks Associated With Forward and Aft Lavatories Drain Systems

Two commenters note that the compliance times of the NPRM do not reflect a difference between risks associated with leakage from the forward lavatory drain system and the risks associated with leakage from the aft drain. One of the commenters asserts that operators who upgraded their forward lavatory systems to address the more significant safety concern over ice ingestion in engines would still be subject to the more stringent leak test intervals of the aft lavatory drain systems because of difficulties in redesigning and implementing retrofit of the aft lavatory drain systems. The commenters assert that the differences between the risks of leakage from the forward lavatory should be reflected by an adjustment to the proposed compliance times.

The FAA does not concur that the risks associated with either the forward or aft lavatories should be distinguished by an adjustment to the proposed compliance times of the NPRM. As discussed previously, ''blue ice'' detaching from the forward lavatory could cause damage to the engine and airframe, as well as present a hazard to persons on the ground; ''blue ice'' detaching from the aft lavatory presents a hazard to persons on the ground. Regardless of whether the formation of ''blue ice'' occurs on the forward or aft lavatory drain system, the resultant unsafe condition would exist. Even if the formation of ''blue ice'' on the aft lavatory drain systems may appear to be a less ''significant'' safety concern than the forward systems, a safety concern for those persons on the ground, nevertheless, still exists.

Request To Involve Principal Maintenance Inspectors (PMI)

This same commenter, in reference to paragraph (b) of the previous NPRM, contends that it is more appropriate for the PMI, rather than the Seattle Aircraft Certification Office (ACO) engineering staff, to approve subsequent changes to the maintenance program once the program has been approved. The commenter considers that the PMI is more qualified than the ACO staff to approve tasks on training, reporting, and adjustment to the leak test intervals based upon reliability program recommendations. The commenter points out that the subject matter of the rule is clearly maintenance-related, and the ACO staff is not equipped to effectively respond to requests for maintenance interval changes that may occur. The commenter states that paragraph (b) of the proposal should be revised to include a statement that the AD is no longer applicable once a revision to the FAA-approved maintenance program is implemented.

The FAA does not concur. Although the FAA agrees that the PMI should have oversight of most of the requirements of the proposed alternative maintenance program provision of the rule, the FAA does not agree that the PMI should be tasked with approving certain adjustments of the program. Failure threshold criteria and definitive leak/failure rate data do not exist for the majority of the subject valves; therefore, a PMI would have no data on which to base the approval of an extension of a leak test interval for many valves with the assurance that the valve would not fail within the adjusted interval. In light of this, it is essential that the FAA, at the ACO level, have feedback as to the leak and failure rates experienced in the field. Although the PMI's serve as the FAA's critical link with the operators (and the PMI oversight responsibilities will not be minimized by this AD action), it is the staff of the ACO that provides the engineering support necessary to evaluate whether increases in leak test intervals will maintain an acceptable level of safety.

Further, the FAA considers it essential that any adjustment of the required leak test intervals, seal change intervals, and data reporting procedures should be approved in a uniform manner to ensure that the program is administered uniformly (and appropriately) fleetwide. The staff of the Seattle ACO is in the best position to ensure that this is accomplished. Additionally, given that possible new relevant issues might be revealed during the approval process, it is imperative that the engineering staff at the ACO have such feedback. In any case, the ACO staff will work closely with the cognizant PMI to ensure that any approved revisions to this aspect of the maintenance program are appropriate and workable for the applicable airline.

Request To Increase Leak Test Intervals for Pneudraulics Drain Valves

Several commenters request that the leak test interval for Pneudraulics drain valve having part number (P/N) 9527–1 be increased from the proposed 1,000 flight hours. Two of the commenters requested the interval be increased to 2,000 flight hours; and one of the commenters, the valve manufacturer, requests that the interval be increased to 4,500 flight hours.

The FAA concurs partially. Since the issuance of the NPRM, the FAA has received new data regarding the in-service performance of the Pneudraulics 9527 series drain valve. The data was obtained in accordance with procedures similar to those of paragraphs (b) and (c) of this supplemental NPRM. This data revealed that, only two leak tests failures were detected during a total time of 847,927 hours on 412 Pneudraulics valves. In consideration of this data, the FAA finds that, for those operators who choose to comply with the requirements of paragraph (a) of the AD, this information justifies an increase of the leak test interval of Pneudraulics valves having P/N 9527 series from 1,000 hours to 2,000 hours. Additionally, the FAA finds that, for operators who choose to comply with the maintenance option of paragraph (b) of the AD, this information justifies an increase of the leak test interval of the Pneudraulics valves P/N 9527 series from 1,000 hours to 4,000 hours. Paragraphs (a) and (b) of this supplemental NPRM have been revised accordingly. However, if following the requirements of paragraphs (b) and (c) of this supplemental NPRM, similar data is gathered by a number of operators and are submitted to the FAA in support of an extension of the leak check interval for another type of valve, the FAA will consider extension of the leak check intervals for that valve for all operators using the valve.

Request To Increase Leak Test Intervals of Certain Other Shaw Valves

One commenter states that its fleet has a mixture of valves that have been modified in accordance with Shaw Service Bulletin SB 10101000B–38–1, and valves that have not been modified in accordance with that service bulletin. The operator requests that the currently proposed leak test interval of 600 flight hours (for the valves that have not been modified in accordance with the service bulletin) be increased to equal the 1,000 flight hour leak test interval of the valves modified in accordance with that service bulletin. Because of the operator's high level of awareness, it sees no safety compromise in requiring the unmodified valves to be leak tested at 1,000 flight hours.

The FAA does not concur. The modifications described by the subject service bulletin were designed to make the valves less likely to leak. Therefore, the leak test interval is permitted to be increased only for those valves that have been modified in accordance with Shaw Service Bulletin SB 1010000B–38–1.

Request To Increase Leak Test Interval for Other Shaw Valves

One commenter, a valve manufacturer, requests that the leak test interval for certain Shaw valves be extended from 1,000 flight hours to 2,000 flight hours when the maintenance procedures have been revised and data have been submitted to substantiate the increased interval.

The FAA concurs that when maintenance procedures have been revised and data have been submitted to substantiate the increased interval, approval may be granted to increase the leak test intervals. Under the provisions of this supplemental NPRM, an operator has the option of proposing a change to its maintenance program, gathering data, and making a request for extension of the leak test interval. Operators interested in this option should contact the Seattle Aircraft Certification Office to discuss implementation of this option before submitting the request to extend the leak test intervals. If a number of operators successfully follow this procedure and provide data similar to that provided for the Pneudraulics P/N 9527 series valve, the FAA will consider an ''across the board'' increase for extension of the leak check interval for the valve that they are using. This procedure is applicable to valve manufacturers as well.

Request To Increase Interval of Replacement of Pneudraulics Valve Seals

One commenter, an operator, requests that the replacements of the seals of the Pneudraulics valves be extended from the proposed ''prior to 5,000 flight hours after the effective date of the AD, and thereafter at intervals not to exceed 18 months,'' to replacement of the seal ''every third leak test of the drain system, or every 6,000 flight hours.'' The commenter states that implementation of the revised compliance times would provide a scheduling convenience, and would still maintain an acceptable level of safety.

The FAA concurs that the intervals for the repetitive replacements can be extended somewhat. Since the Pneudraulics valve seals are similar to those used in the in-line drain valves and replacement of those seals are approved for longer replacement intervals, the FAA has revised paragraphs (a)(1)(ii) and (b)(1)(ii) of this supplemental NPRM to require accomplishment of repetitive seal replacements at intervals not to exceed 18 months or 6,000 flight hours, whichever occurs later.

Request To Revise Compliance Times for Certain Seal Changes

One commenter, the airplane manufacturer, requests that the proposed rule be revised to provide for an alternative repetitive interval for accomplishment of the seal changes. Specifically, the commenter requests that, ''or within 48 months after the last documented seal change'' be added after the proposed repetitive interval of ''5,000 flight hours'' in paragraph (b)(1)(i) of the proposed rule. The commenter states that this alternative repetitive interval would prevent unnecessary seal changes for operators that have recently performed the seal change.

The FAA concurs that the requested alternative repetitive interval would prevent unnecessary seal changes for operators that have recently performed the seal change. The FAA considers that those alternative repetitive intervals provide an equivalent level of safety. Therefore, the FAA has revised paragraph (b)(3) of this supplemental NPRM (which appeared as paragraph (b)(1) of the previous proposal). The FAA also has made a corresponding change to paragraph (a)(8) of this supplemental NPRM since it is similar to the requirements of paragraph (b)(3) of the supplemental NPRM.

Request To Delete Certain Seal Part Numbers

One commenter, the airplane manufacturer, requests that valve seal part numbers 2651–329, 2651–334, 10101000C–G, 10101000C–M, and 1010000C–R be deleted from the proposal. The commenter considers that part numbers that have not been installed, either in production or retrofit, on Boeing Model 737 series airplanes should not be cited in the NPRM. The FAA concurs with the commenter's remarks, and has removed all references to those parts numbers from this supplemental NPRM.

Request To Mandate Leak Testing of All Seals in the Lavatory System

One commenter notes that, while the previous NPRM proposes leak testing of the dump valve seal and the inner seal of the drain valve of the service panel, no testing of the outer cap/door seal is required. The commenter states that since the outer cap/door seal is the ''last resort'' in preventing leakage of ''blue ice,'' leak testing should be required of the outer cap/door.

The FAA does not concur. Some valve designs are such that the valve must be partially disassembled (removing the inner seal, interlocking inner plugs, etc.) to allow the outer door to be tested, which would invalidate the test of the inner seal. Additionally, different valve designs may require valve disassembly and reassembly as part of the test procedure with different test procedures for different valve designs. These factors complicate the specification of a usable test of both inner and outer doors for all existing valve designs. Therefore, the FAA finds that the requirement to apply 3 PSID across the valve inner door and to visually inspect the outer door seal for damage that could cause leakage on all service panel valves to be adequate and appropriate. However, if an operator prefers to test the outer door and inspect the inner door, the FAA will consider requests for an alternative method of compliance as provided in paragraph (f) of this proposed AD.

Request To Require a Lever Lock Cap and a Vacuum Breaker Check Valve

One commenter states that, instead of permitting a vacuum breaker check valve to be used as an alternative to the installation of a lever lock cap, the FAA should require both of them. The commenter states that a long history of poor performance of check valves and lever lock caps indicates that a redundant system requiring both the valve and cap would have greater reliability.

The FAA does not concur in this case. The FAA acknowledges that redundant systems generally provide a higher level of safety; however, in this case, redundancy to the check valve function is provided by the vacuum breaker. In the case of a check valve alone, the lever lock cap provides redundancy to the check valve. There are insufficient data to show which combination is more reliable.

However, service history information indicates that vacuum breaker check valves with poppet check valves (rather than mushroom check valves) have a greater reliability record. Therefore, the FAA has removed reference to Monogram Part Number 3765–175 (mushroom type) from paragraphs (a) and (b) of this supplemental NPRM. By requiring repair of leaking components when ''blue streaks'' are observed, the FAA intends that operators, through their own experience, will determine which combination of valves works the best to avoid leakage. However, if the FAA receives data indicating service problems or unreliability with vacuum breaker check valves using poppet checks, the FAA may consider further rulemaking action.

Request To Revise Approvals of Certain Vacuum Breakers

Two commenters request that the approval of vacuum breakers, as referenced in the proposed rule, be revised. One commenter requests that reference to all Monogram part number series 3765–175 or 3765–190 series be deleted, and replaced with ''* * * an FAA-approved check valve with a vacuum breaker * * *,'' or replaced with a specific reference to valves having Shaw part number 301–0009–01. This commenter states that the vacuum breaker check valves leaked, and should not be provided as an alternative to installation of a lever lock cap on the flush/fill line. The other commenter requests that instead of specifying particular part numbers, the approval reference should be to ''* * * an FAA-approved vacuum break in the * * *.'' This commenter considers that this would cover all vacuum breaker manufacturers.

The FAA concurs partially. The FAA has reviewed available service history data and concluded that vacuum breaker check valves of the poppet type (such as Monogram part number series 3765–190) have fewer reports of leakage than the vacuum breaker test valves of the mushroom type (such as Monogram part number 3765–175). Therefore, as stated previously, the FAA has removed reference to Monogram part number 3765–175 as an approved valve from this supplemental NPRM.

The FAA also has reviewed the design of Shaw part number 301–0009–01, which is a vacuum breaker check valve of the poppet type, and has added it as an acceptable part number in paragraphs (a)(8)(ii) and (b)(3)(ii) of this supplemental NPRM.

Additionally, since the issuance of the previous NPRM, another acceptable valve for the flush/fill line has been certified. The installation of Kaiser Electroprecision flush/fill ball valve part number series 0062–0009 has been added to paragraphs (a)(8)(iii), (b)(3)(iii), and (d)(3) of this supplemental NPRM as an alternative method of preventing leakage from the flush/fill line.

Request To Shorten Leak Test Intervals of Flush/Fill Caps

The commenter states that there is no discussion in the proposal of what would prompt an airline to ensure flush/fill caps are installed in all positions prior to each flight. The commenter contends that it is common practice for caps to be removed from airplanes due to their nuisance value. The commenter also states that the flush/fill caps, as well as the lever lock caps, are difficult to operate and commonly have the seals removed, which render them inoperable on the airplane. The commenter considers the ease with which the seal is removed is a design flaw of the valve itself. Therefore, the commenter requests that another device be considered instead of the flush/fill caps that is not on the exterior of the aircraft and cannot be tampered with by ground maintenance personnel. The commenter notes that a device incorporated further upstream with positive shut-off and anti-siphon features would eliminate the ''blue ice'' that occurs at the flush/fill port. Therefore, the commenter requests that, until such a device can be developed and FAA-approved, the leak tests and inspections of this area should be performed more frequently.

The FAA does not concur with the commenter's request. The FAA does not consider it necessary to require an additional inspection to ensure installation of the flush/fill caps when they are installed in accordance with an AD. If, as the commenter asserts, cases of uninstalled flush/fill caps commonly occur, the FAA does not find that reason to assume that operators would continue that practice in the future if operation without the flush/fill caps would be a violation of an AD. Further, lever lock caps are specified by this supplemental NPRM precisely because they must be in the closed position to allow the service panel door to be closed. In addition, this supplemental NPRM specifies that if there is evidence of leakage, the leaking device must be corrected, or the lavatory drained and placarded inoperative. Therefore, if seals or caps are removed and result in leakage, this provision will ensure that the system is repaired before the lavatory is returned to service.

Additionally, the FAA notes that the vacuum break poppet type check valves specified in the previous NPRM can be used as an alternative to using lever lock caps. The FAA is not aware of any data, presently, that supports an increase or decrease in the leak test intervals of the devices on the flush/fill line. Consequently, this supplemental NPRM contains neither an increase nor a decrease in the leak test intervals of these devices. However, if such data becomes available that supports a decrease in the leak test intervals, the FAA may consider additional rulemaking.

Request To Revise the Leak Test of the Inner Door of the Service Panel Drain Valve

Several commenters request that the leak test of the inner door of the service panel drain be revised to require the test to be run with the outer door open when using a vacuum box so that the 3 PSID differential is applied across the inner door. One of these commenters, the airplane manufacturer, points out that if the outer door seal is good, the inner door seal will not reflect a pressure differential. For this reason, the FAA concurs. The FAA has revised the supplemental NPRM to specify that the test be run with the outer door open when using a vacuum box.

Request To Revise Testing of Drain Panel Valves

One commenter requests that testing of the drain valves cover both the inner door of the valve and the outer door/cap of the valve. The commenter also notes that some valves have their primary seals on the outer doors, not the inner doors, so that omitting the test of the outer door, as proposed in the NPRM, results in the primary seal of the valve being untested.

The FAA does not concur. As discussed previously in the request to mandate leak testing of all seals in the lavatory system, the FAA has revised the requirements of the leak testing of the drain valves of service panels to require applying 3 PSID across the valve inner door and visually inspecting the outer door seal for damage. This approach should adequately test valves with inner and outer doors. However, if

an operator elects to test the outer door and visually inspect the inner door, that operator should apply for approval of an alternative method of compliance under the provisions of paragraph (f) of this supplemental NPRM.

Request To Require Visual Inspection of the Outer Cap/Door

Two commenters request that paragraphs (a)(4) and (b)(2)(iii) of the proposal be revised to delete the requirement to perform a leak test of the outer door of ''donut'' type valves, and add a visual inspection of the outer doors instead. The commenters state that the ''donut'' valves are similar to other valves in that they provide two sealing surfaces. The commenters note that for those other valves, the proposal would require only a test of the inner door or the sealing surface.

The FAA concurs and has revised paragraphs (a)(4) and (b)(2)(iii) of this supplemental NPRM accordingly. In light of the fact that this supplemental NPRM would require eventually removing all ''donut'' valves and replacing them with FAA-approved valves, the FAA finds that, in the interim, a visual inspection of the outer doors, rather than a leak test, will ensure an acceptable level of safety.

Request To Require a Leak Test of the Outer Door of the Service Panel Drain

Another commenter states that since the FAA required it to perform the leak test of the outer door, the rules for testing the service panel drain should not be changed at this time. The commenter states that by requiring leak tests only of the inner door, the proposal provides an unfair competitive advantage in favor of its competitors because some valves have their primary seals on the outer doors instead of the inner doors. In addition, by not requiring a leak test of the outer door, the actual primary seal of the valve would not be tested.

The FAA does not concur with the request to require leak tests of the outer door seal. The FAA finds that performing a leak test of the inner door and visual inspections of the outer door provide an acceptable level of safety. However, if an operator chooses to test the outer door and visually inspect the inner door, under the provisions of paragraph (f) of this supplemental NPRM, that operator may request approval of an adjustment of this requirement if data are submitted to substantiate that such an adjustment would provide an acceptable level of safety.

Request To Extend Leak Test Intervals in Paragraph (b) of the Proposal

Several commenters state that the leak test intervals specified in paragraph (b) of the proposal should be relaxed so that operators would be encouraged to select it as an alternative to the accomplishment of the requirements of paragraph (a) of the proposal. One of the commenters states that this same request was made in response to the proposed rule concerning ''blue ice'' for Boeing Model 727 series airplanes, and that the FAA did not respond to that request. Several commenters assert that paragraph (b) of the proposal should additionally provide terminating action once an operator's FAA-approved maintenance plan has been incorporated.

The FAA does not concur with the commenters' request to increase the leak test intervals specified in paragraph (b) simply in order to encourage operators to choose that option. For the reasons specified previously under the ''General Changes to the Proposal: Revision of Optional Maintenance Program'' section of this supplemental NPRM, the FAA finds that the previously proposed terminating action must be deleted. Further, the expansion of leak test intervals that are included in paragraph (b) of this supplemental NPRM is primarily related to the reliability of the waste drain valves involved. The additional requirements of paragraph (b) provide assurance that expansion of the intervals will not result in significant leakage events in the time between the leak tests. The FAA included paragraph (b) of this supplemental NPRM not only because it does contain certain ''attractive'' features, but also to provide a format for verifiable empirical data to serve as a reliability indicator for the waste drain valves. To date, three operators have opted to follow requirements similar to those provided in paragraph (b) of this supplemental NPRM. The FAA concludes, therefore, that compliance with the optional provisions of paragraph (b) of this supplemental NPRM is of value to some operators.

Additionally, in reviewing the preamble of AD 94–23–10 (applicable to Boeing Model 727 series airplanes), the FAA finds that the commenter's request regarding the leak test intervals of paragraph (b) of that AD was specifically addressed in the final rule. The FAA's response noted the revision of several requirements of paragraph (b) of that final rule to make it more ''attractive'' to operators; certain of those revised requirements included extended leak test intervals for some valves.

Request To Revise Leak Test Intervals for Service Panel Drain Valves

The airplane manufacturer requests that paragraph (b)(2)(ii) of the proposal be revised to increase the replacement interval of the service panel drain valves from 1,000 flight hours to 2,000 flight hours. The commenter states that increasing this interval would not decrease the level of safety because of other requirements of paragraph (b) of the proposal. Further, the commenter notes that two alternative methods of compliance have been granted to increase the interval to 2,000 flight hours.

The FAA does not concur with the commenter's request to increase the leak test interval ''across the board'' for service panel drain valves at this time. However, if data are submitted for specific service panel drain valves in accordance with the data gathering requirements of paragraph (b) of this supplemental NPRM, the FAA will review the data and may consider extending the leak test intervals accordingly. If a number of operators have successfully accomplished such programs, the FAA will evaluate all the data submitted for a particular valve and consider an ''across the board'' extension of the leak test interval.

Request for Clarification of Compliance Times

The airplane manufacturer requests that compliance times in paragraph (b)(4) of the proposal be revised. That proposed compliance time is currently specified as ''* * * at intervals not to exceed 4 calendar days or 45 flight hours, whichever occurs later.'' The commenter requests that the phrase ''not to exceed'' be deleted and replaced with the word ''of.'' The manufacturer states that the phrase ''not to exceed'' appears to be in conflict with the phrase ''* * * whichever occurs later.'' Therefore, the manufacturer suggests revising the compliance time to read ''at intervals of 4 calendar days or 45 flight hours, whichever occurs later.''

The FAA does not concur that the phrases are in conflict with each other. The phrases ''at intervals not to exceed 4 calendar days or 45 flight hours, whichever occurs later'' are standard phrasing the FAA uses routinely in providing certain compliance times. The phrase, ''not to exceed,'' allows accomplishment of the required action at frequencies less than the specified intervals. The phrase, ''whichever occurs later,'' allows an operator to select the means of measuring the

interval that results in less frequent accomplishment of the required actions, depending upon the operator's individual utilization rates. Therefore, no change of compliance time is required to paragraph (b)(4) of the supplemental NPRM.

Request To Incorporate Paragraph (b) Into Paragraph (f) of the Proposal

One commenter considers that the provisions in paragraph (b) of the NPRM are merely guidelines for submitting alternative methods of compliance. Therefore, the commenter requests that paragraph (b) of the proposal be incorporated into the paragraph that specifically addresses alternative methods of compliance [paragraph (f) of the proposal].

The FAA does not concur. The maintenance option provided by paragraph (b) of this supplemental NPRM provides for the acquisition of data that are required to justify extending leak test intervals. Compliance with paragraph (b) of the supplemental NPRM is an approved method of establishing empirical data on valve reliability. The FAA sees no added value in changing the paragraph numbering of the proposal. Moreover, the FAA considers that a change in the numbering of the paragraphs would have the potential for added confusion since an existing AD for the Boeing Model 727 series airplanes concerning ''blue ice'' also has paragraph (b) designated as the maintenance option.

Request To Revise Test Requirements for Flush/Fill Line Anti-Siphon Valves

The airplane manufacturer requests that paragraph (b)(3) of the proposal be revised from ''Thereafter, repeat the requirements at intervals not to exceed 5,000 flight hours'' to ''Thereafter, repeat the requirements at intervals not to exceed 5,000 flight hours or 24 months.'' The commenter notes that the paragraph would then be consistent with the test requirements of the in-line drain valve in paragraph (b)(2)(i) of the proposal.

The FAA does not concur. The compliance times for testing the in-line drain valves specified in paragraph (b)(2)(i) of the supplemental NPRM were based on supportive data to justify those times. The FAA has not received data justifying a similar compliance time for the flush/fill line anti-siphon valve.

Request To Clarify Table 1 of the Proposal

One commenter, a valve manufacturer, requests that specific Shaw Aero valves approved for a leak test interval of 1,000 flight hours be clarified. The FAA has revised Table 1 of this supplemental NPRM to clarify specifically which Shaw valves have been approved for use on Boeing Model 737 series airplanes.

Request To Base Leak Test Intervals for Valves on Valve Quality

One commenter states that it is more important to use a quality valve than a ''maintenance program'' to ensure reliability. The commenter asserts that maintenance programs should be required of all airlines, so that leak test intervals would be based on the quality and performance of the hardware.

The FAA does not concur that claims of valve quality should be the only basis for determining leak test intervals, or that all operators should be required to follow the requirements of the optional maintenance program [paragraph (b) of the supplemental NPRM]. Extension of the leak test interval is based primarily upon hardware reliability, as stated elsewhere in this supplemental NPRM. However, verification of the actual reliability of the hardware is difficult to determine. Review of maintenance data that is obtained through the maintenance program and verified by FAA Flight Standards plays a major role in determining the extension of leak test intervals. Although valve manufacturers and some operators claim that the hardware and systems currently in service are providing adequate levels of safety, incidents of ''blue ice'' continue to occur.

Since leakage from the waste system is not a reportable event according to part 21 of the Federal Aviation Regulations (14 CFR part 21), the FAA included the provisions of paragraph (b) of the proposal to make leakage from the waste system a reportable event. Those operators who choose to compile that data will have documented information to submit to the FAA as a basis for increasing leak test intervals. As stated earlier, the FAA has already used this program to extend the leak test interval for a certain valve.

With regard to the commenter's statement that all operators should be required to follow a maintenance program, the FAA has incorporated requirements to periodically change valve seals and correct any leakage found in accordance with paragraph (a) of this supplemental NPRM. The more extensive requirements of the maintenance program specified in paragraph (b) of the supplemental NPRM provide assurance that significant leakage will not occur during the expanded leak test intervals.

Request To Increase Certain Leak Test Intervals

The ATA asserts that leak test intervals of every 200 flight hours for certain drain system valves cannot be justified based on safety concerns with ''blue ice.'' The ATA requests that those leak test intervals be extended.

The FAA does not concur. The current leak test interval for certain drain system valves is every 200 flight hours, as required by AD 89–11–03. Nevertheless, the FAA has continued to receive reports of damage to airplanes. The FAA intends to increase the leak test interval only for those valves documented to be reliable, in accordance with the proposed requirements of this supplemental NPRM.

Request for Definition of ''Vent Line''

Another operator requests that the term ''vent line'' be defined specifically. The commenter questions if ''vent line'' as cited in the proposed AD refers only to the portion of the line shown on the Monogram check valve.

The FAA acknowledges that clarification is necessary. The vent line vacuum breaker is that portion of the valve and vent line that functions as a vacuum breaker, as opposed to the part of the valve performing a ''check valve'' function. The intent of the previous NPRM was to perform maintenance on the vacuum breaker check valve and ensure that the vacuum break feature operates correctly. For clarification purposes, reference to the term ''vent line'' has been removed from this supplemental NPRM, and the applicable paragraphs have been revised to reference a ''vent line vacuum breaker.''

Request To Revise Reference to Service Information

The airplane manufacturer advised that the correct service bulletins that should be cited in paragraph (f)(2) of the proposal are Boeing Service Bulletins 737–38–1026 (lavatory A), and 737–38–1031 (lavatory F). Those service bulletins describe alternative methods of compliance with the requirements of only paragraph (a)(2) of the supplemental NPRM. The FAA inadvertently cited an incorrect service bulletin in the previous NPRM; the supplemental NPRM has been revised to cite the correct service bulletins.

Request To Change Reference to Certain Drain System Valves

One commenter requests that the description of the ''donut'' valves in paragraphs (a)(4) and (b)(2)(iii) of the NPRM be expanded to read, ''For each lavatory drain system that incorporates

''donut'' plugs (Kaiser Electroprecision, part number 4259–20 or 4259–31), or FAA-approved equivalent, or incorporates Kaiser Electroprecision cap/flange, part numbers * * *.'' The FAA concurs, and has revised paragraphs (a)(6) and (b)(2)(iv) of this supplemental NPRM [which appeared as paragraphs (a)(4) and (b)(2)(iii), respectively, of the previous NPRM] to provide clarification concerning the specific ''donut'' valves, as suggested by the commenter.

Request To Revise Notes 3 and 5 of the Proposal

The airplane manufacturer requests that Notes 3 and 5 of the NPRM be corrected to reference Boeing Maintenance Manual Section 38–32–00/501 instead of the currently referenced Boeing service letter.

The FAA acknowledges that Boeing Maintenance Manual Section 38–32–00/501 is the appropriate guidance for the testing, and has revised Note 3 of this supplemental NPRM accordingly. However, since reference to guidance for performing leak tests specifically addressed in Note 5 of the previous NPRM is no longer necessary or applicable, it has been removed from this supplemental NPRM. (Note 5 of this supplemental NPRM now contains information unrelated to NOTE 5 of the previous NPRM.)

Request To Delete Reference to Development of Future In-Line Drain Valves

One commenter, a valve manufacturer, requests that reference to the development of future in-line drain valves that would provide for possible terminating action be deleted from the proposal since that statement may mislead airlines and other interested parties to think that development and approval of those valves is currently in progress. The commenter states that the NPRM is a place for facts, not supposition of what might be. The commenter further states that it believes it has been ''damaged'' by mention of a future valve, specifically when the FAA has not considered existing in-service data concerning the reliability of this manufacturer's valves.

The FAA acknowledges the commenter's request. The FAA has removed reference to current in-line drain valves, as well as possible future development of those valves, from consideration as terminating action for certain requirements of this supplemental NPRM. As discussed previously in the preamble of this supplemental NPRM, the FAA has determined that terminating action for the leak testing of the in-line valves under an approved maintenance program is no longer appropriate, based on recent reports of leakage of drain systems with in-line drain valves installed.

In addition, it is common practice for the FAA to provide information in NPRM's concerning possible development and approval of various corrective actions. For example, in certain cases, compliance times for corrective actions are based on a time frame that is determined to be adequate in order to develop, approve, and install such corrective actions, e.g., repair, parts, or modifications. Establishment of a reasonable compliance time enables the manufacturer to plan its schedules and resources so that the corrective action is made available to the airlines well within the compliance time established by an AD. For these reasons, the FAA finds that the development and approval of future parts, repair, or modifications are not only relevant to discussions in proposed rules, they are, in certain cases, inherent to the discussion itself.

Economic Impact

There are approximately 2,410 Model 737 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 1,031 airplanes of U.S. registry and 110 U.S. operators would be affected by this proposed AD.

The proposed waste drain system leak test and outer cap inspection would take approximately 6 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact on U.S. operators of these proposed requirements of this AD is estimated to be $371,160, or $360 per airplane, per test/inspection.

Certain airplanes (i.e., those that have ''donut'' type drain valves installed) may be required to be leak tested as many as 15 times each year. Certain other airplanes having other valve configurations would be required to be leak tested as few as 3 times each year. Some airplanes that have various combinations drain valves installed would require approximately 2 leak tests of one drain valve and 3 leak tests of the other drain valve each year. Based on these figures, the annual (recurring) cost impact of the required repetitive leak tests on U.S. operators is estimated to be between $1,080 and $5,400 per airplane per year.

With regard to replacement of ''donut'' type drain valves, the cost of a new valve is approximately $1,200. However, the number of leak tests for an airplane that is flown an average of 3,000 flight hours a year is thereby reduced from 15 tests to 3 tests. The cost reduction because of the number of tests required is approximately equal to the cost of the replacement valve. Therefore, no additional cost is incurred because of this change.

The FAA estimates that it would take approximately 1 work hour per airplane lavatory drain to accomplish a visual inspection of the service panel drain valve cap/door seal and seal mating surfaces, at an average labor cost of $60 per work hour. As with leak tests, certain airplanes would be required to be visually inspected as many as 15 times or as few as 3 times each year. Based on these figures, the annual (recurring) cost impact of the required repetitive visual inspections on U.S. operators is estimated to be between $180 and $900 per airplane per year.

The proposed installation of the flush/fill line cap would take approximately 1 work hour per cap to accomplish, at an average labor rate of $60 per work hour. The cost of required parts would be $275 per cap. There are an average of 2.5 caps per airplane. Based on these figures, the cost impact on U.S. operators of these proposed requirements of this AD is estimated to be $863,463, or $838 per airplane.

The addition of the seal change requirement to paragraph (a) will require approximately 2 work hours to accomplish, at an average labor cost of $60 per hour. The cost of required parts would be $200 per each seal change. Based on these figures, the cost impact on U.S. operators of these proposed requirements of this AD is estimated to be $329,920, or approximately $320 per airplane per year.

The number of required work hours, as indicated above, is presented as if the accomplishment of the actions proposed in this AD were to be conducted as ''stand alone'' actions. However, in actual practice, these actions could be accomplished coincidentally or in combination with normally scheduled airplane inspections and other maintenance program tasks. Therefore, the actual number of necessary ''additional'' work hours would be minimal in many instances. Additionally, any costs associated with special airplane scheduling should be minimal.

In addition to the costs discussed above, for those operators who elect to comply with proposed paragraph (b) of this proposed AD action, the FAA estimates that it would take approximately 40 work hours per operator to incorporate the lavatory drain system leak test procedures into the maintenance programs, at an average

labor cost of $60 per work hour. Based on these figures, the cost impact of the proposed maintenance revision requirement of this AD action on the 110 U.S. operators is estimated to be $264,000, or $2,400 per operator.

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

The FAA recognizes that the obligation to maintain aircraft in an airworthy condition is vital, but sometimes expensive. Because AD's require specific actions to address specific unsafe conditions, they appear to impose costs that would not otherwise be borne by operators. However, because of the general obligation of operators to maintain aircraft in an airworthy condition, this appearance is deceptive. Attributing those costs solely to the issuance of this AD is unrealistic because, in the interest of maintaining safe aircraft, prudent operators would accomplish the required actions even if they were not required to do so by the AD.

A full cost-benefit analysis has not been accomplished for this proposed AD. As a matter of law, in order to be airworthy, an aircraft must conform to its type design and be in a condition for safe operation. The type design is approved only after the FAA makes a determination that it complies with all applicable airworthiness requirements. In adopting and maintaining those requirements, the FAA has already made the determination that they establish a level of safety that is cost-beneficial. When the FAA, as in this proposed AD, makes a finding of an unsafe condition, this means that the original cost-beneficial level of safety is no longer being achieved and that the required actions are necessary to restore that level of safety. Because this level of safety has already been determined to be cost-beneficial, a full cost-benefit analysis for this proposed AD would be redundant and unnecessary.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–6223 (54 FR 21933, May 22, 1989), and by adding a new airworthiness directive (AD), to read as follows:

Boeing: Docket 95–NM–111–AD. Supersedes AD 89–11–03, Amendment 39–6223.

Applicability: All Boeing Model 737 series 100, 200, 300, 400 and 500 airplanes, certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent engine damage, airframe damage, and/or hazard to persons or property on the ground as a result of ''blue ice'' that has formed from leakage of the lavatory drain system or flush/fill systems and dislodged from the airplane, accomplish the following:

(a) Except as provided by paragraph (b) of this AD, accomplish the applicable requirements of paragraphs (a)(1) through (a)(9) of this AD at the time specified in each paragraph. If the waste drain system incorporates more than one type of valve, only one of the waste drain system leak test procedures (the one that applies to the equipment with the longest leak test interval) must be conducted at each service panel location. The waste drain system valve leak tests specified in this AD shall be performed in accordance with the following requirements: fluid shall completely cover the upstream end of the valve being tested; the direction of the 3 pounds per square inch differential pressure (PSID) shall be applied across the valve in the same direction as occurs in flight; the other waste drain system valves shall be open; and the minimum time to maintain the differential pressure shall be 5 minutes. Any revision of the seal change intervals or leak test intervals must be approved by the Manager, Seattle Aircraft Certification Office (SACO), FAA, Transport Airplane Directorate.

(1) Replace the valve seals in accordance with the applicable schedule specified in paragraphs (a)(1)(i), (a)(1)(ii), and (a)(1)(iii) of this AD.

(i) For each lavatory drain system that has an in-line drain valve installed, Kaiser Electroprecision part number series 2651–278: Replace the seals within 5,000 flight hours after the effective date of this AD, or within 48 months after the last documented seal change, whichever occurs later. Thereafter, repeat the replacement of the seals at intervals not to exceed 48 months.

(ii) For each lavatory drain system that has a Pneudraulics part number series 9527 valve: Replace the seals within 5,000 flight hours after the effective date of this AD, or within 18 months of the last documented seal change, whichever occurs later. Thereafter, repeat the replacement of the seals at intervals not to exceed 18 months or 6,000 flight hours, whichever occurs later.

(iii) For each lavatory drain system that has any other type of drain valve: Replace the seals within 5,000 flight hours after the effective date of this AD, or within 18 months after the last documented seal change, whichever occurs later. Thereafter, repeat the replacement of the seals at intervals not to exceed 18 months.

(2) For each lavatory drain system that has an in-line drain valve installed, Kaiser Electroprecision part number series 2651–278: Within 4,500 flight hours after the effective date of this AD, and thereafter at intervals not to exceed 4,500 flight hours, accomplish the procedures specified in paragraphs (a)(2)(i) and (a)(2)(ii) of this AD:

(i) Conduct a leak test of the toilet tank dump valve (in-tank valve that is spring loaded closed and operable by a T-handle at the service panel) and the in-line drain valve. The toilet tank dump valve leak test must be performed by filling the toilet tank with a minimum of 10 gallons of water/rinsing fluid and testing for leakage after a period of 5 minutes. Take precautions to avoid

overfilling the tank and spilling fluid into the airplane. The in-line drain valve leak test must be performed with a minimum of 3 PSID applied across the valve.

(ii) If a service panel valve or cap is installed, perform a visual inspection of the service panel drain valve outer cap/door seal and the inner seal (if the valve has an inner door with a second positive seal), and the seal mating surfaces for wear or damage that may allow leakage.

(3) For each lavatory drain system that has a service panel drain valve installed, Pneudraulics part number series 9527: Within 2,000 flight hours after the effective date of this AD, accomplish the requirements of paragraphs (a)(3)(i) and (a)(3)(ii) of this AD. Thereafter, repeat the leak tests at intervals not to exceed 2,000 flight hours.

(i) Conduct leak tests of the toilet tank dump valve and service panel drain valve. The toilet tank dump valve leak test must be performed by filling the toilet tank with a minimum of 10 gallons of water/rinsing fluid and testing for leakage after a period of 5 minutes. Take precautions to avoid overfilling the tank and spilling fluid into the airplane. The leak test of the service panel drain valve must be performed with a minimum of 3 PSID applied across the valve inner door/closure device.

(ii) Perform a visual inspection of the outer cap/door and seal mating surface for wear or damage that may cause leakage.

(4) For each lavatory drain system that has a service panel drain valve installed, Kaiser Electroprecision part number series 0218–0032 or Shaw Aero part number/serial number as listed in Table 1 of this AD: Within 1,000 flight hours after the effective date of this AD, and thereafter at intervals not to exceed 1,000 flight hours, accomplish the requirements of paragraphs (a)(4)(i) and (a)(4)(ii) of this AD:

TABLE 1.—SHAW AERO VALVES APPROVED FOR 1,000 FLIGHT HOUR LEAK TEST INTERVAL

Shaw waste drain valve part no.	Serial Nos. of part number valve approved for 1,000-hour leak test interval
331 Series, 332 Series	All.
10101000B–A	None.
10101000B–A–1	0207–0212, 0219, 0226 and higher.
10101000BA2	0130 and higher.
10101000C–A–1	0277 and higher.
10101000C–J	None.
10101000C–J–2	None.
10101000CN OR C–N	3649 and higher.
Certain 10101000B valves	Any of these ''B'' series valves that incorporate the improvements of Shaw Service Bulletin 10101000B–38–1, dated October 7, 1994, and are marked ''SBB38–1–58''.
Certain 10101000C valves	Any of these ''C'' series valves that incorporate the improvements of Shaw Service Bulletin 10101000C–38–2 dated October 7, 1994, and are marked ''SBC38–2–58''.

Note 2: Table 1 is a comprehensive list of all approved Shaw Valves, including those valves approved by Parts Manufacturer Approval (PMA) or Supplemental Type Certificate (STC) for installation on Boeing Model 737 series airplanes.

(i) Conduct a leak test of the toilet tank dump valve and service panel drain valve. The toilet tank dump valve leak test must be performed by filling the toilet tank with a minimum of 10 gallons of water/rinsing fluid and testing for leakage after a period of 5 minutes. Take precautions to avoid overfilling the tank and spilling fluid into the airplane. The service panel drain valve leak test must be performed with a minimum of 3 PSID applied across the valve inner door/closure device.

(ii) Perform a visual inspection of the outer cap/door and seal mating surface for wear or damage that may cause leakage.

(5) For each lavatory drain system that has a service panel drain valve installed, Kaiser Electroprecision part number series 0218–0026; or Shaw Aero Devices part number series 10101000B or 10101000C [except as specified in paragraph (a)(4) of this AD]: Within 600 flight hours after the effective date of this AD, and thereafter at intervals not to exceed 600 flight hours, accomplish the requirements of paragraphs (a)(5)(i) and (a)(5)(ii) of this AD:

(i) Conduct a leak test of the dump valve and the service panel drain valve. The leak test of the dump valve must be performed by filling the toilet tank with a minimum of 10 gallons of water/rinsing fluid and testing for leakage after a period of 5 minutes. Take precautions to avoid overfilling the tank and spilling fluid on the airplane. The service panel drain valve leak test must be performed with a minimum 3 PSID applied across the valve inner door/closure device.

(ii) Perform a visual inspection of the outer cap/door and seal mating surface for wear or damage that may cause leakage.

(6) For each lavatory drain system with a lavatory drain system valve that incorporates either ''donut'' plug, Kaiser Electroprecision part number 4259–20 or 4259–31; Kaiser Roylyn/Kaiser Electroprecision cap/flange part numbers 2651–194C, 2651–197C, 2651–216, 2651–219, 2651–235, 2651–256, 2651–258, 2651–259, 2651–260, 2651–275, 2651–282, 2651–286; or other FAA-approved equivalent parts; accomplish the requirements at the specified times of paragraphs (a)(6)(i), (a)(6)(ii), and (a)(6)(iii) of this AD. For the purposes of this paragraph [(a)(6)], ''equivalent part'' means either a ''donut'' plug that mates with the cap/flange having part numbers listed in this paragraph, or a cap/flange that mates with the ''donut'' plug having part numbers listed in this paragraph, such that the cap/flange and ''donut'' plug are used together as an assembled valve.

(i) Within 200 flight hours after the effective date of this AD, and thereafter at intervals not to exceed 200 flight hours, conduct leak tests of the toilet tank dump valve and the service panel drain valve. The leak test of the toilet tank dump valve must be performed by filling the toilet tank with a minimum of 10 gallons of water/rinsing fluid and testing for leakage after a period of 5 minutes. Take precautions to avoid overfilling the tank and spilling fluid on the airplane. The service panel drain valve leak test must be performed with a minimum 3 PSID applied across the valve inner door/closure device.

(ii) Perform a visual inspection of the outer door/cap and seal mating surface for wear or damage that may cause leakage. This inspection shall be accomplished in conjunction with the leak tests of paragraph (a)(6)(i).

(iii) Within 5,000 flight hours after the effective date of this AD, replace the donut valve (part numbers per paragraph (a)(6) of this AD) with another type of FAA-approved valve. Following installation of the replacement valve, perform the appropriate leak tests and seal replacements at the intervals specified for that replacement valve, as applicable.

(7) For each lavatory drain system not addressed in paragraph (a)(2), (a)(3), (a)(4), (a)(5), and (a)(6) of this AD: Within 200 flight hours after the effective date of this AD, and thereafter at intervals not to exceed 200 flight hours, accomplish the requirements of paragraphs (a)(7)(i) and (a)(7)(ii) of this AD:

(i) Conduct a leak test of the toilet tank dump valve and the service panel drain valve. The toilet tank dump valve leak test must be performed by filling the toilet tank with a minimum of 10 gallons of water/rinsing fluid and testing for leakage after a period of 5 minutes. Take precautions to avoid overfilling the tank and spilling fluid on the airplane. The service panel drain valve leak test must be performed with a minimum 3 PSID applied across the valve inner door/closure device.

(ii) Perform a visual inspection of the outer cap/door and seal mating surface for wear or damage that may cause leakage.

(8) For flush/fill lines: Within 5,000 flight hours after the effective date of this AD, perform the requirements of paragraph (a)(8)(i), (a)(8)(ii), or (a)(8)(iii) of this AD, as applicable. Thereafter, repeat the requirements at intervals not to exceed 5,000 flight hours, or 48 months after the last documented seal change, whichever occurs later.

(i) If a lever lock cap is installed on the flush/fill line of the subject lavatory, replace the seals on the toilet tank anti-siphon (check) valve and the flush/fill line cap. Perform a leak test of the toilet tank anti-siphon (check) valve with a minimum of 3 PSID across the valve, in accordance with paragraph (a)(8)(ii)(A) of this AD, as applicable.

Note 3: The leak test procedure described in Boeing Maintenance Manual, 38–32–00/501, may be referred to as guidance for this test if the toilet tank is filled to the level specified in paragraph (a)(8)(ii)(A) of this AD.

(ii) If a vacuum breaker check valve, Monogram part number series 3765–190, or Shaw Aero Devises part number series 301–0009–01 is installed on the subject lavatory, replace the seals/o-rings in the valve. Perform a leak test of the vacuum breaker check valve and verify proper operation of the vent line vacuum breaker in accordance with paragraphs (a)(8)(ii)(A) and (a)(8)(ii)(B) of this AD.

(A) Leak test the toilet tank anti-siphon valve or the vacuum breaker check valve by filling the toilet tank with water/rinsing fluid to a level such that the bowl is approximately half full (at least 2 inches above the flapper in the bowl.) Apply 3 PSID across the valve in the same direction as occurs in flight. The vent line vacuum breaker on vacuum breaker check valves must be pinched closed or plugged for this leak test. If there is a cap/valve at the flush/fill line port, the cap/valve must be removed/open during the test. Check for leakage at the flush/fill line port for a period of 5 minutes.

(B) Verify proper operation of the vent line vacuum breaker by filling the tank and testing at the fill line port for back drainage after disconnecting the fluid source from the flush/fill line port. If back drainage does not occur, replace the vent line vacuum breaker or repair the vacuum breaker check valve in accordance with the component maintenance manual to obtain proper back drainage. As an alternative to the above test technique, verify proper operation of the vent line vacuum breaker in accordance with the procedures of the applicable component maintenance manual.

(iii) If a flush/fill ball valve, Kaiser Electroprecision part number series 0062–0009 is installed on the flush/fill line of the subject lavatory, replace the seals in the flush/fill ball valve and the toilet tank anti-siphon valve. Perform a leak test of the toilet tank anti-siphon valve with a minimum of 3 PSID across the valve, in accordance with paragraph (a)(8)(ii)(A) of this AD.

(9) As a result of the leak tests and inspections required by paragraph (a) of this AD, or if evidence of leakage is found at any other time, accomplish the requirements of paragraph (a)(9)(i), (a)(9)(ii), or (a)(9)(iii), as applicable.

(i) If a leak is discovered, prior to further flight, repair the leak. Prior to further flight after repair, perform the appropriate leak test, as applicable. Additionally, prior to returning the airplane to service, clean the surfaces adjacent to where the leakage occurred to clear them of any horizontal fluid residue streaks; such cleaning must be to the extent that any future appearance of a horizontal fluid residue streak will be taken to mean that the system is leaking again.

Note 4: For purposes of this AD, ''leakage'' is defined as any visible leakage, if observed during a leak test. At any other time (than during a leak test), ''leakage'' is defined as the presence of ice in the service panel, or horizontal fluid residue streaks/ice trails originating at the service panel. The fluid residue is usually, but not necessarily, blue in color.

(ii) If any worn or damaged seal is found, or if any damaged seal mating surface is found, prior to further flight, repair or replace it in accordance with the valve manufacturer's maintenance manual.

(iii) In lieu of performing the requirements of paragraph (a)(9)(i) or (a)(9)(ii): Prior to further flight, drain the affected lavatory system and placard the lavatory inoperative until repairs can be accomplished.

(b) As an alternative to the requirements of paragraph (a) of this AD, operators may revise the FAA-approved maintenance program to include the requirements specified in paragraphs (b)(1) through (b)(7) of this AD. However, until the FAA-approved maintenance program is so revised, operators must accomplish the requirements of paragraph (a) of this AD. The waste drain system valve leak tests specified in this AD shall be performed in accordance with the following requirements: fluid shall completely cover the upstream end of the valve being tested; the direction of the 3 pounds per square inch differential pressure (PSID) shall be applied across the valve in the same direction as occurs in flight; the other waste drain system valves shall be open; and the minimum time to maintain the differential pressure shall be 5 minutes. Any revision of the seal change intervals or leak test intervals must be approved by the Manager, Seattle ACO.

(1) Replace the valve seals in accordance with the applicable schedule specified in paragraphs (b)(1)(i), (b)(1)(ii), or (b)(1)(iii) of this AD.

(i) For each lavatory drain system that has an in-line drain valve installed, Kaiser Electroprecision part number series 2651–278: Replace the seals within 5,000 flight hours after the effective date of this AD, or within 48 months of the last documented seal change, whichever occurs later. Thereafter, repeat the replacement of the seals at intervals not to exceed 48 months.

(ii) For each lavatory drain system that has a Pneudraulics part number series 9527 valve: Replace the seals within 5,000 flight hours after the effective date of this AD, or within 18 months of the last documented seal change, whichever occurs later. Thereafter, repeat the replacement of the seals at intervals not to exceed 18 months or 6,000 flight hours, whichever occurs later.

(iii) For each lavatory drain system that has any other type of drain valve: Replace the seals within 5,000 flight hours after the effective date of this AD, or within 18 months of the last documented seal change, whichever occurs later. Thereafter, repeat the replacement of the seals at intervals not to exceed 18 months.

(2) Conduct periodic leak tests of the lavatory drain systems in accordance with the applicable schedule specified in paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iii), (b)(2)(iv), and (b)(2)(v) of this AD. Only one of the waste drain system leak test procedures (the one that applies to the equipment with the longest leak test interval) must be conducted at each service panel location.

(i) For each lavatory drain system, that has an in-line drain valve installed, Kaiser Electroprecision part number series 2651–278: Within 5,000 flight hours after the effective date of this AD, or within 5,000 hours of the last documented leak test, whichever occurs later, accomplish the procedures specified in paragraphs (b)(2)(i)(A) and (b)(2)(i)(B) of this AD. Thereafter repeat the procedures at intervals not to exceed 24 months or 5,000 flight hours, whichever occurs later.

(A) Conduct a leak test of the dump valve (in-tank valve that is spring loaded closed and operable by a T-handle at the service panel) and the in-line drain valve. The leak test of the toilet tank dump valve must be performed by filling the toilet tank with a minimum of 10 gallons of water/rinsing fluid and testing for leakage after a period of 5 minutes. Take precautions to avoid overfilling the tank and spilling fluid on the airplane. The in-line drain valve leak test must be performed with a minimum of 3 PSID applied across the valve.

(B) If a service panel valve or cap is installed, perform a visual inspection of the service panel drain valve outer cap/door seal and the inner seal (if the valve has an inner door with a second positive seal), and the seal mating surfaces, for wear or damage that may allow leakage.

(ii) For each lavatory drain system that has a service panel drain valve installed, Pneudraulics part number series 9527: Within 4,000 flight hours after the effective date of this AD, or within 4,000 flight hours of the last documented leak test, whichever occurs later, accomplish the requirements of paragraph (b)(2)(ii)(A) and (b)(2)(ii)(B) of this AD. Thereafter, repeat the requirements at intervals not to exceed 4,000 flight hours.

(A) Conduct leak tests of the toilet tank dump valve and service panel drain valve. The toilet tank dump valve leak test must be performed by filling the toilet tank with a minimum of 10 gallons of water/rinsing fluid and testing for leakage after a period of 5 minutes. Take precautions to avoid overfilling the tank and spilling fluid on the airplane. The service panel drain valve leak test must be performed with a minimum of 3 PSID applied across the valve inner door/closure device.

(B) Perform a visual inspection of the outer cap/door and seal mating surface for wear or damage that may cause leakage.

(iii) For each lavatory drain system that has a service panel drain valve installed, Kaiser Electroprecision part number series 0218–0032, or Kaiser Electroprecision part number series 0218–0026, or Shaw Aero Devices part number series 10101000B, 10101000C, 331-series, 332-series: Within 1,000 flight hours after the effective date of this AD, or within 1,000 flight hours of the last documented leak test, whichever occurs later, accomplish the requirements of paragraphs (b)(2)(iii)(A) and (b)(2)(iii)(B) of this AD. Thereafter, repeat the requirements at intervals not to exceed 1,000 flight hours.

(A) Conduct leak tests of the toilet tank dump valve and service panel drain valve. The toilet tank dump valve leak test must be performed by filling the toilet tank with a minimum of 10 gallons of water/rinsing fluid and testing for leakage after a period of 5 minutes. Take precautions to avoid overfilling the tank and spilling fluid on the airplane. The service panel drain valve leak test must be performed with a minimum of 3 PSID applied across the valve inner door/closure device.

(B) Perform a visual inspection of the outer cap/door and seal mating surface for wear or damage that may cause leakage.

(iv) For each lavatory drain system with a lavatory drain system valve that incorporates either ''donut'' plugs Kaiser Electroprecision part number 4259–20 or 4259–31; Kaiser Roylyn/Kaiser Electroprecision cap/flange part number 2651–194C, 2651–197C, 2651–216, 2651–219, 2651–235, 2651–256, 2651–258, 2651–259, 2651–260, 2651–275, 2651–282, 2651–286; or other FAA-approved equivalent part; accomplish the requirements at the times specified in paragraphs (b)(2)(iv)(A), (b)(2)(iv)(B), and (b)(2)(iv)(C) of this AD. For the purposes of this paragraph [(b)(2)(iv)], ''FAA-approved equivalent part'' means either a ''donut'' plug that mates with the cap/flange having part numbers listed in this paragraph, or a cap/flange that mates with the ''donut'' plug having part numbers listed in this paragraph, such that the cap/flange and ''donut'' plug are used together as an assembled valve.

(A) Within 200 flight hours after the effective date of this AD, or within 200 flight hours after the last documented leak test, whichever occurs later, conduct leak tests of the dump valve and the service panel drain valve. Thereafter, repeat the tests at intervals not to exceed 200 flight hours. The dump valve leak test must be performed by filling the toilet tank with a minimum of 10 gallons of water/rinsing fluid and testing for leakage after a period of 5 minutes. Take precautions to avoid overfilling the tank and spilling fluid on the airplane. The service panel drain valve leak test must be performed with a minimum 3 PSID applied across the valve.

(B) Perform a visual inspection of the outer door/cap and seal mating surface for wear or damage that may cause leakage. Perform this inspection in conjunction with the leak tests specified in paragraph (b)(2)(iv)(A).

(C) Within 5,000 flight hours after the effective date of this AD, replace the donut valve with another type of FAA-approved valve. Following replacement of the valve, perform the subsequent leak tests and seal replacements at the intervals specified for the new valve.

(v) For each lavatory drain system that incorporates any other type of approved valves: Within 400 flight hours after the effective date of this AD, or within 400 flight hours of the last documented leak test, whichever occurs later, accomplish the requirements of paragraph (b)(2)(v)(A) and (b)(2)(v)(B) of this AD. Thereafter, repeat the requirements at intervals not to exceed 400 flight hours.

(A) Conduct leak tests of the toilet tank dump valve and the service panel drain valve. The toilet tank dump valve leak test must be performed by filling the toilet tank with a minimum of 10 gallons of water/rinsing fluid and testing for leakage after a period of 5 minutes. Take precautions to avoid overfilling the tank and spilling fluid on the airplane. The service panel drain valve leak test must be performed with a minimum 3 PSID applied across the valve. If the service panel drain valve has an inner door with a second positive seal, only the inner door must be tested.

(B) Perform a visual inspection of the outer cap/door and seal mating surface for wear or damage that may cause leakage.

(3) For flush/fill lines: Within 5,000 flight hours after the effective date of this AD, perform the requirements of paragraph (b)(3)(i), (b)(3)(ii), or (b)(3)(iii), as applicable. Thereafter, repeat the requirements at intervals not to exceed 5,000 flight hours, or 48 months after the last documented seal change, whichever occurs later.

(i) If a lever lock cap is installed on the flush/fill line of the subject lavatory, replace the seals on the toilet tank anti-siphon (check) valve and the flush/fill line cap. Perform a leak test of the toilet tank anti-siphon (check) valve with a minimum of 3 PSID across the valve as specified in paragraph (b)(3)(ii)(A) of this AD.

(ii) If a vacuum breaker check valve, Monogram part number series 3765–190 or Shaw Aero Devises part number series 301–0009–01, is installed on the subject lavatory; replace the seals/o-rings in the valve. Prior to further flight, leak test the vacuum breaker check valve, and test for proper operation of the vent line vacuum breaker as specified in paragraphs (b)(3)(ii)(A) and (b)(3)(ii)(B) of this AD.

(A) Leak test the toilet tank anti-siphon valve or the vacuum breaker check valve by filling the toilet tank with water/rinsing fluid to a level such that the bowl is approximately half full (at least 2 inches above the flapper in the bowl). Pressurize the airplane to 3 PSID. The vent line vacuum breaker on vacuum breaker check valves must be pinched closed or plugged for this leak test. If there is a cap/valve at the flush/fill line port, the cap/valve must be removed/opened during the test. Test for leakage at the flush/fill line port for a period of 5 minutes.

Note 5: The leak test procedure in the appropriate section of Boeing Maintenance Manual 38–32–00 may be used as guidance for this test if the toilet tank is filled approximately half full (at least 2 inches above the flapper in the bowl).

(B) Verify proper operation of the vent line vacuum breaker by filling the tank and testing at the fill line port for back drainage after disconnecting the fluid source from the flush/fill line port. If back drainage does not occur, replace the vent line vacuum breaker or repair the vacuum breaker check valve in accordance with the component maintenance manual as required to obtain proper back drainage.

(iii) If a flush/fill ball valve, Kaiser Electroprecision part number series 0062–009 installed on the flush/fill line of the subject lavatory, replace the seals in the flush/fill ball valve and the toilet tank anti-siphon valve. Perform a leak test of the toilet tank anti-siphon valve in accordance with paragraph (b)(3)(ii))(A) of this AD.

(4) Provide procedures for accomplishing visual inspections to detect leakage, to be conducted by maintenance personnel at intervals not to exceed 4 calendar days or 45 flight hours, which ever occurs later.

(5) Provide procedures for reporting leakage. These procedures shall provide that any ''horizontal blue streak'' findings must be reported to maintenance and that, prior to further flight, the leaking system shall either be repaired, or be drained and placard inoperative.

(6) Provide training programs for maintenance and servicing personnel that include information on ''Blue Ice Awareness'' and the hazards of ''blue ice''.

(7) If a leak is discovered during a leak test required by paragraph (b) of this AD; or if evidence of leakage is found at any other time; or if repair/replacement of a valve (or valve parts) is required as a result of a visual inspection required in accordance with this AD; prior to further flight, accomplish the requirements of paragraph (b)(7)(i), (b)(7)(ii), or (b)(7)(iii), as applicable.

Note 6: For purposes of this AD, ''leakage'' is defined as any visible leakage, if observed during a leak test. At any other time (than during a leak test), ''leakage'' is defined as the presence of ice in the service panel, or horizontal fluid residue streaks/ice trails originating at the service panel. The fluid residue is usually, but not necessarily, blue in color.

(i) Repair the leak and, prior to further flight after repair, perform a leak test. Additionally, prior to returning the airplane to service, clean the surfaces adjacent to where the leakage occurred to clear them of any horizontal fluid residue streaks; such cleaning must be to the extent that any future appearance of a horizontal fluid residue streak will be taken to mean that the system is leaking again.

(ii) Repair or replace the valve or valve parts.

(iii) In lieu of either paragraph (b)(7)(i) or (b)(7)(ii), drain the affected lavatory system and placard the lavatory inoperative until repairs can be accomplished.

(c) For operators who elect to comply with paragraph (b) of this AD: Any revision to (i.e., extension of) the leak test intervals required by paragraph (b) of this AD must be approved by the Manager, Seattle ACO, FAA, Transport Airplane Directorate. Requests for such revisions must be submitted to the Manager of the Seattle ACO through the FAA Principal Maintenance Inspector (PMI), and must include the following information:

(1) The operator's name;

(2) A statement verifying that all known cases/indications of leakage or failed leak tests are included in the submitted material;

(3) The type of valve (make, model, manufacturer, vendor part number, and serial number);

(4) The period of time covered by the data;

(5) The current FAA leak test interval;

(6) Whether or not seals have been replaced between the seal replacement intervals required by this AD;

(7) Whether or not a service panel drain valve is installed downstream of an in-line drain valve, Kaiser Electroprecision part number series 2651–278: Data on a service panel valve installed downstream of an in-line drain valve will not be considered as an indicator of the reliability of the service panel drain valve because the in-line valve prevents potential leakage from reaching the service panel drain valve.

(8) Whether or not leakage has been detected between leak test intervals required by this AD, and the reason for leakage (i.e., worn seals, foreign materials on sealing surface, scratched or damaged sealing surface on valve, etc.);

(9) Whether or not any cleaning, repairs, or seal changes were performed on the valve prior to conducting the leak test. [If such activities have been accomplished prior to conducting the periodic leak test, that leak test shall be recorded as a ''failure'' for purposes of the data required for this request submission. The exception to this is the normally-scheduled seal change in accordance with paragraph (b)(1) of this AD. Performing this scheduled seal change prior to a leak test will not cause that leak test to be recorded as a failure. Debris removal of major blockages done as part of normal maintenance for previous flights is also allowable and will not cause a leak test to be recorded as a failure. Minor debris removal that is not commonly removed during the normal ground maintenance test should not be removed prior to the leak test.]

Note 7: Requests for approval of revised leak test intervals may be submitted in any format, provided the data give the same level of assurance specified in paragraph (c) above. Results of an Environmental Quality Analysis (EQA) examination and leak test on a randomly selected high-flight-hour valve, with seals that have not been replaced during a period of use at least as long as the desired interval, may be considered a valuable supplement to the service history data, reducing the amount of service data that would otherwise be required.

Note 8: For the purposes of expediting resolution of requests for revisions to the leak test intervals, the FAA suggests that the requester summarize the raw data; group the data gathered from different airplanes (of the same model) and drain systems with the same kind of valve; and provide a recommendation from pertinent industry group(s) and/or the manufacturer specifying an appropriate revised leak test interval.

Note 9: In cases where changes are made to a valve design approved for an extended leak test interval such that a new valve dash number or part number is established for the valve, the FAA may not require extensive service history data to approve the new valve to the same leak test interval as the previous valve design. Similarity of design, the nature of the design changes, the nature and amount of testing, and like factors will be considered by the FAA to determine the appropriate data requirements and leak test interval for a new or revised valve based upon an existing design.

(d) For all airplanes: Unless already accomplished, within 5,000 flight hours after the effective date of this AD, perform the actions specified in paragraph (d)(1), (d)(2), or (d)(3) of this AD:

(1) Install an FAA-approved lever/lock cap on the flush/fill lines for all lavatories. Or

(2) Install a vacuum break, Monogram part number series 3765–190, or Shaw Aero Devises part number series 301–0009–01, in the flush/fill lines for all lavatories. Or

(3) Install a flush/fill ball valve Kaiser Electroprecision part number series 0062–0009 on the flush/fill lines for all lavatories.

(e) For any affected airplane acquired after the effective date of this AD: Before any operator places into service any airplane subject to the requirements of this AD, a schedule for the accomplishment of the leak tests required by this AD shall be established in accordance with either paragraph (e)(1) or (e)(2) of this AD, as applicable. After each leak test has been performed once, each subsequent leak test must be performed in accordance with the new operator's schedule, in accordance with either paragraph (a) or (b) of this AD as applicable.

(1) For airplanes previously maintained in accordance with this AD, the first leak test to be performed by the new operator must be accomplished in accordance with the previous operator's schedule or with the new operator's schedule, whichever would result in the earlier accomplishment date for that leak test.

(2) For airplanes that have not been previously maintained in accordance with this AD, the first leak test to be performed by the new operator must be accomplished prior to further flight, or in accordance with a schedule approved by the FAA PMI, but within a period not to exceed 200 flight hours.

(f) Alternative method(s) of compliance with this AD:

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

(2) Alternative methods of compliance previously approved for AD 89–11–03, which permit a 4,500-flight hour interval between leak tests of the forward waste drain system for those operators installing the modifications specified in Boeing Service Bulletin 737–38–1026, Revision 2, dated May 4, 1995, or Boeing Service Bulletin 737–38–1031, Revision 1, dated April 20, 1995, and later FAA-approved revisions, are considered acceptable alternative methods of compliance with the requirements of only paragraph (a)(2) of this AD. For those operators, the other requirements of this AD are still required to be accomplished. All other alternative methods of compliance approved for AD 89–11–03 are terminated and are no longer in effect.

Note 10: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Note 11: For any valve that is not eligible for the extended leak test intervals of this AD: To be eligible for the extended leak test intervals specified in paragraph (b) of this AD, the service history data of the valve must be submitted to the Manager, Seattle ACO, FAA, Transport Airplane Directorate, with a request for an alternative method of compliance. The request should include an analysis of known failure modes for the valve, if it is an existing design, and known failure modes of similar valves, with an explanation of how design features will preclude these failure modes, results of qualification tests, and approximately 25,000 flight hours or 25,000 flight cycles of service history data which include a winter season, collected in accordance with the requirements of paragraph (c) above, or a similar program. One of the factors that the FAA will consider in approving alternative valve designs is whether the valve meets Boeing Specification S417T105 or 10–62213. However, meeting the Boeing specification is not a prerequisite for approval of alternative valve designs.

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

Issued in Renton, Washington, on November 18, 1997.

James V. Devany,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–30855 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–148–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A320 and A321 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Airbus Model A320 and A321 series airplanes. This proposal would require replacement of the fuel pump strainers with improved strainers. This

proposal is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified by the proposed AD are intended to prevent blockage of fuel by the buildup of ice crystals, which could result in low fuel pressure, and consequent shutdown of the engine during critical phases of flight.

DATES: Comments must be received by December 26, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 97–NM–148–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

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

FOR FURTHER INFORMATION CONTACT: International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2110; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 97–NM–148–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 97–NM–148–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified the FAA that an unsafe condition may exist on certain Airbus Model A320 and A321 series airplanes. The DGAC advises that it has received reports of low fuel pressure during taxi, takeoff, and climb. Investigation revealed that the low fuel pressure was caused by the build-up of ice on the fuel pump strainer during extended cold soak conditions or extreme cold weather operations. This condition, if not corrected, could result in low fuel pressure, and consequent shutdown of the engine during critical phases of flight.

Explanation of Relevant Service Information

Airbus has issued Service Bulletin A320–28–1044, Revision 10, dated November 5, 1996, which describes procedures for replacement of the 8 mesh strainers of the fuel pump with 4 mesh strainers. These new strainers have a larger mesh to prevent the build-up of ice, and have protective cowl-strainers to prevent the entry of debris. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition. The DGAC classified this service bulletin as mandatory and issued French airworthiness directive 96–170–082(B), dated August 28, 1996, in order to assure the continued airworthiness of these airplanes in France.

FAA's Conclusions

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

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the service bulletin described previously.

Cost Impact

The FAA estimates that 132 Airbus Model A320 and A321 series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 13 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would be supplied by the manufacturer at no cost to the operators. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $102,960, or $780 per airplane.

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

Regulatory Impact

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

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

A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Industrie: Docket 97–NM–148–AD.

Applicability: Model A320 and A321 series airplanes; as listed in Airbus Service Bulletin A320–28–1044, Revision 10, dated November 5, 1996; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent blockage of fuel by the build-up of ice crystals, which could result in low fuel pressure, and consequent shutdown of the engine during critical phases of flight, accomplish the following:

(a) Within 24 months after the effective date of this AD, replace the 8 mesh strainers of each fuel pump with 4 mesh strainers, in accordance with Airbus Service Bulletin A320–28–1044, Revision 10, dated November 5, 1996.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

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

Note 3: The subject of this AD is addressed in French airworthiness directive 96–170–082(B), dated August 28, 1996.

Issued in Renton, Washington, on November 18, 1997.

James V. Devany,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–30856 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–178–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 and A300–600 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Airbus Model A300 and A300–600 series airplanes. This proposal would require inspections to detect cracks in Gear Rib 5 of the main landing gear (MLG) attachment fittings at the lower flange, and repair, if necessary. This proposal is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified by the proposed AD are intended to detect and correct fatigue cracking of the MLG attachment fittings, which could result in reduced structural integrity of the airplane.

DATES: Comments must be received by December 26, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 97–NM–178–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

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

FOR FURTHER INFORMATION CONTACT: International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2110; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 97–NM–178–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 97–NM–178–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France,

notified the FAA that an unsafe condition may exist on certain Airbus Model A300 and A300–600 series airplanes. The DGAC advises that, on two in-service airplanes, fatigue cracking has been detected on Gear Rib 5 of the main landing gear attachment fitting at the lower flange. Such fatigue cracking, if not detected and corrected in a timely manner, could result in reduced structural integrity of the airplane.

Explanation of Relevant Service Information

Airbus has issued Service Bulletins A300–57A6087 (for Model A300–600 series airplanes) and A300–57A0234 (for Model A300 series airplanes), both dated August 5, 1997. These service bulletins describe procedures for detailed visual and high frequency eddy current inspections to detect cracks in Gear Rib 5 of the main landing gear attachment fittings at the lower flange. The DGAC classified these service bulletins as mandatory and issued French airworthiness directive (CN) 97–274–230(B), dated September 24, 1997, in order to assure the continued airworthiness of these airplanes in France.

FAA's Conclusions

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

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the service bulletins described previously, except as discussed below.

Differences Between the Proposed AD and the Related Service Bulletins

The service bulletins described previously specify that appropriate corrective action may be obtained by contacting the manufacturer, Airbus, directly. However, this proposed AD would requires that any such repair be accomplished in accordance with a method approved by the FAA.

Cost Impact

The FAA estimates that 67 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 6 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $24,120, or $360 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Industrie: Docket 97–NM–178–AD.

Applicability: Model A300–600 series airplanes, as listed in Airbus Service Bulletin A300–57A6087, dated August 5, 1997; and Model A300 series airplanes, as listed in Airbus Service Bulletin A300–57A0234, dated August 5, 1997; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (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 detect and correct cracks in Gear Rib 5 of the main landing gear attachment fittings at the lower flange, which could result in reduced structural integrity of the airplane, accomplish the following:

(a) For Model A300 series airplanes that have accumulated more than 27,000 flight cycles as of the effective date of this AD: Except as provided by paragraph (b) of this AD, within 40 flight cycles after the effective date of this AD, perform a detailed visual inspection to detect cracks in Gear Rib 5 of the main landing gear attachment fittings at the lower flange, in accordance with Airbus Service Bulletin A300–57A0234, dated August 5, 1997. Thereafter, repeat the inspection at intervals not to exceed 40 flight cycles, until the actions required by paragraph (b) are accomplished.

(b) For all airplanes: Perform a detailed visual and a high frequency eddy current inspection to detect cracks in Gear Rib 5 of the main landing gear attachment fittings at the lower flange, in accordance with Airbus Service Bulletin A300–57A6087 (for Model A300–600 series airplanes) or A300–57A0234 (for Model A300 series airplanes), both dated August 5, 1997; as applicable; at the time specified in paragraph (b)(1) or (b)(2) of this AD, as applicable. Accomplishment of the inspection required by this paragraph terminates the inspections required by paragraph (a) of this AD.

(1) For airplanes that have accumulated 20,000 or more total flight cycles as of the effective date of this AD: Inspect within 500

flight cycles after the effective date of this AD.

(2) For airplanes that have accumulated less than 20,000 total flight cycles as of the effective date of this AD: Inspect prior to the accumulation of 18,000 total flight cycles, or within 1,500 flight cycles after the effective date of this AD, whichever occurs later.

(c) If any crack is detected during any inspection required by this AD, prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate.

(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, International Branch, ANM–116. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

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

Note 3: The subject of this AD is addressed in French airworthiness directive (CN) 97–274–230(B), dated September 24, 1997.

Issued in Renton, Washington, on November 18, 1997.

Stewart R. Miller,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–30858 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–CE–78–AD]

RIN 2120–AA64

Airworthiness Directives; Aeromot-Industria Mecanico Metalurgica Ltda. Models AMT–100 and AMT–200 Powered Gliders

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt a new airworthiness directive (AD) that would apply to certain Aeromot-Industria Mecanico Metalurgica Ltda. (Aeromot) Models AMT–100 and AMT–200 powered gliders. The proposed action would require replacing all main landing gear attaching nuts and bolts with ones of improved design. The proposed AD is the result of mandatory continued airworthiness information (MCAI) issued by the airworthiness authority for Brazil. The actions specified by the proposed AD are intended to prevent failure of the main landing gear, which could cause loss of control of the sailplane during landing operations.

DATES: Comments must be received on or before December 26, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–CE–78–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that applies to the proposed AD may be obtained from Grupo Aeromot, Aeromot-Industria Mecanico Metalurgica Ltda., Av. das Industries-1210, Bairro Anchieta, Caixa Postal 8031, 90200-Porto Alegre-RS, Brazil. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Curtis Jackson, Aerospace Engineer, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Blvd., suite 450, Atlanta, Georgia 30349; telephone (770) 703–6083; facsimile (770) 703–6097.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 9–CE–78–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–CE–78–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

The Centro Tecnico Aeroespacial (CTA), which is the airworthiness authority for Brazil, recently notified the FAA that an unsafe condition may exist on certain Aeromot Models AMT–100 and AMT–200 powered gliders. The CTA reports that the main landing gear on two powered gliders failed. The failure is the result of hard landings shearing the attaching bolts and causing collapse of the main landing gear. After further investigation, the manufacturer has determined that these bolts (part numbers (P/N) TH 6x30 PL11) and nuts (P/N 6PA–108) may have intergranular defects and the design is not adequate to withstand a very hard landing. These conditions, if not corrected, could result in loss of the main landing gear during landing operations.

Relevant Service Information

Aeromot has issued Service Bulletin (SB) No. SB–200–32–044, Issue Date August 18, 1997, which specifies procedures for removing the original attaching bolts and nuts, and installing attaching bolts and nuts of an improved design.

The CTA classified these service bulletins as mandatory and issued Brazilian AD 97–09–06, dated August 14, 1997, in order to assure the continued airworthiness of these airplanes in Brazil.

The FAA's Determination

This airplane model is manufactured in Brazil and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CTA has kept the FAA informed of the situation described above. The FAA

has examined the findings of the CTA; reviewed all available information, including the service information referenced above; and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of the Provisions of the Proposed AD

Since an unsafe condition has been identified that is likely to exist or develop in other Aeromot Models AMT–100 and AMT–200 powered gliders of the same type design registered in the United States, the proposed AD would require replacing all main landing gear attaching bolts and nuts with attaching bolts and nuts of improved design. Accomplishment of the proposed action would be in accordance with Aeromot SB No. SB–200–32–044, Issue Date August 18, 1997.

Cost Impact

The FAA estimates that 18 powered gliders in the U.S. registry would be affected by the proposed AD, that it would take approximately 1 workhour per powered glider to accomplish the proposed action, and that the average labor rate is approximately $60 an hour. Parts are provided by the manufacturer at no cost. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $1,080 for the fleet or $60 per glider.

Compliance Time

The compliance time of the proposed AD is in calendar time instead of hours time-in-service (TIS). The average monthly usage of the affected glider ranges throughout the fleet. For example, one owner may operate the glider 25 hours TIS in one week, while another operator may operate the glider 25 hours TIS in one year. In order to ensure that all of the owners/operators of the affected gliders have replaced the attaching bolts and nuts on the main landing gear within a reasonable amount of time, the FAA is proposing a compliance time of 30 calendar days.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive (AD) to read as follows:

Aeromot-Industria Mecanico Metalurgica LTDA: Docket No. 97–CE–78–AD.

Applicability: Model AMT–100 powered gliders (serial numbers (S/N) 100.001 through 100.039 and 100.041 through 100.044) and Model AMT–200 powered gliders (S/N 200.040 and 200.045 through 200.080), certificated in any category.

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

Compliance: Required within the next 30 calendar days after the effective date of this AD, unless already accomplished.

To prevent failure of the main landing gear, which could cause loss of control of the sailplane during landing operations, accomplish the following:

(a) Replace all main landing gear attaching bolts (part number (P/N) TH 6x30 PL11 or an FAA-approved equivalent part number) and nuts (P/N 6 PA–108 or an FAA-approved equivalent part number) with attaching bolts (P/N DIN 931 M6x30 (Pitch 1.0) Class 10.9 or an FAA-approved equivalent part number) and nuts (P/N DIN 982 M6 (Pitch 1.0) or an FAA-approved equivalent part number) in accordance with the Procedures section in AEROMOT–IND. MECANICO–METALURGICA LTDA. Service Bulletin No. SB–200–32–044, Issue Date August 18, 1997.

(b) 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 glider to a location where the requirements of this AD can be accomplished.

(c) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Blvd., suite 450, Atlanta, Georgia 30349. The request shall be forwarded through an appropriate FAA 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 AD, if any, may be obtained from the Atlanta Aircraft Certification Office.

(d) All persons affected by this directive may obtain copies of this document referred to herein upon request to Grupo Aeromot, Aeromot-Industria Mecanico Metalurgica Ltda., Av. das Industries-1210, Bairro Anchieta, Caixa Postal 8031, 90200-Porto Alegre-RS, Brazil; or may examine these documents at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Note 3: The subject of this AD addresses Brazilian CTA AD 97–09–06, dated August 14, 1997.

Issued in Kansas City, Missouri, on November 17, 1997.

Larry E. Werth,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–30866 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–138–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–400 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 747–400 series airplanes. This proposal would require removal and reconfiguration of the battery grounds of the auxiliary power unit (APU). This proposal is prompted by reports of smoke or fire coming from the APU due to battery grounds that were not installed or maintained properly. The actions specified by the proposed AD are intended to prevent overheating and heat damage of the APU battery grounds due to improper installation of the APU battery ground, which could result in heat damage and consequent smoke or fire on the airplane.

DATES: Comments must be received by January 9, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 97–NM–138–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207.

This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Forrest Keller, Senior Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington; telephone (425) 227–2790; fax (425) 227–1181.

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 97–NM–138–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 97–NM–138–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received reports of smoke or fire during ground operation and after auxiliary power unit (APU) start that occurred below the APU battery ground on certain Boeing Model 767 series airplanes. Investigation revealed that the APU, which has a pre-installed, single-ground, single-lug configuration, was the possible source of ignition; fuel for the fire was attributed to debris in the area. Further investigation revealed that an APU battery ground wire connection was loose and the torque of the nut (less than 140 inch-pounds) was less than the minimum (180 inch-pounds) necessary for the ground configuration. The APU battery ground showed signs of arcing and did not have the two washers necessary for the ground build-up. Such improper installation or maintenance, if not corrected, could result in heat damage to the battery grounds of the APU and consequent smoke or fire on the airplane.

Related AD's

On July 11, 1997, the FAA issued AD 97–15–09, amendment 39–10083 (62 FR 38204, July 17, 1997), applicable to all Boeing Model 757 and 767 series airplanes. That AD requires repetitive inspections to detect damage and to verify proper configuration of the battery ground terminations of the APU at the battery and connected structure; and removal, replacement, and repair of the battery ground termination, if necessary. That AD was prompted by reports of smoke or fire coming from the APU due to battery grounds that were not installed or maintained properly.

Similar Model Subject to the Unsafe Condition

APU battery ground configurations installed on Boeing Model 757 and 767 series airplanes are similar to those APU battery grounds installed on Boeing Model 747–400 series airplanes; therefore, Model 747–400 series airplanes may be subject to the same unsafe condition described previously.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Alert Service Bulletin 747–24A2214, dated June 19, 1997, which describes procedures for reconfiguring the APU battery grounds from a single-ground, single-lug configuration to a dual-direct ground, single-lug configuration. This new configuration has less mounting hardware and a larger electrical bonding surface area, which will prevent overheating of the APU battery ground due to improper installation of the APU battery grounds.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require reconfiguring the APU battery grounds from a single-ground, single-lug configuration to a dual-direct ground, single-lug configuration. The actions would be required to be accomplished in accordance with the alert service bulletin described previously.

Cost Impact

There are approximately 359 Model 747–400 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 26 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 16 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $1,325 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $59,410, or $2,285 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket 97–NM–138–AD.
Applicability: Model 747–400 series airplanes; as listed in Boeing Alert Service Bulletin 747–24A2214, dated June 19, 1997; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent the auxiliary power unit (APU) from overheat and heat damage due to an improperly installed/maintained APU battery ground, accomplish the following:

(a) Within 6 months after the effective date of this AD, reconfigure the APU battery grounds to a dual-direct ground, single-lug configuration, in accordance with Boeing Alert Service Bulletin 747–24A2214, dated June 19, 1997.

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

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

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

Issued in Renton, Washington, on November 18, 1997.

James V. Devany,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–30868 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–11–AD]

RIN 2120–AA64

Airworthiness Directives; Lockheed Model L–1011–385 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to all Lockheed Model L–1011–385 series airplanes, that currently requires inspections to detect cracking and other discrepancies of certain web-to-cap fasteners of the rear spar between inner wing stations (IWS) 310 and 343, and of the web area around those fasteners; and various follow-on actions. That AD also provides for an optional modification, which, if accomplished, would defer the initiation of the inspections for a certain period of time. This action would require accomplishment of the previously optional modification. This proposal is prompted by an FAA determination that the optional terminating modification specified in the existing AD must be accomplished within a specified period of time to ensure an acceptable level of safety of the affected fleet. The actions specified by the proposed AD are intended to prevent fatigue cracking in the web of the rear spar of the wing, which could result in failure of the rear spar of the wing and consequent fuel spillage.

DATES: Comments must be received by January 5, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 97–NM–11–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Lockheed Aeronautical Systems Support Company (LASSC), Field Support Department, Dept. 693, Zone 0755, 2251 Lake Park Drive, Smyrna, Georgia 30080. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia.

FOR FURTHER INFORMATION CONTACT: Thomas Peters, Aerospace Engineer, Systems and Flight Test Branch, ACE–116A, FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia 30337–2748; telephone (770) 703–6063; fax (770) 703–6097.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address

specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 97–NM–11–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 97–NM–11–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

On June 5, 1996, the FAA issued AD 96–12–24, amendment 39–9667 (61 FR 29642, June 12, 1996), applicable to all Lockheed Model L–1011–385 series airplanes, to require repetitive visual inspections to detect cracking and other discrepancies of certain web-to-cap fasteners of the rear spar between inner wing stations (IWS) 310 and 343, and of the web area around those fasteners; and various follow-on actions. That action also provides for an optional modification, which, if accomplished, would allow the initiation of the visual inspections to be deferred for a certain period of time. That action was prompted by a report of fatigue cracking in the web of the rear spar of the wing. The requirements of that AD are intended to prevent such fatigue cracking, which could result in failure of the rear spar of the wing and consequent fuel spillage.

Actions Since Issuance of Previous Rule

Since the issuance of AD 96–12–24, the FAA has determined that the optional terminating modification specified in the existing AD must be required to be accomplished within a specified period of time to reduce the possibility of fatigue cracking remaining undetected and to ensure an acceptable level of safety of the affected fleet.

Lockheed Service Bulletin 093–57–218, which is referenced in the existing AD as the appropriate source of service information, does not recommend a limit on the number of inspections to be accomplished prior to installation of the modification. Table I of the service bulletin recommends that the inspections be accomplished at short repetitive intervals, which range from 60 to 180 landings.

The FAA finds that the possibility of maintenance errors during inspection could result in a net degradation in airplane safety if the inspections are performed in accordance with the schedule set forth in the service bulletin. The FAA considers that accomplishment of continuous inspections at the short inspection intervals specified in the service bulletin increases the risk that fatigue cracking could remain undetected. Consequently, the FAA has determined that the previously optional modification must be accomplished to ensure an acceptable level of safety. Following accomplishment of the modification, inspection must resume after the accumulation of no more than 5,000 landings.

Explanation of Relevant Service Information

Since the issuance of AD 96–12–24, the FAA has reviewed and approved Lockheed Service Bulletin 093–57–218, Revision 1, dated September 9, 1996. This service bulletin revision describes procedures for inspections to detect cracking and other discrepancies of certain web-to-cap fasteners of the rear spar, and for modification of the web-to-cap fastener holes, in an expanded area of the IWS (i.e., IWS 299 through IWS 343). In all other respects, Revision 1 of the service bulletin is essentially the same as the original issue.

Additionally, the FAA has reviewed and approved several other Lockheed service bulletins, listed below, which provide options for accomplishment of certain modifications in lieu of that specified in Lockheed Service Bulletin 093–57–218. If accomplished, these modifications would allow the repetitive inspections to be deferred for specified periods of time.

For Lockheed Model L–1011–385–3 series airplanes:

- Lockheed Service Bulletin 093–57–203, Revision 3, dated October 28, 1991; as amended by Change Notifications 093–57–203, R3–CN1, dated June 22, 1992; 093–57–203, R3–CN2, dated February 15, 1993; and 093–57–203, R3–CN3, dated September 15, 1994.
- Lockheed Service Bulletin 093–57–215, dated April 11, 1996. For Lockheed Model L–1011–385–1 series airplanes:
- Lockheed Service Bulletin 093–57–184, Revision 6, dated October 28, 1991, as amended by Change Notifications 093–57–184, R6–CN1, dated June 22, 1992, and 093–57–184, R6–CN2, dated December 14, 1992.
- Lockheed Service Bulletin 093–57–184, Revision 7, dated December 6, 1994, as amended by Change Notifications 093–57–184, R7–CN1, dated August 22, 1995, 093–57–184, R7–CN2, dated February 20, 1996, and 093–57–184, R7–CN3, dated April 4, 1996; and Lockheed Service Bulletin 093–57–212, dated November 14, 1994, as amended by Change Notification 093–57–212, CN1, dated September 27, 1995.
- Lockheed Service Bulletin 093–57–196, Revision 5, dated October 28, 1991, as amended by Change Notification 093–57–196, R5–CN1, dated June 22, 1992; and Lockheed Service Bulletin 093–57–212, dated November 14, 1994, as amended by Change Notification 093–57–212, CN1, dated September 27, 1995.
- Lockheed Service Bulletin 093–57–196, Revision 6, dated December 6, 1994, as amended by Change Notification 093–57–196, R6–CN1, dated August 22, 1995, 093–57–196, R6–CN2, dated February 20, 1996, and 093–57–196, R6–CN3, dated May 21, 1996.

A description of each service bulletin follows:

- Lockheed Service Bulletin 093–57–203. This service bulletin describes procedures for modification of the upper and lower caps of the rear spar between IWS 228 and IWS 346. The modification involves removal of fasteners, reaming of fastener holes, performing an eddy current inspection, removing crack indications, cold working the holes, installing oversize fasteners, adding angle reinforcements to the upper caps, and adding doublers at the rear spar and main landing gear fitting joint.
- Lockheed Service Bulletin 093–57–215: This service bulletin describes procedures for modification of the left and right wing rear spars. The modification entails cold working the fasteners, installing new oversized fasteners (if necessary), adding structure reinforcements to the lower caps, and adding new upper caps and webs at the rear spar and main landing gear fitting joint.
- Lockheed Service Bulletins 093–57–184 and 093–57–212. These service

bulletins describe procedures for modification of the inboard and outboard rear spars, respectively. Modification of the inboard spar web entails removing the entire web inboard to IWS 228.774 and replacing it with a new web portion; adding new upper caps and stiffeners in both wings, cold working certain fastener holes, and removing certain existing fasteners for eddy current hole inspection. Modification of the outboard spar web involves performing an eddy current inspection of the fastener holes, cold working specific fastener holes (if no cracking is found), repairing any crack found, and installing a new outboard web section.

• Lockheed Service Bulletin 093–57–196. This service bulletin describes procedures for modification of the inboard rear spar, which includes removing the entire web inboard to IWS 228.774 and replacing it with a new web portion; adding new upper caps and stiffeners in both wings, cold working certain fastener holes, and removing certain existing fasteners for eddy current hole inspection.

Accomplishment of the actions specified in the service bulletins is intended to adequately address the identified unsafe condition.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would supersede AD 96–12–24 to continue to require inspections to detect cracking and other discrepancies of certain web-to-cap fasteners of the rear spar between IWS 310 and IWS 343, and of the web area around those fasteners; and various follow-on actions. This proposed AD would require accomplishment of the previously optional modification, which, when accomplished, will defer the initiation of the inspections for a certain period of time. The proposed AD also provides for additional options for accomplishment of the previously optional modification, which also defer the inspections for certain specified periods of time. The actions would be required to be accomplished in accordance with the service bulletin described previously.

Differences Between the Service Bulletin and This Proposed AD

Operators should note that Revision 1 of Lockheed Service Bulletin 093–57–218 expands the inspection area to include IWS 299 through IWS 310. However, the FAA has determined that the various X-ray, eddy current, and ultrasonic inspections of certain areas of the rear spar caps, web, skin, and fastener holes required by AD 96–07–13, amendment 39–9563 (61 FR 16379, April 15, 1996), adequately address fatigue cracking in the expanded area specified in Revision 1 of the service bulletin. Therefore, this proposed AD does not require inspection of that expanded area. However, the FAA finds that accomplishment of the proposed modification in the expanded area, as recommended in the service bulletin, is necessary to ensure an acceptable level of safety.

Cost Impact

There are approximately 235 Lockheed Model L–100–385 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 117 airplanes of U.S. registry would be affected by this proposed AD.

The actions that are currently required by AD 96–12–24 take approximately 13 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be $91,260, or $780 per airplane.

The new actions that are proposed in this AD action would take approximately 100 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the proposed requirements of this AD on U.S. operators is estimated to be $702,000, or $6,000 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–9667 (61 FR 29642, June 12, 1996), and by adding a new airworthiness directive (AD), to read as follows:

Lockheed: Docket 97–NM–11–AD. Supersedes AD 96–12–24, Amendment 39–9667.

Applicability: All Model L–1011–385 series airplanes, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (h)(1) 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 fatigue cracking on the web of the rear spar of the wing, which could result in failure of the rear spar of the wing and consequent fuel spillage, accomplish the following:

Restatement of Requirements of AD 96–12–24

(a) Perform a visual inspection to detect signs of cracking and other discrepancies (i.e., corrosion, fastener looseness, nicks,

scratches, or other surface damage) of the web-to-cap fasteners of the rear spar between inner wing stations (IWS) 310 and 343, as specified in Figure 2 of Lockheed Service Bulletin 093–57–218, dated April 11, 1996, or Revision 1, dated September 9, 1996; and of the web area around those fasteners; in accordance with Part I of the Accomplishment Instructions of that service bulletin. Perform the inspection at the applicable time specified in paragraph (a)(1) or (a)(2) of this AD.

(1) Except as provided by paragraph (a)(2) of this AD: Perform the initial inspection prior to the accumulation of the number of landings specified as the ''inspection threshold'' in Table I of Lockheed Service Bulletin 093–57–218, dated April 11, 1996, or Revision 1, dated September 9, 1996, or within 10 days after June 27, 1996 (the effective date of AD 96–12–24), whichever occurs later.

(2) For airplanes on which the wing rear spar has been modified prior to June 27, 1996, in accordance with one of the Lockheed service bulletins listed in paragraph (a)(2)(ii) of this AD, accomplish the inspection as follows:

(i) Perform the initial inspection prior to the accumulation of the number of landings specified as the ''inspection threshold'' in Table I of Lockheed Service Bulletin 093–57–218, dated April 11, 1996, or Revision 1, dated September 9, 1996, calculated from the time the wing rear spar was modified (rather than from the date of manufacture of the airplane), or within 10 days after June 27, 1996, whichever occurs later.

(ii) This paragraph applies to airplanes on which the wing rear spar has been modified in accordance with one of the following service bulletins:

- Lockheed Service Bulletin 093–57–184, Revision 6, dated October 28, 1991, or Revision 7, dated December 6, 1994; or
- Lockheed Service Bulletin 093–57–196, Revision 5, dated October 28, 1991, or Revision 6, dated December 6, 1994; or
- Lockheed Service Bulletin 093–57–203, Revision 3, dated October 28, 1991, or Revision 4, dated March 27, 1995; or
- Lockheed Service Bulletin 093–57–215, dated April 11, 1996.

(b) If no sign of cracking or other discrepancy is found during the inspection required by paragraph (a) of this AD, repeat that inspection thereafter at intervals not to exceed the number of landings specified as the ''repeat visual inspection interval'' in Table I of Lockheed Service Bulletin 093–57–218, dated April 11, 1996, or Revision 1, dated September 9, 1996.

(c) If any sign of cracking is found during an inspection required by paragraph (a) or (b) of this AD, prior to further flight, perform either eddy current surface scan (ECSS) inspections, or bolt hole eddy current (BHEC) inspections, as appropriate, to confirm cracking, in accordance with Lockheed Service Bulletin 093–57–218, dated April 11, 1996, or Revision 1, dated September 9, 1996.

(1) If no cracking is confirmed, repeat the inspection specified in paragraph (a) of this AD at intervals not to exceed the number of landings specified as the ''repeat visual inspection interval'' in Table I of the service bulletin.

(2) If any cracking is confirmed, prior to further flight, repair it in accordance with the service bulletin.

New Requirements of This AD

(d) Except as provided by paragraph (e) or (f) of this AD, as applicable: Within 12 months after the effective date of this AD, modify the web-to-cap fastener holes of the rear spar between IWS 299 and IWS 343 in accordance with Part II of the Accomplishment Instructions of Lockheed Service Bulletin 093–57–218, Revision 1, dated September 9, 1996. Within 5,000 landings following accomplishment of the modification, perform the visual inspection required by paragraph (a) of this AD. Thereafter, repeat that inspection at intervals not to exceed the number of landings specified as the ''repeat visual inspection interval'' in Table I of Lockheed Service Bulletin 093–57–218, Revision 1, dated September 9, 1996.

(e) For Model L–1011–385–3 series airplanes: Accomplishment of the modifications specified in paragraph (e)(1) or (e)(2) of this AD, within 12 months after the effective date of this AD, constitutes an acceptable alternative to the modification specified in paragraph (d) of this AD.

(1) Modify the upper and lower caps of the rear spar between IWS 228 and IWS 346 in accordance with Part I of the Accomplishment Instructions of Lockheed Service Bulletin 093–57–203, Revision 3, dated October 28, 1991. Within 5,000 landings following accomplishment of the modification, perform the visual inspection required by paragraph (a) of this AD. Thereafter, repeat that inspection at intervals not to exceed the number of landings specified as the ''repeat visual inspection interval'' in Table I of Lockheed Service Bulletin 093–57–218, Revision 1, dated September 9, 1996. Or

(2) Modify the left and right wing rear spars in accordance with the Accomplishment Instructions of Lockheed Service Bulletin 093–57–215, dated April 11, 1996. Within the thresholds specified in Table I of Lockheed Service Bulletin 093–57–218, Revision 1, dated September 9, 1996 (calculated from the date of installation of Lockheed Service Bulletin 093–57–215, dated April 11, 1996), perform the visual inspection required by paragraph (a) of this AD. Thereafter, repeat that inspection at intervals not to exceed the number of landings specified as the ''repeat visual inspection interval'' in Table I of Lockheed Service Bulletin 093–57–218, Revision 1, dated September 9, 1996.

(f) For Model L–1011–385–1 series airplanes: Accomplishment of the modifications specified in paragraph (f)(1) or (f)(2) of this AD, within 12 months after the effective date of this AD, constitutes an acceptable alternative to the modification specified in paragraph (d) of this AD.

(1) Modify the inboard and outboard rear spars in accordance with the Accomplishment Instructions of Lockheed Service Bulletin 093–57–184, Revision 6, dated October 28, 1991, or Revision 7, dated December 6, 1994; and Lockheed Service Bulletin 093–57–212, dated November 14, 1994, as amended by Change Notification CN1, dated September 27, 1995. Within the thresholds specified in Table I of Lockheed Service Bulletin 093–57–218, Revision 1, dated September 9, 1996 (calculated from the date of installation of Lockheed Service Bulletin 093–57–184, Revision 6, dated October 28, 1991, or Revision 7, dated December 6, 1994; and Lockheed Service Bulletin 093–57–212, dated November 14, 1994, as amended by Change Notification CN1, dated September 27, 1995), perform the visual inspection required by paragraph (a) of this AD. Thereafter, repeat that inspection at intervals not to exceed the number of landings specified as the ''repeat visual inspection interval'' in Table I of Lockheed Service Bulletin 093–57–218, Revision 1, dated September 9, 1996. Or

(2) Modify the inboard and outboard rear spars in accordance with the Accomplishment Instructions of Lockheed Service Bulletin 093–57–196, Revision 5, dated October 28, 1991, or Revision 6, dated December 6, 1994; and Lockheed Service Bulletin 093–57–212, dated November 14, 1994, as amended by Change Notification CN1, dated September 27, 1995. Within the thresholds specified in Table I of Lockheed Service Bulletin 093–57–218, Revision 1, dated September 9, 1996 (calculated from the date of installation of Lockheed Service Bulletin 093–57–196, Revision 5, dated October 28, 1991, or Revision 6, dated December 6, 1994; and Lockheed Service Bulletin 093–57–212, dated November 14, 1994, as amended by Change Notification CN1, dated September 27, 1995), perform the visual inspection required by paragraph (a) of this AD. Thereafter, repeat that inspection at intervals not to exceed the number of landings specified as the ''repeat visual inspection interval'' in Table I of Lockheed Service Bulletin 093–57–218, Revision 1, dated September 9, 1996.

(g) If any condition (i.e., number of fasteners per stiffener bay, or cracking) is identified during the accomplishment of the modification specified in Lockheed Service Bulletin 093–57–218, Revision 1, dated September 9, 1996, and that condition exceeds the limits specified in paragraph B.(3) of Part II of the Accomplishment Instructions of the service bulletin, prior to further flight, repair in accordance with a method approved by the Manager, Atlanta Aircraft Certification Office (ACO), FAA, Small Airplane Directorate.

(h)(1) 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 ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta ACO.

(2) Alternative methods of compliance, approved previously in accordance with AD 96–12–24, amendment 39–9667, are approved as alternative methods of compliance with paragraph (d) of this AD.

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

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

Issued in Renton, Washington, on November 18, 1997.

James V. Devany,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–30857 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 94–AWP–2]

Proposed Relocation of the Kahului (OGG) VORTAC and Realignment of VOR Federal Airways; Hawaii

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed rule; withdrawal.

SUMMARY: This action withdraws the notice of proposed rulemaking (NPRM) published in the **Federal Register** on March 18, 1994. The NPRM proposed to relocate the Kahului Very High Frequency Omnidirectional Range/Tactical Air Navigation (VORTAC) and realign seven Federal airways. The FAA has determined that withdrawal of the proposal is warranted due to an in-flight aeronautical evaluation (flight check) that revealed the airways would not meet FAA designed criteria.

DATES: The proposed rule is withdrawn as of November 25, 1997.

FOR FURTHER INFORMATION CONTACT: William C. Nelson, Airspace and Rules Division, (ATA–400), Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION: On March 18, 1994, an NPRM was published in the **Federal Register** to amend 14 CFR part 71 to relocate the Kahului VORTAC and realign seven Federal airways that would be affected by this Kahului VORTAC relocation. No comments were received on the proposal.

The FAA has decided to withdraw the proposal at this time due to flight check results.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Withdrawal

In consideration of the foregoing, the Notice of proposed rulemaking, Airspace Docket No. 94–AWP–2, as published in the **Federal Register** on March 18, 1994 (59 FR 12875), is hereby withdrawn.

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

Issued in Washington, DC, on November 13, 1997.

Nancy B. Kalinowski,

Acting Program Director for Air Traffic Airspace Management.

[FR Doc. 97–30773 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–13–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–39336; IC–22896; File No. S7–25–97]

RIN 3235–AH20

Amendments to Rules on Shareholder Proposals

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; Extension of comment period.

SUMMARY: The Securities and Exchange Commission (''we'' or ''Commission'') is extending the comment period for its proposals to amend rule 14a–8, and related rules, set forth in Securities Exchange Act Release No. 39093 (9/18/97), 62 FR 50682 (9/26/97) (the ''Release''). The original deadline established by the Release was November 25, 1997. The new deadline is January 2, 1998.

DATES: Public comments are due on or before January 2, 1998.

ADDRESSES: Please send three copies of the comment letter to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comment letters can be sent electronically to the following e-mail address: rule-comments@sec.gov. The comment letter should refer to File No. S7–25–97; if e-mail is used please include the file number in the subject line. Anyone can inspect and copy the comment letters in the SEC's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. We will post comment letters submitted electronically on our Internet site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Frank G. Zarb, Jr., Special Counsel, Office of Chief Counsel, Division of Corporation Finance, at (202) 942–2900, or Doretha M. VanSlyke, Division of Investment Management, at (202) 942–0721, Securities and Exchange Commission, 450 Fifth Street N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: On September 18, 1997, the Commission issued the Release, proposing amendments to rule 14a–8,[1] the shareholder proposal rule, and related amendments to rules 14a–4,[2] 14a–5,[3] 14a–2,[4] and 13d–5.[5] The deadline for submitting public comments established by the Release was November 25, 1997. The Commission has received requests to extend the deadline. We are therefore extending the comment period to January 2, 1998, so that commenters are ensured of adequate time to fully address the issues raised by the Release.

Dated: November 19, 1997.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–30922 Filed 11–24–97; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 75

Self-Rescue Devices; Use and Location Requirements

AGENCY: Mine Safety and Health Administration, (MSHA) Labor.

ACTION: Extension of comment period.

SUMMARY: MSHA is extending the comment period on its proposed policy letter (PPL) relating to the approval guidelines for storage plans for Self-Contained Self-Rescue (SCSR) Devices in underground coal mines.

DATES: Submit all comments on or before February 23, 1998.

ADDRESSES: Comments may be transmitted by electronic mail, fax or mail. Comments by electronic mail must be clearly identified as such and sent to this e-mail address: psilvey@msha.gov. Comments by fax must be clearly identified as such and sent to: Mine Safety and Health Administration, Office of Standards, Regulations and Variances, 703–235–5551. Send mail comments to: Mine Safety and Health Administration, Office of Standards,

[1] 17 CFR 240.14a–8.
[2] 17 CFR 240.14a–4.
[3] 17 CFR 240.14a–5.
[4] 17 CFR 240.14a–2.
[5] 17 CFR 240.13d–5.

Regulations and Variances, Room 631, 4015 Wilson Boulevard, Arlington, Virginia 22203–1984. Interested persons are encouraged to supplement written comments with computer files or disks; please contact the Agency with any questions about format.

FOR FURTHER INFORMATION CONTACT: Milton D. Conley, Division of Health, Coal Mine Safety and Health, (703) 235–1358.

SUPPLEMENTARY INFORMATION: On September 26, 1997, (62 FR 50541), MSHA published a notice in the **Federal Register** requesting comments on a draft policy letter (PPL) relating to the approval guidelines for storage plans for Self-Contained Self-Rescue (SCSR) Devices in underground coal mines. MSHA published the notice to voluntarily afford an opportunity for interested persons to comment on the PPL before its anticipated issuance and effective date.

The comment period was scheduled to close on November 25, 1997; however, in response to commenters' requests for additional time to prepare their comments, MSHA is extending the comment period until February 23, 1998. The Agency believes that this extension will provide sufficient time for all interested parties to review and comment on the draft policy. All interested parties are encouraged to submit their comments on or prior to February 23, 1998.

Dated: November 20, 1997.

J. Davitt McAteer,

Assistant Secretary for Mine Safety and Health.

[FR Doc. 97–30955 Filed 11–24–97; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD11–97–008]

RIN 2115–AE46

Special Local Regulations; U.S. National Waterski Racing Championship

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to amend the table of events in 33 CFR 100.1101 by adding the U.S. National Waterski Racing Championship conducted in the waters of Mission Bay in San Diego, California, from Government Island south to Ski Beach on the following dates: annually, commencing on the first Friday of October every year, and, including the first Friday of October, lasting a total of three days. The special local regulations applicable to this event are necessary to provide for the safety of life, property, and navigation on the navigable waters of the United States during scheduled events. The Coast Guard is also making a technical amendment to paragraph (a) of 33 CFR 100.1101 to reflect a change of address for the Eleventh Coast Guard District staff element responsible for the Local Notice to Mariners.

DATES: Comments must reach the Coast Guard on or before January 9, 1998.

ADDRESSES: You may mail comments to Lieutenant Michael A. Arguelles, U.S. Coast Guard Marine Safety Office, 2716 North Harbor Drive, San Diego, California 92101, or deliver them to the same address between 9 a.m. and 2 p.m., Monday through Friday, except holidays. The telephone number is (619) 683–6484.

The Marine Safety Office maintains the public docket for this rulemaking. Comments, and any documents referenced in this preamble, will become part of this docket and will be available for inspection and copying at the Marine Safety Office between 9 a.m. and 2 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Michael A. Arguelles, U.S. Coast Guard Marine Safety Office, 2716 North Harbor Drive, San Diego, California 92101. The telephone number is (619) 683–6484.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Persons submitting comments should include their names and addresses, identifying this rulemaking (CGD11–97–008) and the specific section of this document to which each comment applies, and give the reason for each comment. Please submit two copies of all comments and attachments in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgment of receipt of comments should enclose stamped, self-addressed postcards or envelopes.

The Coast Guard will consider all comments received during the comment period. It may change this proposed rule in view of the comments.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to the Marine Safety Office at the address under **ADDRESSES**. The request should include the reasons why a hearing would be beneficial. If it determines that the opportunity for oral presentations will aid this rulemaking, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The U.S. National Waterski Racing Championship will consist of various waterski racing events. The races will take place, annually, over a three day period beginning on the first Friday of October. The special local regulations applicable to this event are necessary to provide for the safety of life, property, and navigation on the navigable waters of the United States during scheduled events. A technical amendment to paragraph (a) of 33 CFR 100.1101 is necessary because the Eleventh Coast Guard District staff element responsible for the Local Notice to Mariners has moved from Long Beach, CA to Alameda, CA.

Discussion of Proposed Rule

The race zone encompasses the water of Mission Bay in San Diego, California, from Government Island south to Ski Beach in Mission Bay. The race course will be marked by buoys to alert non-participants. Each year, the race zone will be in use by vessels competing in the event from and including the first Friday of October, for a total of three days, during the hours of 8 a.m. until 6 p.m. (PDT). During these times the waters of Mission Bay from Government Island to Ski Beach will be closed to all traffic with the exception of emergency vessels, official patrol vessels, and participant vessels. No vessels other than emergency, participant, or official patrol vessels will be allowed to enter this zone unless specifically cleared by or through an official patrol vessel.

Pursuant to 33 CFR 100.1101(b)(3), Commander, Coast Guard Activities San Diego, is designated Patrol Commander for this event; he has the authority to delegate this responsibility to any commissioned, warrant, or petty officer of the Coast Guard. Once the zone is established, authorization to remain within the zone is subject to termination by the Patrol Commander at any time. The Patrol Commander may impose other restrictions within the zone if circumstances dictate. Restrictions will be tailored to impose the least impact on maritime interests yet provide the level of security deemed necessary to safely conduct the race.

With respect to the technical amendment to paragraph (a) of 33 CFR 100.1101, the correct address of the

Eleventh Coast Guard District staff element responsible for Local Notice to Mariners now reads: Commander (Pow), Eleventh Coast Guard District, Coast Guard Island, Building 50–6, Alameda, CA 94501–5100.

Regulatory Evaluation

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require assessment of potential cost and benefits under section 6(a)(3) of that order. It has been exempted from review by the Office of Management and Budget under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979). The Coast Guard expects the economic impact of this regulation to be so minimal that a full Regulatory Evaluation under paragraph 10(e) of the regulatory policies and procedures of the Department of Transportation is unnecessary.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this proposed rule, if adopted, will have a significant economic impact on a substantial number of small entities. ''Small entities'' may include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations less than 50,000.

Because it expects the impact of this proposal to be so minimal, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this proposal, if adopted, will not have a substantial impact on a significant number of small entities. If, however, you think that your business or organization qualifies as a small entity and this proposed rule will have a significant economic impact on your business or organization, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and in what way and to what degree this proposed rule will economically affect it.

Collection of Information

This proposed rule contains no collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Federalism

The Coast Guard has analyzed this proposed rule under the principles and criteria contained in Executive Order 12612 and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this proposed rule and concluded that under paragraph 2.B.2 of Commandant Instruction M16475.1B, it will have no significant environmental impact and it is categorically excluded from further environmental documentation.

List of Subjects in 33 CFR Part 100

Regattas and Marine Parades.

Proposed Regulation

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR Part 100, section 100.1101, as follows:

PART 100—MARINE EVENTS

1. The authority citation for Part 100 continues to read as follows:

Authority: 33 U.S.C. 1233 through 1236; 49 CFR 1.46; 33 CFR 100.35.

2. In § 100.1101 revise paragraph (a) and amend Table 1 of that section by adding an entry for the U.S. National Waterski Racing Championship immediately following the last entry to read as follows:

§ 100.1101 Southern California annual marine events.

(a) Special local regulations will be established for the events listed in Table 1. Further information on exact dates, times, details concerning number and type of participants and an exact geographical description of the areas are published by the Eleventh Coast Guard District in the Local Notice to Mariners at least 20 days prior to each event. To be placed on the mailing list contact: Commander (pow), Eleventh Coast Guard District, Coast Guard Island, Building 50–6, Alameda, CA 94501–5100.

* * * * *

Table 1

* * * * *

U.S. National Waterski Racing Championship
Sponsor: U.S. National Waterski Racing Association.
Date: First Friday of October every year, lasting a total of 3 days (including the first Friday of October).
Location: Mission Bay, San Diego, California, from Government Island south to Ski Beach.

Dated: October 15, 1997.

J.C. Card,

Vice Admiral, U.S. Coast Guard, Commander, Eleventh Coast Guard District.

[FR Doc. 97–30923 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 110

[CGD11–97–007]

RIN 2115–AA98

Anchorage Regulations: San Diego Harbor, CA

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes the establishment of several special anchorages in San Diego Bay, California. These areas are currently used as temporary and long term anchorages. A ''special anchorage'' is an area on the water where vessels less than 20 meters (approximately 65 feet) in length are allowed to anchor without displaying navigation lights which are otherwise required for anchored vessels under Rule 30 of the Inland Navigational Rules, codified at 33 U.S.C. 2030. The intended effect of these special anchorages is to reduce the risk of vessel collisions within San Diego Bay by specifying more special anchorage areas which will provide designated moorings for vessels less than 20 meters in length. In addition, minor corrections to some of the coordinates describing the corner points of existing special anchorage areas have been made in the proposed regulations.

DATES: Comments must be received on or before January 26, 1998.

ADDRESSES: Comments should be mailed to Commanding Officer, Coast Guard Marine Safety Office, 2716 North Harbor Drive, San Diego, CA 92101, (619) 683–6495. The comments and other materials referenced in this notice will be available for inspection and copying at the above address. Normal office hours are between 7:00 a.m. and 4:00 p.m., Monday through Friday except holidays. Comments may also be hand-delivered to this address.

FOR FURTHER INFORMATION CONTACT: Lieutenant Mike Arguelles, Marine Safety Office San Diego, (619) 683–6484, or Mike Van Houten, USCG, Pacific Operations and Waterways Branch, Eleventh Coast Guard District, (510) 437–2984.

SUPPLEMENTARY INFORMATION:

Request for Comments

Interested persons are invited to participate in this proposed rulemaking by submitting written views, data or arguments to the office listed under **ADDRESSES** in this preamble. Persons submitting comments should include

their names and addresses, identify the docket number for the regulations (CGD11–97–007), the specific section of the proposal to which their comments apply, and give reasons for each comment. Receipt of comments will be acknowledged if a stamped, self-addressed postcard or envelope is enclosed. The regulations may be changed in light of the comments received. All comments received before the expiration of the comment period will be considered before final action is taken on this proposal. No public hearing is planned, but one may be held if written requests for a hearing are received and it is determined that the opportunity to make oral presentations will aid in the rule making process.

Discussion of the Proposed Regulation

A ''special anchorage'' is an area on the water in which vessels less than 20 meters (approximately 65 feet) in length are allowed to anchor without displaying navigation lights. Such lights are otherwise required for anchored vessels under Rule 30 of the Inland Navigational Rules, codified at 33 U.S.C. 2030. The Coast Guard proposes to establish 7 new special anchorage areas (A–1a, A–1b, A–1c, A–4, A–6, A–8, & A–9), and modify the 4 special anchorage areas already in existence (A–1, A–2, A–3, & A–5), as follows:

(A–1, A–1a, A–1b, A–1c) Shelter Island Moorings, North San Diego Bay, approximately 75 yards off shore and along Shelter Island (for A–1, minor corrections to some of the coordinates describing the corner points of the special anchorage area),

(A–2) America's Cup Harbor, North San Diego Bay, in the area known as Commercial Basin (minor corrections to some of the coordinates describing the corner points of the special anchorage area),

(A–3) Laurel Street Roadstead Moorings, North San Diego Bay, east of the Coast Guard Activities (minor corrections to some of the coordinates describing the corner points of the special anchorage area),

(A–4) Bay Bridge Roadstead Moorings, Central San Diego Bay, at the northwest end of the Coronado Bridge,

(A–5) Glorietta Bay Anchorage, Central San Diego Bay, across the bay from Naval Amphibious Base (minor corrections to some of the coordinates describing the corner points of the special anchorage area),

(A–6) Fiddlers Cove, South San Diego Bay, just south of the Naval Amphibious Base,

(A–8) Sweetwater Anchorage, South San Diego Bay, west of 24th Street Marine Terminal, and

(A–9) Cruiser Anchorage, North San Diego Bay, west of the Coast Guard Activities.

The primary users of these anchorages are recreational vessels, with the majority of them being long term users. Some of the anchorages are depicted on local charts, while all of them use buoys to delineate their boundaries. By establishing these areas as special anchorages, the requirement of displaying anchor lights and day shapes will be removed for vessels less than 20 meters in length.

Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the rule making does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment

This proposal has been reviewed by the Coast Guard and determined to be categorically excluded from further environmental documentation in accordance with section 2.B.2 of Commandant Instruction M16475.1B, as revised in 59 FR 38654, July 29, 1994. A Categorical Exclusion Determination and Environmental Analysis Checklist will be available for inspection and copying in the docket to be maintained at the address listed in **ADDRESSES**.

Regulatory Evaluation

This proposal is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has been exempted from review by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this proposal to be so minimal that a full Regulatory Evaluation under paragraph 10(e) of the regulatory policies and procedures of DOT is unnecessary. This proposal will impose no cost on vessel operators, it will have minimal impact on vessel traffic, and will provide greater options to vessels desiring to anchor in San Diego Bay.

Small Entities

Under 5 U.S.C. 601 *et seq.*, known as the Regulatory Flexibility Act, the Coast Guard must consider whether this proposal will have a significant economic impact on a substantial number of small entities. ''Small Entities'' include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as ''small business concerns'' under section 3 of the small Business Act (15 U.S.C. 632). Since the impact of this proposal is expected to be minimal, the Coast Guard certifies under 5 U.S.C. 605(b), that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This proposal imposes no collection of information requirements under the Paperwork Reduction Act.

List of Subjects in 33 CFR Part 110

Anchorage grounds.

Proposed Regulations

In consideration of the foregoing, the Coast Guard proposes to amend part 110 of Title 33, Code of Federal Regulations as follows:

PART 110—[REVISED]

1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 2030, 2035, and 2071; 49 CFR 1.46 and 33 CFR 1.05–1(g). Section 110.1a and each section listed in 110.1a is also issued under 33 U.S.C. 1223 and 1231.

1. Section 110.90 is revised to read as follows:

§ 110.90 San Diego Harbor, California.

(a) *Area A–1.* In North San Diego Bay, the Shelter Island Yacht Basin Anchorage, the water area enclosed by a line beginning at latitude 32°42′56.7″ N., longitude 117°13′47.1″ W.; thence southwesterly to latitude 32°42′53.6″ N., longitude 117°13′51.3″ W.; thence northwesterly to latitude 32°43′01.3″ N., longitude 117°13′59.1″ W.; thence northeasterly to latitude 32°43′02.6″ N., longitude 117°13′55.5″ W.; thence southeast to latitude 32°42′59.8″ N., longitude 117°13′50.4″ W.; thence southeast to the point of beginning.

(b) *Area A–1a.* In North San Diego Bay, the Shelter Island Roadstead Anchorage east of Shelter Island, the water area 55 feet either side of a line beginning at latitude 32°42′33.6″ N., longitude 117°13′48.3″ W.; thence northeast to latitude 32°42′36.0″ N., longitude 117°13′45.1″ W.

(c) *Area A–1b.* The water area off Shelter Island's eastern shore, 210 feet shoreward of a line beginning at latitude 32°42′43.9″ N., longitude 117°13′34.3″ W.; thence northeast to latitude 32°42′52.8″ N., longitude 117°13′22.4″ W.

(d) *Area A–1c.* The water area off Shelter Island's eastern shore, 210 feet shoreward of a line beginning at latitude 32°42′55.0″ N., longitude 117°13′19.4″ W.; thence northeast to latitude

32°43′03.5″ N., longitude 117°13′07.6″ W.

(e) *Area A–2.* In North San Diego Bay, the America's Cup Harbor Anchorage, the water area enclosed by a line beginning at latitude 32°43′13.7″ N., longitude 117°13′23.8″ W.; thence northeast to latitude 32°43′16.7″ N., longitude 117°13′16.4″ W.; thence northwest to latitude 32°43′22.6″ N., longitude 117°13′25.8″ W.; thence west to latitude 32°43′22.5″ N., longitude 117°13′29.6″ W.; thence southwest to latitude 32°43′19.0″ N., longitude 117°13′32.6″ W.; thence southeast to the point of beginning.

(f) *Area A–3.* In the North San Diego Bay, the Laurel Street Roadstead Anchorage, the water area enclosed by a line beginning at latitude 32°43′30.5″ N., longitude 117°10′28.5″ W.; and thence southwesterly to latitude 32°43′29.8″ N., longitude 117°10′34.2″ W.; and thence southwesterly to latitude 32°43′25.8″ N., longitude 117°10′36.1″ W.; and thence southerly to latitude 32°43′20.2″ N., longitude 117°10′36.1″ W.; thence westerly to latitude 32°43′20.2″ N., longitude 117°10′52.9″ W.; thence northeasterly to 32°43′29.8″ N., longitude 117°10′48.0″ W., thence northeasterly following a line parallel to, and 200 feet bayward of, the shoreline of San Diego Bay adjoining Harbor Drive to the point of beginning.

(g) *Area A–4.* In Central San Diego Bay, the Bay Bridge Roadstead Anchorage, the water enclosed by a line beginning at latitude 32°41′32.1″ N., longitude 117°09′43.1″ W.; thence southwesterly to latitude 32°41′19.1″ N., longitude 117°09′46.1″ W.; thence southeasterly to latitude 32°41′17.8″ N., longitude 117°09′44.3″ W.; thence southeasterly to latitude 32°41′14.9″ N., longitude 117°09′37.9″ W.; thence northeasterly to latitude 32°41′26.9″ N., longitude 117°09′35.1″ W., thence southwesterly to the point of beginning.

(h) *Area A–5.* In Central San Diego Bay, the Glorietta Bay Anchorage, the water area enclosed by a line beginning at latitude 32°40′42.2″ N., longitude 117°10′03.1″ W.; thence southwesterly to latitude 32°40′41.2″ N., longitude 117°10′06.6″ W.; thence northwesterly to latitude 32°40′46.2″ N., longitude 117°10′15.6″ W.; thence northeasterly to latitude 32°40′46.7″ N., longitude 117°10′14.1″ W.; thence southeasterly to the point of beginning.

(i) *Area A–6.* In Fiddler's Cove, the water enclosed by a line beginning at latitude 32°39′10.4″ N., longitude 117°08′49.4″ W.; thence northwesterly to latitude 32°39′14.9″ N., longitude 117°08′51.8″ W.; thence northeasterly to latitude 32°39′17.6″ N., longitude 117°08′47.5″ W.; thence northwesterly to latitude 32°39′19.8″ N., longitude 117°08′48.8″ W.; thence northeasterly to latitude 32°39′24.4″ N., longitude 117°08′41.4″ W., thence southeasterly to latitude 32°39′15.7″ N., longitude 117°08′36.0″ W.; thence southwesterly to the point of beginning.

Note: This area is located on Federal Property owned by the United States, and it is reserved for active duty military, their dependents, retirees, and DOD employees only.

(j) *Area A–8.* In South San Diego Bay, the Sweetwater Anchorage, the water enclosed by a line beginning at latitude 32°39′12.2″ N longitude 117107′45.1″ W.; thence easterly to latitude 32°39′12.2″ N., longitude 117°07′30.1″ W.; thence southerly to latitude 32°38′45.2″ N., longitude 117°07′30.1″ W.; thence westerly to latitude 32°38′45.2″ N., longitude 117°07′45.1″ W.; thence northerly to the point of beginning.

(k) *Area A–9.* In North San Diego Bay, the Cruiser Anchorage, the water enclosed by a line beginning at latitude 32°43.35.9″ N., longitude 117°11′06.2″ W.; thence southwesterly to latitude 32°43′31.5″ N., longitude 117°11′13.2″ W.; thence southeasterly to latitude 32°43′28.9″ N., longitude 117°11′11.0″ W.; thence southeasterly to latitude 32°43′25.9″ N., longitude 117°11′07.7″ W.; thence northeasterly to latitude 32°43′34.8″ N., longitude 117°11′03.2″ W.; thence northwesterly to the point of beginning. All coordinates referred use Datum: NAD 83.

Note: Mariners anchoring in these anchorages, excluding Anchorage A–6, should consult applicable local ordinances of the San Diego Unified Port District. Temporary floats or buoys for marking anchors are allowed. Fixed moorings, piles or stakes are prohibited. All moorings shall be so that no vessel, when anchored, shall at any time extend beyond the limits of the area.

Dated: October 6, 1997.

J.C. Card,

Vice Admiral, U.S. Coast Guard Commander, Eleventh Coast Guard District.

[FR Doc. 97–30898 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF DEFENSE

DEPARTMENT OF TRANSPORTATION

Coast Guard

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AH88

Election of Education Benefits

AGENCIES: Department of Defense, Department of Transportation (Coast Guard), and Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Department of Veterans Affairs (VA) educational assistance and educational benefits regulations relating to certain elections between benefits. VA has provided by regulation that after a veteran seeks to make an election to have service in the Selected Reserve credited toward payment under the Montgomery GI Bill—Selected Reserve (MGIB–SR) program or under the Montgomery GI Bill—Active Duty (MGIB–AD) program, the election will take effect when the individual has negotiated a check issued under the program she or he has elected. In order to adapt the current rules to the new system of electronic transfers, it is proposed to change these election provisions to make the election effective either upon negotiation of a check or electronic receipt of education benefits. VA has provided by regulation that an election to receive benefits under Survivors' and Dependents' Educational Assistance (DEA) for a program of education rather than pension, compensation, or Dependency and Indemnity Compensation (DIC) will take effect when the individual has commenced a program of education and negotiated a check issued under the program she or he has elected. In order to adapt the current rule to the new system of electronic transfers and to ensure that decisions are made with knowledge, it is proposed to change these election provisions to require a written election to be submitted and to make the election effective either upon negotiation of a check or electronic receipt of education benefits. Nonsubstantive changes would also be made for purposes of clarity and to reflect current statutory codification and authority. The proposed requirements for individuals to make elections before receiving certain benefit payments constitute collections of information.

Accordingly, this document also requests comments under the Paperwork Reduction Act on those proposed collections of information.

DATES: Comments must be received on or before January 26, 1998.

ADDRESSES: Mail or hand deliver written comments to: Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420. Comments should indicate that they are submitted in response to ''RIN 2900–AH88.'' All written comments received will be available for public inspection in the Office of Regulations Management, Room 1158, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays).

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer, Assistant Director for Policy and Program Administration, Education Service (225), Veterans Benefits Administration, Department of Veterans Affairs, (202) 273–7187.

SUPPLEMENTARY INFORMATION: VA administers a number of benefit programs. A veteran or other eligible person may be potentially eligible for benefits under more than one of them. Often the law governing eligibility requires that the individual elect the program under which she or he is to receive benefits. This document proposes to amend the VA educational assistance and educational benefits regulations relating to certain elections between benefits.

VA is given broad statutory authority to prescribe the manner of elections when a veteran must elect whether time served in the Selected Reserve is to be applied toward establishing eligibility for the MGIB–SR program or toward establishing entitlement to a greater monthly rate of educational assistance under the MGIB–AD program. VA has provided by regulation in 38 CFR 21.7042 and 21.7540 that after a veteran seeks to make an election to have service in the Selected Reserve credited toward payment under the MGIB–SR program or under the MGIB–AD program, the election will take effect when the individual has negotiated a check issued under the program she or he has elected. In order to adapt the current rules to the new system of electronic transfers, it is proposed to change these election provisions to make the election effective either upon negotiation of a check or electronic receipt of education benefits.

This document also proposes to amend § 21.3023, which concerns an election to receive DEA for a program of education rather than pension, compensation, or DIC. That section currently provides that the commencement of a program of education constitutes an election and, with limited exceptions, that the election is final when the payee has negotiated one check for the benefit. This section was issued pursuant to 38 U.S.C. 3562, which provides that if a child of a veteran is eligible for both DEA and DIC, commencement of a program of education under DEA would bar the child from receiving pension, compensation, or DIC in the future as a child. For the purposes of determining when there is commencement of a program of education under DEA, it is proposed that the ''commencement of a program'' will be deemed to have occurred at the time of negotiation of the first DEA benefit payment check or upon receipt of the first electronic transfer of a DEA benefit payment. It also is proposed that such an election occur only after a written election to receive DEA has been submitted to VA. These proposed provisions are designed to ensure that elections are made with knowledge and become effective at the time of commencement of a program of education under DEA.

These changes are necessary because the Debt Collection Improvement Act of 1996 (sec. 31001, Pub. L. 104–134) requires that the Federal government make payments through electronic funds transfer. The proposed provisions are intended to adapt the current rules to include the new system of electronic transfer.

This document also proposes to make nonsubstantive amendments for purposes of clarification and to reflect current statutory authority. In addition, this document also seeks approval, as explained below, for certain collections of information in §§ 21.3023, 21.7042, and 21.7540.

The Department of Defense (DOD), the Department of Transportation (Coast Guard), and VA are jointly issuing this proposal insofar as it relates to the MGIB–SR program. This program is funded by DOD and the Coast Guard, and is administered by VA. The remainder of this proposal is issued solely by VA.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the provisions of the proposed §§ 21.3023, 21.7042, and 21.7540 include collections of information. Accordingly, as required by the Act at § 3507(d), VA has submitted a copy of this rulemaking action to the Office of Management and Budget (OMB) for its review of the proposed collections of information.

OMB assigns a control number for each collection of information it approves. VA 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.

Comments on the proposed collections of information should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420. Comments should indicate that they are submitted in response to ''RIN 2900–AH88.''

Title: Election to Receive Dependents' Educational Assistance Instead of Dependency and Indemnity Compensation.

Summary of collection of information: The collection of information in the proposed amendment to § 21.3023 in this rulemaking proceeding would implement a statutory provision that prevents an individual with potential eligibility for DEA and compensation, pension, or DIC from receiving more than one benefit for pursuing a program of education. The proposed rule would require such an individual to make an election if she or he wished to receive DEA.

Description of need for information and proposed use of information: An eligible child may not receive educational assistance under DEA and payments under DIC for the same school attendance. In order for VA to know when the child wishes to receive DEA, it is necessary for the child to state his or her desire for educational assistance under DEA.

Description of likely respondents: Individuals with potential eligibility for DEA.

Estimated number of respondents: 2,900 annually.

Estimated frequency of responses: Once per eligible claimant.

Estimated total annual reporting and recordkeeping burden: 580 hours of reporting burden. VA does not believe that there would be an additional recordkeeping burden.

Estimated average burden per collection: .2 hour.

Title: Election to Apply Selected Reserve Service to Either the Montgomery GI Bill—Active Duty or to the Montgomery GI Bill—Selected Reserve.

Summary of collection of information: The collection of information in the

proposed amendments to §§ 21.7042 and 21.7540 in this rulemaking proceeding would implement a statutory provision that prevents an individual with potential eligibility for educational assistance under both the Montgomery GI Bill—Active Duty or the Montgomery Bill—Selected Reserve from using the same Selected Reserve service to establish eligibility for assistance under the Montgomery GI Bill—Selected Reserve, and to establish entitlement to educational assistance at an increased monthly rate under the Montgomery GI Bill—Active Duty.

Description of need for information and proposed use of information: An individual who participates in the Montgomery GI Bill—Active Duty and who serves on active duty for two years followed by six years in the Selected Reserve must choose whether to apply the Selected Reserve service toward the Montgomery GI Bill—Active Duty or to the Montgomery GI Bill—Selected Reserve. If she or he decides to apply it towards the Montgomery GI Bill—Selected Reserve, she or he would be eligible for 36 months of educational assistance under the Montgomery GI Bill—Active Duty at the rate of $347.65 per month for full-time training and 12 months of educational assistance under the Montgomery GI Bill—Selected Reserve. If she or he chooses to apply that service towards the Montgomery GI Bill—Active Duty, she or he would be eligible for 36 months of educational assistance under the Montgomery GI Bill—Active Duty at the rate of $427.87 per month for full-time training while remaining ineligible for educational assistance under the Montgomery GI Bill—Selected Reserve. VA must know which benefit the individual wants the Selected Reserve service credited to in order to determine the proper payments to the individual.

Description of likely respondents: Members of the Selected Reserve.

Estimated number of respondents: 35 annually.

Estimated frequency of responses: Once per eligible claimant.

Estimated total annual reporting and recordkeeping burden: 11.67 hours of reporting burden. VA does not believe that there would be an additional recordkeeping burden.

Estimated average burden per collection: .33 hour.

The Department considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections 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.

OMB is required to make a decision concerning the proposed collections of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed regulations.

Regulatory Flexibility Act

The signers of this document hereby certify that this proposed rule, if promulgated, would not have significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule would directly affect only individuals and would not directly affect small entities. Pursuant to 5 U.S.C. 605(b), the proposed rule, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance numbers for programs affected by the proposed rule are 64.117 and 64.124. The proposed rule also affects the Montgomery GI Bill—Selected Reserve for which there is no Catalog of Federal Domestic Assistance number.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Defense Department, Education, Employment, Grant programs-education, Grant Programs—veterans, Health care, Loan programs—education, Loan Programs—veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation, Veterans, Vocational education, Vocational rehabilitation.

Approved: September 5, 1997.

Hershel W. Gober,

Acting Secretary of Veterans Affairs.

Approved: August 6, 1997.

G.R. Woolever,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Human Resources.

Approved: August 5, 1997.

Normand G. Lezy,

Lieutenant General, USAF, Deputy Assistant Secretary (Military Personnel Policy).

For the reasons set out in the preamble, 38 CFR part 21, subparts C, K, and L are proposed to be amended as follows.

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart C—Survivors' and Dependents' Educational Assistance Under 38 U.S.C. Chapter 35

1. The authority citation for part 21, subpart C, is revised to read as follows:

Authority: 38 U.S.C. 501(a), 512, 3500–3566, unless otherwise noted.

2. In § 21.3023, paragraph (c)(3) is amended by removing ''educational assistance'' and adding, in its place, ''education under DEA''; the section heading, paragraph (c) introductory text, and paragraph (c)(1) are revised, and an authority citation for the section is added, to read as follows:

§ 21.3023 Nonduplication; pension, compensation, and dependency and indemnity compensation.

* * * * *

(c) *Child; election.* An election by a child under this section must be submitted to VA in writing.

(1) Except as provided in paragraph (c)(2) of this section, an election to receive Survivors' and Dependents' Educational Assistance (DEA) is final when the eligible child commences a program of education under DEA (38 U.S.C. chapter 35). Commencement of a program of education under DEA will be deemed to have occurred for VA purposes on the date the first payment of DEA educational assistance is made, as evidenced by negotiation of the first check or receipt of the first payment by electronic funds transfer.

* * * * *

(Authority: 38 U.S.C. 3562)

Subpart K—All Volunteer Force Educational Assistance Program (Montgomery GI Bill—Active Duty)

3. The authority citation for part 21, subpart K, continues to read as follows:

Authority: 38 U.S.C. 501(a), chs. 30, 36, unless otherwise noted.

4. In § 21.7042, the section heading and paragraphs (d)(2), and (d)(3) are revised, and paragraph (d)(4) is added, to read as follows:

§ 21.7042 Eligibility for basic educational assistance.

* * * * *

(d) * * *

(2) An individual must elect, in writing, whether he or she wishes service in the Selected Reserve to be credited towards establishing eligibility under 38 U.S.C. chapter 30 or under 10 U.S.C. chapter 1606 when:

(i) The individual:

(A) Is a veteran who has established eligibility for basic educational assistance through meeting the provisions of paragraph (b) of this section; and

(B) Also is a reservist who has established eligibility for benefits under 10 U.S.C. chapter 1606 through meeting the requirements of § 21.7540; or

(ii) The individual is a member of the National Guard or Air National Guard who has established eligibility for basic educational assistance under 38 U.S.C. chapter 30 through activation under a provision of law other than 32 U.S.C. 316, 502, 503, 504, or 505.

(3) An election under this paragraph (d) to have Selected Reserve service credited towards eligibility for payment of educational assistance under 38 U.S.C. chapter 30 or under 10 U.S.C. chapter 1606 is irrevocable when the veteran either negotiates the first check or receives the first payment by electronic funds transfer of the educational assistance elected.

(4) If a veteran is eligible to receive educational assistance under both 38 U.S.C. chapter 30 and 10 U.S.C. chapter 1606, he or she may receive educational assistance alternately or consecutively under each of these chapters to the extent that the educational assistance is based on service not irrevocably credited to one or the other chapter as provided in paragraphs (d)(1) through (d)(3) of this section.

(Authority: 10 U.S.C. 16132; 38 U.S.C. 3033(c))

* * * * *

Subpart L—Educational Assistance for Members of the Selected Reserve

5. The authority citation for part 21, subpart L, is revised to read as follows:

Authority: 10 U.S.C. 1606; 38 U.S.C. 501, unless otherwise noted.

6. In § 21.7540, paragraph (c) and the authority citation for paragraph (d) are revised, to read as follows:

§ 21.7540 Eligibility for educational assistance.

* * * * *

(c) *Limitations on establishing eligibility.* (1) An individual must elect in writing whether he or she wishes service in the Selected Reserve to be credited towards establishing eligibility under 38 U.S.C. chapter 30 or under 10 U.S.C. chapter 1606 when:

(i) The individual is a reservist who is eligible for basic educational assistance provided under 38 U.S.C. 3012 and has established eligibility to that assistance partially through service in the Selected Reserve; or

(ii) The individual is a member of the National Guard or Air National Guard who has established eligibility for basic educational assistance provided under 38 U.S.C. 3012 through activation under a provision of law other than 32 U.S.C. 316, 502, 503, 504, or 505 followed by service in the Selected Reserve.

(2) An election under this paragraph (c) to have Selected Reserve service credited towards eligibility for payment of educational assistance under 38 U.S.C. chapter 30 or under 10 U.S.C. chapter 1606 is irrevocable when the reservist either negotiates the first check or receives the first payment by electronic funds transfer of the educational assistance elected.

(3) If a reservist is eligible to receive educational assistance under both 38 U.S.C. chapter 30 and 10 U.S.C. chapter 1606, he or she may receive educational assistance alternately or consecutively under each of these chapters to the extent that the educational assistance is based on service not irrevocably credited to one or the other chapter as provided in paragraphs (c)(1) and (c)(2) of this section.

(Authority: 10 U.S.C. 16132; 38 U.S.C. 3033(c))

* * * * *

(d) * * *

(Authority: 10 U.S.C. 16132(d), 16134)

[FR Doc. 97–30872 Filed 11–24–97; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[TN 86–1–9802b; TN 127–1–9803b; FRL–5922–7]

Designation of Areas for Air Quality Planning Purposes; Tennessee: Redesignation of the Polk County and New Johnsonville Sulfur Dioxide Nonattainment Area to Attainment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve requests for redesignation of the Polk County area and that portion of Benton and that portion of Humphreys Counties, Tennessee, surrounding TVA's Johnsonville plant (New Johnsonville area) from nonattainment to attainment for the sulfur dioxide (SO_2) National Ambient Air Quality Standards (NAAQS), pursuant to the request submitted on January 6, 1988, July 12, 1990, December 17, 1993, and April 17, 1995, by the State of Tennessee, through the Tennessee Department of Environment and Conservation (TDEC). EPA is also proposing to approve the maintenance plans.

In the final rules section of this **Federal Register**, the EPA is approving the State's State Implementation Plan (SIP) revision as a direct final rule without prior proposal because the EPA views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this proposed rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

DATES: To be considered, comments must be received by December 26, 1997.

ADDRESSES: Written comments on this action should be addressed to Mr. Scott M. Martin regarding the Polk County area and Mr. Steven M. Scofield regarding the New Johnsonville area at the EPA Regional Office listed below.

Copies of the documents relative 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.

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 443, 401 M Street, SW, Washington DC 20460

Environmental Protection Agency, Region 4 Air Planning Branch, 61 Forsyth Street, Atlanta, Georgia 30303

Tennessee Department of Environment and Conservation, Division of Air Pollution Control, 9th Floor L & C Annex, 401 Church Street, Nashville, Tennessee 37243–1531

FOR FURTHER INFORMATION CONTACT:

For the Polk County area: Mr. Scott M. Martin, Regulatory Planning Section, Air Planning Branch, Air, Pesticides, and Toxics Management Division, Region 4 Environmental Protection Agency, 61 Forsyth Street, Atlanta, Georgia 30303. The telephone number is 404/562–9036.

For the New Johnsonville area: Mr. Steven M. Scofield, Regulatory Planning Section, Air Planning Branch, Air, Pesticides, and Toxics Management Division, Region 4 Environmental Protection Agency, 61 Forsyth Street, Atlanta, Georgia 30303. The telephone number is 404/562–9034.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the rules section of this **Federal Register**.

Dated: October 10, 1997.

A. Stanley Meiburg,

Acting Regional Administrator.

[FR Doc. 97–30953 Filed 11–24–97; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 262 and 263

[FRL–5926–3]

Uniform Hazardous Waste Manifest: Notice of Public Meeting

AGENCY: Environmental Protection Agency.

ACTION: Notice of public meeting.

SUMMARY: The Environmental Protection Agency (EPA) will hold public meetings on December 11, 1997 and January 8, 1998 to make information available on a project underway to revise the Resource Conservation and Recovery Act (RCRA) regulations governing hazardous waste transportation.

ADDRESSES: The first public meeting will be held on Thursday, December 11, 1997 from 8:30 a.m. to 5:00 p.m. at the Hyatt Regency Crystal City at 2799 Jefferson Davis Highway, Arlington, Virginia 22202. The second meeting will be held on Thursday January 8, 1998 at the Sheraton Fisherman's Wharf Hotel at 2500 Mason Street, San Francisco, California 94133. A meeting for state regulators will take place at the above locations on Wednesday December 10, 1997 and Wednesday, January 7, 1998. States are also encouraged to attend the public meetings.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA Hotline at 800–824–9346 or TDD 800–553–7672 (hearing impaired). In the Washington D.C. metropolitan areas, call 703–412–9810 or TDD 703–412–3323.

SUPPLEMENTARY INFORMATION: Under RCRA, EPA published regulations governing hazardous waste management. A portion of these regulations cover the movement of hazardous waste from its site of generation to a facility that can appropriately manage the waste. Specifically, they are the regulations found at 40 CFR part 262 for packaging, labeling, marking, and manifesting of hazardous wastes in preparation for transport; the regulations found at 40 CFR part 263 which address transportation (and which are jointly issued by the Department of Transportation); the regulations at 40 CFR part 264, Subpart E and 40 CFR part 265, Subpart E governing the receipt of waste at Treatment Storage and Disposal Facilities; and 40 CFR part 271 regarding state program implementation of the manifest system.

EPA is preparing a rulemaking to modify the current hazardous waste manifest system to reduce its burden. EPA is considering several approaches to reducing the burden of the Uniform Hazardous Waste Manifest form and the manifest system in general. These include the use of automation to electronically prepare, transmit, and store manifests; the use of a streamlined paper form; easier access to manifest-related information; and allowing some current manifest users alternatives to the traditional tracking system.

The purpose of these public meetings is to explain the draft rulemaking strategies the Agency is considering and to gather information on whether these strategies ensure that the burden of the manifest tracking system is minimized while ensuring the safe movement of hazardous waste.

The Agency believes that this project will affect all small quantity generators and large quantity generators of hazardous waste. The regulated community will benefit from public meetings by having early input into the regulatory development process. The Agency will be able to use this early input to finalize options it will incorporate into a proposed rulemaking on the manifest. Such early discussion will result in more fully developed options which take into account as much as possible, the input received from participants. EPA will answer questions and will receive informal input from the regulated community and from states as to whether the strategies developed by EPA will result in burden reduction without compromising environmental protection.

EPA will also hold separate meetings with state hazardous waste regulators to discuss state implementation of the new manifest system. State meetings will be held on the day prior to the public meetings.

EPA anticipates publishing the proposed rulemaking in the Fall of 1998 at which time formal comments will be taken from the public. The RCRA Hotline will take names and addresses of those who would like copies of the materials developed at the meetings.

This document is also available in electronic format on the Internet. Follow these instructions to access the information electronically:

WWW: http://www.epa.gov/osw

FTP: ftp.epa.gov

Login: anonymous

Password: your internet address

Files are located in /OSW/publicate/htm

Dated: November 17, 1997.

Matthew Hale,

Acting Director, Office of Solid Waste.

[FR Doc. 97–30816 Filed 11–24–97; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 971029257–7257–01; I.D. No. 101097A]

RIN 0648–AG56

Designated Critical Habitat; Central California Coast and Southern Oregon/ Northern California Coast Coho Salmon

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

ACTION: Proposed rule; request for comments and notice of public hearings.

SUMMARY: The NMFS proposes to designate critical habitat for two Evolutionarily Significant Units (ESUs) of coho salmon (*Oncorhynchus kisutch*) pursuant to the Endangered Species Act of 1973 (ESA). Critical habitat for the Central California Coast ESU encompasses accessible reaches of all rivers (including estuarine areas and tributaries) between Punta Gorda and the San Lorenzo River (inclusive) in California. Also included are two rivers entering San Francisco Bay: Mill Valley Creek and Corte Madera Creek. Critical habitat for the Southern Oregon/ Northern California Coast ESU encompasses accessible reaches of all rivers (including estuarine areas and tributaries) between the Mattole River in California and the Elk River in Oregon, inclusive.

The areas described in this proposed rule represent the current freshwater and estuarine range of the listed species. For both ESUs, critical habitat includes all waterways, substrate, and adjacent riparian zones below longstanding, naturally impassable barriers (i.e., natural waterfalls in existence for at least several hundred years). NMFS has identified twelve dams in the range of these ESUs that currently block access to habitats historically occupied by coho salmon. However, NMFS has not designated these inaccessible areas as critical habitat because areas downstream are believed to be sufficient for the conservation of the ESUs. The economic and other impacts resulting from this critical habitat designation are expected to be minimal.

DATES: Comments must be received on or before January 26, 1998. Public hearings on this proposed action are scheduled for the month of December 1997. See **SUPPLEMENTARY INFORMATION** for dates and times of public hearings.

ADDRESSES: Comments should be sent to: Garth Griffin, NMFS, Protected Resources Division, 525 NE Oregon St., Suite 500, Portland, OR 97232–2737; or Craig Wingert, NMFS, Southwest Region, Protected Species Management Division, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213. See **SUPPLEMENTARY INFORMATION** for locations of public hearings.

FOR FURTHER INFORMATION CONTACT: Garth Griffin at (503) 231–2005, Craig Wingert at (562) 980–4021, or Joe Blum at (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

On October 31, 1996, NMFS published its determination to list Central California Coast coho salmon (Oncorhynchus kisutch) as threatened under the ESA (61 FR 56138). In a technical correction to the final listing determination (62 FR 1296, January 9, 1997), NMFS defined the Central California Coast coho salmon ESU to include all coho salmon naturally reproduced in streams between Punta Gorda in Humboldt County, California, and the San Lorenzo River in Santa Cruz County, California. Subsequently, on May 6, 1997, NMFS published its determination to list the Southern Oregon/Northern California Coast coho salmon ESU as threatened under the ESA (62 FR 24588) and defined the ESU to include all coho salmon naturally reproduced in streams between Cape Blanco in Curry County, Oregon, and Punta Gorda in Humboldt County, California.

Section 4(a)(3)(A) of the ESA requires that, to the maximum extent prudent and determinable, NMFS designate critical habitat concurrently with a determination that a species is endangered or threatened. On July 25, 1995, NMFS published a **Federal Register** notice (60 FR 38011) soliciting information and data regarding the biological status of West Coast coho salmon, available salmon conservation measures, and information on areas that may qualify as critical habitat. At the time of final listing for each of these two ESUs, critical habitat was not determinable, since information necessary to perform the required analyses was lacking. NMFS has determined that sufficient information now exists to designate critical habitat for the two listed coho salmon ESUs. NMFS has considered all available information and data in making this proposal.

Use of the term ''essential habitat'' within this Notice refers to critical habitat as defined by the ESA and should not be confused with the requirement to describe and identify Essential Fish Habitat (EFH) pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et sec.

Definition of Critical Habitat

Critical habitat is defined in section 3(5)(A) of the ESA as ''(i) the specific areas within the geographical area occupied by the species * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species * * * upon a determination by the Secretary of Commerce (Secretary) that such areas are essential for the conservation of the species.'' (see 16 U.S.C. 1532(5)(A)). The term ''conservation,'' as defined in section 3(3) of the ESA, means ''* * * to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.'' (see U.S.C. 1532(3)).

In designating critical habitat, NMFS considers the following requirements of the species: (1) Space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, or rearing of offspring; and, generally, (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of this species (see 50 CFR 424.12(b)). In addition to these factors, NMFS also focuses on the known physical and biological features (primary constituent elements) within the designated area that are essential to the conservation of the species and may require special management considerations or protection. These essential features may include, but are not limited to, spawning sites, food resources, water quality and quantity, and riparian vegetation (see 50 CFR 424.12(b))).

Consideration of Economic and Other Factors

The economic and other impacts of a critical habitat designation have been considered and evaluated in this proposed rulemaking. NMFS identified present and anticipated activities that may adversely modify the area(s) being considered or be affected by a

designation. An area may be excluded from a critical habitat designation if NMFS determines that the overall benefits of exclusion outweigh the benefits of designation, unless the exclusion will result in the extinction of the species (see 16 U.S.C. 1533(b)(2)).

The impacts considered in this analysis are only those incremental impacts specifically resulting from a critical habitat designation, above the economic and other impacts attributable to listing the species or resulting from other authorities. Since listing a species under the ESA provides significant protection to a species' habitat, in many cases, the economic and other impacts resulting from the critical habitat designation, over and above the impacts of the listing itself, are minimal (see Significance of Designating Critical Habitat section of this notice). In general, the designation of critical habitat highlights geographical areas of concern and reinforces the substantive protection resulting from the listing itself.

Impacts attributable to listing include those resulting from the ''take'' prohibitions contained in section 9 of the ESA and associated regulations. ''Take,'' as defined in the ESA, means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (see 16 U.S.C. 1532(19)). Harm can occur through destruction or modification of habitat (whether or not designated as critical) that significantly impairs essential behaviors, including breeding, feeding, rearing, or migration.

Significance of Designating Critical Habitat

The designation of critical habitat does not, in and of itself, restrict human activities within an area or mandate any specific management or recovery actions. A critical habitat designation contributes to species conservation primarily by identifying important areas and by describing the features within those areas that are essential to the species, thus alerting public and private entities to the area's importance. Under the ESA, the only regulatory impact of a critical habitat designation is through the provisions of section 7. Section 7 applies only to actions with Federal involvement (e.g., authorized, funded, or conducted by a Federal agency) and does not affect exclusively state or private activities.

Under the section 7 provisions, a designation of critical habitat would require Federal agencies to ensure that any action they authorize, fund, or carry out is not likely to destroy or adversely modify designated critical habitat. Activities that destroy or adversely modify critical habitat are defined as those actions that ''appreciably diminish the value of critical habitat for both the survival and recovery'' of the species (see 50 CFR 402.02). Regardless of a critical habitat designation, Federal agencies must ensure that their actions are not likely to jeopardize the continued existence of the listed species. Activities that jeopardize a species are defined as those actions that ''reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery'' of the species (see 50 CFR 402.02). Using these definitions, activities that would destroy or adversely modify critical habitat would also be likely to jeopardize the species. Therefore, the protection provided by a critical habitat designation generally duplicates the protection provided under the section 7 jeopardy provision. Critical habitat may provide additional benefits to a species in cases where areas outside the species' current range have been designated. When actions may affect these areas, Federal agencies are required to consult with NMFS under section 7 (see 50 CFR 402.14(a)), a requirement which may not have been recognized but for the critical habitat designation.

A designation of critical habitat provides a clear indication to Federal agencies as to when section 7 consultation is required, particularly in cases where the action would not result in immediate mortality, injury, or harm to individuals of a listed species (e.g., an action occurring within the critical area when a migratory species is not present). The critical habitat designation, describing the essential features of the habitat, also assists in determining which activities conducted outside the designated area are subject to section 7, i.e., activities that may affect essential features of the designated area.

A critical habitat designation will also assist Federal agencies in planning future actions, since the designation establishes, in advance, those habitats that will be given special consideration in section 7 consultations. With a designation of critical habitat, potential conflicts between Federal actions and endangered or threatened species can be identified and possibly avoided early in the agency's planning process.

Another indirect benefit of a critical habitat designation is that it helps focus Federal, state, and private conservation and management efforts in such areas. Management efforts may address special considerations needed in critical habitat areas, including conservation regulations to restrict private as well as Federal activities. The economic and other impacts of these actions would be considered at the time of those proposed regulations and, therefore, are not considered in the critical habitat designation process. Other Federal, state, and local management programs, such as zoning or wetlands and riparian lands protection, may also provide special protection for critical habitat areas.

Process for Designating Critical Habitat

Developing a proposed critical habitat designation involves three main considerations. First, the biological needs of the species are evaluated and habitat areas and features that are essential to the conservation of the species are identified. If alternative areas exist that would provide for the conservation of the species, such alternatives are also identified. Second, the need for special management considerations or protection of the area(s) or features is evaluated. Finally, the probable economic and other impacts of designating these essential areas as ''critical habitat'' are evaluated. After considering the requirements of the species, the need for special management, and the impacts of the designation, the proposed critical habitat is published in the **Federal Register** for comment. The final critical habitat designation, considering comments on the proposal and impacts assessment, is typically published within one year of the proposed rule. Final critical habitat designations may be revised, using the same process, as new information becomes available.

A description of the critical habitat, need for special management, impacts of designating critical habitat, and the proposed action are described in the following sections.

Critical Habitat of California and Southern Oregon Coho Salmon

Biological information for listed coho salmon can be found in NMFS species' status reviews (Bryant, 1994; Weitkamp *et al.*, 1995; NMFS, 1997), species life history summaries (Shapavalov and Taft, 1954; Laufle *et al.*, 1986; Hassler, 1987; Anderson, 1995; Sandercock, 1991), and in **Federal Register** notices of proposed and final listing determinations (59 FR 21744, April 26, 1994; 60 FR 38011, July 25, 1995; 61 FR 56138, October 31, 1996; 62 FR 24588, May 6, 1997).

The current geographic range of coho salmon from the Oregon and California coasts includes vast areas of the North Pacific ocean, nearshore marine zone, and extensive estuarine and riverine

areas. The marine distribution south of Punta Gorda, California, appears to encompass a relatively narrow, nearshore strip approximately 100 km wide (Taft, 1937; Shapovalov and Taft, 1954; Laufle *et al.*, 1986; NOAA, 1990; Weitkamp *et al.*, 1995). North of Punta Gorda, the distribution widens to encompass nearly all marine areas north of 41 ° N latititude (Wright, 1968; Godfrey *et al.*, 1975; NOAA, 1990). Major rivers, estuaries, and bays known to support coho salmon within the Southern Oregon/Northern California Coast ESU include the Rogue River, Smith River, Klamath River, Mad River, Humboldt Bay, Eel River, and Mattole River. Within the range of the Central California Coast ESU, major rivers, estuaries, and bays include the Ten Mile, Noyo, Big, Navarro, Garcia, Gualala, and Russian Rivers, and Tomales and San Francisco Bays [Emmett *et al.*, 1991; Nickelson *et al.*, 1992; Brown and Moyle, 1991; Bryant, 1994; California Department of Fish and Game (CDFG), 1994; Weitkamp *et al.*, 1995]. Many smaller coastal rivers and streams in each ESU also provide essential estuarine habitat for coho salmon, but access is often constrained by seasonal fluctuations in hydrologic conditions.

Any attempt to describe the current distribution of coho salmon must take into account the fact that extant populations and densities are a small fraction of historical levels. All coho salmon stocks in the Central California Coast ESU are extremely depressed relative to past abundance and there are limited data to assess population numbers or trends. The main coho salmon stocks in this region are from the Ten Mile River, Big River, Noyo River, Navarro River, Garcia River, Gualala River, Russian River, Lagunitas Creek, Waddell Creek, and Scott Creek. Several of these stocks are heavily influenced by hatcheries and apparently have little natural production in mainstem reaches. Historically, coho salmon abundance within this region was estimated from 50,000 to 125,000 native coho salmon. Presently, coho salmon abundance within this region is estimated to be less than 5,000 naturally reproducing fish, and a vast majority of these are considered to be non-native fish (Brown and Moyle, 1991; Bryant, 1994; CDFG, 1994).

All coho salmon stocks between Punta Gorda and Cape Blanco in the Southern Oregon/Northern California Coast ESU are also depressed relative to past abundance, and there are limited data to assess population numbers or trends currently. The main coho salmon stocks in this region are from the Rogue, Klamath, and Trinity Rivers, and the latter two are heavily influenced by hatcheries and apparently have little natural production in mainstem reaches. Other important stocks within this ESU include the Winchuck, Chetco, Smith, Mad, Elk, Eel, and the Mattole Rivers. Historically, coho salmon abundance within this region was estimated from 150,000 to 400,000 native fish. Presently, abundance is estimated to be less than 30,000 naturally reproducing coho salmon, and a vast majority of these (roughly 20,000) are considered to be non-native fish (Brown and Moyle, 1991, Bryant, 1994; CDFG, 1994; Weitkamp *et al.*, 1995). Within the range of both ESUs, the species' life cycle can be separated into five essential habitat types: (1) Juvenile summer and winter rearing areas; (2) juvenile migration corridors; (3) areas for growth and development to adulthood; (4) adult migration corridors; and (5) spawning areas. Areas 1 and 5 are often located in small headwater streams, while areas 2 and 4 include these tributaries as well as mainstem reaches and estuarine zones. Growth and development to adulthood (area 3) occurs primarily in near- and off-shore marine waters, although final maturation takes place in freshwater tributaries when the adults return to spawn. Within these areas, essential features of coho salmon critical habitat include adequate; (1) substrate, (2) water quality, (3) water quantity, (4) water temperature, (5) water velocity, (6) cover/shelter, (7) food, (8) riparian vegetation, (9) space, and (10) safe passage conditions. Given the vast geographic range occupied by each of these coho salmon ESUs and the diverse habitat types used by the various life stages, it is not practical to describe specific values or conditions for each of these essential habitat features. However, good summaries of these environmental parameters and freshwater factors that have contributed to the decline of this and other salmonids can be found in reviews by CDFG, 1965; California Advisory Committee on Salmon and Steelhead Trout (CACSST), 1988; Brown and Moyle, 1991; Bjornn and Reiser, 1991; Nehlsen *et al.*, 1991; Higgins *et al.*, 1992; California State Lands Commission (CSLC), 1993; Botkin *et al.*, 1995; NMFS, 1996; and Spence *et al.*, 1996.

NMFS believes that the current freshwater and estuarine range of the species encompasses all essential habitat features and is adequate to ensure the species' conservation. Therefore, designation of habitat areas outside the species' current range is not necessary. It is important to note that habitat quality in this current range is intrinsically related to the quality of upland areas and of inaccessible headwater or intermittent streams which provide key habitat elements (e.g., large woody debris, gravel, water quality) crucial for coho in downstream reaches. NMFS recognizes that estuarine habitats are important for rearing and migrating coho salmon and has included them in this designation. Marine habitats (i.e., oceanic or nearshore areas seaward of the mouth of coastal rivers) are also vital to the species, and ocean conditions are believed to have a major influence on coho salmon survival (see review in Pearcy, 1992). However, no need appears to be necessary for special management consideration or protection of this habitat. Therefore, NMFS is not proposing to designate critical habitat in marine areas at this time. If additional information becomes available that supports the inclusion of such areas, NMFS may revise this designation.

Defining specific river reaches that are critical for coho salmon is difficult because of the current low abundance of the species and of our imperfect understanding of the species' freshwater distribution, both current and historical. The latter is due, in large part, to the lack of comprehensive sampling effort dedicated to monitoring the species. For example, in contrast to coho salmon spawner surveys in index and randomly selected stream reaches north of Cape Blanco, Oregon, information on adult coho salmon distribution in California and southwest Oregon streams has been typically gathered secondarily to chinook salmon surveys. Some surveys concerning juveniles have been conducted. However, they are rarely conducted in a consistent, systematic and comprehensive manner and typically do not give an accurate estimate of future adult escapement.

In California and Oregon, several recent efforts have been made to characterize the species' distribution [Brown and Moyle, 1991; Hassler *et al.*, 1991; The Wilderness Society (TWS), 1993; Bryant, 1994; CDFG, 1994; Weitkamp *et al.*, 1995; Adams *et al.*, 1996; Oregon Coastal Salmon Restoration Initiative (OCSRI), 1997] or to identify watersheds important to at-risk populations of salmonids and resident fishes [Forest Ecosystem Management Assessment Team (FEMAT), 1993]. In southwest Oregon, the Oregon Department of Fish and Wildlife (ODFW) has developed a draft series of maps depicting ''core areas'' for coho salmon and other species. These core areas are defined as ''reaches or

watersheds within individual coastal basins that are judged to be of critical importance to the sustenance of salmon populations that inhabit those basins'' (OCSRI, 1997) and are derived from 1:100,000 U.S. Geological Survey (USGS) hydrologic unit maps. The areas depicted are primarily river reaches where best available data or professional judgement indicate high concentrations of spawning or rearing coho salmon. Within the Oregon portion of the Southern Oregon/Northern California Coast ESU, 17 areas have been identified as core areas, and the vast majority of these (14 of 17) are located in the mid-to-upper portions of the Rogue River basin. Notably missing are core areas for this species in the Chetco, Pistol, and Winchuck River basins. The ODFW recognizes that coho salmon do inhabit these other southwest Oregon basins, but considers the species ''rare'' in coastal streams draining the Siskiyou Mountains (ODFW, 1995). While NMFS believes that this mapping effort holds great promise to focus habitat protection and restoration efforts, the core areas are only a subset of the areas that NMFS believes are critical habitat for coho salmon.

In California, the NMFS and U.S. Forest Service (Bryant and Olsen, in prep.) have developed a series of Geographic Information System maps depicting coho salmon historic and current distribution by using data and information NMFS had compiled for the west coast coho salmon status review and information previously developed on fish distributions by ODFW, California Department of Fish and Game, U.S. Forest Service, and U.S. Fish and Wildlife Service. These coho salmon distribution maps, depicted on USGS hydrologic units at a scale of 1:100,000, are the first attempt to develop a comprehensive distribution profile of coho salmon throughout California's watersheds and are an important step in the development of conservation and recovery efforts.

The limited data across the range of both ESUs, as well as dissimilarities in data types within the Southern Oregon/Northern California Coast ESU, make it difficult to define this species distribution at a fine scale. However, through consultations with other Federal and State biologists, NMFS has been able to construct a clearer picture of coho salmon distribution at the scale of fifth, sixth, and seventh field watersheds (Bryant and Olsen, in prep.). These watersheds and drainages provide a finer scale of geographic resolution than the larger USGS hydrologic units they are nested within. NMFS explored using these data to more accurately characterize the coho salmon's distribution in these listed ESUs. Except in a very few cases, the assessment revealed that coho salmon, though considerably reduced in population size, are still distributed or have the potential for distribution throughout nearly all watersheds within the geographic range of both ESUs. Notable exceptions are areas above several impassable dams (see Barriers Within the Species' Range section of this notice) and some streams that have had only sporadic presence/absence sampling.

Based on consideration of the best available information regarding the species' current distribution, NMFS believes that the preferred approach to identifying critical habitat is to designate all areas (and their adjacent riparian zones) accessible to the species within the range of each ESU. The NMFS has taken this approach in previous critical habitat designations for other species (e.g., Snake River salmon and proposed for Umpqua River cutthroat trout) which inhabit a wide range of freshwater habitats, in particular small tributary streams (58 FR 68543, December 28, 1993; 62 FR 40786, July 30, 1997). NMFS believes that adopting a more inclusive, watershed-based description of critical habitat is appropriate because it (1) recognizes the species' use of diverse habitats and underscores the need to account for all of the habitat types supporting the species' freshwater and estuarine life stages, from small headwater streams to migration corridors and estuarine rearing areas; (2) takes into account the natural variability in habitat use (e.g., some streams may have fish present only in years with plentiful rainfall) that makes precise mapping difficult; and (3) reinforces the important linkage between aquatic areas and adjacent riparian/upslope areas.

An array of management issues encompass these habitats, and special management considerations will be necessary, especially on lands and streams under Federal ownership (see Activities that May Affect Critical Habitat and Need for Special Management Considerations or Protection sections of this notice). While marine areas are also a critical link in this cycle, NMFS does not believe that special management considerations are needed to conserve the habitat features in these areas. Hence, only the freshwater and estuarine areas are being proposed for critical habitat at this time.

Barriers Within the Species' Range

Within the range of both ESUs, coho salmon face a multitude of barriers that limit the access of juvenile and adult fish to essential freshwater habitats. While some of these are natural barriers (e.g., waterfalls or high-gradient velocity barriers) that have been in existence for hundreds or thousands of years, more significant are the manmade barriers that have been created in the past several decades (CACSST, 1988; FEMAT, 1993; Botkin *et al.*, 1995; National Research Council, 1996). The extent of such barriers as culverts and road crossing structures that impede or block fish passage appears to be substantial. For example, of 532 fish presence surveys conducted in Oregon coastal basins during the 1995 survey season, nearly 15 percent of the confirmed end of fish use were due to human barriers, principally road culverts (OCSRI, 1997). Pushup dams/diversions and irrigation withdrawals also present significant barriers or lethal conditions (e.g., high water temperatures) to coho salmon in southern Oregon and California. However, because these manmade barriers can, under certain flow conditions, be surmounted by fish or present only a temporary/seasonal barrier, NMFS does not consider them to delineate the upstream extent of critical habitat.

Numerous hydropower and water storage projects have been built which either block access to areas used historically by coho salmon or alter the hydrograph of downstream river reaches. NMFS has identified a total of 12 dams within the range of both ESUs which currently have no fish passage facilities to allow coho access to former spawning and rearing habitats. Blocked habitat constitutes approximately 9 to 11 percent of the historic range of each ESU. While these blocked areas are proportionally significant in certain basins, NMFS believes this blocked habitat is not currently essential for the recovery of either ESU. NMFS will re-evaluate this conclusion during the recovery planning process and in section 7 consultation.

Because these projects are widely distributed throughout the range of each ESU, they can have a major downstream influence on coho salmon. Such impacts can include the following: Depletion and storage of natural flows which can drastically alter natural hydrological cycles; increase juvenile and adult mortality due to migration delays resulting from insufficient flows or habitat blockages; loss of sufficient habitat due to deterring and blockage; stranding of fish resulting from rapid flow fluctuations; entrainment of juveniles into poorly screened or unscreened diversions; and increased

mortality resulting from increased water temperatures (CACSST, 1988; Bergren and Filardo, 1991; CDFG, 1991; Reynolds *et al.*, 1993; Chapman *et al.*, 1994; Cramer *et al.*, 1995; NMFS, 1996). In addition to these factors, reduced flows negatively affect fish habitats due to increased deposition of fine sediments in spawning gravels, decreased recruitment of large woody debris and spawning gravels, and encroachment of riparian and non-endemic vegetation into spawning and rearing areas resulting in reduced available habitat (CACSST, 1988; FEMAT, 1993; Botkin *et al.*, 1995; NMFS, 1996). These dam-related factors will be effectively addressed through section 7 consultations. Following are brief summaries of the 12 dams (by ESU, ordered from south to north) identified within the range of both ESUs and the habitats these dams effectively remove from coho salmon production.

Dams in the Range of the Central California Coast ESU

There are five dams within the range of this ESU that currently block access to historical spawning and rearing areas of coho salmon. Combined, these blocked areas amount to approximately 9 percent of the freshwater and estuarine range of the ESU.

1. Newell Dam is located on Newell Creek (tributary to the San Lorenzo River), approximately 18 miles (29 km) upstream from the Pacific Ocean, and forms Loch Lomond reservoir in Santa Cruz County, California. The dam does not have a fish passage facility, and upon its completion in 1960, blocked access to approximately 5 miles (8 km) of mainstem upstream habitat. These blocked areas constitute approximately 26 percent of the entire San Lorenzo River basin.

2. Peters Dam is located on Lagunitas Creek, approximately 14 miles (23 km) upstream from the Pacific Ocean, and forms Kent Lake in Marin County, California. The dam does not have a fish passage facility, and upon its completion in 1940, blocked access to approximately 8 miles (13 km) of mainstem upstream habitat. These blocked areas constitute approximately 6 percent of the entire Lagunitas Creek basin.

3. Nicasio Dam is located on Nicasio Creek (tributary to Lagunitas Creek), approximately 8 miles (13 km) upstream from the Pacific Ocean, and forms Nicasio Reservoir in Marin County, California. The dam does not have a fish passage facility, and upon its completion in 1961, blocked access to approximately 5 miles (8 km) of mainstem upstream habitat. These blocked areas constitute approximately 10 percent of the entire Lagunitas Creek basin.

4. Warm Springs Dam is located on Dry Creek (tributary to the Russian River), approximately 45 miles (72 km) upstream from the Pacific Ocean, and forms Sonoma Lake in Sonoma County, California. The dam does not have a fish passage facility, and upon its completion in 1982, blocked access to approximately 50 miles (80 km) of upstream habitat. These blocked areas constitute approximately 9 percent of the entire Russian River basin.

5. Coyote Dam is located on the mainstem Russian River, approximately 95 miles (153 km) upstream from the Pacific Ocean, and forms Lake Mendocino in Mendocino County, California. The dam does not have a fish passage facility, and upon its completion in 1959, blocked access to approximately 36 miles (58 km) of mainstem upstream habitat. These blocked areas constitute approximately 7 percent of the entire Russian River basin.

Dams in the Range of the Southern Oregon/Northern California Coast ESU

There are seven dams within the range of this ESU that currently block access to historical spawning and rearing areas of coho salmon. Combined, these blocked areas amount to approximately 11 percent of the freshwater and estuarine range of the ESU.

1. Scott Dam is located on the mainstem Eel River, approximately 169 miles (272 km) upstream from the Pacific Ocean, and forms Lake Pillsbury in Lake County, California. The dam does not have a fish passage facility, and upon its completion in 1922, blocked access to approximately 36 miles (58 km) of upstream habitat. These blocked areas constitute approximately 8 percent of the entire Eel River basin.

2. Matthews Dam is located on the mainstem Mad River, approximately 79 miles (127 km) upstream from the Pacific Ocean, and forms Ruth Lake in Trinity County, California. The dam does not have a fish passage facility, and upon its completion in 1961, blocked access to approximately 2 miles (3 km) of mainstem upstream habitat. These blocked areas constitute approximately 13 percent of the entire Mad River basin.

3. Lewiston Dam is located on the Trinity River (tributary to the lower Klamath River), approximately 110 miles (177 km) upstream from the Pacific Ocean, and forms Lewiston Reservoir in Trinity County, California. The dam does not have a fish passage facility, and upon its completion in 1963, blocked access to approximately 109 miles (175 km) of upstream habitat. These blocked areas constitute approximately 24 percent of the Trinity River subbasin and 9 percent of the entire Klamath River basin.

4. Dwinnell Dam is located on the Shasta River (tributary to the upper Klamath River), approximately 214 miles (345 km) upstream from the Pacific Ocean, and forms Dwinnell Reservoir in Siskiyou County, California. The dam does not have a fish passage facility, and upon its completion in 1928, blocked access to approximately 17 miles (27 km) of upstream habitat. These blocked areas constitute approximately 17 percent of the Shasta River subbasin and 2 percent of the entire Klamath River basin.

5. Iron Gate Dam is located on the mainstem Klamath River, approximately 190 miles (306 km) upstream from the Pacific Ocean, and forms Iron Gate Reservoir in Siskiyou County, California. The dam does not have a fish passage facility, and upon its completion in 1961, blocked access to approximately 30 miles (48 km) of mainstem upstream habitat. These blocked areas constitute approximately 8 percent of the entire Klamath River basin.

6. Applegate Dam is located on the Applegate River (tributary to the Rogue River), approximately 140 miles (225 km) upstream from the Pacific Ocean, and forms Applegate Reservoir in Jackson County, Oregon. The dam does not have a fish passage facility, and upon its completion in 1980, blocked access to approximately 30 miles (48 km) of upstream habitat. These blocked areas constitute approximately 29 percent of the Applegate River subbasin and approximately 5 percent of the entire Rogue River basin that was historically accessible to coho salmon.

7. Lost Creek Dam is located on the Rogue River, approximately 156 miles (252 km) upstream from the Pacific Ocean, and forms Lost Creek Reservoir in Jackson County, Oregon. The dam does not have a fish passage facility, and upon its completion in 1977, blocked access to approximately 6 miles (10 km) of mainstem upstream habitat. These blocked areas constitute approximately 1 percent of the entire Rogue River basin that was historically accessible to coho salmon.

Land Ownership Within the Species' Range

Tables 5 and 6 summarize the major river basins inhabited by each coho salmon ESU as well as counties containing basins designated as critical

habitat. NMFS has also derived estimates of land ownership by Federal, State, and Private/Other (primarily private and tribal) landholders for each of the major river basins. Due to data limitations which prevent mapping the precise river reaches inhabited by coho salmon, the ownership estimates were based on land area within entire river basins. Aggregating all basins in the Central California Coast ESU yields ownership estimates of approximately 5 percent Federal; 6 percent State, and 89 percent Private/Other lands. In contrast, ownership for the Southern Oregon/ Northern California Coast ESU is approximately 53 percent Federal, 1 percent State, and 46 percent Private/ Other lands. These data clearly indicate that the role of Federal land/water management agencies will be greater in the Southern Oregon/Northern California Coast ESU while private landholders will play a major role in protecting and restoring coho salmon habitat in the Central California Coast ESU.

Need for Special Management Considerations or Protection

In order to assure that the essential areas and features are maintained or restored, special management may be needed. Activities that may require special management considerations for freshwater and estuarine life stages of listed coho salmon include, but are not limited to (1) land management; (2) timber harvest; (3) point and non-point water pollution; (4) livestock grazing; (5) habitat restoration; (6) irrigation water withdrawals and returns; (7) mining; (8) road construction; (9) dam operation and maintenance; and (10) dredge and fill activities. Not all of these activities are necessarily of current concern within every watershed; however, they indicate the potential types of activities that will require consultation in the future. No special management considerations have been identified for listed coho salmon while they are residing in the ocean environment.

Activities That May Affect Critical Habitat

A wide range of activities may affect the essential habitat requirements of listed coho salmon. More in-depth discussions are contained in the **Federal Register** notices announcing the listing determinations for each ESU (61 FR 56138, October 31, 1996; 62 FR 24588, May 6, 1997). These activities include water and land management actions of Federal agencies (i.e., U.S. Forest Service, U.S. Bureau of Land Management, U.S. Army Corps of Engineers, U.S. Bureau of Reclamation, the Federal Highway Administration, and the Federal Energy Regulatory Commission) and related or similar actions of other federally regulated projects and lands, including livestock grazing allocations by the U.S. Forest Service and U.S. Bureau of Land Management; hydropower sites licensed by the Federal Energy Regulatory Commission; dams built or operated by the U.S. Army Corps of Engineers or U.S. Bureau of Reclamation; timber sales conducted by the U.S. Forest Service and U.S. Bureau of Land Management; road building activities authorized by the Federal Highway Administration, U.S. Forest Service, and U.S. Bureau of Land Management; and mining and road building activities authorized by the states of California and Oregon. Other actions of concern include dredge and fill, mining, and bank stabilization activities authorized or conducted by the U.S. Army Corps of Engineers.

The Federal agencies that will most likely be affected by this critical habitat designation include the U.S. Forest Service, U.S. Bureau of Land Management, U.S. Bureau of Reclamation, U.S. Army Corps of Engineers, the Federal Highway Administration, and the Federal Energy Regulatory Commission. This designation will provide these agencies, private entities, and the public with clear notification of critical habitat designated for listed coho salmon and the boundaries of the habitat and protection provided for that habitat by the section 7 consultation process. This designation will also assist these agencies and others in evaluating the potential effects of their activities on listed coho salmon and their critical habitat and in determining when consultation with NMFS is appropriate.

Expected Economic Impacts

The economic impacts to be considered in a critical habitat designation are the incremental effects of critical habitat designation above the economic impacts attributable to either listing or to authorities other than the ESA (see Consideration of Economic and Other Factors section of this notice). Incremental impacts result from special management activities in areas outside the present distribution of the listed species that have been determined to be essential to the conservation of the species. However, NMFS has determined that the species' present freshwater and estuarine range contains sufficient habitat for conservation of the species. Therefore, the economic impacts associated with this critical habitat designation are expected to be minimal.

The Forest Service, Bureau of Land Management, Bureau of Reclamation, and Army Corps of Engineers manage areas of proposed critical habitat for the listed coho salmon ESUs. The Corps of Engineers and other Federal agencies that may be involved with funding or permits for projects in critical habitat areas may also be affected by this designation. Because NMFS believes that virtually all ''adverse modification'' determinations pertaining to critical habitat would also result in ''jeopardy'' conclusions, designation of critical habitat is not expected to result in significant incremental restrictions on Federal agency activities. Critical habitat designation will, therefore, result in few, if any, additional economic effects beyond those that may have been caused by listing and by other statutes. Additionally, previously completed biological opinions would not require re-initiation to reconsider any critical habitat designated in this rulemaking.

Public Comments Solicited; Public Hearings

NMFS is soliciting information, comments and/or recommendations on any aspect of this proposal from all concerned parties (see **ADDRESSES**). In particular, NMFS is requesting any data, maps, or reports describing areas that should be excluded from the critical habitat designation due to either the species' historic absence or the lack of special management considerations required in a particular area. NMFS will consider all information, comments, and recommendations received before reaching a final decision.

Joint Commerce-Interior ESA implementing regulations state that the Secretary ''shall promptly hold at least one public hearing if any person so requests within 45 days of publication of a proposed regulation to * * * designate or revise critical habitat.'' (see 50 CFR 424.16(c)(3)). Public hearings on the proposed rule provide the opportunity for the public to give comments and to permit an exchange of information and opinion among interested parties. NMFS encourages the public's involvement in such ESA matters.

The public will have the opportunity to provide oral and written testimony at the public hearings. Written comments on the proposed rule may also be submitted to Garth Griffin (see **ADDRESSES** and **DATES**). The hearings are scheduled from 6 p.m. to 9 p.m. as follows:

1. Monday, December 8, 1997—Gold Beach City Hall, City Council Chambers, 29592 Ellensburg Avenue, Gold Beach, Oregon.

2. Tuesday, December 9, 1997—Eureka Inn, 518 7th Street, Eureka, California.

3. Thursday, December 11, 1997—Days Inn, 185 Railroad Street, Santa Rosa, California.

These hearings are physically accessible to people with disabilities. Requests for sign language interpretation or other aids should be directed to Garth Griffin or Craig Wingert (see **ADDRESSES**).

Compliance With Existing Statutes

NMFS has determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared for critical habitat designations made pursuant to the ESA. See *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

Classification

The Assistant Administrator for Fisheries, NOAA (AA) has determined that this rule is not significant for purposes of Executive Order (E.O.) 12866.

NMFS proposes to designate only the current range of these coho salmon ESUs as critical habitat. Given the affinity of this species to spawn in small streams, this current range encompasses a wide range of habitat, including small tributary reaches, as well as mainstem, off-channel and estuarine areas. Areas excluded from this proposed designation include nearshore habitats in the Pacific Ocean, historically-occupied areas above 12 extant and impassable dams, and headwater areas above impassable natural barriers (e.g., long-standing, natural waterfalls). NMFS has concluded that currently inhabited areas within the range of each ESU are the minimum habitat necessary to ensure conservation and recovery of the listed species.

Since NMFS is designating the current range of the listed species as critical habitat, this designation will not impose any additional requirements or economic effects upon small entities, beyond those which may accrue from section 7 of the ESA. Section 7 requires Federal agencies to insure that any action they carry out, authorize, or fund is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat (ESA section 7(a)(2)). The consultation requirements of section 7 are nondiscretionary and are effective at the time of species' listing. Therefore, Federal agencies must consult with NMFS and ensure their actions do not jeopardize a listed species, regardless of whether critical habitat is designated.

In the future, should NMFS determine that designation of habitat areas outside the species' current range is necessary for conservation and recovery, NMFS will analyze the incremental costs of that action and assess its potential impacts on small entities, as required by the Regulatory Flexibility Act. Until that time, a more detailed analysis would be premature and would not reflect the true economic impacts of the proposed action on local businesses, organizations, and governments.

Accordingly, the Assistant General Counsel for Legislation and Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant economic impact of a substantial number of small entities, as described in the Regulatory Flexibility Act.

This rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

The AA has determined that the proposed designation is consistent to the maximum extent practicable with the approved Coastal Zone Management Program of the states of Oregon and California. This determination will be submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act.

References

The complete citations for the references used in this document can be obtained by contacting Garth Griffin, NMFS (see **ADDRESSES**).

List of Subjects in 50 CFR Part 226

Endangered and threatened species, Incorporation by reference.

Dated: November 19, 1997.

David L. Evans,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 226 is proposed to be amended as follows:

PART 226—DESIGNATED CRITICAL HABITAT

1. The authority citation for part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

2. Sections 226.24 and 226.25 are added to subpart C to read as follows:

§ 226.24 Central California Coast Coho Salmon (Oncorhynchus kisutch).

Critical habitat is designated to include all river reaches accessible to listed coho salmon from Punta Gorda in northern California south to the San Lorenzo River in central California, including Mill Valley and Corte Madera Creeks, tributaries to San Francisco Bay. Critical habitat consists of the water, substrate, and adjacent riparian zone of estuarine and riverine reaches in hydrologic units and counties identified in Table 5 of this part. Accessible reaches are those within the historical range of the ESU that can still be occupied by any life stage of coho salmon. Inaccessible reaches are those above specific dams identified in Table 5 of this part or above longstanding, naturally impassable barriers (i.e., natural waterfalls in existence for at least several hundred years). Adjacent riparian zones are defined as those areas within a horizontal distance of 300 ft (91.4 m) from the normal line of high water of a stream channel or adjacent off-channel habitats (600 ft or 182.8 m, when both sides of the channel are included). Figure 10 of this part identifies the general geographic extent of larger rivers and streams within hydrologic units designated as critical habitat for Central California Coast coho salmon. Note that Figure 10 of this part does not constitute the definition of critical habitat but, instead, is provided as a general reference to guide Federal agencies and interested parties in locating the boundaries of critical habitat for listed Central California Coast coho salmon. Hydrologic units are those defined by the Department of the Interior (DOI), U.S. Geological Survey (USGS) publication, ''Hydrologic Unit Maps,'' Water Supply Paper 2294, 1986, and the following DOI, USGS, 1:500,000 scale hydrologic unit maps: State of Oregon, 1974 and State of California, 1978 which are incorporated by reference. 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 of the USGS publication and maps may be obtained from the USGS, Map Sales, Box 25286, Denver, CO 80225. Copies may be inspected at NMFS, Protected Resources Division, 525 NE Oregon Street—Suite 500, Portland, OR 97232–2737, or NMFS, Office of Protected Resources, 1335 East-West Highway, Silver Spring, MD 20910, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

Note: The incorporation by reference and availability of inspection copies are pending approval by the Office of the Federal Register.

§ 226.25 Southern Oregon/Northern California Coast Coho Salmon (Oncorhynchus kisutch).

Critical habitat is designated to include all river reaches accessible to listed coho salmon between Cape Blanco, Oregon, and Punta Gorda, California. Critical habitat consists of the water, substrate, and adjacent riparian zone of estuarine and riverine reaches in hydrologic units and counties identified in Table 6 of this part. Accessible reaches are those within the historical range of the ESU that can still be occupied by any life stage of coho salmon. Inaccessible reaches are those above specific dams identified in Table 6 of this part or above longstanding, naturally impassable barriers (i.e., natural waterfalls in existence for at least several hundred years). Adjacent riparian zones are defined as those areas within a horizontal distance of 300 ft (91.4 m) from the normal line of high water of a stream channel or adjacent off-channel habitats (600 ft or 182.8 m, when both sides of the channel are included). Figure 11 of this part identifies the general geographic extent of larger rivers and streams within hydrologic units designated as critical habitat for Southern Oregon/Northern California Coast coho salmon. Note that Figure 11 of this part does not constitute the definition of critical habitat but, instead, is provided as a general reference to guide Federal agencies and interested parties in locating the boundaries of critical habitat for listed Southern Oregon/Northern California Coast coho salmon. Hydrologic units are those defined by the Department of the Interior (DOI), U.S. Geological Survey (USGS) publication, ''Hydrologic Unit Maps,'' Water Supply Paper 2294, 1986, and the following DOI, USGS, 1:500,000 scale hydrologic unit maps: State of Oregon (1974) and State of California (1978) which are incorporated by reference.

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 of the USGS publication and maps may be obtained from the USGS, Map Sales, Box 25286, Denver, CO 80225. Copies may be inspected at NMFS, Protected Resources Division, 525 NE Oregon Street—Suite 500, Portland, OR 97232–2737, or NMFS, Office of Protected Resources, 1335 East-West Highway, Silver Spring, MD 20910, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

Note: The incorporation by reference and availability of inspection copies are pending approval by the Office of the Federal Register.

3. Tables 5 and 6 are added in numerical order to part 226 to read as follows:

TABLE 5 TO PART 226.—HYDROLOGIC UNITS AND COUNTIES CONTAINING CRITICAL HABITAT FOR THREATENED CENTRAL CALIFORNIA COAST COHO SALMON, AND DAMS/RESERVOIRS REPRESENTING THE UPSTREAM EXTENT OF CRITICAL HABITAT

Hydrologic unit name	Hydrologic unit No.	Counties contained in hydrologic unit and within range of ESU[1]	Dams (reservoirs)
San Lorenzo-Soquel	18060001	Santa Cruz (CA), San Mateo (CA)	1. Newell Dam (Loch Lomond).
San Francisco Coastal South	18050006	San Mateo (CA).	
San Pablo Bay	18050002	Marin (CA), Napa (CA).	
Tomales-Drake Bays	18050005	Marin (CA), Sonoma (CA)	2. Peters Dam (Kent Lake). 3. Nicasio Dam (Nicasio Reservoir).
Bodega Bay	18010111	Marin (CA), Sonoma (CA).	
Russian	18010110	Sonoma (CA), Mendocino (CA)	4. Warm Springs Dam (Sonoma Lake) 5. Coyote Dam (Lake Mendocino).
Gualala-Salmon	18010109	Sonoma (CA), Mendocino (CA).	
Big-Navarro-Garcia	18010108	Mendocino (CA).	

[1] Some counties have very limited overlap with estuarine, riverine, or riparian habitats identified as critical habitat for this ESU. Consult USGS hydrologic unit maps (available from USGS) to determine specific county and basin boundaries.

TABLE 6 TO PART 226.—HYDROLOGIC UNITS AND COUNTIES CONTAINING CRITICAL HABITAT FOR THREATENED SOUTHERN OREGON/NORTHERN CALIFORNIA COAST COHO SALMON, AND DAMS/RESERVOIRS REPRESENTING THE UPSTREAM EXTENT OF CRITICAL HABITAT

Hydrologic unit name	Hydrologic unit No.	Counties contained in hydrologic unit and within range of ESU[1]	Dams (reservoirs)
Mattole	18010107	Humboldt (CA), Mendocino (CA).	
South Fork Eel	18010106	Mendocino (CA), Humboldt (CA).	
Lower Eel	18010105	Mendocino (CA), Humboldt (CA), Trinity (CA).	
Middle Fork Eel	18010104	Mendocino (CA), Trinity (CA), Glenn (CA), Lake (CA).	
Upper Eel	18010103	Mendocino (CA), Glenn (CA), Lake (CA)	1. Scott Dam (Lake Pillsbury).
Mad-Redwood	18010102	Humboldt (CA), Trinity (CA)	2. Matthews Dam (Ruth Lake).
Smith	18010101	Del Norte (CA), Curry (OR).	
South Fork Trinity	18010212	Humboldt (CA), Trinity (CA).	
Trinity	18010211	Humboldt (CA), Trinity (CA)	3. Lewiston Dam (Lewiston Resevoir).
Salmon	18010210	Siskiyou (CA).	
Lower Klamath	18010209	Del Norte (CA), Humboldt (CA), Siskiyou (CA).	
Scott	18010208	Siskiyou (CA).	
Shasta	18010207	Siskiyou (CA)	4. Dwinnell Dam (Dwinnell Reservoir).
Upper Klamath	18010206	Siskiyou (CA), Jackson (OR)	5. Irongate Dam (Irongate Reservoir).
Chetco	17100312	Curry (OR), Del Norte (CA).	

TABLE 6 TO PART 226.—HYDROLOGIC UNITS AND COUNTIES CONTAINING CRITICAL HABITAT FOR THREATENED SOUTHERN OREGON/NORTHERN CALIFORNIA COAST COHO SALMON, AND DAMS/RESERVOIRS REPRESENTING THE UPSTREAM EXTENT OF CRITICAL HABITAT—Continued

Hydrologic unit name	Hydrologic unit No.	Counties contained in hydrologic unit and within range of ESU [1]	Dams (reservoirs)
Illinois	17100311	Curry (OR), Josephine (OR), Del Norte (CA).	
Lower Rogue	17100310	Curry (OR), Josephine (OR), Jackson (OR).	
Applegate	17100309	Josephine (OR), Jackson (OR), Siskiyou (CA).	6. Applegate Dam (Applegate Reservoir).
Middle Rogue	17100308	Josephine (OR), Jackson (OR).	
Upper Rogue	17100307	Jackson (OR), Klamath (OR), Douglas (OR).	7. Lost Creek Dam (Lost Creek Reservoir).
Sixes	17100306	Curry (OR).	

[1] Some counties have very limited overlap with estuarine, riverine, or riparian habitats identified as critical habitat for this ESU. Consult USGS hydrologic unit maps (available from USGS) to determine specific county and basin boundaries.

4. Figures 10 and 11 are added in numerical order to part 226 to read as follows:

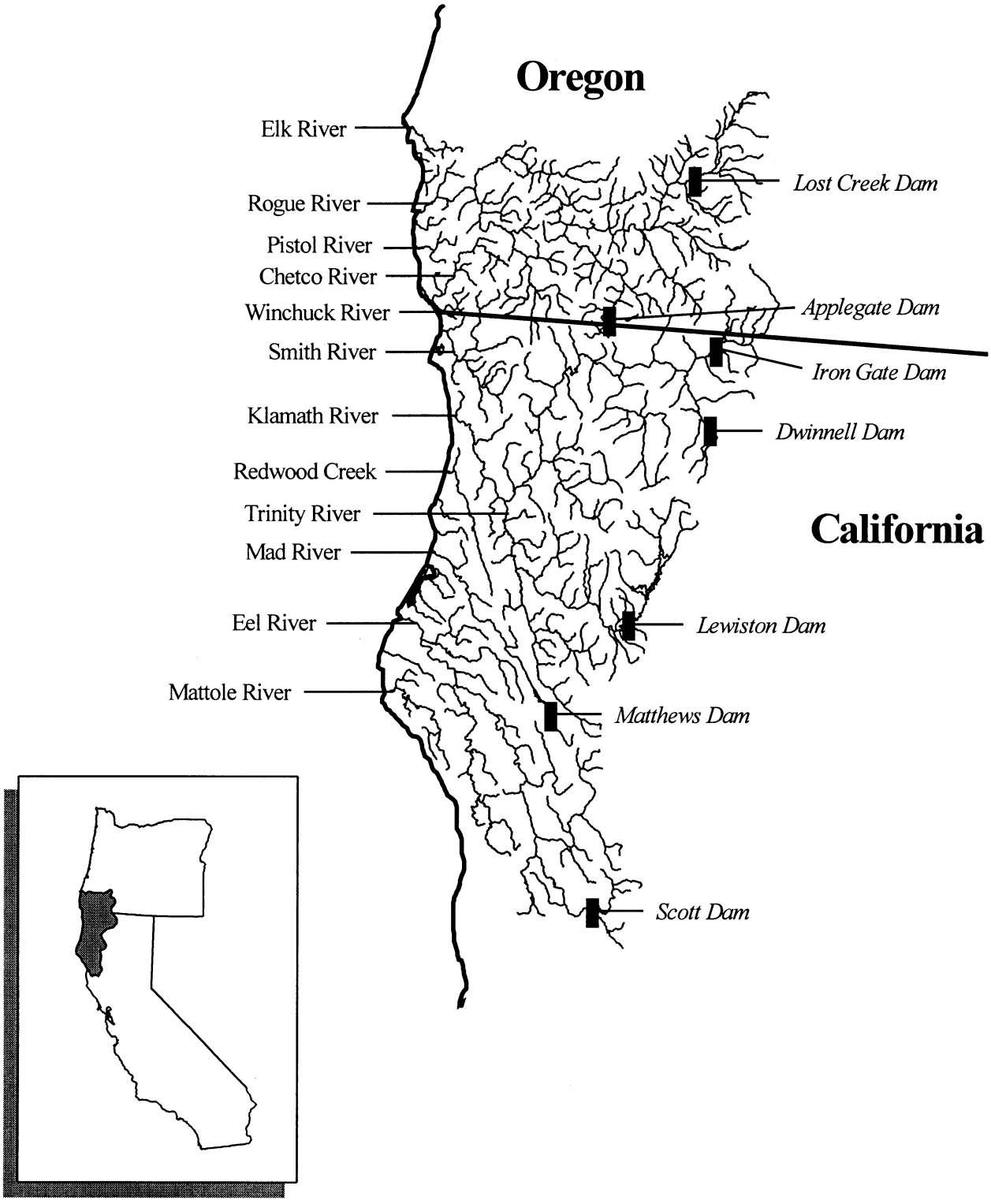
Figures to Part 226

* * * * *

BILLING CODE 3510–22–P

Figure 10 to Part 226.—Critical Habitat for Central California Coast Coho Salmon

Figure 11 to Part 226.—Critical Habitat for Southern Oregon/Northern California Coast Coho Salmon



[FR Doc. 97–30865 Filed 11-20-97; 12:13 pm]
BILLING CODE 3510–22–C

Notices

Federal Register

Vol. 62, No. 227

Tuesday, November 25, 1997

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Commodity Credit Corporation's (CCC) intention to request an extension for and revision to a currently approved information collection. This information collection is used in support of loan programs regarding rice, feed grains, wheat, oilseeds, and farm-stored peanuts as authorized by the Federal Agriculture Improvement and Reform Act of 1996 (the 1996 Act).

DATE: Comments on this notice must be received on or before January 26, 1998 to be assured consideration.

ADDITIONAL INFORMATION OR COMMENTS: Contact Margaret Wright, Agricultural Program Specialist, USDA, FSA, PSD, STOP 0512, 1400 Independence Avenue, SW, Washington, DC 20250–0512; telephone (202) 720–8481; e-mail mwright2 @ wdc.fsa.usda.gov.; or facsimile (202) 690–3307.

SUPPLEMENTARY INFORMATION:

Title: Loan Program.

OMB Control Number: 0560–0087.

Expiration Date of Approval: February 28, 1998.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: The 1996 Act provides for loans to eligible producers on eligible commodities. The information is necessary to ensure the integrity of the program and to ensure that only eligible producers receive loans.

Producers requesting CCC commodity loans must provide specific data relative to the loan request. Forms included in this information collection package require the type of commodity, quantity of commodity, storage location, liens on the commodity, etc., in order to determine eligibility. Producers must also agree to the terms and conditions contained in the loan note and security agreement and other loan-related forms. Without this collection of information, CCC cannot ensure the integrity of the CCC commodity loan program. One form that allowed a producer to use their CCC loan grain as livestock feed for the Emergency Feed Assistance Program is being eliminated from this package because this provision is no longer available.

Estimate of Respondent Burden: Public reporting burden for this collection of information is estimated to average .2253 hours per response.

Respondents: Individual producers and small businesses.

Estimated Number of Respondents: 364,240.

Estimated Number of Responses per Respondent: 3.92.

Estimated Total Annual Burden Hours on Respondents: 438,732 hours.

Proposed topics for comments include: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments must be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503 and to Margaret A. Wright, Agricultural Program Specialist, USDA–FSA–PSD, STOP 0512, 1400 Independence Avenue, SW, Washington, D.C. 20250–0512; telephone (202) 720–8481; e-mail mwright2 @ wdc.fsa.usda.gov. Copies of the information collection may be obtained from Margaret Wright at the above address.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives in within 30 days of publication.

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.

Signed at Washington, DC, on November 19, 1997.

Bruce R. Weber,

Acting Executive Vice President, Commodity Credit Corporation.

[FR Doc. 97–30945 Filed 11–24–97; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 97–072N]

HACCP Implementation Meetings

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice.

SUMMARY: The Food Safety and Inspection Service (FSIS) is holding a series of four one-day ''HACCP Implementation Meetings.'' The purpose of the meetings is to brief management of large (500 + employees) official meat and poultry establishments on how the Agency will conduct inspection operations subsequent to the January 26, 1998, deadline for HACCP/Pathogen Reduction implementation in large plants. At each meeting, FSIS officials will discuss HACCP requirements, microbiological requirements, HACCP/Pathogen Reduction training, and Agency verification. Time will be allotted for questions and answers.

DATES: See **SUPPLEMENTARY INFORMATION** for dates and times of the meetings.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** for the location of the meetings.

FOR FURTHER INFORMATION CONTACT: To register for the meeting, call (202) 501–7136 or FAX (202) 501–7642. If you require a sign language interpreter or

other special accommodations, contact Ms. Jennifer Callahan at (202) 501–7138.

SUPPLEMENTARY INFORMATION: On July 25, 1996, FSIS published a final rule, ''Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems'' (61 FR 38806). This rule introduced sweeping changes to the meat and poultry inspection system. In the preamble to the final rule, FSIS announced that it would hold implementation conferences in Washington, DC, and in various cities throughout the country. A series of six meetings were held from October to November, 1996. The following is a list of locations, dates, and times for each of the four additional implementation meetings scheduled for December 1997 and January 1998.

Meeting location	Date	Time
Washington, DC: Washington Plaza Hotel, 10 Thomas Circle, NW, Washington, DC 20005	December 16, 1997	8:00 a.m.–5:00 p.m.
Des Moines, IA: Hotel Savery, 4th & Locust, Des Moines, IA 50309	January 14, 1998	8:00 a.m.–5:00 p.m.
Denver, CO: Four Points Hotel 3535 Quebec Street, Denver, CO 80207	January 16, 1998	8:00 a.m.–5:00 p.m.
Memphis, TN: Holiday Inn Select, 160 Union Avenue, Memphis, TN 38103	January 21, 1998	8:00 a.m.–5:00 p.m.

Done in Washington, DC, on: November 18, 1997.

Thomas J. Billy,

Administrator.

[FR Doc. 97–30962 Filed 11–20–97; 4:11 pm]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

California Coast Province Advisory Committee (PAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The California Coast Province Advisory Committee (PAC) will meet on December 3 and 4, 1997, at the Brook Trails Fire Department meeting room in Willits, CA. The meeting will be held from 10:00 a.m. to 5:30 p.m. on December 3, and from 8:30 a.m. to 4:30 p.m. on December 4. The Brook Trails Fire Department is located at 24860 Birch Street in Willits. Agenda items to be covered include: (1) Coho Salmon Subcommittee recommendation on road stream crossings; (2) Presentation on Intergovernmental Advisory Committee (IAC)/PAC relations; (3) US Fish and Wildlife Service presentation on baseline analysis/current conditions of the northern spotted owl in the four northern California National Forests; (4) Recreation/Tourism Subcommittee report; (5) Panel presentation on Native American perspectives on prescribed burning and fuels management; (6) Public/Private/Tribal Partnership Opportunities Subcommittee reports to include Fork Fire recommendations, Forest Highway 7 update, grazing and Jobs in the Woods proposals; (7) Monitoring Subcommittee report on findings on watershed analyses; (8) Presentation on Pacific Southwest Research fuels research proposal; (9) Report and recommendations from the PAC/SCERT coordinating committee; (10) Presentation on how changes related to implementation of the Northwest Forest Plan affect Forest Service payments in lieu of taxes to Counties; (11) Presentation on the Effectiveness Monitoring Protocol; (12) Work on the Ground Subcommittee reports to include federal agencies' fuels planning, Threatened and Endangered Species consultations, and future subcommittee topics; and (13) Open public forum. All California Coast Province Advisory Committee meetings are open to the public. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Daniel Chisholm, USDA, Forest Supervisor, Mendocino National Forest, 825 N. Humboldt Avenue, Willows, CA 95988, (530) 934–3316 or Phebe Brown, Province Coordinator, USDA, Mendocino National Forest, 825 N. Humboldt Avenue, Willows, CA 95988, (530) 934–3316.

Dated: November 14, 1997.

Arthur Quintana,

Acting Forest Supervisor.

[FR Doc. 97–30960 Filed 11–24–97; 8:45 am]

BILLING CODE 3410–FK–M

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration, USDA

Proposed Posting of Stockyards

The Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, has information that the livestock market named below is a stockyard as defined in Section 302 of the Packers and Stockyards Act (7 U.S.C. 202), and should be made subject to the provisions of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*).

GA–222—B & B Sales Commerce, Georgia

Pursuant to the authority under Section 302 of the Packers and Stockyards Act, notice is hereby given that it is proposed to designate the stockyard named above as a posted stockyard subject to the provisions of said Act.

Any person who wishes to submit written data, views or arguments concerning the proposed designation may do so by filing them with the Director, Livestock Marketing Division, Grain Inspection, Packers and Stockyards Administration, Room 3408-South Building, U. S. Department of Agriculture, Washington, D.C. 20250 by December 10, 1997.

All written submissions made pursuant to this notice will be made available for public inspection in the office of the Director of the Livestock

Marketing Division during normal business hours.

Done at Washington, DC this 14th day of November 1997.

Daniel L. Van Ackeren,

Director, Livestock Marketing Division, Packers and Stockyards Programs.

[FR Doc. 97–30878 Filed 11–24–97; 8:45 am]

BILLING CODE 3410–EN–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Posting of Stockyards

Pursuant to the authority provided under Section 302 of the Packers and Stockyards Act (7 U.S.C. 202), it was ascertained that the livestock markets named below were stockyards as defined by Section 302(a). Notice was given to the stockyard owners and to the public as required by Section 302(b), by posting notices at the stockyards on the dates specified below, that the stockyards were subject to the provisions of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*).

Facility No., name, and location of stockyard	Date of posting
AR–173, Centerton Livestock Auction, Centerton, Arkansas.	Oct. 6, 1997.
KY–175, Kentucky Livestock Exchange, Owenton, Kentucky.	Oct. 28, 1997.
NC–172, Martin County Horse Auction, Oak City, North Carolina.	Oct. 23, 1997.

Done at Washington, DC this 14th day of November 1997.

Daniel L. Van Ackeren,

Director, Livestock Marketing Division, Packers and Stockyards Programs.

[FR Doc. 97–30877 Filed 11–24–97; 8:45 am]

BILLING CODE 3410–EN–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Deposting of Stockyards

Notice is hereby given, that the livestock markets named herein, originally posted on the dates specified below as being subject to the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*), no longer come within the definition of a stockyard under the Act and are therefore, no longer subject to the provisions of the Act.

Facility No., name, and location of stockyard	Date of posting
KS–115, Concordia Livestock Auction, Concordia, Kansas.	May 7, 1952.
MD–119, Kolb's Sale Barn, Woodsboro, Maryland.	June 3, 1996.
NC–138, Wells Livestock Market, Inc., Wallace, North Carolina.	July 10, 1959.
NC–150, Jefferson Stockyard & Grill, Inc., Jefferson, North Carolina.	Nov. 22, 1978.
TX–162, El Paso Livestock Auction Co., Inc., El Paso, Texas.	Nov. 15, 1967.
VA–110, Southside Livestock Markets, Inc., Farmville, Virginia.	Mar. 20, 1961.
WA–121, Sunnyside Livestock Market, Inc., Sunnyside, Washington.	Oct. 5, 1959.

This notice is in the nature of a change relieving a restriction and, thus, may be made effective in less than 30 days after publication in the **Federal Register** without prior notice or other public procedure. This notice is given pursuant to section 302 of the Packers and Stockyards Act (7 U.S.C. 202) and is effective upon publication in the **Federal Register**.

Done at Washington, DC this 14th day of November 1997.

Daniel L. Van Ackeren,

Director, Livestock Marketing Division Packers and Stockyards Programs.

[FR Doc. 97–30879 Filed 11–24–97; 8:45 am]

BILLING CODE 3210–KD–P

DEPARTMENT OF COMMERCE

Critical Foundations: Protecting America's Infrastructures

AGENCY: Department of Commerce.

ACTION: Notice of availability and request for comments.

SUMMARY: The Department of Commerce announces the availability of and seeks public comment on ''Critical Foundations: Protecting America's Infrastructures,'' the report of the President's Commission on Critical Infrastructure Protection. The Commission was established by Executive Order in July 1996 to conduct a comprehensive study of the physical and electronic (''cyber'') threats to and vulnerabilities of the nation's critical infrastructures and recommend a national policy for protecting the infrastructures and assuring their continued operation. The executive order provided for a Commission comprised 10 members from the Federal government and 10 members from outside the Federal government. When the Commission terminated on October 13, 1997, some of the Commission's staff was retained to assist the Principals Committee, Steering Committee, and Advisory Committee in reviewing the report and preparing recommendations to the President. Notwithstanding the substantial public input that went into development of the Commission's findings and recommendations, their significance makes them worthy of additional public discussion and comment.

DATES: Comments should be submitted no later than January 9, 1998.

REPORT AVAILABILITY AND ADDRESSES: The report is available electronically from the Commission's transition office site on the World Wide Web: http://www.pccip.gov/.

Comments may be sent to the Commission at P.O. Box 46258, Washington, DC 20050–6258. Comments may also be submitted by facsimile to 202–696–9411, or by electronic mail to Comments@pccip.gov. Comments submitted by facsimile or electronic mail need not also be submitted by regular mail.

FOR FURTHER INFORMATION CONTACT: The Commission at 703–696–9395.

SUPPLEMENTARY INFORMATION: Executive Order 13010 of July 15, 1996 (61 FR 37347), as amended, established the President's Commission on Critical Infrastructure Protection and its associated Principals Committee, Steering Committee, and Advisory Committee as described below. A complete text of the Executive Order may also be found at the Commission's website (http://www.pccip.gov).

A Statement of the Problem

Certain national infrastructures are so vital that their incapacity or destruction would have a debilitating impact on the defense or economic security of the United States. These critical infrastructures include telecommunications, electrical power systems, gas and oil storage and transportation, banking and finance, transportation, water supply systems, emergency services (including medical, police, fire, and rescue), and continuity of government services. Threats to these critical infrastructures fall into two categories: physical threats to tangible property (''physical threats''), and threats of electronic, radio-frequency, or computer-based attacks on the information or communications

components that control critical infrastructures (''cyber threats''). Because many of these critical infrastructures are owned and operated by the private sector, it is essential that the government and private sector work together to develop a strategy for protecting them and assuring their continued operation.

Commission Membership

The Commission comprised one member each from the Department of the Treasury, Department of Justice, Department of Defense, Department of Commerce, Department of Transportation, Department of Energy, Central Intelligence Agency, Federal Emergency Management Agency, Federal Bureau of Investigation, National Security Agency. These agencies also appointed members from the private sector. The Commission Chair was designated by the President from the private sector.

The Principals Committee

The Commission reported to the President through a Principals Committee, which is charged to review any reports or recommendations before submission to the President. The Principals Committee comprises the Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of Commerce, Secretary of Transportation, Secretary of Energy, Director of Central Intelligence, Director of the Office of Management and Budget, Director of the Federal Emergency Management Agency, Assistant to the President for National Security Affairs, Assistant to the Vice President for National Security Affairs, Assistant to the President for Economic Policy and Director of the National Economic Council, and Assistant to the President and Director of the Office of Science and Technology Policy.

The Steering Committee

The Commission's day-to-day work was overseen by a Steering Committee on behalf of the Principals Committee. The Steering Committee comprised five members: The Deputy Secretary of Defense, the Attorney General, the Deputy National Security Advisor, the Vice President's Domestic Policy Advisor and the Chair of the Commission itself. The Steering Committee received regular reports on the progress of the Commission's work and approved the submission of reports to the Principals Committee.

Advisory Committee

The Commission received advice from an Advisory Committee composed of individuals appointed by the President from the private sector, academia, and local government who were knowledgeable about critical infrastructures. The Committee will study the report and provide advice to the Steering Committee.

Mission

As provided in the Executive Order, the Commission was to consult with the public and private sector owners and operators of the critical infrastructures and others that have an interest in critical infrastructure assurance issues and that may have differing perspectives on these issues. The Commission was to assess the scope and nature of threats to and vulnerabilities of the critical infrastructures; determine the legal and policy issues raised by efforts to protect critical infrastructures and assess how they might be addressed; recommend a comprehensive national policy and implementation strategy for protecting critical infrastructures and assuring their continued operation; and propose any statutory or regulatory changes necessary to effect its recommendations.

Sector Studies

The Commission divided its work into these five ''sectors'' based on the common characteristics of the included industries:

- Information and communications.
- Banking and finance.
- Energy, including electrical power, and oil and gas production and storage.
- Physical distribution, including transportation and oil and gas distribution.
- Vital human services, including water supply, emergency services and government services.

Public Hearings and Outreach

The Commission conducted extensive meetings with a range of professional and trade associations concerned with the infrastructures, private sector infrastructure users and providers, academia, state and local government agencies, consumers, federal agencies, and many others. Of special interest were five public meetings in five major cities.

Overview of the Report's Findings

1. New Thinking is Required in Cyberspace. It is not surprising that infrastructures have always been attractive targets for those who would do us harm. In the past we have been protected from hostile attacks on the infrastructures by broad oceans and friendly neighbors. Today, the evolution of cyber threats has changed the situation dramatically. In cyberspace, national borders are no longer relevant.

Potentially serious cyber attacks can be conceived and planned without detectable logistic preparation. They can be invisibly reconnoitered, clandestinely rehearsed, and then mounted in a matter of minutes or even seconds without revealing the identity and location of the attacker.

Formulas that carefully divide responsibility between foreign defense and domestic law enforcement no longer apply as clearly as they used to and, in some instances, you may have to solve the crime before you can decide who has the authority to investigate it.

2. We Should Act Now to Protect our Future. The Commission has not discovered an imminent attack or a credible threat sufficient to warrant a sense of immediate national crisis. However, the Commission found that our vulnerabilities are increasing steadily while the costs associated with an effective attack continue to drop. The investments required to improve the situation are still relatively modest, but will rise if we procrastinate.

3. *Infrastructure Assurance is a Shared Responsibility.* National security requires much more than military strength. While no nation state is likely to invade our territory or attack our armed forces, we are inevitably the target of ill will and hostility from some quarters. Disruption of the services on which our economy and well-being depend could have significant effects, and if repeated frequently, could seriously harm public confidence. Because our military and private infrastructures are becoming less and less separate, because it is getting harder to differentiate threats from local criminals from those from foreign powers, and because the techniques of protection, mitigation, and restoration are largely the same, we conclude that responsibility for infrastructure protection and assurance can no longer be delegated on the basis of who the attacker is or where the attack originates. Rather, the responsibility should be shared cooperatively among all of the players.

Overview of the Report's Recommendations

1. A Broad Program of Education and Awareness. Possible undertakings include White House conferences, National Academy of Science studies, presentations at industry and government associations and professional societies, development and promulgation of elementary and secondary curricula, and sponsorship of graduate studies and programs.

2. Infrastructure Protection through Industry Cooperation and Information Sharing. Sector-by-sector cooperation and information sharing would take place in the context of partnerships between owners and operators and government. These partnerships would identify and share best practices. The National Institute of Standards and Technology, the National Security Agency, and the Department of Energy's National Laboratories would provide technical skills and expertise required to identify and evaluate vulnerabilities in the associated information networks and control systems. Sector cooperation might begin with sharing information and techniques related to risk management assessments. This could evolve into the development and deployment of ways to prevent attacks, and if attacks occur, to mitigate damage, quickly recover services, and reconstitute the infrastructure

3. Reconsideration of Laws Related to Infrastructure Protection. Some laws capable of promoting infrastructure assurance efforts are not as clear or effective as they could be. Others operate in ways that may be unfriendly to security concerns. Sorting them all out will be a lengthy and complex undertaking, involving efforts at local, state, federal, and international levels. The report identifies specific existing laws that could be modified to support infrastructure protection.

4. A Revised Program of Research and Development. While some of the basic technology needed to improve infrastructure protection already exists, it is not yet widely deployed. In all areas of activities aimed at protecting and assuring the infrastructure, mitigating damages, and responding and recovering from attacks, additional research effort is needed. The Commission recommends increasing government spending in research and development on capabilities such as intrusion detection.

5. A National Organization Structure. To implement the recommendations the following new organizations and revised roles for existing organizations are recommended:

Office of National Infrastructure Assurance as the top-level policy making office connected closely to the National Security Council and the National Economic Council;

Infrastructure Assurance Support Office to house the bulk of the staff that would be responsible for follow-through on the Commission's recommendations;

Information Sharing and Analysis Center to begin the step-by-step process of establishing a realistic understanding of distinguishing actual attacks from coincidental events;

National Infrastructure Assurance Council of industry CEOs, Cabinet Secretaries, and representatives of state and local government to provide policy advice and implementation commitment;

Lead Agencies, designated within the Federal government, to serve as a conduit from the government into each sector and to facilitate the creation of sector coordinators, if needed; and

Sector Coordinators to provide the focus for industry cooperation and information sharing, and to represent the sector in matters of national cooperation and policy;

Warning Center to identify anomalous events indicating that the infrastructure is under attack and alert the Information Sharing and Analysis Center for dissemination of bulletins and threat advisories to infrastructure stakeholders.

William Reinsch,

Under Secretary of Commerce, Bureau of Export Administration.

[FR Doc. 97–30851 Filed 11–24–97; 8:45 am]

BILLING CODE 3110–$$–P

DEPARTMENT OF COMMERCE

Bureau of the Census

The Census Advisory Committee (CAC) on the African American Population, the CAC on the American Indian and Alaska Native Populations, the CAC on the Asian and Pacific Islander Populations, and the CAC on the Hispanic Population

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of public meeting.

Pursuant to the Federal Advisory Committee Act (P.L. 92–463 as amended by Pub. L. 94–409, Pub. L. 96–523, and Pub. L. 97–375), we are giving notice of a joint meeting followed by separate and concurrently held (described below) meetings of the CAC on the African American Population, the CAC on the American Indian and Alaska Native Populations, the CAC on the Asian and Pacific Islander Populations, and the CAC on the Hispanic Population. The joint meeting will convene on December 11–12, 1997 at the Bureau of the Census, Francis Amasa Walker Conference Center, Federal Building 3, 4700 Silver Hill Road, Suitland Maryland 20746.

Each of these Committees is composed of nine members appointed by the Secretary of Commerce. They provide an organized and continuing channel of communication between the communities they represent and the Bureau of the Census on its efforts to reduce the differential in the population totals from Census 2000 and on ways that decennial census data can be disseminated to maximize their usefulness to these communities and other users.

The Committees will draw on past experience with the 1990 census process and procedures, results of evaluations and research studies, and the expertise and insight of their members to provide advice and recommendations during the research and development, design, planning and implementation phases of Census 2000.

The agenda for the December 11 combined meeting, which will begin at 9 a.m. and end at 5 p.m., is as follows: (1) Introductory Remarks and Updates; (2) What Is the Master Activity Schedule? How Will it Work for Census 2000 Dress Rehearsal Plans?; and (3) Building Partnerships.

The agendas for the four separate committees in the concurrent meetings held at various times during the day are as follows:

The CAC on the African American Population: (1) Review Issues From Last Meeting; (2) Discussants' Review of the Topics for the Plenary Sessions; (3) Review Responses to Recommendations; and (4) Discussion of Topics with Staff.

The CAC on the American Indian and Alaska Native Populations: (1) Review Issues From Last Meeting; (2) Discussants' Review of the Topics for the Plenary Sessions; (3) Review Responses to Recommendations; and (4) Discussion of Topics with Staff.

The CAC on the Asian and Pacific Islander Populations: (1) Review Issues From Last Meeting; (2) Discussants' Review of the Topics for the Plenary Sessions; (3) Review Responses to Recommendations; and (4) Discussion of Topics with Staff.

The CAC on the Hispanic Population: (1) Review Issues From Last Meeting; (2) Discussants' Review of the Topics for the Plenary Sessions; (3) Review Responses to Recommendations; and (4) Discussion of Topics with Staff.

The agenda for the December 12 combined meeting, which will begin at 8:45 a.m. and end at 4:15 p.m., is as follows: (1) Report on the 2000 Census Advisory Committee Meetings; (2) Process of Determining the Final Proposals on Tabulation of Race and Ethnic Data in Federal Statistical Systems; (3) How Will the OMB Proposal on Tabulation of Race and Ethnic Data Be Implemented in the Dress Rehearsal Tabulations? (4) What Standard Products Should the Census

Bureau Develop From the Census 2000?; (5) How Can Local Organizations and Local Officials Identify Service Locations [such as shelters, soup kitchens] Needed to Conduct the Service-Based Enumeration? (6) A Conversation: Advisory Committees; (7) Committee Recommendations; and (7) Public Comment.

The agendas for the four separate committees in their concurrent meetings held at various times are as follows:

The CAC on the African American Population: Draft Recommendations.

The CAC on the American Indian and Alaska Native Populations: (1) Election of Chair and (2) Draft Recommendations.

The CAC on the Asian and Pacific Islander Populations: Draft Recommendations.

The CAC on the Hispanic Population: Draft Recommendations.

All meetings are open to the public, and a brief period is set aside on December 12 during the closing session for public comment and questions. Individuals with extensive questions or statements must submit them in writing to the Census Bureau Committee Liaison Officer, Ms. Maxine Anderson-Brown, Room 3039, Federal Building 3, Washington, D.C. 20233, at least three days before the meeting.

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Census Bureau Committee Liaison Officer.

Individuals who wish additional information regarding these meetings or to submit written statements may contact the Committee Liaison Officer on (301) 457–2308, TDD (301) 457–2540.

Dated: November 19, 1997.

Bradford R. Huther,

Deputy Director and Chief Operating Officer, Bureau of the Census.

[FR Doc. 97–30853 Filed 11–24–97; 8:45 am]

BILLING CODE 3510–07–M

DEPARTMENT OF COMMERCE

Bureau of the Census

The Census Advisory Committee on the American Indian and Alaska Native Populations

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of public meeting.

Pursuant to the Federal Advisory Committee Act (Public Law 92–463 as amended by Public Law 94–409, Public Law 96–523, and Public Law 97–375), we are giving notice of a meeting of the Census Advisory Committee on the American Indian and Alaska Native Populations. The meeting will convene on December 10, 1997 at the Bureau of the Census, Francis Amasa Walker Conference Center, Federal Building 3, Suitland, Maryland 20746.

The Committee is composed of nine members appointed by the Secretary of Commerce. The Committee provides an organized and continuing channel of communication between the communities they represent and the Bureau of the Census on its efforts to reduce the differential in the population totals from Census 2000 and on ways that decennial census data can be disseminated to maximize their usefulness to their communities and other users.

The committee will draw on past experience with the 1990 census process and procedures, results of evaluations and research studies, and the expertise and insight of its members to provide advice and recommendations during the research and development, design, planning, and implementation phases of Census 2000.

The agenda for the meeting on December 10, which will begin at 1:30 p.m. and adjourn at 5:30 p.m., covers the American Indian and Alaska Native enumeration plan, geography issues, and staffing needs.

The meeting is open to the public, and a brief period is set aside during the closing session for public comment and questions. Those persons with extensive questions or statements must submit them in writing to the Census Bureau Committee Liaison Officer, Ms. Maxine Anderson-Brown, Room 3039, Federal Building 3, Washington, D.C. 20233, at least three days before the meeting.

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Census Bureau Committee Liaison Officer.

Individuals who wish additional information regarding this meeting or to submit written statements may contact the Committee Liaison Officer on (301) 457–2308, TDD (301) 457–2540.

Dated: November 19, 1997.

Bradford R. Huther,

Deputy Director and Chief Operating Officer, Bureau of the Census.

[FR Doc. 97–30852 Filed 11–24–97; 8:45 am]

BILLING CODE 3510–07–U

DEPARTMENT OF COMMERCE

International Trade Administration

[A–403–801]

Fresh and Chilled Atlantic Salmon From Norway; Termination of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of termination of antidumping duty administrative review.

SUMMARY: In response to a request by the petitioner, the Coalition for Fair Atlantic Salmon Trade, the Department of Commerce published in the **Federal Register** (62 FR 27720, May 21, 1997) a notice announcing the initiation of an administrative review of the antidumping duty order on fresh and chilled Atlantic salmon from Norway for one exporter Nordic Group A/L, covering the period April 1, 1996, through March 31, 1997. The Department of Commerce is terminating this review as a result of the absence of entries into the United States of fresh and chilled Atlantic salmon exported by Nordic Group A/L.

EFFECTIVE DATE: November 25, 1997.

FOR FURTHER INFORMATION CONTACT: Todd Peterson or Thomas Futtner, Office of AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–4195 or 482–3814, respectively.

SUPPLEMENTARY INFORMATION:

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to 19 CFR Part 353 (1997).

Background

On April 12, 1991, the Department of Commerce (the Department) published the antidumping duty order on fresh and chilled Atlantic salmon from Norway (56 FR 14920). The Department published a notice of ''Opportunity to Request Administrative Review'' on April 2, 1997 (62 FR 15655). On April 30, 1997, the petitioner, Coalition for

Fair Atlantic Salmon Trade (FAST), requested that we conduct an administrative review of Nordic Group A/L (Nordic), an exporter of subject merchandise, for the period April 1, 1996, through March 31, 1997. We published a notice of ''Initiation of Antidumping and Countervailing Duty Administrative Review'' on May 21, 1997 (62 FR 27720). On May 27, 1997, Nordic reported that it made no shipments of the subject merchandise during the period of review (POR). On August 5, 1997, the Department conducted a no-shipment data query regarding Nordic using the U.S. Customs Service database. The purpose of this query was to determine whether the U.S. Customs Service suspended liquidation of entry summaries of this merchandise during the POR. Because the U.S. Customs Service did not identify any suspended entry summaries of subject merchandise exported by Nordic during the POR, we have determined that no entries into the Customs territory of the United States occurred during the POR. Therefore, the Department is terminating this review. The cash deposit rate for Nordic will continue to be zero percent, the rate established in the most recently completed segment of this proceeding (62 FR 1430, January 10, 1997, a new shipper review).

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: November 18, 1997.

Holly Kuga,

Acting Deputy Assistant Secretary, Group II for Import Administration.

[FR Doc. 97–30959 Filed 11–24–97; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–501]

Notice of Amended Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 25, 1997.

FOR FURTHER INFORMATION CONTACT: Charles Riggle or Dennis McClure, Office of Antidumping/Countervailing Duty Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–0650 or (202) 482–3530, respectively.

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions as they existed on December 31, 1994.

Background

On October 2, 1997, the Department of Commerce (the Department) published the final results of its administrative review of the antidumping duty order on certain welded carbon steel pipe and tube from Turkey (62 FR 51629). The period of review (POR) is May 1, 1993, through April 30, 1994.

On October 16, 1997, the Borusan Group (Borusan) filed two timely clerical error allegations. On October 21, 1997, Allied Tube & Conduit and Wheatland Tube Company (petitioners) replied to the allegations made by Borusan, pursuant to 19 C.F.R. 353.28. On October 24, 1997, Borusan filed unsolicited and untimely comments in response to the petitioners' October 21, 1997, submission. Pursuant to 19 C.F.R. 353.31, we did not consider Borusan's October 24, 1997, submission in our analysis, since it was submitted after the October 16, 1997, deadline for submitting comments on ministerial error allegations.

Scope of the Review

Imports covered by this review are shipments of certain welded carbon steel pipe and tube products with an outside diameter of 0.375 inch or more but not over 16 inches, of any wall thickness. These products are currently classifiable under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. These products, commonly referred to in the industry as standard pipe and tube, are produced to various American Society for Testing and Materials (ASTM) specifications, most notably A–120, A–53, or A–135.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Allegations of Clerical Errors

Allegation 1: Inclusion of Inventory Carrying Costs in Constructed Value (CV)

Borusan alleges that because Borusan's sales to the United States were purchase price (PP) sales the Department should not have included inventory carrying costs in the calculation of CV.

The petitioners argue that Borusan's allegation is methodological, not ministerial, in nature. The petitioners cite to Policy Bulletin 94.2, ''Treatment of Inventory Carrying Costs in Constructed Value'' (March 25, 1994).

DOC Position: We do not find this issue to be ministerial in nature, because it is a substantive argument for a new methodology. *Kerr-McGee Chemical Corp.* v. *United States,* No. 97–2, Slip Op. at 20 (CIT January 8, 1997). Accordingly, we have not considered this issue because it is outside the scope of permissible corrections under 19 C.F.R. 353.28(d). Id. For more discussion, *see* Memorandum from the Team to Richard W. Moreland, dated November 18, 1997 (*Analysis Memorandum*).

Allegation 2: Calculation of Weighted-Average Packing Costs

Borusan alleges that the Department should have used production quantities, instead of sales quantities, to weight-average the indexed packing costs used in calculating cost of production and foreign market value.

The petitioners respond that the Department's use of sales quantities does not appear to be a ministerial error, noting that the use of sales quantity is reasonable because packing costs are largely related to the shipment, not production, of merchandise.

DOC Position: In the final results of the 1994–95 administrative review of certain welded carbon steel pipe and tube from Turkey, we indexed all costs, including packing expenses, using production quantities instead of sales quantities. *See* SAS programs used in the *Notice of Amended Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey,* 62 FR 27013 (May 16, 1997). Therefore, in accordance with 19 C.F.R. 353.28(c), we are amending the final results of this administrative review to correct this ministerial error. For more discussion, *see Analysis Memorandum.*

Amended Final Results of Review

Upon correction of the ministerial error regarding packing costs, we have determined that the following margin for Borusan exists for the period indicated below:

Manufacturer/ exporter	Time period	Margin percent
Borusan	5/1/93–4/30/94	3.97

For Borusan, the cash deposit rate will continue to be 2.57 percent, the rate effective since May 16, 1997, which was published in the *Notice of Amended Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey*, 62 FR 27013 (May 16, 1997).

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. If the exporter is not a firm covered in this or a prior review, or the original investigation, but the manufacturer is, the cash deposit rate will be that established for the manufacturer of the merchandise. If neither the exporter nor the manufacturer is a firm covered in this or any previous review, the cash deposit rate will be 14.74 percent, the ''all others'' rate established in the LTFV investigation.

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice is a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also reminds parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Failure to comply is a violation of the APO.

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 353.28.

Dated: November 19, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 97–30958 Filed 11–24–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 111097B]

North Pacific Fishery Management Council; Public Meetings

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

ACTION: Addendum to previously published agenda.

SUMMARY: The following items have been added to the previously published agenda for the meeting of the North Pacific Fishery Management Council (Council) December 9–14, 1997.

ADDRESSES: The meetings will be held at the Anchorage Hilton Hotel, 500 W. Third Avenue, Anchorage, AK 99501.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Council staff, telephone: 907–271–2809.

SUPPLEMENTARY INFORMATION:

1. The Council has added a discussion of topics relating to the recently-approved License Limitation Program for Alaska groundfish and crab fisheries, including discussion of the treatment of vessels which were foreign-owned on June 17, 1995, and the timing of a trawl closure in the Eastern Gulf of Alaska and reallocation of sablefish bycatch to the individual fishing quota fishery. The Council may initiate analysis of amendments to the program and/or give direction to staff as appropriate.

2. The Council will also receive a report on an experimental fishing project involving mesh panel openings.

Although other issues not contained in this agenda may come before this Council for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal Council action during the meeting. Council action will be restricted to those issues specifically identified in the agenda listed in this notice.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Helen Allen, 907–271–2809, at least 5 working days prior to the meeting date.

Dated: November 18, 1997.

Gary C. Matlock, Ph.D.,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97–30874 Filed 11–24–97; 8:45 am]

BILLING CODE 3510–22–F

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 the People's Republic of China

November 20, 1997.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs increasing limits.

EFFECTIVE DATE: November 26, 1997.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, 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: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limits for certain categories are being increased for 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 62 FR 6950, published on February 14, 1997.

Troy H. Cribb,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 20, 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 February 10, 1997, 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 and silk apparel, produced or manufactured in China and exported during the twelve-month period beginning on January 1, 1997 and extending through December 31, 1997.

Effective on November 26, 1997, you are directed to increase the limits for the following categories, as provided for under the terms of the bilateral agreement between the Governments of the United States and the People's Republic of China:

Category	Adjusted twelve-month limit [1]
Sublevels in Group I	
200	751,317 kilograms.
334	341,541 dozen.
359–C [2]	622,579 kilograms.
438	28,228 dozen.
445/446	310,468 dozen.
611	5,576,939 square meters.
634	653,954 dozen.
641	1,404,487 dozen.
651	811,250 dozen of which not more than 138,858 dozen shall be in Category 651–B [3].
Group IV	
832, 834, 838,839,843,850–852, 858 and 859, as a group.	11,588,728 square meters equivalent.

[1] The limits have been adjusted to account for any imports exported after December 31, 1996.

[2] Category 359–C: only HTS numbers 6103.42.2025, 6103.49.8034, 6104.62.1020, 6104.69.8010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025 and 6211.42.0010.

[3] Category 651–B: only HTS numbers 6107.22.0015 and 6108.32.0015.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Troy H. Cribb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 97–31083 Filed 11–21–97; 12:41 pm]

BILLING CODE 3510–DR–F

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textile Products Produced or Manufactured in the People's Republic of China

November 20, 1997.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs increasing limits.

EFFECTIVE DATE: November 26, 1997.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, 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: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limits for Categories 434, 647, 670–L and 870 are being increased for carryforward. As a result, the limits for these categories, which are currently filled, will re-open.

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 62 FR 6950, published on February 14, 1997.

Troy H. Cribb,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 20, 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 February 10, 1997, 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 and silk apparel, produced or manufactured in China and exported during the twelve-month period beginning on January 1, 1997 and extending through December 31, 1997.

Effective on November 26, 1997, you are directed to increase the limits for the following categories, as provided for under the terms of the bilateral agreement between the Governments of the United States and the People's Republic of China:

Category	Adjusted twelve-month limit [1]
Sublevels in Group I	
434	14,256 dozen.
647	1,663,051 dozen.
670–L [2]	16,687,879 kilograms.
Level not in a group	
870	33,923,079 kilograms.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1996.

[2] Category 670–L: only HTS numbers 4202.12.8030, 4202.12.8070, 4202.92.3020, 4202.92.3030 and 4202.92.9025.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Troy H. Cribb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 97–31084 Filed 11–21–97; 12:41 pm]

BILLING CODE 3510–DR–F

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0135]

Proposed Collection; Comment Request Entitled Subcontractor Payments

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0135).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Subcontractor Payments. The clearance currently expires on March 31, 1998.

DATES: Comments may be submitted on or before January 26, 1998.

FOR FURTHER INFORMATION CONTACT: Jack O'Neill, Federal Acquisition Policy Division, GSA (202) 501–3856.

ADDRESSES: Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4037, Washington, DC 20405. Please cite OMB Control No. 9000–0135, Subcontractor Payments, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

Part 28 of the FAR contains guidance related to obtaining financial protection against damages under Government contracts (e.g., use of bonds, bid guarantees, insurance etc.). Part 52 contains the texts of solicitation provisions and contract clauses. These regulations implement a statutory requirement for information to be provided by Federal contractors relating to payment bonds furnished under construction contracts which are subject to the Miller Act (40 USC 270a-270d). This collection requirement is mandated by Section 806 of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Pub. L. 102–190), as amended by Section 2091 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–335). The clause at 52.228–12, Prospective Subcontractor Requests for Bonds, implements Section 806(a)(3) of Public Law 102–190, as amended, which specifies that, upon the request of a prospective subcontractor or supplier offering to furnish labor or material for the performance of a construction contract for which a payment bond has been furnished to the United States pursuant to the Miller Act, the contractor shall promptly provide a copy of such payment bond to the requestor.

In conjunction with performance bonds, payment bonds are used in Government construction contracts to secure fulfillment of the contractor's obligations under the contract and to assure that the contractor makes all payments, as required by law, to persons furnishing labor or material in performance of the contract. This regulation provides prospective subcontractors and suppliers a copy of the payment bond furnished by the contractor to the Government for the performance of a Federal construction contract subject to the Miller Act. It is expected that prospective subcontractors and suppliers will use this information to determine whether to contract with that particular prime contractor. This information has been and will continue to be available from the Government. The requirement for contractors to provide a copy of the payment bond upon request to any prospective subcontractor or supplier under the Federal construction contract is contained in Section 806(a)(3) of Public Law 102–190, as amended by Sections 2091 and 8105 of Public Law 103–355.

B. Annual Reporting Burden

The annual reporting burden is estimated as follows: Respondents, *12,000;* responses per respondent, *5*; total annual responses, *60,000;* preparation hours per response, *.5;* and total response burden hours, *30,000.*

Obtaining Copies of Proposals: Requester may obtain a copy of the justification from the General Services Administration, FAR Secretariat (VRS), Room 4037, 1800 F Street, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0135, Subcontractor Payments, in all correspondence.

Dated: November 20, 1997.

Sharon A. Kiser,

FAR Secretariat.

[FR Doc. 97–30896 Filed 11–24–97; 8:45 am]

BILLING CODE 6820–34–U

DEPARTMENT OF ENERGY

Draft Environmental Impact Statement on Management of Certain Plutonium Residues and Scrub Alloy Stored at the Rocky Flats Environmental Technology Site

AGENCY: Department of Energy.

ACTION: Notice of availability.

SUMMARY: The Department of Energy (DOE) announces the availability of the Draft Environmental Impact Statement on Management of Certain Plutonium Residues and Scrub Alloy Stored at the Rocky Flats Environmental Technology Site (draft EIS) for public review and comment. The Department has prepared this draft EIS pursuant to the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321, *et seq.*), in accordance with the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508) and the DOE NEPA implementing regulations (10 CFR part 1021). The draft EIS analyzes reasonable alternative means of processing certain plutonium residues and all of the scrub alloy currently stored at the Rocky Flats Site near Golden, Colorado to a form suitable for disposal or other disposition. Plutonium residues and scrub alloy are materials that were generated during the manufacture of components for nuclear weapons. DOE will hold three public hearings during the comment period, which ends January 5, 1998.

ADDRESSES: Requests for copies of the draft EIS should be directed to: Center for Environmental Management Information, P.O. Box 23769, Washington, D.C. 20026–3769, 1–800–736–3282 or in Washington, D.C., 202–863–5084. Copies of the draft EIS are also available for public review at the locations listed at the end of this Notice.

Written comments on the draft EIS should be mailed to: Mr. Charles R. Head, U.S. Department of Energy, Office of Environmental Management (EM–60), 1000 Independence Avenue, SW, Room 5B–086, Washington, DC 20585–0001. Comments may also be submitted to RFPR.EIS@EM.DOE.GOV by E-mail.

FOR FURTHER INFORMATION CONTACT: For further information about the draft EIS and about plutonium residues and scrub alloy, contact: Mr. Charles Head at the above address or call (202) 586–5151.

For information on the DOE NEPA process, contact: Carol M. Borgstrom, Director, Office of NEPA Policy and Assistance, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585–0001, (202) 586–4600 or leave a message at 1–800–472–2756.

DATES: The comment period ends on January 5, 1998. Comments postmarked after that date will be considered to the extent practicable. DOE will hold public hearings as follows:

Golden, Colorado—December 10, 1997
Los Alamos, New Mexico—December 11, 1997
Augusta, Georgia—December 16, 1997

Further details on the hearings are provided under **SUPPLEMENTAL INFORMATION.**

SUPPLEMENTARY INFORMATION:

Background

On November 19, 1996, DOE published a Notice of Intent (NOI) in the **Federal Register** (61 FR 58866) to prepare an EIS on the management of certain plutonium residues and scrub alloy stored at the Rocky Flats Environmental Technology Site. The plutonium residues and scrub alloy were generated as intermediate products or byproducts resulting from the manufacture of components for nuclear

weapons. Now that nuclear weapons manufacturing and processing activities at Rocky Flats have ceased, the plutonium residues and scrub alloy are being stored pending disposition.

The purpose and need for agency action is to process certain plutonium residues and all of the scrub alloy currently stored at the Rocky Flats Site to address health and safety concerns raised by the Defense Nuclear Facilities Safety Board in its Recommendation 94–1, and to prepare these materials for offsite disposal or other disposition, while supporting site closure and limiting worker exposure and waste production. The proposed action is to process the plutonium residues and scrub alloy in preparation for disposal or other disposition.

The materials addressed in this draft EIS include approximately 40% of the 106,600 kg (235,000 lb) existing inventory of Rocky Flats plutonium residues, and also the entire inventory of Rocky Flats scrub alloy. The covered material consists of 42,200 kg (93,000 lb) of plutonium residues [containing 2,600 kg (5,730 lb) of plutonium] and 700 kg (1,540 lb) of scrub alloy [containing 200 kg (440 lb) of plutonium]. The remaining Rocky Flats plutonium residues will meet the requirements for disposal after being processed as discussed in DOE's Solid Residues Environmental Assessment (DOE/EA–1120, April 1996), and are not addressed in the draft EIS.

Alternatives Considered

The draft EIS evaluates reasonable processing alternatives that could be applied in the 1998–2004 time frame. Three alternatives are analyzed for each residue category and the scrub alloy:

Alternative 1—No Action
Alternative 2—Processing without Plutonium Separation
Alternative 3—Processing with Plutonium Separation

Any plutonium separated from the plutonium residues and scrub alloy as a result of the proposed action would be placed into safe and secure storage pending disposition by immobilization or conversion to mixed-oxide fuel in accordance with decisions to be made under DOE's Surplus Plutonium Disposition Environmental Impact Statement (62 FR 28009, May 22, 1997). The processing technology options for each material category analyzed in the draft EIS include those that can be accomplished at Rocky Flats, and those for plutonium separation only that can be accomplished offsite at the Savannah River Site, near Aiken, South Carolina, and/or at Los Alamos National Laboratory in Los Alamos, New Mexico.

Invitation To Comment

The public is invited to submit written and oral comments on any or all portions of the draft EIS. DOE especially welcomes comments on the following topics: the technical adequacy of the document; the alternative(s) that DOE should select upon completion of the document; and the criteria that DOE should use in making these selections.

Public Hearings and Procedures

DOE will hold three public hearings according to the schedule provided at the end of this section. The hearing format will provide for collection of written and oral comments and will enable the public to discuss issues and concerns with DOE staff. Participants who wish to speak at the hearings are asked to register in advance by calling toll-free: 1–800–736–3282. Requests to speak that have not been submitted prior to the hearings will be handled in the order in which they are received during the meetings. DOE's responses to comments received during the public comment period will be presented in the final EIS.

An independent facilitator will open the hearings by explaining the format to be followed. The hearings will be conducted in a manner that is intended to foster a cordial, open and mutually beneficial dialog between the participants and the DOE representatives. In the interests of achieving this goal, DOE representatives may ask clarifying questions regarding statements made at the hearings, will answer questions from the public, and may comment on statements made by other hearing participants.

To ensure that everyone has an adequate opportunity to speak, each speaker at a public hearing will be allotted 5 minutes. Depending on the number of persons who request an opportunity to speak, more time may be allowed for speakers representing several parties or organizations. Persons wishing to speak on behalf of organizations should identify the organization in their request. Written comments will also be accepted at the hearings, and speakers at public hearings are encouraged to provide written versions of their oral comments for the record.

DOE will take notes and prepare a summary of the oral comments received during the public hearings.

Schedule of Public Hearings

December 10, 1997—Rocky Flats Environmental Technology Site, Near Golden, CO

6:00–9:00 pm mountain time, Rocky Flats Environmental Technology Site, Building 060 (outside of the West Gate of the Rocky Flats Environmental Technology Site), State Highway 93, Golden, CO 80402. Contact: Michael Konczal, 303–966–7095.

December 11, 1997—Los Alamos, NM

6:00–9:00 pm mountain time, Los Alamos Area Office, 528—35th Street, Rooms 100/129, Los Alamos, NM 87544. Contact: Bob Promell, 505–665–4411.

December 16, 1997—Augusta, Georgia

6:00–9:00 pm eastern time, Ramada Plaza Hotel, Grove Room, 640 Broad Street, Augusta, GA 30901. Contact: Drew Grainger, 807–725–1523.

Public Reading Rooms where the draft EIS is available:

U.S. Department of Energy, Freedom of Information Room, Room 1E–190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585. Telephone 202–586–6020.

Lawrence Livermore National Laboratory, East Gate Visitors Center, Greenville Road, Livermore, CA 94550. Telephone 510–424–4026.

California State University, Northridge/Oviatt Library, 18111 Nordhoff Street, Northridge, CA 91330. Telephone 818–677–2274.

U.S. Department of Energy, Oakland Operations Office, Public Reading Room, Energy Information Center, 8th Floor, 1301 Clay Street, Oakland, CA 94612. Telephone 510–637–1762.

Simi Valley Public Library, 2629 Tapo Canyon Road, Simi Valley, CA 93063. Telephone 805–525–2384.

Platt Brand Public Library, 23600 Victory Boulevard, Woodland Hills, CA 91367. Telephone 818–887–0160.

Standley Lake Public Reading Room, 8485 Kipling Street, Arvada, CO 80005. Telephone 303–456–0806.

University of Colorado Libraries, Government Publications, Campus Box 184, Boulder, CO 80309. Telephone 303–492–1411.

U.S. EPA Superfund Records Center, 999 18th Street, 5th Floor Denver, CO 80202. Telephone 303–312–6473.

Colorado Department of Public Health and Environment, Information Center, 4300 Cherry Creek Drive South, Denver, CO 80222. Telephone 303–692–2037.

Colorado State University, Document Department, The Libraries, Fort Collins, CO 80523. Telephone 970–491–1101.

U.S. Department of Energy, Golden Field Office, Public Reading Room,

14869 Denver West Parkway, Golden, CO 80401. Telephone 303–275–4742.

Colorado School of Mines, Arthur Lakes Library, 1400 Illinois Street, Golden, CO 80401. Telephone 303–273–3000.

Rocky Flats Citizens Advisory Board, Public Reading Room, 9035 Wadsworth Avenue, Suite 2250, Westminster, CO 80021. Telephone 303–420–7855.

Rocky Flats Public Reading Room, Front Range Community College Library, 3645 West 112th Avenue, Westminster, CO 80030. Telephone 303–469–4435.

Pullen Public Library, 100 Decatur Street, SE, Atlanta, GA 30303. Telephone 404–651–2185.

Georgia Institute of Technology, Bobby Dodd Way, Atlanta, GA 30332. Telephone 404–894–4519.

Reese Library—Augusta College, 2500 Walton Way, Augusta, GA 30904. Telephone 706–737–1744.

Chatham Effingham Library, 2002 Bull Street, Savannah, GA 31499. Telephone 912–234–5127.

Argonne National Laboratory, Technical Library, P.O. Box 2528, Idaho Falls, ID 83403. Telephone 208–533–7341.

University of Illinois at Chicago, U.S. Department of Energy, Public Document Room, 3rd Floor, 801 S. Morgan Street, Chicago, IL 60607. Telephone 312–996–2738.

East St. Louis Public Library, 405 North 9th Street, East St. Louis, IL 62201. Telephone 618–747–7280.

Lincoln Public Library, 326 South 7th Street, Springfield, IL 62701. Telephone 217–753–4900.

Salina Public Library, 301 West Elm, Salina, KS 67401. Telephone 785–825–4624.

Washburn Law Library, 1700 College, Topeka, KS 66621. Telephone 913–231–1010.

U.S. Department of Energy, Environmental Information Center, 175 Freedom Boulevard, Kevil, KY 42053. Telephone 502–462–2550.

Paducah Public Library, 555 Washington Street, Paducah, KY 42001. Telephone 502–442–2510.

Mid Continent Public Library, Blue Ridge Branch, 9253 Blue Ridge Boulevard, Kansas City, MO 64138. Telephone 816–761–3382.

St. Louis Public Library, 1301 Olive Street, St. Louis, MO 63103. Telephone 314–241–2288.

Scenic Regional Library, 308 Hawthorn Drive, Union, MO 63084. Telephone 314–583–3224.

Albuquerque Operations Office, National Atomic Museum, 20358 Wyoming Boulevard SE, Kirtland Air Force Base, Albuquerque, NM 87185. Telephone 505–845–4378.

U.S. Department of Energy, Technical Vocation Institute, Main Campus Library, 525 Buena Vista SE, Albuquerque, NM 87106. Telephone 505–845–4378.

U.S. Department of Energy, FOIA Reading Room, 4700 Morris NE, Albuquerque, NM 87111. Telephone 505–224–5731.

Los Alamos Community Reading Room, 1350 Central, Suite 101, Los Alamos, NM 87544. Telephone 505–665–2127.

New Mexico State Library, 325 Don Gasper, Santa Fe, NM 87503. Telephone 505–827–3800.

U.S. Department of Energy, Public Reading Room, Gregg Graniteville Library, 171 University Parkway, Aiken, SC 29801. Telephone 803–641–3465.

County Library, 404 King Street, Charleston, SC 29403. Telephone 803–723–1645.

South Carolina State Library, 1500 Senate Street, Columbia, SC 29211. Telephone 803–734–8666.

Orangeburg County Free Library, 510 Louis Street, NE, Orangeburg, SC 29116. Telephone 803–531–4636.

Lawson McGhee Public Library, 500 West Church Avenue, Knoxville, TN 37902. Telephone 615–544–5750.

Nashville Public Library, 225 Polk Avenue, Nashville, TN 37203. Telephone 615–862–5800.

U.S. Department of Energy, Public Reading Room, Oak Ridge Operations Office, 55 Jefferson Circle, Room 1123, Oak Ridge, TN 37831. Telephone 615–576–1216.

Issued in Washington, D.C., November 20, 1997.

David G. Huzienga,

Acting Deputy Assistant Secretary for Nuclear Material and Facility Stabilization, Office of Environmental Management.

[FR Doc. 97–30957 Filed 11–24–97; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–81–000]

Florida Gas Transmission Company; Notice of Request Under Blanket Authorization

November 19, 1997.

Take notice that on November 12, 1997, Florida Gas Transmission Company, (FGT) 1400 Smith Street, Houston, Texas 77002, filed in the above docket a request pursuant to Sections 157.205 and 157.212 of the Commission's Regulations, under the Natural Gas Act (NGA) (18 CFR 157.205 and 157.212) for authorization to construct and operate a new delivery point in Iberville Parish, Louisiana under FGT's blanket authority issued in Docket No. CP82–553–000 pursuant to Section 7 of the NGA, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Specifically, FGT proposes to construct, operate and own a new delivery point for Iberville Parish Natural Gas System (Iberville) at or near mile post 19.9 on FGT's existing Chacahoula Lateral in Iberville Parish, Louisiana. FGT states that the subject delivery point will include minor connecting pipe, electronic flow measurement equipment, and any other related appurtenant facilities necessary for FGT to transport for and deliver up to 500 MMBtu per day and 182,500 MMBtu per year of natural gas to Iberville. FGT further states that Iberville will construct, own and operate the meter and regulation station. Iberville will reimburse FGT for the $30,000 estimated construction costs.

FGT states that the proposed quantities to be delivered by FGT to Iberville at the subject delivery point will be on an interruptible basis and consequently will have no incremental effect on FGT's pipeline system. FGT states that the proposed request will not impact FGT's peak day deliveries but could impact FGT's annual gas deliveries up to 182,500 MMBtu.

FGT states that the proposed activity described herein is not prohibited by its existing tariff and that it has sufficient capacity to continue all services without detriment or disadvantage to FGT's other customers. FGT further states that the total volumes to be delivered after this request will not exceed the total volumes delivered prior to this request.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for

authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97–30883 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP96–152–002]

Kansas Pipeline Company; Notice of Supplement to Amendment

November 19, 1997.

Take notice that on November 12, 1997, Kansas Pipeline Company, majority owner and operator of Riverside Pipeline Company, L.P. (''Kansas Pipeline''), 8325 Lenexa Drive, Suite 400, Lenexa, Kansas 66214, filed a letter, a corrected pro forma tariff sheet and alternative pro forma tariff sheets to supplement its amendment to its proposed tariff that is the subject of the Commission's October 3, 1997 order in the above docketed proceeding, *Kansas Pipeline Company, et. al.*, 81 FERC ¶ 61,005 (1997).

On October 21, 1997, Kansas Pipeline filed pro forma tariff Sheet Nos. 18 and 19 proposing to implement negotiated transportation rates with its largest customers, Western Resources, Inc., and Missouri Gas Energy, a Division of Southern Union Company. The original pro forma sheets reflect unbundled negotiated transportation rates exclusive of costs associated with the Transok, Inc., lease.

By this supplement, Kansas Pipeline corrects a mathematical error to Sheet No. 18 and submits Alternative pro forma Sheet Nos. 18 and 19 which depict rates that will be used if Kansas Pipeline continues, in the interim, to provide service to these two customers under the Transok lease.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 1, 1997, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceedings. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Kansas Pipeline to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 97–30881 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–83–000]

Koch Gateway Pipeline Company; Texas Gas Transmission Corporation; Notice of Joint Application for Abandonment

November 19, 1997.

Take notice that on November 12, 1997, Koch Gateway Pipeline Company (Koch), P.O. Box 1478, Houston, Texas 77251 and Texas Gas Transmission Corporation (Texas Gas), P.O. Box 20008, Owensboro, Kentucky 42304 filed a joint application pursuant to Section 7(b) of the Natural Gas Act and Part 157 of the Commission's Regulations requesting permission and approval to abandon a natural gas exchange service between Koch and Texas Gas which was authorized in Docket No. CP61–79,[1] as amended, and provided under Koch's Rate Schedule X–12 in its FERC Gas Tariff, Original Volume No. 2 and Texas Gas's FERC Rate Schedule X–27, Original Volume No. 2. The application is on file with the Commission and open to public inspection.

Koch and Texas Gas state that this exchange service is no longer required and request that the Commission grant abandonment of this obsolete service commitment. By letter dated April 18, 1996, Texas Gas notified Koch of its desire to terminate the August 30, 1960 exchange agreement, effective July 18, 1996.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 10, 1997, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a motion to intervene in accordance with the Commission's rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Koch and Texas Gas to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 97–30884 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

[1] *See* 24 FPC 1099 (1960).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–79–000]

NorAm Gas Transmission Company; Notice of Request Under Blanket Authorization

November 19, 1997.

Take notice that on November 12, 1997, NorAm Gas Transmission Company (NorAm), 1600 Smith Street, Houston, Texas 77002, filed in Docket No. CP98–79–000 a request pursuant to Sections 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.216) for permission and approval to abandon a portion of NorAm's Line 2–T located in Roger Mills County, Oklahoma, and a portion of its Line 5 located in Grant and Kay Counties, Oklahoma. NorAm makes such request under its blanket certificate issued in Docket Nos. CP82–384–000 and CP82–384–001 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

NorAm proposes to abandon segments of two lines that it acquired as part of its merger with Consolidated Gas Utilities Corporation,[1] because the expected revenue recovery does not justify the expenditure to relocate those line segments. It is stated that both lines serve ARKLA, a division of NorAm Energy Corporation.

Line 2–T is comprised of 59,277 feet of 3-inch line. NorAm is proposing to abandon 53,764 feet of Line 2–T, along with nine active and six inactive rural domestic taps. It is stated that the remaining 5,513 feet of Line 2–T will continue to serve ARKLA's Cheyenne town border station without interruption. NorAm avers that planned construction by the Oklahoma Department of Transportation, dictates that the above mentioned facilities be abandoned or moved from the public right-of-way.

Line 5 is comprised of 115,838 feet of 8-inch to 12-inch line. NorAm is proposing herein to abandon a 43,824 foot 8-inch segment of Line 5, along with 19 active and one inactive rural domestic tap. NorAm indicates that this segment of Line 5, is likewise located on a county right-of-way.

NorAm estimates it would cost $327,000 to relocate that segment of Line 2–T, indicating that segment of Line 2–T generates an annual revenue of approximately $200. NorAm further indicates that the subject segment of Line 5, has an estimated yearly lost and unaccounted for gas cost of $62,740—compared to the approximate $583 of annual revenue that is generated by that segment of Line 5.

NorAm states that it has paid to convert each active customer to an alternate source of fuel.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97–30882 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

[1] See 24 FPC 91, CP60–79.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98–384–000]

PECO Energy Company; Notice of Filing

November 19, 1997.

Take notice that on October 30, 1997, PECO Energy Company (PECO) filed an executed Transmission Agency Agreement between PECO and MC[2] Inc., (hereinafter Supplier). The terms and conditions contained within this Agreement are identical to the terms and conditions contained with the Form of Transmission Agency Agreement submitted to the Commission on October 3, 1997, as part of the joint filing by the Pennsylvania Public Utility Commission and the Pennsylvania PJM Utilities at Docket No. ER98–64–000. This filing merely submits an individual executed copy of the Transmission Agency Agreement between PECO and an alternative supplier participating in PECO's Retail Access Pilot Program.

Copies of the filing were served on the Supplier and the Pennsylvania Public Utility Commission.

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 an 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 December 1, 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. 97–30887 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98–385–000]

PECO Energy Company; Notice of Filing

November 19, 1997.

Take notice that on October 30, 1997, PECO Energy Company (PECO), filed an executed Transmission Agency Agreement between PECO and Enron Power Marketing Inc., (hereinafter Supplier). The terms and conditions contained within this Agreement are identical to the terms and conditions contained with the Form of Transmission Agency Agreement submitted to the Commission on October 3, 1997, as part of the joint filing by the Pennsylvania Public Utility Commission and the Pennsylvania PJM Utilities at Docket No. ER98–64–000. This filing merely submits an individual executed copy of the Transmission Agency Agreement between PECO and an alternative supplier participating in PECO's Retail Access Pilot Program.

Copies of the filing were served on the Supplier and the Pennsylvania Public Utility Commission.

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

December 1, 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. 97–30888 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98–386–000]

PECO Energy Company; Notice of Filing

November 19, 1997.

Take notice that on October 30, 1997, PECO Energy Company (PECO), filed an executed Installed Capacity Obligation Allocation Agreement between PECO and Enron Power Marketing Inc., (hereinafter Supplier). The terms and conditions contained within this Agreement are identical to the terms and conditions contained with the Form of Installed Capacity Allocation Agreement filed by PECO with the Commission on October 3, 1997, at Docket No. ER98–28–000. This filing merely submits an individual executed copy of the Installed Capacity Obligation Allocation Agreement between PECO and an alternate supplier participating in PECO's Pilot.

Copies of the filing were served on the Supplier and the Pennsylvania Public Utility Commission.

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 December 1, 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. 97–30889 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98–388–000]

PECO Energy Company; Notice of Filing

November 19, 1997.

Take notice that on October 30, 1997, PECO Energy Company (PECO) filed an executed Transmission Agency Agreement between PECO and Allegheny Energy Solutions Inc., (hereinafter Supplier). The terms and conditions contained within this Agreement are identical to the terms and conditions contained with the Form of Transmission Agency Agreement submitted to the Commission on October 3, 1997, as part of the joint filing by the Pennsylvania Public Utility Commission and the Pennsylvania PJM Utilities at Docket No. ER98–64–000. This filing merely submits an individual executed copy of the Transmission Agency Agreement between PECO and an alternative supplier participating in PECO's Retail Access Pilot Program.

Copies of the filing were served on the Supplier and the Pennsylvania Public Utility Commission.

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 December 1, 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. 97–30890 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98–389–000]

PECO Energy Company; Notice of Filing

November 19, 1997.

Take notice that on October 30, 1997, PECO Energy Company (PECO) filed an executed Transmission Agency Agreement between PECO and Delmarva Power & Light d/b/a Connective Energy (hereinafter Supplier). The terms and conditions contained within this Agreement are identical to the terms and conditions contained with the Form of Transmission Agency Agreement submitted to the Commission on October 3, 1997, as part of the joint filing by the Pennsylvania Public Utility Commission and the Pennsylvania PJM Utilities at Docket No. ER98–64–000. This filing merely submits an individual executed copy of the Transmission Agency Agreement between PECO and an alternative supplier participating in PECO's Retail Access Pilot Program.

Copies of the filing were served on the Supplier and the Pennsylvania Public Utility Commission.

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 December 1, 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. 97–30891 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–84–000]

The Peoples Gas Light and Coke Company; Notice of Application

November 19, 1997.

Take notice that on November 12, 1997, The Peoples Gas Light and Coke Company (Peoples Gas), 130 East Randolph Drive, Chicago, Illinois 60601, filed in Docket No. CP98–84–000, an application pursuant to Section 7 of the Natural Gas Act, as amended, and Section 284.224 of the Commission's Regulations, for a blanket certificate of public convenience and necessity authorizing Peoples Gas to provide firm and interruptible transportation services in interstate commerce, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Peoples Gas is a public utility and its rate and tariffs are subject to regulation by the Illinois Commerce Commission. Peoples Gas is engaged in the business of purchasing and storing natural gas and distributing and selling natural gas to approximately 840,000 retail customers within the City of Chicago, Illinois. Peoples Gas owns and operates a distribution system within the City of Chicago and it owns and operates a storage field located in central Illinois. Peoples Gas states that it owns and operates a looped pipeline (30-inch and 42-inch) which connects the storage field with its distribution system. Peoples Gas claims that these facilities are subject to the Illinois Commission's jurisdiction. Peoples Gas asserts that these facilities currently serve only retail customers in Illinois and that it is not authorized to provide interstate services subject to the Commission's jurisdiction.

Peoples Gas notes that its facilities interconnect with four interstate pipelines, namely ANR Pipeline Company, Midwestern Gas Transmission Company, Natural Gas Pipeline Company of America and Trunkline Gas Company. Peoples Gas claims that it could also have interconnections with Northern Border Pipeline Company and Alliance Pipeline Company if these projects are approved and completed. Since these pipelines are tied to major gas producing regions in the United States and Canada. Peoples Gas feels that it is strategically located to provide transportation service in the Chicago, Illinois market area. By transporting gas on behalf of other local distribution companies, producer/marketers and end users, Peoples Gas claims that it will enhance competition in the Chicago market by facilitating pooling, providing additional options for shippers serving midwest markets and for end users in those markets by linking existing and proposed pipelines, and improving liquidity in the commodity market at the Chicago citygate.

Peoples Gas asserts that during the twelve-month period ending September 30, 1997, it received 287,644 Mdth of gas from all sources into its system within or at the boundary of the State of Illinois. Peoples Gas states that it does not currently provide wholesale transportation services and none of the gas received during the most recent period was exempt from the Commission's regulation by reason of Section 1(c) of the NGA. Peoples Gas states that all of the gas received was exempt from the Commission's jurisdiction by reason of section 1(b) of the NGA since all of such gas was purchased for the purpose of distribution to end users within Illinois and was subject to the Illinois Commission jurisdiction. Peoples Gas filed its proposed rates in its contemporaneously filed application in Docket No. PR98–1–000 for approval of rates pursuant to Sections 284.123 and 284.224 of the Commissions Regulations (18 CFR 284.123 and 284.224) Peoples Gas states that it will comply with the conditions of Section 284.224(e) of the Commission's regulations.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 10, 1997, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment and grant of certificate are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Peoples Gas to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 97–30885 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98–85–000]

Texas Eastern Transmission Corporation; Notice of Application for Abandonment

November 19, 1997.

Take notice that on November 12, 1997, Texas Eastern Transmission Corporation (Texas Eastern), 5400 Westheimer Court, Houston, Texas (77056–5310, filed an application pursuant to Section 7(b) of the Natural Gas Act and Part 157 of the Commission's Regulations for an order granting permission and approval to abandon certain facilities in place and by removal, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, Texas Eastern requests authorization to abandon the Point Au Chien compressor station; lateral lines 40–E–11, 40–E–12, 40–E–13, and 40–F; and certain meter stations and appurtenant facilities. All of the facilities for which Texas Eastern seeks abandonment authority for are located in Lafourche and Terrebonne Parishes, Louisiana. Texas Eastern states that neither it nor its customers are utilizing the subject facilities. In addition, Texas Eastern states that it does not propose to attach any new sources of natural gas to the subject facilities.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 10, 1997, file with the Federal Energy Regulatory Commission, 888 1st Street, NE, Washington, D.C. 20426, a

motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a motion to intervene in accordance with the Commission's rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Texas Eastern to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 97–30886 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–408–000]

Trailblazer Pipeline Company; Notice of Informal Settlement Conference

November 19, 1997.

Take notice that an informal settlement conference will be convened in this proceeding on December 4, 1997 at 10:00 a.m., to continue through December 5, 1997 as needed, at the offices of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC, for the purpose of exploring the possible settlement of the above-referenced docket.

Any party, as defined by 18 CFR 385.102(c), or any participant as defined by 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

For additional information, please contact Robert Young at (202) 208–5705 or Thomas Burgess at (202) 208–2058.

Lois D. Cashell,

Secretary.

[FR Doc. 97–30892 Filed 11–24–97; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS–42193; FRL–5759–3]

Endocrine Disruptors; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice of public meeting.

SUMMARY: EPA is announcing the sixth meeting of the Endocrine Disruptors Screening and Testing Advisory Committee (EDSTAC), a committee established under the provisions of the Federal Advisory Committee Act (FACA) to advise EPA on a strategy for screening chemicals and pesticides for their potential to disrupt endocrine function in humans and wildlife.

DATES: The meeting will begin on December 2 at 9 a.m. and is scheduled to adjourn December 3 at 12 p.m. A public comment period will be held on the evening of December 2 from 7 p.m. to 9 p.m.

ADDRESSES: The meeting will be held at the Omni Rosen Hotel, 9840 International Drive, Orlando, FL. The telephone number at the hotel is 407–354–9840; fax: 407–248–0865.

FOR FURTHER INFORMATION CONTACT: For technical information, contact Dr. Anthony Maciorowski (telephone: 202–260–3048) or Mr. Gary Timm (telephone: 202–260–1859) at EPA. To obtain additional information please contact the contractor assisting EPA with meeting facilitation and logistics: Ms. Tutti Otteson, The Keystone Center, P.O. Box 8606, Keystone, CO 80435. Telephone: 970–468–5822; fax: 970–262–0152; email: totteson@keystone.org.

SUPPLEMENTARY INFORMATION: EPA's Office of Prevention, Pesticides and Toxic Substances is taking the lead for the Agency on endocrine disruptor screening and testing required by recent legislation (i.e., reauthorization of the Safe Drinking Water Act and the Food Quality Protection Act) and has formed an advisory committee (EDSTAC) to provide advice and counsel to the Agency on a strategy to screen and test chemicals, including pesticides, for their potential to disrupt endocrine function in humans, fish, and wildlife.

It is proposed that the agenda for this meeting include the following topics:

1. A report from the Screening and Testing Work Group—Further discussion of Tier 1 screening assays—Proposals for Tier 2 testing.
2. An update on the Communication Strategy from the Communications and Outreach Work Group.
3. A report from the Priority Setting Work Group—Proposals for handling mixtures and polymers—Update on other topics.

Dated: November 20, 1997.

William H. Sanders,

Director, Office of Pollution Prevention and Toxics.

[FR Doc. 97–31127 Filed 11–21–97; 2:49 pm]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Submitted to OMB for Review and Approval

November 17, 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 (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before December 26, 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 Commission, Room 234, 1919 M St., N.W., Washington, DC 20554 or via internet to jboley@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s) contact Judy Boley at 202–418–0214 or via internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0739.
Title: Amendment of the Commission's Rules to Establish Competitive Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services.
Form Number: N/A.
Type of Review: Revision of a currently approved collection.
Respondents: Business or other for-profit; state, local or tribal government.
Number of Respondents: 19.
Estimated Time Per Response: 6,056 hours.
Cost to Respondents: $1,003,000.
Total Annual Burden: 116,456 hours.
Needs and Uses: Incumbent Local Exchange Carriers (LECs) offering in-region broadband Commercial Mobile Radio Services (CMRS) must do so through a separate affiliate. The CMRS affiliate must maintain separate books of accounts and will be subject to the Commission's joint cost and affiliate transaction rules. The Commission imposes the recordkeeping collection to ensure that incumbent LECs providing in-region broadband CMRS through a separate affiliate are in compliance with the Communications Act, as amended, and with Commission policies and regulations.

OMB Control Number: 3060–0698.
Title: Amendment of the Commission's Rules to Establish a Radio Astronomy Coordination Zone in Puerto Rico (ET Docket No. 96–2, RM–8165; Report and Order).
Form Number: N/A.
Type of Review: Revision of a currently approved collection.
Respondents: Individuals or households; business or other for-profit; state, local or tribal government.
Number of Respondents: 500.
Estimated Time Per Response: 1 hour.
Cost to Respondents: $3,000.
Total Annual Burden: 300 hours.
Needs and Uses: The Report and Order establishes a Coordination Zone that covers the Islands of Puerto Rico, Desecheo, Mona, Vieques, and Culebra within the Commonwealth of Puerto Rico (the Puerto Rico Islands). The Coordination Zone and notifications procedures will enable the Arecibo Radio Astronomy Observatory (Observatory) to receive information needed to assess whether an applicant's proposed operations will cause harmful interference to the Observatory's operations and will promote efficient resolution of problems coordination between applicants and the Observatory.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–30849 Filed 11–24–97; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Submitted to OMB for Review and Approval

November 19, 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, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before December 26, 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 Commission, Room 234, 1919 M St., N.W., Washington, DC 20554 or via internet to jboley@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s) contact Judy Boley at 202–418–0214 or via internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0621.
Title: Rules and Requirements for Broadband PCS Licenses.
Form Number: N/A.
Type of Review: Extension of a currently approved collection.
Respondents: Individuals or households; business or other for-profit; not-for-profit institutions; state, local or tribal government.
Number of Respondents: 3,000.
Estimated Time Per Response: Ranges from .50–20 hours.
Cost to Respondents: N/A.
Total Annual Burden: 14,044 hours.
Needs and Uses: The information requested provides the Commission with information to determine the legal, technical and other qualifications of applicants to obtain a broadband Personal Communications Service (PCS) license. The information is also used to determine whether grant of an application will serve the public interest, convenience and necessity. The staff uses the information to ensure that licensees who acquire their licenses through competitive bidding are not unjustly enriched by premature transfer of their licenses.

OMB Control Number: 3060–0508.
Title: Rewrite and Update of Part 22.
Form Number: N/A.
Type of Review: Extension of a currently approved collection.
Respondents: Business or other for-profit.
Number of Respondents: 20,860 respondents; 107,872 annual responses.
Estimated Time Per Response: Ranges from .25 to 600 hours.
Cost to Respondents: N/A.
Total Annual Burden: 266,555 hours.
Needs and Uses: The information requested provides the Commission with information to determine the legal, technical and other qualifications of applicants to operate a station in the Public Mobile Services. The information is also used to determine whether grant of an application will serve the public interest, convenience and necessity. The staff uses the information to ensure that applicants and licensees comply with ownership and transfer restrictions.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–30901 Filed 11–24–97; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA–97–2420; Report No. AUC–17–D (Auction No. 17)]

Opportunity for Reply Comment on Reserve Prices or Minimum Opening Bids for LMDS Auction Extended

Released: November 18, 1997.

When FCC licenses are subject to auction (*i.e.*, because they are mutually exclusive) the recently enacted Balanced Budget Act of 1997 calls upon the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid established, unless the Commission determines that a reserve price or minimum bid is not in the public interest. The Commission recently announced the auction of 986 licenses for the Local Multipoint Distribution Service (''LMDS''), and originally set an auction commencement date of December 10, 1997 (62 FR 53629, October 15, 1997), later rescheduled to February 18, 1998 by Public Notice released on November 10, 1997. This document is available in the Commission's Office of Public Affairs, 1919 M Street, N.W., Room 202, Washington, DC 20554. In anticipation of that auction and in light of the Balanced Budget Act, the Commission proposed that minimum opening bids be established for the LMDS auction, that they be calculated under a specific iterated formula, and that the Commission have discretion to lower the minimum opening bids as it deems appropriate. Because of the imminence of the auction, the Commission sought comment on its proposals under a schedule that provided a somewhat abbreviated deadline for reply comments.

The Commission received comments from the following parties:

BroadBand, Inc.
Cornerstone Wireless Communications, L.L.C.
East Ascension Telephone Company, Inc.
Eclipse Communications Corporation
Fremont Telcom Co.
HighSpeed.Com, L.L.C.
Horizon Personal Communications, Inc.
JATO Communications Corp.
Midwest Wireless Communications, L.L.C.
Montana Wireless, Inc.
North Alabama Cellular, LLC
Pioneer Telephone Association, Inc.
Richard L. Vega Group, Inc.
Spectraware Corporation
Tel/Logic Inc.
Thomas F. Mitts and Pappas Telecasting Companies
U.S. WaveLink Telecommunications, L.P.
U.S. Wireless Communications, Inc.
Vanguard Cellular Systems, Inc.
VIPC
Virginia Tech Foundation, Inc.
WinStar Communications, Inc.
Zip Communications Corporation

A reply comment was received from the National Telephone Cooperative Association.

More recently, the Commission postponed the auction commencement date until February 18, 1998. Because of the additional time available prior to the commencement of the auction, the Commission hereby reopens the period for reply comments on its above-referenced proposals regarding minimum opening bids. Reply comments therefore will be due on or before December 1, 1997. To file formally, parties must submit an original and four copies to the Office of the Secretary, Room 222, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Public Reference Room, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

For further information concerning this proceeding, contact Brett Tarnutzer, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418–0660.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–30848 Filed 11–24–97; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 10:41 a.m. on Wednesday, November 12, 1997, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters relating to the Corporation's corporate and supervisory activities.

In calling the meeting, the Board determined, on motion of Director Joseph H. Neely (Appointive), seconded by Director Ellen S. Seidman (Director, Office of Thrift Supervision), concurred in by Ms. Julie Williams, acting in the place and stead of Director Eugene A. Ludwig (Comptroller of the Currency), and Acting Chairman Andrew C. Hove, Jr., that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), and (c)(9)(A)(ii) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), and (c)(9)(A)(ii)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Dated: November 18, 1997.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

[FR Doc. 97–31025 Filed 11–20–97; 4:35 pm]

BILLING CODE 9714–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 10:04 a.m. on Tuesday, November 18, 1997, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters relating to the Corporation's corporate, supervisory, and resolution activities.

In calling the meeting, the Board determined, on motion of Director Ellen S. Seidman (Director, Office of Thrift Supervision), seconded by Director Joseph H. Neely (Appointive), concurred in by Ms. Julie Williams, acting in the place and stead of Director Eugene A. Ludwig (Comptroller of the Currency), and Acting Chairman Andrew C. Hove, Jr., that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii)), (c)(9)(B), and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, N.W., Washington, D.C.

Dated: November 18, 1997.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

[FR Doc. 97–31026 Filed 11–20–97; 4:35 pm]

BILLING CODE 6714–01–M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Commission hereby gives notice of the filing of the following agreement(s) under the Shipping Act of 1984.

Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, NW., Room 962. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 202–008090–041.

Title: Mediterranean North Pacific Coast Freight Conference.

Parties:

Med Pacific Express
Zim Israel Navigation Co., Ltd.

Synopsis: The proposed amendment would permit the parties to discuss and agree, with voluntary adherence, on rates to be charged for the carriage of open tariff items and would reduce the independent action notice period applicable to direct vessel calls at San Francisco and Oakland from ten calendar days to two business days. It would also permit members that provide direct vessel service to Portland, Oregon, or serve Seattle via Portland to offer individual service contracts for those ports.

Agreement No.: 202–011375–034.

Title: Trans-Atlantic Conference Agreement (''TACA'').

Parties:

Atlantic Container Line AB
Cho Yang Shipping Co., Ltd.
DSR-Senator Lines
Hanjin Shipping Co., Ltd.
Hapag-Lloyd Container Linie GmbH
Hyundai Merchant Marine Co., Ltd.
Mediterranean Shipping Co., S.A.
A.P. Moller-Maersk Line
Orient Overseas Container Line (UK) Ltd.
Neptune Orient Lines Ltd.
Nippon Yusen Kaisha
POL-Atlantic
P&O Nedlloyd B.V.
P&O Nedlloyd Limited
Sea-Land Service, Inc.
Tecomar S.A. de C.V.
Transportation Maritima Mexicana, S.A. de C.V.

Synopsis: The proposed modification (1) authorizes the parties to consider and act upon proposals and recommendations of the Equipment Interchange Discussion Agreement (FMC No. 202–011284), and (2) deletes expiration dates attached to exceptions to service contract through rate and assessorial charge guidelines applicable to shipments to and from the territory of the former Soviet Union.

Agreement No.: 232–011521–004.

Title: Hanjin/Tricon Far East Services Slot Charter Agreement.

Parties:

Hanjin Shipping Co., Ltd.
Cho Yang Shipping Co. Ltd.
DSR-Senator Lines GmbH

Synopsis: The proposed amendment expands the geographic scope of the Agreement to include ports in Europe, the Middle East, Asia, Canada, and Central America. It also changes the name of the Agreement to the Hanjin/Tricon Slot Charter Agreement.

Agreement No.: 232–011519–003.

Title: Tricon/Hanjin Transpacific Agreement.

Parties:

Hanjin Shipping Co., Ltd.
Cho Yang Shipping Co. Ltd.
DSR-Senator Lines

Synopsis: The proposed amendment expands the geographic scope of the Agreement to include ports in Europe, the Middle East, Asia, Canada, and Central America. It changes the name of the Agreement to the Tricon/Hanjin Agreement and replaces and supersedes Agreements No. 232–011475 (the Hanjin/Tricon Agreement) and 232–011501 (the Hanjin/Tricon Panama Agreement).

Agreement No.: 207–011586–001.

Title: Transroll Navegacao, S.A./NPR Holding Corp. Joint Venture Agreement.

Parties:

Transroll Navegacao, S.A.
NPR Holding Corporation

Synopsis: The proposed Agreement reflects Transroll Navegacao's assignment of its rights and obligations under the Agreement to Transroll Maritime Services, Ltd., a newly created Liberian subsidiary.

Agreement No.: 202–011587–001.

Title: United States South Europe Conference.

Parties:

A. P. Moller-Maersk Line
P&O Nedlloyd B.V.
P&O Nedlloyd Limited
Sea-Land Service, Inc.

Synopsis: The proposed amendment would permit the parties to apply surcharges to service contracts at the level set in the Agreement tariff or at some higher level at the time the contract is signed and it would permit them to deviate from their tariff with regard to currency and bunker fuel surcharge amounts on such items.

Agreement No.: 232–011594.

Title: Sea-Land/Dole Space Charter Agreement.

Parties:

Sea-Land Service, Inc.
Dole Ocean Liner Express

Synopsis: The proposed Agreement permits the parties to charter space to each other, and to engage in related activities, including providing terminal services to each other, interchanging containers and related equipment, and agreeing on sailing schedules, in the trade between United States Atlantic and Gulf ports and ports in Puerto Rico, and U.S inland and coastal points served via such ports, on the one hand, and, on the other hand, ports in Guatemala, Honduras, Costa Rica, Nicaragua, and El Salvador, and inland and coastal points via such ports.

Agreement No.: 224–201041.

Title: Port of New Orleans/International Shipholding Corp. Terminal Agreement.

Parties:

Port of New Orleans
International Shipholding Corporation

Synopsis: The proposed Agreement establishes dockage rates for LASH mother vessels owned and/or operated by Waterman Steamship Corporation, Central Gulf Lines, Inc., and Forest Lines, Inc. The term of the Agreement continues until September 30, 1998. This Agreement supersedes Agreement No. 224–200852.

Dated: November 20, 1997.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 97–30908 Filed 11–24–97; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR 510).

Persons knowing of any reason why any of the following applicants should

not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, D.C. 20573.

J.E.S. Forwarding Inc., 130A Kinderkamack Road, Montvale, NJ 07645, Officer: John E. Staib, Jr., President

A A Shipping, 100 Market Street, Suite 116, Inglewood, CA 90301, Peter Mozie, Barbara Mozie, Partnership

Dated: November 19, 1997.

Joseph C. Polking,

Secretary.

[FR Doc. 97–30871 Filed 11–24–97; 8:45 am]

BILLING CODE 6730–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Infectious Diseases (BSC, NCID): Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act (Pub. L. 92–463) of October 6, 1972, that the Board of Scientific Counselors, National Center for Infectious Diseases (BSC, NCID), Centers for Disease Control and Prevention (CDC), Department of Health and Human Services, has been renewed for a 2-year period beginning October 31, 1997, through October 31, 1999.

For further information, contact Joseph E. McDade, Ph.D., Acting Deputy Director, National Center for Infectious Diseases, CDC, 1600 Clifton Road, m/s C20, Atlanta, Georgia 30333.

Dated: November 19, 1997.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 97–30900 Filed 11–24–97; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

CDC Advisory Committee on HIV and STD Prevention: Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following committee meeting.

Name: CDC Advisory Committee on HIV and STD Prevention.

Times and Dates: 8:30 a.m.–5 p.m., December 16, 1997. 8:30 a.m.–3 p.m., December 17, 1997.

Place: Corporate Square Office Park, Corporate Square Boulevard, Building 11, Room 1413, Atlanta, Georgia 30329.

Status: Open to the public, limited only by the space available. The meeting room will accommodate approximately 100 people.

Purpose: This committee is charged with advising the Director, CDC, regarding objectives, strategies, and priorities for HIV and STD prevention efforts including maintaining surveillance of HIV infection, AIDS, and STDs, the epidemiologic and laboratory study of HIV/AIDS and STDs, information/education and risk reduction activities designed to prevent the spread of HIV and STDs, and other preventive measures that become available.

Matters to be Discussed: Agenda items will include issues regarding building HIV prevention capacity in racial/ethnic minority communities; issues pertaining to integration of HIV/STD prevention efforts; and discussions on HIV surveillance.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Beth Wolfe, Program Analyst, National Center for HIV, STD, and TB Prevention, 1600 Clifton Road, N.E., m/s E–07, Atlanta, Georgia 30333, telephone 404/639–8008.

Dated: November 19, 1997.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 97–30899 Filed 11–24–97; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Agency Recordkeeping/Reporting Requirements Under Emergency Review by the Office of Management and Budget (OMB)

Title: Annual Statistical Report on Children in Foster Homes and Children in Families Receiving Payments in Excess of the Poverty Income Level from a State Program Funded under Part A of Title IV of the Social Security Act.

OMB No.: 0970–0004.

Description: This information is collected to meet the statutory requirements of section 1124 of Title I of the Elementary and Secondary Education Act (as amended by Pub. L. 103–382). It is collected by DHHS from State public welfare agencies and turned over to the Department of Education which uses it to arrive at the formula for allocating Title I grant funds to State and local elementary and secondary schools for the purposes of providing education assistance to disadvantaged children.

Respondents: States, Local and Tribal Government.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ACF–4125	52	1	6	312

Estimated Total Annual Burden Hours: 312.

Additional Information: ACF is requesting that OMB grant a 180 day approval for this information collection under procedures for emergency processing by April 9, 1997. A copy of this information collection, with applicable supporting documentation, may be obtained by calling the Administration for Children and Families, Reports Clearance Officer, Robert Driscoll at (202) 401–9313.

Comments and questions about the information collection described above should be directed to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for ACF, Office of Management and Budget, Paperwork Reduction Project, 725 17th Street N.W., Washington, D.C. 20503, (202) 395–7316.

Dated: November 19, 1997.

Bob Sargis,

Acting Reports Clearance Officer.

[FR Doc. 97–30919 Filed 11–24–97; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 97N–0456]

Agency Information Collection Activities: Proposed Collection

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on reporting and recordkeeping requirements relating to the use of narcotic drugs in treating drug addiction.

DATES: Submit written comments on the collection of information by January 26, 1998.

ADDRESSES: Submit written comments on the collection of information to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Karen Nelson, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information listed below.

With respect to the following collection of information, FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Conditions for the Use of Narcotic Drugs for Treatment of Narcotic Addiction Reporting and Recordkeeping Requirements (21 CFR 291.505) (OMB Control Number 0910–0140—Reinstatement)

Section 303(g) of the Controlled Substances Act (21 U.S.C. 823(g)) provides for a separate controlled substances registration for practitioners who dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment. This separate registration is conditioned on the Secretary of Health and Human Services (the Secretary) determining that the applicant is a practitioner who is qualified (under standards established by the Secretary) to engage in the treatment with respect to which registration is sought. Section 303(g) requires that the Secretary (and, by delegation, FDA and the National Institute of Drug Abuse): (1) Establish standards for practitioners who dispense narcotic drugs to persons for maintenance and/or detoxification treatment; (2) determine whether practitioners who wish to conduct such treatment are qualified under the standards; and (3) determine whether such practitioners will comply with the standards regarding the quantities of narcotic drugs that may be provided for unsupervised use by persons in such treatment.

Regulations found at 21 CFR 291.505 were issued under this authority. These regulations establish reporting requirements that include an application for approval of use of narcotic drugs in a narcotic addiction treatment program that must be submitted to, and approved by, FDA before the treatment program (which may be an individual or an organization) may receive shipments of narcotic drugs. Additional submissions are required when significant changes are implemented by treatment programs; for some kinds of changes, the regulations require FDA preapproval of the change before it is implemented. Additional submissions and FDA preapproval are also required if a treatment program seeks an exemption from certain requirements. The regulations contain no periodic reporting requirements.

The regulations governing the use of narcotic drugs for treatment of addiction also contain recordkeeping requirements that codify usual and customary practices within the medical and rehabilitative communities. Because the records required by the regulations would be kept even without a regulatory requirement, the time and financial resources necessary to comply with the recordkeeping requirements have not been included in the burden estimate below (see 5 CFR 1320.3(b)(2)).

FDA is requesting approval of the following FDA forms:

Form FDA–2632—''Application for Approval for Use of Narcotic Drugs in a Narcotic Addiction Treatment Program''. Organizations or individuals who wish to receive shipments of narcotic drugs for the treatment of narcotic addiction are required to submit this form in duplicate to FDA and to the appropriate State regulatory authority. All information and attachments to the application are required by the regulation. The application must include a list of personnel active in the program, such as physicians, nurses, and counselors; the names of hospitals, institutions, and analytical laboratories; and all other facilities used to provide necessary services required by the regulations. Form FDA–2632 is also used to report to FDA that a program will relocate, change the sponsor, or dispense Levo-Alpha-Acetyl-Methadol (LAAM).

Form FDA–2633—''Medical Responsibility Statement for Use of Narcotic Drugs in a Treatment Program''. Each licensed physician authorized to administer or

dispense narcotic drugs for the treatment of narcotic addiction must complete this form and submit it to FDA and to the appropriate State regulatory authority.

Form FDA–2635—''Consent to Treatment with an Approved Narcotic Drug''. This form is to be completed by the practitioner and signed by the patient when the practitioner explains the treatment program to each new patient. The completed form becomes part of the patient's records and is not transmitted to FDA. Having a patient execute an informed consent form before undertaking a course of medical therapy, such as maintenance or detoxification, is usual and customary medical practice.

Form FDA–2636—''Hospital Request for Methadone Detoxification Treatment''. Before a hospital may receive shipments of methadone for detoxification treatment, a responsible official of the hospital must submit this form to FDA and to the appropriate State regulatory authority, and must have received a notice of approval from FDA. Form FDA–2636 is also used to inform FDA of changes in responsible hospital administrators.

Respondents to this information collection are sponsors and physicians, for treatment programs, and hospital officials, for hospital detoxification programs.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Form	21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Time per Response	Total Hours
Form FDA–2632, Application for Approval for Use of Narcotic Drugs in a Narcotic Addiction Treatment Program (New Programs)	291.505(b)(1)(ii), (b)(2)(i), (b)(2)(vi), (b)(3)(i), (c)(3), (c)(4), (d)(2)(i), and (d)(4)(i)(D)	55	1	55	105 min	96.25
Form FDA–2632, Application for Approval for Use of Narcotic Drugs in a Narcotic Addiction Treatment Program (Relocation)	291.505(b)(1)(ii), (c)(4)	35	1	35	70 min	40.83
Form FDA–2632, Application for Approval for Use of Narcotic Drugs in a Narcotic Addiction Treatment Program (Sponsor Change)	291.505(c)(2)(ii),(c)(4)	60	1	60	20 min	20
Form FDA–2632, Application for Approval for Use of Narcotic Drugs in a Narcotic Addiction Treatment Program (Levo-Alpha-Acetyl-Methadol(LAAM)Use)	291.505(b)(2)(iv), (c)(4)	75	1	75	15 min	18.75
Form FDA–2633, Medical Responsibility Statement for Use of Narcotic Drugs in a Treatment Program	291.505(c)(4)	275	1	275	15 min	68.75
Form FDA–2636, Hospital Request for Methadone Detoxification Treatment (New Applicant)	291.505(f)(2)	20	1	20	10 min	3.33
Form FDA–2636, Hospital Request for Methadone Detoxification Treatment (Administrator Change)	291.505(f)(2)	5	1	5	10 min	0.83
Notifications of deletion of facility in which medication is administered	291.505(b)(2)(i)	45	1	45	15 min	11.25
Requests to change testing laboratory	291.505(d)(2)(i)	25	1	25	40 min	16.66
Reports of addition, modification, or deletion of any program services	291.505(d)(4)(i)(D)	32	1	32	15 min	8
Requests to allow patients to take home daily doses greater than 100 milligrams	291.505(d)(6)(v)(D)	600	1	600	15 min	150
Requests for exemptions from specific program standards	291.505(d)(11)	800	3	2,100	30 min	1,050
Requests for approval of a hospital as a temporary treatment program	291.505(f)(2)(i)	3	1	3	15 min	.75
Requests for alternative methods of distribution	291.505(j)(1)	5	1	5	30 min	2.5
TOTALS		2,035		3,335		1,487.9

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

These estimates are based on conversations with treatment and detoxification programs, on the number of responses received in past years, and on examination of received responses.

Dated: November 18, 1997.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 97–30911 Filed 11–24–97; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 97N–0376]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for emergency processing under the Paperwork Reduction Act of 1995 (the PRA). The purpose of the proposed collection of information, a two-part telephone survey of tobacco retailers, is to assess the effectiveness of an advertising campaign aimed at increasing retailers' awareness of, and motivating retailers to comply with, new regulations that prohibit retailers from selling cigarettes and smokeless tobacco to persons younger than 18 years of age and require retailers to verify, by means of photographic identification containing the bearer's date of birth, the age of every purchaser who is younger than 27 years old. The first phase of the survey must be completed by December 31, 1997.

DATES: Submit written comments on the collection of information by December 5, 1997.

ADDRESSES: Submit written comments on the collection of information to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW., rm. 10235, Washington, DC 20503, Attn: Desk Officer for FDA. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Karen L. Nelson, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, rm. 16B–18, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: With respect to the following collection of information, FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Tobacco Retailer Tracking Survey

On February 28, 1997, new Federal regulations at 21 CFR part 897 went into effect that prohibit retailers from selling cigarettes and smokeless tobacco to persons younger than 18 years of age, and require retailers to verify, by means of photographic identification, the age of purchasers younger than 27 years old. FDA is planning to conduct a pilot advertising will campaign, in one State, aimed at raising retailers' awareness of the new regulations, and motivating retailers to comply. The campaign will target persons who sell cigarettes or smokeless tobacco to consumers for their personal use, including clerks and cashiers in grocery and convenience stores, pharmacies and drug stores, gas stations, liquor stores, taverns and bars, and tobacco stores. As part of the pilot, FDA is proposing to conduct a two-part telephone survey of tobacco retailers to measure their awareness of, and self-reported compliance with, the new regulations before and after exposure to the advertising campaign in the test State. FDA also would study levels of awareness and self-reported compliance among tobacco retailers in a control State matched demographically with the test State. Retailers in the control State would not be exposed to the media campaign, and FDA would not be actively conducting compliance checks before awareness and self-reported levels of compliance are measured.

A random sample of 1,350 tobacco retailers in the test State (675 for each phase) and 300 tobacco retailers in the control State would be selected for a telephone interview. All interviewing would be conducted by a single market research firm that would employ computer-aided telephone interviewing technology to expedite the fieldwork and ensure accuracy. FDA plans to use the results of the survey in designing a nationwide advertising campaign that would help to reduce youth access to cigarettes and smokeless tobacco. Under 21 U.S.C. 393(b)(2)(C), FDA is authorized to conduct surveys and other research relating to its responsibilities under the Federal Food, Drug, and Cosmetic Act.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
1,650 survey	1	1,650	.2	330
Total		1,650		330

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA has requested emergency processing of this proposed collection of information under section 3507(j) of the PRA and 5 CFR 1320.13. This information is needed by December 31, 1997, and is essential to the agency's mission. The use of normal PRA clearance procedures would be likely to result in the prevention or disruption of this collection of information.

Dated: November 19, 1997.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 97–30912 Filed 11–24–97; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 97N–0445]

Intermountain Health Care, Inc.; Revocation of U.S. License No. 0729

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. 0729) and the product licenses issued to Intermountain Health Care, Inc., for the manufacture of Whole Blood, Red Blood Cells, Cryoprecipitated AHF, Plasma, and Platelets. The firm voluntarily surrendered its licenses as part of a Consent Decree of Permanent Injunction.

DATES: The revocation of the establishment license (U.S. License No. 0729) and the product licenses became effective October 8, 1997.

FOR FURTHER INFORMATION CONTACT: Astrid L. Szeto, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION: FDA has revoked the establishment license (U.S. License No. 0729) and product licenses issued to Intermountain Health Care, Inc., Eighth Ave. and C St., Salt Lake City, UT 84143, for the manufacture of Whole Blood, Red Blood Cells, Cryoprecipitated AHF, Plasma, and Platelets. The revocation affects all locations under the license which included: Salt Lake City, Ogden, Provo, Logan, and St. George, UT.

FDA inspected Intermountain Health Care, Inc., facilities located in Ogden, UT, December 3 through December 18, 1996; Provo, UT, February 13, 1997, through March 14, 1997; and Salt Lake City, UT, March 17, 1997, through April 18, 1997. These inspections revealed numerous serious deviations from applicable Federal regulations and the standards established in the firm's license. Based on the serious nature of the deficiencies identified, FDA determined that a danger to health existed. The deficiencies noted included, but were not limited to, the following: (1) Failure to operate equipment in a manner for which it was designed (21 CFR 606.60(a)); and (2) failure to perform and document a thorough investigation, including conclusions and followup, of: (a) Any unexplained discrepancy or the failure of any lot or unit to meet any of its specifications; (b) any reports of complaints of adverse reactions regarding each unit of blood or blood product arising as a result of either blood collection or transfusion (21 CFR 606.100(c) and 606.170(a)); (c) failure to adequately determine donor suitability (21 CFR 640.3(b)); (d) failure to adequately prepare the skin of the donor at the site of phlebotomy by a method that provides maximum assurance of a sterile container of blood (21 CFR 640.4(f)); (e) failure to assure that personnel responsible for the collection, processing, compatibility testing, storage, or distribution of blood or blood products have adequate training and experience (§ 606.20(b) (21 CFR 606.20(b))); and (f) failure to maintain complete, accurate, and concurrent records (21 CFR 606.160).

FDA determined that these deficiencies constituted a danger to the public health that warranted suspension under 21 CFR 601.6(a). These deficiencies also demonstrated management's failure to exercise control over the establishment in all matters relating to compliance and to ensure that personnel are adequate in number, adequately trained and supervised, and have a thorough understanding of the procedures that they perform, as required by 21 CFR 600.10(a) and (b) and § 606.20(a) and (b).

In a letter to the firm dated April 28, 1997, FDA suspended the establishment license (U.S. License No. 0729) and product licenses for the manufacture of Whole Blood, Red Blood Cells, Cryoprecipitated AHF, Plasma, and Platelets. As required by a Consent Decree of Permanent Injunction signed by the court on July 9, 1997, Intermountain Health Care, Inc., waived its opportunity for a hearing, and in a letter to FDA dated July 11, 1997, surrendered its licenses.

FDA has placed copies of the letters previously discussed on file under the docket number found in brackets in the heading of this notice with the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. These letters are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Accordingly, under 21 CFR 601.5(a), 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. 0729) and the product licenses for the manufacture of the aforementioned products issued to Intermountain Health Care, Inc., were revoked, effective October 8, 1997.

This notice is issued and published under 21 CFR 601.8 and the redelegation under 21 CFR 5.67(c).

Dated: November 12, 1997.

Kathryn C. Zoon,

Director, Center for Biologics Evaluation and Research.

[FR Doc. 97–30915 Filed 11–24–97; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Biological Response Modifiers Advisory Committee; Notice of Subcommittee Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). At least one portion of the meeting will be closed to the public.

Name of Committee: Subcommittee meeting of the Biological Response Modifiers Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA regulatory issues.

Date and Time: The meeting will be held on December 17, 1997, 9 a.m. to 6 p.m.

Location: DoubleTree Hotel, Plaza Ballrooms I and II, 1750 Rockville Pike, Rockville, MD.

Contact Person: Gail M. Dapolito or Rosanna L. Harvey, Center for Biologics Evaluation and Research (HFM–21), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–0314, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 12388. Please call the Information Line for up-to-date information on this meeting.

Agenda: On December 17, 1997, the Xenotransplantation Subcommittee will discuss the following public health issues concerning cross-species transplantation: (1) Development of appropriate assays for detection and identification of infectious retroviruses, (2) limitations of current screening and diagnostic tools, (3) diagnostic testing and clinical care of patients post-transplant, (4) impact of diagnostic screening results on clinical trial

development, and (5) delineation of the key features of informed consent for patients who have received a porcine xenograft and who undergo screening for porcine endogenous retrovirus.

Procedure: On December 17, 1997, from 9 a.m. to 11:30 a.m., and 12 m. to 6 p.m., the meeting is open to the public. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by December 10, 1997. Oral presentations from the public will be scheduled between approximately 9 a.m. and 10 a.m. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before December 10, 1997, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Closed Committee Deliberations: On December 17, 1997, from 11:30 a.m. to 12 m., the meeting will be closed to permit discussion and review of trade secret and/or confidential information (5 U.S.C. 552b(c)(4)). The meeting will be closed to discuss current investigational new drug application submissions under FDA review.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: November 17, 1997.

Michael A. Friedman,

Deputy Commissioner for Operations.

[FR Doc. 97–30910 Filed 11–24–97; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Orthopaedic and Rehabilitation Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). At least one portion of the meeting will be closed to the public.

Name of Committee: Orthopaedic and Rehabilitation Devices Panel of the Medical Devices Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA regulatory issues.

Date and Time: The meeting will be held on December 11, 1997, 9 a.m. to 8 p.m., and December 12, 1997, 8 a.m. to 2 p.m.

Location: Holiday Inn, Versailles Ballrooms III and IV, 8120 Wisconsin Ave., Bethesda, MD.

Contact Person: Jodi H. Nashman, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2036, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 12521. Please call the Information Line for up-to-date information on this meeting.

Agenda: On December 11, 1997, the committee will discuss, make recommendations, and vote on one premarket approval application (PMA) for a spinal intervertebral fusion device. Additionally, there will be a general discussion of the minimum acceptable length of patient followup for marketing approval of spinal implant devices. On December 12, 1997, the committee will discuss, make recommendations, and vote on a PMA for an anti-adhesion barrier gel.

Procedure: On December 11, 1997, from 9 a.m. to 8 p.m., and on December 12, 1997, from 9 a.m. to 2 p.m., the meeting is open to the public. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by December 3, 1997. Oral presentations from the public regarding spinal intervertebral fusion systems and devices will be scheduled between approximately 9 a.m. and 10 a.m., on December 11, 1997. Oral presentations from the public regarding anti-adhesion barrier gels will be scheduled between 9 a.m. and 10 a.m., on December 12, 1997. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before December 3, 1997, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Closed Committee Deliberations: On December 12, 1997, from 8 a.m. to 9 a.m., the meeting will be closed to permit discussion and review of trade secret and/or confidential information (5 U.S.C. 552b(c)(4)) regarding present and future FDA issues.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: November 18, 1997.

Michael A. Friedman,

Deputy Commissioner for Operations.

[FR Doc. 97–30914 Filed 11-24-97; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Circulatory System Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). At least one portion of the meeting will be closed to the public.

Name of Committee: Circulatory System Devices Panel of the Medical Devices Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA regulatory issues.

Date and Time: The meeting will be held on December 4, 1997, 8 a.m. to 5 p.m.

Location: Corporate Bldg., conference room 020B, 9200 Corporate Blvd., Rockville, MD.

Contact Person: John E. Stuhlmuller, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8243, ext. 157, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 12625. Please call the Information Line for up-to-date information on this meeting.

Procedure: On December 4, 1997, from 8 a.m. to 9 a.m., the meeting is open to the public. Interested persons may present data, information, or views, orally or in writing, on issues appropriate for the committee. Written submissions may be made to the contact person by December 3, 1997. Oral presentations from the public will be scheduled between 8 a.m. and 9 a.m. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before December 3, 1997, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

FDA regrets that it was unable to publish this notice 15 days prior to the December 4, 1997, Circulatory System Devices Panel of the Medical Devices Advisory Committee meeting. Because the agency believes there is some urgency to bring this issue to public discussion and qualified members of the Circulatory System Devices Panel of the Medical Devices Advisory Committee were available at this time, the Commissioner concluded that it was in the public interest to hold this meeting even if there was not sufficient time for the customary 15-day public notice.

Closed Committee Deliberations: On December 4, 1997, from 9 a.m. to 5 p.m., the meeting will be closed to permit discussion and review of trade secret and/or confidential commercial information on a product development protocol. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b (c)(4)).

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: November 20, 1997.

Michael A. Friedman,

Deputy Commissioner for Operations.

[FR Doc. 97–31064 Filed 11–21–97; 11:12 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Notice of Meeting of the Advisory Committee to the Director, NIH

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the Advisory Committee to the Director, NIH, December 4, 1997, Conference Room 10, Building 31, National Institutes of Health, Bethesda, Maryland 20892.

The entire meeting will be open to the public from 8:30 a.m. to adjournment. The topics proposed for discussion include: (1) Center for Scientific Review; (2) Report from the Clinical Research Panel; (3) New Investigator Awards, Modular Awards, and Clinical Research Training; (4) Report from the Working Group on Research Tools; (5) Implementation of the Government Performance and Results Act; and (6) Report on the Review of Administrative Functions at NIH. Attendance by the public will be limited to space available.

Ms. Janice Ramsden, Special Assistant to the Deputy Director, National Institutes of Health, 1 Center Drive MSC 0159, Bethesda, Maryland 20892–0159, telephone (301) 496–0959, fax (301) 496–7451, will furnish the meeting agenda, roster of committee members, and available substantive program information upon request. Any individual who requires special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. Ramsden no later than November 26, 1997.

Dated: November 18, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–30931 Filed 11–24–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to Section 10(d) of Public Law 92–463, as amended, notice is hereby given of a meeting of the President's Cancer Panel, National Cancer Institute. This meeting will be closed to the public in accordance with the provisions set forth in sec. 552b(c)(9)(B), Title 5, U.S.C. The purpose of this meeting is to plan the 1997 Final Report of the Chairman to the President and to set agendas for the upcoming 1998 panel meetings. Premature disclosure of the specific details of these discussions and recommendations would be likely to significantly frustrate the subsequent implementation of the proposed recommendations made by the Panel.

Linda Quick-Cameron, Committee Management Officer, National Cancer Institute, Executive Plaza North, Room 609, 6130 Executive Blvd., MSC 7410, Bethesda, MD 20892–7410 (301/496–5708) will provide a copy of the roster of committee members upon request. Other information pertaining to the meeting may be obtained from the contact person indicated below.

Committee Name: President's Cancer Panel.

Date: December 1, 1997.

Place: Hyatt Regency Bethesda, 1 Bethesda Metro Center, Bethesda, MD 20814.

Closed: 10:30 a.m. to Adjournment.

Agenda: Discussion and preparation of the 1997 Final Report of the Chairman to the President and set agendas for the 1998 meetings.

Contact Person: Maureen O. Wilson, Ph.D., Executive Secretary, National Cancer Institute, Building 31, Room 4A48, 9000 Rockville Pike, MSC 2473, Bethesda, MD 20892–2473, Telephone: (301) 496–1148.

Dated: November 6, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–30926 Filed 11–24–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting of the National Cancer Advisory Board and Its Subcommittees

Pursuant to the Federal Advisory Committee Act, as amended, notice is hereby given of the meeting of the National Cancer Advisory Board (Board), National Cancer Institute (NCI), and its Subcommittees on December 2–3, 1997. The meetings of the Board and its Subcommittees will be open to the public as indicated below. Attendance by the public will be limited to space available.

A portion of the Board meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(6) and 552b(c)(9)(B), Title 5 U.S.C. and section 10(d) of the Federal Advisory Committee Act, as amended, for discussions pertaining to NCI personnel and programmatic issues. These discussions could reveal information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy and would be likely to significantly frustrate the subsequent implementation of personnel and programmatic recommendations made during these discussions.

The Committee Management Office, National Cancer Institute, National Institutes of Health, Executive Plaza North, Room 609, 6130 Executive Boulevard, MSC 7410, Bethesda, Maryland 20892–7410, (301) 496–5708 will provide summaries of the meetings and rosters of the Board members, upon request.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Mrs. Linda Quick-Cameron, Committee Management Officer, at (301) 496–5708 in advance of the meeting.

Name of Committee: National Cancer Advisory Board.

Contact Person: Dr. Marvin R. Kalt, Executive Secretary, National Cancer Institute, NIH, Executive Plaza North, Room

600, 6130 Executive Blvd., MSC MSC 7405, Bethesda, MD. 20892–7405, (301) 496–5147.

Dates of Meeting: December 2–3, 1997.

Place of Meeting: Building 31, Conference Room 10/C Wing, National Institutes of Health, 9000 Rockville Pike, Bethesda, MD. 20892.

Open: December 2—8:30 a.m. to 4:00 p.m.; December 3—8:30 a.m. to 1:00 p.m.

Agenda: Report of the Director, National Cancer Institute; Legislative Update; Report of the President's Cancer Panel; Subcommittee Reports; Overview of Board of Scientific Advisors activities. Intramural and Extramural Program Overviews and Updates. Presentations by various NCI working groups on current and proposed program activities, projects and initiatives; other NCAB business.

Closed: December 2—4:10 p.m. to Recess.

Agenda: Review and discussion of Intramural site visits, proprietary, programmatic and personnel issues. Review and discussion of Extramural proprietary, programmatic and personnel issues.

This notice is being published less than 15 days 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 Numbers: 93.393, Cancer Cause and Prevention Research; 93.392, Cancer Detection and Diagnosis Research; 93.3394, Cancer Treatment Research; 93.396, Cancer Biology Research; 93:397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control)

Dated: November 18, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–30928 Filed 11–24–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Center for Research Resources Special Emphasis Panel (SEP) meeting:

Name of SEP: Comparative Medicine (Telephone Conference Call).

Date: December 8, 1997.

Time: 11:00 a.m.

Place: National Institutes of Health, 6705 Rockledge Drive, MSC 7965, Room 6018, Bethesda, MD 20892–7965.

Contact Person: Dr. Raymond R. O'Neill, Scientific Review Administrator, 6705 Rockledge Drive, MSC 7965, Room 6018, Bethesda, MD 20892–7965, (301) 435–0820.

Purpose/Agenda: To evaluate and review grant applications.

This notice is being published less than 15 days prior to the above meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

This 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. 93.306, Laboratory Animal Science and Primate Research, National Institutes of Health, HHS)

Dated: November 18, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–30929 Filed 11–24–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Eye Institute Special Emphasis Panel (SEP) meeting:

Name of SEP: Clinical Research.

Date: December 3, 1997.

Time: 8:30 a.m.

Place: National Eye Institute, Executive Plaza South, Suite 350, 6120 Executive Blvd., Bethesda, MD 20892–7164.

Contact Person: Andrew P. Mariani, Ph.D., Executive Plaza South, Room 350, 6120 Executive Blvd., Bethesda, MD 20892–7164, (301) 496–5561.

Purpose/Agenda: Review of Grant Applications.

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. 93.867, Vision Research: National Institutes of Health)

Dated: November 17, 1997.

LaVeen Ponds,

Acting Committee Management Officer, NIH.

[FR Doc. 97–30932 Filed 11–24–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Heart, Lung, and Blood Institute Special Emphasis Panel (SEP) meetings:

Name of SEP: Medical Management of Bleeding Disorders in Women (Telephone Conference Call).

Date: December 18, 1997.

Time: 11:00 a.m.

Place: Two Rockledge Center, Room 7214, 6701 Rockledge Drive, Bethesda, Maryland 20892–7924.

Contact Person: Valerie Prenger, Ph.D., Two Rockledge Center, Room 7198, 6701 Rockledge Drive, Bethesda, Maryland 20892–7924, (301) 435–0297.

Purpose/Agenda: To review and evaluate grant applications.

Name of SEP: Maintenance of NHLBI Biological Specimen Repository.

Date: December 18, 1997.

Time: 8:00 a.m.

Place: Bethesda Marriott Hotel, 5151 Pooks Hill Road, Bethesda, Maryland 20814.

Contact Person: Diane M. Reid, M.D., Two Rockledge Center, Room 7182, 6701 Rockledge Drive, Bethesda, Maryland 20892–7924, (301) 435–0277.

Purpose/Agenda: To review and evaluate contract proposals.

Name of SEP: SCOR—Cystic Fibrosis.

Date: January 11–12, 1998.

Time: 7:30 p.m.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, Maryland 20815.

Contact Person: Ivan Baines, Ph.D., Two Rockledge Center, Room 7184, 6701 Rockledge Drive, Bethesda, MD 20892–7924, (301) 435–0277.

Purpose/Agenda: To review and evaluate grant applications.

Name of SEP: Structure, Function, and Genetics of Coagulation Factors.

Date: January 15, 1998.

Time: 10:00 a.m.

Place: Bethesda Holiday Inn, 8120 Wisconsin Avenue, Bethesda, Maryland 20814.

Contact Person: Louis M. Ouellette, Ph.D., Two Rockledge Center, Room 7216, 6701 Rockledge Drive, Bethesda, MD 20892–7924, (301) 435–0310.

Purpose/Agenda: To review and evaluate grant applications.

These 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 Programs Nos. 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; and 93.839, Blood Diseases and Resources Research, National Institutes of Health)

Dated: November 18, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–30934 Filed 11–24–97; 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; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel (SEP) meeting.

Name of Sep: Bone Structure and Gene Expression.

Date: December 19, 1997.

Time: 8:00 a.m.—adjournment.

Place: Holiday Inn Bethesda, 8120 Wisconsin Avenue, Bethesda, Maryland 20814.

Contact Person: Tommy L. Broadwater, Ph.D., Scientific Review Administrator, Natcher Building, 45 Center Drive, Rm 5AS25U, Bethesda, Maryland 20892, Telephone: 301–594–4952.

Purpose/Agenda: To evaluate and review a grant application.

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 this application could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the application, 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 Disease Research], National Institutes of Health, HHS)

Dated: November 19, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–30925 Filed 11–24–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel meetings:

Name of SEP: ZDK1–GRB–C–J1.

Date: December 11–13, 1997.

Time: 8:00 p.m.

Place: Sheraton Grande Torrey Pines Hotel, 10950 North Torrey Pines Road, La Jolla, California 92037.

Contact: Dan E. Matsumoto, Ph.D., Scientific Review Administrator, Review Branch, DEA, NIDDK, Natcher Building, Room 6as–37B, National Institutes of Health, Bethesda, Maryland 20892–6600, Phone: (301) 594–8894.

Name of SEP: ZDK1–GRB–C–J2.

Date: December 8, 1997.

Time: 1:00 p.m.

Place: Room 6as–37B, Natcher Building, NIH (Telephone Conference Call).

Contact: Dan E. Matsumoto, Ph.D., Scientific Review Administrator, Review Branch, DEA, NIDDK, Natcher Building, Room 6as–37B, National Institutes of Health, Bethesda. Maryland 20892–6600, Phone: (301) 594–8894.

Purpose/Agenda: To review and evaluate grant applications.

These 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 No. 93.847–849, Diabetes, Endocrine and Metabolic Diseases; Digestive Diseases and Nutrition; and Kidney Diseases, Urology and Hematology Research, National Institutes of Health)

Dated: November 17, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–30927 Filed 11–24–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel meeting:

Name of SEP: ZDK1 GRB 8 J3.

Date: December 10, 1997.

Time: 1:30 PM.

Place: Room 6as–25N, Natcher Building, NIH (Telephone Conference Call).

Contact: Roberta Haber, Ph.D., Scientific Review Administrator, Review Branch, DEA, NIDDK, Natcher Building, Room 6as–25N, National Institutes of Health, Bethesda, Maryland 20892–6600, Phone: (301) 594–8898.

Purpose/Agenda: To review and evaluate grant applications.

This meeting will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5 U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program No. 93.847–849, Diabetes, Endocrine and Metabolic Diseases; Digestive Diseases and Nutrition; and Kidney Diseases, Urology and Hematology Research, National Institutes of Health)

Dated: November 17, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–30933 Filed 11–24–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following Center for Scientific Review Special Emphasis Panel (SEP) meetings:

Purpose/Agenda: To review individual grant applications.

Name of SEP: Biological and Physiological Sciences.

Date: December 3, 1997.

Time: 11:00 a.m.
Place: NIH, Rockledge 2, Room 5198, Telephone Conference.
Contact Person: Dr. Michael Micklin, Scientific Review Administrator, 6701 Rockledge Drive, Room 5198, Bethesda, Maryland 20892, (301) 435–1258.

Name of SEP: Biological and Physiological Sciences.
Date: December 8, 1997.
Time: 10:00 a.m.
Place: NIH, Rockledge 2, Room 5202, Telephone Conference.
Contact Person: Dr. Anita Sostek, Scientific Review Administrator, 6701 Rockledge Drive, Room 5202, Bethesda, Maryland 20892, (301) 435–1260.

Name of SEP: Biological and Physiological Sciences.
Date: December 10, 1997.
Time: 1:00 p.m.
Place: NIH, Rockledge 2, Room 4208, Telephone Conference.
Contact Person: Dr. Anita Weinblatt, Scientific Review Administrator, 6701 Rockledge Drive, Room 4208, Bethesda, Maryland 20892, (301) 435–1224.

Name of SEP: Clinical Sciences.
Date: December 10, 1997.
Time: 1:00 p.m.
Place: NIH, Rockledge 2, Room 4112, Telephone Conference.
Contact Person: Dr. Gopal Sharma, Scientific Review Administrator, 6701 Rockledge Drive, Room 4112, Bethesda, Maryland 20892, (301) 435–1783.

Name of SEP: Clinical Sciences.
Date: December 11, 1997.
Time: 11:00 a.m.
Place: NIH, Rockledge 2, Room 4138, Telephone Conference.
Contact Person: Dr. Anthony Chung, Scientific Review Administrator, 6701 Rockledge Drive, Room 4138, Bethesda, Maryland 20892, (301) 435–1213.

Name of SEP: Biological and Physiological Sciences.
Date: December 11, 1997.
Time: 1:00 p.m.
Place: NIH, Rockledge 2, Room 4202, Telephone Conference.
Contact Person: Dr. Gene Zimmerman, Scientific Review Administrator, 6701 Rockledge Drive, Room 4202, Bethesda, Maryland 20892, (301) 435–1220.

Name of SEP: Biological and Physiological Sciences.
Date: December 11, 1997.
Time: 1:00 p.m.
Place: NIH, Rockledge 2, Room 4208, Telephone Conference.
Contact Person: Dr. Anita Weinblatt, Scientific Review Administrator, 6701 Rockledge Drive, Room 4208, Bethesda, Maryland 20892, (301) 435–1224.

Name of SEP: Chemistry and Related Sciences.
Date: December 11, 1997.
Time: 12:00 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: December 18, 1997.
Time: 9:00 a.m.
Place: NIH, Rockledge 2, Room 5196, Telephone Conference.
Contact Person: Ms. Carol Campbell, Scientific Review Administrator, 6701 Rockledge Drive, Room 5196, Bethesda, Maryland 20892, (301) 435–1257.
Purpose/Agenda: To review Small Business Innovation Research.

Name of SEP: Microbiological and Immunological Sciences.
Date: November 21, 1997.
Time: 1:00 p.m.
Place: Doubletree Hotel, Rockville, MD.
Contact Person: Dr. Gilbert Meir, Scientific Review Administrator, 6701 Rockledge Drive, Room 5112, Bethesda, Maryland 20892, (301) 455–1169.

The notice is being published less than 15 days prior to the above meeting due to the urgent need to meet timing limitations imposed by the grant review and funding cycle.

Name of SEP: Behavioral and Neurosciences.
Date: December 2, 1997.
Time: 8:30 a.m.
Place: Holiday Inn, Silver Spring, MD.
Contact Person: Dr. Leonard Jakubczak, Scientific Review Administrator, 6701 Rockledge Drive, Room 5172, Bethesda, Maryland 20892, (301) 435–1247.

Name of SEP: Microbiological and Immunological Sciences.
Date: December 2, 1997.
Time: 8:30 a.m.
Place: Holiday Inn, Chevy Chase, MD.
Contact Person: Dr. Gilbert Meier, Scientific Review Administrator, 6701 Rockledge Drive, Room 5112, Bethesda, Maryland 20892, (301) 435–1219.

Name of SEP: Microbiological and Immunological Sciences.
Date: December 3, 1997.
Time: 2:00 p.m.
Place: NIH, Rockledge 2, Room 5112, Telephone Conference.
Contact Person: Dr. Gilbert Meier, Scientific Review Administrator, 6701 Rockledge Drive, Room 5112, Bethesda, Maryland 20892, (301) 435–1219.

The meetings will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(b), 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: November 18, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–30930 Filed 11–24–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: Pigment Epithelium Derived Growth Factor

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: This notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(I), announces that the National Institutes of Health is contemplating the grant of an exclusive world-wide license to GenVec, Inc., a Delaware corporation headquartered in Rockville, Maryland to practice the inventions embodied in the U.S. Patent Applications listed below (and corresponding foreign patent applications) in the field of ocular gene therapy. These inventions are owned by the Government of the United States of America as represented by the Department of Health and Human Services.

1. USSN 07/952,796 entitled ''DNA Clones for the Expression of Pigment Epithelium Derived Growth Factor and Related Proteins'' filed September 24, 1992 by Fintan R. Steele, Gerald J. Chader, Joyce Tombran-Tink and Sofia P. Becerra.

2. USSN 08/257,963 entitled ''Pigment Epithelium Derived Factor: Characterizations of Its Biological Activity and Sequences Encoding and Expressing the Protein'' filed June 7, 1994 by Gerald J. Chader, Sofia P. Becerra, Joan P. Schwartz, Takayuki Taniwaki and Yukihera Sugita.

3. USSN 08/279,979 entitled ''Retinal Pigmented Epithelium Derived Neurotrophic Factor'' filed July 25, 1994 by Fintan R. Steele, Gerald J. Chader, Joyce Tombran-Tink, Sofia P. Becerra and Ignacio R. Rodriquez and Lincoln Johnson.

4. USSN 08/367,841 entitled ''Pigment Epithelium Derived Factor: Characterization, Genomic Organization and Sequence of the PEDF Gene'' filed December 30, 1994 by Gerald J. Chader, Joyce Tombran-Tink, Sofia P. Becerra, Ignacio R. Rodriquez and Fintan R. Steele and Lincoln Johnson.

5. USSN 08/377,710 entitled ''DNA Clones for the Expression of Pigment Epithelium Derived Factor and Related Proteins'' filed January 25, 1995 by Fintan R. Steele, Gerald L. Chader, Joyce Tombran-Tink, Sofia P. Becerra and Ignacio R. Rodriquez.

6. USSN 08/520,373 entitled ''Retinal Pigmented Epithelium Derived

Neurotrophic Factor'' filed August 29, 1995 by Gerald J. Chader, Joyce Tombran-Tink, Sofia P. Becerra, Ignacio R. Rodriquez and Fintan R. Steele.

DATES: Only written comments and/or applications for a license which are received by NIH on or before January 26, 1998 will be considered.

ADDRESSES: Requests for copies of the patent applications, inquiries, comments and other materials relating to the contemplated licenses should be directed to: Jaconda Wagner, Esq., Technology Licensing Specialist, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; *Telephone:* (301) 496–7735 ext. 284; *Facsimile:* (301) 402–0220. A signed Confidentiality Agreement will be required to receive copies of the patent applications.

SUPPLEMENTARY INFORMATION: Cultured retinal pigment epithelium (RPE) cells secrete pigment epithelium-derived factor (PEDF) into the photoreceptor matrix. This protein, with a molecular weight of approximately 50 kD, has trophic activity which induces neuronal cell differentiation, survival of mature neurons and a gliastatic effect. This technology can be used to develop therapeutics for the treatment of inflammatory, vascular, degenerative and dystrophic diseases of the retina and central nervous system (CNS) as well as to treat cancers of the CNS and conditions resulting from the activity of serine proteases.

The various patent applications encompassing this invention contain claims to a recombinant DNA molecule comprising a gene encoding the PEDF; an organism transformed with the recombinant DNA molecule; a method of treating tumors ocular diseases, nerve injuries and conditions resulting from the activity of serine proteases using the PEDF; the PEDF protein and its biological activity, specifically a method of enhancing neuron cell survival and inhibiting glial cell proliferation; purified antibodies to PEDF; a method for purifying the PEDF; and immunoassay for detecting the level of PEDF in a sample.

The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless within sixty (60) days from the date of this published notice, NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Applications for a license in the field of use filed in response to this notice will be treated as objections to the grant of the contemplated licenses. Comments and objections submitted to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: November 14, 1997.

Barbara M. McGarey,

Deputy Director, Office of Technology Transfer.

[FR Doc. 97–30924 Filed 11–24–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4263–N–58]

Notice of Proposed Information Collection for Public Comment

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due: January 26, 1998.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Policy Development & Research, Department of Housing & Urban Development, 451—7th Street, SW, Room 8228, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Alan Rothman, Social Science Research Analyst, Office of Policy Development and Research—telephone (202) 708–4370, x139 (this is not a toll-free number) for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

The office is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Assessment and Analysis of Multifamily Building's Conformity with Fair Housing Guidelines Provisions

OMB Control Number: None.

Description of the Need for Information and the Proposed Use: The Fair Housing Amendment Act (the Act) of 1988 requires that newly constructed multifamily dwellings covered under the Act, available for first occupancy after March 13, 1991, be designated and constructed to be accessible to persons with disabilities. The purpose of this project is to assess the extent of conformity with the accessibility provisions and examine reasons for, as well as explanations, for different patterns of conformity/non-conformity.

Agency Form Numbers: Not applicable.

Members of the Affected Public: Property owners, property management personnel, occupants, local code officials, architects, engineers, and builders.

Estimation of the Total Number of Hours Needed to Prepare the Information Collection Including Number of Respondents, Frequency of Response, and Hours of Response: Grand total hours for all personnel is 11,936 labor hours over ninety (90) weeks. Total hours for contractor personnel is estimated at 10,900 hours. The total hours for voluntary one-time responses, from management/owners/project representatives and residents, is 1,036 hours for the 386 projects to be considered in the statistical model. The hour breakdown for the survey respondents is 128 hours during the mobilization phase, 803 hours during Phase I—survey/data gathering efforts, and 105 hours for Phase II—assessment and analysis effort.

Status of the Proposed Information Collection: Pending OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: November 13, 1997.

Paul A. Leonard,

Deputy Assistant Secretary for the Office of Policy Development.

[FR Doc. 97–30942 Filed 11–24–97; 8:45 am]

BILLING CODE 4210–62–M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf, Gulf of Mexico Region, Proposed Central Gulf Sales 169, 172, 175, 178, and 182

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of availability of the final multisale Environmental Impact Statement (EIS) on proposed central Gulf of Mexico (GOM) sales 169, 172, 175, 178, and 182.

The Minerals Management Service (MMS) has prepared a final multisale EIS on five proposed Outer Continental Shelf (OCS) oil and gas lease sales in the Central GOM. We will conduct a planning process for one sale each year from 1998 through 2002. Although this EIS addresses five proposed lease sales, it is a decision document only for proposed Sale 169. We will consult with other Federal Agencies and the affected States for each of the yearly proposed sales. We will perform a National Environmental Policy Act review, and give the public an opportunity to participate in each sale.

You may obtain single copies of the final multisale EIS from the Minerals Management Service, Gulf of Mexico OCS Region, Attention: Public Information Office (MS–5034), 1201 Elmwood Park Boulevard, Room 114, New Orleans, Louisiana 70123–2394 or by calling 1–800–200–GULF.

You may look at copies of the draft EIS in the following libraries:

Texas

Abilene Christian University, Margaret and Herman Brown Library, 1600 Campus Court, Abilene;
Alma M. Carpenter Public Library, 330 South Ann, Sourlake;
Aransas Pass Public Library, 110 North Lamont Street, Aransas Pass;
Austin Public Library, 402 West Ninth Street, Austin;
Bay City Public Library, 1900 Fifth Street, Bay City;
Baylor University, 13125 Third Street, Waco;
Brazoria County Library, 410 Brazoport Boulevard, Freeport;
Calhoun County Library, 301 South Ann, Port Lavaca;
Chambers County Library System, 202 Cummings Street, Anahuac;
Comfort Public Library, Seventh & High Streets, Comfort;
Corpus Christi Central Library, 805 Comanche Street, Corpus Christi;
Dallas Public Library, 1513 Young Street, Dallas;
East Texas State University Library, 2600 Neal Street, Commerce;
Houston Public Library, 500 McKinney Street, Houston;
Jackson County Library, 411 North Wells Street, Edna;
Lamar University, Gray Library, Virginia Avenue, Beaumont;
LaRatama Library, 505 Mesquite Street, Corpus Christi;
Liberty Municipal Library, 1710 Sam Houston Avenue, Liberty;
Orange Public Library, 220 North Fifth Street, Orange;
Port Arthur Public Library, 3601 Cultural Center Drive, Port Arthur;
Port Isabel Public Library, 213 Yturria Street, Port Isabel;
R.J. Kleberg Public Library, Fourth and Henrietta, Kingsville;
Reber Memorial Library, 193 North Fourth, Raymondville;
Refugio County Public Library, 815 South Commerce Street, Refugio;
Rice University, Fondren Library, 6100 South Main Street, Houston;
Rockwall County Library, 105 South First Street, Rockwall;
Rosenberg Library, 2310 Sealy Street, Galveston;
Sam Houston Regional Library & Research Center, FM 1011 Governors Road, Liberty;
Stephen F. Austin State University, Steen Library, Wilson Drive, Nacogdoches;
Texas A & M University, Corpus Christi Library, 6300 Ocean Drive, Corpus Christi;
Texas A & M University, Evans Library, Spence and Lubbock Streets, College Station;
Texas Southmost College Library, 1825 May Street, Brownsville;
Texas State Library, 1200 Brazos Street, Austin;
Texas Tech University Library, 18th and Boston Avenue, Lubbock;
University of Houston Library, 4800 Calhoun Boulevard, Houston;
University of Texas at Arlington, Library, 701 South Cooper Street, Arlington;
University of Texas at Austin, Library, 21st and Speedway Streets, Austin;
University of Texas at Brownsville, Oliveria Memorial Library, 80 Fort Brown, Brownsville;
University of Texas at Dallas, McDermott Library, 2601 North Floyd Road, Richardson;
University of Texas at El Paso, Library, Wiggins Road and University Avenue, El Paso;
University of Texas at San Antonio, Library, 6900 North Loop 1604 West, San Antonio;
University of Texas Law School, Tarlton Law Library, 727 East 26th Street, Austin;
University of Texas, LBJ School of Public Affairs Library, 2313 Red River Street, Austin;
Victoria Public Library, 320 North Main, Victoria;

Louisiana

Calcasieu Parish Library, 327 Broad Street, Lake Charles;
Cameron Parish Library, Marshall Street, Cameron;
Grand Isle Branch Library, Highway 1, Grand Isle;
Government Documents Library, Loyola University, 6363 St. Charles Avenue, New Orleans;
Iberville Parish Library, 24605 J. Gerald Berret Boulevard, Plaquemine;
Jefferson Parish Regional Branch Library, 4747 West Napoleon Avenue, Metairie;
Jefferson Parish West Bank Outreach Branch Library, 2751 Manhattan Boulevard, Harvey;
Lafayette Public Library, 301 W. Congress Street, Lafayette;
Lafitte Branch Library, Route 1, Box 2, Lafitte;
Lafourche Parish Library, 303 West 5th Street, Thibodaux;
Louisiana State University Library, 760 Riverside Road, Baton Rouge;
Louisiana Tech University, Prescott Memorial Library, Everet Street, Ruston;
LUMCON, Library, Star Route 541, Chauvin;
McNeese State University, Luther E. Frazar Memorial Library, Ryan Street, Lake Charles;
New Orleans Public Library, 219 Loyola Avenue, New Orleans;
Nicholls State University, Nicholls State Library, Leighton Drive, Thibodaux;
Plaquemines Parish Library, 203 Highway 11, South, Buras;
St. Bernard Parish Library, 1125 East St. Bernard Highway, Chalmette;
St. Charles Parish Library, 105 Lakewood Drive, Luling;
St. John The Baptist Parish Library, 1334 West Airline Highway, LaPlace;
St. Mary Parish Library, 206 Iberia Street, Franklin;
St. Tammany Parish Library, Covington Branch, 310 West 21st Street, Covington;
St. Tammany Parish Library, Slidell Branch, 555 Robert Boulevard, Slidell;
Terrebonne Parish Library, 424 Roussell Street, Houma;

Tulane University, Howard Tilton Memorial Library, 7001 Freret Street, New Orleans;
University of New Orleans Library, Lakeshore Drive, New Orleans;
University of Southwestern LA, Dupre Library, 302 East St. Mary Boulevard, Lafayette;
Vermilion Parish Library, Abbeville Branch, 200 North Street, Abbeville;

Mississippi

Gulf Coast Research Laboratory, Gunter Library, 703 East Beach Drive, Ocean Springs;
Hancock County Library System, 312 Highway 90, Bay St. Louis;
Harrison County Library, 14th and 21st Avenues, Gulfport;
Jackson George Regional Library System, 3214 Pascagoula Street, Pascagoula;

Alabama

Dauphin Island Sea Lab, Marine Environmental Science Consortium, Library, Bienville Boulevard, Dauphin Island;
Gulf Shores Public Library, Municipal Complex, Route 3, Gulf Shores;
Mobile Public Library, 701 Government Street, Mobile;
Thomas B. Norton Public Library, 221 West 19th Avenue, Gulf Shores;
University of South Alabama, University Boulevard, Mobile;
Montgomery Public Library, 445 South Lawrence Street, Montgomery;

Florida

Bay County Public Library, 25 West Government Street, Panama City;
Charlotte-Glades Regional Library System, 18400 Murdock Circle, Port Charlotte;
Collier County Public Library, 650 Central Avenue, Naples;
Environmental Library, Sarasota County, 7112 Curtis Avenue, Sarasota;
Florida A & M University, Coleman Memorial Library, Martin Luther King Boulevard, Tallahassee;
Florida Northwest Regional Library System, 25 West Government Street, Panama City;
Florida State University, Strozier Library, Call Street and Copeland Avenue, Tallahassee;
Fort Walton Beach Public Library, 105 Miracle Strip Parkway, Fort Walton Beach;
Leon County Public Library, 200 West Park Avenue, Tallahassee;
Marathon Public Library, 3152 Overseas Highway, Marathon;
Monroe County Public Library, 700 Fleming Street, Key West;
Port Charlotte Public Library, 2280 Aaron Street, Port Charlotte;
Selby Public Library, 1001 Boulevard of the Arts, Sarasota;
St. Petersburg Public Library, 3745 Avenue North, St. Petersburg;
Tampa-Hillsborough County Library, Documents Division, 900 North Ashley Drive, Tampa;
University of Florida Library, University Avenue, Gainesville;
University of Florida, Holland Law Library, Southwest 25th St. and 2nd Avenue, Gainesville;
West Florida Regional Library, 200 West Gregory Street, Pensacola

Dated: November 19, 1997.

Carolita U. Kallaur,

Associate Director for Offshore Minerals Management.

[FR Doc. 97–30921 Filed 11–24–97; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf, Central Gulf of Mexico, Oil and Gas Lease Sale 169

AGENCY: Minerals Management Service, Interior.

ACTION: Availability of the proposed notice of sale.

Gulf of Mexico Outer Continental Shelf (OCS); notice of availability of the proposed notice of sale for proposed Oil and Gas Lease Sale 169 in the Central Gulf of Mexico. This notice of availability is published pursuant to 30 CFR 256.29(c), as a matter of information to the public.

With regard to oil and gas leasing on the OCS, the Secretary of the Interior, pursuant to section 19 of the OCS Lands Act, as amended, provides the affected States the opportunity to review the proposed Notice of Sale.

The proposed notice of sale for proposed Sale 169 may be obtained by written request to the Public Information Unit, Gulf of Mexico Region, Minerals Management Service, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, or by telephone at (504) 736–2519.

The final notice of sale will be published in the **Federal Register** at least 30 days prior to the date of bid opening. Bid opening is scheduled for March 1998.

Dated: November 18, 1997.

Carolita U. Kallaur,

Acting Director, Minerals Management Service.

[FR Doc. 97–30893 Filed 11–24–97; 8:45 am]

BILLING CODE 4310–MR–M

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before November 15, 1997. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, D.C. 20013–7127. Written comments should be submitted by December 10, 1997.

Paul Lusignan,

Acting Keeper of the National Register.

CALIFORNIA

Los Angeles County

Town House, The, 2959–2973 Wilshire Blvd. and 607–643 S. Commonwealth Ave., Los Angeles, 96000821

INDIANA

Allen County

Brown, John, Stone Warehouse, 114 E. Superior St., Fort Wayne, 97001542

Dearborn County

Moore's Hill United Methodist Church, 13476 Main St., Moores Hill, 97001537

Grant County

Woodside, 1119 Overlook Rd., Marion vicinity, 97001538

Marion County

Wasson, H.P. & Company Building, 2 W. Washington and 2 N. Meridian Sts., Indianapolis, 97001539

Rush County

St. Paul Methodist Episcopal Church, 426 N. Morgan St., Rushville, 97001536

St. Joseph County

Children's Dispensary, 1045 W. Washington, South Bend, 97001541
Colonial Gardens Commercial Historic District, 2919–3027 Mishawaka Ave., South Bend, 97001540
South Michigan Street Historic District, Roughly along jct. of Monroe and Michigan Sts., South Bend, 97001556

Vermillion County

Hill Crest Community Center, 505 N. Eight St., Clinton, 97001555

IOWA

Lee County

Mechanic's Rock, Approx. 1 mi. S of Montrose, Mississippi mi. 374, Montrose vicinity, 97001543

Linn County

Lesinger Block (Commercial and Industrial Development of Cedar Rapids MPS), 1317 3rd St., SE, Cedar Rapids, 97001544

NEVADA

Lyon County

Buckland Station, 7 mi. S of jct. of NV 95 and US 50, Stagecoach vicinity, 97001546

NORTH CAROLINA

Rowan County

Hambley-Wallace House, 508 S. Fulton St., Salisbury, 97001545

OHIO

Clark County

Pringle-Patric House, 1314–1316 E. High St., Springfield, 97001547

TENNESSEE

Hardeman County

Davis Bridge Battlefield (Civil War Historic and Historic Archeological Resources in Tennessee MPS), Roughly along Ripley-Pocahontas and Essary Spring Rds, Pocahontas vicinity, 97001549

Henderson County

Parker's Crossroads Battlefield (Civil War Historic and Historic Archeological Resources in Tennessee MPS), TN 22, 26 mi. E of Jackson, Parker's Crossroads vicinity, 97001550

Maury County

Spring Hill Battlefield (Civil War Historic and Historic Archeological Resources in Tennessee MPS), Jct. of Kedron and Old Kedron Rds., Spring Hill, 97001548

WISCONSIN

Calumet County

Calumet County Ark Group, Address Restricted, Hilbert vicinity, 97001551

Crawford County

Unpleasant Ridge, Address Restricted, Boydtown vicinity, 97001553

Dane County

Southwest Side Historic District, Roughly bounded by Lowell, S. Monroe, W. Main and S. Page Sts., Stoughton, 97001554

Vernon County

Tollackson Mound Group, Address Restricted, Harmony vicinity, 97001552

Proposed Move; A move has been proposed for:

INDIANA

Chief Richardville House, W. of Huntington, US 24 and IN 9/37 Huntington vicinity, 85002446

[FR Doc. 97–30846 Filed 11–24–97; 8:45 am]

BILLING CODE 4310–70–U

INTERNATIONAL TRADE COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: December 2, 1997 at 2:30 p.m.

PLACE: Room 101, 500 E Street S.W., Washington, DC 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meeting: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 731-TA–753–756 (Final) (Certain Carbon Steel Plate from China, Russia, South Africa, and Ukraine)—briefing and vote.
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: November 20, 1997.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 97–31090 Filed 11–21–97; 12:37 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Edward B. Curry, M.D.; Revocation of Registration

On June 3, 1997, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Edward B. Curry, M.D., of Syracuse, New York, notifying him of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration AC2054360, under 21 U.S.C. 824(a)(3), and deny any pending applications for renewal of such registration as a practitioner pursuant to 21 U.S.C. 823(f), for reason that he is not currently authorized to handle controlled substances in the State of New York. The order also notified Dr. Curry that should no request for a hearing be filed within 30 days of receipt, his hearing right would be deemed waived.

The Order to Show Cause was first sent to Dr. Curry's registered address, and was returned to DEA unclaimed. DEA then learned that Dr. Curry was residing at an address in Birmingham, Alabama, and the Order to Show Cause was sent to him at that address. DEA received a signed receipt indicating that the order was received by Dr. Curry on August 8, 1997. No request for a hearing or any other reply was received by DEA from Dr. Curry or anyone purporting to represent him in this matter. Therefore, the Acting Deputy Administrator, finding that (1) 30 days have passed since the receipt of the Order to Show Cause, and (2) no request for a hearing having been received, concludes that Dr. Curry is deemed to have waived his hearing right. After considering material from the investigative file in this matter, the Acting Deputy Administrator now enters his final order without a hearing pursuant to 21 CFR 1301.43 (d) and (e) and 1301.46.

The Acting Deputy Administrator finds that effective May 7, 1996, the State of New York, Department of Health, State Board for Professional Medical Conduct (Board) issued a Determination and Order revoking Dr. Curry's license to practice medicine. The Board found that Dr. Curry failed to comply with an order of the Committee on Professional Conduct that he undergo a psychiatric examination; engaged in physical and/or verbal abuse of patients; engaged in conduct evidencing moral unfitness; suffered from mental impairment; and practiced medicine while impaired.

The Acting Deputy Administrator finds that in light of the fact that Dr. Curry is not currently licensed to practice medicine in the State of New York, it is reasonable to infer that he is not currently authorized to handle controlled substances in that state. The DEA does not have the statutory authority under the Controlled Substances Act to issue or maintain a registration if the applicant or registrant is without state authority to handle controlled substances in the state in which he conducts his business. 21 U.S.C. 802(21), 823(f) and 824(a)(3). This prerequisite has been consistently upheld. See Romeo J. Perez, M.D., 62 FR 16193 (1997); Demetris A. Green, M.D., 61 FR 60728 (1996), Dominick A. Ricci, M.D., 58 FR 51104 (1993).

Here it is clear that Dr. Curry is not currently authorized to handle controlled substances in the State of New York. Therefore, Dr. Curry is not entitled to a DEA registration in that state.

Accordingly, the Acting Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration AC2054360, previously issued to Edward B. Curry, M.D., be,

and it hereby is, revoked. The Acting Deputy Administrator further orders that any pending applications for the renewal of such registration, be and they hereby are, denied. This order is effective December 26, 1997.

Dated: November 17, 1997.

James S. Milford,

Acting Deputy Administrator.

[FR Doc. 97–30844 Filed 11–24–97; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Bureau of Justice Statistics; Agency Information Collection Activities: Existing Collection; Comment Request

ACTION: Revision to existing collection: Summary of sentenced population movement—annual data collection.

Office of Management and Budget approval is being sought for the information collection listed below. The proposed collection was previously published in the **Federal Register** on September 16, 1997, allowing for a 60-day public comment period. One comment was received by the Bureau of Justice Statistics. Changes were performed where appropriate.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until December 26, 1997. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20530.

(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 submissions of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Summary of Sentenced Population Movement—Annual Data Collection.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* NPS–1. Bureau of Justice Statistics, 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:* Federal, State, and Local or Tribal Government. The National Prisoner Statistics—1 is the only national source of information on the number of persons under jurisdiction or in custody at midyear and yearend; the number and type of admissions and releases; the number of inmate deaths by cause; counts by sex, race and Hispanic origin; number of inmates with HIV/AIDS, and prison capacity and jail backups due to crowding.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond.* Fifty-two respondents at 6.5 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* Three hundred thirty-eight annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instruction, or additional information, please 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: November 19, 1997.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 97–30894 Filed 11–24–97; 8:45 am]

BILLING CODE 4410–18–M

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meeting

The National Credit Union Administration Board determined that its business requires the addition of the following item, which is open to public observation, to the previously announced open meeting (Federal Register, Vol. 62, page 62077, Thursday, November 20, 1997) scheduled for Monday, November 24, 1997.

9. Interim Final Rule with Request for Comments, Part 703, NCUA's Rules and Regulations, Investment and Deposit Activities.

The Board voted unanimously that agency business requires that this item be considered with less than the usual seven days notice, that it be open to the public, and that no earlier announcement of this change was possible.

The previously announced items are:

1. Requests from Three (3) Federal Credit Unions to Convert to a Community Charter.

2. Request from a Federal Credit Union for a Charter and Insurance Conversion.

3. Requests from Two (2) Credit Unions to Merge and Convert Insurance.

4. Extension of Regulation Effective Date: Part 704, NCUA's Rules and Regulations, Corporate Credit Unions.

5. Notice of Proposed Rule and Request for Comments: Part 708a, Appendix A, NCUA's Rules and Regulations, Mergers or Conversions of Federally Insured Credit Unions to Non-Credit Union Status.

6. Notice of Proposed Rule and Request for Comments: Part 708b, Subpart C, NCUA's Rules and Regulations, Mergers of Federally Insured Credit Unions; Voluntary Termination or Conversion of Insured Status.

7. Proposed National Small Credit Union Development Program.

8. NCUA's 1998/1999 Operating Budget.

FOR FURTHER INFORMATION CONTACT: Becky Baker, Secretary of The Board, Telephone 703–518–6304.

Becky Baker,

Secretary of the Board.

[FR Doc. 97–31145 Filed 11–21–97; 3:05 pm]

BILLING CODE 7535–01–M

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meeting

The National Credit Union Administration Board determined that its business requires the addition of the following item, which is closed to public observation to the previously announced closed meeting (Federal Register, Vol. 62, page 62077, Thursday, November 20, 1997) scheduled for Monday, November 24, 1997.

9. Matters Relating to the OPM Report. Closed pursuant to exemptions (2) and (8).

The Board voted unanimously that agency business requires that this item be considered with less than the usual seven days notice, that it be closed to the public, and that no earlier announcement of this change was possible.

The previously announced items are:

1. Administrative Action under Sections 116, 206 and 208 of the Federal Credit Union Act. Closed pursuant to exemptions (8), (9)(A)(ii) and (9)(B).

2. Administrative Action under Section 206 of the Federal Credit Union Act. Closed pursuant to exemptions (8), (9)(A)(ii) and (9)(B).

3. Administrative Action under Section 206 of the Federal Credit Union Act. Closed pursuant to exemptions (5), (7), (8) and (10).

4. Two (2) Administrative Actions under Part 704 of NCUA's Rules and Regulations. Closed pursuant to exemption (8).

5. One (1) Personnel Action. Closed pursuant to exemptions (2) and (6).

6. Delegations of Authority. Closed pursuant to exemptions (2) and (6).

7. Final Rule: Amendments to Part 790.2(b)(7), NCUA's Rules & Regulations. Closed pursuant to exemptions (2) & (6).

8. Final Rule: Amendments to Part 791, including 791.4, 791.5, and 791.6, NCUA's Rules & Regulations. Closed pursuant to exemptions (2) & (6).

FOR FURTHER INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone (703) 518–6304.

Becky Baker,

Secretary of the Board.

[FR Doc. 97–31146 Filed 11–21–97; 3:05 pm]

BILLING CODE 7535–01–M

NUCLEAR REGULATORY COMMISSION

Documents Containing Reporting or Recordkeeping Requirements: Office of Management and Budget (OMB) Review

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

1. Type of submission, new, revision, or extension: Revision.

2. The title of the information collection: 10 CFR 50.55a, ''Codes and Standards; Amended Requirements.''

3. The form number if applicable: Not applicable.

4. How often the collection is required: The ASME has set a frequency for conducting these activities with its attendant recordkeeping based on operating history and the need for component functionality. The frequency is dependent on the safety function of the component. The information is generally not submitted to the NRC, but is retained by the licensees to be made available to the NRC in the event of an NRC audit. Reporting requirements consist of one-time relief requests or technical specification amendments.

5. Who will be required or asked to report: Nuclear power plant licensees.

6. An estimate of the number of responses: The requirements will apply to licensees and applicants for nuclear power plant licenses. Because no applicants for construction permits or operating licensees are expected, the reports will apply to the 109 nuclear power plants with operating licenses.

7. The estimated number of annual respondents: 109.

8. An estimate of the total number of hours needed annually to complete the requirement or request: Implementation of later Code edition and addenda for ASME Boiler and Pressure Vessel Code (BPV Code) Section XI and OM Code activities is estimated to result in a (1) one-time recordkeeping burden of 48,502 hours (445 hours/plant) and (2) one-time reporting requirements of 328 hours (3 hours/plant) for a total of 18,830 hours. The estimated total annual industry increase in recordkeeping burden is 13,512 hours annually (124 hours/plant). Due to elimination of certain ASME OM Code reporting requirements, the estimated total industry annual reporting burden will decrease by 4,245 hours annually (39 hours/plant).

9. An indication of whether Section 3507(d), Pub. L. 104–13 applies: Applicable.

10. Abstract: The Nuclear Regulatory Commission (NRC) regulations require that nuclear power plant owners (1) construct Class 1, Class 2, and Class 3 components in accordance with the rules provided in Section III, Division 1, ''Requirements for Construction of Nuclear Power Plant Components,'' of the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (BPV Code), (2) inspect Class 1, Class 2, Class 3, Class MC (metal containment) and Class CC (concrete containment) components in accordance with the rules provided in Section XI, Division 1, ''Requirements for Inservice Inspection of Nuclear Power Plant Components,'' of the ASME BPV Code, and (3) test Class 1, Class 2, and Class 3 pumps and valves in accordance with the rules provided in Section XI, Division 1, of the ASME BPV Code. Every 120 months licensees are required to update their inservice inspection (ISI) and inservice testing (IST) programs to meet the version of Section XI incorporated by reference into the regulations in effect 12 months prior to the start of a new 120-month interval.

Submit, by (insert date 30 days after publication in the **Federal Register**), comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the supporting statement may be viewed free of charge at the NRC Public Document Room, 2120 L Street, NW (lower level), Washington, DC. OMB clearance packages are available via the NRC's interactive rulemaking website through the NRC home page (http://www.nrc.gov). This site provides the availability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking website, contact Carol Gallagher, (301) 415–5905: e-mail CAG@nrc.gov.

Comments and questions should be directed to the OMB reviewer by December 26, 1997: Norma Gonzales, Office of Information and Regulatory Affairs (3150–0011), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395-3084.

The NRC Clearance Officer is Brenda Jo. Shelton, (301) 415–7233.

Dated at Rockville, Maryland, this 19th day of November, 1997.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Information and Records Management Branch, Office of the Chief Information Officer.

[FR Doc. 97–30917 Filed 11–24–97; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–309]

Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station); Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–36, issued to Maine Yankee Atomic Power Company (the licensee), for operation of the Maine Yankee Atomic Power Station (Maine Yankee) located in Lincoln County, Maine.

Environmental Assessment

Identification of the Proposed Action

The proposed action would revise selected portions of Technical Specification (TS) Section 5.0, Administrative Controls, to define the facility staffing and training requirements for a permanently defueled facility.

The proposed action is in accordance with the licensee's application for amendment dated August 15, 1997, as supplemented by letters dated September 19 and October 21, 1997.

The Need for the Proposed Action

By letter dated August 7, 1997 the licensee submitted certifications of permanent cessation of power operations and permanent removal of fuel from the reactor in accordance with 10 CFR 50.82(a)(1) (i) and (ii). Pursuant to 10 CFR 50.82(a)(2), the 10 CFR Part 50 license no longer authorizes operation of the reactor or placement or retention of fuel in the reactor vessel. The proposed amendment would implement administrative changes to reflect the elimination of the TS requirement for the licensee to maintain 10 CFR Part 55 licensed operators. There will be no physical changes to the Maine Yankee facility associated with this proposed amendment.

Environmental Impacts of the Proposed Action

The Commission has completed its evaluation of the proposed amendment to the Maine Yankee TS and concludes that the proposed amendment is an administrative change reflecting the elimination of the TS requirement to maintain 10 CFR Part 55 licensed operators that is consistent with the permanently defueled condition of the plant. There will be no changes to the facility or its operation as a result of the proposed amendment.

The proposed change will not increase the probability or consequences of accidents, no changes are being made in the types of any effluents that may be released offsite, and there is no significant increase in the allowable individual or cumulative occupational radiation exposure. Accordingly, the Commission concludes that there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential nonradiological impacts, the proposed action does not affect nonradiological plant effluents and has no other nonradiological environmental impacts.

Accordingly, the Commission concludes that there are no significant environmental impacts associated with the proposed action.

Alternatives to the Proposed Action

Since the Commission has concluded there is no measurable environmental impact associated with the proposed action, any alternatives with equal or greater environmental impact need not be evaluated. As an alternative to the proposed action, the staff considered denial of the proposed action. Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement for the Maine Yankee facility.

Agencies and Persons Consulted

In accordance with its stated policy, on October 16, 1997 the staff consulted with Mr. Pat Dostie of the State of Maine, Office of Nuclear Safety regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

Based upon the environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated August 15, 1997, as supplemented by letters dated September 19 and October 21, 1997, which are available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Wiscasset Public Library, High Street, P. O. Box 367 Wiscasset, Maine, 04578.

Dated at Rockville, Maryland, this 18th day of November 1997.

For the Nuclear Regulatory Commission.

Seymour H. Weiss,

Director, Non-Power Reactors and Decommissioning Project Directorate, Division of Reactor Program Management, Office of Nuclear Reactor Regulation.

[FR Doc. 97–30918 Filed 11–24–97; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of November 24, December 1, 8, and 15, 1997.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of November 24

There are no meetings the week of November 24.

Week of December 1—Tentative

There are no meetings the week of December 1.

Week of December 8—Tentative

Thursday, December 11

2:00 p.m.
Briefing on Investigative Matters (Closed—Ex. 5 & 7)
3:00 p.m.
Affirmation Session (PUBLIC MEETING) (if needed)

Friday, December 12,

9:00 a.m.
Meeting with Northeast Nuclear on Millstone (PUBLIC MEETING), (Contact: Bill Travers, 301–415–1200)

Week of December 15—Tentative

Wednesday, December 17

2:00 p.m.
Briefing on Integration and Evaluation of Results from Recent Lessons-Learned Reviews (including 50.59 Process Improvements)
3:30 p.m.
Affirmation Session (PUBLIC MEETING) (if needed)

Thursday, December 18

10:00 a.m.

Meeting with Advisory Committee on Nuclear Waste (ACNW), (Contact: John Larkins, 301–415–7360)

ADDITIONAL INFORMATION: Affirmations of ''Final Rule—Deliberate Misconduct by Unlicensed Persons'' and ''Louisiana Energy Services—Financial Qualifications Aspects of Petitions for Review of LBP–96–25'' were postponed from Friday, November 21. No new date has been set.

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292.

CONTACT PERSON FOR MORE INFORMATION: Bill Hill (301) 415–1661.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at:

http://www.nrc.gov/SECY/smj/schedule.htm

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This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to it, please contact the Office of the Secretary, Attn: Operations Branch, Washington, DC 20555 (301–415–1661).

In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to wmh@nrc.gov or dkw@nrc.gov.

* * * * *

Dated: November 21, 1997.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 97–31115 Filed 11–21–97; 2:27 pm]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–22894; 812–10630]

Cash Accumulation Trust, et al.; Notice of Application

November 18, 1997.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the ''Act'') exempting applicants from sections 12(d)(1) (A) and (B) of the Act, under sections 6(c) and 17(b) of the Act exempting applicants from section 17(a) of the Act, and under section 17(d) of the Act and rule 17d–1 thereunder.

SUMMARY OF APPLICATION: The requested order would permit certain registered investment companies to invest excess cash in affiliated money market and/or short-term bond funds in excess of the limits of section 12(d)(1) of the Act.

APPLICANTS: Cash Accumulation Trust (''CAT''), PIMCO Funds: Multi-Manager Series (''PFMMS''), and all other registered investment companies and series thereof that currently or in the future are part of a ''group of investment companies'' that includes either CAT or PFMMS (together with CAT and PFMMS, the ''Funds''), PIMCO Advisors, L.P. (''PALP''), and PIMCO Funds Distribution Company (''PFDCO'').

FILING DATES: The application was filed on April 25, 1997 and amended on July 31, 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 person 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 December 15, 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 Newton B. Schott, Jr., Esq., 2187 Atlantic Street, Stamford, CT 06902.

FOR FURTHER INFORMATION CONTACT: Annmarie Zell, Law Clerk, at (202) 942–0532 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. CAT and PFMMS are open-end investment companies organized as Massachusetts business trusts and registered under the Act. CAT has a money market portfolio and a short-term bond portfolio. PFMMS has 22 separate portfolios.

2. PALP, a Delaware limited partnership, is registered as an investment adviser under the Investment Advisers Act of 1940. PALP serves as investment adviser to CAT and PFMMS and has retained a number of PALP's subpartnerships to act as subadvisers for most of the Funds' portfolios (collectively with PALP, the ''Advisers''). PFDCO, a subsidiary of PALP, is registered as a broker-dealer under the Securities Exchange Act of 1934 and acts or will act as each Fund's principal underwriter.

3. Applicants request an order that would permit certain Funds (''Participating Funds'') to invest their excess cash in one or more Funds that are money market or short-term bond Funds (''Central Funds''), and the Adviser to effect such transactions.[1] Central Funds that are money market funds will be subject to rule 2a–7 under the Act. Central Funds that are short-term bond funds will seek current income consistent with the preservation of capital by investing in fixed-income securities while maintaining a dollar-weighted average maturity of three years or less.

4. Each Participating Fund has, or may have, uninvested cash held by its custodian bank. Uninvested cash may result from a variety of sources, including dividends or interest received from portfolio securities, unsettled securities transactions, reserves held for investment strategy purposes, scheduled maturity of investments, liquidation of investment securities to meet anticipated redemptions and dividend payments, and new cash received from investors. Currently, the Funds can invest uninvested cash directly in money market instruments or other short-term debt obligations.

5. The Participating Funds wish to have the option to use the Central Funds as an additional cash management device for their uninvested cash. Applicants believe that the proposed transactions may reduce aggregate counterparty risk on repurchase agreements, protect liquidity, reduce credit exposure to custodian banks, reduce custodian transaction costs, and diversify risk across a wide range of short-term investments.

6. To provide the Participating Funds with a wider selection of short-term investment vehicles, the Central Funds may include one or more short-term bond funds. Applicants note that an investment in a Central Fund that is a

[1] Each Fund that intends to rely on the order has been named as an applicant. Any other existing Fund and any Future Fund that may rely on the order in the future will do so only in accordance with the terms and conditions of the application.

short-term bond fund would be available only to those Participating Funds for which a direct investment in short-term bonds would be consistent with their investment objectives, policies, and restrictions. By investing in a short-term bond fund, a Participating Fund could gain exposure to different points on the yield curve without the need to buy the underlying securities. A Participating Fund could achieve this exposure through a Central Fund while obtaining greater liquidity and diversification than otherwise might be available.

7. If a Central Fund offers more than one class of shares, each Participating Fund will invest only in the class with the lowest expense ratio at the time of investment. The shares of the Central Funds sold to and redeemed from the Participating Funds will not be subject to a sales load, redemption fee, distribution fee under a plan adopted in accordance with rule 12b–1 under the Act (''rule 12b–1 fee''), or service fee (as defined in section 2830(b)(9) of the Conduct Rules of the National Association of Securities Dealers, Inc.).

8. Under applicants' proposal, the number or value of the shares of the Central Funds held by a Participating Fund may exceed the percentage restrictions set forth in section 12(d)(1) of the Act. Applicants' review of the historical cash positions held by the Participating Funds indicates that, while the Funds typically are fully invested (*e.g.*, cash positions of 10% of total assets or less), cash positions fluctuate with shareholder and investment activity, and cash positions in excess of 20% of total assets occasionally may occur. For each Participating Fund, the uninvested cash available for investment at any particular time may total 25% or more of the Participating Fund's total net assets. Thus, each Participating Fund seeks relief to invest up to 25% of its total assets in the Central Funds.

Applicants' Legal Analysis

1. Section 12(d)(1)(A) of the Act provides that a registered investment company may not acquire securities of another investment company if such securities represent more than 3% of the acquired company's outstanding voting stock, more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other acquired investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies. Section 12(d)(1)(J) of the Act provides that the SEC may exempt any persons or transactions from section 12(d)(1) to the extent the exemption is consistent with the public interest and the protection of investors. For the following reasons, applicants believe the proposed transactions satisfy this standard.

2. Applicants state that section 12(d)(1) is intended to protect an investment company's shareholders against (a) undue influence over portfolio management through the threat of large scale redemptions; (b) the layering of fees; and (c) an overly complex structure. Applicants believe that none of these perceived abuses is created by the proposed transactions.

3. Applicants submit that each of the Central Funds will be managed specifically to maintain a highly liquid portfolio, and the Adviser will have superior ability to anticipate Participating Funds' cash flows. Applicants believe that no layering of sales charges will occur because no front-end sales charge, contingent deferred sales charge, rule 12b–1 fee, or other underwriting or distribution fee will be charged in connection with the purchase and sale of shares of the Central Funds. The Adviser will credit to the respective Participating Fund or waive the investment advisory fee that it or its affiliates earns as a result of the Participating Fund's investment in one or more Central Funds to the extent such fees are based upon the Participating Fund's assets invested in shares of the Central Funds. Therefore, applicants believe that the proposed transactions will not result in the layering of any sales charges or investment advisory fees. Regarding the complexity of the proposed structure, applicants note that, as conditions to the application, no Participating Fund will invest more than 25% of its assets in the Central Funds and no Central Fund will acquire securities of any investment company in excess of the limits of section 12(d)(1)(a).

4. Section 17(a) of the Act makes it unlawful for any affiliated person of a registered investment company, acting as principal, to sell or purchase any security to or from the company. Section 2(a)(3) of the Act defines an affiliated person of an investment company to include any person that owns more than 5% of the outstanding voting securities of that company, and any person directly or indirectly controlling, controlled by, or under common control with such investment company. Because the Funds share a common investment adviser or have an investment adviser that is under common control with those of the other Funds, and because PFMMS and CAT share a common board of trustees, applicants believe that each of the Funds may be deemed to be under common control with all the other Funds, and, therefore, an affiliated person of those Funds. In addition, applicants state that a Participating Fund may be an affiliated person of a Central Fund by owning more than 5% of the outstanding voting securities of the Central Fund. Applicants request an exemption from section 17(a) to permit the sale of shares of the Central Funds to the Participating Funds and the redemption of such shares by the Central Funds.

5. Section 17(b) of the Act authorizes the SEC to exempt a transaction from section 17(a) if the terms of the proposed 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 investment company concerned and the general purposes of the Act. Section 6(c) authorizes the Commission to exempt persons or transactions from the provisions of the Act to the extent that such exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. Applicants submit, for the reasons discussed below, that their request for relief satisfies these standards.

6. Applicants believe that section 17(a) was designed to prevent ''overreaching'' on the part of an affiliated person and to ensure that all transactions between an affiliated person and an investment company are conducted on an arm's length basis. Applicants submit that the proposed transactions will not involve overreaching because the consideration paid and received for the sale and redemption of shares of the Central Funds will be based on the net asset value per share of the Central Funds. Applicants also assert that the proposed transactions are appropriate because they provide the Participating Funds and their shareholders with a possible means of obtaining high current rates of return for cash investments.

7. Section 17(d) of the Act and rule 17d–1 prohibit an affiliated person of a registered investment company, acting as principal, from participating in any joint arrangement with the investment

company unless the SEC has issued an order authorizing the arrangement. Applicants believe that the Funds, by participating in the proposed transactions, and the Adviser, by managing the proposed transactions, could be deemed to be participating in a joint arrangement within the meaning of section 17(d) and rule 17d–1.

8. In determining whether to grant an exemption under rule 17d–1, the SEC considers whether the investment company's participation in the joint enterprise is consistent with the provisions, policies, and purposes of the Act, and the extent to which such participation is on a basis different from or less advantageous than that of other participants. Applicants assert that no Participating Fund or Central Fund will participate in the proposed transactions on a basis that is different from or less advantageous than that of any other participant and that the transactions will be consistent with the Act.

Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. The shares of the Central Funds sold to and redeemed from the Participating Funds will not be subject to a sales load, redemption fee, distribution fee under a plan adopted in accordance with rule 12b–1, or service fee (as defined in rule 2830(b)(9) of the NASD Conduct Rules).

2. If the Adviser collects a fee from a Central Fund for acting as its investment adviser with respect to assets invested by a Participating Fund, before the next meeting of the board of trustees of a Participating Fund that invests in the Central Funds is held for the purpose of voting on an advisory contract under section 15 of the Act, the Adviser to the Participating Fund will provide the board of trustees with specific information regarding the approximate cost to the Adviser for, or portion of the advisory fee under the existing advisory fee attributable to, managing the assets of the Participating Fund that can be expected to be invested in such Central Funds. Before approving any advisory contract under section 15, the board of trustees of such Participating Fund, including a majority of the trustees who are not ''interested persons,'' as defined in section 2(a)(19) of the Act, shall consider to what extent, if any, the advisory fees charged to the Participating Fund by the Adviser should be reduced to account for the fee indirectly paid by the Participating Fund because of the advisory fee paid by the Central Fund to the Adviser. The minute books of the Participating Fund will record fully the trustees' consideration in approving the advisory contract, including the considerations relating to fees referred to above.

3. Each of the Participating Funds will invest uninvested cash in, and hold shares of, the Central Funds only to the extent that the Participating Fund's aggregate investment in the Central Funds does not exceed 25% of the Participating Fund's total net assets. For purposes of this limitation, each Participating Fund or series thereof will be treated as a separate investment company.

4. Investment in shares of the Central Funds will be in accordance with each Participating Fund's respective investment restrictions, if any, and will be consistent with each Participating Fund's policies as set forth in its prospectuses and statements of additional information.

5. Each Participating Fund, the Central Funds, and any future Fund that may rely on the order shall be part of a ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, that includes either CAT or PFMMS.

6. No Central Fund shall acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–30863 Filed 11–24–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–26781]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

November 18, 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 December 12, 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.

Eastern Utilities Associates (70–6583)

Eastern Utilities Associates (''EUA''), P.O. Box 2333, Boston, Massachusetts 02107, a registered holding company, has filed a post-effective amendment to its application-declaration filed under Sections 6(a) and 7 of the Act and rule 54 under the Act.

EUA is currently authorized under an order of the Commission dated December 19, 1994 (HCAR No. 26193) (''Prior Order'') to sell up to 6.8 million of its authorized common shares under its Dividend Reinvestment and Common Share Purchase Plan (''Plan'') through December 31, 1997. Under the Prior Order, EUA is authorized to issue these shares or to purchase them on the open market. As of November 1, 1997, EUA has sold 6,042,088 of its authorized common shares under the Plan.

EUA now proposes to extend its authority to sell the remaining 757,912 shares of its common stock under the Plan through December 31, 2000. In addition, EUA proposes to sell up to one million additional shares of its common stock under the Plan from time to time through December 31, 2000. EUA will either issue the shares of its common stock it sells under the Plan or purchase them on the open market.

EUA will use the proceeds from the sale of common shares under the Plan for investment in its subsidiaries, payment of its indebtedness and/or for its general corporate purposes.

Consolidated Natural Gas Company, et al. (70–8621)

Consolidated Natural Gas Company (''Consolidated''), CNG Tower, Pittsburgh, Pennsylvania 15222–3199, a registered holding company, and its wholly owned nonutility subsidiary, CNG Energy Services Corporation (''Energy Services''), One Park Ridge Center, Pittsburgh, Pennsylvania 15244–

0746, have filed a post-effective amendment to an application-declaration under sections 6(a), 7, 9(a), 10, 12(b) and 13(b) of the Act and rules 45, 54, 83–91 thereunder.

By order dated February 27, 1987 (HCAR No. 24329), the Commission authorized Energy Services, among other things, to be the gas marketing subsidiary for the Consolidated System. This order authorized Energy Services, as a gas marketer, to purchase, pool, transport, exchange, store and sell gas supplies from competitively priced sources, including the spot markets, independent producers and brokers, and CNG Producing Company (''Gas Related Activities'').

By order dated July 26, 1995 (''Order'') Energy Services was authorized, through December 31, 1997, to invest an aggregate amount up to $150 million to acquire: (1) An ownership interest, which may be up to 50% of the voting or nonvoting stock, in one or more corporations established for the sole purpose of engaging in Gas Related Activities; (2) either in its own name or through a wholly owned special purpose subsidiary company, up to 50% of the general partnership interest in one or more partnerships, or up to 50% voting equity interest in one or more other joint business entities such as joint ventures or limited liability companies, which are established for the sole purpose of engaging in Gas Related Activities; and/or (3) up to 100% of the limited partnership interests in one or more partnerships established for the sole purpose of engaging in Gas Related Activities (collectively, ''Authorized Activities''). None of the projects in which Energy Services may invest can be a public-utility company.

As of June 30, 1997 Energy Services has invested, under the Order, $19.168 million and $14.845 million in two pipeline gathering systems, respectively, in the Main Pass area near the Alabama coast of the Gulf of Mexico. The Order also authorized Consolidated and Energy Services to guarantee their obligations incurred as a result of equity investments made in the joint entities. To date, no guarantees have been issued.

The applicants now propose to extend the period of authorization, through December 31, 2002, whereby the applicants may invest the remaining $115.987 million and an additional $84.013 million (totaling $200 million) in Authorized Activities under the terms and conditions set forth in the Order.

Consolidated and Energy Services also propose to continue to make guarantees of obligations to make equity investments in the joint entities, up to an aggregate principal amount of $200 million under the terms and conditions set forth in the Order.[1]

Energy Services proposes to continue to enter into service agreements with one or more of the entities in which it is investing. These agreements would be in the form of an operating and maintenance agreement under which Energy Services would operate and manage the business of the entity, and/or administrative services agreement whereby Energy Services would provide certain administrative services. Under the proposed service agreements, Energy Services would be compensated according to the ''at cost'' requirements of section 13 and the corresponding rules.

Energy Services proposes to finance its $200 million investment in Authorized Activities by: (1) Selling shares of its common stock [2] to Consolidated; (2) open account advances; [3] and (3) long-term loans.[4]

Monongahela Power Company, et al. (70–9121)

Monongahela Power Company (''Monongahela''), 1310 Fairmont Avenue, Fairmont, West Virginia 26554, The Potomac Edison Company (''Potomac Edison''), 10435 Downsville Pike, Hagerstown, Maryland 21740, and West Penn Power Company (''West Penn''), 800 Cabin Hill Drive, Greensburg, Pennsylvania 15601, each an electric utility subsidiary of Allegheny Energy, Inc., a registered holding company, have filed a declaration under sections 6(a), 7, 9(a), 10 and 12(c) of the Act and rule 53 under the Act.

By order dated February 4, 1977 (HCAR No. 19875), the Commission authorized Monongahela, Potomac Edison and West Penn (''Declarants'') to issue notes (''Series A Notes'') to The Greene County Industrial Authority, Greene County, Pennsylvania (''Authority''). Declarants issued these notes in connection with the issuance of five series of Bonds (together, ''Series A Bonds'') by the Authority used to finance certain pollution control equipment and facilities (''Facilities'') at a generating station in Greene County that is jointly owned by Declarants. The Series A Bonds were issued in an aggregate principal amount of $27.495 million, of which $24.995 million currently remains outstanding.

The Authority intends to issue three series of the bonds in an aggregate principal amount of $24.995 million (together, ''Series B Bonds''), the proceeds of which will be used to refund the Series A Bonds that remain outstanding. Declarants now request authority through December 31, 2002 to issue notes (''Series B Notes'') to support the contemporaneous issuance of the Series B Bonds by the Authority. The Series A Notes will be canceled.

The Series B Bonds will be issued under a supplemental trust indenture with a corporate trustee, approved by Declarants, and sold at a time, interest rate, and price approved by Declarants. The interest rate for the Series B Bonds will not exceed the interest rate of the corresponding series of Series A Bonds presently outstanding. The Series B Bonds will mature no later than the year 2020.

Each Declarant will issue a Series B Note that will correspond to that series of Series B Bonds issued by the Authority on its behalf with respect to principal amount, interest rate and redemption provisions. In addition, each Series B Notes will have principal payment installments that correspond to any mandatory sinking fund payments and stated maturities of the corresponding Series B Bonds. The Series B Notes will be secured by a second lien on the Facilities and certain other properties, subject to the lien securing each Declarant's first mortgage bonds.

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[1] The guarantees would be calculated as part of the maximum $2 billion authority to guarantee obligations of subsidiaries granted to Consolidated and its subsidiaries in *Consolidated Natural Gas Co.*, Holding Co. Act Release No. 26500 (Mar. 28, 1996).

[2] Energy Services currently has authorized 4,000 shares of common stock par value $1.00 per share. However, it has requested in a pending proceeding in File No. 70–8981 for authority to increase its common stock equity to 50,000 shares of common stock, par value $10,000 per share.

[3] Open account advances may be made to Energy Services on a revolving basis to finance the Authorized Activities. Open account advances will be made under letter agreement with Energy Services and will be repaid on or before a date not more than one year from the date of the first advance with interest at the same effective rate of interest as Consolidated's weighted average effective rate for commercial paper and/or revolving credit borrowings. If no borrowings are outstanding, the interest rate shall be predicated on the Federal Funds' effective rate of interest as quoted daily by the Federal Reserve Bank of New York. Only outstanding amounts of open account advances will be calculated against the $200 million financing limits requested in this filing.

[4] Loans to Energy Services will be evidenced by long-term non-negotiable notes of Energy Services maturing over a period of time (not in excess of 50 years) to be determined by the officers of Consolidated, with the interest predicated on and equal to Consolidated's cost of funds for comparable borrowings. In the event Consolidated has not had recent comparable borrowings, the rates will be tied to the Salmon Brothers, Inc. Bond Market Roundup or similar publication on the date nearest to the time of takedown. All loans may be prepaid at any time without premium or penalty.

Payment on the Series B Notes will be applied to pay the maturing principal and redemption price of and interest and other costs on the Series B Bonds as such amounts become due. Each Declarant also proposes to pay any trustees' fee or other expenses incurred by the Authority.

Yankee Atomic Electric Company (70–9135)

Yankee Atomic Electric Company (''Yankee Atomic''), 580 Main Street, Bolton, Massachusetts 01740, an indirect electric utility subsidiary of New English Electric System and Northeast Utilities, both registered holding companies, has filed a declaration under Sections 6(a) and 7 of the Act and rule 54 under the Act.

By order dated December 28, 1995 (HCAR No. 26441), the Commission authorized Yankee Atomic to incur short-term borrowings through December 31, 1997 from banks up to an aggregate principal amount of $10 million at any one time. Yankee Atomic now requests an extension of this authority through December 31, 2002.

Yankee Atomic will evidence its borrowings through the issuance of notes that will be payable in less than one year from the date of issuance. The interest rate will not exceed the lending bank's base or prime lending rate, or the high federal funds rate, plus 1% in either case. Yankee Atomic pays fees to the banks in lieu of compensating balance arrangements. Yankee Atomic will use the proceeds to meet its working needs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–30861 Filed 11–24–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 22895; 812–10624]

UAM Funds, Inc., et al.; Notice of Application

November 19, 1997.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the ''Act'') for an exemption from section 12(d)(1)(G)(i)(II), and under sections 6(c) and 17(b) for an exemption from section 17(a).

SUMMARY OF THE APPLICATION: Applicants seek an order that would permit a fund of funds relying on section 12(d)(1)(G) to make direct investments in equity and fixed income securities. The order also would permit applicants to redeem shares in-kind under certain circumstances.

APPLICANTS: UAM Funds, Inc. (the ''Fund''), on behalf of the TS & W Balanced Portfolio (the ''Balanced Portfolio'') and the TS & W International Equity Portfolio (the ''International Equity Portfolio'') (collective, the ''Portfolios''), and Thompson, Siegel & Walmsley, Inc. (the ''Adviser'').

FILING DATES: The application was filed on April 18, 1997, and amended on August 4, 1997. Applicants have agreed to file an additional amendment, the substance of which is incorporated in this notice, during the notice period.

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 December 15, 1997, and should be accompanied by proof of service on applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, One International Place, 44th Floor, Boston, MA 02110.

FOR FURTHER INFORMATION CONTACT: Kathleen L. Knisely, Staff Attorney, at (202) 942–0517, or Christine Y. Greenless, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. 202–942–8090).

Applicants' Representations

1. The Fund, a Maryland corporation, is registered under the Act as an open-end management investment company and is comprised of multiple series, including the Portfolios.[1] The Balanced Portfolio invests in a diversified portfolio of common stocks of established companies and investment grade fixed income securities. The Balanced Portfolio may invest in equity securities issued by foreign companies as provided in its investment policies.

2. The International Equity Portfolio generally invests in equity securities of established companies listed on U.S. or foreign securities exchanges. The International Equity Portfolio also may invest in convertible bonds, convertible preferred stocks, non-convertible preferred stocks, fixed income securities of governments, government agencies, supranational agencies and companies, and cash equivalents (including foreign money market instruments). The International Equity Portfolio may purchase and sell options on any of the above-mentioned securities and also may invest in closed-end investment companies holding foreign securities.

3. The Adviser, registered under the Investment Advisers Act of 1940, serves as investment adviser to the Portfolios. The Adviser is a wholly-owned subsidiary of United Asset Management Corporation (''UAM''), which is a Delaware holding company incorporated for the purpose of acquiring and owning firms engaged primarily in institutional investment management.

4. The Adviser receives an advisory fee based on a percentage of net assets of the particular Portfolio. The Adviser currently intends to waive its advisory fee with respect to the portion of the Balanced Portfolio's assets that are invested in the shares of the International Equity Portfolio by excluding these assets from the net assets of the Balanced Portfolio for purposes of calculation of the advisory fee. Currently, no sales loads or other distribution charges will be incurred by the Balanced Portfolio in purchasing shares of the International Equity Portfolio. Other expenses incurred by the International Equity Portfolio will be borne by it, and thus indirectly by the Balanced Portfolio.

5. Applicants propose to use the International Equity Portfolio as a means to invest a portion of the Balanced Portfolio's assets in foreign equity securities. Applicants believe that the use of a single investment vehicle to invest in a broadly diversified portfolio of foreign equity securities will provide the Balanced Portfolio with the most effective exposure to the

[1] Until October 31, 1995, the Fund was named The Regis Fund, Inc. All parties that currently intend to rely on the order are named as applicants.

performance of foreign markets while at the same time minimizing costs. The Balanced Portfolio also may have some additional direct investments in foreign stocks. This could occur both (a) because the Balanced Portfolio, between its periodic purchase or sale transactions in shares of the International Equity Portfolio, may accumulate cash that it wishes to invest in foreign securities, and (b) because the Balanced Portfolio may use foreign securities to meet some of its remaining strategic diversification targets. Applicants state that the Balanced Portfolio needs the flexibility to invest directly in foreign securities because, on occasion, a particular foreign security may be determined to be the most suitable investment to satisfy a specific investment strategy being pursued by the Balanced Portfolio. Direct investments also may result because the Balanced Portfolio determines that a specific weighting in a particular foreign security, which is not satisfied by ownership of the International Equity Portfolio, would be beneficial to the Portfolio.

6. Applicants state that the International Equity Portfolio is more diversified in foreign markets than the Balanced Portfolio could be investing on its own. As a result, events affecting the price of a single foreign issuer or country can be expected to have less impact on the International Equity Portfolio than they would have on the foreign securities holdings of the Balanced Portfolio. Applicants represent that this diversification can be expected to benefit both Portfolios by providing greater price stability and lower volatility, while at the same time capturing the performance benefits of exposure to foreign markets.

7. Applicants also expect that use of the International Equity Portfolio as a vehicle for international investing by the Balanced Portfolio will increase the efficiency of portfolio management of the Balanced Portfolio. Tracking the performance of various country markets and issuers in foreign markets is a time-consuming process and substantially different from tracking the domestic market and domestic issuers, which would normally be attendant with the Balanced Portfolio's portfolio management. By obtaining most of its exposure to foreign markets through the International Equity Portfolio, the Balanced Portfolio and its shareholders would gain the benefit of exposure to this sector without incurring the penalty attendant upon its portfolio manager spending a disproportionate amount of his or her time following these relatively small positions.

8. Applicants anticipate that the efficiencies resulting from the use of the International Equity Portfolio will result in cost savings to the Balanced Portfolio in three areas: administrative costs, out-of-pocket costs, and trading costs. Savings of administrative costs will be attributable to a great reduction in administrative procedures. Savings of out-of-pocket costs such as audit fees and custodial fees will be offset by increases in other out-of-pocket costs such as legal and transfer agency fees. Applicants expect that the major cost savings will occur because the International Equity Portfolio will experience trading costs that will be substantially less than the trading costs that would be incurred if the foreign stocks were purchased separately for the Balanced Portfolio. Applicants believe that this cost savings will increase in direct proportion to the number of foreign stocks over which the investment in the foreign securities is diversified.

9. Although the majority of the Balanced Portfolio's investments in foreign securities will be through the International Equity Portfolio, the Balanced Portfolio may have some additional direct investments in foreign stocks. Applicants state that the Adviser has adopted the following procedures to avoid the unnecessary expense that could occur if the International Equity Portfolio were to sell a particular stock at the same time that the Balanced Portfolio were to purchase it, or vice versa. The International Equity Portfolio will generate a list of stocks that it intends to purchase or sell, which it will forward to the portfolio manager of the Balanced Portfolio. If the Balanced Portfolio's portfolio manager wishes to sell or buy a stock on the list, the International Equity Portfolio will effect the transaction directly with the Balanced Portfolio pursuant to the provisions of rule 17a–7 (a) through (f), except as described below. The value of the stock will be the current market price, determined in accordance with the provisions of rule 17a–7. Payment will be made by simultaneous transfer of cash or by simultaneous redemption or issuance of shares of the International Equity Portfolio with an equal value, depending on whether the Balanced Portfolio wishes to alter its investment in the International Equity Portfolio. In cases where the payment for the subject stock is International Equity Portfolio shares rather than cash, the transactions will comply with the provision of rule 17a–7 (a) through (f) in all respects other than the requirement that purchases and sales be made only for cash consideration.

10. To minimize the need for the International Equity Fund to maintain excessive cash balances, the Adviser will coordinate the Balanced Portfolio's purchases and sales of shares of the International Equity Portfolio to minimize the cash flow into or out of the International Equity Portfolio, and attempt to anticipate the Balanced Portfolio's cash needs and to coordinate net cash investment or redemptions to permit the orderly acquisition or disposition of foreign securities within the International Equity Portfolio. The purchase or sale of shares of the International Equity Portfolio by the Balanced Portfolio will also be coordinated with purchase and sale or ''rebalancing'' transactions calculated to bring the holdings of the International Equity Portfolio back in line with its targets. The Adviser will monitor the process over time to ensure that the best interests of the Balanced Portfolio and the International Equity Portfolio are met.

11. The Adviser anticipates that in virtually all instances it will be able to follow the foregoing procedures. It is conceivable, however, that there will be occasions where these procedures cannot be followed because the Balanced Portfolio makes an unusually large purchase or redemption of International Equity Portfolio shares. Under these circumstances, the Adviser in its sole discretion may cause the transaction to be executed in-kind. In the case of a purchase, the Balanced Portfolio would acquire foreign stocks directly, then contribute them to the International Equity Portfolio in exchange for its shares. In the case of a redemption, the International Equity Portfolio would deliver redemption proceeds to the Balanced Portfolio in the form of a *pro rata* distribution of foreign stocks, which the Balanced Portfolio could then sell. These in-kind transactions will comply with the provisions of rule 17a–7(a) and (f), except that the consideration for the foreign stocks will be International Equity Portfolio shares rather than cash.

Applicants' Legal Analysis

A. Section 12(d)(1)

1. Section 12(d)(1)(A) of the Act provides that no registered investment company may acquire securities of another investment company if such securities represent more than 3% of the acquired company's outstanding voting stock, more than 5% of the acquiring company's total assets, or if such securities, together with the securities of

other investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies.

2. Section 12(d)(1)(G) of the Act provides that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (a) The acquiring company and the acquired company are part of the same group of investment companies; (b) the acquiring company holds only securities of acquired companies that are part of the same group of investment companies, government securities, and short-term paper; (c) the aggregate sales loads and distribution-related fees of the acquiring company and the acquired company are limited; and (d) the acquired company has a policy that prohibits it from the acquiring securities of registered open-end investment companies or registered unit investment trusts in reliance on section 12(d)(1)(F) or (G).

3. Applicants state that the proposed arrangement would comply with the provisions of section 12(d)(1)(G), but for the fact that the Balanced Portfolio would like to retain the flexibility to invest directly in stocks, bonds, and other instruments, in addition to investing in the International Equity Portfolio.[2]

4. Section 12(d)(1)(J) provides that the SEC may exempt persons or transactions from any provision of section 12(d)(1) if and to the extent the exemption is consistent with the public interest and the protection of investors. Applicants believe that the proposed arrangement will not implicate any of the abuses that section 12(d)(1) was intended to prevent, such as duplicative costs, undue influence or control, or the potential adverse impact of large-scale redemptions.

B. Section 17(a)

5. Section 17(a) of the Act prohibits certain purchases and sales of securities between investment companies and their affiliated persons, as defined in section 2(a)(3) of the Act. The Adviser is an affiliated person of each Portfolio. To the extent that the Portfolios are deemed under common control by reason of having the same investment adviser, each Portfolio would be an affiliated person of the other Portfolio under section 2(a)(3)(C) of the Act. Accordingly, purchases or sales of securities between the International Equity Portfolio and the Balanced Portfolio may violate section 17(a). Applicants request an exemption from section 17(a) of the Act to the extent necessary to permit them to redeem shares in-kind as described in the application.

6. Sections 6(c) and 17(b) of the Act set forth the standards for exempting a series of transactions from section 17(a). Under section 17(b), the terms of the transaction must be reasonable and fair and must not involve overreaching on the part of any person, the transaction must be consistent with the policy of each investment company concerned, and the transaction must be consistent with the general purposes of the Act. In addition, under section 6(c), the exemption must be necessary or appropriate in the public interest, consistent with the protection of investors, and consistent with the purposes fairly intended by the policy and provisions of the Act.

7. Applicants believe that the proposed transactions meet the standards for relief under sections 6(c) and 17(b). Applicants contend that the terms of the proposed transactions are reasonable and fair and do not involve overreaching. The consideration paid and received for the purchase and redemption of International Equity Portfolio shares will be based on the net asset value of the International Equity Portfolio. Currently, the Balanced Portfolio will not incur any sales load or other charge in purchasing shares of the International Equity Portfolio. Applicants believe that the proposed transactions are consistent with the policies of each Portfolio. The Balanced Portfolio's investments in the International Equity Portfolio, and the International Equity Portfolio's issuance of shares, will be effected in accordance with each Portfolio's investment restrictions and policies. Applicants also believe that the proposed transactions are consistent with the general purposes of the Act. Section 17(a) was intended to prohibit affiliated persons from furthering their own interests by, for example, selling property to an investment company at less than fair value. Applicants believe that their proposal does not present those concerns.

[2] Section 12(d)(1)(G)(i)(II) limits a fund of funds' investments to certain government securities and short-term instruments.

Applicants' Conditions

Applicants agree that the order granting the requested relief shall be subject to the following conditions:

1. Applicants will comply with all provisions of section 12(d)(1)(G), except for section 12(d)(1)(G)(i)(II) to the extent that it restricts the Balanced Portfolio from investing in equity and fixed income securities, and other instruments as described in the application.

2. Before approving any advisory contract for the Balanced Portfolio under section 15 of the Act, the directors of the Fund, including a majority of the directors who are not ''interested persons'' as defined in section 2(a)(19) of the Act (the ''Independent Directors''), shall find that the advisory fee, if any, charged under the contract is based on services provided that are in addition to, rather than duplicative of, services provided pursuant to the International Equity Portfolio's advisory contract. The finding, and the basis upon which the finding was made, will be recorded fully in the minute books of the Fund.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–30862 Filed 11–24–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39333; File No. SR–AMEX–97–36]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange, Inc. Relating to Revised Equity Fee Schedule

November 17, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. 78s(b)(1), notice is hereby given that on October 14, 1997, the American Stock Exchange, Inc. (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission the fee change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the fee change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex has revised its schedule of fees imposed on trades in Standard & Poor's Depositary Receipts® (''SPDRs®'') and Standard & Poor's MidCap Depositary Receipts® (''MidCap SPDRs®''). The text of the fee change is available at the Office of the Secretary, the Amex and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the fee change and discussed any comments it received on the fee change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently imposes a transaction charge and a regulatory fee on trades in equity securities executed on the Exchange. The Exchange's equity transaction charge is a two-part fee consisting of a share charge and a value charge, based on the total number of shares traded and the value of such shares, respectively. All equity trades executed through the Exchange's Post Execution Reporting (''PER'') order routing system up to 1,099 shares are exempt from Exchange equity transaction charges (excluding only those for the account of non-member competing dealers). The Exchange also imposes a separate regulatory fee on all equity trades calculated at .00005 times the total value of shares traded.

The Exchange is now making revisions to its schedule of fees relative to trades on the Exchange in SPDRs and MidCap SPDRs. The Exchange will charge a different and separate fee which will vary depending on for whom the trade was executed. Specialists will be charged a transaction fee of $.006 per share ($.60 per 100 shares), capped at $300 per trade. Registered Traders will be charged a transaction fee of $.007 per share ($.70 per 100 shares), capped at $350 per trade. Off-floor orders (both customer and broker-dealer) will be charged a transaction fee of $.006 per share ($.60 per 100 shares), capped at $100 per trade.

In addition to the foregoing, orders up to 5,099 shares in SPDRs and MidCap SPDRs routed to the Exchange Floor electronically through the Exchange's PER System will not be assessed a transaction fee.[1] However, the new fee schedule will operate on a principle consistent with that applied in the context of the Exchange's current fee waiver in equities generally for PER orders up to 1,099 shares, in that the various fee waivers in SPDRs and MidCap SPDRs will not be available to PER orders for the account of a non-member competing marketmaker.

These changes are calculated to lower costs to users of the products while making the cost of trading on the Exchange comparable to the economics of trading this and functionally similar products in other markets. The revised equity fee schedule was implemented by the Exchange on October 29, 1997. The Exchange will notify member firms as to the date of effectiveness and as to any necessary modifications to provide for proper identification of orders entitled to the fee exemption.

2. Statutory Basis

The fee change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b)(4)[2] in particular in that it is intended to assure the equitable allocation of reasonable dues, fees, and other charges among members, issuers, and other persons using the Exchange's facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The fee change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the fee change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee or other imposed by the Exchange and, therefore, has become effective pursuant to Section 19(b)(3)(A) of the Act[3] and subparagraph (e)(2) of the Rule 19b–4 thereunder.[4] At any time within 60 days of the filing of such fee change, the Commission may summarily abrogate such fee change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the fee change that are filed with the Commission, and all written communications relating to the fee change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–AMEX–97–36 and should be submitted by December 16, 1997.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–30864 Filed 11–24–97; 8:45 am]

BILLING CODE 8010–01–M

[1] Very recently (see SR–AMEX–97–34) the Exchange had extended a PER fee waiver to customer orders up to 5,099 shares in all exchange-traded fund products (''EXTRA Funds''). This fee schedule change was not implemented and is being replaced by the fee schedule revisions being made herein.

[2] 15 U.S.C. 78f(b)(4).

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 19b–4(e).

[5] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice No. 2654]

Shipping Coordinating Committee International Maritime Organization (IMO) Legal Committee; Notice of Meeting

The U.S. Shipping Coordinating Committee (SHC) will conduct an open meeting at 10:00 a.m., on Thursday, December 4, 1997, in Room 2415 at U.S. Coast Guard Headquarters, 2100 Second Street, S.W., Washington, D.C. The purpose of this meeting is to report on

the 76th session of the IMO Legal Committee, which was held October 13–17, 1997, in London, regarding the provision of financial security for seagoing vessels (focussing on security for passenger claims), compensation for pollution from ships' bunkers, a draft convention on wreak removal, the carriage by sea of radioactive materials, and other matters. This meeting will also be a further opportunity for interested members of the public to express their views on whether the United States should ratify the 1996 Hazardous and Noxious Substances Convention, or the 1996 protocol to the Limitation of Liability for Maritime Claims convention of 1976, both adopted in London in May, 1996.

Members of the public are invited to attend the SHC meeting, up to the seating capacity of the room. For further information, or to submit views concerning the subjects of discussion, write to either Captain Malcolm J. Williams, Jr., or Lieutenant Commander Bruce P. Dalcher, U.S. Coast Guard (G–LMI), 2100 Second Street, S.W., Washington, D.C. 20593, or by telephone (202) 267–1527, telefax (202) 267–4496.

Dated: November 20, 1997.

Russell A. La Mantia,

Chairman, Shipping Coordinating Committee.

[FR Doc. 97–30920 Filed 11–24–97; 8:45 am]

BILLING CODE 4710–07–M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request of the Government of Anguilla To Be Designated a Beneficiary of the Caribbean Basin Economic Recovery Act; Request for Public Comment

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for public comment.

SUMMARY: Anguilla has requested designation as a beneficiary country under the Caribbean Basin Economic Recovery Act. Interested parties are invited to submit comments relevant to the criteria to be examined in determining Anguilla's eligibility for such designation.

DATES: Comments are due at USTR by January 2, 1998.

ADDRESSES: Comments should be addressed to: Susan Cronin, Director for Caribbean and Central American Affairs, Office of the U.S. Trade Representative, 600 17th Street, N.W., Room 523, Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Susan Cronin, Director for Caribbean and Central American Affairs, Office of the United States Trade Representative, 600 17th Street, N.W., Room 523, Washington, DC 20506; (202) 395–5190.

SUPPLEMENTARY INFORMATION: The Caribbean Basin Economic Recovery Act (the ''CBERA'') (Title II, Pub. L. 98–67, as amended (19 U.S.C. 2701 et seq.)) authorizes the President to proclaim duty-free treatment for eligible articles from designated beneficiary countries in the Caribbean Basin. Anguilla has requested designation as a beneficiary country under the CBERA.

Section 212(b) of the CBERA provides that the President shall not designate any country a CEBRA beneficiary country—

(1) If such country is a Communist country;

(2) If such country—

(A) has nationalized, expropriated or otherwise seized ownership or control of property owned by a United States citizen or by a corporation, partnership, or association which is 50 per centum or more beneficially owned by United States citizens,

(B) has taken steps to repudiate or nullify—

(i) any existing contract or agreement with, or

(ii) any patent, trademark, or other intellectual property of,

a United States Citizen or a corporation, partnership, or association which is 50 per centum or more beneficially owned by United States citizens, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of property so owned, or

(C) has imposed or enforced taxes or other exactions, restrictive maintenance or operational conditions, or other measures with respect to property so owned, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of such property, unless the President determines that—

(i) prompt, adequate, and effective compensation has been or is being made to such citizen, corporation, partnership, or association,

(ii) good-faith negotiations to provide prompt, adequate, and effective compensation under the applicable provisions of international law are in progress, or such country is otherwise taking steps to discharge its obligations under international law with respect to such citizen, corporation, partnership, or association, or

(iii) a dispute involving such citizen, corporation, partnership, or association, over compensation for such a seizure has been submitted to arbitration under the provisions of the Convention for the Settlement of Investment Disputes, or in another mutually agreed upon forum, and promptly furnishes a copy of such determination to the Senate and House of Representatives;

(3) if such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership or association which is 50 per centum or more beneficially owned by United States citizens, which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their disputes;

(4) if such country affords preferential treatment to the products of a developed country, other than the United States, which has, or is likely to have, a significant adverse effect on United States commerce, unless the President has received assurances satisfactory to him that such preferential treatment will be eliminated or that action will be taken to assure that there will be no such significant adverse effect, and he reports those assurances to the Congress;

(5) if a government-owned entity in such country engages in the broadcast of copyrighted material, including films or television material, belonging to United States copyright owners without their express consent;

(6) unless such country is a signatory to a treaty, convention, protocol, or other agreement regarding the extradition of United States citizens; and

(7) if such country has not or is not taking steps to afford internationally recognized worker rights (as defined in section 502(a)(4) of the Trade Act of 1974) to workers in the country (including any designated zone in that country).

Paragraphs (1), (2), (3), (5), and (7) shall not prevent the designation of any country as a beneficiary country under this Act if the President determines that such designation will be in the national economic or security interest of the United States and reports such determination to the Congress with his reasons therefor.

Section 212(c) of the CBERA provides that the President, in determining whether to designate any country a CBERA beneficiary country, shall take into account—

(1) an expression by such country of its desire to be so designated;

(2) the economic conditions in such country, the living standards of its inhabitants, and any other economic factors which he deems appropriate;

(3) the extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country;

(4) the degree to which such country follows the accepted rules of international trade provided for under the General Agreement on Tariffs and Trade, as well as applicable trade agreements approved under section 2(a) of the Trade Agreements Act of 1979;

(5) the degree to which such country uses export subsidies or imposes export performance requirements or local content requirements which distort international trade;

(6) the degree to which the trade policies of such country as they relate to other beneficiary countries are contributing to the revitalization of the region;

(7) the degree to which such country is undertaking self-help measures to provide its own economic development;

(8) whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights.

(9) the extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights;

(10) the extent to which such country prohibits its nationals from engaging in the broadcast of copyrighted material, including films or television material, belonging to United States copyright owners without their express consent; and

(11) the extent to which such country is prepared to cooperate with the United States in the administration of the provisions of this title.

Interested parties are invited to submit comments on the application to Anguilla of some or all of these criteria for designation.

Public Comments

Interested parties must provide twelve copies of any comments, which must be in English and which must be received at USTR no later than 5 p.m., Friday, January 2, 1998. If the comments contain business confidential information, ten copies of a non-confidential version must also be submitted. A justification as to why the information contained in the comments should be treated confidentially must be included in the comments. In addition, comments containing confidential information should be clearly marked ''confidential'' at the top of each page. The version that does not contain confidential information should be clearly marked ''public version'' or ''non-confidential'' at the top of each page.

Comments submitted in response to this notice, except for information granted ''business confidential'' status pursuant to 15 CFR 2007.7, will be available for public inspection shortly after the filing deadline, by appointment with the staff of the USTR Public Reading Room (202 395–6186).

Frederick L. Montgomery,

Chairman, Trade Policy Staff Committee.

[FR Doc. 97–30954 Filed 11–24–97; 8:45 am]

BILLING CODE 3190–01–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–97–3129; Notice 1]

Ford Motor Company; Receipt of Application for Decision of Inconsequential Noncompliance

Ford Motor Company, Dearborn, Michigan, has estimated that approximately 853,000 of the 1995–1997 Ford Explorer and 1997 Mercury Mountaineer vehicles with console armrests fail to comply with 49 CFR 571.302, Federal Motor Vehicle Safety Standard (FMVSS) No. 302, ''Flammability of Interior Materials,'' and has filed an appropriate report pursuant to 49 CFR Part 573, ''Defects and Noncompliance Reports.'' Ford has also petitioned to be exempted from the notification and remedy requirements of 49 U.S.C. Chapter 301—''Motor Vehicle Safety'' on the basis that the noncompliance is inconsequential as it relates to motor vehicle safety.

This notice of receipt of a petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

FMVSS No. 302, Paragraphs S4.2 and S4.3 specify that any portion of a single or composite material which is within ½ inch of the occupant compartment air space, when tested in accordance with paragraph S5, shall not burn, nor transmit a flame across its surface at a rate of more than 4 inches per minute. Composite is defined as a material that adheres to other material(s) at every point of contact. FMVSS No. 302's burn rate testing requires a 4-inch wide by 14-inch long sample, wherever possible (S5.2).

The Ford armrest has multi-layer cover materials: a 1.5mm thick exterior cover, a 2mm thick second layer Ethylene Vinyl Acetate/Polyethylene (EVA/PE), referred to in the petition as ''plus pad,'' a 13mm thick third layer foam bun pad, and a 3mm polycarbonate substratum. The subject flammable interior material of Ford's petition for determination of inconsequential noncompliance is the 2mm thick ''plus pad'' layer.

Ford acknowledged that the ''plus pad'' material is not adhered to its 1.5mm exterior cover material or the 13mm foam bun under it at every point of contact. Therefore, as specified in FMVSS No. 302, the ''plus pad'' material cannot be tested with other materials as a composite material and has to be tested separately. Ford reported that when the ''plus pad'' material was tested separately, it showed a burn rate range from 8 to 10 inches per minute—a noncompliance to FMVSS No. 302. Ford stated that all other affected materials in the armrest satisfy the 4-inch per minute burn rate, presumably they were tested according to the standard's requirements. Ford explained that the supplier of the ''plus pad'' material only ''certified'' the raw material for FMVSS No. 302 by testing 11mm thick samples, not the designed 2mm thickness.

Ford supports its application for inconsequential noncompliance with the following:

A. Ford stated that the FMVSS No. 302 burn rate testing requirement of cutting a sample from the ''normal configuration and packaging in the vehicle'' is conservative in regard to the actual fire spreading potential of the tested material.

B. The 2mm ''plus pad'' failed the FMVSS No. 302 test requirements when tested as a single material. However, a series of further testing demonstrates that the noncompliance does not adversely affect occupant safety because it does not increase the burn rates of the assembly or the adjacent materials in the assembly to levels higher than specified by FMVSS No. 302.

C. The ''plus pad'' counts less than 10 percent of the armrest material and is an insignificant percentage of the vehicle's remaining materials. All other flammable interior materials of the subject vehicles complied with FMVSS No. 302. Therefore, the noncompliance of the ''plus pad'' offers an insignificant portion of interior materials that could potentially support an interior fire.

Ford attached the following summary results of several alternative tests, including a worse case scenario test:

1. FMVSS No. 302 type tests (cover, plus pad, and foam)—treated the

assembly materials as a composite material.

2. FMVSS No. 302 type tests (cover, plus pad, and foam) simulating cut or torn materials:

a. Cut the cover layer longitudinally,

b. Cut a hole in the cover layer, and

c. Cut through the cover layer and the ''plus pad'' longitudinally.

3. FMVSS No. 302 type tests (plus pad and foam)—with the cover layer completely removed to simulate a worst case scenario.

4. Cut a complete armrest assembly in half along the lateral-vertical plane:

a. Exposed the opposite of the cut end to the flame, and

b. Exposed the cut cross-section to the flame.

All tested results satisfied the FMVSS No. 302 burn rate requirements.

In conclusion, Ford requested NHTSA to grant the inconsequentiality petition since the ''plus pad'' complied with FMVSS No. 302's requirements in every other test except that when tested by itself. Ford's request was based on the facts that the ''plus pad'' represents an insignificant adverse effect on interior material burn rate and the potential for occupant injury due to interior fire and that the noncompliance presents no reasonably anticipated risk to motor vehicle safety.

Interested persons are invited to submit written data, views, and arguments on the application of Ford described above. Comments should refer to the docket number and be submitted to: U.S. Department of Transportation Docket Management, Room PL–401, 400 Seventh Street, SW, Washington, DC 20590. It is requested, but not required, that two copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date, will also be filed and will be considered to the extent possible. When the application is granted or denied, the notice will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: December 26, 1997.

For further information contact the following persons at the National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington, DC, 20590. For non-legal issues: Dr. William J.J. Liu, Office of Crashworthiness Standards (Telephone: 202–366–4923). For legal issues: Mr. Z. Taylor Vinson, Office of the Chief Counsel (Telephone: 202–366–5263).

(49 U.S.C. 30118 and 30120; delegations of authority at 49 CFR 1.50 and 501.8)

Issued on: November 19, 1997.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 97–30904 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–97–3052; Notice 1]

Kolcraft Enterprises, Inc.; Receipt of Application for Decision of Inconsequential Noncompliance

Kolcraft Enterprises of Chicago, Illinois, has determined that approximately 107,000 child restraint systems fail to comply with 49 CFR 571.213, Federal Motor Vehicle Safety Standard (FMVSS) No. 213, ''Child Restraint Systems,'' and has filed an appropriate report pursuant to 49 CFR Part 573, ''Defects and Noncompliance Reports.'' Kolcraft has also petitioned to be exempted from the notification and remedy requirements of 49 U.S.C. Chapter 301—''Motor Vehicle Safety'' on the basis that the noncompliance is inconsequential as it relates to motor vehicle safety.

This notice of receipt of a petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgement concerning the merits of the petition.

FMVSS No. 213, Paragraph S5.7 requires that each material used in a child restraint system shall conform to the requirements of S4 of FMVSS No. 302, ''Flammability of Interior Materials.'' This requires that any material that does not adhere to other material(s) at every point of contact shall meet the burn rate requirements of S4.3 when tested separately. Materials are to be tested as a composite only if the material adheres to other material(s) at every point of contact.

At issue in this petition are seat covers on certain models of Kolcraft child restraints that do not meet the flammability requirements of FMVSS Nos. 213 and 302. The Kolcraft child restraints affected and the dates of production are as follows: Plus 4, Infant Rider (Models 36822–HY and 13x22–HY; 1/96 to 4/97); Plus 4, Infant Rider (Models 36820–LM and 13822–LM; 2/96 to 4/97); Plus 4, Travel-About, Infant Rider (Models 36820–RF and 138x2–RF; 3/96 to 4/97); Plus 4, Plus 5, Infant Rider, Travel-About (Models 368xx-SE and 13xx2–SE; 2/96 to 12/96); Rock n' Ride (Model 13100–PJ; 1/96 to 5/97; no longer in production); and Performa (Model 23305–TU; 3/96 to 10/96). The seat covers are constructed either of fabric, fiberfill and backing (scrim) or of vinyl, foam, and vinyl backing. In each of the affected models, one or more of the filling, face, or backing materials exceeded the 4 inches per minute burn rate when tested in accordance with S5 of FMVSS No. 302. Kolcraft estimates that about 107,000 child restraints potentially contain the non-compliant materials.

Kolcraft supports its application for inconsequential noncompliance with the following:

Kolcraft tested all potentially affected child restraint seat covers in the composite state and disaggregated state, and confirmed that all seat covers comply with the flammability standards of FMVSS No. 302 when tested in the composite state (as incorporated into FMVSS No. 213). Kolcraft also found that all potentially affected child restraint seat covers passed the cigarette burn test contained in California Technical Bulletin 116 when tested in the composite state.

Kolcraft maintains that the construction of the potentially affected seat covers makes it very unlikely that the various layers of its child restraint seat covers would ever be exposed to fire separately. The layers of fabric are securely bonded or sewn together around the entire perimeter of the seat cover and other areas. Kolcraft contends that it is unlikely that a large section of the fabric would be torn away, and extremely remote that that particular portion would be exposed to a potential ignition source. The most common source of ignition, and the source that FMVSS No. 302 is primarily designed to protect against, is a lighted cigarette. As stated above, all of Kolcraft's child restraints passed the cigarette burn test contained in California Technical Bulletin 116.

Kolcraft also contends that the frequency of incidents involving nonconforming materials or equipment should be a factor in determining whether noncompliance has an impact on safety. Kolcraft notes that, to their knowledge, there has not been one incident of a child injured by a fire that originated in a child restraint in the last 19 years.

Based on the above factors, Kolcraft contends that their child restraint seat pads—by virtue of complying with the flammability requirements of FMVSS No. 302 when tested in the composite state and by passing the cigarette burn test contained in California Technical Bulletin 116—comply with the purpose and intent of FMVSS Nos. 213 and 302, and therefore, their noncompliance is inconsequential as it relates to motor vehicle safety.

Interested persons are invited to submit written data, views, and arguments on the application of Kolcraft described above. Comments should refer to the docket number and be submitted to: U.S. Department of Transportation Docket Management, Room PL–401, 400 Seventh Street, SW, Washington, DC

20590. It is requested, but not required, that two copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date, will also be filed and will be considered to the extent possible. When the application is granted or denied, the notice will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: December 26, 1997.

(49 U.S.C. 30118 and 30120; delegations of authority at 49 CFR 1.50 and 501.8)

Issued on: November 20, 1997.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 97–30905 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition for Exemption From the Vehicle Theft Prevention Standard; BMW

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition for exemption.

SUMMARY: This notice grants in full the petition of BMW of North America, Inc., (BMW) for an exemption of a high-theft line, the Carline 3, from the parts-marking requirements of the vehicle theft prevention standard. This petition is granted because the agency has determined that the antitheft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements.

DATES: The exemption granted by this notice is effective beginning with the 1999 model year (MY).

FOR FURTHER INFORMATION CONTACT: Mr. Sanjay Patel, Office of Planning and Consumer Programs, NHTSA, 400 Seventh Street, S.W., Washington, D.C. 20590. Mr. Patel's telephone number is (202) 366–0846. His fax number is (202) 493–2739.

SUPPLEMENTARY INFORMATION: In a petition dated August 28, 1997, BMW of North America, Inc. (BMW), requested exemption from the parts-marking requirements of the theft prevention standard (49 CFR Part 541) for the Carline 3, beginning with MY 1999. The petition has been filed pursuant to 49 CFR Part 543, Exemption from Vehicle Theft Prevention Standard, based on the installation of an antitheft device as standard equipment for an entire vehicle line.

BMW's submittal is considered a complete petition, as required by 49 CFR Part 543.7, in that it meets the general requirements contained in § 543.5 and the specific content requirements of § 543.6. In its petition, BMW provided a detailed description and diagram of the identity, design, and location of the components of the antitheft device for the new line. This antitheft device includes an electronic immobilizer system, consisting of a key with a transponder (a transmitter/receiver) that is a microchip that is integrated into the key. This transponder will allow the ignition to operate and fuel supply to be released when a correct signal has been received. BMW states that its electronically-coded vehicle immobilizer (EWS) will prevent the vehicle from being driven away under the power of its own engine by manipulations on the ignition lock and on the doors. The immobilizer device is automatically activated when the engine is shut off and the vehicle key is removed from the ignition lock cylinder. In addition to the key, the antitheft device can be activated by use of its radio frequency remote control. The frequency codes of the remote control are ever-changing which prevents an unauthorized person from opening the vehicle by intercepting the signals.

The vehicle is also equipped with a central-locking system which locks all doors, the hood, the trunk and fuel filler lid. To prevent locking the keys in the car upon exiting, the driver door can only be locked with a key or by the radio frequency remote control after it is closed. This also locks the other doors, and if they are open at the time of locking, the doors are locked when they are closed.

BMW mentioned the uniqueness of its locks and its ignition key. BMW stated that its vehicle's locks are almost impossible to pick, and its ignition key cannot be duplicated on the open market. BMW also stated that a special key blank, key-cutting machine and owner's individual code are needed to cut a new key and that its key blanks, machines and codes will be closely controlled and new keys will only be issued to authorized persons. Additionally, spare keys can only be obtained through the BMW dealer because they are not a copy of lost originals, but new keys with their original electronic identification. Every key request is also documented so that any inquiries by insurance companies and investigative authorities can be followed up on.

The battery for BMW's Carline 3 will be inaccessibly located and covered as an additional security measure. Therefore, even if a thief does manage to penetrate and disconnect the battery, it will not unlock the doors. However, in the event of a crash, an inertia switch will automatically unlock all the doors.

BMW also stated that its antitheft device does not incorporate any audible or visual alarms. However, based on the declining theft rate experience of other vehicles equipped with devices that do not have an audio or visual alarm for which NHTSA has already exempted from the parts-marking requirements, the agency has concluded that the data indicate that lack of a visual or audio alarm has not prevented these antitheft devices from being effective protection against theft.

BMW compared the device proposed for its new line with devices which NHTSA has previously determined to be as effective in reducing and deterring motor vehicle theft as would compliance with the parts-marking requirements of Part 541, and has concluded that the antitheft device proposed for this new line is no less effective than those devices in the lines for which NHTSA has already granted exemptions from the parts-marking requirements. The antitheft system that BMW intends to install on its Carline 3 for the MY 1999 is exactly the same system that BMW installed on its Carline 5 for MY 1997. The agency granted BMW's petition for exemption of its Carline 5 in full beginning with the 1997 model year (See 61 FR 6292, February 16, 1996).

In order to ensure reliability and durability of the device, BMW stated that it conducted performance tests under BMW Standard 600 13.0, Parts 1 and 2, e.g., climatic tests, high temperature endurance run, thermoshock test in water, chemical resistance, vibrational load, electrical ranges, mechanical shock tests, and electromagnetic field compatibility.

Additionally, BMW stated that its immobilizer system fulfills the requirements of the European vehicle insurance companies which became standard as of January 1995. The requirements prescribe that the vehicle must be equipped with an electronic vehicle immobilizing device which works independently from the mechanical locking system and prevents the operation of the vehicle through the use of coded intervention in the engine management system. In addition, the device must be self-arming (passive),

and must become effective upon leaving the vehicle, or not later than the point at which the vehicle is locked, and must deactivate the vehicle only by electronic means and not with the mechanical key. BMW also stated that the doors and ignition locks for the Carline 3 conform to Swedish Regulation F42–1975, which requires a minimum of five minutes resistance to the application of commonly available tools.

Based on evidence submitted by BMW, the agency believes that the antitheft device for the Carline 3 is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the theft prevention standard (49 CFR Part 541).

The agency concludes that the device will provide the types of performance listed in § 543.6(a)(3): Promoting activation; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device. The device lacks the ability to attract attention to the efforts of unauthorized persons to enter or operate a vehicle by a means other than a key (§ 543.6(a)(3)(ii)).

As required by 49 U.S.C. § 33106 and 49 CFR Part 543.6(a) (4) and (5), the agency finds that BMW has provided adequate reasons for its belief that the antitheft device will reduce and deter theft. This conclusion is based on the information BMW provided about its device.

For the foregoing reasons, the agency hereby grants in full BMW's petition for exemption for Carline 3 from the parts-marking requirements of 49 CFR Part 541.

If BMW decides not to use the exemption for this line, it should formally notify the agency. If such a decision is made, the line must be fully marked according to the requirements under 49 CFR Parts 541.5 and 542.6 (marking of major component parts and replacement parts).

NHTSA notes that if BMW wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Part 543.7(d) states that a Part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the antitheft device on which the line's exemption is based. Further, Part 543.9(c)(2) provides for the submission of petitions ''to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in that exemption.'' The agency wishes to minimize the administrative burden that Part 543.9(c)(2) could place on exempted vehicle manufacturers and itself.

The agency did not intend in drafting Part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be *de minimis.* Therefore, NHTSA suggests that if the manufacturer contemplates making any changes the effects of which might be characterized as *de minimis,* it should consult the agency before preparing and submitting a petition to modify.

Authority: 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued: November 18, 1997.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 97–30903 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Notice No. 97–14]

Notice of Information Collection Approval

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of Information Collection Approval.

SUMMARY: This notice announces OMB approval of information collection request for OMB No. 2137–0595, entitled Cargo Tank Motor Vehicles in Liquefied Compressed Gas Service. This information collection has been extended until March 31, 1999.

DATES: The expiration date of this information collection is March 31, 1999.

ADDRESSES: Requests for a copy of an information collection should be directed to Deborah Boothe, Office of Hazardous Materials Standards (DHM–10), Research and Special Programs Administration, Room 8102, 400 Seventh Street, SW, Washington, DC 20590–0001.

FOR FURTHER INFORMATION CONTACT: Deborah Boothe, Office of Hazardous Materials Standards (DHM–10), Research and Special Programs Administration, Room 8102, 400 Seventh Street, SW, Washington, DC 20590–0001, Telephone (202) 366–8553.

SUPPLEMENTARY INFORMATION: Office of Management and Budget (OMB) regulations (5 CFR 1320) implementing provisions of the Paperwork Reduction Act of 1995 (P.L. 104–13) require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(s)) and specify that no person is required to respond to an information collection unless it displays a valid OMB control number. RSPA published a final rule in the **Federal Register** (62 FR 44038) on August 18, 1997, entitled ''Hazardous Materials: Cargo Tank Motor Vehicles in Liquefied Compressed Gas Service''. RSPA received approval from OMB for the information collection in that final rule under OMB No. 2137–0595. The approval expires on February 28, 1998.

RSPA published Notice No. 97–4 (62 FR 44169) on August 19, 1997, requesting comments on this information collection. The comment period on Notice No. 97–4 closed on September 18, 1997. Based on comments received on Notice 97–4, RSPA submitted a request to OMB for extension of the information collection approval until March 31, 1999, which is the expiration date for requirements in the final rule. RSPA received no comments to Notice No. 97–4. RSPA has received approval from OMB for information collection OMB No. 2137–0595, entitled ''Hazardous Materials: Cargo Tank Motor Vehicles in Liquefied Compressed Gas Service.''

This information collection approval expires on March 31, 1999.

Issued in Washington, DC on November 20, 1997.

Edward T. Mazzullo,

Director, Office of Hazardous Materials Standards.

[FR Doc. 97–30963 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Treasury Advisory Committee on Commercial Operations of the U.S. Customs Service; Notice of Meeting

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of meeting.

SUMMARY: This notice announces the date and location of the next meeting and the agenda for consideration by the Treasury Advisory Committee on Commercial Operations of the U.S. Customs Service.

DATE: The next meeting of the Treasury Advisory Committee on Commercial Operations of the U.S. Customs Service will be held on December 11, 1997. The

session will be held from approximately 9:00 a.m. to 12:30 p.m. at a meeting room in or near the main Treasury Building at 1500 Pennsylvania Avenue, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Dennis M. O'Connell, Director, Office of Tariff and Trade Affairs, Office of the Under Secretary for Enforcement, Room 4004, 1500 Pennsylvania Avenue, N.W., Washington, D.C. 20220. Tel.: (202) 622–0220.

SUPPLEMENTARY INFORMATION: This is the fifth meeting of the current two-year term of the Committee. The provisional agenda to be considered at the meeting is as follows:

1. Automated Export System: Establishment and operation of the subcommittee to develop industry recommendations.

2. The Treasury Investment Review Board role in the future of Customs automation.

It is expected that several additional items will be added to the provisional agenda prior to the meeting. Members of the public may obtain the final content of the agenda and the precise location of the meeting by calling the information number one week prior to the meeting. The Committee, in its discretion, may take up other matters, time permitting.

The meeting is open to the public. However, participation in the discussion is limited to Committee members and Treasury and Customs staff. It is necessary for any person other than an Advisory Committee member who wishes to attend the meeting to give notice by contacting Ms. Theresa Manning no later than December 4, 1997 at 202–622–0220.

Dated: November 19, 1997.

John P. Simpson,

Deputy Assistant Secretary (Regulatory, Tariff and Trade Enforcement).

[FR Doc. 97–30956 Filed 11–24–97; 8:45 am]

BILLING CODE 4810–25–M

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

RIN 1505–AA71

Bank Enterprise Award Program; Amended Notice of Funds Availability (NOFA) for the Bank Enterprise Award (BEA) Program

AGENCY: Community Development Financial Institutions Fund, Department.

ACTION: Amended Notice of Funds Availability (NOFA).

SUMMARY: The Community Development Financial Institutions Fund (the Fund) issues this amendment to the Notice of Funds Availability (NOFA) published in the **Federal Register** on March 7, 1997, which invited applications for the Bank Enterprise Award (BEA) Program. That NOFA identified the applicable Assessment Period as March 1, 1997 through August 31, 1997. Since publication, the Fund has learned that technical advice that the Fund provided to an entity in connection with the entity's certification as a Community Development Financial Institution (CDFI) under 12 CFR part 1805 may have led the entity to obtain investment capital from insured depository institutions prior to the commencement of the Assessment Period. Currently, pursuant to the BEA Program as set forth in the March 7, 1997 NOFA and the BEA Program regulations at 12 CFR part 1806, CDFI Related Activities carried out by insured depository institutions before March 1, 1997 are not eligible for an award. To fulfill the purpose of the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4701 *et seq.*), the Fund will allow insured depository institution applicants the option of electing an Assessment Period from February 1, 1997 through July 31, 1997, provided that they meet certain conditions. The Fund is confident that there are sufficient funds available to make full cash awards to all insured depository institution applicants in the second round of the BEA Program that qualified to receive awards, and assures all such applicants that no awards will be reduced as a result of this amendment.

DATES: Elections must be received in the offices of the Fund on or before December 12, 1997.

ADDRESSES: Elections shall be mailed or faxed to: The Community Development Financial Institutions Fund, U.S. Department of the Treasury, 601 13th Street, NW, Suite 200 South, Washington, D.C. 20005, Fax Number (202) 622–7754.

FOR FURTHER INFORMATION CONTACT: The Community Development Financial Institutions Fund, U.S. Department of the Treasury, 601 13th Street, NW, Suite 200 South, Washington, D.C. 20005, or call (202) 622–8662.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of the Community Development Banking and Financial Institutions Act of 1994 (Act) was to create the Fund to promote economic revitalization and community development through investment in and assistance to Community Development Financial Institutions (CDFIs). The Fund's BEA Program helps achieve this purpose through an incentive system for insured depository institutions to increase their lending to and investment in CDFIs by rewarding participating institutions with awards.

II. Reasons for Amending the March 7, 1997 Notice of Funds Availability

In early 1997, the Fund provided technical advice to an entity regarding the Fund's requirements for certification as a CDFI under 12 CFR part 1805. The Fund understands that its technical advice led the entity to obtain investment capital from insured depository institutions in February 1997, and that the Fund also certified it as a CDFI in February 1997.

Under the BEA Program, insured depository institutions which engage in CDFI Related Activities, including equity investments in CDFIs, during an Assessment Period will be eligible for an award (see 12 CFR part 1806). The Fund sets forth the applicable Assessment Period in a Notice of Funds Availability (NOFA). On March 7, 1997 (62 FR 10679), the Fund published a NOFA in the **Federal Register** setting the applicable Assessment Period as March 1, 1997 through August 31, 1997. As a result, CDFI Related Activities conducted by insured depository institutions in February 1997 are not eligible for a Bank Enterprise Award.

The Fund believes that such a result would be inconsistent with the purpose of the Act under circumstances where insured depository institutions carried out CDFI Related Activities prior to the Assessment Period as a direct or indirect result of the Fund's technical advice, and would have carried out such activities during the Assessment Period but for such advice. Specifically, the Act is intended to reward insured depository institutions for increased investments in CDFIs. If the Fund does not amend the NOFA, at least two insured depository institutions would not be eligible to receive a Bank Enterprise Award for CDFI Related Activities carried out in February 1997.

III. Amended Optional Assessment Period

The amended optional Assessment Period is February 1, 1997 through July 31, 1997.

IV. Eligibility

Any insured depository institution that timely submitted to the Fund an application in response to the March 7, 1997 NOFA may elect the amended

optional Assessment Period, provided that the Fund receives the following by the date set forth above:

(a) A detailed written explanation, with any and all supporting documentation, describing the Fund's technical advice, the impact of such advice on the insured depository institution's carrying out of CDFI Related Activities in February 1997; and

(b) A revised ''Worksheet,'' ''Certification,'' and ''Documentation'' to reflect the Qualified Activities carried out during the February 1, 1997 through July 31, 1997 Assessment Period (see 12 CFR 1806.301 and 1806.202(d)).

V. Acceptance

Elections received in the offices of the Fund after the date set forth above will be rejected. The Fund will accept a timely election from an eligible insured depository institution which meets its burden of establishing to the Fund that: (1) it carried out CDFI Related Activities in February 1997 as a direct or indirect result of the Fund's technical advice; and (2) it would have carried out those Activities during the March 1, 1997 through August 31, 1997 Assessment Period but for the Fund's technical advice. The Fund reserves the right to make follow-up inquiries.

Authority: 12 U.S.C. 1834a, 4701, 4704, 4713; 12 CFR part 1806.

Maurice A. Jones,

Acting Deputy Director.

[FR Doc. 97–30895 Filed 11–24–97; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Financial Management Service; Proposed Collection of Information: Annual Financial Statement of Surety Companies—Schedule F

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Financial Management Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection. By this notice, the Financial Management Service solicits comments concerning the form ''Annual Financial Statement of Surety Companies—Schedule F.''

DATES: Written comments should be received on or before January 26, 1997.

ADDRESSES: Direct all written comments to Financial Management Service, 3361–L 75th Avenue, Landover, Maryland 20785.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to the Surety Bond Branch, 3700 East-West Highway, Hyattsville, Maryland 20782, (202) 874–6850.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995, (44 U.S.C. 3506(c)(2)(A)), the Financial Management Service solicits comments on the collection of information described below.

Title: Annual Financial Statement of Surety Companies—Schedule F.

OMB Number: 1510–0012.

Form Number: FMS 6314.

Abstract: This form provides information that is used to determine the amount of unauthorized reinsurance of a Treasury Certified Company, and to compute its underwriting limitations. This computation is necessary to ensure the solvency of companies certified by Treasury, and their ability to carry out contractual surety requirements.

Current Actions: Extension of currently approved collection.

Type of Review: Regular.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 385.

Estimated Time Per Respondent: varies from 8 hrs–80 hrs.

Estimated Total Annual Burden Hours: 16,324.

Comments: Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance and purchase of services to provide information.

Dated: November 19, 1997.

Mitchell A. Levine,

Assistant Commissioner.

[FR Doc. 97–30845 Filed 11–24–97; 8:45 am]

BILLING CODE 4810–35–M

UNITED STATES INFORMATION AGENCY

Proposed Collection; Comment Request

AGENCY: United States Information Agency.

ACTION: Proposed Collection; Comment Request.

SUMMARY: The United States Information Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on an information collection requirement concerning the public use form entitled ''Application for Administrative and Teaching Exchanges/Seminars Abroad''. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 [Pub. L. 104–13; 44 U.S.C. 3506(c)(2)(A)].

USIA is requesting OMB approval for a three-year reinstatement to the Fulbright Teacher Exchange Program, Application for Teaching Positions/ Seminars Abroad, IAP–92 under OMB control number 3116–0181 which is scheduled to expire on February 28, 1998. The information collection activity involved with this program is conducted pursuant to the mandate given to the United States Information Agency under the terms and conditions of the Mutual Education and Cultural Exchange Act of 1961, Pub. L. 87–256.

DATES: Comments are due on or before January 26, 1998.

COPIES: Copies of the Request for Clearance (OMB 83–I), supporting statement, and other documents that will be submitted to OMB for approval may obtained from the USIA Clearance Officer. Comments should be submitted to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for USIA, and also to the USIA Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Agency Clearance Officer, Mrs. Jeannette Giovetti, United States Information Agency, M/ADD, 301 Fourth Street, S.W., Washington, D.C. 20547, telephone (202) 619–4408, internet address: JGiovett@USIA.GOV; and OMB review: Mr. Victoria Wassmer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building,

Docket Library, Room 10202, NEOB, Washington, D.C. 20503, Telephone (202) 395–3176.

SUPPLEMENTARY INFORMATION: Public reporting burden for this collection of information (Paper Work Reduction Project: OMB No. 3116–0181) is estimated to average two (2) hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Responses are voluntary and respondents will be required to respond only one time.

Comments are requested on the proposed information collection concerning (a) whether the proposed collection of information is necessary for the proper performance of the agency, including whether the information has practical utility; (b) the accuracy of the Agency's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Send comments regarding this burden estimate or any other aspect of this collection of information to the United States Information Agency, M/ADD, 301 Fourth Street, S.W., Washington, D.C. 20547; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Docket Library, Room 10202, NEOB, Washington, D.C. 20503.

Current Actions: USIA is requesting OMB approval for the reinstatement of this collection for a three-year period.

Title: Application for Teaching Positions/Seminars Abroad.

Form Number: IAP–92.

Abstract: To be used by applicants under the Fulbright Teacher Exchange Program which provide opportunities for U.S. teachers to exchange positions for designated periods with foreign counterparts, or to attend one of a number of short-term seminars abroad on a variety of topics.

Proposed Frequency of Responses: No. of Respondents—940, Recordkeeping Hours—2.0, Total Annual Burden—1880.

Dated: November 19, 1997.

Rose Royal,

Federal Register Liaison.

[FR Doc. 97–30880 Filed 11–24–97; 8:45 am]

BILLING CODE 8230–01–M

DEPARTMENT OF VETERANS AFFAIRS

Special Medical Advisory Group, 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' Special Medical Advisory Group has been renewed for a 2-year period beginning November 13, 1997, through November 13, 1999.

Dated: November 17, 1997.

By Direction of the Acting Secretary.

Heyward Bannister,

Committee Management Officer.

[FR Doc. 97–30875 Filed 11–24–97; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Structural Safety of Department of Veterans Affairs Facilities, Notice of Meeting

The Department of Veterans Affairs (VA), in accordance with Public Law 92–463, gives notice that two meetings of the Advisory Committee on Structural Safety of Department of Veterans Affairs Facilities will be held on:

Monday, December 8, 1997: 8:30 a.m. to 4:30 p.m.

Tuesday, December 9, 1997: 10:00 a.m. to 12:30 p.m.

The location of the meetings will be 811 Vermont Avenue, NW; Washington, DC; in Room 438 on December 8, 1997, and Room 442 on December 9, 1997.

The all day meeting of Monday, December 9, 1997, is a work session to review the developments in the field of structural design, as they relate to seismic safety of buildings, and fire safety issues. The Tuesday, December 9, 1997, meeting is a formal session to vote on structural and fire safety issues for inclusion in VA's standards.

Both meetings will be open to the public up to the seating capacity of the room. Because of the limited seating capacity, it will be necessary for those wishing to attend to contact Krishna K. Banga, Senior Structural Engineer, Standards Service, Facilities Quality Office, Office of Facilities Management, Department of Veterans Affairs Central Office (phone 202–565–9370) by December 1, 1997.

Dated: November 17, 1997.

By Direction of the Acting Secretary.

Heyward Bannister,

Committee Management Officer.

[FR Doc. 97–30876 Filed 11–24–97; 8:45 am]

BILLING CODE 8320–01–M

Federal Register

Tuesday
November 25, 1997

Part II

Department of Transportation

Federal Aviation Administration

14 CFR Part 21

Primary Category Seaplanes; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 21

[Docket No. 27641; Amendment No. 21–75]

RIN 2120–AG39

Primary Category Seaplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This direct final rule increases the maximum weight limit for seaplanes that are proposed for type certification in the primary category. When the Federal Aviation Administration (FAA) established the 2,700-pound maximum weight limit for primary category aircraft, it did not consider seaplanes. Seaplanes generally weigh more than comparable landplanes because of the increased airframe weight and drag associated with their designs. Therefore, the 2,700-pound maximum weight limit for primary category aircraft results in a significantly inferior performance, range, and payload when applied to seaplanes than was originally intended for primary category aircraft. The FAA has determined that a 3,375-pound maximum weight limit would provide seaplanes with a level of utility comparable to primary category landplanes.

DATES: Effective February 23, 1998.

Comments for inclusion in the Rules Docket must be received on or before December 26, 1997.

ADDRESSES: Comments on this direct final rule should be delivered, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel (AGC–200), *Attention:* Rules Docket, Docket No. 27641, 800 Independence Avenue, SW., Washington, DC 20591. Comments also may be submitted electronically to the following Internet address: 9–NPRM–CMTS@faa.dot.gov. Comments submitted must be marked: Docket No. 27641. Comments may be examined in Room 915G on weekdays between 8:30 a.m. and 5:00 p.m., except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Brian A. Yanez, Certification Procedures Branch (AIR–110), Aircraft Certification Service, Federal Aviation Administration, 800 Independence Avenue, SE., Washington, DC 20591, telephone (202) 267–9588.

SUPPLEMENTARY INFORMATION:

Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comments, and, therefore, is issuing it as a direct final rule. The subject of this rulemaking was raised previously in the **Federal Register** through the publication of a notice of a petition for exemption to permit an amphibious airplane to be type certificated in the primary category with a maximum weight of 3,300 pounds. The FAA received 115 favorable comments and no negative comments on the proposed increased weight limit.

Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment, is received on this direct final rule within the comment period, the regulation will become effective on the date specified. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective.

If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking (NPRM) may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by an NPRM, 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. Comments should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES.** All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. Factual information that supports a commenter's ideas and suggestions is helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. Substantive comments should be accompanied by cost estimates. All comments submitted will be available, before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with FAA personnel concerning this action will be filed in the docket.

Commenters wishing the FAA to acknowledge receipt of their comments must submit with those comments a pre-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 27641.'' The postcard will be date stamped and returned to the commenter.

Availability of Final Rule

Using a modem and suitable communications software, an electronic copy of this document may be downloaded from the FAA regulations section of the FedWorld electronic bulletin board service (*telephone:* 703–321–3339).

Internet users may reach the FAA's web page at http://www.faa.gov or the Office of the Federal Register's web page on GPO Access at http://www.access.gpo.gov/nara/index.html for access to recently published rulemaking documents.

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Communications must identify the amendment number or docket number of this direct final rule.

Background

Statement of the Problem

On December 22, 1993, a manufacturer of amphibious kit planes petitioned the FAA for exemption from the maximum weight limit for type certification of primary category aircraft in § 21.24(a)(1)(ii) of Title 14, Code of Federal Regulations (14 CFR). The manufacturer listed the individual components that cause amphibious airplanes to weigh more than landplanes with a comparable utility. On May 10, 1994, a summary of the petition was published in the **Federal Register** (59 FR 24209) for public comment. The FAA subsequently determined that the manufacturer's request should be addressed in a rulemaking action rather than through the exemption process, because the relief sought addressed the general applicability of the type certification requirements for primary category aircraft.

History

On September 9, 1992, the FAA published in the **Federal Register** (57

FR 41360) a final rule establishing a new certification category for personal- and recreational-use aircraft, known as primary category aircraft. The final rule established simplified procedures for type, production, and airworthiness certification, and associated maintenance procedures for these aircraft. The intent of the rule was to: (1) provide a category for aircraft that are less costly to certificate, produce, purchase, and maintain than current normal category aircraft; (2) stimulate the introduction of new, less costly aircraft designs; (3) enable kit manufacturers to fill the demand for low-cost aircraft; and (4) improve the safety of kit-built aircraft presently being certificated as experimental, amateur-built aircraft.

Primary category airplanes may be unpowered or powered by a single, naturally aspirated engine, with a stall speed of 61 knots or less. These airplanes are limited to a maximum weight of 2,700 pounds, a maximum seating capacity of four persons, and an unpressurized cabin. Seaplanes were not considered when the primary category weight limit was established.

Discussion

A seaplane is an airplane designed to take off from and land on water. A seaplane can be classified as a flying boat, whose hull is the means of support on the water, or a floatplane, which is supported on the water by one or more floats. Amphibious airplanes are seaplanes designed to take off from and land on either water or land.

Seaplanes generally weigh more than comparable landplanes due to the increased airframe weight and drag associated with their designs. Therefore, the 2,700-pound maximum weight limit for primary category aircraft results in a significantly inferior performance, range, and payload when applied to seaplanes than was originally intended for primary category aircraft. The following features may contribute to a seaplane's increased weight:

(1) A requirement for more horsepower to counteract the increased drag of the hull/step configuration and sponsons. Seaplanes typically require a six-cylinder engine rather than the lighter four-cylinder engine used on landplanes weighing less than 2,700 pounds;

(2) Increased structural strength of the airplane's pylon or tail structure to support the engine and propeller, which are usually mounted above the hull;

(3) Larger elevators and stabilizers to overcome the vertical pitching forces and a larger rudder for yaw stability due to the high thrust line;

(4) A water rudder mechanism for taxiing in the water;

(5) Structural strengthening of the hull (including skin strength, bulkheads, and longerons) to withstand water takeoff and landing loads;

(6) Wing sponsons and necessary reinforcement of the wing structure to carry additional loading; and

(7) Retractable landing gear to permit operations from water or land.

Because seaplanes weigh an average of 25 percent more than comparable landplanes, this rule increases the maximum weight limit by 25 percent, to 3,375 pounds, for seaplanes certificated in the primary category. This increase should offer primary category seaplanes a level of utility comparable to primary category landplanes.

Currently, many seaplanes are certificated as experimental airplanes. The inclusion of seaplanes in the primary category will result in safety benefits by standardizing the design and construction processes of these airplanes through the type certification process. The FAA notes that kit-built seaplanes are eligible for certification in the primary category if the kit is supplied by an FAA-approved manufacturer and is assembled under the supervision and quality control of the production approval holder.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), there are no reporting or recordkeeping requirements associated with this direct final rule.

International Compatibility

The FAA has reviewed corresponding International Civil Aviation Organization (ICAO) standards and Joint Aviation Authorities (JAA) regulations and found no comparable primary category certification standards. The FAA notes that because primary category aircraft have a special airworthiness certificate rather than an airworthiness certificate based on ICAO Annex 8 standards, owners of U.S.-registered primary category aircraft would require prior permission of the appropriate airworthiness authority to operate outside the United States.

Regulatory Evaluation Summary

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs Federal agencies to consider, for new regulations or modifications to existing regulations, if the potential benefits to society outweigh the potential costs. Second, the Regulatory Flexibility Act (RFA) of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effects of regulatory changes on international trade. In conducting these assessments, the FAA has determined that the proposed rule: (1) would generate benefits exceeding its costs and is not ''significant'' as defined in Executive Order 12866; (2) would not be ''significant'' as defined in the Department of Transportation's (DOT) Policies and Procedures; (3) would not have a significant impact on a substantial number of small entities; and (4) would not restrain international trade. These analyses, available in the docket, are summarized below.

The rule will provide the opportunity to reduce certification and manufacturing costs for seaplanes weighing between 2,700 and 3,375 pounds that otherwise would be certificated under § 21.21. The rule makes available simplified procedures for type, production, and airworthiness certification, and associated maintenance procedures for these aircraft. The certification basis and standards afforded by this amendment will be an option for the affected parties. Manufacturers and owners/operators will only select the new alternative if it is in their own best economic interests to do so. Therefore, the FAA concludes that the rule will be cost beneficial.

Regulatory Flexibility Determination

The RFA of 1980 was enacted by Congress to ensure that small entities are not unnecessarily or disproportionately burdened by Government regulations. The RFA requires a Regulatory Flexibility Analysis if a rule will have a significant economic impact, detrimental or beneficial, on a substantial number of small entities. FAA Order 2100.14A, Regulatory Flexibility Criteria and Guidance, establishes threshold cost values and small entity size standards for complying with RFA review requirements in FAA rulemaking actions. Since the alternatives afforded will be optional, the rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Statement

The rule will not constitute a barrier to international trade, including the export of U.S. goods and services to foreign countries and the import of foreign goods and services into the United States.

Federalism Implications

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.

Unfunded Mandates Reform Act Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), codified as 2 U.S.C. 1501–1571, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any one year.

This rule does not meet the thresholds of the Act. Therefore, the requirements of Title II of the Act do not apply.

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and International Trade Impact Analysis, the FAA has determined that this regulation is not significant under Executive Order 12866. In addition, the FAA certifies that this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This regulation is not considered significant under DOT Order 2100.5, Policies and Procedures for Simplification, Analysis, and Review of Regulations. A final regulatory evaluation of the regulation, including a final Regulatory Flexibility Determination and International Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects in 14 CFR Part 21

Aircraft, Aviation safety, Exports, Imports, Primary category, Reporting and recordkeeping requirements.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 21 of the Federal Aviation Regulations as follows:

PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND PARTS

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

Authority: 42 U.S.C. 7572; 49 U.S.C. 106(g), 40105, 40113, 44701–44702, 44707, 44709, 44711, 44713, 44715, 45303.

2. Section 21.24 is amended by revising paragraph (a)(1)(ii) to read as follows:

§ 21.24 Issuance of type certificate: primary category aircraft.

(a) * * *

(1) * * *

(ii) Weighs not more than 2,700 pounds; or, for seaplanes, not more than 3,375 pounds;

* * * * *

Issued in Washington, DC, on November 19, 1997.

Jane F. Garvey,

Administrator.

[FR Doc. 97–30833 Filed 11–24–97; 8:45 am]

BILLING CODE 4910–13–M

Federal Register

Tuesday
November 25, 1997

Part III

Northeast Dairy Compact Commission

7 CFR Ch. XIII

Compact Over-Order Price Regulation and Results of Producer Referendum; Final Rules

NORTHEAST DAIRY COMPACT COMMISSION

7 CFR Parts 1301, 1304, 1305, 1306 and 1307

Compact Over-Order Price Regulation

AGENCY: Northeast Dairy Compact Commission.

ACTION: Final rule.

SUMMARY: This rule extends the present compact over-order price regulation (''price regulation'') for all Class I, fluid milk route distributions in the territorial region of the six New England states beyond its present expiration date of December 31, 1997. The rule extends the price regulation for the period January 1, 1998 through termination of the Compact enabling legislation.[1] The regulation is established in the combined, Federal Milk Market Order #1 and compact over-order, amount of $16.94 (Zone 1).

In so extending the price regulation, the Northeast Dairy Compact Commission (''Compact Commission'') reaffirms and again bases the decision on its findings that such price regulation is necessary to assure the viability of dairy farming in New England, that it is necessary to assure the region's consumers of a continued, adequate, local supply of fresh and wholesome milk, reasonably priced, and that it is otherwise in the public interest. The Compact Commission also establishes the price regulation based on the finding that the regulation has been approved by producer referendum pursuant to Article V, section 13 of the Northeast Interstate Dairy Compact. Notice of approval by referendum is published separately in this **Federal Register**.

This rule also establishes a Task Force under Article VII. D. of the Compact Commission's Bylaws to determine whether it is appropriate to provide similar reimbursement to the region's School Lunch Programs, established under the National School Lunch Act of 1946 and the Child Nutrition Act of 1966 for any adverse financial impact. The Task Force is to report back on its assessment of whether it is appropriate to reimburse the programs and, if so, to recommend a procedure for reimbursement to the Compact Commission at its regularly scheduled meeting for February, 1998.

Finally, the price regulation extends the administrative assessment of 3.2 cents per hundredweight of milk on all route dispositions of Class I, fluid milk in the territorial region of the six New England states. It is noted that the additional, start-up assessment of approximately 1.3 cents per hundredweight presently imposed will expire with final payment in December, 1997.

EFFECTIVE DATE: January 1, 1998.

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SUPPLEMENTARY INFORMATION:

Background

The Compact Commission was established under authority of the Northeast Interstate Dairy Compact (''Compact''). The Compact was enacted into law by each of the six participating New England states as follows: Connecticut—Public Law 93–320; Maine—Public Law 89–437, as amended, Public Law 93–274; Massachusetts—Public Law 93–370; New Hampshire—Public Law 93–336; Rhode Island—Public Law 93–106; Vermont—Public Law 89–95, as amended, 93–57. Consistent with Article I, Section 10 of the United States Constitution, Congress consented to the Compact in Public Law 104–127 (FAIR ACT), Section 147, codified at 7 U.S.C. 7256. Subsequently, the United States Secretary of Agriculture, pursuant to 7 U.S.C. 7256(1), authorized implementation of the Compact.

Section 8 of the Compact empowers the Compact Commission to engage in a broad range of activities designed to ''promote regulatory uniformity, simplicity and interstate cooperation.'' For example, the Compact authorizes the Compact Commission to engage in a range of inquiries into the existing milk programs of both the participating states and the federal milk marketing system, to make recommendations to participating states, and to work to improve industry relations as a whole. See Compact, Art. IV, section 8.

In addition to the powers conferred by Section 8, the Compact also authorizes the Compact Commission to consider adopting a compact over-order price regulation. See Compact, Art. IV, section 9. A ''compact over-order price'' is defined as:

> A minimum price required to be paid to producers for Class I milk established by the Commission in regulations adopted pursuant to sections nine and ten of this compact, which is above the price established in federal marketing orders or by state farm price regulation in the regulated area. Such price may apply throughout the region or in any part or parts thereof as defined in the regulations of the commission.

See Compact, Art. II, section 2(8).

The regulated price authorized by the Compact is actually an incremental amount above, or ''over-order'' the minimum price for the same milk established by Federal Milk Market Order #1. The price regulation establishes the minimum procurement price to be paid by fluid milk processors for milk that is ultimately utilized for fluid milk consumption in the New England region.[2] Price regulation also provides for payment of a uniform ''over-order'' price, out of the proceeds of the price regulation, to all dairy farmers making up the New England milkshed regardless of the utilization of their milk.[3] See Compact, Art. IV, section 9 (''The Commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area.''.)

Section 11 of the Compact delineates the administrative procedure the Compact Commission must follow in deciding whether to adopt a price regulation:

> Before promulgation of any regulations establishing a compact over-order price or commission marketing order, including any provision with respect to milk supply under subsection 9(f), or amendment thereof, as provided in Article IV, the commission shall conduct an informal rulemaking proceeding to provide interested persons with an opportunity to present data and views. Such rulemaking proceeding shall be governed by section four of the Federal Administrative Procedures Act, as amended (5 U.S.C. 553). In addition, the commission shall, to the extent practicable, publish notice of rulemaking proceedings in the official register of each participating state. Before the initial adoption of regulations establishing a compact over-order price or a commission marketing order and thereafter before any amendment with regard to prices or assessments, the commission shall hold a public hearing. The Commission may commence a rulemaking proceeding on its own initiative or may in its sole discretion act upon the petition of any person including individual milk producers, any organization of milk producers or handlers, general farm organizations, consumer or public interest groups, and local, state or federal officials.

Section 12(a) of the Compact directs the Commission to make four findings of fact before an over-order price

[1] 7 U.S.C. 7256(3) ''Consent for the Northeast Interstate Dairy Compact shall terminate concurrent with the Secretary's implementation of the dairy pricing and Federal milk marketing order consolidation and reforms under section 7203 of this title.''

[2] 7 CFR 1305.2.

[3] 7 CFR 1307.4.

regulation can become effective. Specifically, the Commission shall make findings of fact with respect to:

(1) Whether the public interest will be served by the establishment of minimum milk prices to dairy farmers under Article IV.

(2) What level of prices will assure that producers receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.[4]

(3) Whether the major provisions of the order, other than those fixing minimum milk prices, are in the public interest and are reasonably designed to achieve the purposes of the order.

(4) Whether the terms of the proposed regional order or amendment are approved by producers as provided in section thirteen.

Compact, Art. V. Section 12.

Pursuant to Section 11 of the Compact, the Compact Commission initiated a rulemaking procedure in December, 1996.[5] The rulemaking culminated on May 30, 1997 with the issuance of a final rule establishing a compact over-order price regulation for the period July 1–December 31, 1997.[6]

On September 8, 1997, the Compact Commission issued notice of proposed rulemaking to consider whether to extend the price regulation beyond the present December 31, 1997 expiration date.[7] The technical provisions of the price regulation established by final rule of May 30, 1997 and as codified at 7 CFR Chapter 1300, and the summary and analysis of the rule, were issued as a proposed rule in the September 8, 1997 notice of rulemaking, with the further proposals that the regulation be extended for one year and that it be amended generally. Pursuant to Compact, Art. IV, Section 11, the Compact Commission held a public hearing on September 24, 1997 on the proposed rule, and accepted written comment pursuant to its bylaws until October 8, 1997.

Based on the oral and written comment received, and upon the reasoning set forth in its previous proposed and final rules, the Compact Commission hereby extends the present price regulation for the period January 1, 1998 through termination of the Compact enabling legislation. As explained below, the amount of the price regulation remains unchanged at $16.94. As also explained below, the technical regulation, as codified at 7 CFR Chapter 13 [§§ 1301.11(b), 1304.5(a), 1305.1, 1306.1, 1306.2, 1306.3(b) through (f), 1307.1, 1307.2, and 1307.4(f)], is amended in certain instances.

Immediately following is a summary analysis and response to the comment received during the present rulemaking procedure. A more detailed review and response follows, organized around the finding analysis required by Section 12 of the Compact. This analysis also summarizes and incorporates the relevant reasoning developed in the previous rulemaking. The analysis also identifies and describes any amendments to the price regulation made as part of this final rule.

I. Summary Analysis of Comments Received in Response to the Proposed Rule and Compact Commission's Response

Oral and written comment received in the September 24, 1997 hearing and additional written comments received by the Compact Commission's published deadline of October 8, 1997 were duly considered by the Compact Commission. The Compact Commission met on October 23, 1997 to consider and act on the comment received. Public notice of this meeting was published on October 16, 1997 in the **Federal Register**. 62 FR 53769.

Eighty-nine separate comments were received during the hearing and written comment period. Of the total commenters, five expressed opposition to the regulation's extension and eighty-four expressed support for its extension.

The five commenters expressing opposition to the regulation's extension include an economist for Public Voice for Food and Health Policy, a public interest group based in Washington, DC, and four representatives of Massachusetts ACORN, a low income community advocacy group in Dorchester, MA. These commenters expressed concern primarily with the regulation's impact on low income consumers in the New England region.

The Compact Commission recognizes and acknowledges the concerns raised by these opposing commenters. As explained in greater detail in the subsequent analysis, one of the central reasons the Compact Commission adopted its initial regulation for the limited period of six months on May 30, 1997 was to ensure close monitoring of the regulation's impact on consumers, including low income consumers. See 62 FR 29638. This careful scrutiny is derived from the finding analysis and inquiry into the public interest in milk price regulation which the Compact Commission must make under the Compact, and which is concerned with, among other issues, the impact of price regulation upon consumers, including low income consumers.

While accentuating the need for continued, careful scrutiny, the commenters have not established that the price regulation is causing such anomalous market distortions of the retail market as to justify elimination of price regulation. When viewed in the context of, and balanced with, the comments presented in support of continuing the regulation, along with the reasoning derived from the prior rulemaking, the Compact Commission concludes the interests of consumers in a stable milk supply and, ultimately, stabilized prices, will continue to be served by extending the price regulation.

Fifty-four of the eighty-four commenters expressing support for extension of the regulation were dairy farmers. Other commenters expressing support for extension include representatives of dairy farmer cooperatives, farm credit agencies, banks, dairy processors, dairy feed and fertilizer suppliers, Farm Bureaus, farm machinery dealers, New England state WIC Programs, New England state Departments of Agriculture, a state legislator, a large animal veterinarian, and a consumer.

These commenters, farmers and others alike, expressed support for extending the regulation for periods of varying duration. The broad majority supported extension through the termination of the Compact Commission's authority to establish an over-order price regulation under the Congressional Consent to the Compact.[8] The supporting comment also was mixed with regard to whether the amount of the over-order price should be kept at the same rate or increased, and, if increased, at what rate. Most of

[4] The Commission limited its assessment to issues relating to the fluid milk market, given the limitations on its authority to regulate the price of milk used for manufacturing purposes. See Compact, Section 9(a); see also 7 U.S.C. 7256(2).

[5] The Commission issued a notice of Hearing on December 13, 1996 at 61 FR 65604 and held public hearings on December 17 and 19, 1996. The Notice also invited the public to submit written comments through January 2, 1997. Following the close of this comment period, the Commission met on January 16, 1997 and established three working groups to consider the testimony and data submitted. The Commission issued a Notice of Additional Comment Period on March 14, 1997. 62 FR 12252. This comment period closed on March 31, 1997; the reply comment period closed April 9, 1997. Based on the testimony and comment received, the Compact Commission issued a proposed rule on April 28, 1997 to adopt price regulation. 62 FR 23032. As part of the proposed rule, the Commission published for comment technical regulations to be codified at 7 CFR Section 1300, et seq. Minor corrections to the proposed rule were published on May 8, 1997, 62 FR 25140, to provide clarification and to correct errors. The Compact Commission received additional comment in response to the proposed rule issued April 28, 1997.

[6] 62 FR 29626 (May 30, 1997).

[7] 62 FR 47156 (September 8, 1997).

[8] 7 U.S.C. 7256(3).

the comment supported an increase reflecting the increase in the Consumer Price Index. Finally, a number of the commenters recommended certain amendments to the technical codified price regulation.

In view of these amendments suggested by the commenters, the Compact Commission notes that, in addition to allowing for close review of the regulation's impact on the retail market, the limited, six month duration of the initial price regulation was also established to ensure close scrutiny of the regulation's impact on the overall fluid milk marketplace. As with review of the impact on the retail market, this overall assessment is necessary to determine whether the price regulation has caused such market distortions as to require its discontinuation, or whether its extension will continue to serve the public interest.

As explained in detail below, the Compact Commission concludes from this rulemaking process that the public interest is best served by the regulation's extension from January 1, 1998 through termination of the Compact enabling legislation. Accounting for the concerns of the commenters, the Compact Commission concludes the public interest, including those of low income consumers, will be better served by extending the price regulation so as to establish stable prices across the wholesale and retail markets in New England for the continuous period July 1, 1997 through termination of the Compact enabling legislation. The Commission concludes that close scrutiny of the regulation's impact must continue and, accordingly, schedules subsequent rulemaking with review of all relevant issues to be commenced, pursuant to Section 11 of the Compact, no later than July 1, 1998.

The comments received, with regard to the significant concerns and relative positions on the critical issues invoked by the finding analysis mandated by Section 12(a) of the Compact, are now addressed in detail.

II. Summary and Further Explanation of Findings Regarding Adoption of Over-order Price

As noted above, Section 12(a) of the Compact directs the Commission to make four findings of fact before an over-order price regulation can become effective. The issues relating to the first three topics (excluding the referendum procedure) were exhaustively reviewed in the Compact Commission's initial proposed rule. The Compact Commission's findings on these topics, based on that analysis, were reaffirmed with further discussion in the subsequently adopted final rule on May 30, 1997, which rule served as the proposed rule in the present rulemaking process. The analysis of these issues contained in the previous proposed and final rules is again reaffirmed, subject to the further discussion contained here.

As in the previous rulemaking, the second finding required by the Compact (the level of prices needed to assure a sufficient price to producers and an adequate supply of milk) is discussed initially. The Compact Commission finds that a price of $16.94 per hundredweight continues to be needed to achieve these dual goals. The first finding required by the Compact (whether the public interest will be served by the establishment of minimum milk prices) is then discussed. The Compact Commission further finds that the public interest will be served by an over-order price regulation in the amount of $16.94 to extend from January 1, 1998 through termination of the Compact enabling legislation.

With respect to both of these findings, the Compact Commission's inquiry has been guided by Section 9(e) of the Compact, which sets forth several factors which the Compact Commission must consider during the hearing process to determine whether to adopt and if so, the amount of, an over-order price:

> In determining the price, the commission shall consider the balance between production and consumption of milk and milk products in the regulated area, the costs of production, including, but not limited to the price of feed, the cost of labor including the reasonable value of the producer's own labor and management, machinery expense, and interest expense, the prevailing price for milk outside the regulated area, the purchasing power of the public and the price necessary to yield a reasonable return to the producer and the distributor.

The third finding required by the Compact is then discussed; the Compact Commission concludes that the major provisions of this order, other than those establishing minimum milk prices, are in the public interest and reasonably designed to achieve the purposes of the order.

The fourth required finding is whether the terms of the proposed order have been approved by producer referendum, pursuant to Article IV, section 12 of the Compact. In this final rule, the Compact Commission makes this finding premised upon certification of such approval, published separately in this **Federal Register**. The procedure for such certification is set forth infra in the section of this rule addressing the fourth finding.

A. What Level of Prices Will Assure That Producers Receive a Price Sufficient To Cover Their Costs of Production and Elicit an Adequate Local Supply of Milk

As one of the four underlying findings required for the establishment of price regulation, the Compact Commission must determine:

> (2) What level of prices will assure that producers receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.[9]

Compact Art. V, section 12(a)(2).

As in the prior rulemaking, the Compact Commission's deliberations regarding the level of price required to cover costs of production focused again on the variety of cost inputs identified in Section 9(e) of the Compact. With regard to the price needed to elicit an adequate local supply of milk, the Compact Commission reviewed the nature of the balance of production and consumption in the region, as also called for by Section 9(e) of the Compact.[10] This required review again prompts assessment of the degree to which farm prices have been insufficient to cover costs of production over time (''price insufficiency''), and the degree to which such insufficiency has affected the balance of production and consumption in the region. Assessment of this issue also required consideration of the wide swings over time in farmer pay prices under federal regulation, which have caused farm financial stress and made it difficult for farmers to plan financially (''price instability''), and the failure of farmer pay prices to keep up with inflation.

Farmer Costs of Production

The Compact Commission's inquiry with regard to whether prices are sufficient to cover the cost of production was guided by Section 9(e) of the Compact, which directs the Commission to consider cash costs of production, including feed, machinery expense, labor, and interest, as well as the non-cash costs of value for the farmer's own labor and a reasonable return on the farmer's investment.

With regard to the various specific components of cash and non-cash costs

[9] The Commission limited its assessment to issues relating to the fluid milk market, given the limitations on its authority to regulate the price of milk used for manufacturing purposes. *See* Compact, § 9(a); *see also* 7 U.S.C. section 7256(2). At the same time, for purposes of this analysis, it must be recognized that the present supply needs for manufacturing purposes are not available for fluid usage.

[10] This assessment was presented under the second, broader public interest analysis in the first rulemaking procedure.

reviewed under Section 9(e) of the Compact, the Compact Commission determined in the previous rulemaking that feed costs are a significant production cost component. The Commission found that feed costs can account for as much as 50 percent of a farmer's cost of production. 62 FR 23034. Farmers indicated that feed costs had risen beyond their means. In 1996, in particular, feed costs increased by some 29 percent. 62 FR 29633.[11]

According to the comment received in the present rulemaking, feed costs continue to account for a significant portion of cost of production. A Vermont dairy farmer indicated that the ratio of purchased grain cost to the value of milk produced for his farm has normally been 20% but that, since January of 1997, it has averaged 32%. De Geus and Gillmeister, in their joint submission,[12] report that the Economic Research Service (ERS) of the USDA indicate that feeds account for as much as 50% of the cash expenses for milk production in 1996. They also report that feed prices are down this year relative to 1996 but remain historically high. They rely on the ERS September 1997 Livestock, Dairy, and Poultry Monthly Report,[13] as well as the recent farm experience in New England, to conclude that high grain and high hay prices will raise this year's production costs higher, but not as high as last year's level.

De Geus, in a separate submission,[14] indicates that Vermont feed costs are expected to remain high because of flooding in northern Vermont and drought conditions in southern Vermont, parts of New York, and much of the rest of New England.[15] A dairy farmer from Connecticut reported that, since last September, his grain costs had increased approximately 8%.[16] Other commenters noted that the increase in grain prices they are experiencing is creating an imbalance between their production costs and farm price for milk.[17]

Machinery expense as a factor in the cost of production arises primarily in the context of depreciation; that is, depreciation must be covered by replacing old and worn out equipment. *See* 62 FR 29633. As in the prior rulemaking, farmers again indicated that pay prices are too low to permit them to make these investments.[18] Claude and Jeanne Bourbeau indicated that that ''[their] debt load has increased in the past year due to depreciation of farm equipment. Money is needed to replace equipment and the milk check does not provide adequate funds to replace this equipment.'' [19] Another farmer indicated that it doesn't make sense to invest in new equipment because it would just add to his debt load and increase his monthly payments.[20] Both Wesley Snow of Brookfield, Vermont and Robert Dow of Dover, Maine indicated that the increase in equipment costs since they purchased their current equipment makes replacement impossible, given their current milk price.[21]

Section 9(e) also directs the Compact Commission to consider interest and labor costs in assessing the sufficiency of farmer pay prices. (Measurement of these components of costs of production, in particular, provide for much of the variability in the range of cost of production noted below.) In the previous rulemaking, the Compact Commission determined that both interest and non-family labor expenses constitute a significant proportion of costs of production: from $0.50 to $1.18 per hundredweight for interest expenses, and $1.08 to $1.92 per hundredweight for labor expenses. 62 FR 29633.[22]

Section 9(e) also directs the Compact Commission to consider certain non-cash costs, including a reasonable value for the farmer's own labor and a reasonable return on the farmer's investment. In considering whether pay prices provide a reasonable value for the farmer's labor, the Compact Commission previously determined that dairy farms in New England are still predominately family operated, and, that in light of farmer pay prices, much of this family labor is completely uncompensated, or significantly undercompensated. *Id.* The Commission concluded that this failure to compensate for family labor discourages entry into the dairy industry. See 62 FR at 23035.

Comment received in this rulemaking again supports this determination. A number of commenters indicated that they were experiencing difficulty in hiring labor at rates they were able to pay.[23] One dairy farmer indicated that he must pay his hired help more than he pays himself.[24]

Allaire Palmer reports that his ''family employees have not had a raise in four years and work for six dollars per hour. Rent is furnished because employees are required to be available twenty-four hours per day.'' [25] Two dairy farmers testified that their children and grandchildren were not interested in continuing the family tradition of farming because of the long hours and short profit.[26] On the basis of the record, the Compact Commission finds that current pay prices continue to discourage family entry into dairy farming because they fail to offer reasonable value for the farmer's labor.

With regard to whether pay prices provide a reasonable return on the farmer's investment, the Compact Commission noted several comments received in the previous rulemaking indicating that a reasonable return ranges between 4% and 5%.[27] The Commission determined that, for an extended period of time, pay prices have been insufficient to provide a rate of return on equity that reaches these levels. 62 FR 29633.

Comment received from farmers in the present rulemaking again highlighted the impact of these

[11] In addition, a cost-of-production study conducted by Wackernagel and relied upon by the Commission (62 FR 23034) indicated that feed and crop expenses together can account for some 39% of a farmer's cash operating expenses.

[12] Reenie De Geus and William Gillmeister, Dairy Economists for the Vermont and Massachusetts Departments of Agriculture, Written comment, (''WC''), October 8, 1997.

[13] The Report describes the current national situation to be: ''Forage supplies will be of mediocre quality and high priced, even though the silage crop looks promising in most areas. Milk-feed price ratios will be at levels normally associated with conservative concentrate feeding and below-trend growth in milk per cow.''

[14] Reenie De Geus, WC, October 8, 1997.

[15] Vermont dairy farmers reiterated this point in their submissions. Paul Doten, Harvey T. Smith, WC, October 8, 1997.

[16] David Jaquier, Dairy Farmer, East Canaan, CT, Public Hearing (''PH'') at p.134, September 14, 1997.

[17] Walter Fletcher, Donna Caverly, Richard Woodger, Maine Dairy Farmers, WC, October 8, 1997.

[18] See 62 FR 29633. Economist Reenie De Geus noted in record testimony that expenditures on machinery and other depreciation expenses tend to rise in the good years and are delayed in the bad years. Reenie De Geus, WC 75.

[19] Claude and Jeanne Bourbeau, Dairy Farmers, Swanton, Vermont, WC, October 8, 1997.

[20] David Hinsworth, Dairy Farmer, Royalton, Vermont, WC, October 8, 1997.

[21] WC, October 8, 1997.

[22] See: Wackernagel, which analyzed Agrifax and ELFAC farms over a 3-year period; Maine cost-of-production studies; and Pelsue and ERS-USDA studies submitted by Smith.

[23] Lester Bailey, Robert L. Foster, and Claude and Jeanne Bourbeau, Dairy Farmers, WC, October 8, 1997.

[24] Onan Whitcomb, Williston, Vt., WC, October 8, 1997.

[25] Allaire P. Palmer, Dairy Farmer, Cornish, Maine, WC, October 8, 1997.

[26] Douglas Carlson, Dairy Farmer, Canaan, CT, and Dale Lewis, Dairy Farmer, Haverill, NH, PH at p. 99 and p. 140, respectively, September 24, 1997.

[27] Robert A. Smith of the Yankee Farm Credit System suggested a 4% rate of return was reasonable in his testimony at the September 24, 1997 PH and in his comments submitted in the previous rulemaking in April, 1997. 62 FR 23033. The Maine cost-of-production studies, which analyze southern New England, used a 5% return on equity. *Id.* at 23034. In addition, Michael Sciabarrasi of University of New Hampshire Cooperative Extension Service, suggested that 5% was a minimal rate of return. Id.

expenses upon their costs of production and the failure of pay prices to cover them completely. A number of commenters pointed out that failure of pay prices to cover their costs of production left them with no return on their investment.[28] Douglas Carlson pointed out in his testimony that because of the large number of recent farm foreclosures, auctions are not bringing a reasonable return on the original investment, reflecting a lower general value of farm capital investments.[29] The Compact Commission, therefore, reaffirms the determination that pay prices are insufficient to provide a rate of return on equity that reaches a reasonable range between 4% and 5%.

This survey of various cost inputs of under Section 9(e) of the Compact underscores the pressure farmers operate under with regard to the inability of pay prices to cover costs of production. With regard to identifying overall costs of production, as determined by the previous rulemaking, numerous studies provide a variety of estimates.[30] While based on different methods for determining costs of production, particularly with respect to non-cash costs, these studies provide the basis for making the overall assessment of price needed to cover cost of production, as required by the Compact. In the previous rulemaking, based on a comprehensive assessment of a number of studies, the Compact Commission concluded that the range of the costs of production for New England is somewhere between $14.06 and $16.46. *Id*.

The Compact Commission received additional comment on the measure of overall cost of production in the present rulemaking from a number of commenters. Robert A. Smith of Northeast Farm Credit Associations again reported that, on the basis of a report prepared by Farm Credit Partners surveying farms in New England, New York and Pennsylvania, the costs of production for the region were $14.25/cwt. for 1995 and $15.00/cwt. for 1996. When adjusted for a 4% return on equity, these costs become $15.37/cwt. for 1995 and $16.02/cwt. for 1996.[31] The cost figures for New England were the same as for the larger region as a whole.[32]

Reenie De Geus, Vermont's Department of Agriculture, Food and Market dairy economist, reported that the average costs of production for Vermont farms in the Farm Credit Partners survey was $14.06/cwt. for 1995 and $15.32/cwt. for 1996, up 9%.[33] For that six year period, 1991 to 1996, the average cost of production for these Vermont farms is $14.65/cwt. with only a 3% return on equity.[34] A representative of a dairy processor testified that the cost of production is in the range of $13.50/cwt. to $14.00/cwt.[35] Comment from individual farmers indicated a range for their costs of production from $12.66/cwt. to $17.95/cwt.[36] for an average among them of $14.65/cwt.

Combined with the analysis conducted during the prior rulemaking, the Compact Commission determines in this rule that the cost of production remains in the range of $14.06/cwt. to $16.46/cwt.[37] Acccordingly, the Commission concludes that an overall combined pay price[38] in this range is necessary ''to assure that producers receive a price sufficient to cover their costs of production'' within the meaning of the finding analysis required by Section 12(a) of the Compact.

In the prior rulemaking, the Compact Commission concluded that an over-order pay price in the range of $0.46–$1.90 was necessary to bring farmer pay prices up to the level necessary to cover cost of production. See 62 FR 29633 (Final Rule); 62 FR 23040–41 (Proposed Rule). Assuming Class I utilization of 50 percent, this means that price regulation in the amounts of $0.92–$3.80 would be necessary to achieve the necessary range of over-order payment.

Elicitation of an Adequate Local Supply of Milk

The required finding with regard to pay price accounts for the broader assessment of the level needed to elicit an adequate supply of milk, in addition to the relatively discrete assessment of the level needed to cover cost of production. In the prior rulemaking, the Compact Commission determined that the Compact § 9(e) scrutiny of the balance of production and consumption of fluid, or beverage milk, in the region is critical to this additional assessment. See 62 FR 29634–35.

The Compact Commission determined that production and consumption is presently in balance, but in a balance of pronounced and unsustainable stress that must be alleviated. 62 FR 23040. The Compact Commission concluded that overall milk production was in decline in the New England region and in the portion of New York State which has traditionally been a supplemental part of the New England milkshed. 62 FR 23039–40. The Compact Commission also found that supplies of milk are being transported increasing distances from the region's population centers and associated processing plants. 62 FR 23040. While over fifty percent of the milk produced in the New England milkshed is presently utilized in a variety of manufactured dairy products, the Compact Commission concluded that substitution of such milk cannot be relied upon to provide an alternative supply for fluid utilization purposes. 62 FR 23039. In sum, the Compact Commission concluded that the balance of production and consumption in the region depended on at least stabilizing, if not increasing, the present, local supply through price regulation. 62 FR 23040.

Assessment of how to alleviate the stress on the region's supply of milk through price regulation requires consideration of how best to alleviate the stress under which producers operate. This inquiry naturally reverts back to the issue of the degree to which farmer pay prices are not sufficient to cover costs of production. In addition, as previously determined, the review leads the Compact Commission to conclude that the nature of the persistently unstable farmer pay prices and the degree to which farmer prices have failed to keep pace with inflation are also structural factors of stress.

Price Insufficiency

As noted above, the Compact Commission's comprehensive review in the prior rulemaking of the various cost inputs and the variety of studies of

[28] Allaine Palmer, David Bradshaw, Rosemarie Jeleniewski, Harold Larrabee, and Roger Scott, Dairy Farmers, WC, October 8, 1997.

[29] Douglas Carlson, PH at p. 102.

[30] 62 FR 29632–33.

[31] Robert A. Smith, Manager of Public Affairs and Regional Council Relations, CoBank and Northeast Farm Credit Associations, PH at p. 75, September 24, 1997.

[32] *Id*.

[33] De Geus, WC.

[34] *Id*.

[35] Gary Warren, Vice-President, Fairdale Farms, Bennington, VT, PH at p. 124, September, 24, 1997.

[36] Ivar Green, Allaire Palmer, David Bradshaw, Claude and Jeanne Bourbeau, and Neal Rea, WC, October 8, 1997; Ed Platt, PH, September 24, 1997. It is to be noted that some of their estimates include a return on equity and while others do not.

[37] The Commission notes that it is in process of conducting the comprehensive cost of production study authorized by its previous final rule. See 62 FR29632. One commenter (Gillmeister) argues for a division of the proceeds of price regulation based upon a presentation of varying costs of production among the New England states and New York. The Commission declines to adopt the approach of this commenter as premature, given that the Commission has just undertaken its study process to determine costs of production in the states and the region.

[38] This combined price reflects the federal Market Order #1 blend price plus the Compact over-order producer price. For a more complete discussion of the components of the actual pay or ''mail box'' price paid to farmers see 62 FR 23037.

overall cost of production provided the basis for the Compact Commission to determine the amount and degree to which farmer pay prices were not sufficient to cover costs of production. 62 FR 29633. Based on its review of the studies, overall, the Compact Commission concluded that costs of production have exceeded the farm pay price by an amount in the range of $0.46–$1.90. *Id.*

As also noted above, the newly received data, in combination with the previous analysis, leads the Compact Commission again to conclude that farmer pay prices are failing to cover costs of production and that there is a continuing need for an over-order price that results in farmer pay prices in the range of $0.46 to $1.90.

Failure of Farmer Pay Prices To Keep Up With Inflation

The Compact Commission determined in the prior rulemaking that the failure of farmer pay prices to keep up with inflation was a significant factor contributing to chronic price insufficiency and farm financial stress. 62 FR 29633–64. For this reason, the Compact Commission adopted the joint proposal of Reenie De Geus and William Gillmeister, dairy economists for the Vermont and Massachusetts Departments of Agriculture, respectively, to establish an over-order price regulation based, in part, on an inflation adjustment.[39]

Comment received in the present rulemaking did not focus on the issue of the chronic, structural failure of prices to keep up with inflation to the same degree as in the prior rulemaking. This is perhaps a result of the fact that the price regulation adopted as part of the prior rulemaking was premised, in part, on a structural adjustment for inflation. In any event, the Commission remains mindful that the relationship between farmer pay prices and inflation remains a critical concern. Certainly, the comment received supports this determination.[40]

The Compact Commission also remains mindful, however, of the concern expressed by several commenters in the prior rulemaking (62 FR 29634) and a comment submitted in this rulemaking[41] that an inflation adjustment not be built in as a permanent, automatic adjustment.[42] The Compact Commission's determination of the proper balance between adjustment for inflation and accounting for broader market conditions, in establishing the appropriate level of price regulation, is presented in the summary analysis of this section, below.

Price Instability

The Compact Commission received a wealth of testimony and comment in the prior rulemaking indicating that wide fluctuations in the price of milk are also a primary cause of farm financial stress and, in particular, made it difficult for farmers to plan financially. 62 FR 29633.

The comment received in the present rulemaking accentuates the fact of persistent fluctuations in the pricing structure under federal regulation. The price drop from the Autumn of last year to the present was both precipitous and dramatic. Between October, 1996 and July, 1997, the New England Market Order #1 Blend price fell from $16.84 to $11.97.[43] For October, 1997, the blend price is estimated to be $13.50.[44]

Not surprisingly, farmers again expressed their reluctance to make long-term investments in their farming operations, and their concern that when prices dropped precipitously they were unable to meet their most basic obligations. For example, the ability of farmers to pay machinery expenses is further diminished by price instability because farmers are unable to invest (e.g., in new machinery or in upgrading their facilities), given the wide fluctuations in the price of milk.

Of most concern, Leon Berthiaume, General Manager of St. Albans Cooperative Creamery, testified that—

> In May through July, 66 to 100 of our members received a check of less than $1,000.00 for 15 days worth of milk production. We also during [sic] this period of time there was 20 to 50 members that received no check at all for those 15 days of production. We are continuing to experience farm auctions. In the last 2½ weeks, we have lost 12 members from our Cooperative, and in the next week we have three more members that are scheduled to be auctioned off.[45]

Gary Warren, in his testimony at the public hearing, underscored the benefits of price stability across the market, from farmer to consumer.[46] Robert A. Smith pointed out that volatility in milk prices makes it very difficult for farmers to effectively plan and make the type of investments necessary to position themselves for the future.[47]

In addition to testimony of the apparent, continuing, stress on supply, however, the Compact Commission received testimony that production had nonetheless increased by 2.2 percent in 1997.[48] This indicates that, in the short term, despite the persistent failure over time of prices to cover cost of production and the structural conditions of market stress, farmers are still able to produce milk to cover demand. The Compact Commission concludes this is in part because of the presence of a range of cost of production,[49] and in part because of the working dynamic between the fluid and manufactured milk markets under federal regulation. One commenter indicated such increased production may also in part be a function of the cool 1997 summer.[50] In addition, testimony in the record indicates that increased production may be a factor of persistently low farm prices.[51] (The Compact Commission also notes that, in addition to price enhancement under the Compact price regulation for August and September, 1997, according to De Geus, ''last year was an abnormally high year both for price and costs with the result that farmers had a positive return

[39] Their joint submission in this rulemaking, however, argues against using the Consumer Price Index (CPI) as a structural adjustment to the Compact over-order price because the dairy farmer's costs of production are driven by factors other than those measured by the CPI, such as the cost of grain. The Commission concludes that the CPI is not a perfect fit for systemic cost increases on the farm.

[40] Robert Wellington, Sr. Vice-President, AgriMark Cooperative, WC, October 8, 1997; Lee and Charlotte Bosworth, Auburn, ME; Mary Connolly, Pittsfield, ME; Alaine Palmer, Cornish, ME; Pery and Carol Hogden, Randolph, VT; David Hansen, North Brookfield, MA; Edward A. Ellis, Hebron, CT; Wesley and Brenda Snow, Brookfield, VT; Robert Dow, Dover, ME; Lowell J. Davenport Jr., Ancramdale, NY; Dairy Farmers, WC, October 8, 1997.

[41] See De Geus and Gillmeister, Id. In large part based on their comment, CPI is rejected for automatic adjustment to the Compact over-order price. See below.

[42] Based in part on this concern, the Commission concluded on May 30, 1997 that adoption of a price regulation for the limited duration of six months would allow for continuing evaluation of broader market conditions. *Id.*

[43] Market Order #1 Administrator Statistics.

[44] Wellington, PH at p. 8.

[45] Leon Berthiaume, PH at pp. 57–58. Robert Wellington also testified at the PH at p. 8 that Agri-Mark, the region's largest cooperative, accounting for 1630 of the approximately 3840 pool producers in Federal Market Order #1, indicates a loss of 73 member producers in July, 1997 from the previous July. It also was down 61 members in August compared to the previous August. Agri-Mark also added 10 new New York members in July, 1997 as compared with the previous July, and 17 such new members in August, as compared with the previous year. According to the testimony, ''New York has been the only area available to obtain the additional milk needed for New England consumers.''

[46] Warren, PH at p. 128.

[47] Smith, PH at p. 76.

[48] Leon Graves, Commissioner, Vt. Dept. of Agriculture, Food and Markets, WC, October 8, 1997.

[49] John Schnittker, Public Voice for Food and Health Policy, PH at p. 13, September 24, 1997; Gillmeister, WC, October 8, 1997; De Geus and Gillmeister, WC, October 8, 1997.

[50] Wellington, PH at p. 114.

[51] Wellington, PH at p. 110; Carl Peterson, Dairy Farmer and President, AgriMark, PH at p. 70.

of one cent for the first time in six years.'')[52]

The Compact Commission concludes, accordingly, that the required determination of the amount needed both to cover cost of production and to assure an adequate supply must account simultaneously for both the persistent gap between cost of production and pay prices and the level of supply in the market in spite of that gap. The finding analysis reflects an intended balancing of the basic economic requirement that pay prices cover cost of production to ensure sustainability with a recognition that supply may still be provided despite some gap between cost of production and pay prices.

John Schnittker argues, without supporting evidence, that the price regulation would primarily help the larger and generally more financially healthy dairy producers and would help the smaller and financially stressed producers the least.[53] The commenter made the same argument in the previous rulemaking process, also without supporting evidence. The Compact Commission there concluded that the criticism of the Compact over-order price regulation by Schnittker was incorrect. 62 FR 29634. The assertion assumes that the smaller producer is less efficient than the larger producer. On the basis of the detailed analysis of Professor Wackernagel,[54] the Commission again concludes, however, that the financial viabililty of both 80 cow farms and 350 cow farms will be improved substantially by the Compact over-order price regulation.

Summary Analysis—Level of Prices Needed to Assure That Producers Receive a Price Sufficient To Cover Their Costs of Production and Elicit an Adequate Local Supply of Milk

As noted above, the Compact Commission has determined that an over-order price in the range of $0.46–$1.90 continues to be needed to assure that farmer costs of production are covered, requiring an over-order price regulation in the range of $0.92–$3.80.[55] With regard to the price needed to elicit an adequate supply of milk for the region, the Compact Commission again notes that such an amount is not necessarily identical with that required to cover costs of production. The Compact Commission further concludes that the analysis of the appropriate level of price regulation must also account for price instability and the failure of producer prices to account for inflation,[56] as well as the regulation's duration.

As noted at the outset, the prior rulemaking resulted in establishment of an over-order price regulation of $16.94 for six months duration. 62 FR 29632. The Compact Commission received numerous comments from farmers on the appropriate level of price and duration for an extension of the price regulation. The majority of these commenters recommended that the price be adjusted by the CPI at 2.2%, with such adjustment to last through the termination of the Compact.[57] Wellington and Berthiaume made a similar recommendation; Beach recommended an adjustment by the CPI at 2.2% for a period of six months.[58] De Geus and Gillmeister recommended that it be raised by 2%.[59] (In his separate comment, Gillmeister proposed a six months' duration; De Geus proposed extension through sunset.) Warren suggested that the price be raised by $1.00.[60]

Viewing the comment in light of all the relevant factors, the Compact Commission finds the argument of De Geus and Gillmeister[61] persuasive for not further adjusting the amount of the Compact over-order price regulation in direct proportion to the Consumer Price Index. The function of the initial regulation was a one-time regulatory adjustment in response to the strikingly apparent, chronic, structural failure of the marketplace to account for inflation. Price regulation forward must be responsive to the variety of market forces at work, including but not limited to inflation, as argued by these commenters.

The Compact Commission further concludes that the present amount of the price regulation at $16.94 is sufficiently responsive to the variety of market forces referred to above. The resulting degree of price enhancement provided by the price regulation still ensures that the net pay price remains within the range, albeit at the low end, of that identified as necessary to provide for covering the costs of production.

The Compact Commission also determines that extension of the $16.94 price regulation for the period January 1, 1998 through termination of the Compact enabling legislation, so as to establish uniform regulation and price for a total period of at least 21 months, will provide critical assurance of continued price stability for producers. Finally, the presence of a regulation of stable, continuous, duration will still allow the Commission to hear and consider the need to make further adjustment to account for increased costs of production and inflation at any time, before farmer pay prices again begin to lag far behind inflation. The Commission will commence rulemaking, pursuant to Section 11 of the Compact, no later than July 1, 1998 to consider whether any further adjustment in the Compact over-order regulation price is necessary and appropriate.

In this regard, the Commission takes official notice of the fact that the first three months of the regulation increased farmer pay prices, on average, by approximately $1.30 per hundredweight, raising the combined, regulated minimum pay price from approximately $12.00 to approximately $13.30 per hundredweight. For the next two months of the regulation, it is projected that the regulation will increase the pay price by approximately $.75 and $.40, respectively, yielding combined pay prices of approximately $13.90—$14.10 per hundredweight. The regulation, accordingly, is providing both price enhancement and stability.

With this background, the response of the Compact Commission to the comments received from farmers and cooperative representatives indicating the need for further price enhancement is to extend the current regulation at the same price. The extension of the regulation serves the essential function of establishing combined price enhancement and price stability in the market for a period of at least 21 consecutive months. At the same time, the extension in no way precludes the Commission from finding that a further adjustment in price is warranted after making an assessment of the costs of production, market prices and production levels during the rulemaking process the Commission will commence no later than July 1, 1998.

In sum, extension of the price regulation in the amount of $16.94 through termination of the Compact enabling legislation is the appropriate ''level of price needed to assure that producers receive a price sufficient to

[52] See footnote 27; 62 FR 29633.

[53] Schnittker, PH at p. 11.

[54] 62 FR 29634 (May 30, 1997).

[55] Assuming Class I utilization of 50 percent, the amount of the over-order regulation price must be twice the over-order producer price to account for the entire, identified, amounts.

[56] The Commission here reaffirms its reliance upon the study by Professor Wackerngel, cited at length in both the previous proposed and final rules, which analyzed in detail the impact of Compact price enhancement and price stabilization upon two different farm sizes—an 80 cow herd and a 350 cow herd. 62 FR 29634 (May 30, 1997).

[57] 7 U.S.C. 7256(3).

[58] Wellington, PH at p. 107; Berthiaume, PH at p. 58; Sally Beach, Independent Dairymen's Coop., PH at p. 82.

[59] De Geus and Gillmeister, WC.

[60] Warren, PH at p. 126.

[61] See: note 34 *supra.*

cover their costs of production and elicit an adequate local supply of milk.''

B. Whether the Public Interest Will Be Served by the Establishment of Minimum Milk Prices to Dairy Farmers

In the prior rulemaking, the Compact Commission first focused specifically on the producer related-inquiry of Section 9(e) in making the finding concerning the appropriate level of price required by the Compact, and then referred to the conclusions there determined in making the broader ''public interest finding'' required by the Compact. 62 FR 29632. This analytical approach is adopted for purposes of extending the rule. This analytical approach is also adopted with regard to the dual findings required for establishment of the proper level of price under the rule.

The Compact Commission also adopts the two-part assessment of the broader ''public interest'' utilized in the prior rulemaking. This assessment is premised first on a review of those components of the public interest specifically identified by section 9(e), followed by consideration of a broader range of subjects and issues drawn from these specific components.

As set forth in section A, above, focusing on the producer/milk supply-related finding inquiry, the Compact Commission found the amount of $16.94 per hundredweight to be the appropriate level of price regulation, extended for the period January 1, 1998 through termination of the Compact enabling legislation. This level of price was determined to be necessary to ''cover * * * costs of production and elicit * * * an adequate supply of milk'' within the meaning of the required finding analysis. The price assures in addition, thereby, that the ''balance between production and consumption of milk productions in the regulated area'' will be maintained within the meaning of Compact, section 9(e).

With regard to the review of ''the purchasing power of the public'' contemplated by Compact, section 9(e), the Compact Commission has again determined that this inquiry is relevant to assessing the impact of price regulation on the consumer market, the ''critical part of the Compact Commission's assessment of the public interest under this finding section.'' 62 FR 23045. This inquiry focuses ''primary concern on the consumer interest because milk is a staple product.'' *Id*.[62]

The Compact Commission determined in the prior rulemaking that the continuing erosion of the region's milkshed has had a direct—and adverse—impact on retail prices, and hence on the purchasing power of the public, in part because of the increased transportation costs associated with an expanding milkshed. 62 FR 29635. The Compact Commission similarly determined that ''farm/wholesale price volatility had also likely had an adverse impact on retail prices over time, and that stabilization of the farm/wholesale price through a compact over-order price regulation, traced through to the endpoint retail market, likely will manifest as a corresponding positive impact on retail prices.'' [63] *Id*. Finally, the Compact Commission determined that ''the foregoing analysis supports the conclusion that the purchasing power of the public likely will be enhanced, rather than diminished, as a result of the stabilizing effects of the over-order price regulation.'' *Id*.

Based on the reasoning presented in the proposed and final rules, the Compact Commission reaffirms these determinations.[64]

The detailed data and comment received with regard to the consumer interest focused on prevailing retail prices for Class I fluid milk in the region and the potential and actual impact of the price regulation on the retail market. Adverse comment was also received with regard to retail prices and concerns about the regulation's impact on low income consumers. Comment was also submitted with regard to extension of the State WIC program reimbursement provisions.

Impact on Retail Prices—Data and Analysis

De Geus and Gillmeister submitted joint testimony with regard to the impact of the price regulation on the overall retail market. Data was submitted placing the price regulation's impact within a context of price movements between 1995 and the present. The relationship between the procurement cost for raw milk and the retail price was assessed. According to their testimony,

> The important point to note in the relationship between tables 1 and 2 is that farm prices for Class I milk fell dramatically in January of 1997, while retail price [sic] remained elevated. Then, when the Compact [sic] implemented the Final Rule in July of 1997, the prevailing price jumped 30 cents from their already elevated level. In Figure 1, Vermont shows a 20 cent increase in the price of a gallon of milk. Then in August the prevailing price in Boston fell 10 cents and remained unchanged in September. Expectations are that the prevailing price will fall more over time.

The commenters further indicated that—

> The baseline projections for dairy product prices for 1998 shows a decrease in prices of 0.4%. That is to say, dairy product prices are expected to decline * * *. Overall, we feel that the consumer is doing quite well. While fluid milk prices increased in July, they should decrease some over the next several months as competition for the growing sea of consumer dollars begins to over-ride any over-order price.

TABLE 1: FEDERAL MARKET ORDER #1 (ZONE 1) CLASS I PRICES 1995–1997

[Per cwt] [65]

Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Average
15.10	14.62	14.59	15.03	15.13	14.47	14.36	14.66	14.47	14.79	15.32	15.85	14.85
16.11	16.15	15.97	15.83	15.94	16.33	17.01	17.16	17.73	18.18	18.61	17.37	16.82
14.85	14.58	15.18	15.69	15.73	14.69	16.94	16.94	16.94	16.94	16.94	16.94	15.54

[65] Source: Gillmeister and DeGeus, infra, (Market Order #1 Administrator Statistics).

[62] With regard to the Compact's emphasis on the ''prevailing price for milk outside the regulated area'' and the first ''public interest'' finding, the Compact Commission again determines this data to be relevant with regard to the retail price of milk outside the region. (It is also relevant to the farm price of milk outside the region.) Based on the comments received in the prior rulemaking, the Commission identified the retail prices in two separate markets outside the Compact region as a benchmark for tracking the impact of price regulation on retail prices in the region, 62 FR 23046–47 (April 28, 1997), and to compare ''the current, relative alignment in prices between the New England and New York regions against the relative alignments once price regulation is in place.'' 62 FR 23048 (April 28, 1997). The comprehensive study to conduct this tracking analysis is currently being developed by the Commission.

[63] As a general manager of a processing facility testified, stable wholesale prices should lead to stable retail prices. Warren, PH at p. 130.

[64] The Commission also concluded that the actual impact on retail prices could only be determined by careful monitoring and tracking over time. 62 FR 23048 (April 28, 1997). The Commission is in process of establishing and implementing the study procedure necessary to accomplish this assessment.

TABLE 2: BOSTON RETAIL PRICES 1995–1997

[Per gallon] [66]

Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Average
2.59	2.49	2.49	2.59	2.49	2.49	2.49	2.49	2.49	2.49	2.49	2.59	2.52
2.59	2.59	2.69	2.59	2.69	2.59	2.59	2.79	2.59	2.59	2.59	2.59	2.62
2.59	2.59	2.69	2.59	2.59	2.59	2.89	2.79	2.79	.....	.....	.....	2.67

[66] Source: Gillmeister and De Geus, infra, (International Association of Milk Control Agencies).

De Geus submitted additional individual testimony, indicating similar retail price experience in Vermont and Connecticut:

RETAIL PRICE

	Vermont: $/gallon	Connecticut: $/gallon
November 1996	$2.49	$2.67
December	2.53	2.68
January 1997	2.54	2.65
February	2.51	2.62
March	2.48	2.61
April	2.49	2.60
May	2.48	2.65
June	2.49	2.61
July	2.64	2.81
August	2.62	2.83
September	2.62	2.78

As can be seen, prices in Vermont increased by 15 cents after initiation of the price regulation in July, then declined the following month, and held constant in September. In Connecticut, prices were observed to have increased by 20 cents after initiation of the price regulation in July, another 2 cents in August, and then decreased by 5 cents for September.

Despite the apparent initial spike in retail prices,[67] the Compact Commission concludes that the regulation has not affected the retail market so anomalously as to require its elimination. Rather, it is concluded from the data and analysis presented that the retail market can best be understood as in the process of adjustment to the current price regulation. The Commission particularly notes that the average Class I price for 1997 will be 11 cents less than last year, while the retail price for the Boston market is expected to be 5 cents greater. Recognizing that last year's prices were unusually high, and that the retail market usually takes time to adjust to price changes,[68] it is noted that the retail price has increased 15 cents since 1995, while the farm price, including that imposed by the price regulation has increased by only six cents.

The Compact Commission also takes note that the over-order price obligation for July, 1997 was $3.00, while for November it will be substantially less, in the amount of $0.91. The impact of having a flat price in the market, resulting from the interplay between the underlying federal, Class I price and the Compact ''over-order'' price, accordingly, thus has yet to be fully assimilated into the pricing dynamic of the market.

The data and analysis presented are not inconsistent with the Compact Commission's prior determination that stabilization of the farm/wholesale price through a compact over-order price regulation, traced through to the endpoint retail market, likely will manifest as a corresponding positive impact on retail prices.'' 62 FR 29635.[69] Indeed, if the commenters cited above are correct in their assessment of the likely trend of retail prices in 1998, it will only require a slight such ''drift downward'' for retail prices to reach their 1995 level.

Comment on the Impact of the Compact Over-order Price Regulation on Low Income Consumers

The Compact Commission received four comments from an organization representing low income consumers [70] who expressed opposition to the extension of the price regulation. Their comments centered on a concern with increased retail prices for fluid milk faced by low income parents and grandparents. Because they attributed recent price increases in their neighborhoods to the Compact Commission's decision to establish the price regulation, they are opposed to its extension.

Another commenter expressed opposition based on his analysis that the regulation was benefiting farmers at the expense of consumers, particularly low income consumers. According to this commenter, the over-order price now in effect could increase consumer cost for milk in the Compact region by as much as $70 million over the next year.[71]

The Compact Commission's response to these commenters flows from its assessment of the actual and potential impact on the retail market described above. As indicated, the Commission determined price regulation would likely have a ''positive impact'' on retail prices over time, though cognizant of the possibility of short-term increases in milk prices at the retail level, when it adopted the regulation. Establishment of a six month regulation ensured either expiration of the regulation in short order or review of the regulation soon after its adoption to determine whether unexpected anomalies were occurring so as to preclude its extension.[72]

Even accounting for these adverse comments, the Compact Commission determines that no such anomalies are occurring in the marketplace. Rather, the market is in process of responding to the imposition of a flat, combined

[67] De Geus indicated that the data gathered for the Connecticut market, identifying a price increase of 20 cents, includes ''Mom and Pop'' stores while the Vermont data, identifying a price increase of 15 cents, does not. According to De Geus, this difference is attributable to the difference in data collection. WC.

[68] Cf. 62 FR 29629 citing Hansen, Hahn, and Weimar, ''Determinants of the Farm-to-Retail Milk Price Spread'', Agriculture Information Bulletin Number 693 (March 1994). See also Kinnucan and Forker, ''Asymmetry in Farm-Retail Price Transmission for Major Dairy Products'', Amer. J. Ag. Econ., 285–292 (May, 1987).

[69] One commenter who is the general manager of a processing facility supported the Commission's analysis with his assessment that stable wholesale prices should lead to stable retail prices. PH at p 130.

[70] Joyce Campbell, Patricia Maben, and Florence Knedsen of Massachusetts ACORN, a low income community advocacy group, PH at pp. 14–25; Felicia Fields, President, Boston ACORN, WC.

[71] John Schnittker, Public Voice for Food and Health, PH at p 9. The Commission notes in response to this comment that, despite the apparent initial spike in prices, the Commission does not determine that the apparent impact of the price regulation is some form of a price increase attributable to a direct ''pass-through'', as apparently inferred by the commenter. As in the previous rulemaking the Commission declines to adopt this approach in view of the lack of explanation, and given that it is directly contrary to the developed literature on this issue which suggests a contrary conclusion. As the Commission determined in its proposed rule, price stabilization eliminates the need for retailers to retain significant margins in order to protect against the uncertainty in wholesale costs that exists when prices are volatile. See 62 FR 23049 (citing Hahn, et al.). Because retailers will not have to engage in this ''risk response'' pricing strategy to ensure cost recovery, the Commission again disagrees with the commenter's conclusory remarks regarding the impact of price regulation on retail prices.

[72] The WIC reimbursement provisions were established in part to cover such a contingency.

Class I price, and the actual impact of the regulation is yet to be determined. The interplay of the underlying federal Class I pricing regulation and the ''over-order'' mechanism, combining to establish the flat, combined price, have yet to work through the asymmetric pricing regimen of retail milk prices. Moreover, while prices may have spiked up in response to initial imposition of the price regulation, according to the received data and analysis, they declined the next month and ''are expected to fall more over time.'' [73]

The Compact Commission notes further that the WIC program,[74] along with the School Lunch Program,[75] provides a buffer to assist low income consumers with increases in the retail cost of milk that might occur.[76] In view of the existence of these programs, and given the current market picture presented by the data and analysis as a whole, the Commission determines that the adverse comment does not establish the need for elimination of the price regulation.

Reasonable Rate of Return to the Distributor

With regard to the ''price necessary to yield a reasonable rate of return to the distributor,'' Compact, Section 9(e), the Compact Commission has previously determined that ''[t]he focus of this inquiry is the determination of a price that ensures a reasonable rate of return,'' and, more specifically, ''whether processing plants are currently covering costs of production,'' including the distributors' rate of return on capital. 62 FR 23045.

Working from this framework, the Compact Commission sought and received comment on wholesale costs and prices. The data received persuaded the Compact Commission to conclude that processors are in fact covering their margins, including a return on capital of $0.06 per gallon.[77] The Compact Commission further determined that ''minimization of such persistent fluctuations in price can only serve as a benefit to stability of firm participants in the wholesale market.'' 62 FR 29635.

The Compact Commission hereby reaffirms the resulting determination that the benefits of price stabilization [78] in the wholesale market parallel the benefits of price stabilization at the farm level, namely, allowing processors to engage in long-term economic planning and investment, and thereby improve their economic efficiency and performance. *Id.*

Broadened Inquiry Under Compact Section 9(e)

As indicated in the introduction to this finding section, the Compact Commission determined under the prior rulemaking that the ultimate finding required by Section 12 of the Compact—whether ''the public interest will be served by the establishment of minimum milk prices to dairy farmers''—necessitated consideration of a broader range of subjects and issues than those specifically delineated by Section 9(e) of the Compact. Accordingly, the Compact Commission sought comment regarding the potential impact of price regulation on each of the farm, wholesale and retail sub-markets which comprise the overall market for fluid milk. 62 FR 23042. These inquiries were broken down further into the individual components of these respective sub-markets, including some of the components specifically listed in Section 9(e) of the Compact, as discussed above. This broad-ranging inquiry, focusing on all phases of the fluid milk market, allowed the Compact Commission to gather substantial data and make an informed determination that an over-order price regulation would be in the public interest, overall, and with regard to its specific impact on each of the three discrete sub-markets—farm, wholesale and retail. 62 FR 23048–50. For purposes of completeness, the Compact Commission's conclusions with regard to the wholesale and retail submarkets are again expressly presented, along with analysis of relevant comment received as part of this rulemaking process.[79]

Wholesale Sub-Market—The Compact Commission assessed the impact of price regulation on the wholesale market by considering the issue of rate of return to processors, as discussed above, (62 FR 23045), and by assessing whether price regulation would result in market distortion with regard to wholesale price and thereby contravene the public interest. 62 FR 23048. In assessing the concern with market distortion, the Compact Commission carefully reviewed present patterns of supply for the region's wholesale needs. The Compact Commission determined that the wholesale market presently is supplied almost totally in the form of raw, bulk product transported from areas of concentration of dairy farms in the rural part of the region to the fluid processing plants located in close proximity to the region's cities. 62 FR 23045. The Compact Commission also determined that the marginal, remainder of the wholesale market is supplied by finished, packaged milk transported from processing plants located some distance away from the region's cities. *Id.*

With regard to the primary bulk supply component of the wholesale market, the Compact Commission determined that there was unlikely to be market distortion caused by price regulation that could adversely affect the wholesale price. According to the comment received in the previous rulemaking, present patterns of raw product supply between processors and independent farmers or cooperative organizations of farmers are relatively stable and are unlikely to be affected by a regulated price increase in the amount and for the duration established by the price regulation. 62 FR 23048.

The Compact Commission also concluded that price regulation was unlikely to cause market distortion with regard to the secondary packaged product component of the market. The concern here is whether price regulation can be administered uniformly with regard to raw product and, as identified and addressed in the current rule, packaged milk supplies. If a significant portion of the packaged milk supplies is left unregulated, this might distort the market by creating a competitive advantage for such packaged products, encouraging their substitution as a source of wholesale supply. 62 FR 23048. Given that packaged milk as

[73] De Geus and Gillmeister, infra.

[74] The WIC reimbursement provisions remain in effect as part of this extended price regulation.

[75] Pub.L. 79–346 and Pub.L. 89–642; see also: 62 FR 29637 (May 30, 1997).

[76] The Commission takes official notice that the Massachusetts WIC Program guidelines show program eligibility at 185% of the federal poverty level. Under the guidelines, a family of four is eligible at an income of $29,639 per annum or $572 monthly.

[77] The comment received and used for this analysis included a study by R. Aplin, E. Erba, M. Stephenson, ''An Analysis of Processing and Distribution Productivity and Costs in 35 Fluid Milk Plants,'' February 1997, R.B. 97–03, Cornell University, and an extract by the same authors, entitled ''Presentation at IDFA Annual Meeting in Dallas, Texas (October 1996). (This extract provides ''estimated costs of marketing 2% lowfat milk through supermarkets, New York Metro Area, $ per gallon, 1995). In comment received on the proposed rule, Professor Aplin indicates that the extract was based on identified costs of the northeast plants that were part of the broader, overall study group. The Commission also relied upon a study by the Economic Research Service (ERS) of the United States Department of Agriculture, Food Cost Review/AER–729. The Commission found the Aplin et al. study more representative, given its identified inclusion of a significant percentage of northeast plants. Moreover, the ERS study incorporated data drawn from vertically integrated, or combined, processing/retailing facilities. The Compact region only includes one such operation.

[78] See: footnote 64, supra.

[79] As in the prior rulemaking, the impact on the farm submarket is presented under the inquiry mandated by the farmer/supply finding.

wholesale supply is more expensive than raw product supply, such substitution resulting from market distortion would increase retail prices and be contrary to the public interest.

The Compact Commission concluded that raw product and packaged product supplies could be regulated uniformly and that such uniform regulation will prevent market distortion, including indirect impact on price. (The basis for this conclusion was presented under the third finding analysis of the prior rulemaking. 62 FR 29637)

The comment received in the present rulemaking initially confirms the Compact Commission's assessment that the price regulation would not adversely affect the relatively stable market patterns of the wholesale sub-market. As presented in the next finding analysis, the Commission received and has responded in detail to comment received indicating the need for marginal adjustment in the operation of the price regulation in the wholesale market. Such comment indicating the need only for marginal adjustment confirms that the regulation has not had such an anomalous impact on the marketplace so as to require its elimination. At the same time, the Compact Commission reaffirms the need to continue to monitor comprehensively the regulation's impact on this sub-market, as detailed in the prior rulemaking. The Commission is in process of implementing the tracking mechanism necessary to conduct the required monitoring established by the prior rulemaking.

Retail Sub-Market—With regard to the retail market, the Compact Commission concluded in the prior rulemaking that price regulation was likely overall to have a positive impact on ''the purchasing power of the public'' within the meaning of Compact Section 9(e), and thereby to be distinctly in the public interest. See 62 FR 23048. (The Commission's underlying conclusion, that stabilizing the milk supply and removing variability in the federally regulated, farm/wholesale, pricing structure would likely combine to have a positive, downward impact on retail prices is explained in further detail at 62 FR 23048–50.) As noted above, the Commission has reaffirmed this conclusion in view of the comment received with regard to retail prices.

In the prior rulemaking, the Compact Commission also made a further determination of the potential, positive impact of price regulation with regard to the broader, consumer-based market. More specifically, the Commission concluded that price regulation will not have a negative impact on government supplemental nutrition programs such as the National School Lunch Program. The Commission made this further determination based on its assessment that the pricing patterns of such programs were premised on essentially the same competitive patterns of the broader, consumer-based market. See 62 FR 23050. Citing a General Accounting Office description of the program, the Commission noted in its proposed rule:

> The National School Lunch Act of 1946 (Pub L. 79–396) and the Child Nutrition Act of 1966 (Pub L. 89–642) authorize USDA to reimburse state and local school authorities—under grant agreements—for some or all of the costs of these programs. Reimbursements are based on either the number of meals served or the number of half pints served. The schools use these funds, as well as state and local funds and moneys collected from students, to purchase food, including milk, for these programs. These purchases are made through either sealed bid or negotiated procurements. USDA's regulations require that these procurements be conducted in a manner that provides for the maximum amount of open and free competition.[80]

The Compact Commission reaffirms this understanding of the expected interplay between the price regulation and the School Lunch Program. Given the critical concern with the potential impact on such supplemental food nutrition programs, and in view of the comment received on this issue, the Commission determines it appropriate to establish a Task Force pursuant to Article VII. D. of the Compact Commission's Bylaws to assess more closely the regulation's actual and potential impact on the School Lunch programs. The Task Force shall report back to the Commission at its regularly scheduled meeting for February, 1998. Based on the Committee's assessment of the impact of the Compact over-order price regulation, it shall make recommendations as to whether the region's School Lunch Programs should receive reimbursement for some or all of any increased costs attributable to the price regulation and, if so, the method for reimbursing the appropriate local authorities.

Price Regulation and the WIC Program

The Compact Commission did determine in the prior rulemaking that pricing and reimbursement patterns for one government supplemental nutrition program, the WIC Program, are not configured according to the same pattern as the broader consumer-based retail market. 62 FR 23050; 29637. Accordingly, the Commission exempted the WIC program from operation of the price regulation. *Id*. at 23050–53; 29637.

Two of the State WIC Program Directors submitted comment in support of extending the provisions in the current rule for reimbursing State WIC Programs for their costs incurred as a result of the Compact over-order price regulation.[81] The current rule includes a formal agreement between the Compact Commission and the six State WIC Programs that governs the terms of the reimbursement program. The Compact Commission herein extends that agreement for the effective period of the rule.

About the WIC Program

The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is a unique health and nutrition program serving women and children with—or at risk of developing—nutrition-related health problems. WIC provides access to healthcare, free nutritious food, and nutrition information to help keep low to moderate income pregnant women, infants and children under five healthy and strong. The Program provides a monthly ''prescription'' for nutritious foods tailored to supplement the individual dietary needs of each participant. Milk and other dairy products play a large and important role in every participant's food package.

The WIC Program is a Federally funded program carried out according to provisions of the Federal Child Nutrition Act. The Program is funded through the Food and Consumer Service of the United States Department of Agriculture (USDA) and administered on the local level by State WIC Programs in the Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont State Departments of Public Health (the States). Additional state funds are also provided in Massachusetts. Participants are issued WIC checks or vouchers at local agencies for WIC authorized foods. The checks or vouchers—which do not have a predetermined value—are redeemed at authorized retail stores at current store prices in accordance with posted prices. Prepayment edits are performed on each check to ensure that specific food

[80] GAO Report 13–239877 at 2 (October 16, 1992), submitted by Jeffords as Additional Reply Comment, April 9, 1997; See also 62 FR 23050.

The Commission further notes that the purchasing patterns of other institutional buyers such as the military and hospitals, as described in the GAO study similarly mirror the broader, competitive market. The Commission concludes that these institutional buyers will also benefit from the impact of price regulation on the competitive market.

[81] Mary Kelligrew Kassler, Director of the Massachusetts WIC Program, WC; Jadwiga Goclowski, Division Director/State WIC Director, Department of Health, State of Connecticut, WC.

purchasing, pricing and payment requirements are met.

Because WIC is not an entitlement program and has a capped program appropriation, any increase in food costs results in fewer women and children being served. It is imperative, therefore, that WIC's funds be held harmless from any adverse impact due to a Regulation. While the Compact Commission has again concluded that price regulation should have a ''positive impact'' on retail markets, it has also found that the market is presently adjusting to the price regulation with an as-yet indeterminable, overall, actual outcome. In order to ensure that WIC funds are held harmless, it is necessary to extend the reimbursement procedure during the effective period of the Compact over-order price regulation.

Continuing Assessment of Impact

The Compact Commission, in its current rule, provides for continuous monitoring and analysis of Class I fluid milk retail price data in order to accurately assess and evaluate any regulation-related adverse or beneficial impact on costs to consumers and WIC, and to make related adjustments to assure that the public interest is served and consumers and the WIC Program and its participants are protected. The Compact Commission, under this rule, will continue to monitor and analyze information at both the New England Regional and individual State levels—including each State's WIC programs—comprising representative samples of market areas and retail store types, proportion of sales by package size, and degree to which retail price fluctuations differ for package sizes in relation to each other.

WIC Reimbursement System

Given that State WIC Programs have a September 30th fiscal year end, the Compact Commission can not make the Program whole after the fact. WIC must operate in a funding ''limbo'' between October and January when its State Program grants are announced. Uncertainty regarding the potential effect of price regulation, or reimbursements to States made by the Compact Commission at a later date, would force State WIC managers to lower first quarter participation levels. The State WIC Programs have proposed and the Commission has agreed to a method by which the WIC Program will be held harmless from any impact related to a demonstration of a Compact Over-Order Price Regulation for Class 1 fluid milk. The Commission will reimburse each respective State WIC Program. The amount of reimbursement will be based on a formal agreement to be entered into by the Compact Commission and the six New England State WIC Program Directors, as approved by the Food and Consumer Service of the USDA. Under the agreement, the reimbursement amounts will be based on: (1) The quantities of milk purchased with WIC checks and (2) the amount of any Compact Over-Order Price Regulation.

The Compact Commission has also made provision for continuing monitoring and analysis of retail and wholesale prices for fluid milk. Should there be continuing adverse impacts on consumers, in general, and low income consumers, in particular, the Commission will be able to react.

Impact on Retailers

Finally, the Compact Commission reaffirms its prior determination that price regulation does not and will not likely have an adverse impact on the retailers, themselves. In summary: in similar manner as with its assessment of the wholesale market in the prior rulemaking, the Commission reviewed retail costs and prices to determine if retailers are covering costs, including return on capital, under present market conditions. 62 FR 23045, 23046–48. The Compact Commission concluded that such margins are presently being covered, and that price regulation will not adversely affect the ability of retail outlets to continue to cover their margins. *Id*. at 23048.[82]

Public Interest Finding—Summary Analysis

Based on this analysis under Compact section 9(e) and the broader market-wide analysis, the Compact Commission concludes that continuing the price regulation in the amount of $16.94 for the period January 1, 1998 through termination of the Compact enabling legislation will ensure the ''public interest'' is served in the manner contemplated by the finding analysis under Compact section 12(a)(2). The Compact Commission concludes the current price regulation has begun to achieve its intended purposes of price stabilization and limited price enhancement for producers without distortion of downstream wholesale and retail markets. While the actual impact on the downstream markets cannot yet be determined comprehensively, the data and comment presented indicate that at worst only marginal adjustments are necessary and that at best the regulation may be serving its intended purpose of having a positive, downward pressure on retail prices. Extension of the regulation in substantially similar form will continue its function as a limited market adjustment which again accounts for its potential impact on all levels of the market, from farm to retail, including the benefits of market stability.

As noted throughout the analysis under this and the previous finding section, the Compact Commission has again considered and accounted for the variety of potential market impacts in fashioning this extension of the price regulation. The Commission remains concerned with its potential, adverse impact on the wholesale market, as well as with regard to unanticipated impacts on consumer prices.

While the Compact Commission has concluded that the regulation has not and is not likely to adversely affect the wholesale market and may well, indeed, have a positive impact on retail prices, the Commission will ensure comprehensive monitoring of these market functions. The Commission has also determined that it will commence a rulemaking proceeding, pursuant to section 11 of the Compact, no later than July 1, 1998 during which it will make an assessment of, among other issues, the data and analysis received as a result of its tracking analysis.

As a final safeguard against unanticipated, adverse consequences, the Commission has again acted to ''hold harmless'' the WIC Program by reestablishing the reimbursement provisions for all New England State WIC Programs, despite the Commission's conclusion of the remoteness of there occurring unanticipated, adverse consequences in the retail market. Finally, as a new element of this monitoring procedure adopted under the previous rulemaking, the Commission will establish a Task Force to assess the specific impact of the regulation on the region's School Lunch Programs and to determine whether it is appropriate to establish some form of reimbursement for these programs.

[82] The comment received and used for the cost analysis relied upon the study by Aplin et al, ''An Analysis of Processing and Distribution Productivity and Costs in 35 Fluid Milk Plants'', February 1997, R.B. 97–03, Cornell University and the extract by the same authors, entitled ''Presentation at IDFA Annual Meeting in Dallas, Texas (October 1996). (This extract provides ''estimated costs of marketing 2% lowfat milk through supermarkets, New York Metro Area, $ per gallon, 1995). In comment received on the proposed rule, Professor Aplin indicates that the represented supermarket costs were representative of New England supermarkets, as well. The Commission notes that these studies focus on supermarket costs. Supermarkets represent the primary retail outlet for fluid milk in the marketplace. According to the Aplin study, retail cost, with return is $2.12 per gallon.

C. Whether the Major Provisions of the Order, Other Than Those Fixing Minimum Prices, Are Reasonably Designed To Achieve the Purposes of the Order

The third provision of section 12(a) of the Compact requires that the Compact Commission determine whether the non-price provisions of the proposed rule would also be in the public interest, and, based on the record before it, the Commission so finds. The Commission's assessment focuses on two conditions: assurance that the regulation does not create an incentive for dairy farmers to produce additional, surplus supplies of milk, and second, the Commission's regulation is uniform and equitable and does not unduly distort traditional markets and marketing channels. The Compact Commission finds that both conditions are met by the final rule, as amended from the proposed rule.

Based on their individual farm or cooperative experience with production over the period January through August, 1997, several commenters[83] indicated that the price regulation had not created an incentive for dairy farmers to produce additional, surplus supplies of milk. They indicated that production for either their farm or their cooperative was roughly the same in 1997 for the 8 month period as for the same period in 1996.[84] One dairy farmer indicated that in his experience, it is low prices that cause the farmer to produce more milk in order to meet the monthly fixed commitments for farm expenses.[85] Similarly, another commenter indicated that the over-order producer price would likely not be an incentive for increased production because the farmer will have a better cash flow under the regulation and can avoid the extra costs of increasing production with additional cows or other strategies.[86]

Two commenters[87] based their opinion that the regulation will not elicit increased production on an analysis of the interactive effect of the compact over-order price when applied in complement to the Basic Formula Price (BFP) of the federal Milk Market Order #1. Because the current compact over-order price of $16.94 establishes a partial floor price to the producer, the supply and demand in the New England milkshed, the farmer receives appropriate economic signals about the amount of production called for by the market. They independently conclude that this mechanism provides a more stable price for the producer while allowing the natural mechanisms of the marketplace to influence supply and demand.

The joint submission of Renee De Gues and William Gillmeister, both dairy economists for the Vermont and Massachusetts Departments of Agriculture, respectively, indicates that, based on reported data, production levels in the region have not changed dramatically since the Final Rule was implemented on July 1, 1997. Based on the data they submitted, they conclude that ''the Compact is not stimulating production in New York and Pennsylvania because from July through September, milk production in those states seems to have matched milk production patterns for the U.S.'', as a whole. Receipts for New York and New England, while up over the same period in 1996, were normal when compared to 1994 and 1995. In their joint submission, they report that receipts from New York, Vermont and Connecticut increased by 0.6%, 0.17%, and 3.5%, respectively, from July to August, 1997. Receipts from Maine, Massachusetts, New Hampshire, and Rhode Island fell by 1.6%, 2.1%, 1.4%, and 2.4%, respectively, from July to August, 1997. Moreover, production levels were considerably below the average increase in the national production.[88]

The Compact Commission notes that the Commodity Credit Corporation (CCC) made no purchases of surplus milk in the region during fiscal year 1996 or 1997.[89] The Commission established a monitoring plan in the May 30, 1997 Final Rule that will track regional and national rates of production to determine whether the regional rate of increased production is within 0.25% of the national rate of increased production. If New England production levels do increase within this range, then for each such month, the Commission will estimate the potential cost of CCC surplus purchases of surplus which might occur should the rate of regional increased production exceed the national rate. The Commission will retain a portion of the proceeds of the price regulation sufficient to cover such estimated costs, as necessary. See 62 FR 23054. In this rulemaking, the Commission determines that the tracking procedure and the plan for paying CCC for any surplus purchases are still the most viable and reasonable method for dealing with any increased production in the region.

On the basis of this record, the Compact Commission concludes that neither additional supplies nor surplus production has occurred to date nor does it expect any to occur under an extension of the Compact over-order price regulation. The Commission will continue the tracking procedures established under the current regulation to monitor production, so as to allow appropriate action should an unanticipated change in production patterns occur. 62 FR 23054. Pursuant to section 9(f)[90] of the Compact, the Commission finds that it is not now necessary to take any action to ensure that the over-order price does not create an incentive for producers to generate additional supplies of milk. If the monitoring procedures indicate the need for such action, the Commission will take the necessary and feasible action, as appropriate, to reimburse the Commodity Credit Corporation for any purchases of resulting surplus supplies.[91]

One commenter[92] suggested an amendment to the codified regulations that would establish a method for assessing pro rata all pooled producers for a three month period for the purpose of any retroactive payment to the Commodity Credit Corporation for surplus purchases. The Commission's response is that, should payments at the end of the fiscal year to the commodity Credit Corporation be necessary and appropriate, the entire producer pool ought to bear those costs, when incurred. This mechanism provides an added disincentive for over-production

[83] Leon Berthiaume, St. Albans Coop., PH at p. 63 and WC; Sally Beach, IDA, PH at p. 85; Douglas Carlson, dairy farmer, PH at p. 102; David Jaquier, dairy farmer, PH at p. 137; Norma O'Leary, Ct. Farm Bureau, WC; Carl Peterson, dairy farmer, PH at p. 70; Robert Wellington, AgriMark Coop., PH at p. 111 and WC.

[84] Berthiaume indicated in his testimony, PH at p. 59–64 that production for St. Albans Cooperative was the same for January through June, 1997 as it was for the same period in 1996. It increased 1% in July, 1997 and 2.3% in August, 1997, well below the average increase in the 20 largest dairy states which was 5% and 4.4%, respectively.

[85] Peterson. PH, p. 70.

[86] Wellington, WC. In his written comment, he also made the point that farm prices regularly below the costs of production will not themselves generate any long-term additional supplies of milk.

[87] Smith and Wellington. *op. cit.*

[88] Leon Graves, Commissioner, Vt. Dept. of Agriculture, Food and Markets, WC.

[89] Wellington, WC.

[90] When establishing a compact over-order price, the commission shall take such action as necessary and feasible to ensure that the price does not create an incentive for producers to generate additional supplies of milk.'' Compact. section 9(f).

[91] ''Before the end of each fiscal year that a Compact price regulation is in effect, the Northeast Interstate Dairy Compact Commission shall compensate the Commodity Credit Corporation for the cost of any purchases of milk and milk products by the Corporation that result from the projected rate of increase in milk production for the fiscal year within the Compact region in excess of the projected national average rate of the increase in milk production, as determined by the Secretary [of Agriculture].'' 7 U.S.C. 7256(6).

[92] Leon Berthiaume, WC.

by the pool producers appropriate under Section 9(e) of the Compact.

The inquiry on the second condition centers on the technical provisions, currently codified in 7 CFR parts 1300, 1301, and 1303–1307. These provisions establish the definitions and procedures for the assessment of price regulation collection from processors and disbursements to producers. The Commission finds, generally, that these provisions continue to ensure uniform and equitable administration of the price regulation. The provisions continue to be patterned closely upon the underlying federal Milk Market Order #1, as they were when adopted on May 30, 1997. 62 FR 29637. They are designed to and have, in fact, worked since July 1, 1997 in complement to the Market Order with the direct, technical assistance of the Market Order #1 Administrator's office.

In response to the Compact Commission's proposal to extend and amend generally the current provisions of the regulation, a number of comments were received at both the public hearing and in later written submissions. To allow later written comment on a number of technical administrative issues, the Compact Regulation Administrator[93] suggested in his testimony at the September 24, 1997 public hearing, that an additional criteria be added to 7 CFR 1301.11(b), relating to qualifying as a producer under the regulation, to include having moved milk into the regulated area for more than half the days during December of 1997. The current rule provides that any dairy farmer who moved milk into New England in December of 1996 for over half of the days on which he or she shipped milk qualified for the over-order producer price. This reflects the traditional parallel provision of the federal Milk Market Order for qualifying for pooling during a specific time period of each year.[94] Those who qualify during this specific period have demonstrated that they are traditionally associated the regional milkshed. The Commission finds it reasonable and consistent to provide a parallel one month qualifying period for December of 1997 added to December of 1996. It, therefore, amends 7 CFR 1301.11(b) to insert ''and December 1997'' after December, 1996 in the current regulation.

The same commenter also suggested that 7 CFR 1301.11(b) be further amended by adding a provision that would limit the total amount of milk at a pool plant eligible to qualify out of region producers to the total bulk receipts of fluid milk products less the total bulk transfers of fluid milk products (not including bulk transfers of skimmed milk and condensed milk).

The principal criterion for qualifying a producer for the over-order producer price is whether the farmer has committed to supply the Compact area milkshed. Out of area producer milk being shipped into a Compact area pool plant and then transferred out of the plant for distribution outside of the regulated area does not meet that criteria. The commenter noted that, under the current version of this section, milk could be shipped into a pool plant only to qualify the producer for the Compact over-order producer price. The Commission finds that the suggestion deals adequately with this problem and is consistent with the principal criteria for producer qualification of a demonstrated commitment to supply the New England milkshed. There are, however, additional problems associated with this suggested provision.

Another commenter[95] advocated that the current rule not be amended and that the current treatment of plant diversions be left in place, to parallel the treatment under the federal Milk Market Order. He pointed out that plant diversions are part of everyday life in all regions of the country and that these diversions are required by a variety of circumstances. A third commenter[96] pointed out that it would be unfair to penalize the out of area producers and prevent their qualification because business necessity at the plant required that producer's milk be transferred on any particular day. He suggested that ''reloading'' occurs for a variety of reasons, among which are varying seasonal demand and supply in the milkshed, and that a percentage limit on bulk milk transfers for purposes of qualifying out of region producers could solve the problem while not distorting normal business practice.

A dairy processor from New York[97] identified a somewhat related concern with regard to the current rules for qualified out of region producers whose milk is shipped to a pool plant in the regulated area with sales outside the regulated area in competition with the New York processor. According to the commenter, the New York processing facility must match the over-order producer price paid by the New England-based pool plant to qualified New York producers in order to assure maintenance of raw product supply. According to the commenter, this payment raises the New York processor's costs compared with the New England processing facility's costs.

This comment raises a similar concern to that presented with regard to bulk transfers, in that new milk is being pooled which is not traditionally associated with the pool for the regulated New England area. The Commission responds to this comment by amending the regulation to limit producer qualification in some instances with regard to milk utilized for sales outside the region. All out of region producers historically associated with the milkshed for the region, or those providing supply in December 1996 and 1997, will qualify on that basis. Newly supplying producers, however, will qualify only to the extent that their receiving plant has sales in the regulated region attributable to such new, additional, supply.

In recognition of the problem to which Ross's suggested amendment is addressed, to reflect the need to accommodate reloading as a current business practice for balancing milk supplies to fit consumer needs and available plant capacity, and to correct the problem pointed out by the New York processor, the Compact Commission adopts two new provisions in § 1301.11(b) which will:

(a) restrict a handler's ability to increase its out of region producer supply not traditionally associated with regulated area, by limiting the out of region producer qualification to only 10% of the milk received from those producers but subsequently reloaded and transferred in bulk for disposition out of the region; and will:

(b) provide for minimization or elimination of qualification of out of region producers whose milk is shipped to a pool plant that packages the milk for sale outside of the regulated area, solely for such sales.

To reflect the decisions of the Compact Commission to include these new provisions, 7 CFR 1301.11 (b) is amended as indicated *infra* in ''Codification in Code of Federal Regulations''.

One commenter[98] suggested that the five month qualifying period be reduced to 3 months to allow more out of region producers to take advantage of the over-order producer price. Another

[93] Carmen L. Ross, Compact Regulation Administrator, PH at pp. 44–55.

[94] Under the federal Milk Market Order #1 regulatory provisions, producers qualify who ship milk for over half of the days in July through August each year.

[95] Eugene Madill, CEO, Dairylea Coop., PH at p. 37.

[96] Wellington, PH at p. 109 and WC.

[97] Gary Dake, Vice-President, Stewart's Processing Corp., Saratoga Springs, NY, WC.

[98] Garry Warren, PH at p.126.

commenter,[99] however, advocated that the qualifying period remain at the five months required by the current provision. The Compact Commission's response to these comments is that the five month period is a reasonable measure of a producer's initial commitment to supply the New England milk pool. The Commission concludes that the current provision with the suggested amendments adopted above ensures equitable and uniform treatment of out of region producers. The Commission, therefore, will continue the current five month requirement in 7 CFR 1301.11(b).

A previous commenter[100] suggested another amendment to clarify the current regulation in 7 CFR 1304.5 dealing with the classification of milk. He suggested deleting the current provision at § 1304.5(a) and adding a new subsection (a) to clarify that fluid milk products which had been pooled at a New England pool plant and shipped to a partially regulated plant will be attributed only to the pool plant. This suggestion ensures that milk already subject to the Compact over-order obligation at the pool plant will not again be subject to the obligation at a partially regulated plant to which it is later shipped.

Although no double billing has occurred under the current provision, this clarification will ensure that it cannot happen. There was no comment opposing this suggestion.

The Compact Commission agrees that the current provision should be clarified to ensure uniform and equitable administration of the regulation. The Commission, therefore, adopts the amendment to delete the current language at 7 CFR 1304.5(a) and to replace it with a new subsection (a) as is indicated *infra* in ''Codification in Code of Federal Regulations.''

The Commission notes that the current codified provision at § 1305.1 establishing the Compact over-order Class I price does not include the dollar amount adopted by the Commission on May 30, 1997. Because of the need for clarity in the codified regulations, the Compact Commission amends that section to include reference to the new Compact over-order price of $16.94, as indicated *infra* in ''Codification in Code of Federal Regulations.''

The same commenter suggested that 7 CFR 1306.1 and 1306.2 be amended to establish a parallel exemption from regulation with that of the federal Milk Market Order #1 for any dairy processor who handles less than an average of 300 quarts per day. He points out that these limited amounts of milk should be excluded from the Compact pool as a *de minimus* exemption because of the relatively small amounts of the Compact over-order obligation and consequent producer price distribution. There was no further comment received on this suggestion.

The Compact Commission finds merit in the suggestion as a way to simplify administration of the regulation and to reflect the practice under the federal Milk Market Order system. The Commission, therefore, amends 7 CFR 1306.1 and 1306.2 as is indicated *infra*. ''Codification in Code of Federal Regulations.''

The same commenter pointed out that, in the notice of final rule,[101] the Compact Commission adopted the requirement of a formal agreement for a reimbursement system between the Commission and the State WIC Program directors, to be approved by the Food and Consumer Service of the USDA, that will ensure reimbursement of any additional costs incurred by those programs because of the over-order price regulation, the requirement was inadvertently omitted from the codification. In the same final rule notice, the Commission had also approved the establishment of a Commission reserve account for reimbursement of anticipated WIC Program costs.

As explained in the prior finding analysis, the Commission has reestablished and extended the WIC reimbursement system.[102] The Commission, therefore, amends 7 CFR 1306.3 to add a new subsection (b).

In addition, the Compact Commission notes that, although it adopted a mechanism for reserving funds to cover any costs to be reimbursed to the Commodity Credit Corporation for surplus purchases in its Proposed and Final Rule,[103] it did not include any provision in the codified regulations. To address that omission, the Commission amends 7 CFR 1306.3 further to add a new subsection (c) and to redesignate the remaining subsections to be (d) through (f), as indicated *infra* in ''Codification in Code of Federal Regulations.''

The same commenter also suggested changes needed to 7 CFR 1307.1 both to accommodate new references required by the above amendments and to correct the language. There was no additional comment on these suggestions. The Commission adopts these suggestions and amends 7 CFR 1307.1, as indicated *infra* in ''Codification in Code of Federal Regulations.''

The same commenter suggested changes to 7 CFR 1307.2 to clarify the intent and to delete subsection (c) which is not needed. There were no additional comments on this suggestion. The Compact Commission agrees with the comments and amends 7 CFR 1307.2 by deleting (c) in its entirety and amending (b) (1) and (2), as indicated *infra* in ''Codification in Code of Federal Regulations.''

This same commenter's last suggestion for changes to the codified provisions of the regulation was to amend 7 CFR 1307.4 to exclude milk at a partially regulated plant that was diverted from a pool plant, where it was already pooled for purposes of the Compact over-order price obligation. There was no additional comment on this suggestion. Because this amendment will ensure that the price obligation not be assessed twice on the same milk, the Commission adopts the suggestion and amends 7 CFR 1307.4(f), as indicated *infra* in ''Codification in Code of Federal Regulations.''

Another commenter[104] suggested an amendment to 7 CFR 1304.4(a)(ii) to avoid the assessment of the over-order obligation on a cooperative for bulk milk which the cooperative ships to other pool or partially regulated plants. He points out that under the current regulation the cooperative and its membership are financially responsible for the assessment for which the receiving plant is billed by the cooperative and which will ultimately be paid by the receiving plant. He suggests that it is more appropriate that the second processing plant be financially responsible than the farmer cooperative.

The Compact Commission's response is that the over-order price obligation is imposed on this particular cooperative as a processor operating a compact pool plant. It is a traditional technique of milk market regulation to impose the obligation on the pool plant that receives the milk from the producer. It is, therefore, appropriate that the cooperative continue to be responsible for the obligation as the operator of the receiving pool plant.

With these amendments to the current codified provisions of the price regulation, the Commission finds that the major provisions of the order, other than those fixing minimum prices, are reasonably designed to achieve the purposes of the order.

[99] Wellington, WC.

[100] Carmen L. Ross, Id.

[101] 62 FR 29630.

[102] See: Discussion of the WIC Programs, supra.

[103] 62 FR 23054 and 29638.

[104] Leon J. Berthiaume, WC.

Finally, the Compact Commission concludes that the administrative assessment of $0.032 per hundredweight of milk on all route dispositions of class I fluid milk in the territorial region of the six New England states should be extended in order to finance the budgeted costs for administration of the Compact Commission's regulations through the effective period of the rule. The Commission notes that the additional, start-up assessment of approximately $0.013 per hundredweight presently imposed will expire with final payment in December of 1997.

III. Required Findings of Fact

Pursuant to Compact Article V, Section 12, the Compact Commission hereby finds:

(1) That the public interest will be served by the continuation of minimum prices in the amount of $16.94 (Zone 1) to dairy farmers under Article IV for the period January 1, 1998 through termination of the Compact enabling legislation.

(2) That a level price of $16.94 (Zone 1) will assure that producers receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.

(3) That the major provisions of the order, other than those fixing minimum milk prices, are in the public interest and are reasonably designed to achieve the purposes of the order.

(4) That the terms of the proposed price regulation were approved by producers by referendum.[105]

[105] Section 13 of the Compact requires that the Commission conduct a referendum among producers and that, at least, two-thirds of the voting producers approved the regulation. A separate notice in the **Federal Register** certifies the results of the referendum pursuant to the following Referendum Approval Certification Procedure:

The Compact Commission resolves and adopts this procedure for certifying whether the price regulation adopted by this final rule has been duly approved by producer referendum in accordance with Compact Article V, section 12.

_____ is hereby designated as ''Referendum Agent'' and authorized to administer this procedure.

The designated Referendum Agent shall:

1. Verify all ballots with respect to timeliness, producer eligibility, cooperative identification, authenticity and other steps taken to avoid duplication of ballots. Verification of ballots shall include those cast individually by block vote. Ballots determined by the Referendum Agent to be invalid shall be marked ''disqualified'' with a notation of the reason for disqualification. Disqualified ballots shall not be considered in determining approval or disapproval of the regulation.

2. Compute and certify the following:

A. The total number of ballots cast.

B. The total number of ballots disqualified.

C. The total number of verified ballots cast in favor of the price.

D. The total number of verified ballots cast in opposition to the price regulation.

E. Whether two-thirds of all verified ballots were cast in the affirmative.

3. Report to the Executive Director of the Compact Commission the certified computations and results of the referendum under Section 2.

4. At the completion of his or her work, seal all ballots, including the disqualified ballots, and shall submit a final report to the Executive Director stating all actions taken in connection with the referendum. The final report shall include all ballots cast and all other information furnished to or compiled by the Referendum Agent.

The ballots cast, the identity of any person or cooperative, or the manner in which any person or cooperative voted, and all information furnished to or compiled by the Referendum Agent shall be regarded as confidential.

The Executive Director shall publish the certified results of the referendum in the **Federal Register**.

List of Subjects in 7 CFR Parts 1300, 1301, 1303–1307

Milk.

Codification in Code of Federal Regulations

For reasons set forth in the preamble, the Compact Commission amends title 7, chapter XIII, as follows:

PART 1301—DEFINITIONS

1. The authority citation for part 1301 continues to read as follows:

Authority: 7 U.S.C. 7256

2. In § 1301.11, paragraph (b) is revised to read as follows:

§ 1301.11 Producer.

* * * * *

(b) A dairy farmer who produces milk outside of the regulated area that is moved to a pool plant, *provided* that on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during December 1996 and December 1997, all of that milk was physically moved to a pool plant in the regulated area. *Or:* to be considered a qualified producer, on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during the current month and for five (5) months subsequent to July of the preceding calendar year, all of that milk must have moved to a pool plant, provided that the total amount of milk at a pool plant eligible to qualify producers who did not qualify in December 1996 and December 1997 shall not exceed the total bulk receipts of fluid milk products less:

(1) Producer receipts as described in paragraph (a) of this section and producer receipts as described in paragraph (b) of this section who are qualified based on December 1996 and December 1997;

(2) 90% of the total bulk transfers of fluid milk products (not including bulk transfers of skimmed milk and condensed milk) disposed outside of the regulated area; and

(3) 100% of packaged fluid milk products disposed outside of the regulated area.

* * * * *

PART 1304—CLASSIFICATION OF MILK

1. The authority for part 1304 continues to read as follows:

Authority: 7 U.S.C. 7256.

2. In § 1304.5, paragraph (a) is revised to read as follows:

§ 1304.5 Classification of producer milk at a partially regulated plant.

* * * * *

(a) Subtract from the total pounds of fluid milk products in Class I the pounds of fluid milk products in:

(1) Receipts of Class I fluid milk products from pool plants if reported and classified Class I by the pool plant;

(2) Disposition of Class I fluid milk products outside of the regulated area;

(3) Receipts of exempt fluid milk products pursuant to Section 1301.13 (a), (b), and (c) of this Chapter.

* * * * *

PART 1305—CLASS PRICE

1. The authority citation for part 1305 continues to read as follows:

Authority: 7 U.S.C. 7256.

2. Section 1305.1 is revised to read as follows:

§ 1305.1 Compact over-order class I price and compact over-order obligation.

The compact over-order Class I price per hundredweight of milk shall be as follows:

(a) The class I price shall be $16.94 per hundredweight.

(b) The compact over-order obligation shall be computed as follows:

(1) The compact Class I price ($16.94);

(2) Deduct Federal Order #1 Zone 1, Class I price;

(3) The remainder shall be the compact over-order obligation.

PART 1306—COMPACT OVER-ORDER PRODUCER PRICE

1. The authority for part 1306 continues to read as follows:

Authority: 7 U.S.C. 7256.

2. Sections 1306.1, 1306.2, and 1306.3 are revised to read as follows:

§ 1306.1 Handler's value of milk for computing basic over-order producer price.

For the purpose of computing the basic over-order producer price, the compact commission shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1301.9 (d) of the chapter with respect to milk that was not received at a pool plant, as directed in this section. Any pool plant that does not exceed a daily average of 300 quarts of disposition in the compact regulated area in the month shall not be subject to the compact over-order obligation. The total assessment for each handler is to be calculated by multiplying the pounds of Class I fluid milk products as determined pursuant to § 1304.1 (a) by the compact over-order obligation.

§ 1306.2 Partially regulated plant operator's value of milk for computing basic over-order producer price.

For the purpose of computing the basic over-order producer price, the compact commission shall determine for each month the value of milk disposition in the regulated area by the operator of a partially regulated plant as directed in this section. Any partially regulated plant that does not exceed a daily average of 300 quarts of disposition in the compact regulated area in the month shall not be subject to the compact over-order obligation. The total assessment for each handler is to be calculated by multiplying the pounds of Class I fluid milk products as determined pursuant to § 1304.1 (a) of this chapter by the compact over-order obligation.

§ 1306.3 Computation of basic over-order producer price.

The compact commission shall compute the basic over-order producer price per hundredweight applicable to milk received at plants as follows:

(a) Combine into one total the values computed pursuant to § 1306.1 and § 1306.2 of this chapter for all handlers from whom the compact commission has received at the Compact Commission's office prior to the 9th day after the end of the month the reports for the month prescribed in § 1303.1 and the payments for the preceding month required under § 1307.3 (a) of this chapter.

(b) Subtract 3% of the total value computed pursuant to paragraph (a) above for the purpose of retaining a reserve for WIC pursuant to the Formal Agreement for reimbursement of WIC Program costs entered into between the Commission and the six New England State WIC Program Directors, as approved by the Food and Consumer Service of the United States Department of Agriculture (USDA);

(c) In any month when the average percentage increase in production in the regulated area comes within 0.25 of the average percentage increase in production for the nation, subtract from the total value computed pursuant to paragraph (a) above, for the purpose of retaining a reserve, an amount estimated by the Commission in consultation with the USDA for anticipated costs to reimburse the Commodity Credit Corporation (CCC) at the end of its fiscal year for any surplus milk purchases. Should those funds not be needed because no surplus purchases were made by the CCC at the end of its fiscal year, it is to be disbursed as follows:

(1) Any producer who has received payment from a handler pursuant to § 1307.4 shall become eligible to receive a pro rata disbursement by submitting to the Commission documentation that the producer did not increase production of milk during and after the month on which the regional rate of production increase met or exceeded the national rate of production increase, as compared to the same period in the preceeding year. Such documentation shall be filed with the Commission not later than 45 days after the end of the fiscal year.

(2) The Commission shall calculate the amount of refund to be provided to each eligible producer by taking into account the total amount of retained proceeds, the total production of milk by all producers eligible for refunds, and the total amount of production by each eligible producer.

(d) Add an amount equal to not less than one-half of the unobligated balance of the producer-settlement fund at the close of business on the 8th day after the end of the month;

(e) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk;

(2) The total hundredweight for which a value is computed pursuant to § 1306.2(a); and

(f) Subtract not less than four (4) cents nor more than five (5) cents for the purpose of retaining a cash balance in the producer-settlement fund. The result shall be the basic over-order producer price for the month.

PART 1307—PAYMENTS FOR MILK

1. The authority citation for part 1307 continues to read as follows:

Authority: 7 U.S.C. 7256.

2. Sections 1307.1 and 1307.2 are revised to read as follows:

§ 1307.1 Producer-settlement fund.

(a) The compact commission shall establish and maintain a separate fund known as the *producer-settlement fund.* It shall deposit into the fund all amounts received from handlers under § 1307.3, § 1307.7, and § 1307.8 of this Chapter and the amount subtracted under § 1306.3(f). It shall pay from the fund all amounts due handlers under § 1307.3, § 1307.7, and § 1307.8 and the amount added under § 1306.3(d) subject to their right to offset any amounts due from the handler under these sections and under § 1308.1 of this chapter.

(b) All amounts subtracted under § 1306.3(f), including interest earned thereon, shall remain in the producer-settlement fund as an obligated balance until it is withdrawn for the purpose of effectuating § 1306.3(d).

(c) The compact commission shall place all monies subtracted under § 1306.3(b), 1306.3(c), and 1306.3(f) in an interest-bearing bank account or accounts in a bank or banks duly approved as a Federal depository for such monies, or invest them in short-term U.S. Government securities.

§ 1307.2 Handlers' producer-settlement fund debits and credits.

On or before the 15th day after the end of the month, the compact commission shall render a statement to each handler showing the amount of the handler's producer-settlement fund debit or credit, as calculated in this section.

(a) The producer-settlement fund debit for each plant and each cooperative association in its capacity as a handler under § 1301.9 (d) of this chapter shall be the value computed pursuant to §§ 1306.1 and 1306.2.

(b) The producer-settlement fund credit for each plant and each cooperative association in its capacity as a handler under § 1301.9 (d) shall be computed as specified in this paragraph.

(1) Multiply the quantities of producer milk that were reported by pool plants pursuant to § 1303.1 and the quantities or route disposition in the marketing area by partially regulated plants for which a value was determined pursuant to § 1306.2(a) by the basic over-order producer price computed under § 1306.3.

(2) For any cooperative association in its capacity as a handler under § 1301.9 (d), multiply the quantities of all producer milk reported pursuant to § 1303.1(c) by the basic over-order producer price computed under § 1306.3.

3. In § 1307.4, paragraph (f) is revised to read as follows:

§ 1307.4 Payments to producers.

* * * * *

(f) At a partially regulated plant each handler shall make payments, on a pro rata basis, to all producers and dairy farmers for milk (excluding diverted pool producer milk) received from them during the month, the payment received pursuant to § 1307.3 (b).

Daniel Smith,

Executive Director.

[FR Doc. 97–30602 Filed 11–24–97; 8:45 am]

BILLING CODE 1650–01–P

NORTHEAST DAIRY COMPACT COMMISSION

7 CFR Chapter XIII

Results of Producer Referendum

AGENCY: Northeast Dairy Compact Commission.

ACTION: Notice of referendum results.

SUMMARY: On October 23, 1997, the Northeast Dairy Compact Commission adopted, by final rule, an extension of the current over-order price regulation through the termination of the Compact enabling legislation,[1] which is published elsewhere in this issue of the **Federal Register.** To become effective, the extension of a price regulation must be approved by at least two-thirds of all producers voting by referendum. A producer referendum was held during the period of October 24 through November 12, 1997. The extension of the Commission's price regulation through termination of the Compact enabling legislation was approved by more than two-thirds of all producers voting in the referendum. This document discusses the referendum on the final rule and gives notice of the results.

ADDRESSES: Northeast Dairy Compact Commission, 43 State Street, P.O. Box 1058, Montpelier, Vermont 05601.

FOR FURTHER INFORMATION CONTACT: Daniel Smith, Executive Director, Northeast Dairy Compact Commission at the above address or by telephone at (802) 229–1941 or by facsimile at (802) 229–2028.

SUPPLEMENTARY INFORMATION: The Compact Commission was established under the authority of the Northeast Interstate Dairy Compact (''Compact''). The Compact was enacted into law by each of the six participating New England states as follows: Connecticut—Pub. L. 93–320; Maine—Pub. L. 89–437, as amended, Pub. L. 93–274; Massachusetts—Pub. L. 93–370; New Hampshire—Pub. L. 93–336; Rhode Island—Pub. L. 93–106; Vermont—Pub. L. 89–95, as amended, 93–57. Consistent with Article I, Section 10 of the United States Constitution, Congress consented to the Compact in Pub. L. 104–127 (FAIR ACT), Section 147, codified at 7 U.S.C. 7256. Subsequently, the United States Secretary of Agriculture, pursuant to 7 U.S.C. 7256(1), authorized implementation of the Compact.

Article V, Section 13(a) of the Compact provides that to ascertain whether a price regulation established by the Commission is approved by producers the Commission shall conduct a referendum among producers. Section 13(b) provides further that a price regulation shall be deemed approved by producers if the Commission determines that it is approved by at least two-thirds of the voting producers who, during a representative period, have been engaged in the production of milk subject to Commission price regulation. Section 13(c) directs the Commission to consider the approval or disapproval of any qualified cooperative association by block vote as the approval or disapproval of the producers who are members or stockholders in the cooperative association. Section 13(c)(4) provides that producers who are members of cooperatives may express their approval or disapproval of the order by ballot, contrary to the position taken by their cooperative, and the Commission shall then remove their vote from the total certified by the Cooperative.

By Final Rule, published in this **Federal Register**, the Commission adopted an extension of the over-order price regulation through termination of the Compact enabling legislation on October 23, 1997. The Final Rule includes specific findings of fact required under Section 12(a)(1)–(4) of the Compact. The following notice provides certification of the finding required under Section 12(a)(4), specifically: ''Whether the terms of the proposed regional order or amendment are approved by producers as provided in section 13.''

The Commission adopted the following resolution for certifying a referendum vote at its October 23, 1997 meeting:

Referendum Approval Certification Procedure

The Compact Commission resolves and adopts this procedure for certifying whether the Price Regulation adopted on October 23 has been duly approved by producer referendum in accordance with Article V, § 12 of the Northeast Interstate Dairy Compact.

The Compact Commission further resolves to designate and authorize a ''Referendum Agent'' to administer this procedure. The Referendum Agent shall:

1. Verify all ballots in accordance with Commission's requirements with respect to timeliness, Cooperative identification, producer eligibility, appearance of authenticity and other steps taken to avoid duplication of ballots. Ballots determined by the referendum agent to be invalid shall be marked ''disqualified'' with a notation of the reason for the disqualification. Disqualified ballots shall not be considered in determining approval or disapproval of the regulation. Verification of ballots shall include those cast individually and by block vote.

2. Certify the following:

a. The total number of ballots cast.

b. The total number of ballots disqualified.

c. The total number of verified ballots cast in favor of the price.

d. The total number of verified ballots cast in opposition to the price regulation.

e. Whether two-thirds of all verified ballots were cast in the affirmative.

3. Report to the Executive Director of the Compact Commission the certified computations and results of the referendum under Section 2, who shall publish such results in the **Federal Register**.

4. At the completion of his or her work, shall seal all ballots, including the disqualified ballots, and shall submit a final report to the Executive Director stating all actions taken in connection with the referendum. The final report shall include all ballots cast and all other information furnished to or compiled by the Referendum Agent.

The ballots cast, the identity of any person or cooperative, or the manner in which any person or cooperative voted and all information furnished to or compiled by the Referendum Agent shall be regarded as confidential.

The Commission hereby duly appoints Mae Schmidle as the Referendum Agent to act in accordance with the procedures adopted by this Resolution.

The Commission appointed Ms. Mae Schmidle, the Commission's Vice Chair as Referendum Agent. A referendum was held during the period of October 24 through November 12, 1997. All producers who were producing milk pooled in Federal Order #1 or for consumption in New England, during August of 1997, the representative period determined by the Commission were deemed eligible to vote. The mailing of ballots to eligible producers was completed on October 30, 1997 by the Federal Order #1 Market Administrator. The ballots included an official summary of the Commission's action. Producers were notified that, to be counted, their ballots had to be returned to the Commission offices by 5:00 PM on November 12, 1997.

Eleven Cooperative Associations were notified of the procedures necessary to

[1] U.S.C. 7256(3).

block vote by a letter dated October 24, 1997. Cooperatives were required to provide prior written notice of their intention to block vote to all members on a form provided by the Commission, and to certify to the Commission that (1) timely notice was provided, (2) the number of eligible producers for whom they claimed to be voting, and (3) that they were qualified under the Capper-Volstead Act. Cooperative Associations were further notified that Cooperative Association block vote reporting forms had to be returned to the Commission offices by 5:00 PM on November 12, 1997.

Notice

On November 13, 1997 the duly authorized referendum agent verified all Ballots according to procedures and criteria established by the Commission. A total of 4,178 ballots were mailed to eligible producers. All ballots and Block Vote Reporting Forms received by the Commission were opened and counted. A total of 3,560 producer ballots were returned to the Commission office. Ballots and Block Vote Reporting forms were verified or disqualified based on criteria established by the Commission, including timeliness, cooperative identification by cooperative members, producer eligibility, appearance of authenticity, appropriate certifications by cooperative associations and other steps taken to avoid duplication of ballots. Ballots determined by the referendum agent to be invalid were marked ''disqualified'' with a notation as to the reason. A total of 65 ballots were disqualified by the referendum agent.

The referendum agent then certified the following:

A total of 4,178 ballots were mailed to eligible producers.

A total of 3,560 ballots were returned to the Commission.

A total of 65 ballots were disqualified.

A total of 3,495 ballots were verified.

A total of 3,482 verified ballots were cast in favor of the price regulation.

A total of 13 verified ballots were cast in opposition to the price regulation.

Accordingly, pursuant to the Referendum Approval Certification Procedure resolution adopted by the Northeast Diary Compact Commission on October 23, 1997, I hereby provide notice that 3,482 of 3,495 verified ballots cast or 99.6% of all verified ballots cast were in favor of the price regulation, and that, therefore, greater than two-thirds of all verified were cast in the affirmative.

Daniel Smith,

Executive Director.

[FR Doc. 97–30600 Filed 11–24–97; 8:45 am]

BILLING CODE 1650–01–M

Federal Register

Tuesday
November 25, 1997

Part IV

Department of Education

34 CFR Part 668

Student Assistance General Provisions; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1840–AC36

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the Student Assistance General Provisions regulations (34 CFR part 668) to revise Subparts B and K and add a new Subpart L. These final regulations improve the Secretary's oversight of institutions participating in programs authorized by title IV of the Higher Education Act of 1965, as amended (title IV, HEA programs), by revising the standards of financial responsibility to provide a more accurate and comprehensive measure of an institution's financial condition. The regulations reflect the Secretary's commitment to ensuring institutional accountability and protecting the Federal interest while imposing the least possible burden on participating institutions.

DATES: *Effective dates:* These regulations take effect on July 1, 1998.

Applicability and Compliance Dates: The Secretary will apply the standards of financial responsibility established in these regulations to institutions that submit audited financial statements to the Department on or after July 1, 1998. However, affected parties do not have to comply with the information collection requirements in §§ 668.171(c), 668.172(c)(5), 668.174(b)(2)(i), 668.175(d)(2)(ii), 668.175(f)(2)(iii), and 668.175(g)(2)(i) until the Department publishes in the **Federal Register** the control number assigned by the Office of Management and Budget (OMB) to these information collection requirements.

FOR FURTHER INFORMATION CONTACT: For general information contact Mr. John Kolotos or Mr. Lloyd Horwich, U.S. Department of Education, 600 Independence Avenue, S.W., Room 3045, ROB–3, Washington, D.C. 20202, telephone (202) 708–8242. For information regarding accounting and compliance issues, an institution should contact the Department's Institutional Participation and Oversight Service (IPOS) Case Management Team for the state in which it is located:

IPOS Case Management Team Contacts

Boston Team, (617) 223–9338 (covering Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont)

New York City Team, (212) 264–4022 (covering New Jersey, New York, Puerto Rico and the Virgin Islands)

Philadelphia Team, (215) 596–0247 (covering Delaware, District of Columbia, Maryland, Pennsylvania, Virginia and West Virginia)

Atlanta Team, (404) 562–6315 (covering Alabama, Florida, Georgia, Mississippi, North Carolina and South Carolina)

Chicago Team, (312) 886–8767 (covering Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin)

Dallas Team, (214) 880–3044 (covering Arkansas, Louisiana, New Mexico, Oklahoma and Texas)

Kansas City Team (816) 880–4053 (covering Iowa, Kansas, Kentucky, Missouri, Nebraska and Tennessee)

Denver Team, (303) 844–3677 (covering Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming)

San Francisco Team, (415) 437–8276 (covering Arizona, California, Hawaii, Nevada, American Samoa, Guam, Federated States of Micronesia, Palau, Marshall Islands and Northern Marianas)

Seattle Team, (206) 287–1770 (covering Alaska, Idaho, Oregon and Washington).

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 standard time, Monday through Friday.

Individuals with disabilities may obtain a copy of this document in an alternate format (e.g. Braille, large print, audiotape, or computer diskette) by contacting Mr. John Kolotos or Mr. Lloyd Horwich.

SUPPLEMENTARY INFORMATION:

The following is an ordered list of the key topics covered in this preamble:

- Overview of the Standards and Provisions of Financial Responsibility.
- Community Involvement in the Regulatory Process.
- The Secretary's Responsibility for Assessing the Financial Condition of Participating Institutions.
- Need for Revising the Rules.
- The Final Rule.
- Provisions for Public Institutions.
- The Ratio Methodology for Private Non-Profit and Proprietary Institutions.
- Overview of the Methodology.
- Issues Raised in the Notice of Proposed Rulemaking and other Department Publications.
- Substantive Changes to the NPRM.
- Analysis of Comments and Changes.

On September 20, 1996, the Secretary published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) addressing a variety of topics, including a ratio methodology that would be used in part to determine whether an institution is financially responsible (61 FR 49552–49574). The NPRM also included financial responsibility standards for third-party servicers that enter into a contract with a lender or guaranty agency, and provisions for submitting financial statement and compliance audits, adding additional locations, and changes of ownership that result in a change of control (61 FR 49552–49574). On November 29, 1996, the Secretary published final regulations governing submissions of financial statement and compliance audits and other aspects of financial responsibility, but delayed establishing final standards regarding the ratio methodology and other proposed provisions (including changes of ownership and additional locations), pending further comment, study, and review (61 FR 60565–60577).

The Secretary provided an extensive opportunity for public involvement and comment on these final regulations. On December 18, 1996, the Secretary reopened the comment period until February 18, 1997 for the delayed standards and provisions (61 FR 66854). On February 18, 1997, the Secretary extended that comment period until March 24, 1997 (62 FR 7333–7334). On March 20, 1997, the Secretary again extended the comment period until April 14, 1997 (62 FR 13520).

These regulations establish under a new Subpart L the provisions and standards of financial responsibility that an institution must satisfy to begin or continue to participate in the title IV, HEA programs. Furthermore, these regulations amend certain sections of Subparts B and K to harmonize the requirements under those sections with the provisions and standards under Subpart L. As discussed more fully under Parts 4 and 15 of the Analysis of Comments and Changes, these regulations do not establish new standards of financial responsibility for lender or guaranty agency third-party servicers, or new provisions regarding additional locations and changes of ownership.

Overview of the Standards and Provisions of Financial Responsibility

As provided under section 498 of the HEA, the Secretary determines whether an institution is financially responsible based on the extent to which an institution satisfies three statutory components, which are illustrated below.

STATUTORY COMPONENTS OF FINANCIAL RESPONSIBILITY

Financial obligations (provisions for debt payments, refunds, and repayments)	Administration of the title IV, HEA programs (past performance and program compliance provisions)	Financial condition (ratio standards)
HEA sections 498(c)(1)(C)	HEA sections 498(c)(1)(B) and 498(d)	HEA sections 498(c)(1)(A)
The extent to which an institution: (1) Satisfies its obligations to students and to the Secretary, including making refunds to students in a timely manner and repaying program liabilities to the Secretary; and (2) Is current in its debt payments.	The extent to which an institution or the persons or entities that exercise substantial control over the institution administer properly the title IV, HEA programs.	The extent to which an institution has the resources necessary to: (1) Provide and to continue to provide the education and services described in its official publications; and (2) Continue to satisfy its financial obligations.

The current standards and provisions under 34 CFR 668.15 relating to an institution's financial obligations and administration of title IV, HEA programs are detailed in the above chart and carried forward in these regulations, under §§ 668.171 and 668.174, respectively. These regulations focus on establishing a ratio methodology that provides a comprehensive measure of the financial condition of proprietary and private non-profit institutions.

The current regulations employ three independent tests for assessing the financial condition of an institution, and require an institution to satisfy the minimum standard established for each of those separate tests to be considered financially responsible.

In contrast, these regulations employ a ratio methodology under which an institution need only satisfy a single standard—the composite score standard. Unlike the current tests that treat different measures of an institution's financial condition without reference to each other, the ratio methodology takes into account an institution's total financial resources and provides a combined score of the measures of those resources along a common scale (from negative 1.0 to positive 3.0). This new approach is more informative and allows a relative strength in one measure to mitigate a relative weakness in another measure.

Under these regulations, the Secretary considers a proprietary or private non-profit institution to be financially responsible based on its composite score. If an institution achieves a composite score of at least 1.5, it is financially responsible without further oversight. An institution with a composite score in the zone from 1.0 to 1.4 is financially responsible, subject to additional monitoring, and may continue to participate as a financially responsible institution for up to three years.

An institution that does not satisfy either the composite score or zone standards, or that fails to meet its financial obligations or satisfy other standards of financial responsibility, may be allowed to participate in the title IV, HEA programs by qualifying under the provisions of an alternative standard. The alternative standards are described under § 668.175 of these regulations and illustrated in the following table.

ALTERNATIVE STANDARDS

Alternative	Used when:	Provisions
Letter of credit [1] for a new institution	An institution that seeks to participate in the title IV, HEA programs for the first time does not satisfy the composite score standard but satisfies all other applicable standards and provisions.	The institution may begin to participate by submitting a letter of credit for at least 50 percent of the title IV, HEA program funds that the Secretary determines the institution will receive during its initial year of participation, as provided under § 668.175(b).
Letter of credit for a participating institution	A participating institution does not satisfy one or more of the standards of financial responsibility (including the composite score standard) or the institution's auditor expresses an adverse, qualified, or disclaimed opinion, or the auditor expresses doubt about the continued existence of the institution as a going concern.	The institution may continue to participate as a financially responsible institution by submitting a letter of credit for at least 50 percent of the title IV, HEA program funds the institution received during its last completed fiscal year, as provided under § 668.175(c).
Provisional certification	A participating institution: (1) Does not satisfy the composite score standard or any provision regarding its financial obligations; or (2) Has or had a program compliance problem as provided under § 668.174 but satisfied or resolved that problem.	The institution may participate under a provisional certification by submitting a letter of credit for at least 10 percent of the title IV, HEA program funds the institution received during its last completed fiscal year and meeting other provisions described under § 668.175(f).
Provisional certification for an institution where persons or entities owe liabilities.	The persons or entities that exercise substantial control over the institution owe a liability for a violation of a title IV, HEA program requirement.	The institution may continue to participate under a provisional certification if it satisfies the provisions described under § 668.175(g).

[1] A letter of credit is a financial instrument, typically issued by a commercial bank, whereby the bank guarantees payment to the Secretary for an amount up to the amount of the letter of credit.

A public institution demonstrates that it is financially responsible under these regulations by providing a letter from an official of the State or other government entity confirming the institution's status as a public institution.

Although the Secretary proposed to treat independent hospital institutions slightly differently under the ratio methodology, the Secretary now believes that any differences between these institutions and institutions in the other sectors relate primarily to control. Under these regulations, therefore, an independent hospital institution must satisfy the provisions of the ratio methodology established for a proprietary institution if it is a for-profit entity, or the provisions established for a private non-profit institution if it is a non-profit entity. If an independent hospital institution is a public entity, it must satisfy the requirements established for public institutions.

Community Involvement in the Regulatory Process

The Secretary sought to maximize the postsecondary education community's participation in this regulatory initiative. In developing the initial study on which the NPRM was based, the Department's contractor, KPMG Peat Marwick LLP (KPMG), consulted with a task force representing various sectors of the community. To ensure that the community was given sufficient time to analyze and comment on the proposed rules, the Secretary reopened the original comment period and then extended that comment period twice, so that the total comment period was 207 days. In response, the Secretary received approximately 850 comments during the original and extended comment periods.

Between December 18, 1996 and the publication of these final regulations, the Department took the following actions to supplement the original empirical work on which the NPRM was based, and to solicit questions, suggestions, and other comments regarding the proposed ratio methodology:

- The Department again engaged KPMG to assist the Department in reexamining the proposed ratio methodology, considering public comments and suggestions to change and improve the methodology, and conducting additional empirical studies of financial statements and other sources of information. Much of this additional work was based on suggestions made by the community.
- The Department held meetings with more than 20 representatives of higher education associations and institutions on February 5, 1997 and March 11, 1997, with nine representatives of proprietary institutions on February 27, 1997, and with four representatives of higher education associations and public institutions on April 4, 1997. The Department also conducted a number of other meetings with parties representing individual institutions or groups of institutions.
- For purposes of public consideration and comment, the Department published on the Office of Postsecondary Education's World-Wide Web site, minutes of the meetings with representatives of postsecondary education associations, information regarding possible changes to the proposed ratio methodology, and the results of some of the empirical studies. The Department also made available, for viewing on-line, the KPMG report on which the Department based the proposed ratio methodology.

Many commenters expressed their appreciation to the Secretary for the open, collaborative, and cooperative nature of this rulemaking process and for the extensive opportunities for public and community involvement. The Secretary in turn appreciates the commenters' thoughtful and constructive contributions to this process.

The Secretary's Responsibility for Assessing the Financial Condition of Participating Institutions

The statute and the legislative record show that Congress expects the Secretary to determine whether institutions participating in the title IV, HEA programs are financially sound and administratively capable of providing the education they advertise (Higher Education Amendments of 1992, Report of the Committee on Education and Labor, House of Representatives, One Hundred Second Congress, Second Session, p. 74). Congress authorized the Secretary (at that time, the Commissioner) to establish financial responsibility standards with the passage of the Education Amendments of 1976 (Pub. L. 94–482), and reinforced that authority in subsequent amendments to the HEA. In those amendments, but particularly in the legislative history leading to the 1992 Amendments, Congress made clear that the Secretary should scrutinize closely the financial condition of institutions with regard to their capacity to fulfill their educational and administrative responsibilities, and thus expected the Department to ''play a more active role'' in the gatekeeping process (i.e., determining whether institutions should begin to participate in the title IV, HEA programs and overseeing participating institutions to determine whether those institutions should continue to participate).

In keeping with the statute and congressional intent, the Secretary establishes in these regulations the standards and provisions that a postsecondary institution must satisfy to demonstrate that it is financially sound enough for students to confidently invest their time and money in programs offered by the institution, and for the Federal government, on behalf of taxpayers, to provide that institution with access to substantial amounts of public funds. The Department is committed to carrying out the Secretary's gatekeeping and oversight responsibilities in a manner that ensures accountability and program integrity but that provides as much flexibility to, and places as little burden on, institutions as possible.

Need for Revising the Rules

The current regulations have enabled the Department to identify and take action against many financially weak problem institutions that drew the attention of Congress. The Secretary nevertheless believes that problems still exist that call for continued close scrutiny, and undertook an extensive process to develop more effective regulations for the following reasons.

First, the Secretary believes that the standards need to be revised to provide a more comprehensive measure of an institution's financial condition. As previously noted, the current standards provide discrete measures of certain aspects of an institution's financial condition. Those aspects are measured by three independent tests—an acid test ratio, a test for operating losses, and a test of tangible net worth. However, because each test provides a measure of financial health without regard to the other tests or to other resources available to an institution, the assessment made under each of these tests does not always reflect the overall financial condition of an institution.

Second, because the current standards do not consider the extent to which an institution satisfies or fails to satisfy the tests, the Department cannot readily make distinctions among (1) institutions that are clearly not financially healthy, (2) institutions that are financially sound enough to participate in the title IV, HEA programs, and (3) institutions whose financial health is questionable. Consequently, a more considered approach is needed to evaluate the relative level of financial health of institutions to more closely tie the Department's gatekeeping and oversight efforts to the corresponding risk to the

Federal interest posed by institutions at various levels.

Third, the Secretary believes that the current standards must be improved to properly address the different accounting, financial, and operating characteristics that exist between proprietary and private non-profit institutions.

Finally, based on KPMG's original study and the additional analysis performed during the extended comment period, the Secretary is prepared to carry out a commitment made to representatives of the postsecondary education community in the context of the promulgation of the 1994 financial responsibility regulations, that instead of establishing independent tests, the Department would assess the institutions' financial responsibility based on blended test scores.

The Final Rule

Provisions for Public Institutions

The Secretary initially proposed to apply the ratio methodology to public institutions, but, based on public comment, the Secretary has decided not to use the methodology to determine the financial responsibility of those institutions for two primary reasons. First, these institutions are subject to more public oversight and scrutiny than private non-profit and proprietary institutions. The Secretary believes that it is the responsibility of the State or responsible government entity to make available the resources necessary for those institutions to provide the education and services expected by students who enroll at those institutions and the residents of the State or locality whose funds support the institutions. Second, the legal and financial relationships between public institutions and their respective State or local governments vary widely, impacting in different ways the assets and liabilities reported on those institutions' financial statements. Thus, the ratio methodology would not treat all public institutions equitably.

In view of these and other reasons noted by the commenters (see Analysis of Comments and Changes, Part 4), the Secretary does not establish in these regulations a composite score standard for public institutions. Rather, the Secretary will rely on the statutory alternative that, in lieu of satisfying the general standards of financial responsibility (including the composite score standard), a public institution is financially responsible if its debts and liabilities are backed by the full faith and credit of the State or other government entity. The Secretary will consider that a public institution has that backing if the institution provides a letter from the cognizant State or government entity confirming the institution's status as a public institution. The Secretary takes this approach in implementing the full faith and credit provision under section 498(c)(3)(B) of the HEA to eliminate technical and other problems experienced by public institutions in demonstrating their compliance with this provision under the current regulations.

The Ratio Methodology for Private Non-Profit and Proprietary Institutions

In developing the final regulations, the Secretary sought to address all of the needs for revising the current rules by formulating a ratio methodology, and provisions relating to the methodology, that would be fair, easily understood by institutions, and efficiently administered by the Department.

Based on the additional analysis performed by the Department and KPMG during the extended comment period, and the many helpful comments and suggestions made by the community, the Department establishes by these final regulations a ratio methodology for proprietary and private non-profit institutions that:

(1) Provides a comprehensive measure of financial health (the composite score) by using ratios that take into account all of the resources of an institution and employing an approach under which the financial strength demonstrated in one ratio mitigates a financial weakness in another ratio;

(2) Provides the Department the means to assess the relative health of all institutions along a common scale; and

(3) Takes into account the key differences between these sectors of postsecondary institutions.

In so doing, the ratio methodology enables the Department to use more effectively the case management system implemented by IPOS. Under this system, case teams responsible for particular institutions have access to all of the data available to the Department regarding those institutions, including financial, compliance, and programmatic information. The case teams use this information to identify institutions whose level of financial health, or whose conduct in administering the title IV, HEA programs, or both, indicates that those institutions (1) need technical assistance, (2) must be monitored more closely, or (3) pose a risk to the Federal interest that requires the Department to initiate an adverse action.

Furthermore, in the interest of treating all institutions fairly and equitably, the Department will calculate the ratios under the methodology by using only the information contained in an institution's audited financial statements that are prepared in accordance with generally accepted accounting principles (GAAP) and by removing the effects of questionable accounting treatments.

The Secretary is committed to ensuring a smooth transition and to helping institutions understand the ratio methodology and other provisions established in these regulations by offering technical assistance, both initially and as case teams identify institutions in need of further assistance.

Overview of the Methodology

The methodology is an arithmetic means of combining different but complementary measures (ratios) of fundamental elements of financial health that yields a single measure (the composite score) representing an institution's overall financial health. Under the methodology, the composite score is calculated by:

(1) Determining the value of each ratio;

(2) Calculating a strength factor score for each of the ratios;

(3) Calculating a weighted score by multiplying the strength factor score by its corresponding weighting percentage; and

(4) Adding together the weighted scores to arrive at the composite score.

In the first step of the methodology, the values of the Primary Reserve, Equity, and Net Income ratios are calculated from information contained in an institution's audited financial statement. These ratios together measure the five fundamental elements of financial health: financial viability, liquidity, ability to borrow, capital resources, and profitability. The strength factor scores are calculated using linear algorithms (equations) and those scores reflect along a common scale the degree to which an institution in a particular sector demonstrates strength or weakness in the fundamental elements. The weighting percentages for each of the ratios make it possible to compare institutions across sectors by accounting for the relative importance that the fundamental elements have for institutions in each sector. In the final step of the methodology, the weighted scores are added together. The resulting value, the composite score, represents an overall measure of an institution's financial health.

Each step of calculating the composite score under the ratio methodology is illustrated in Appendices F and G of these regulations and discussed more fully in the following sections.

Step 1: Financial Ratios

The methodology employs three ratios that measure the same elements of financial health but are customized to reflect the accounting differences between the sectors. The values of the ratios are determined from information contained in an institution's audited financial statement and are generically defined as follows:

For proprietary institutions:

$$\text{Primary Reserve ratio} = \frac{\text{Adjusted Equity}}{\text{Total Expenses}}$$

$$\text{Equity ratio} = \frac{\text{Modified Equity}}{\text{Modified Assets}}$$

$$\text{Net Income ratio} = \frac{\text{Income Before Taxes}}{\text{Total Revenues}}$$

For private non-profit institutions:

$$\text{Primary Reserve ratio} = \frac{\text{Expendable Net Assets}}{\text{Total Expenses}}$$

$$\text{Equity Ratio} = \frac{\text{Modified Net Assets}}{\text{Modified Assets}}$$

$$\text{Net Income ratio} = \frac{\text{Change in Unrestricted Net Assets}}{\text{Total Unrestricted Revenues}}$$

A detailed description of the components of the numerators and denominators of the ratios is provided under Appendix F of these regulations for proprietary institutions and under Appendix G for private non-profit institutions.

In view of the public comment and the empirical work performed by KPMG, the Secretary selected these ratios because together they take into account the total financial resources of an institution and provide broad measures of the following fundamental elements of financial health:

1. *Financial viability:* The ability of an institution to continue to achieve its operating objectives and fulfill its mission over the long-term;

2. *Profitability:* Whether an institution receives more or less than it spends during its fiscal year;

3. *Liquidity:* The ability of an institution to satisfy its short-term obligations with existing assets;

4. *Ability to borrow:* The ability of an institution to assume additional debt; and

5. *Capital resources:* An institution's financial and physical capital base that supports its operations.

In identifying these fundamental elements, the Secretary relied on KPMG's extensive experience in analyzing the financial condition of postsecondary institutions and the work of the community task force assembled to assist the Department and KPMG in developing the ratio methodology.

The *Primary Reserve ratio* provides a measure of an institution's expendable or liquid resource base in relation to its overall operating size. It is, in effect, a measure of the institution's margin against adversity. The Primary Reserve ratio measures whether an institution has financial resources sufficient to support its mission—that is, whether the institution has (1) sufficient financial reserves to meet current and future operating commitments, and (2) sufficient flexibility in those reserves to meet changes in its programs, educational activities, and spending patterns. Thus, the Primary Reserve ratio provides a measure of two of the fundamental elements of financial health—financial viability and liquidity.

The *Equity ratio* provides a measure of the amount of total resources that are financed by owners' investments, contributions or accumulated earnings, depending on the type of institution, or stated another way, the amount of an institution's assets that are subject to claims of third parties. Thus, the ratio captures an institution's overall capitalization structure, and by inference its ability to borrow. With respect to the fundamental elements of financial health, the Equity ratio measures capital resources, ability to borrow, and financial viability.

The *Net Income ratio* provides a direct measure of an institution's profitability or ability to operate within its means and is one of the primary indicators of the underlying causes of a change in an institution's financial condition.

A more thorough description of the ratios is provided under part 4 of the Analysis of Comments and Changes.

Step 2: Strength Factor Scores

The strength factor score reflects the degree to which an institution demonstrates strength or weakness in the fundamental elements as measured by the ratios. That strength or weakness is assigned a point value of not less than negative 1.0 nor more than positive 3.0, where a negative 1.0 indicates a relative weakness in the fundamental elements and a positive 3.0 indicates relative strength in those elements. The point values are assigned by a linear algorithm (equation) developed for each ratio.

For example, the linear algorithm for calculating the strength factor score for the Equity ratio of a proprietary institution is ''6 X Equity ratio result.'' A proprietary institution with an Equity ratio equal to -0.167 would have a strength factor score of negative 1.0 (6 X $-0.167 = -1.002$).

The linear algorithms developed for each ratio are contained in Appendix F for proprietary institutions and Appendix G for private non-profit institutions. The algorithms are explained in greater detail under Part 6

of the Analysis of Comments and Changes.

In developing the algorithms, the Department, having consulted with KPMG, determined the value of each ratio at three critical points along the scoring scale:

(1) The point at which an institution begins to demonstrate a minimal level of strength;

(2) The point at which an institution demonstrates no strength; and

(3) The point at which an institution demonstrates relative strength.

The algorithms were then constructed to yield, at these relative levels of financial health, strength factor scores of 1.0, zero, and 3.0, respectively. For example, as calculated under the algorithms, a strength factor score of 1.0 indicates that an institution has a minimal level of expendable reserves (Primary Reserve ratio), is just beginning to demonstrate equity (its assets are greater than its liabilities, but not by much) (Equity ratio), and broke even (Net Income ratio). A strength factor score of zero indicates that an institution has no expendable reserves or equity, and incurred a small loss. On the upper end of the scale, a strength factor score of 3.0 indicates that an institution has a healthy level of expendable reserves and equity (its assets are substantially greater than its liabilities) and generated operating surpluses that added to its overall wealth.

The Secretary considered carefully the comments made by the community regarding the proposed scoring scale and the impact of the proposed methodology on an institution's ability to satisfy its mission objectives. In view of these comments and the empirical work performed by KPMG during the extended comment period, the Secretary revised the scoring scale to make greater distinctions among institutions on the lower end of the scale and to consider more fairly the actual financial health of institutions as measured by the methodology. Since the strength factor scores reflect the degree to which an institution demonstrates strength or weakness in the fundamental elements as measured by the ratios, these scores enable the Department to assess the extent to which an institution has the financial resources to:

(1) Replace existing technology with newer technology;

(2) Replace physical capital that wears out over time;

(3) Recruit, retain, and re-train faculty and staff (human capital); and

(4) Develop new programs.

A more thorough discussion of the revisions to the scoring process and strength factor scores is provided under Part 6 of the Analysis of Comments and Changes.

Step 3: Weighting Percentages

The weighting percentages for each of the ratios make it possible to compare institutions across sectors by accounting for the relative importance that the fundamental elements have for institutions in each sector. For example, expendable resources (as measured by the Primary Reserve ratio) are more important to private non-profit institutions than to proprietary institutions—proprietary institutions generally have greater access to capital markets, and owners, unlike trustees, may invest cash as needed to support operations, or may increase expendable resources by leaving earnings in the institution. On the other hand, non-profit institutions are generally dependent on contributions from donors as their primary source of additional capital.

In this step of the methodology, the strength factor score is multiplied by a weighting percentage. For example, the weighting percentage for the Primary Reserve strength factor score of a proprietary institution is 30 percent. To determine the weighted score for a proprietary institution with a Primary Reserve strength factor score of 1.2, the institution would multiply 1.2 by 30 percent, for a weighted score of 0.36 (1.2 $\times$ 30 percent = 0.36).

The regulations revise the proposed weighting percentages to account for the effect of replacing the proposed Viability ratio with the Equity ratio and to reflect more accurately the importance of each ratio. These revisions, and the rationale for establishing the weighting percentages, are discussed more fully under Part 7 of the Analysis of Comments and Changes.

Step 4: Composite Score

In the final step of the methodology the weighted scores are added together to arrive at the composite score. Because the weighted scores reflect the strengths and weaknesses represented by the ratios and take into account the importance of those strengths and weaknesses, a strength in the weighted score of one ratio may compensate for a weakness in the weighted score of another ratio. Thus, the composite score reflects the overall financial health of an institution and provides a cardinal ranking of all institutions along a common scale from negative 1.0 to positive 3.0.

A sample calculation of a composite score is illustrated in the following chart.

CALCULATING A PROPRIETARY INSTITUTION'S COMPOSITE SCORE

Step 1 Calculate the ratio results	Step 2 Calculate strength factor score by use of the appropriate algorithm	Step 3 Calculate weighted score (multiply strength factor score by weighting percentage)	Step 4 [1]
Primary reserve ratio = .06	.06 $\times$ 20 = 1.20	1.20 $\times$ 30% = 0.36000	
Equity ratio = .27	.27 $\times$ 6 = 1.620	1.620 $\times$ 40% = 0.64800	
Net income ratio = .029	(.029 $\times$ 33.3) + 1 = 1.9657	1.9657 $\times$ 30% = 0.58971	

[1] Step 4: Add the weighted scores (=1.59771) and round the total of the weighted scores to one digit after the decimal point to arrive at the composite score = 1.6.

While institutions may achieve the same composite score in different ways (by having different ratio results), institutions with the same scores are similarly situated with respect to the resources that they can bring to bear to satisfy their obligations to students and to the Secretary.

The Regulatory Standard of Financial Responsibility

As noted previously, an institution must satisfy the standards and provisions under each component of financial responsibility. With respect to its financial condition, an institution must achieve a composite score of at least 1.5 (the composite score standard).

In determining the minimum composite score that an institution

would need to achieve to demonstrate that it is financially responsible, the Department, having consulted with KPMG, formulated the algorithms to establish the point along the scoring scale below which an institution is clearly not financially healthy, i.e., a composite score of 1.0. From that point, the Secretary determined the level of financial health that indicates that an institution has the resources necessary not only to continue operations, but to fund to some extent its mission objectives.

An institution with a composite score of 1.0 should be able to continue operations but does not have the financial resources to meet its operating needs without difficulty, or the financial reserves necessary to deal with adverse economic events without having to rely on additional sources of capital. Moreover, because it has very limited resources, the institution will have difficulty funding its technology, capital replacement, and program needs. Below this level, an institution will have even more difficulties, if not serious difficulties, in meeting its operating needs without additional revenue or support, and in funding any of its technology, capital replacement, human capital, or program needs.

A composite score of 1.5 generally characterizes an institution that has some margin against adversity, is funding its historical capital replacement costs, and has the resources to provide funding for some investment in human and physical capital. However, the institution has no excess funds to support new program initiatives or major infrastructure upgrades.

The composite score reflects the relative financial health of institutions along the scoring scale from negative 1.0 to positive 3.0. Stated another way, any given composite score along this scale reflects the degree of uncertainty that an institution will be able to continue operations and meet its obligations to students and to the Secretary; the uncertainty that an institution will be able to continue operations and meet its obligations increases as its composite score decreases. Thus, if the Secretary's sole aim for these regulations had been to accept the lowest level of uncertainty, only institutions achieving the highest composite score would be considered financially responsible. The Secretary notes that a significant number of institutions in the samples examined by the Department and KPMG attained composite scores of 3.0 (44 percent of the institutions in the private non-profit sample, and 13 percent of the institutions in the proprietary sample). However, the Secretary believes that a composite score of 1.5 reflects a level of financial health that is in keeping with the statutory requirements and the Secretary's goals in determining that institutions are financially responsible. This level balances the need to minimize uncertainty with the need to minimize regulatory burdens on institutions that are likely to remain in business, provide educational services at a satisfactory level, and administer properly the title IV, HEA programs.

Institutions With Composite Scores in the Zone

As noted previously, provided that an institution satisfies the standards relating to its debt payments and its administration of the title IV, HEA programs, an institution demonstrates that it is financially responsible by achieving a composite score of at least 1.5, or by achieving a composite score in the zone from 1.0 to 1.4 and meeting certain provisions.

The ratio methodology is designed to identify the point along the scoring scale where an institution is financially sound enough (a composite score of at least 1.5) to continue to participate in the title IV, HEA programs without any additional monitoring arising from a review of its financial condition, and the point below which (a composite score of less than 1.0) there is considerable uncertainty regarding an institution's ability to continue operations and meet its obligations to students and to the Secretary. For institutions scoring below 1.0, additional monitoring and surety are required immediately to protect the Federal interest.

The Secretary considers institutions with composite scores in the zone between these two points (i.e., a composite score of 1.0 to 1.4) to be financially weak but viable, and therefore allows these institutions up to three consecutive years to improve their financial condition without requiring surety. The provisions for institutions scoring in the zone are contained in § 668.175(d) of these regulations under the zone alternative.

Under those provisions, an institution qualifies initially as a financially responsible institution by achieving a composite score between 1.0 and 1.4, and continues to qualify by achieving a composite score of at least a 1.0 in each of its two subsequent fiscal years. If an institution does not achieve at least a 1.0 in each of its subsequent two fiscal years or does not sufficiently improve its financial condition so that it satisfies the 1.5 composite score standard by the end of the three-year period, the institution may continue to participate in the title IV, HEA programs by qualifying under another alternative.

Institutions scoring in the zone should generally be able to continue operations in the short-term, absent any adverse economic events. However, even though the resources of institutions scoring in the zone are notably greater than the resources of institutions scoring below 1.0, those resources provide only a limited margin against adversity. Moreover, because zone institutions have notably less resources than institutions scoring above the zone, their ability to fund necessary mission objectives is similarly limited. In view of the limited resources of zone institutions, and the uncertainty regarding the ability of those institutions to continue operations and satisfy their obligations to students and to the Secretary in times of fiscal distress, the Secretary believes it is necessary to monitor more closely the operations of zone institutions, including their administration of title IV, HEA program funds.

Accordingly, the regulations require an institution in the zone to provide timely information regarding certain accrediting agency actions that may adversely effect the institution's ability to satisfy its obligations to students and to the Secretary, and certain financial events that may cause or lead to a deterioration of the institution's financial condition. In addition, the Secretary may require the institution to submit its compliance and financial statement audits soon after the end of its fiscal year.

With regard to the administration of title IV, HEA program funds, the Secretary provides those funds to a zone institution, or to an institution with a composite score of less than 1.0, under the reimbursement payment method or under a new payment method, cash monitoring. The Secretary establishes as part of these regulations the cash monitoring payment method in view of the public comment that the reimbursement payment method is burdensome or that it may be inappropriate for some institutions. Under either the reimbursement or cash monitoring payment method, to help ensure that title IV, HEA program funds are used for their intended purposes, an institution must first make disbursements to eligible students and parents before it requests or receives funds for those disbursements from the Secretary. However, unlike reimbursement, where an institution must provide specific and detailed documentation for each student to whom it made a disbursement, before

the Department provides title IV, HEA programs funds to the institution, the Department provides funds to an institution under the cash monitoring payment in one of two less burdensome ways. The Department either requires an institution to make disbursements to eligible students or parents before drawing down title IV, HEA program funds for the amount of those disbursements, or requires the institution to submit some documentation identifying the eligible students and parents to whom a disbursement was made before the Secretary provides funds to the institution for those disbursements. Although the Secretary anticipates that the documentation requirements under cash monitoring will be minimal for most institutions, the Case Teams have the flexibility under these regulations to tailor the documentation requirements on a case-by-case basis. In addition, the Secretary expects that institutions with composite scores of less than 1.0 will continue to receive funds under the reimbursement payment method if those institutions are provisionally certified (in rare instances, however, the Secretary may provide funds under the cash monitoring payment method to an institution based in part on its compliance history and the amount of the letter of credit submitted to the Department).

The Secretary notes that the future implementation of the just-in-time payment method—which the Secretary intends to implement as soon as possible—may reduce or eliminate the use of the cash monitoring payment method. Any changes to the cash monitoring payment method arising from the implementation of the just-in-time payment method will be addressed in a future proposed regulation, and the Secretary will invite public comment on those changes. (For more information on Cash Monitoring, see the discussion under part 9 of the Analysis of Comments and Changes).

In developing these provisions, the Secretary intended to achieve three objectives. First, the Secretary wished to provide a reasonable amount of time for institutions to improve their financial condition without increasing the risks to the Federal interest. Second, the Secretary did not wish to interfere unnecessarily in the operations of institutions seeking to improve their financial condition. Third, the Secretary wished to provide as much flexibility as possible to the Department's case teams in determining the appropriate level of monitoring and oversight required of institutions in the zone.

Alternative Ways of Demonstrating Financial Responsibility

Section 498(c)(3) of the HEA provides alternatives under which the Secretary must consider an institution to be financially responsible if it fails to satisfy one or more of the components of financial responsibility. These alternatives are described under § 668.175 of the regulations. This section also contains alternatives under which the Secretary will permit an institution that does not demonstrate that it is financially responsible under the statutory provisions to continue to participate in the title IV, HEA programs.

An institution that does not achieve a composite score of 1.5, or qualify under the zone alternative, may demonstrate that it is financially responsible by submitting to the Secretary a letter of credit for at least 50 percent of the title IV, HEA program funds the institution received in its last fiscal year. If the institution's composite score is less than 1.0, it may continue to participate as a financially responsible institution by submitting the 50 percent letter of credit, or the institution may submit a smaller letter of credit (at least 10 percent of the amount of its prior year title IV, HEA program funds) and participate under a provisional certification.

As noted previously, the ratio methodology is designed to consider all of an institution's resources. In particular, the Primary Reserve and Equity ratios together reflect all of the resources accumulated over time by an institution that are available to the institution to support its current and future operations. For this and other reasons discussed under Part 7 of the Analysis of Comments and Changes, these two ratios account for 70 percent of the composite score for proprietary institutions and 80 percent for non-profit institutions.

Institutions that do not satisfy the composite score standard that would otherwise participate under the zone alternative or be required to provide a letter of credit may find that it is less costly to take the steps necessary to improve their financial condition. Based on an analysis of the data compiled by KPMG, the Secretary notes that a number of institutions scoring below the zone (i.e., have composite scores of less than 1.0) may qualify under the zone alternative by making relatively small capital infusions or increasing modestly their unrestricted net assets. For some of these institutions, the amount of the cash infusion or increase in net assets that would be necessary to achieve a composite score of 1.0 is less than five percent of total revenue because that infusion or increase is reflected positively in both the Primary Reserve and Equity ratios. Alternatively, institutions may choose to retain more earnings. In either case, the cost to many institutions of improving their financial condition is less, sometimes far less, than the cost of securing a letter of credit.

Institutions that qualify under the zone alternative may find that by taking similar actions they can improve sufficiently their financial condition to achieve a composite score of 1.5. A zone institution that achieves a composite score of 1.5 at the end of any year in the zone or by the end of the three-year period, avoids the costs that it would otherwise incur in securing a letter of credit under the available alternatives.

More importantly, the resources that would otherwise be used, by a zone institution or an institution scoring below the zone, to secure the letter of credit would now be available to the institution to support its mission objectives. The Secretary anticipates that financially weak institutions will move into and out of the zone as those institutions demonstrate a commitment to improve their financial health. Furthermore, the Secretary expects that institutions will seek to improve their financial health in the manner that most benefits students.

Collective Guarantees

Several commenters suggested that the Secretary revise the final regulations to include an alternative under which a group of institutions could (under some type of insurance-pooling arrangement) collectively provide a letter of credit, or other financial instrument, that would serve to cover the potential liabilities of any institution in the group. The merits of this alternative are that all of the institutions in the group could continue to participate in the title IV, HEA programs as financially responsible institutions at a lower cost than if any one of those institutions posted a letter of credit on its own. In the meetings held during the extended comment period, some participants noted that the potential interest in such an alternative would depend on the nature of the final regulations.

Although the Secretary did not revise the regulations to include this suggested alternative (primarily because the commenters and meeting participants did not provide any details regarding insurance-pooling arrangements or alternative financial instruments, and because the Secretary is uncertain about the continued community interest in

this alternative), the Secretary will consider collective guarantee or insurance-pooling requests on a case-by-case basis.

Issues Raised in the Notice of Proposed Rulemaking and Other Department Publications

The September 20, 1996 NPRM included a discussion of the major issues surrounding the proposed regulations (as well as a summary of the August 1996 report by KPMG) that will not be repeated here. The following list summarizes those issues and identifies the pages of the preamble to the NPRM (61 FR 49552–49563) on which the discussion of those issues can be found:

- The scope and purpose statement of the new subpart L (p. 49556).
- A proposal to modify the precipitous closure alternative to demonstrating financial responsibility, and a clarification of the types of alternatives to demonstrating financial responsibility available to new institutions (pp. 49557–49558).
- Financial responsibility standards and other requirements for institutions undergoing a change of ownership (p. 49558).
- Past performance standards (p. 49559).
- An outline of additional requirements and administrative actions, including requirements for institutions that are provisionally certified, and an outline of administrative actions taken when an institution fails to demonstrate financial responsibility (p. 49559).
- The contents of the proposed Appendix F (p. 49559).

The following list summarizes the areas of discussion that were posted on the Department's World-Wide Web site. This site is located at (http://www.ed.gov/offices/OPE/PPI/finanrep.html). This web site will remain active at least until the regulations are fully effective.

- The possibility of using in the ratio analysis an Equity ratio either as an additional ratio, or as a substitute for the Viability ratio; and a discussion of the components of, and possible strength factor scores for, that ratio.
- Possible adjustments to the threshold factors to take into account new data of the effects of Financial Accounting Standards Board (FASB) Statements 116 and 117 on private non-profit institutions, and to take into account additional data on proprietary institutions.
- Possible modifications to the weighting percentages of the ratios, including the weighting for the proposed Equity ratio.
- Possible modifications to the calculation of composite scores from the ratio analysis to eliminate ''cliff effects,'' including the possible use of a linear algorithm or the addition of more strength factor categories to linearize the composite scores.
- Possible modifications to the scoring scale, including truncating the upper end of the scale to eliminate unnecessary differentiation of institutions that attain high composite scores.
- Community suggestions regarding the treatment of goodwill in the calculation of the ratios.
- Community suggestions for a secondary tier of analysis, and suggested changes to the alternative means of demonstrating financial responsibility for those institutions that fail the ratio test.
- Discussions of the utility of using a cash flow analysis.
- Discussions of the treatment of institutional grants and other fully-funded operations in the calculation of the ratios.
- Discussions of donor income with regard to determining the financial responsibility of non-profit institutions, and in particular of institutions that have continued for many years on tight budgets with a minimal financial cushion.
- The treatment of debt in the proposed ratio methodology, including concerns that the proposed ratio methodology could penalize institutions for taking on necessary amounts of debt to expand or to invest in infrastructure, and suggestions for the evaluation of institutions that remain debt-free.
- Community suggestions for altering the proposed standards for changes of ownership.
- Discussions of the utility and practicality of using a trend analysis rather than a snapshot approach, and community suggestions that financial responsibility need not be determined annually, at least for stronger institutions.
- Community suggestions for revising the ''full faith and credit'' alternative for public institutions.

Substantive Changes to the NPRM

The following discussion reflects substantive changes made to the NPRM in the final regulations.

- The proposed ratio standards for public institutions have been eliminated in favor of a revised approach in implementing the statutory alternative that an institution is financially responsible if it is backed by the full faith and credit of a State or equivalent government entity.
- The proposed Viability ratio has been replaced by the Equity ratio.
- The proposed scoring scale has been modified to range from negative 1.0 to positive 3.0, rather than from 1.0 to 5.0. The low end of the range, below 1.0, indicates the poorest financial condition. At the high end, a score of 3.0 indicates financial health.
- The proposed strength factor tables have been replaced by linear algorithms.
- The proposed ratio results necessary to earn points along the scoring scale have been lowered to reflect a time frame of 12-to-18 months rather than 3-to-4 years.
- As a result of revising the scoring scale and the strength factor scores, and the change in focus from 3-to-4 years to 12-to-18 months, the minimum composite score for establishing financial responsibility has been changed from the proposed standard of 1.75 (on a scale of 1.0 to 5.0) to 1.5 (on a scale of negative 1.0 to positive 3.0).
- The proposed precipitous closure alternative has been modified and implemented in these regulations as the zone alternative. Under the zone alternative, an institution whose composite score is less than 1.5 but equal to at least 1.0 may participate in title IV, HEA programs as a financially responsible institution for up to three consecutive years.
- As part of the modifications to the proposed precipitous closure alternative, the provision requiring owners or persons exercising substantial control over an institution to provide personal financial guarantees is eliminated. Instead, an institution whose composite score is less than 1.5 is required to provide information regarding certain oversight and financial events, and the Department provides title IV, HEA program funds to that institution under the reimbursement payment method or under a new, less burdensome payment method, Cash Monitoring (discussed above and under part 9 of the Analysis of Comments and Changes).
- The proposal to apply the ratio methodology to third-party servicers entering into a contact with lenders and guaranty agencies has been withdrawn. The financial standards currently under § 668.15 continue to apply to those entities.
- The proposed revisions to the procedures relating to changes of ownership have been withheld pending further review and comment.

Executive Order 12866

These final regulations have been reviewed as significant in accordance with Executive Order 12866. Under the

terms of the order, the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering the title IV, HEA programs effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these regulations, the Secretary has determined that the benefits of the regulations justify the costs.

The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

The potential costs and benefits of these final regulations are discussed elsewhere in this preamble under the heading Final Regulatory Flexibility Analysis (FRFA), and in the information previously stated under Supplementary Information and in the following Analysis of Comments and Changes.

Analysis of Comments and Changes

In response to the Secretary's invitation to comment on the NPRM, approximately 850 parties submitted comments. An analysis of the comments and of the changes in the regulations since the publication of the NPRM follows.

The Department received comments on these regulations from September 20, 1996 through April 14, 1997. Although the Department received and considered comments on all of the topics included in the NPRM, the comments discussed here are primarily those which address the changes to the NPRM made by these final regulations.

Major issues are discussed under the section of the regulations to which they pertain. Comments concerning the new Subpart L are grouped by topic or issue. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under applicable statutory authority—are not addressed. An analysis of the comments received regarding the Initial Regulatory Flexibility Analysis (IRFA) can be found elsewhere in this preamble under the heading Final Regulatory Flexibility Analysis (FRFA).

Section 668.23—Compliance Audits and Audited Financial Statements

Comments: Several commenters noted that the requirements under § 668.23(f)(3) (previously codified under § 668.24), are not always possible to meet. Under this section, an institution's or servicer's response to the Secretary regarding notification of questioned expenditures must be based on an attestation engagement performed by the institution's or servicer's auditor. The commenters maintained that an attestation engagement is proper only when the subject of the attestation is capable of being evaluated based on reasonable, objective criteria, and that some responses to notifications of questioned expenditures may be based on grounds that could not be so evaluated, i.e., the contention that an auditor misinterpreted or misapplied a regulatory requirement when the auditor questioned the institution's or servicer's compliance or expenditure.

Discussion: The Secretary agrees that there are cases in which the institution's response to an audit does not have to be based on an attestation engagement. This provision was intended to inform institutions that new information or documentation that was not available during the original audit should be accompanied by the auditor's attestation report, when that report is submitted to the Secretary. Without the auditor's report, the resolution of the audit may be delayed or the data may not be considered reliable. However, the Secretary agrees that the necessity for the attestation engagement is determined by the nature of the response being made, and may not be required in all cases.

The Secretary also has determined that the procedures described in § 668.23(f)(1)–(3) are redundant with requirements under OMB Circulars A–128 and A–133 and the Office of Inspector General Audit Guide, and that redundancy may cause confusion for some institutions. The OMB Circulars and the Audit Guide each contain requirements that a Corrective Action Plan, which includes the institution's responses to the audit findings and questioned costs, be submitted with the audit. If the institution disagrees with the findings or believes corrective action is not needed, it provides the rationale for that belief in the Corrective Action Plan.

Normally, an institution submits information in its Corrective Action Plan, in response to a specific request from the Secretary, or as part of an appeal under 34 CFR 668 subpart H. The Secretary establishes whether an attestation report is required as part of the Secretary's request for information; the Hearing Official evaluates the reliability of information submitted with an appeal. To avoid duplication and unnecessary audit work and because few institutions submit additional data as described in paragraph (f), the Secretary removes this paragraph.

Changes: The Secretary removes paragraph (f) under § 668.23.

Subpart L—Financial Responsibility

Part 1. General Comments Regarding the Proposed Ratio Methodology

Comments: Many participants involved in the discussions conducted by the Secretary during the extended comment period expressed the view that the manner in which those discussions were conducted demonstrated the Department's commitment to public and community involvement in the rulemaking process and should serve as a model for future rulemaking.

Several commenters maintained that the Secretary cannot change the current standards of financial responsibility without first convening regional meetings to obtain public involvement in the development of proposed regulations as provided under the negotiated rulemaking process described in section 492 of the HEA. One commenter opined that absent a negotiated rulemaking process the Secretary could not promulgate regulations that would have legal force and effect.

Several commenters argued that the proposed ratio methodology is contrary to statutory provisions under section 498 of the HEA because the proposed ratios do not include the type of ratios specified by the HEA.

Other commenters maintained that any attempt by the Secretary to promulgate financial responsibility standards was duplicative, and that for reasons of efficiency and regulatory relief the Secretary should rely upon standards used by financial institutions and accrediting agencies.

Discussion: The Secretary appreciates the participants' remarks and thanks those persons for their valuable input regarding the direction and development of these rules. The Secretary disagrees that negotiated rulemaking is required under the HEA to implement these regulations. In accordance with section 492 of the HEA, the Secretary conducted regional meetings to obtain public involvement in the preparation of draft regulations for parts B, G and H of the HEA as amended by the Higher Education Amendments of 1992. As required under section 492, those draft regulations were then used in a negotiated rulemaking process that was subject to specific time limits connected with the enactment of the 1992

Amendments. The negotiated rulemaking requirement was therefore anchored at one end by the statutorily required regional meetings that followed the enactment of the 1992 Amendments, and at the other end by fixed time limits for the final regulations created by that process. Subsequent regulatory changes to these sections cannot be tied to those requirements for negotiated rulemaking because the regional meetings and statutory timeframes for those regulations have already passed. The HEA does not restrict the Secretary's authority to make additional regulatory changes in this area, and changes to the regulations may therefore be made without using negotiated rulemaking.

Even though negotiated rulemaking was not required for these regulations, the Secretary believes that the opportunities afforded to the higher education community during the extended comment period to provide input regarding the proposed regulations are consistent with the spirit of cooperation that underlies the negotiated rulemaking process. In the numerous meetings held during the extended comment period with representatives from institutions, higher education associations, and other interested parties, the meeting participants identified many areas in the proposed regulations that the Secretary has since modified and improved to more accurately measure the relative financial health of institutions.

The Secretary disagrees that section 498(c)(2) of the HEA requires the Secretary to utilize particular ratios in determining financial responsibility. That section of the HEA merely provides examples of ratios that the Secretary may use in determining whether an institution is financially responsible, e.g., the statutory reference to an ''asset to liabilities'' ratio is a generic rather than a specific reference or requirement. Moreover, the Secretary believes that the ratio methodology established by these regulations not only incorporates the same aspects of financial health as the ratios illustrated in the HEA, but does so in a more comprehensive manner.

With respect to the comments that the Secretary should rely on financial determinations made by accrediting agencies or financial institutions, the Secretary notes that section 498(c) of the HEA requires the Secretary to make those determinations for institutions participating in the title IV, HEA programs. In addition, because the financial standards used by other parties reflect the mission of those parties or are used by those parties to initiate or continue a business relationship, there is no assurance that determinations made under those standards by those parties will have a direct bearing on whether an institution is financially responsible for the purposes required under HEA, i.e., that the institution is able to (1) provide the services described in its official publications, (2) administer properly the title IV, HEA programs in which it participates, and (3) meet all of its financial obligations to students and to the Secretary. Moreover, and absent any provision in the statute that permits the Secretary to delegate financial responsibility determinations to other parties, if the Secretary adopted the commenters' suggestion, similarly situated institutions would be treated differently depending on the party making the determination.

Changes: None.

Part 2. Comments Regarding the Timing and Implementation of New Financial Standards

Comments: Several commenters recommended that the Secretary postpone any changes to the financial responsibility standards until after reauthorization of the HEA. The commenters argued that if new standards are implemented now, these standards might be changed during the reauthorization process or the statute may be amended to include other requirements, thus potentially subjecting institutions to several different requirements within a few years. Another commenter suggested that the proposed standards form the starting point for discussions between the Secretary and the higher education community on reauthorization issues involving financial responsibility.

Many commenters believed that the reporting requirements under FASB 116, Accounting for Contributions Received and Contributions Made, and FASB 117, Financial Statements of Not-for-Profit Organizations, are too recent to be thoroughly understood. In particular, the commenters maintained that since the impact of these FASB requirements on the proposed ratio methodology is not known, the Secretary should delay publishing final rules. Along the same lines, commenters representing proprietary institutions maintained that the Secretary should not promulgate the ratio methodology because it is untested and its impact on the community is not known.

Discussion: The Secretary believes that changes to the current financial responsibility standards are necessary for the reasons cited in the preamble to this regulation (see the discussion under the heading *Need for Revising the Rules* in the **SUPPLEMENTARY INFORMATION** section of these regulations).

With regard to new accounting standards under FASB Statements 116 and 117, since most private non-profit colleges and universities adopted the new FASB standards for their fiscal years that ended June 30, 1996, only a limited number of financial statements prepared under those standards were available for examination at the time the NPRM was published. Based on that limited number of financial statements, the proposed strength factors for the Primary Reserve ratio were set approximately 66 percent higher than strength factors for institutions under a fund accounting model (AICPA Audit Guide financial reporting model). This increase in the strength factors was intended to reflect the fact that under FASB 116/117 realized and unrealized gains on investments held as endowments are included in unrestricted or temporarily restricted net assets, whereas under fund accounting these gains were generally treated as nonexpendable assets. Therefore, it was anticipated that the expendable net assets of all institutions would increase significantly.

During the extended comment period KPMG conducted an analysis of financial statements from 395 non-profit institutions that adopted FASB 116/117 and found that the impact of the new accounting standards is not uniform across the private non-profit sector. The anticipated impact that expendable net assets would increase significantly occurred only among institutions holding large endowments; the impact was negligible for institutions with little or no endowment. Based on the more thorough KPMG analysis, the Secretary revises the strength factors for the Primary Reserve ratio for private non-profit institutions in a manner that discounts the effects of the new FASB standards for all non-profit institutions.

Changes: See the discussion of the strength factor score for the Primary Reserve ratio, Analysis of Comments and Changes, Part 6.

Comments: A commenter representing proprietary institutions questioned the manner in which the KPMG study was conducted. The commenter believed that small business interests were not considered since no representatives of small proprietary institutions were among those institutional representatives that assisted with the KPMG study. Moreover, the commenter implied that the Secretary did not consider the comments submitted by a group of CPAs on behalf of proprietary institutions regarding the KPMG report, and therefore may have violated the

requirement in the Regulatory Flexibility Act (RFA) that the Secretary confer with representatives of small businesses.

Discussion: The Secretary notes that the suggestions of the group of CPAs referenced by the commenters were considered in developing these final regulations. More significantly, however, during the extended comment period the Secretary sought and obtained the views and comments of individuals and organizations with diverse experience in higher education finance. Specifically, the Secretary met with organizations representing proprietary institutions and directly with persons from proprietary institutions, including representatives from small institutions. In addition the Secretary provided on the Department's web site a summary of the views expressed by the participants at those meetings and additional information regarding the ratio methodology.

Changes: None.

Part 3. Comments Regarding Annual Determinations of Financial Responsibility

Comments: Many commenters from private non-profit institutions maintained that institutions should not be subjected to annual determinations of financial responsibility. The commenters believed that annual determinations are unnecessarily burdensome, and represent an inefficient use of the Secretary's resources, particularly in cases in which an institution has been recently recertified. The commenters opined that when a determination is made during the recertification process that an institution is financially responsible, the Secretary has sufficiently discharged his oversight responsibilities in this area.

Discussion: The Secretary believes that it is not prudent to ignore the financial condition of many institutions for the three- to four-year period between recertification cycles for several reasons. First, the financial condition of an institution may deteriorate, increasing unnecessarily the risks to students and taxpayers that the institution will close or will otherwise be unable to meet its obligations. Second, many institutions prepare an annual audited financial statement for other purposes, so the only burden that may result from an annual determination stems from the institution's failure to satisfy the standards of financial responsibility. Lastly, if the Secretary were to adopt the commenters' suggestion by establishing longer term financial standards for all institutions, those standards would necessarily need to be much higher than the standards in these regulations, resulting in more institutions failing the standards and creating additional burdens for those institutions and the Secretary. Nevertheless, the Secretary may in the future explore the possibility of determining the financial responsibility of certain institutions less often or only during the recertification process.

Changes: None.

Part 4. Comments Regarding the Adequacy and Appropriateness of the Proposed Ratio Methodology

General comments: Many commenters from a variety of sectors supported the direction taken by the proposed regulations, including customizing the ratios for each sector. The commenters agreed with the Secretary that the proposed methodology provides a better assessment of an institution's financial condition than the regulatory tests currently in place. However, the commenters believed that some changes should be made to the proposed regulations.

Several commenters asserted that the proposed ratio methodology is inadequate because it does not consider other factors, such as enrollment trends, used by credit rating agencies like Moody's or Standard and Poor's. The commenters suggested that along with using the proposed methodology, the Secretary should consider an institution's Moody's or Standard and Poor's credit rating, and the institution's history of handling Federal funds, before the Secretary determines whether the institution is financially responsible.

Similarly, one commenter from a non-profit institution argued that credit rating agencies place a significant emphasis on the strength of an organization's revenue stream, but the proposed ratios virtually ignore this variable. The commenter stated that in assessing the revenue strength of educational institutions, the rating agencies typically review such data as average SAT scores and student acceptance rates. It was the commenter's view that a revenue strength score should be part of the evaluation process and should carry no lesser weight than that associated with expenses.

Other commenters from non-profit institutions maintained the ratio methodology is not valid because it is not based on traditional measures of financial strength, and did not take into account the institution's total financial circumstances as required by the HEA. Another commenter from the non-profit sector argued that the proposed rules, because of their emphasis on profitability, appeared to be designed for proprietary institutions. The commenter urged the Secretary to amend the rules to reflect the difference in each sector. Several other commenters from private non-profit institutions asserted that the proposed ratio methodology is deficient because it does not take into account specific missions of institutions.

Several commenters believed that the proposed methodology is too restrictive, arguing that it is too heavily biased in safeguarding the Secretary from events that are very rare.

Several other commenters representing proprietary institutions maintained that the new methodology was incomplete because it contained no way to measure the effectiveness of an institution's management.

Other commenters believed that many small institutions with good educational and compliance records that pass the current standards would fail the standards proposed in the NPRM. The commenters opined that this outcome points to a flaw in the manner in which the methodology treats small institutions. An accountant for a proprietary institution argued that because the proposed methodology does not provide an adjustment for size, it is unfair to compare an institution with $10 million in tuition revenue to an institution with $500,000 in tuition revenue by applying the same standards and criteria to both institutions.

Several commenters maintained that the proposed methodology is complex and difficult to understand. The commenters argued that the proposed rules will require institutions to rely more heavily on CPAs, thus increasing their costs.

Discussion: The Secretary thanks the commenters supporting the approach taken under these rules to establish better, more comprehensive financial standards and appreciates the cooperation and effort of commenters and other participants in the rulemaking process for sharing their views and concerns with the Secretary during the initial and extended comment periods.

With regard to the concerns raised by the commenters about the adequacy of the ratio methodology, the Secretary wishes to make the following points. First, the ratio methodology is designed to make appropriate, albeit broad, distinctions between the sectors of higher education institutions. The Secretary acknowledges that the methodology does not directly consider intra-sector differences nor does it take into account all of the variables or elements suggested by the commenters regarding the mission or organizational

structure of institutions. To do so would create an enormously complex model that as a practical matter would be impossible to implement. Rather, the methodology focuses on key ratios and differences between the sectors that the Secretary believes are the most critical in evaluating fairly the relative financial health of all institutions along a common scale.

Second, the adequacy of the ratio methodology should be judged in the context of both its design objectives and the associated regulatory provisions that complement those objectives. In developing these regulations the Secretary sought to minimize two potential errors—that a financially healthy institution would fail the ratio standard and be inappropriately subject to additional requirements and burdens, and that a financially weak institution would satisfy the ratio standard and later fail to carry out its obligations at the expense of students and taxpayers. The ratio methodology, in combination with the alternative standards established by these regulations (see Analysis of Comments and Changes, Part 9), reflects the Secretary's decision to err on the side of allowing some financially weak institutions to participate in the title IV, HEA programs but in a manner that protects the Federal interest.

Third, the Secretary disagrees that the ratio methodology is flawed because it does not provide an adjustment for the size of an institution. To the contrary, an adjustment for size is unnecessary because a ratio converts amounts into a metric that is relative to an institution's own size, making possible a comparison of that institution to other institutions regardless of the size of those institutions. This comparative analysis is the basic design element of the ratio methodology that enables the Secretary to evaluate the relative financial health of all institutions along a common scale.

Similarly, the Secretary disagrees that the methodology favors large or publicly traded institutions. Presumably, the commenters are referring to a situation where a large institution is not dependent upon a single revenue stream or has access to wider donor bases or more capital markets than a small institution. While this flexibility may advantage a large institution, the Secretary believes that flexibility is inherent to the institution and beyond the scope of the methodology. The fact that a large institution may be able to improve its financial condition by managing its resources effectively also holds true for a small institution, particularly since the ratios account for an institution's performance relative to its size.

With regard to the comment from the non-profit sector that the proposed ratio methodology appeared to be designed for proprietary institutions because it emphasized profitability, the Secretary notes that the measure of profitability (the Net Income ratio) accounted for 50 percent of the composite score for proprietary institutions, but for only 10 percent of the composite score for non-profit institutions. As discussed more fully under Part 7 of the Analysis of Comments and Changes (Comments regarding the weighting of the proposed ratios), the Secretary has revised the proposed percentages for the Net Income ratio to more accurately reflect the differences between the sectors of postsecondary institutions.

The Secretary disagrees that the methodology will require institutions to rely more heavily on CPAs. As illustrated in the appendices to these regulations, an institution can readily calculate its composite score from its audited financial statements, provided that those statements are prepared in accordance with GAAP. Furthermore, by limiting the number of ratios, the Secretary believes that it should not be difficult for any institution to determine the impact that its business and programmatic decisions have or will have on its financial condition as measured by the methodology.

Changes: None.

Comments regarding alternative ratios: Several commenters argued that the proposed ratio methodology is limited and arbitrary, suggesting alternative ratios that should be used instead, including: the acid test ratio; a debt to equity ratio; a title IV, HEA loan program default ratio; a debt to revenue ratio; a longevity ratio; a debt service coverage ratio; and a measure of working capital.

Several commenters believed that the Primary Reserve ratio disadvantages institutions that converted short-term liabilities into long-term debt to meet the acid test ratio requirement.

A commenter from an accrediting agency asserted that the composite score based on the proposed ratio methodology is inadequate in assessing an institution's financial health, and that other measures such as operating income, debt levels, availability of working capital, and significant items contained in notes to the financial statements should be used instead.

Discussion: The Secretary considered a number of ratios that could be used in addition to or in place of the proposed ratios, including the ratios suggested by the commenters, but decided to replace only the proposed Viability ratio, with an Equity ratio. As discussed below, while the ratios suggested by the commenters are valid measures, taken individually or as a whole they measure the financial health of an institution more narrowly than do the ratios established by these regulations. In selecting the ratios, the Secretary considered the extent to which those ratios provided broad measures of the following fundamental elements of financial health:

1. *Financial viability:* The ability of an institution to continue to achieve its operating objectives and fulfill its mission over the long-term;
2. *Profitability:* Whether an institution receives more or less than it spends during its fiscal year;
3. *Liquidity:* The ability of an institution to satisfy its short-term obligations with existing assets;
4. *Ability to borrow:* The ability of an institution to assume additional debt; and
5. *Capital resources:* An institution's financial and physical capital base that supports its operations.

The Secretary believes that the ratios used in the methodology, Primary Reserve, Equity, and Net Income, not only measure these fundamental elements well, but that they do so in a manner that takes into account the total resources of an institution. With respect to the ratios suggested by the commenters, the Secretary wishes to make the following points.

The Secretary agrees that the acid test ratio (cash and cash equivalents divided by current liabilities) is a useful measure of highly liquid assets available to meet current obligations, and it is used in the current regulations as a test of financial responsibility. However, the acid test is not included in the ratio methodology for several reasons. First, it has been the Department's experience that certain institutions manipulate the ratio elements to satisfy the 1:1 acid test standard, such as by reclassifying current liabilities as long-term liabilities. Second, the information needed to calculate the ratio is difficult to extract from the financial statements prepared for non-profit institutions because that information is not a required disclosure (assets and liabilities are not necessarily classified on those financial statements as current and noncurrent). Moreover, expendable capital (as measured by the Primary Reserve ratio) is a broader and more important element of financial health than highly liquid capital, because it mitigates the effects of differing cash management and investment strategies used by institutions. For example, an

institution that invests excess cash in other than short-term instruments may fail the acid test requirement, whereas that excess cash, regardless of how it is invested, is considered an expendable resource under the Primary Reserve ratio. For these same reasons, Working Capital ratios (working capital is the difference between current assets and current liabilities) are not included in the methodology.

With respect to Cash Flow ratios, the Secretary considered several measures of cash provided from operations to cover debt payments. However, cash flow (taken directly from the Cash Flow Statement) can be easily manipulated. For example, delaying payment to creditors by simply extending the normal payment terms to 120 days would give the appearance that cash has been provided by operations. Therefore, the Secretary decided to retain the Net Income ratio which, as an accrual-based measure, recognizes expenses when they are incurred, not when they are paid.

The Secretary considered an Operating Income ratio that would measure income from operations as a percentage of net revenue, but the results of that ratio would only partially address the question of whether an institution operated within its means during its fiscal year. By comparison, the Net Income ratio measures net income as a percentage of net revenues after operations and other non-operating items and thus provides a more complete measure of whether an institution spent more than it brought in during the fiscal year.

The Secretary also considered adjusting the Net Income ratio for non-cash items, but decided instead to make an allowance for the largest non-cash item—depreciation expense—in the strength factors for this ratio (see Analysis of Comments and Changes, part 6).

With regard to the Debt to Equity ratio and the other suggested Debt ratios, the Secretary notes that, like the proposed Viability ratio, these ratios cannot be applied universally. Based on the audited financial statements reviewed by KPMG during the extended comment period, approximately 35 percent of proprietary institutions and 13 percent of private non-profit institutions have no debt. In addition, Debt to Revenue and Debt Service Coverage ratios, while providing insight as to how the institution is managing its debt, are less important than a measure of leverage itself. For these and other reasons, the Secretary includes in the ratio methodology an Equity ratio (tangible equity divided by tangible total assets) as the primary measure of leverage.

The Secretary is not convinced that the utility of a Longevity measure or ratio is on par with the utility of the ratios used in the methodology. Unlike the ratios used in the methodology that measure the actual financial condition of an institution, it is not clear how a Longevity measure could be used as part of the methodology. A Longevity measure merely implies that an institution that has been operating for many years will continue to operate, but provides no insight regarding the institution's current financial condition or its ability to satisfy its obligations. Moreover, a Longevity measure cannot be used as an independent test because it has no predictive value at the institutional level. Based on data obtained from Dun & Bradstreet regarding the probabilities of credit stress and bankruptcy, the Secretary found that institutions that have been in existence for more than 30 years have on average more likelihood of enduring credit stress and less likelihood of going bankrupt than institutions that are less than 30 years old. However, there were a significant number of institutions in the data group that have been in existence for more than 30 years that were rated by Dun & Bradstreet as representing high risks of late payments or financial failure. In addition, the Secretary reviewed the files of closed institutions and found that a significant percentage of those institutions (12 percent) were in existence for more than 25 years.

With regard to the notes to financial statements and independent accountants' reports, the Secretary wishes to clarify that these notes and reports are reviewed by the Secretary to determine if an institution complies with other standards or elements of financial responsibility. For example, if an auditor expresses a ''going-concern'' opinion, the institution is not financially responsible even if it satisfies all other standards. However, the information contained in the notes and reports does not always constitute a sufficient basis on which the Secretary makes or can make a determination of financial responsibility.

Changes: The proposed ratio methodology is revised, in part, by replacing the Viability ratio with the Equity ratio.

Comments regarding the use of ratios: One commenter from the proprietary sector argued that the proposed ratio methodology should not be used to determine that an institution is not financially responsible. The commenter stated that the AICPA CPA/MAS Technical Consulting Practice Aid No. 3 warns of the shortcomings of ratio analysis, including improper comparisons that do not take into account size, geographical location and business practices, and other variables such as depreciation and number of years considered by that analysis. Based on these shortcomings, the commenter concluded that a financially strong institution may fail to achieve the required composite score requirement or be forced to make unsound business decisions solely to meet the requirement. Although the commenter believed that the proposed ratio methodology could be used to determine that an institution is financially responsible, the commenter recommended that the Secretary allow an institution that fails to achieve the composite score to demonstrate its financial strength without imposing the letter of credit requirement.

Discussion: The Secretary disagrees. The practice aid is specifically designed to provide a consulting or accounting practitioner illustrative examples of the use of financial ratio analysis techniques in performing a comparative analysis of a client organization with other appropriate organizations.

The ''shortcomings'' referred to by the commenter relate to factors that should be considered by the practitioner in understanding the differences that may occur between comparable companies and explaining those differences to the client. To the extent practicable, the ratio methodology developed for these regulations mitigates these differences by evaluating the financial health of an institution relative to other institutions, and by measuring an institution's financial health against a minimum standard established by the Secretary. In addition, the individual ratio definitions are constructed to account for reporting and accounting differences between the sectors of higher education institutions. While other factors, such as operating structure, could affect an institution's performance, the consequences of those factors reflect management decisions that fall outside the scope of the Secretary's review.

Changes: None.

Comments regarding public institutions: One commenter argued that there is no need for Federal financial standards for public institutions for several reasons.

First, the commenter maintained that there is no danger of a ''precipitous closure'' of a public institution because, in his State, the closure of a State college or university requires the approval of the State General Assembly. Moreover, the commenter believed that

in authorizing a closure, the General Assembly would be careful to protect the interests of students and all creditors. In any event, the commenter opined that the Secretary could recover any monies due from a closed State institution by offset against future aid to other State institutions. For local public institutions (community colleges), the commenter stated that, in his State, a closure would have to be approved in a general election. However, the closure of a local institution cannot adversely affect student refunds or other liabilities of the institution because State law requires the continuance of property tax assessments until all debts of the institution are paid in full.

Second, the commenter noted that public institutions are subject to far more official oversight than private or proprietary institutions. In his State, the activities of State institutions are monitored by, among others, the State Controller, the State Auditor, and the State Commission on Higher Education.

Third, the commenter pointed out that public institutions are subject to more public scrutiny than are private and proprietary institutions, i.e., public institutions conduct their affairs in public, publish budgets, hold governing board meetings that are open to the public, and make their financial statements available for public inspection. The commenter believed strongly that this scrutiny enhances the financial responsibility of public institutions.

Fourth, the commenter noted that the 1973 AICPA Audit Guide is obsolete for colleges and universities under FASB jurisdiction and will soon be obsolete for other public institutions. The commenter stated that the Government Accounting Standards Board (GASB) intends to publish an exposure draft on its Colleges and Universities Reporting Model at the end of March 1997 and a final Statement of Financial Reporting Standards in the second quarter of 1988. According to the commenter, since the proposed reporting model makes major changes to public institutions' financial statements, it is unlikely that any ratio definitions based on the 1973 AICPA Audit Guide will be useful when the new model takes effect (probably the fiscal year starting in 2000). The commenter suggested therefore that the Secretary delay promulgating financial ratio standards for public institutions until the new GASB standards are in effect.

Next, the commenter argued that the proposed methodology's reliance on profits and expendable fund balances is inappropriate for public institutions, and may be contrary to State public policy. The commenter believed that unlike private non-profit and proprietary institutions that need to have sufficient reserves (or be able generate the profits necessary to accumulate sufficient reserves) to continue operations during economic fluctuations, public institutions have much less need for reserves because their major funding sources are less susceptible to those fluctuations.

In addition, the commenter stated that in his State, public policy prohibits State institutions from accumulating large expendable funds balances. The State General Assembly appropriates funds for the purpose of meeting the immediate education needs of State residents and not for creating institutional reserves. The commenter continued that consistent with this policy, the State does not fund colleges and universities for the long-term compensated absence liabilities that those institutions are required to accrue under GASB Statement No. 16 (the State funds these liabilities when they become due). Consequently, the commenter believed that the existence of these liabilities virtually guarantees that smaller State institutions will fail the proposed ratio standards. Moreover, the commenter argued that the proposed ratio standards do not sufficiently recognize the differences between public sector financial reporting requirements (GASB) and private sector requirements (FASB).

Several other commenters maintained that some State institutions would not achieve the required composite score if they are required to include in the calculation of the proposed ratios, items that are beyond the control of those institutions. Therefore, the commenters suggested that it would be fairer to allow State institutions to exclude from the ratio analysis items such as plant debt and certain employee benefits that are the obligation of the State or funded by the State.

For several reasons, commenters representing public institutions believed that the Secretary should amend proposed § 668.174(a)(1). Under this section, an institution that fails to achieve the required composite score may demonstrate to the Secretary that it is nevertheless financially responsible if the institution's liabilities are backed by the full faith and credit of the State or by an equivalent government entity. First, the commenters recommended that the Secretary qualify the term ''liabilities'' by adding the phrase ''that may arise from the institution's participation in the title IV, HEA programs.'' In support of this recommendation, the commenters noted that in both of the other alternatives under this section, liabilities are either based on or limited to the amount of title IV, HEA program funds received by an institution. Moreover, the commenters argued that if the Secretary interprets ''liabilities'' to mean all balance sheet liabilities of an institution, the State would have to accept these liabilities as General Obligations of the State. According to the commenters, since most States have constitutional prohibitions against general obligation debt, States would be prohibited from providing the required backing for any institution that has revenue bonds or similar debt outstanding.

Next, the commenters recommended that the Secretary amend the term ''equivalent government entity'' by adding the phrase ''including local governments or separate districts with taxing authority'' to clarify that the guarantee required under § 668.174(a)(1) may be provided by any entity that has the taxing power to validate its guarantee.

Discussion: The Secretary agrees with many of the points made by the commenters and therefore does not establish in these regulations a composite score standard for public institutions. Instead of satisfying the composite score standard, an institution must notify the Secretary that it is designated as a public institution by the State, local or municipal government entity, tribal authority, or other government entity that has the legal authority to make that designation, and provide a letter from an official of that State or government entity confirming that it is a public institution.

Changes: The composite score standard and Primary Reserve requirements proposed under § 668.172(a)(1)(i) and (ii) for public institutions are eliminated. The replacement provisions described above are relocated under § 668.171(c).

Comments regarding third-party servicers: Several commenters believed strongly that the proposed regulations are unsuitable for third-party servicers, noting that the KPMG study did not include an analysis of third-party servicers. The commenters argued that the servicer business sector is fundamentally different from any type of institutional educational sector, pointing out that the contractual obligations and legal structures of servicers are different than those of institutions.

In addition, the commenters contended that while the proposed requirements regarding alternative financial standards and the actions the

Secretary may take against entities that fail to satisfy the standards may be appropriate for institutions, these alternate standards and actions are not applicable or appropriate for third-party servicers. For these reasons, the commenters requested the Secretary to put aside the proposed rules and work with third-party servicers to formulate new, more applicable rules.

Several other commenters representing third-party servicers argued that since the proposed methodology favors entities with high equity and low debt, it is inappropriate for third-party servicers that have low equity and high debt but generate high income streams. Moreover, the commenters noted that while the Secretary consulted with third-party servicers in establishing the current regulations (as part of the Negotiated Rulemaking process), third-party servicers were not consulted before these proposed rules were published. Therefore, the commenters recommended that the Secretary continue to evaluate third-party servicers under the current regulations.

Several commenters representing third-party servicers maintained that the alternative of submitting a letter of credit of up to 50 percent of title IV, HEA program funds does not apply to third-party servicers. The commenters suggested instead that third-party servicers that are collection agencies for FFELP funds post a fidelity bond in the amount equal to the amount held each month by the agency in its trust account on behalf of the guarantors prior to remittance to the guarantor. These commenters argued that such a standard represents the current industry practice to protect guaranty agencies with which a collection agency contracts, from loss caused by the agency's actions.

Discussion: The Secretary agrees to develop in the future financial standards solely for third-party servicers. In the meantime, those servicers must comply with the requirements under 34 CFR Parts 668 and 682.

Changes: The third-party servicer requirements under proposed § 668.171(b) are removed.

Part 5. General Comments Regarding the Proposed Ratios

Comments regarding the Primary Reserve ratio: Many commenters opposed the requirement that public and private non-profit institutions must have a positive Primary Reserve ratio to meet the general standards of financial responsibility. The commenters maintained that this requirement represents a separate, single standard, contradicting both the intent of proposed ratio methodology and the statutory requirement that the Secretary consider an institution's total financial condition.

Several commenters from non-profit institutions believed that the Primary Reserve ratio favors colleges and universities that accumulate resources to safeguard Federal funds rather than expend those resources to provide student services. The commenters argued that this preference is not only contrary to the operation and mission of most colleges and universities, it will result in inflationary pressures that create tuition increases.

Several commenters argued that institutions will be forced to reduce teaching and other staff to attain adequate scores for the Primary Reserve ratio. The commenters reasoned that reducing ''total expenses'' to improve the ratio score necessarily reduces salaries and wages for teachers and staff because salaries and wages comprise the largest component of ''total expenses'' at most institutions.

A commenter from a non-profit institution argued that expended title IV, HEA program funds should be subtracted from ''total expenses'' because these funds are not included in ''total unrestricted income.'' Likewise, the commenter believed that revenues expended from restricted endowments should not be included in ''total expenses'' if those funds are not counted in ''total unrestricted income.''

Other commenters opined that the Primary Reserve ratio treats non-profit institutions unfairly because the numerator excludes most restricted assets, but the denominator does not exclude the expenses attributable to those assets.

Some commenters suggested that the Secretary refine the term ''expenses'' in several ways. First, it should be adjusted so that it reflects cash consumption rather than non-cash accounting charges—such non-cash charges as depreciation and amortization expense should be eliminated, while principal repayments on debt should be added. Second, expenses associated with sponsored programs should be eliminated. These commenters, and other commenters, maintained that sponsored program expenses, such as those associated with the U.S. Government-sponsored scientific research programs, are a function of those research programs and can generally be eliminated upon termination of those programs (during the course of the program, expenses are funded by revenues received from the sponsoring agency). The commenters concluded that the Secretary should not penalize an institution whose researchers are capable of generating significant grants.

Discussion: The Primary Reserve ratio provides a measure of an institution's expendable or liquid resource base in relation to its overall operating size. It is, in effect, a measure of the institution's margin against adversity. Specifically, the Primary Reserve ratio measures whether an institution has financial resources sufficient to support its mission—that is, whether the institution has (1) sufficient financial reserves to meet current and future operating commitments, and (2) sufficient flexibility in those reserves to meet changes in its programs, educational activities, and spending patterns. Therefore, the Secretary continues to believe that an institution with a negative Primary Reserve ratio has serious financial difficulties.

If an institution's Primary Reserve ratio is negative, expendable net assets are in a deficit position. In those cases the institution will need to generate surpluses to replenish the deficit, or may be forced to draw on other resources or sell off assets to make ends meet, thus increasing the uncertainty that the institution will be able to meet its obligations. However, because an Equity ratio is now included in the methodology, the Secretary eliminates the proposed provision that a non-profit institution is not financially responsible if it has a negative Primary Reserve ratio. The Equity ratio measures the amount of total resources that are financed by owners' investments, contributions, or accumulated earnings (or conversely, the amount of total resources that are subject to claims of third parties) and thus captures an institution's overall capitalization structure and, by inference, its overall leverage. Because the Equity ratio supplements the measure of the amount of expendable reserves provided by the Primary Reserve ratio with a measure of other capital resources available to support the institution, it provides a measure of resources that could mitigate the effects of a negative Primary Reserve ratio.

With regard to the comments about total expenses, those expenses, including salaries paid to faculty and staff, are part of the commitment of an institution to provide services to students. The relative size of each component in an institution's annual operating budget is a management decision. In addition, the Secretary notes that based on the AICPA Audit Guide for Not-for-Profit Organizations issued on June 1, 1996, most title IV,

HEA program funds will not be included in total expenses of colleges and universities. For example, payments made to those institutions under the Direct Loan, Federal Family Education Loan, Federal Pell Grant, and Federal Supplementary Educational Opportunity Grant programs are not included in total expenses reported on the statement of activities. In addition, the Audit Guide will require scholarship expenses to be netted against tuition income in the revenue portion of the statement.

The Secretary disagrees that the definition of the term ''expenses'' as used in the Primary Reserve ratio should exclude non-cash charges such as depreciation and amortization and, except in certain circumstances, sponsored program expenses. The Primary Reserve ratio measures an institution's expendable or liquid resource base in relation to its overall operating size. Operating size is the total of all expenses incurred by the institution in the course of its business and is a key financial element because it provides the best view of the size of its programmatic activities and commitments. Because depreciation expense represents a charge to operations that reflects the future replenishment of the existing plant (and replaces the actual cash outlays for equipment and repairs formerly in the revenue and expenditures statement of private non-profit institutions under the fund accounting model), it represents a commitment of capital resources to the institution and reflects its overall operating size.

The Secretary disagrees that an institution can eliminate expenses relating to U.S. Government-sponsored scientific research programs immediately upon the termination of those programs. To the contrary, because many universities require highly specialized facilities and equipment to conduct research under those programs, they will likely incur significant upfit and other costs in re-deploying their research facilities in the event of a loss in program funding. Therefore, the Secretary considers scientific research expenditures to be an appropriate component of the operating size of an institution since the institution is committed to making those expenditures until adjustments can be made.

However, the Secretary agrees that in certain instances sponsored program expenses should be excluded from the ratio calculations. The Secretary believes that an institution that receives HEA grant program funds, especially those associated with programs that strengthen institutions or expand access to higher education, should not fail the composite score standard solely because of the expenditure of those funds. Therefore, the amount of HEA funds that an institution reports as expenses in its Statement of Activities for a fiscal year are excluded from the ratio calculations but only if these reported expenses alone are responsible for the institution's failure to achieve a composite score of 1.5 for that fiscal year.

Changes: The Secretary eliminates the requirement proposed under § 668.172(a)(1)(ii) that a public or private non-profit institution must have a positive Primary Reserve ratio.

Proposed § 668.173(e), describing the items that are excluded from the ratio calculations, is relocated under § 668.172(c) and revised, in part, to provide that the Secretary may exclude from the ratio calculations reported expenses of HEA program funds under the conditions described previously.

Comments regarding the Viability ratio: A commenter from a non-profit institution maintained that the implicit assumption of the Viability ratio is that an institution should minimize or eliminate debt in order to preserve the accumulation of assets. The commenter opined that such a philosophy would lead to institutions avoiding the creation of revenue-creating assets, such as residence halls. Accordingly, the commenter believed that the correct measurement should be the amount of risky loans that an institution undertakes, and recommended therefore that the amount of loans secured by collateral be eliminated from the denominator of the Viability ratio.

Similarly, many commenters opined that the proposed definition of adjusted equity will discourage institutions from financing property, plant and equipment from current revenues. The commenters believed that institutions will elect instead to assume long-term debt even if the assumption of long-term debt is contrary to good business practice.

For several reasons, many commenters opposed the proposed adjustment for proprietary institutions that would limit the threshold factor for the Viability Ratio to the threshold factor for the Primary Reserve ratio in cases where the institution's Primary Reserve ratio threshold factor is a one or a two. First, these commenters maintained that such an adjustment defeats the purpose of measuring financial responsibility on the basis of three ratios. Second, the commenters argued that if the reason for this adjustment is to circumvent possible abuse and manipulation of the Viability ratio, then there may be something wrong with using the ratio as part of the methodology. Third, the commenters argued that it is arbitrary and unfair to assume, based on the premise that the institution has manipulated its financial report, that an institution's Viability ratio will always be higher than its Primary Reserve ratio. Rather, the commenters maintained that an institution could achieve a high Viability ratio through careful financial management. The commenters recommended therefore that the Secretary use this adjustment only if the reason for using it is consistent with the concepts underlying the proposed ratio methodology. Similarly, commenters maintained that this adjustment is unfair to non-profit institutions that have no debt, because the weighting for the Primary Reserve ratio increases from 55 percent to 90 percent.

One commenter suggested that if an institution has no debt, the Secretary should allow an institution to show the amount of long-term debt that it would be able to obtain, such as, by demonstrating to the Secretary that the institution has a line of credit, or by providing to the Secretary a letter from a bank indicating the bank's willingness to make a long-term loan to the institution.

Many other commenters from the proprietary sector believed the Secretary should reward an institution that has no debt for its sound management practices, rather than penalize that institution by increasing the weighting for its Primary Reserve ratio from 20 percent to 50 percent. These commenters, and other commenters, suggested instead that for an institution that has no debt the Secretary should assign a threshold factor of 5.0 on its Viability ratio, or weight the Viability ratio at 30 percent, or both. Another commenter maintained that the amount of equity needed to achieve a strength factor score of 3.0 on the Viability Ratio is excessive and penalizes an institution for using leverage prudently. This commenter proposed that the amount of equity that results in achieving a strength factor score of 3.0 should instead yield a strength factor score of 5.0.

Another commenter suggested that an institution's Viability ratio strength factor be limited to two times the Primary Reserve strength factor in cases where the institution has a Primary Reserve strength factor score of 1.0 or 2.0. According to the commenter, this weighting scheme would allow an institution with no debt, but with a reasonable Primary Reserve ratio score,

to pass the ratio standards if it has a bad year (i.e., achieves only a strength factor score of 1.0 on the Net Income ratio). The commenter further stated that under this approach, a similarly situated institution with a Primary Reserve ratio strength factor score of 1.0 would not pass the ratio standards.

Several commenters from proprietary institutions asserted that eliminating the Viability ratio for institutions that have no debt is particularly unjust because the current acid test ratio compels institutions to remain debt-free. One of the commenters argued that the proposed adjustment to the Viability ratio acts to raise the Primary Reserve weighting for proprietary institutions to a level required of non-profits despite the real differences between these sectors. The commenter asserted that this methodology would only encourage institutions to take out debt in order to use the Viability ratio, rather than discourage that practice. The commenter suggested that if the Secretary chooses to keep this methodology, the Net Income and Primary Reserve ratios should be weighted at 80 percent and 20 percent, respectively.

Discussion: The Secretary proposed the Viability ratio because it measures one of the most basic elements of clear financial health: the availability of expendable resources (resources which can be accessed in short order) to cover debt should the institution need to settle its obligations. As such, it is useful in measuring the financial condition of most institutions. However, the Secretary has decided to remove the Viability ratio from the ratio methodology established in these regulations for the following reasons.

First, in linking the results of the Viability and Primary Reserve ratios the Secretary sought to discourage an institution from manipulating its Viability ratio by taking on a small amount of debt solely to inflate its composite score. However, linking the two ratios may result in a composite score that understates the financial health of an institution that legitimately carries a small amount of debt.

Second, based on analyses conducted by KPMG during the extended comment period of 507 audited financial statements from proprietary institutions and 395 audited financial statements from private non-profit institutions, the Secretary found that 35 percent of those proprietary institutions and 13 percent of those non-profit institutions had no long-term debt. Accordingly, the Viability ratio could not be applied to a significant number of institutions in each sector—the composite score for those institutions would therefore be determined solely on the results of the Primary Reserve and Net Income ratios. The Secretary agrees that this was a shortcoming in the proposed methodology, and includes in the ratio methodology established by these regulations only ratios that can be applied to all institutions.

In view of the public comments, the Secretary agrees that certain aspects of the proposed methodology associated with the Viability ratio may cause, unintentionally, tensions between an institution's desire to make appropriate business decisions and the institution's compliance with the proposed regulations. Among these business decisions are those related to whether an institution should finance the cost of plant assets with external sources, or whether it should fund the cost of those investments internally with revenues from operations (or from some combination of those sources). From the analysis performed during the extended comment period, the Secretary found that some institutions chose to utilize internal resources to fund their plant assets as opposed to borrowing from external sources. For some of those institutions, that choice was a prudent business decision that is not reflected directly in either the Viability or Primary Reserve ratios. The impact of those business decisions is now reflected in the Equity ratio.

Changes: The proposed Viability ratio is replaced by the Equity ratio.

Comments regarding the numerator of the Primary Reserve and Viability ratios—Expendable Net Assets or Adjusted Equity: Commenters from non-profit institutions asserted that the numerator of the Viability and Primary Reserve ratios mistakenly neglects permanently restricted endowment net assets. The commenters maintained that revenue generated from these assets not only helps fund operations, but also helps to provide scholarships to students that generate more revenue for the institution. Some commenters believed that the Primary Reserve and Viability ratios should also include some percentage of the physical plant which is free and clear of debt, arguing that excluding physical plant from the numerators of these ratios will only encourage institutions to keep assets in cash rather than invest in physical assets that benefit students. Alternately, these commenters, and other commenters, asserted that if physical plant is not included in the numerator of the Primary Reserve ratio, then depreciation costs on physical plant should not be included in ''total expenses'' of the denominator of this ratio.

Another commenter representing private non-profit institutions objected to the blanket exclusion of related party receivables from the ratio calculations. The commenter asserted that this exclusion would impact negatively many institutions that depend on church pledges, and suggested instead that the Secretary consider such factors as prior payment history and the financial strength of the related party before making a decision to exclude these receivables.

A few commenters suggested that expendable net assets exclude an institution's liability for post-retirement benefits, maintaining that this liability represents a very long-term moral obligation that will not render any institution incapable of teaching its students or discharging its obligations under the title IV, HEA programs.

Many commenters from the proprietary sector, including students, objected to the definition of ''adjusted equity'' as used in the numerator of the Primary Reserve and Viability ratios. The commenters asserted that excluding fixed assets (property, plant, and equipment) and intangible assets from the definition will cause institutions to forego investing in new educational equipment and educational facilities, resulting in an erosion in the quality of education students receive. Moreover, these commenters argued that the proposed treatment of equity is counterproductive because it creates a disincentive for owners to invest the resources necessary to provide quality education.

Based on the information provided by the Secretary during the extended comment period, one commenter calculated the Primary Reserve ratio for the 30 Dow Jones companies. According to the commenter, 18 of those companies would receive a strength factor score of zero, and only 9 would receive a strength factor score of 2.0 or 3.0. In order for 50 percent of these companies to achieve a strength factor score of 2.0 or 3.0, the commenter indicated that the suggested ratio score of .20 would need to be reduced to .07. From this analysis, the commenter concluded that the suggested strength factors for the Primary Reserve ratio do not appear to be reasonable and recommended that the Secretary modify the proposed definition of adjusted equity to include fixed assets.

One commenter opposed the proposed definition of adjusted equity, arguing that the definition is not explained or justified, and that it is contrary to evaluations conducted by

other agencies, such as the Securities and Exchange Commission (SEC). The commenter suggested that if the Secretary is attempting to ascertain through this definition which assets the institution holds that have value and may easily be converted to cash, then all items that result in cash flow should be included. An example of this would be that all of an institution's deferred income (reflected as a liability on the balance sheet) will not be paid in cash. In particular, the commenter maintained that many of the costs associated with an institution's recruiting activities will already have been incurred and when the deferred income is recognized on the institution's income statement as shareholder equity, the cash outlay will be less than the revenue, i.e., if the cash outlay is 55 percent of the revenue, the remaining 45 percent of the deferred income should be added to equity to arrive at the institution's adjusted equity.

Another commenter from a proprietary institution objected to the proposed definition of ''adjusted equity'' because it does not measure the debt capacity of an institution. This commenter suggested that the definition be changed to ''net tangible assets plus unused lines of credit.''

Several commenters maintained that the proposed definition of ''adjusted equity'' does not capture the institution's ability to adjust to periods of declining revenue, which the commenters believed is the aim of the Primary Reserve and Viability ratios.

Discussion: The Secretary disagrees with the commenters who suggested that the definition of expendable net assets mistakenly excludes permanently restricted net assets. The Primary Reserve ratio is a measure of the resources available to an institution on relatively short notice, and therefore the ratio measures only expendable net assets. Permanently restricted net assets are neither liquid or expendable, except in the event of some legal action, and therefore do not form any part of the resource measured by this ratio. The Secretary wishes to emphasize that the non-liquid resources represented by permanently restricted assets are measured by the Equity ratio.

With regard to the comment concerning the applicability of the Primary Reserve ratio to the 30 Dow Jones companies, the Secretary notes that the ratio methodology is designed to measure the elements of financial health that are appropriate for postsecondary institutions, not for manufacturing and industrial entities, which comprise most of the Dow Jones companies.

The Secretary disagrees that fixed assets should be included in adjusted equity or that plant assets should be included in the definition of expendable net assets. Because the Primary Reserve ratio provides a measure of an institution's expendable resource base in relation to its overall operating size, the logic for excluding net investment in plant is twofold. First, plant assets represent sunk costs to be used in future years by an institution to fulfill its mission—plant assets will not normally be sold to produce cash since they will presumably be needed to support on-going programs. Moreover, in some instances there is a lack of a ready market to turn the assets into cash, even if they are not needed programmatically.

Second, excluding net plant assets is necessary in identifying the expendable or relatively liquid net assets (that would be used as a component of any measure of liquid equity) available to the institution on relatively short notice. Including plant assets would distort the measure of liquid equity, and therefore would distort an important short-term measure of the institution's financial health. (The regulatory practice of excluding fixed assets is not unique to these rules. Various other regulated industries, such as depository institutions and broker dealers, are also subject to practices that exclude or limit the extent that fixed assets may comprise regulatory capital.) The Secretary notes that all tangible assets are considered by the Equity ratio.

The definition of expendable net assets excludes from those assets an institution's post-retirement benefits obligation.

The Primary Reserve ratio is not meant to capture debt or ability to borrow, but to measure the institution's expendable reserves. A measure of debt and ability to borrow is incorporated in the Equity ratio.

The Secretary disagrees that the proposed definition of ''adjusted equity'' does not capture an institution's ability to adjust to periods of declining revenue because the balance sheet ratios, Primary Reserve and Equity, represent the resources accumulated over time by the institution that are available to the institution to make necessary adjustments.

Changes: None.

Comments regarding the Equity ratio: Several commenters from proprietary institutions who opposed excluding fixed assets from adjusted equity (in calculating the Primary Reserve ratio) believed that this exclusion not only discourages institutions from investing in educational equipment, but rewards institutions that invest the least, i.e., those institutions that lease instead of purchase equipment.

Most commenters supported the suggestion made by the Secretary during the extended comment period to use an Equity ratio instead of the proposed Viability ratio. Some of these commenters believed that the use of an Equity ratio not only resolves many of the problems associated with the Viability ratio; it is also a good measure of how well an institution is capitalized and an indirect measure of an institution's ability to borrow. Moreover, these commenters opined that an Equity ratio encourages the kind of behavior that the Secretary should want to encourage—reinvestment in the institution.

Similarly, several commenters believed that the Equity ratio provides a necessary measure of capital investment, and argued that it is a better ratio than the liquidity ratio under current regulations. One of these commenters stated that liquidity ratios measure assets that can be removed fraudulently, whereas capital investment ratios measure assets that can be used to determine the owner's commitment to the institution.

Other commenters supporting the use of an Equity ratio recommended that the ratio include endowment assets in the numerator. However, some of these commenters suggested the Secretary should not raise the strength factors for the Equity ratio to compensate for the inclusion of endowment assets because this would disadvantage institutions with little or no endowments. Another commenter believed that excluding endowment assets from the Equity ratio would treat all institutions more fairly.

Discussion: The Secretary reiterates that fixed assets are not expendable assets and are thus not included in calculating the Primary Reserve ratio. However, fixed assets are included (as part of the total resources of the institution) in the Equity ratio. In providing a measure of capital resources, the Equity ratio supplements the expendable resources measured by the Primary Reserve ratio.

By comparing equity to total assets, the Equity ratio indicates the share of assets shown on the institution's balance sheet that the institution actually owns, reflecting the commitment to the institution of the owners or persons that control the institution, and provides insight into the capital structure of the institution, i.e., it indicates whether an institution has acquired a disproportionate amount of its assets utilizing debt. Excessive amounts of debt will adversely affect the

ratio and little or no debt will have the opposite effect.

The Secretary notes that Permanently Restricted Net Assets (which include the permanently restricted piece of endowment funds) are included in the numerator of the Equity ratio. However, in including those assets the Secretary did not adjust the strength factors for the Equity ratio. The strength factor values for the Equity ratio are not normalized to the relative equity of institutions in either sector; therefore inclusion of permanently restricted endowment in the calculation of the Equity ratio will help the ratio results of institutions with large endowments, but will not hurt the ratio results of institutions with little or no endowment.

Changes: The ratios described under proposed § 668.173 are relocated under § 668.172 and revised to include the Equity ratio. The Equity ratio is specifically defined for proprietary institutions under Appendix F and for private non-profit institutions under Appendix G.

Comments regarding the Net Income ratio: A few commenters believed that the proposed Net Income ratio is not fair to proprietary institutions, arguing that since the ratio is constructed and weighted in a manner that does not allow institutions that have operating losses to meet the composite score standard, those institutions would be forced to submit a letter of credit. One of these commenters asserted that operating losses sometimes occur due to changing economic circumstances (e.g., the acquisition and redevelopment of a financially-troubled institution), but that this condition is usually not a permanent feature of the institution's financial condition. Accordingly, the commenter suggested that one way of remedying this inequity would be for the Secretary to determine that an institution is financially responsible if the institution satisfies the composite score requirement for two years in a three-year cycle, or three years in a four-year cycle.

Similarly, other commenters believed that the Net Income ratio should be eliminated because it represents only the results from operations for one fiscal year but does not take into consideration prior year reserves that may be available to offset negative net income in any year.

Several commenters representing proprietary institutions asserted that institutions operating in states such as Oregon, Texas, Florida, Alaska, and Nevada that have taxes on gross receipts or property rather than on income are disadvantaged by the Net Income ratio because taxes on gross receipts or property are always reflected as a business tax in operating expenses rather than an income tax.

Many commenters from proprietary institutions maintained that, although it is important under the proposed methodology to attain a strength factor score of at least 3.0 on the Primary Reserve ratio (so that the Viability ratio can be counted independently), attaining that strength factor requires that adjusted equity be at least 30 percent of annual expenses. The commenters argued that this strength factor was too high for several reasons. First, the commenters opined that retaining 30 percent of equity as a reserve fund creates a disincentive to invest in property and equipment. Second, the commenters stated that retaining equity rather than distributing profits to shareholders exposes a for-profit institution to an ''accumulated earnings tax'' of 39.6 percent on profits in excess of $250,000, unless the institution provides a reasonable business reason for retaining the equity and a plan for its use. Under this 30 percent requirement, the commenters maintained that an institution with as little as $833,333 in annual expenses would be exposed to the accumulated earnings tax. Third, the commenters maintained that it is very unusual for a business that is expected to provide a return on investment to retain equity exclusive of fixed assets in an amount equal to 30 percent of a year's expenses.

Similarly, several commenters representing proprietary institutions maintained that the ratios erroneously ignore differences between Chapter S and C corporations, particularly in regard to accumulated earnings tax. The commenters argued that since the treatment of owners' salaries is discretionary under both types of corporations, the proposed methodology creates an incentive for owners to manipulate their salaries (or dividends and other equity distributions) to meet the composite score. The commenters further stated that this manipulation runs afoul of income and payroll tax laws, and that regulations should not entice owners to behave in this manner. One of these commenters suggested that the Secretary define ''income before taxes'' as the profit before owners' salaries and distributions so that all proprietary institutions are treated in the same manner with respect to calculating the Net Income ratio.

Discussion: An institution must generate surpluses to build reserves for future program initiatives and to increase its margin against adversity. However, the Secretary accepts that there will be circumstances where this is not possible. Therefore, the strength factors for the Net Income ratio allow an institution to earn some points toward its composite score if the institution incurs a small loss.

Regarding the comment that the Net Income ratio does not consider prior-year reserves, the Secretary reminds the commenters that those reserves are considered by the Primary Reserve and Equity ratios.

With regard to the Accumulated Earnings Tax, the Secretary would like to clarify that the only portion of stockholders' equity that is subject to the tax is retained earnings. Other components of equity such as common stock and other capital are not subject to this tax. Moreover, the Secretary believes that any potential exposure to the accumulated earnings tax on excess profits is a tax planning issue regardless of the value of the strength factors for the Primary Reserve ratio (of the 507 financial statements reviewed for proprietary institutions, the Primary Reserve ratio was 0.30 or higher for 84 or 17 percent of these institutions; of those 84 institutions, only 39 had equity (retained earnings) greater than $250,000). These and other institutions should already be considering the potential impact of the tax, including ways to use earnings accumulated beyond the IRS limits for reasonable business needs. In any event, the Secretary notes that the changes made to the proposed methodology for other reasons minimize an institution's exposure to the accumulated earnings tax—the Viability ratio has been eliminated, and a Primary Reserve ratio result of 0.15 (as opposed to the proposed result of 0.30) is now required to earn the maximum strength factor score for that ratio.

If earnings are accumulated beyond the IRS limits, IRS regulation 26 CFR 1.537–2(b) provides some broad criteria that can be used to support the contention that earnings are being accumulated for the reasonable needs of the business, including to: (1) Provide for bona fide business expansion or plant replacement, (2) acquire a business enterprise through purchasing stock or assets, (3) provide for the retirement of bona fide indebtedness created in connection with the trade or business, (4) provide necessary working capital for the business, (5) provide for investments in or loans to customers or suppliers if necessary to maintain the business of the corporation, and (6) provide for the payment of reasonable anticipated product liability losses, an actual or potential lawsuit, the loss of a major customer, or self-insurance. A

business contingency can be considered a reasonable need if the contingency is likely to occur (e.g. flood losses in a flood prone area). The accumulation of earnings to provide against unrealistic contingencies is not considered a reasonable need.

The Secretary notes that there are several other ways to determine reasonable working capital needs, including the ''Bardahl'' formula. Institutions should work with their tax advisor with respect to these matters.

The Secretary disagrees that the methodology should discount Gross Receipt Tax paid by institutions in certain States because these taxes, just like other sales and property taxes that differ from State to State, are a cost of doing business.

Changes: The strength factors and weighting percentages for the Primary Reserve and Net Income ratios are revised (see Analysis of Comments and Changes, Parts 6–7).

Comments regarding the market value of assets: A commenter from a non-profit institution noted that the Viability ratio ignores the market value of assets (assets are booked at cost for balance sheet presentations), but that lenders look to market values when considering collateral to secure long-term debt. Consequently, the commenter argued that an institution's ability to borrow in order to liquidate or restructure debt may be a better measure of financial viability than an institution's ability to liquidate long-term debt from expendable resources.

Similarly, several commenters from proprietary institutions maintained that since the proposed ratio methodology does not consider the market value of real estate, it depresses the financial score of an institution that holds valuable properties, particularly if those properties have been depreciated over a long period of time. One commenter argued that this is evidenced by the fact that the commenter's institution was rated ''good'' by Dun and Bradstreet as of June 30, 1995, and passes the current financial responsibility standards under § 668.15, but would fail the proposed ratio standards. The commenter suggested that this problem could be solved either by allowing the institution to credit back the difference between the net book value of the property and the secured debt (mortgage), or allow the institution to provide and include as an asset the amount of the property's appraised value as certified by an appraiser. A few commenters suggested that the term ''expendable net assets'' include at least the book value (if not the market value) of property, plant, and equipment, arguing that it is unrealistic to assume that these assets are valueless or incapable of being liquidated.

Discussion: The Secretary has decided not to consider the market value of property, plant, and equipment because accepting the market value of those assets would introduce a significant amount of subjectivity into the ratio calculations—the appraised value of those assets may differ depending on the person making the appraisal and the method by which that appraisal is made (such as future cash flows or comparable sales). In addition, the ratio methodology would favor unfairly an institution that chose to bear appraisal costs over an institution that did not similarly do so.

Changes: None.

Comments regarding second-tier and trend analysis: Several commenters suggested that the Secretary perform a ''second-tier analysis'' or use trend data to determine whether an institution that fails to achieve the required composite score is nevertheless financially responsible.

Other commenters believed that trend analysis is more revealing than the proposed one-year snapshot of an institution's financial health and suggested that the Secretary require that CPAs include that analysis as part of the institution's audited statements. One of these commenters stated that since trend data is available to an institution's current CPA, the CPA could add a footnote to the financial statement that contained the required ratio results for the institution's three most current fiscal years, as well as an average for that three-year period.

Another commenter argued that the proposed ratio methodology is useless because it employs hybrid ratios that cannot be benchmarked. This commenter proposed instead that the standards consist of a liquidity ratio, a trend analysis of cash flows from operations, and a different, better defined income ratio.

One commenter believed that the proposed methodology should be discarded in favor of more easily constructed measures, including a three-year averaged adjusted current ratio of 1:1 that would compare tangible current assets with adjusted current liabilities and a five- to ten-year trend analysis of cash flows from operations.

Discussion: In addition to the ratios suggested by the commenters previously discussed under this Part, the Secretary considered other ratios (Age of Plant, Cash Income, Secondary Reserve, and Debt to Total Assets) that could be used as secondary measures.

The Secretary did not adopt these ratios because, like the ratios suggested by the commenters, they measure financial health more narrowly than the Primary Reserve, Equity, and Net Income ratios. Moreover, the Secretary believes that these ratios do not provide significant additional insight with respect to evaluating the financial health of an institution that would warrant their inclusion in the methodology.

Although the Secretary believes that trend analysis could be a useful approach or consideration in determining whether an institution is financially responsible, historical data regarding the ratios and the ratio methodology must first be obtained and analyzed before promulgating regulations.

Changes: None.

Comments regarding extraordinary gains and losses: Several commenters representing the proprietary sector opposed the proposal under which the Secretary may exercise discretion in determining whether an institution is financially responsible. Under this proposal, the Secretary may decide to exclude extraordinary gains and losses, income or losses from discontinued operations, prior period adjustments, and the cumulative effects of changes in accounting principles. The commenters argued that the uncertainty inherent in this proposal would make it difficult for an institution to calculate the ratios (preventing the institution from determining its regulatory status), and to develop a plan to compensate for a treatment that may exclude these items. Moreover, the commenters believed that if some institutions are favored by this discretionary treatment, public confidence in the fairness of the proposed methodology would be eroded. For these reasons, the commenters suggested that the proposal be amended by eliminating the Secretary's discretion in favor of excluding these items for all institutions.

Discussion: The commenters are correct that extraordinary gains and losses, income or losses from discontinued operations, prior period adjustments, and the cumulative effects of changes in accounting principles, should be excluded from the calculation of the Net Income ratio because these items are generally non-recurring and do not reflect the institution's continuing operations. The Secretary notes that these items are generally excluded from the ratio calculations.

The commenters are also correct in arguing that the ratio methodology should treat all institutions fairly with respect to these items, and that is the basis for the Secretary's discretion. It

has been the Secretary's experience that certain institutions do not present these items in accordance with GAAP or employ questionable accounting treatments that beneficially distort their financial condition. Consequently, the Secretary retains the discretion to include or exclude these items, or include or exclude the effects of questionable accounting treatments.

Changes: The items that the Secretary may exclude from the ratio calculations proposed under § 668.173(e) are relocated under § 668.172(c) and revised to provide that the Secretary generally excludes extraordinary gains or losses, income or losses from discontinued operations, prior period adjustments, the cumulative effect of changes in accounting principles, and the effect of changes in accounting estimates. This section is also revised to provide that the Secretary may include or exclude the effects of questionable accounting treatments.

Comments regarding unsecured related party receivables and intangible assets: Several commenters maintained that because GAAP requires that an asset possess value before it can be included in a financial statement, the Secretary improperly excludes all unsecured related party receivables on the assumption that those receivables have no value. The commenters believed that in order to obtain a complete and accurate picture of an institution's cash flow, and thus financial condition, the Secretary must change the definition of ''adjusted equity'' to include intangible assets, unsecured related party receivables, and fixed assets that the institution's independent auditor determines have value and liquidity. The commenters suggested that adjusted equity include at least the following: (1) Fixed assets and intangible assets that the institution's CPA determines to have value and liquidity, and (2) unsecured related party receivables, if the related party co-signs the institution's Program Participation Agreement and satisfies the same financial ratios required of the institution.

Other commenters suggested that equity be defined in accordance with the FASB pronouncement, ''Accounting for the Impairment of Long-Lived Assets'', maintaining that all authoritative accounting pronouncements must be taken into account in preparing financial statements under GAAP.

Several commenters argued that excluding intangible assets disregards accounting conventions used when acquisitions occur.

A commenter asserted that the definition of intangible assets contained in Accounting Principles Board (APB) Opinion No. 17 is too vague to be useful, and that the final rules should include a clarification of the term, specifically as it relates to deferred tax benefits, deferred direct response advertising costs, deferred enrollment expenses, and prepaid expenses.

A few commenters responding to the alternative set forth by the Secretary during the extended comment period for dealing with intangible assets—that intangibles could either be excluded from the calculation of the Equity ratio or that the strength factors for the Equity ratio could be increased to compensate for including intangibles—generally preferred to exclude intangibles because this alternative would disadvantage fewer institutions. One of these commenters suggested, however, that the Secretary include intangible assets but not increase the strength factors in cases where those assets are less than 10 percent of shareholders' equity. Another commenter suggested that the Secretary include in the calculation of the ratios a portion of intangible assets but require that an institution amortize those assets over a limited period, for example eight years.

Other commenters from proprietary institutions believed that the Secretary should exclude intangible assets because of the difficulties in valuing those assets.

Discussion: The Secretary uses the term ''intangible assets'' with the same meaning as the definition contained in APB Opinion No. 17, Intangible Assets, and disagrees that this definition is unsuitable for regulatory purposes. That definition, which may not be all inclusive, includes specifically identifiable intangibles, i.e., patents, franchises, and trademarks. The definition also includes the most common intangible asset, goodwill. ''Goodwill'' is the common name used to describe the excess of the cost of an acquired enterprise over the sum of identifiable net assets. The Secretary notes that items such as deferred tax assets and liabilities, deferred enrollment expenses, deferred direct response advertising costs and prepaid expenses do not meet the definition of an intangible asset in accordance with the definition in APB Opinion No. 17.

The Secretary does not agree that intangible assets should be included in the calculation of the ratios, because those assets generally represent amounts that are not readily available to meet obligations. In addition, the Secretary believes that including those assets would inject a very subjective element into the ratio calculations, leading to an evaluation of financial health that would be arbitrary, or that could overstate significantly the financial health of an institution. Although amounts on financial statements are estimates to varying degrees, goodwill valuation is particularly subjective. In reviewing the financial statements of the proprietary sector, the Secretary found that the two most common intangibles were goodwill (excess purchase price over the fair value of assets purchased) and covenants not to compete. Clearly there is no established market for those assets and assigning a value to those assets for purposes of determining financial responsibility would be subjective at best. Moreover, there is the problem of the nature of the asset itself—it is highly unlikely that an institution could sell intangible assets to meet its general obligations. If an institution finds itself in need of liquidating assets during its normal business cycle to meet obligations, an asset such as goodwill is likely impaired. Also, in reviewing financial standards for other industries like banking and securities, the Secretary found that removing intangibles when calculating regulatory equity is a generally accepted practice.

With regard to unsecured related party receivables, the empirical data show that these receivables occur mainly in the proprietary sector where an institution is one entity in a commonly-controlled business group. Generally, unsecured related party receivables result from various intercompany transactions including shifting cash from one entity to another in the form of advances, intercompany sales for goods and services, or through more formal borrowing arrangements. Because the control over the repayment of the transaction usually lies completely with the ''owners'' of the business group, the receivable has little or no value to the institution whose financial responsibility is being evaluated. Also, in an administrative proceeding, unsecured or uncollateralized related party receivables are not recognized by the judge as assets available to satisfy the obligations of an institution. For these reasons, the Secretary excludes these receivables from the ratio calculations.

With regard to the commenters from private colleges and universities who objected to the blanket exclusion of related party receivables from the ratio calculations, these commenters are likely referring to annual pledges from churches or other benefactors, and not to related party receivables as defined under GAAP. On this matter, the

Secretary follows the guidance of FASB Statement 116, which prescribes criteria for recording pledges (unconditional promises to give) in the financial statements of colleges and universities as net contributions receivable. The Statement defines the term ''promise to give'' using the common meaning of the word promise—a written or oral agreement to do (or not to do) something. A promise to give is a written or oral agreement to contribute cash or other assets to another entity. A promise carries rights and obligations—the recipient of a promise to give has a right to expect that the promised assets will be transferred in the future, and the maker has a social and moral obligation, and generally a legal obligation, to make the promised transfer. The making or receiving of an unconditional promise to give is an event that, like other contributions, meets the fundamental recognition criteria. The Secretary will include these assets (such as pledges from church related organizations, community foundations, and trust funds) in the calculation of the numerators of the Primary Reserve and Equity ratios if they meet these requirements as set forth under FASB 116 and are recorded as an economic resource in an institution's audited financial statements.

With regard to deferred marketing costs, the Secretary is concerned that institutions that record deferred direct response advertising costs as an asset are not always following the letter or spirit of the published guidance on this subject. The Secretary has experienced significant abuses with regard to recording those costs—institutions are listing items as assets that do not meet the criteria in the Accounting Standards Division—Statement of Position (SOP) 93–7, Reporting on Advertising Costs. In instances where the Secretary determines that abuses are occurring the Secretary will exclude those assets from the ratio calculations.

With respect to deferred direct response advertising costs, the Secretary will specifically determine whether (1) the primary purpose of the advertising is to elicit sales to customers who have responded to that advertising, and (2) that advertising results in probable future benefits.

Specific documentation that the Secretary may request with respect to the first item includes the following:

(1) Files indicating the customer names and the related direct-response advertisement;

(2) A coded order form, coupon or response card, included with an advertisement, indicating the customer's name; and

(3) A log of customers who have made phone calls to a number appearing in an advertisement, linking those calls to the advertisement.

The Secretary also reminds institutions that the conditions in SOP 93–7 must be met in order to report the costs of direct-response advertising as assets. The Secretary believes that those conditions are narrow because it is generally difficult to determine the probable future benefits of the advertising with the degree of reliability sufficient to report related costs as deferred assets.

Changes: None.

Part 6. Comments Regarding the Proposed Strength Factors

Comments regarding the scoring process: Several commenters maintained that the proposed ratio methodology is flawed because slight changes in a single factor could create an unusual variance in an institution's composite score.

Other commenters noted that an institution could automatically receive a strength factor score of 1.0 on all its ratios regardless of its financial condition, and questioned this procedure given that it would equate institutions that have a net loss or deficit with institutions that are profitable and have positive equity.

Several commenters were concerned that the media would use the composite scores of institutions in frivolous and very misleading ways such as ranking institutions by those scores.

Discussion: The Secretary agrees that under the proposed methodology a minor difference in a ratio result could disproportionately affect an institution's composite score. For example, a proprietary institution with a Primary Reserve ratio result of 0.29 would be assigned a strength factor score of 2.0, whereas another institution with only a marginally better ratio result of 0.30 would be assigned a higher strength factor, 3.0. Assuming that all other factors are equal, the latter institution would receive a higher composite score even though the ratio results of both institutions are essentially the same. In addition, because the proposed strength factors represent a range of ratio results, a proprietary institution with a Primary Reserve ratio result of 0.30 would be assigned the same strength factor as an institution with a higher ratio result, 0.49. To eliminate the effects of differences in ratio results, the Secretary establishes in these regulations linear algorithms under which a strength factor score is calculated based on an institution's actual ratio result. For example, the strength factor score for a proprietary institution with a Primary Reserve ratio result of 0.15 is calculated by multiplying that ratio result by a constant, using the algorithm $0.15 \times 20 = 3.0$.

The Secretary also agrees that the proposed procedure of assigning a strength factor score of 1.0 for negative ratio results does not differentiate sufficiently the financial health of institutions on the lower end of the scoring scale. In addition, the Secretary believes that for the purpose of these regulations, it is not necessary to differentiate greatly among institutions at the higher end of the scale. Therefore, in keeping with the methodology's design objective that an institution must demonstrate strength in one aspect of financial health to compensate for a weakness in another aspect and to provide greater differentiation among institutions on the lower end of the scale, the Secretary establishes in these regulations a scoring scale of negative 1.0 to positive 3.0.

In developing the strength factor scores for each of the ratios along this scale, the Secretary considered an institution's ability to satisfy its mission objectives relating to technology, capital replacement, human capital, and program initiatives. Specifically, the strength factor score reflects the extent to which an institution has the financial resources to:

(1) Replace existing technology with newer technology;

(2) Replace physical capital that wears out over time;

(3) Recruit, retain, and re-train faculty and staff (human capital); and

(4) Develop new programs.

The Secretary acknowledges that the importance of satisfying these objectives varies from institution to institution but believes that an institution must satisfy these objectives over time, not only to demonstrate that it has the financial resources necessary to provide the education and services for which its students contract, but also to meet the changing needs of its students and the demands of the marketplace.

The Secretary wishes to emphasize that the methodology measures only the financial ability of an institution to carry out these objectives. The methodology does not, nor is it intended to, assess the quality of an institution's educational programs or facilities; such quality assessments are made by the institution's accrediting agency.

Changes: The procedures for calculating the composite score proposed under § 668.173(a) are revised and relocated under § 668.172(a) to provide for the calculation of the strength factor scores. In addition,

proposed Appendix F is revised and supplemented by a new Appendix G, to reflect a scoring scale from negative 1.0 to positive 3.0, and to incorporate the linear algorithms used to calculate the strength factor scores for each of the ratios.

Comments regarding the strength factors:

Primary Reserve ratio: Several commenters believed that the required ratio results associated with the strength factors should be lowered for proprietary institutions to reflect the shorter programs offered by those institutions, arguing that since the ratio appears to gauge an institution's financial ability to complete a program, fewer resources are needed to ensure the completion of short programs.

One commenter opined that the ratio values underlying the Primary Reserve ratio strength factors for proprietary institutions are too high, noting that none of the large proprietary corporations he surveyed maintained adjusted equity equal to 30 percent of their total year expenses. The commenter argued that as the strength factor levels for this ratio are unfairly comparable to those proposed for non-profit institutions, the Secretary should adjust the proprietary sector strength factors as follows:

Ratio result	Strength factor
.05 or less	1
.06–.14	2
.15–.24	3
.25–.34	4
.35 or more	5

Another commenter also recommended that the Secretary revise the Primary Reserve ratio strength factors as indicated previously, arguing that the proposed factors penalize any institution that chooses to invest in property and equipment.

Another commenter from a proprietary institution argued that since the Primary Reserve ratio does not consider the timing of expenses or the differences between variable and fixed expenses, the ratio is difficult to value (it overlooks too many variables, such as normal business cycles for fixed expenses, and the ability of institutions to forego variable expenses during times of fiscal distress). The commenter suggested that if the Secretary establishes a Primary Reserve ratio in final regulations, the middle range of the strength factors for this ratio should reflect about 60–90 days of expenses, or about 17–25 percent of total annual expenses.

Equity ratio: Several commenters from proprietary institutions maintained that the proposed ratio standards do not recognize unused lines of credit or other direct measures of ability to borrow. One commenter suggested that such a measure should be constructed by comparing fixed assets to long-term debt, with strength factors as follows:

Ratio result	Strength factor
0.0–0.18	1
0.19–0.39	2
0.40–0.59	3
0.60–0.79	4
>0.79	5

Another commenter maintained that the suggested Equity ratio should be amended to include such a measure.

One commenter from a proprietary institution maintained that the strength factors for the Equity ratio should be set by considering an acceptable ratio of long-term assets to long-term liabilities. The commenter argued that an institution that is growing will expend its asset base in advance of recording income generated by those assets. According to the commenter, assuming a current ratio of 1:1, a ratio of long-term assets to long-term liabilities should have the following strength factors:

Ratio result	Strength factor
0.0	0
.10	1
.20	2
.25	3

Net Income ratio: Many commenters from the proprietary sector believed that the proposed strength factors for the Net Income ratio are too high. Several of these commenters opined that the emphasis placed on profitability under the proposed methodology might tempt institutions to raise tuition and cut back on educational outlays, thus shortchanging students and lowering the quality of education.

Several commenters from the proprietary sector objected to the Net Income ratio, arguing that it would discourage institutions from investing in property, plant, and equipment because it measures net income after depreciation. The commenters suggested two alternatives: (1) Retaining the proposed strength factors but reconstructing the ratio so that it is based on operating profit; or (2) retaining the proposed ratio but adjusting the strength factors.

One commenter from a proprietary institution stated that certain accrediting agencies take a strong stance against profits in excess of five percent. The commenter suggested therefore that the Secretary take this into account in establishing strength factors for the Net Income ratio.

Although several commenters agreed that the strength factors for proprietary institutions should be higher than those for non-profit institutions to take taxes into account, the commenters believed that the difference in the proposed strength factors between these sectors is excessive. Assuming a tax rate of 40 percent, the commenters suggested that comparable and fairer strength factors for proprietary institutions should be set at 166 percent of those for non-profit institutions. Under this suggestion, the resulting strength factors would be:

Ratio result	Strength factor
<0	1
0–.0166	2
0.0167–.049	3
0.050–.082	4
>0.082	5

Another commenter argued that the strength factors for the Net Income ratio for proprietary institutions should be set at 3.0 for a five percent profit level, and the rest of the range set as follows:

Ratio result	Strength factor
<.02	1
0.02–.035	2
0.036–.05	3
0.051–.075	4
>.075	5

One commenter suggested the following strength factors, opining that the proposed strength factors penalize an institution that returns some of its operating profit to students (by providing better qualified faculty and updated teaching tools and equipment, and increasing student services):

Ratio result	Strength factor
<0	1
0–.017	2
0.018–.049	3
0.050–.082	4
>.082	5

A commenter suggested that the Secretary establish a strength factor score of 3.0 for a net income ratio of .03, to reflect the amount of State and Federal income taxes an institution must pay.

Another commenter from a proprietary institution argued that a low profit percentage does not necessarily indicate financial weakness since

income tends to be lower for a financially healthy institution during periods of expansion. Accordingly, the commenter suggested the following strength factors:

Ratio result	Strength factor
<0.0	1
0.0–.015	2
>0.015	3

One commenter recommended that the Secretary establish equal strength factor levels for proprietaries and non-profits, amend the numerator of the ratio for proprietaries to ''Income After Taxes'', and impute the taxes for proprietary institutions that are Subchapter S corporations or partnerships.

Discussion: The Secretary thanks the commenters for their suggestions regarding the proposed strength factors. In view of these comments, other comments regarding the proposed ratios, and the analysis performed by KPMG during the extended comment period, the Secretary revises the proposed strength factors.

In developing the strength factor scores for each of the ratios, the Secretary started by selecting critical points along the scoring scale and determining the appropriate value (ratio result) for each of those points. For example, a strength factor score of 1.0 represents the lowest ratio result that the Secretary believes an institution must achieve to continue operations, absent any adverse economic conditions. With respect to the Net Income ratio, a strength factor score of 1.0 equates to a ratio result of zero—the point where an institution just barely operated within its means. At this point, the institution broke even on an accrual basis, but it did not add to or subtract from its overall wealth. Moving down the scale, a strength factor score of zero indicates that the institution may have generated sufficient cash to meet its operating expenses, but, on an accrual basis, the institution incurred a loss. On the upper end of the scale, a strength factor score of 3.0 indicates that the institution not only operated within its means, but that it added to its overall wealth. The Secretary then drew a line that best fit those values, resulting in the linear algorithms.

Strength factor scores for the Primary Reserve ratio: The strength factor score for the Primary Reserve ratio for a proprietary institution is calculated using the following algorithm:

Strength factor score = 20×Primary Reserve ratio result. The strength factor score for the Primary Reserve ratio for a private non-profit institution is calculated using the following algorithm:

Strength factor score = 10×Primary Reserve ratio result. The charts below show the strength factor scores for specific Primary Reserve ratio results.

PRIMARY RESERVE RATIOS' STRENGTH FACTOR SCORES FOR PROPRIETARY INSTITUTIONS

A Ratio Result of	Algorithm (20 X Ratio Result)	Equals a Strength Factor Score of
−.05 or less	20 X (−.05)	−1.0
0	20 X 0	0
.05	20 X .05	1.0
.075	20 X .075	1.5
.15 or greater	20 X .15	3.0

PRIMARY RESERVE RATIOS' STRENGTH FACTOR SCORES FOR PRIVATE NONPROFIT INSTITUTIONS

A Ratio Result of	Algorithm (10 X Ratio Result)	Equals a Strength Factor Score of
−.10 or less	10 X −.10	−1.0
0	10 X 0	0
.10	10 X .10	1.0
.15	10 X .15	1.5
.30 or more	10 X .30	3.0

As illustrated in the charts, for any strength factor score, the Primary Reserve ratio result is twice as high for a non-profit institution as it is for a proprietary institution. There are two reasons for this difference.

First, proprietary institutions generally have shorter business cycles than non-profit institutions, i.e., a proprietary institution generally has new classes starting throughout the year whereas a non-profit institution typically has only two to four starts (semesters or quarters) each year. Because of these shorter business cycles proprietary institutions are generally not as dependent on reserves of liquid assets (as measured by Primary Reserve ratio) since they can rely more on tuition revenues for necessary liquidity. In comparison, non-profit institutions must generally maintain greater amounts of liquid resources to fund short-term operations because of the longer period of time between receipt of new revenues.

Second, proprietary institutions should generally be able to obtain additional capital more quickly than non-profit institutions because owners, unlike trustees, are free to invest cash as needed to support operations and owners may increase expendable resources by leaving earnings in the institution. On the other hand, non-profit institutions are generally dependent on contributions from donors as their primary source of additional capital.

Discussion of Strength Factor Scores for the Primary Reserve Ratio

Strength factor score of 1.0: A strength factor score of 1.0 indicates that an institution has very little margin against adversity. For a proprietary institution, expendable resources equal only five percent of its total expenses (stated another way, the institution has about 18 days worth of resources that can be liquidated in the short-term to cover current operations). For a non-profit institution, expendable resources equal only 10 percent of its total expenses (the institution has about 37 days worth of resources that can be liquidated in the short-term to cover current operations).

At this level of expendable resources, the Secretary believes that an institution may be able to make payroll and meet existing obligations, but it will have difficulty financing any of its mission objectives. With respect to the fundamental elements of financial health, a strength factor score of 1.0 indicates relative weakness in viability and liquidity.

Strength factor score of zero: Moving down the scale, a strength factor score of zero indicates than an institution has no margin against adversity—the value of its liabilities is equal to the value of its expendable assets.

With no expendable resources, the Secretary believes that the institution will have difficulty meeting existing or future obligations without additional revenue or support, i.e., the institution is very sensitive to fluctuations in revenues or unexpected losses and will need to access shortly some resources from additional borrowing, capital infusions, or conversions from non-expendable assets to pay bills if it does not generate sufficient resources from revenues. With respect to the fundamental elements of financial health, a strength factor score of zero indicates weakness in financial viability and liquidity. Below this level, an institution receives negative points toward its composite score.

Strength factor score of negative 1.0: A strength factor score of negative 1.0 means that an institution has negative expendable resources—the value of its liabilities exceeds the value of its expendable assets.

At this level, the Secretary believes the institution will have serious difficulties satisfying existing obligations, and even more difficulties meeting any of its mission objectives. Because the institution is financing daily operations from another source, it must demonstrate some strength in that other source (revenue or ability to borrow) to earn positive points toward

its composite score. A strength factor score of negative 1.0 indicates extreme weakness in viability and liquidity.

Strength factor score of 3.0 : On the other end of the scale, a strength factor score of 3.0 indicates that an institution has a healthy margin against adversity. For a proprietary institution, expendable resources are equal to 15 percent of its total expenses. The institution has about 55 days worth of resources that can be liquidated in the short-term to cover current operations—one or more class starts. For a non-profit institution, expendable resources are equal to 30 percent of its total expenses. The institution has about 110 days worth of resources that can be liquidated in the short-term to cover current operations—about one semester.

At this level of expendable resources, the Secretary believes that an institution has the resources to invest in human and physical capital and new program initiatives. The institution demonstrates strength in the fundamental elements of financial viability and liquidity.

In assessing the reasonableness of the strength factors for the Primary Reserve ratio, the Secretary compared these factors to the standards set by Moody's. Moody's, a primary bond rating agency, uses an expendable resources to operations ratio (similar to the Primary Reserve ratio) in analyzing credit worthiness. The Secretary notes that the Moody's ratio is more conservative than the Primary Reserve ratio because it considers only unrestricted net assets as expendable resources whereas the Primary Reserve ratio generally includes unrestricted net assets and temporarily restricted net assets as expendable resources. The median Moody's ratio for non-profit institutions with a bond rating of Aa is 4.58 for small institutions and 3.28 for large institutions. (As this ratio decreases, the relative financial health of the institution decreases.) The median Moody's ratio for institutions with a Baa bond rating is 0.669 for large institutions and 0.449 for small institutions. The Moody's definition of their Baa grade is: ''Medium grade obligations, i.e., they are neither highly protected nor poorly secured. They lack outstanding characteristics and in fact have speculative characteristics as well.'' Institutions in this category represent a reasonable credit risk, but absent some other factor or set of circumstances, Moody's would not consider those institutions to be financially healthy.

The Secretary notes that while there are differences between the Moody's ratio and the Primary Reserve ratio, the Primary Reserve ratio result necessary to earn the highest strength factor (0.30 for non-profit institutions, and 0.15 for proprietary institutions) is lower than the median standard set by Moody's for investment grade institutions (0.669 or 0.449).

The Secretary believes it is appropriate that the Primary Reserve strength factors are lower than the standards set by Moody's for two reasons. First, the ratio methodology is designed to assess an institution's financial health over the short-term (a 12- to 18-month time horizon), whereas the repayment period of the bonds being rated is generally long-term. Second, the rating agencies are assessing repayment capabilities in the normal course without abnormal events such as spending endowment funds or liquidating fixed assets.

Strength Factor Scores for the Equity Ratio

The strength factor score for the Equity ratio for both proprietary and non-profit institutions is calculated using the following algorithm:

Strength factor score=6 × Equity ratio result.

The chart below shows the strength factor scores for specific Equity ratio results.

EQUITY RATIO

A ratio result of:	Algorithm (6 × ratio result)	Equals a strength factor score of:
−0.167 or less	6 × −0.167	−1
0	6 × 0	0
0.167	6 × 0.167	1
0.250	6 × 0.250	1.5
0.50 or more	6 × 0.50	3

Discussion of Strength Factor Scores for the Equity Ratio

Strength factor score of 1.0: For a proprietary institution, a strength factor score of 1.0 indicates that the owner is just beginning to demonstrate a financial commitment to the business since the institution's assets are greater than its liabilities, but not by much. For a non-profit institution, a strength factor score of 1.0 may reflect a permanent endowment that provides some revenue or that may be drawn upon in extreme circumstances. In either case, most of the institution's assets are subject to claims of third parties—for every $10.00 in assets, the institution has $8.33 in liabilities. Stated another way, the institution's liabilities are five times greater than its equity.

The Secretary believes that this relatively small amount of equity indicates that the institution will have difficulty borrowing at favorable market rates and that it has a very limited ability to meet its technology and capital replacement needs. With respect to the fundamental elements of financial health, a strength factor score of 1.0 indicates relative weakness in financial viability, ability to borrow, and capital resources.

Strength factor score of zero: Moving down the scale, an absence of equity (strength factor score of zero) provides no evidence of an owner's financial commitment to the business since there are no accumulated earnings or invested amounts beyond the institution's liabilities to third parties. For a non-profit institution, the absence of net assets indicates that there is little or no permanent endowment to draw upon in extreme circumstances.

At this level, the value of the institution's assets is equal to the value of its liabilities. Consequently, the Secretary believes that the institution will have difficulty obtaining additional financing because there may not be any assets to secure that financing. For an institution with relatively old plant assets that have been fully depreciated, zero equity implies that the institution must rely on additional revenues, including pledges or capital infusions, to build or invest in the future. For an institution with newer plant assets, zero equity implies that the institution has stretched its borrowing capacity beyond a reasonable limit. With respect to the fundamental elements of financial health, a strength factor score of zero indicates weakness in viability, ability to borrow, and capital resources. Below this level, an institution receives negative points toward its composite score.

Strength factor score of negative 1.0: A strength factor score of negative 1.0 means that the institution is virtually insolvent since its obligations to third parties are greater than the assets it has to satisfy those obligations. For every $11.67 (or more) in liabilities, the institution has just $10.00 in assets.

At this level, the Secretary believes that the institution has no ability or a significantly diminished ability to borrow because it has no resources, or very limited resources, to offer as collateral that are not already subject to claims of third parties. Moreover, the institution will have difficulty meeting any of its mission objectives. The institution will need to demonstrate strength in another source (profitability), or the owner will need to make a capital infusion, to earn positive points toward its composite score. With respect to the fundamental elements of financial health, a strength factor score

of negative 1.0 indicates extreme weakness in viability, ability to borrow, and capital resources.

Strength factor score of 3.0: On the upper end of the scale, a strength factor score of 3.0 provides evidence of an owner's financial commitment to the business, and for a non-profit institution, it indicates the accumulation of substantial net assets, including permanent endowment. The institution's assets are significantly greater than its liabilities—for every $10.00 in assets the institution has $5.00 in liabilities. Stated another way, the institution's liabilities are less than its equity.

At this level, the Secretary believes that an institution has the resources necessary to borrow significant amounts at favorable market rates, replace physical capital as needed, and fund new program initiatives. A strength factor score of 3.0 indicates strength in financial viability, ability to borrow, and capital resources.

As with the Primary Reserve ratio, the Secretary tested the reasonableness of the Equity ratio strength factor scores by comparing the scores in this case, to the data compiled by Robert Morris Associates (RMA). The Secretary notes that although RMA compiles survey data from various industries, it forms no conclusions about those industries from that data. RMA uses a total liabilities to tangible net worth ratio (total liabilities divided by (total tangible assets—total liabilities)) that is similar to the Equity ratio ((total tangible assets—total liabilities) divided by tangible assets). By using the RMA data, lending institutions and other investors can see how a particular institution's ratio result compares to industry averages.

In the RMA 1996 Annual Statement Studies, the median total liabilities to tangible net worth ratio score for colleges and universities (SIC #8221) was generally around 0.50 but went as high as 2.7 for small institutions—a 0.50 ratio result indicates that for every $3.00 of assets, there is $1.00 in liabilities. For SIC #8299, Services-School and Educational Services (proprietary institutions), the median was around 1.3, but went as high as 2.4—a ratio result of 1.3 indicates that for every $1.77 of assets, there is $1.00 in liabilities.

Although the 2 to 1 (assets to liabilities) relationship necessary to earn the highest score for the Equity ratio is slightly lower than the RMA median for proprietary institutions, 2.3 to 1 (and much lower than the RMA median for non-profit institutions, 3 to 1), the Secretary believes that the strength factor score for the Equity ratio is reasonable for two reasons. First, the methodology is designed to differentiate more among institutions on the lower end of the scoring scale, not at the median or high end ranges. Second, the methodology measures an institution's financial health over a relatively short time horizon, 12-to-18 months, whereas users of the RMA data are evaluating the institution over a much longer time frame.

Strength Factor Scores for the Net Income Ratio

The strength factor score for the Net Income ratio for a proprietary institution is calculated using the following algorithm:

Strength factor score=1+(33.3 × Net Income ratio result). The strength factor score for the Net Income ratio for a private non-profit institution is calculated using the following algorithms:

If the Net Income ratio result is negative, the Strength factor score=1+(25 × Net Income ratio result);

If the Net income ratio result is positive, the Strength factor score=1+(50 × Net Income ratio result); or

If the Net Income ratio result is zero, the Strength factor score=1.

The charts below show the strength factor scores for specific Net Income ratio results.

NET INCOME RATIOS' STRENGTH FACTOR SCORES FOR PROPRIETARY INSTITUTIONS

A ratio result of:	Algorithm 1+(33.3×net income ratio result)	Equals a strength factor score of:
−0.06 or less	1+(33.3×−0.06)	−1.0
−0.03	1+(33.3×−0.03)	0
0.00	1+(33.3×0.00)	1.0
0.015	1+(33.3×0.015)	1.5
0.06 or more	1+(33.3×0.06)	3.0

Net Income Ratios' Strength Factor Scores for Private Non-Profit Institutions

A ratio result of:	Algorithm (see below)	Equals a strength factor score of:
−0.08 (or less).	1+(25×−0.08)	−1.0
−0.04	1+(25×−0.04)	0
0.00	If ratio equals zero, strength factor score automatically equals 1.	1.0
0.01	1+(50×0.01)	1.5
0.04 (or greater).	1+(50×0.04)	3.0

The Secretary is convinced by the commenters not to unduly penalize institutions that incur a small operating loss, and to maintain a more neutral position on those institutions that break even. Therefore, the Secretary allows an institution with a small operating loss to earn positive points toward its composite score by taking into account that the institution may be generating positive cash flow despite those losses.

Based on the analysis conducted by KPMG during the extended comment period, the Secretary found that, on average, three percent of the expenses for proprietary institutions related to non-cash items such as depreciation or amortization. The corresponding amount for non-profit institutions was approximately four percent. The Secretary believes that an institution should generally be able to endure three or four percent losses before being forced to rely on expendable reserves or its ability to raise additional capital or sell off any of its infrastructure to continue operations. Although the Secretary found that some institutions had significantly higher amounts of depreciation, limiting the depreciation estimate to these percentages adds a degree of conservatism to the methodology. If higher percentages were adopted, an institution would be able to incur larger operating losses (including cash losses) before receiving negative points toward its composite score. Moreover, higher depreciation estimates would have the perverse effect of rewarding an institution that incurred sizable operating losses but had little or no depreciation expense (the institution's assets may be nearly or fully depreciated, indicating technological and physical obsolescence). Therefore, the Secretary set a strength factor score of 1.0 for the Net Income ratio at the point where an institution is estimated to break even on an accrual basis, and a strength factor score of zero at the point where an institution is estimated to break even on a cash basis.

The Secretary also agrees with the commenters from the proprietary sector that the combined effect of the proposed strength factors and weighting placed

too much emphasis on the Net Income ratio. In addition, research conducted by KPMG during the extended comment period indicates that a six percent return on revenue for proprietary institutions, and a four percent return for non-profit institutions, are reasonable values for those institutions to earn the highest strength factor score for the Net Income ratio.

Industry Norms and Key Business Ratios, published by Dun & Bradstreet, indicates that the return on sales ratio (net profit after taxes divided by annual sales) for the middle quartile of comparable industries (SIC codes 82, 8243, 8244, and 8299) is three or four percent. *The Almanac of Business and Industrial Financial Ratios,* authored by Leo Troy, Ph.D., shows that similar industries' typical pre-tax profit as a percentage of net sales is between two and seven percent. As with the Moody's and RMA data discussed earlier, the information published by Dun & Bradstreet and Leo Troy is used only to test the reasonableness of the strength factor scores for the Net Income ratio.

In addition, Moody's uses a return on unrestricted net assets ratio and their literature shows that the median results for small non-profit institutions is 0.043—very close to the 0.04 Net Income ratio result needed to earn the highest strength factor score. For large non-profit institutions, the median result is 0.052. The Secretary notes that the ratio used by Moody's excludes investment gains and measures net income as a percentage of net assets, not total revenue, so it is not perfectly comparable with the Net Income ratio.

Discussion of Strength Factor Scores for the Net Income Ratio:

Strength factor score of 1.0: A strength factor score of 1.0 indicates that an institution just barely operated within its means. On an accrual basis, the institution broke even. At this level the institution is able to fund historical capital replacement costs, but is not completely providing for the future replenishment of its capital assets.

The Secretary believes that an institution needs to generate operating surpluses because, absent those surpluses, it cannot grow its margin against adversity without capital infusions or donor contributions. A strength factor score of 1.0 indicates relative weakness on the fundamental financial element of profitability.

Strength factor score of zero: Moving down the scale, a strength factor score of zero indicates that an institution did not operate within its means during its operating cycle, but may have broken even on a cash basis, i.e., the institution may have generated sufficient cash to meet its operating expenses, but it did not fund its non-cash expenses. On an accrual basis, a proprietary institution incurred a loss equal to three percent of its total revenues, and a non-profit institution incurred a loss equal to four percent of its total revenues.

At this level, the Secretary believes that an institution is unable to fund its capital replacement costs and that it cannot continue operations for an extended time without depleting its equity. A strength factor score of zero indicates weakness on the fundamental financial element of profitability. Below this level, an institution receives negative points toward its composite score.

Strength factor score of negative 1.0: A strength factor score of negative 1.0 indicates that an institution not only did not operate within its means, but that its operations most likely produced negative cash flow since losses exceeded non-cash expenses. On an accrual basis, a proprietary institution incurred losses equal to 6 percent (or more) of its total revenues, while a non-profit institution incurred losses equal to 8 percent (or more) of its revenues.

At this level, the institution decreased its margin against adversity and continued losses will deplete its other resources. A strength factor score of negative 1.0 indicates weakness in the fundamental financial element of profitability.

Strength factor score of 3.0: On the upper end of the scale, a strength factor score of 3.0 indicates that an institution not only operated within its means, but added to its overall wealth, thus increasing its margin against adversity. On an accrual basis, a proprietary institution generated operating surpluses equal to at least six percent of its total revenues, and a non-profit institution generated surpluses equal to at least four percent of its total revenues.

At this level, the Secretary believes that the institution is not only funding its capital replacement costs, but that it has operating surpluses to invest in new program initiatives and human and physical capital. A strength factor score of 3.0 indicates strength on the fundamental financial element of profitability.

Changes: As discussed in this Part, proposed Appendix F is revised and supplemented by a new Appendix G to reflect the strength factor scores for each of the ratios, and to provide the linear algorithms used to calculate those scores.

Part 7. Comments Regarding the Weighting of the Proposed Ratios

Comments: A commenter from a proprietary institution believed that the proposed strength factor values and weighting of the Primary Reserve ratio for proprietary institutions are too low. The commenter argued that the weighting given to the Primary Reserve ratio should be at least equal to the weighting given to the Net Income ratio because the retained wealth of an institution, which can be used to weather financial difficulties, is just as important as the one-year profit earned by the institution. Accordingly, the commenter suggested that the Secretary weight the ratios as follows: 40 percent for the Primary Reserve ratio, 30 percent for the Net Income ratio, and 30 percent for the Viability ratio.

A commenter from a proprietary institution opined that if the Secretary substitutes an Equity ratio for the Viability ratio, the Secretary should weight the Equity ratio the most because it is the ratio that best measures long-term financial stability.

Commenters from proprietary institutions believed that a 50 percent weighting on the Net Income ratio placed too much emphasis on the short-term financial situation of the institution. One of these commenters suggested instead that all of the ratios should be weighted equally. Along the same lines, other commenters from proprietary institutions favored lowering the weighting of the Net Income ratio from 50 percent to 30 percent or 40 percent, while another commenter suggested that the Secretary assign the same weight to the Net Income ratio for proprietary institutions that is assigned to non-profit institutions.

Some commenters believed that the proposed weighting of the income ratio would lead to fiscal mismanagement (institutions would need to stockpile profits to meet the ratio standards) or encourage unscrupulous for-profit institutions to declare and pay out huge dividends to owners.

One commenter representing proprietary institutions appreciated the Secretary's willingness to revise the proposed ratio weights in response to public comment, but believed that the suggested revised weights moved too far in reducing the weight of the Net Income ratio and increasing the weight of the Primary Reserve ratio for proprietary institutions. The commenter asserted that because the proprietary sector consists of a variety of institutions of different sizes, structures, and management philosophies (and

must deal with a variety of different tax issues), the Secretary should place the majority of the weight on the combination of the ratios that measure financial health in the short and long-term: the Net Income and Equity ratios. The commenter suggested that an equitable weighting would be in the neighborhood of 40 percent for the Equity ratio, 40 percent for the Net Income ratio, and 20 percent for the Primary Reserve ratio.

Another commenter believed that the two most important factors for determining the financial responsibility of a proprietary institution are whether the institution is making a profit and the amount of tangible net worth the institution has available to sustain losses. Accordingly, the commenter suggested that the Secretary weight the Net Income ratio at 50 percent, the Equity ratio at 30 percent, and the Primary Reserve ratio at 20 percent. Alternatively, the commenter opined that weighting the Net Income and Equity ratios at 40 percent each would also be reasonable. The commenter believed strongly that the weighting for the Primary Reserve could be increased above 20 percent, but only if the ratio results required for the corresponding strength factors are reduced or if the Secretary modifies the definition of adjusted equity to include fixed assets.

Other commenters suggested various other weighting percentages that the Secretary should adopt for proprietary institutions, including weighting the Equity ratio at 30 percent, the Primary Reserve ratio at 20 percent, and the Net Income ratio at 50 percent.

A commenter representing private non-profit institutions argued that the Secretary should consider any institution to be financially responsible if that institution has positive expendable net assets and generates an annual surplus of revenues over expenses because such an institution does not represent a threat to Federal funds. Accordingly, the commenter recommended that the Secretary weight the Net Income ratio more heavily and in a manner that establishes the financial responsibility standard for private non-profit institutions as breaking even or running a small surplus annually. Similarly, another commenter from a private non-profit institution objected that the proposed ratio methodology weights the two balance sheet ratios (Viability and Primary Reserve) more heavily than the income statement ratio (Net Income). The commenter believed that this weighting scheme minimizes the value of strong operating results (as measured by annual changes in unrestricted net assets), and favors unfairly institutions with substantial expendable net assets. Along the same lines, another commenter suggested that the Primary Reserve and Net Income ratios for private non-profit institutions be weighted equally.

Other commenters from the non-profit sector believed that the Primary Reserve ratio was too heavily weighted (55 percent), arguing that such a weighting would create a disincentive for institutions to invest internal funds in plant assets even if those assets were revenue producing (such as dormitories).

Discussion: The Secretary thanks the commenters for their suggestions regarding the weighting percentages.

Discussion Regarding the Relative Importance (Weighting Percentages) of each of the Ratios for Proprietary Institutions

Regarding these and other comments from proprietary institutions that the weighting percentage for the Primary Reserve ratio should not be increased from the proposed level of 20 percent, the Secretary notes that expendable resources are measured by two of the proposed ratios, Primary Reserve and Viability, that together carry a combined weight of 50 percent. The Primary Reserve ratio measures expendable resources in relation to total expenses and the Viability ratio measures expendable resources in relation to total long-term debt. Since the proposed Viability ratio has been eliminated in favor of the Equity ratio, the Secretary believes that the weighting percentage for the Primary Reserve ratio must be increased because it is the only remaining measure of an institution's expendable resources. However, the Secretary does not believe that the weighting percentage of the Primary Reserve ratio should be increased to reflect the combined weight given to expendable resources under the proposed methodology because the importance of expendable resources to proprietary institutions is somewhat mitigated for two reasons. First, since proprietary institutions have frequent class starts they can rely more on tuition revenues than on reserves of liquid assets to meet near-term needs. Second, by comparing expendable equity to debt, the Viability ratio provided a measure of an institution's ability to borrow that is now provided by the Equity ratio.

The Secretary agrees with the commenters who argued that the Primary Reserve and Equity ratios are just as or more important than the Net Income ratio because together these balance sheet ratios reflect all of the resources accumulated over time by an institution that are available to the institution to support its current and future operations. By comparing tangible equity to tangible total assets, the Equity ratio provides a measure of the total resources that are financed by accumulated earnings and owner investments, or, stated another way, the amount of an institution's assets that are subject to claims of third parties. In so doing, the Equity ratio provides an indication of the commitment of an owner to the institution—a higher ratio indicates a greater commitment on the owner's part because a greater percentage of the owner's capital is at risk than would otherwise be the case if that institution was either highly leveraged or the owner had taken capital out of the institution. However, unlike the Primary Reserve ratio (or the Viability ratio), the Equity ratio does not provide a direct measure of the amount of resources that an institution has to meet its near-term obligations. Rather, the Equity ratio provides a high-level view of an institution's overall capitalization, and by inference its proportionate ability to borrow. Thus, the Equity ratio supplements the direct measure of the resources that an institution has available in the near-term (i.e., expendable resources measured by the Primary Reserve ratio) by providing a measure of all of the resources available to the institution to support its operations. In combination, the Primary Reserve and Equity ratios reflect the financial viability of an institution; that is, the ability of the institution to continue to achieve its operating and mission objectives over the long-term.

With regard to the weighting of the Net Income ratio, the Secretary is convinced by the commenters that in emphasizing profitability (by weighting the Net Income ratio at 50 percent), the proposed methodology may encourage proprietary institutions to cut back on necessary educational expenses or engage in other inappropriate behaviors. In addition, the Secretary agrees with these and other commenters that minor operating losses or year-to-year fluctuations in profits may not severely impair an institution from meeting its operating objectives in any particular year as long as the institution has other resources available to support its operations. For these reasons, the Secretary believes that the weighting percentage for the Net Income ratio must be reduced. However, the Net Income ratio must still carry a significant weight because operating

profits increase the institution's financial health over time and are necessary for a proprietary institution to meet one of its primary objectives—to distribute earnings to owners and shareholders.

Discussion Regarding the Relative Importance (Weighting Percentages) of Each of the Ratios for Non-Profit Institutions

The Secretary agrees that the weighting percentage for the Net Income ratio must be increased because the proposed methodology does not adequately account for strong operating performance. However, that increase must be limited because, unlike proprietary institutions, generating operating surpluses is not an objective of many non-profit institutions. In addition, accumulated operating surpluses are reflected in the Equity ratio.

The Secretary also agrees with the comments that the proposed weighting of Primary Reserve ratio (55 percent) is too high and that emphasizing the importance of expendable resources may create a disincentive for institutions to invest internal funds in necessary non-expendable assets. By using internal funds to finance the cost of plant assets, an institution's expendable resources are reduced, lowering both its Primary Reserve and Viability ratios. Because these two ratios carry a combined weight of 90 percent under the proposed methodology, a business decision to use internal funds for these purposes may substantially impact an institution's composite score. Although the Secretary believes that the weighting percentage of the Primary Reserve ratio must be reduced, it must still carry a significant weight for two reasons. First, since the operating cycles for non-profit institutions are generally tied to semesters or terms (as compared to proprietary institutions that generally have more frequent class starts), non-profit institutions must rely more on expendable reserves than on tuition revenues to meet near-term needs. Second, since the Viability ratio has been eliminated in favor of the Equity ratio that considers all of an institution's resources (including fixed assets and endowments), the impact of any reduction in expendable reserves reflected by the Viability ratio is also eliminated.

Changes: In view of this discussion, and the professional judgment of the Department and KPMG, the Secretary establishes the following weighting percentages:

Ratio	Proprietary institutions (percent)	Private non-profit institutions (percent)
Primary Reserve	30	40
Equity	40	40
Net Income	30	20

Proposed Appendix F is revised and supplemented by a new Appendix G to reflect these weighting percentages.

Part 8. Comments Regarding the Proposed Ratio Methodology as a Test of Financial Responsibility.

Comments regarding the composite score standard: Many commenters from private non-profit institutions opposed the creation of a ''bright line'' standard (i.e., the 1.75 composite score) based on the KPMG report. These commenters maintained that the KPMG report did not establish a test of financial responsibility, but merely recommended a screening process under which the Secretary could easily identify problem institutions. The commenters recommended that the Secretary remove the bright line standard as a test of financial responsibility and instead perform additional analyses of institutions falling below the 1.75 composite score before determining whether those institutions are financially responsible.

Several commenters from proprietary institutions maintained that the 1.75 composite score was too high, and that the Secretary should either abandon or revise the proposed methodology.

One commenter from a proprietary institution suggested that because of the uncertainty of the impact of these ratios, the Secretary should establish a three-year period of evaluation during which the composite score would be set at 1.25.

Several commenters opined that the Secretary should not conclude that an institution is not financially responsible solely because it failed to achieve a 1.75 composite score. The commenters asserted that certain occurrences, such as retirement incentive plans formulated to downsize an institution, could make it appear that the institution is not financially responsible under the proposed ratio methodology, when in fact the institution is financially healthy. The commenters suggested that the Secretary should determine that an institution is not financially responsible only if an independent auditor indicates concern about the institution's financial health in the Independent Auditor's Report or Management Letter comments.

A commenter from a proprietary institution suggested that the Secretary establish the composite score requirement based on the following rationale: if the Secretary allows an institution that loses money to pass the composite score requirement, the institution should be allowed to pass only if it is able under the other ratios to operate for 45 days by using its equity to meet current expenses. According to the commenter, this would lead to the following set of strength factors and weightings for a passing composite score of 1.0: a Primary Reserve Ratio result of .06 would equal a strength factor score of 1.0, weighted at 20 percent; an Equity Ratio result (defined as net worth/expenses) of .125 would equal a strength factor score of 2.0, weighted at 40 percent; and a Net Income Ratio result that was negative, resulting in a strength factor score of zero, weighted at 40 percent. The commenter suggested that the absolute value of the Net Income Ratio, when negative, should be no less than 50 percent of equity in order for the institution to pass. The commenter also suggested that an institution with negative equity, or with an operating loss that is in excess of 50 percent of its net worth, should fail the ratio tests.

Discussion: With regard to the first set of comments, the Secretary acknowledges that there were differing expectations about the intended use of the methodology. However, the Secretary disagrees that the KPMG report did not provide a basis for proposing a regulatory test (the composite score standard) solely because the report did not describe how the Secretary would determine the disposition of those institutions that would not satisfy that test. The Secretary provided alternatives for those institutions as part of the proposed rule. Moreover, the methodology detailed in that report provided a measure of the financial health of institutions along a scale from which the Secretary could reasonably propose a regulatory test of financial responsibility.

The Secretary agrees with the commenters that the composite score standard under the proposed methodology is too rigorous, mainly because that methodology was designed to evaluate the financial health of an institution over a two-to four-year time horizon.

In the methodology established by these regulations, the strength factor scores and weighting percentages are revised to measure the financial health of an institution over a much shorter time horizon, 12-to-18 months, to correspond with the period that generally passes before the Secretary receives financial statements from institutions and makes financial

responsibility determinations based on those statements.

In determining the minimum value of the composite score that an institution would need to achieve to demonstrate that it is financially responsible, the Secretary sought to identify the score at which an institution should not only have some margin against adversity, but also the resources to fund to some extent its technology, capital replacement, human capital, and program needs. The Secretary understands that institutions have differing funding needs and that it may not be necessary for some institutions to fully fund those needs every year. However, the Secretary believes that for an institution to demonstrate that it has the financial ability to provide, and to continue to provide in times of fiscal distress, the education and services for which its students contract, it must over time generate or acquire the resources to adequately fund its needs and to grow, if necessary, its margin against adversity. Along these lines, the Secretary establishes a composite score standard of 1.5.

As discussed previously under Analysis of Comments and Changes, Part 6, a strength factor score of 1.0 represents the lowest ratio result that the Secretary believes an institution must achieve to continue operations, absent any adverse economic conditions. A hypothetical institution with strength factor scores of 1.0 for all of the ratios achieves a composite score of 1.0. At this level on the scoring scale, the institution has very little margin against adversity, is just barely living with its means, and most of its assets are subject to claims of third parties. Although the institution may be able to make its payroll and meet its existing obligations, it will have difficulty borrowing at favorable market rates. Moreover, because it has very limited resources, the institution will have difficulty funding its technology, capital replacement, and program needs. Moving below this level on the scoring scale, it becomes very difficult for the institution to satisfy existing obligations, and even more difficult to fund any of its technology, capital replacement, human capital, and program needs. Moving up the scale, the institution's overall financial health increases incrementally. At a composite score of 1.5, the institution operated within its means and added somewhat to its overall wealth, and has some margin against adversity. At this level, the institution is funding historical capital replacement costs and has operating surpluses to provide funding for some investment in human and physical capital, but it has no excess funds to support new program initiatives or major infrastructure upgrades. In addition, while the institution may be able to borrow at favorable market rates, it may need to borrow to replace physical capital.

The Secretary notes that the specific financial characteristics of institutions may differ somewhat from those of this hypothetical institution, depending on the strength or weakness those institutions demonstrate in the fundamental elements of financial health. However, since the methodology measures those strengths and weaknesses along a common scale and takes into account the relative importance of the fundamental elements, the overall financial health of an institution at any given composite score is the same as that of any other institution with that composite score.

To illustrate the differences between groups of institutions scoring above and below the composite score standard, the following charts show the median value of each ratio for those institutions.

EMPIRICAL DATA FOR PROPRIETARY INSTITUTIONS, MEDIAN RATIO RESULTS

Range of composite scores	Equity ratio	Primary reserve ratio	Net income ratio
0.5 to 0.9	0.089	0.008	0.017
1.0 to 1.4	.180	.038	.024
1.5 to 1.9	.294	.094	.009

EMPIRICAL DATA FOR NON-PROFIT INSTITUTIONS, MEDIAN RATIO RESULTS

Range of composite scores	Equity ratio	Primary reserve ratio	Net income ratio
0.5 to 0.9	0.388	−0.087	−0.017
1.0 to 1.4	.583	.009	−0.001
1.5 to 1.9	.602	.087	.004

These ranges are selected to reflect the difference between the minimum composite score that the Secretary believes an institution must attain to continue operations (1.0) and the composite score that an institution must attain to be financially responsible (1.5). To characterize the ratio results of institutions in these ranges, the median (the value that falls in the middle of the range) was chosen as the measure of central tendency because unlike the mean or mode, the median ignores extreme values, except to account for their location with respect to the middle value of the range.

For proprietary institutions in the 0.5 to 0.9 composite score range, the median value of the Net Income ratio indicates relative strength in one fundamental element of financial health—profitability. However, that strength is outweighed by weaknesses in the Equity and Primary Reserve ratios. In contrast, the proprietary institutions scoring in the 1.5 to 1.9 range show relative strength in the Equity and Primary Reserve ratios. These strengths in viability, liquidity, capital resources, and ability to borrow, account for 70 percent of the composite score and outweigh those institutions' relative weakness in profitability.

For non-profit institutions in the 0.5 to 0.9 composite score range, the median value for the Equity ratio indicates relative strength in ability to borrow, viability, and capital resources, but that strength is outweighed by serious weaknesses in the Primary Reserve and Net Income ratios which account for 60 percent of the composite score. In the 1.5 to 1.9 range, the positive Primary Reserve and Net Income ratios, although relatively weak, supplement those institutions' strength in the Equity ratio.

Changes: The composite score standard proposed under § 668.172(a) is relocated to § 668.171(b) and revised to provide that to be financially responsible an institution must achieve a score of at least 1.5.

Part 9. Comments Regarding Alternative Means of Demonstrating Financial Responsibility

Comments regarding the proposed precipitous closure alternative: A commenter from a higher education association believed that the Secretary should amend the proposed precipitous closure alternative by eliminating the qualifying requirement that an institution must satisfy the general standards of financial responsibility for its previous fiscal year. The commenter opined that the ratios are not short-term measures of financial health that can be corrected quickly by an institution and suggested that an institution should only have to show that its financial condition has not worsened during the year in which the institution relied on this alternative in order to use it again. The commenter reasoned that if the institution's financial health is improving, it poses less of a risk in subsequent years.

Many commenters from proprietary institutions opposed the proposed precipitous closure requirements. The commenters believed that by including personal financial guarantees, the Secretary elevated the precipitous closure standard beyond the current past performance and going concern requirements. These commenters and

many others from the non-profit sector maintained that the proposed requirement of personal financial guarantees is neither supported by, nor in keeping with, section 498(c)(3)(C) of the HEA. The commenters believed that the Secretary should retain the current alternatives described in § 668.15(d)(2) under which an institution that fails to satisfy the general standards may demonstrate that it is nevertheless financially responsible.

Many other commenters opposed the concept of requiring personal financial guarantees under any circumstances. Some commenters from non-profit institutions maintained that personal financial guarantees would be impossible to obtain from their trustees or would lead persons to refuse to serve as trustees or would create conflicts of interest for trustees. Several commenters representing proprietary institutions believed that personal financial guarantees are unfair and arbitrary, because the guarantees would expose the owners of small family businesses to the loss of personal assets, including their homes and savings.

Several other commenters recommended that instead of immediately requiring a letter of credit or personal financial guarantees from an institution that fails to achieve the composite score, the Secretary should use a longer term analysis of the institution's financial condition, including the institution's management record. These commenters believed that if an institution failed the general standards one year out of several, more extensive forms of reporting or monitoring should be required to determine whether the institution is improving (particularly when the institution's failure to meet the ratio standards results from normal fluctuations in the business cycle).

Discussion: With regard to the comment that the Secretary should eliminate the requirement that an institution must satisfy the general standards of financial responsibility for its previous fiscal year to qualify for the proposed alternative, the Secretary notes that this requirement was originally established as part of the precipitous closure exception under the financial responsibility regulations published on April 29, 1994. Under that exception an institution was not required to post a surety or enter into provisional certification to continue participating in the title IV, HEA programs. To minimize the Federal risks from unprotected participation, the Secretary structured the exception so that it was available only to an institution that (1) was financially responsible in its fiscal year prior to the year in which it sought to qualify under the exception, (2) demonstrated that its deteriorated financial condition was not exacerbated by benefits given to owners or related parties, and (3) otherwise demonstrated, by satisfying certain conditions, that it had sufficient resources to ensure that it would not close precipitously. That structure allowed a qualifying institution one year to improve its financial condition and prevented that exception from becoming a means for the institution to continue participating under a lower standard of financial responsibility than that required of all other institutions (for more information, see 59 FR 34964–34965).

In keeping with the concept that the precipitous closure exception should provide an opportunity for a financially weak institution to improve its financial condition, but instead of requiring the institution to demonstrate that it had not engaged in certain practices that could have led to its deteriorated financial condition, the Secretary proposed that an institution would need to attain a composite score of at least 1.25 and the owners, trustees, or other persons exercising substantial control over the institution would have to provide personal financial guarantees. The proposed composite score was intended to establish a minimum threshold below which an institution's financial condition had so seriously deteriorated that additional protections, such as surety or provisional certification, would be required immediately to protect the Federal interest. For institutions scoring at or above that minimum threshold, the Secretary proposed requiring personal financial guarantees based on the reasoning that if the owner or person exercising substantial control over the institution was willing to risk the loss of his or her personal assets on behalf of the institution, the Secretary would accept the corresponding risk to the Federal interest by allowing that financially weak institution to continue to participate in the title IV, HEA programs.

In light of the comments, the Secretary acknowledges that requiring personal financial guarantees may prevent some institutions from qualifying under the proposed alternative. Moreover, the Secretary is convinced by these and other commenters that instead of immediately requiring personal financial guarantees or a surety, a more considered and less burdensome approach should be adopted for institutions that do not satisfy the composite score standard. Along these lines, and in view of the preceding discussion, the Secretary establishes in these regulations the ''zone'' alternative under which a financially weak institution has up to three consecutive years to improve its financial condition without having to post a surety, provide personal financial guarantees, or participate under a provisional certification. To qualify initially under this alternative, an institution must achieve a composite score in the zone from 1.0 to 1.4, and to continue to qualify, must achieve a composite score of at least 1.0 in each of its two subsequent fiscal years. If the institution does not score at least 1.0 in one of those subsequent fiscal years or does not sufficiently improve its financial condition so that it satisfies the composite score standard (achieves a composite score of at least 1.5) by the end of the three-year period, the institution must satisfy another alternate standard under these regulations to continue to participate in the title IV, HEA programs. However, the institution may qualify again under the zone alternative for its fiscal year following the next fiscal year in which it achieves a composite score of at least 1.5.

The zone alternative is not available to an institution scoring below 1.0 because there is considerable uncertainty regarding the ability of the institution to continue operations and satisfy its obligations to students and to the Secretary. For that institution, the Secretary believes that additional oversight and surety are required immediately to protect the Federal interest.

On the other hand, an institution scoring in the zone should generally be able to continue operations for the next 12-to-18 months, absent any adverse economic event. However, because of that institution's limited ability to deal with adversity and its overall weak financial condition, the Secretary believes it is necessary to monitor more closely the operations of that institution, including its administration of title IV, HEA program funds. Accordingly, under the zone alternative the Secretary requires an institution to provide timely information regarding certain oversight and financial events that may adversely impact the institution's financial condition, but that the Secretary would not generally become aware of until six months after the end of the institution's fiscal year when that institution submits its audited compliance and financial statements. The following chart compares the proposed precipitous closure alternative to the zone alternative.

Provision	Proposed precipitous closure alternative, § 668.174(a)(3)	Zone alternative, § 668.175(d)
To qualify initially under the alternative, an institution must.	1. Achieve a composite score of 1.25 to 1.74 (on a scale from 1.0 to 5.0);. 2. Satisfy all of the general standards of financial responsibility for its previous fiscal year;. 3. Provide personal financial guarantees from owners, board of trustees, or other persons exercising substantial control over institution; and. 4. Demonstrate to the Secretary that it will not close precipitously.	1. Achieve a composite score of 1.0 to 1.4 (on a scale from negative 1.0 to positive 3.0). *Informational and Administrative Procedures* Rather than having to satisfy the qualifying requirements under the proposed precipitous closure alternative, an institution must provide information regarding certain oversight and financial events and comply with cash management and other provisions.
To continue to qualify, an institution must.	Not available; an institution could qualify under this alternative for only one year.	Achieve a composite score no less than 1.0 in each of its next two years under the alternative and continue to comply with the *Informational and Administrative Procedures* above.
Institution may qualify again under the alternative.	For its fiscal year following the year that it satisfies the composite score standard (1.75).	For its fiscal year following the next year that it satisfies the composite score standard (1.5 or greater).

With regard to the reporting requirements under the zone alternative, an institution must provide information to the Secretary no later than 10 days after the following events occur: (1) Any adverse action taken against it by its accrediting agency, (2) any event that causes the institution, or related entity, to realize any liability that was noted as a contingent liability in the institution's or related entity's most recent audited financial statements, (3) any violation by the institution of any existing loan agreement, (4) any failure of the institution to make a payment in accordance with its existing debt obligations that results in a creditor filing suit to recover funds under those obligations, (5) any withdrawal of owner's equity from the institution by any means, including by declaring a dividend, or (6) any extraordinary losses.

In addition, the Secretary may, on a case-by-case basis, require an institution to submit its compliance and financial statement audits earlier than six months after the end of its fiscal year or provide information about its current operations and future plans.

With regard to administering title IV, HEA program funds, the Secretary is mindful of the concerns raised by commenters about the onerous nature of the reimbursement payment method. Therefore, the Secretary amends the Cash Management regulations under subpart K to include a new payment method, cash monitoring, that is in several respects similar to reimbursement but much less onerous. Like the reimbursement payment method, an institution under the cash monitoring payment method must first make disbursements to eligible students and parents before the Secretary provides title IV, HEA program funds to the institution for the amount of those disbursements.

However, under cash monitoring, the Secretary (1) allows the institution itself to make a draw of title IV, HEA program funds for the amount of the disbursements the institution has made to eligible students and parents, or (2) reimburses the institution for those disbursements based on a modified and more streamlined review and approval process. For example, instead of requiring the institution to provide specific documentation for each student to whom the institution made a disbursement, and reviewing that documentation before providing funds to the institution, the Secretary may simply require the institution to identify those students and their respective disbursement amounts and provide title IV, HEA program funds to the institution based solely on that information. The Secretary further amends subpart K to provide that an institution that is placed under the cash monitoring payment method is subject to the disbursement and certification provisions that apply to FFEL Program funds, but in keeping with the nature of cash monitoring, the Secretary may modify those provisions.

For an institution that qualifies under the zone alternative, the Secretary determines whether to provide title IV, HEA program funds to the institution under one of the cash monitoring payment options or by reimbursement. As part of its compliance audit, an institution must require its auditor to express an opinion on its compliance with the requirements under the zone alternative, including its administration of the payment method under which the institution received and disbursed title IV, HEA program funds. If an institution fails to comply with the information reporting or payment method requirements, the Secretary may determine that the institution no longer qualifies under this alternative.

Finally, with respect to the other comments regarding personal financial guarantees, the Secretary would like to clarify that under section 498(e) of the HEA the Secretary may require these guarantees from an institution with past performance problems or from an institution that fails, or has failed in the preceding five years, to satisfy the general standards of financial responsibility.

Changes: The precipitous closure alternative proposed under § 668.174(a)(3) is replaced by the zone alternative. The zone alternative is located under § 668.175(d) of these regulations.

The Cash Management regulations under subpart K are revised in several ways. First, § 668.162(a)(1) is amended to include cash monitoring as a payment method under which the Secretary may provide title IV, HEA program funds to an institution. Second, a new paragraph (e) is added to § 668.162 that sets forth the provisions of the cash monitoring payment method. Lastly, a new paragraph (f) is added to § 668.167 to provide that the Secretary may require an institution under the cash monitoring payment method to comply with the disbursement and certification provisions that apply to institutions placed under the reimbursement payment method. This paragraph also provides that the Secretary may modify those disbursement and certification procedures for institutions under cash monitoring.

The provisional certification alternatives proposed under § 668.178 (b) through (d) are relocated under § 668.175 (f) and (g) and revised to clarify when and the conditions under which the Secretary may require an institution, or the persons who exercise substantial control over the institution, to provide personal financial guarantees. Also, these sections are amended by removing the proposed

requirement that an institution must demonstrate that it will not close precipitously and providing in place of that requirement that an institution must comply with the zone provisions under § 668.175 (d)(2) and (3).

Comments regarding the irrevocable letter of credit alternative: Many commenters maintained that the proposed rules continue to contradict statutory language in specifying that letters of credit be for one-half of all annual title IV, HEA disbursements, rather than for one-half of potential annual liabilities.

A commenter representing private non-profit institutions asserted that the letter of credit alternative was not feasible for small, frugal, tuition-driven institutions. The commenter suggested that the Secretary should not require these institutions to provide letters of credit unless the institutions have audit or program review liabilities.

Many commenters contended that providing a letter of credit payable to the Secretary erodes an institution's financial condition, affects negatively an institution's ability to provide educational services, and could lead to the precipitous closure of an institution that would otherwise have continued operations. One of these commenters reasoned that this provision is counter-intuitive—an institution that could afford to secure a letter of credit would not need to because it would probably pass the ratio standards, but an institution that did not pass the ratio standards probably could not afford to secure the letter of credit.

Similarly, another commenter recommended that in cases where institutions fail to meet the composite score standard for one year, the Secretary should adopt an accrediting agency approach and work with those institutions by helping them create a formal recovery plan instead of imposing letter of credit requirements that would weaken those institutions' financial condition.

Several commenters from the proprietary sector suggested that the Secretary expand the alternative methods of demonstrating financial responsibility for small institutions to include a provision under which those institutions could provide a letter of credit in the amount of five percent or 10 percent of their prior-year title IV, HEA program funds. The commenters stated that this alternative would be more equitable because a small institution may not be able to afford the cost of obtaining a large letter of credit, or have available sufficiently large credit lines to secure a 50 percent letter of credit. The commenters also recommended that for all institutions, an alternative should be the provision of a letter of credit in an amount ranging from five percent to 50 percent of the institution's prior-year title IV funds, tied to the perceived shortfall in funds, or to the operating loss that triggered the institution's failure to meet the standards.

Discussion: The Secretary continues to believe that the practice of equating the institution's potential liabilities with the amount of funds received during a prior year is reasonable, especially since the law takes into consideration the value of potential loan discharges and unpaid student refunds. The thresholds used to measure financial responsibility, and to establish appropriate minimum surety levels, do not take into consideration additional risks that may be present at institutions where there have been demonstrated compliance problems in administering the title IV, HEA programs. For that reason, the larger surety that allows an institution to be considered financially responsible may be as low as 50 percent, the minimum required under the law which states that such a surety must be not less than one-half of its annual potential liabilities. In the alternative, the Secretary may certify the institution provisionally and require the institution to post a letter of credit as low as 10 percent of its prior year's funding.

Where compliance issues are identified with an institution that does not demonstrate financial responsibility under these regulations, or where greater risks are identified in the institution's deteriorated financial condition, the corresponding amounts of surety required to either demonstrate financial responsibility or participate under provisional certification will be higher. Although this larger surety may impose additional hardships on an institution that is experiencing financial difficulties, the corresponding higher risks arising from that institution's continued participation in the title IV, HEA programs warrant the additional protection to the Federal interests.

With respect to the comments that the Secretary should provide an alternative under which an institution would be allowed to post a small letter of credit to demonstrate that it is financially responsible, the Secretary notes that this alternative is not permitted under the law. Under section 498(c)(3)(A) of the HEA, an institution that does not satisfy the general standards of financial responsibility must post a letter of credit of not less than one-half of its potential annual liabilities to demonstrate that it is financially responsible. For this reason, the Secretary structured the zone alternative to allow a financially weak institution with no compliance problems to continue to participate as a financially responsible institution for up to three consecutive years. This alternative provides institutions scoring in the zone a reasonable period of time to improve their financial condition by working with their accrediting bodies through the formal recovery plans mentioned by the commenter, or by other means. To the extent that an institution is unable to raise its composite score to 1.5 or higher after three years, or if the institution's composite score decreases below 1.0, that institution will generally be able to continue to participate in the title IV, HEA programs by posting a large surety or under a provisional certification with a smaller surety.

Changes: None.

Comments regarding other alternatives: One commenter from a non-profit institution believed that the calculation of a few ratios cannot begin to compare as a true measure of financial strength to a credit rating received by an institution from a major rating agency. Therefore, instead of the proposed methodology the commenter suggested that the Secretary consider any institution whose debt is rated as investment grade (BBB/Baa) or better to be financially responsible.

Many commenters from proprietary institutions argued that in accordance with the language contained in section 498(c)(3)(A) of the HEA, the Secretary should allow institutions to post performance bonds as well as letters of credit as an alternative to meeting ratio standards of financial responsibility.

A commenter from a higher education organization representing public and non-profit institutions suggested the following alternatives for any degree-granting, regionally accredited institution that is designated as a public institution by the State in which it is located or that has been in continuous existence for 25 years or since the authorization of the HEA in November 1965: (1) The institution can meet reasonable tests of self-insurance covering the potential liability of one-half of its annual funding under the title IV, HEA programs, (2) the institution participates in an insurance pool approved by the Secretary that indemnifies the institution for one-half of its annual funding under the title IV, HEA programs, (3) the institution presents a letter of credit covering at least one-half of its annual funding under the title IV, HEA programs, or (4) the institution presents other financial instruments, satisfactory to the Secretary, to cover one-half of the

institution's funding under the title IV, HEA programs.

Similarly, another commenter from a non-profit institution suggested the Secretary (1) should consider that an institution is financially responsible if the institution has been continuously operating with the same management structure for the past 20 years, (2) apply financial responsibility standards only if an institution has exceeded the maximum allowable default rate; and (3) should consider an institution a financial risk and place that institution on some type of probation if the institution has experienced five or more consecutive years of operating deficits, declining net assets, declining net worth, or declining enrollments.

A commenter from a higher education association representing proprietary institutions believed that the 50 percent letter of credit alternative was onerous and excessive and suggested that the Secretary consider the following alternatives: (1) A letter of credit equal to 25 percent of the amount of title IV, HEA program funds received by an institution during the previous year, (2) a performance bond, (3) a 10 percent letter of credit if the institution participates in a State tuition recovery program, (4) instead of reimbursement, the use of an escrow account under which an institution would be allowed to draw title IV, HEA program funds when it earned those funds, (5) a financial guarantee, or infusion of additional capital, by a parent corporation on behalf of an institution, or (6) a 10 percent letter of credit combined with provisional certification but not the reimbursement payment method.

Discussion: Some of the suggested alternatives, such as those relating to longevity, trend analysis, and smaller letters of credit, are not included in these regulations based on the discussion under Analysis of Comments and Changes, Part 9. Regarding the suggestion that the Secretary permit institutions to post performance bonds rather than letters of credit, it has been the Secretary's experience that performance bonds are virtually uncollectible and thus provide little or no protection to the Federal interest.

With respect to the commenters' suggestion that institutions should be able to use self-insurance or insurance pooling as a method of providing surety, the Secretary notes that a letter of credit may be obtained on behalf of an institution from a bank by a number of different entities, and that these regulations do not prevent several institutions (or other entities) from entering into an arrangement with a bank under which their pooled resources would be used to obtain a letter of credit for an institution that is required to post surety. In the absence of any specific information from the commenters regarding self-insurance or insurance pooling, the Secretary does not modify the regulations to permit any type of insurance pooling that would provide anything other than a letter of credit as surety for an institution.

In response to the comment regarding bond ratings, the Secretary believes that it is unlikely that an institution with an investment grade bond rating will not achieve a composite score of at least 1.5 because, as noted under Analysis of Comments and Changes, Part 6, the financial standards used by rating agencies are more stringent than the standards under these regulations.

While the regulations permit an institution to use its participation in an approved State tuition recovery plan as a substitute for a surety that would otherwise be required if the institution failed to make its refunds in a timely manner, the Secretary does not believe that these plans are appropriate resources to consider for paying liabilities that arise from an institution's administration of the title IV, HEA programs.

The Secretary notes that the cash monitoring payment method may also be used instead of reimbursement for institutions that participate under a provisional certification. This new payment method will reduce the relative burden noted by the commenters who suggested that the reimbursement requirement should be eliminated from the provisional certification procedures.

Changes: The provisional certification alternatives proposed under § 668.178 (b) through (d) are relocated under § 668.175 (f) and (g) and revised to provide that the Secretary may require an institution under either of these alternatives to disburse and request title IV, HEA program funds under the cash monitoring payment method.

Comments regarding alternatives for new institutions: Some commenters objected to the proposal contained in § 668.174(b)(2) under which the Secretary has the discretion to establish the amount of a letter of credit based on the amount of title IV, HEA program funds the Secretary expects that a new institution will receive for the first year it participates under these programs. The commenters believed that the Secretary could use this discretion to establish arbitrarily high letters of credit. As an alternative, the commenters suggested that the Secretary enter into an agreement with an institution establishing the amount of title IV, HEA program funds the institution may draw down during its initial year of participation. Under this arrangement, the institution would initially submit a letter of credit based on the agreed amount and submit additional letters of credit during the year if the institution needed to draw down title IV, HEA program funds in excess of the agreed amount.

Discussion: While the commenters' suggestion has merit, even if an institution agreed to submit additional letters of credit as a condition under a provisional certification, there is no assurance that the institution would be able to submit those letters of credit. In that circumstance, the institution's continued participation in the title IV, HEA programs would be severely jeopardized, placing at risk both students who relied on Federal funds to attend the institution and the Secretary for providing those funds.

To the extent that the Secretary accepts the risk to the Federal interest by allowing a financially weak institution to participate for the first time in the title IV, HEA programs, that risk must be mitigated at the onset by a letter of credit for an amount that the Secretary estimates is sufficient to cover the institution's potential liabilities. This is not to say that the Secretary will determine the amount of that letter of credit without conferring with the institution.

Changes: None.

Part 10. Comments Regarding Past Performance

Comments regarding substantial control: A commenter representing proprietary institutions was concerned that the past performance standards under proposed § 668.167(a)(1) could adversely affect innocent people. The commenter described a situation where an individual acting as a court-appointed officer of an institution undergoing reorganization under Chapter 11 could be harmed if the institution has title IV, HEA program liabilities and that individual is unable to bring the institution out of Chapter 11 status. The commenter believed that under the current rules, the Secretary would consider that the individual exercised substantial control over this failed institution and thus, because of the unpaid program liabilities could not subsequently exercise substantial control over another institution, i.e., because of the individual's past performance, another institution would not risk losing its ability to participate in the title IV, HEA programs by allowing the individual to exercise

substantial control. The commenter suggested that the Secretary modify the regulations to exclude from these provisions a person who was not employed by an institution at the time that the institution incurred title IV, HEA, program liabilities but who is retained either for the purpose of assisting in a reorganization plan or by a bankrupt corporation under a court-approved process.

Discussion: The commenter correctly notes that the regulations cause an institution to fail the financial responsibility standards if a person that exercises substantial control over the institution either held an ownership interest in another institution that owes a liability or exercised substantial control over that other institution. The regulations also provide that such a failure can be cured either by showing that the liability from the other institution is being repaid under an agreement with the Secretary, or that the person has repaid a portion of that liability that is equivalent to the former ownership interest. If the person did not hold an ownership interest in the other institution, but was instead a board member or executive officer of that institution or related entity, that person's repayment liability is capped at 25 percent of the applicable liability. Furthermore, the regulations provide that the institution whose financial responsibility is being determined may show that the person identified as exercising substantial control over the institution should nevertheless be considered to lack that control, or the institution may show that the person lacked that control over the institution that owes the liability.

The analysis made under this provision will take into consideration whether the liability arose when the person was exercising control over the institution, and whether that person should have ensured that the institution paid the liability. In the commenter's example, it could be reasonable to conclude that a court-appointed bankruptcy trustee with no prior dealings with the institution, who took control when no funds remained available to pay the liability, would not now cause another institution to fail the financial responsibility requirements. In other situations where someone has taken control over an institution that continued to participate in the title IV, HEA programs, it may be appropriate to hold that person accountable under the regulations if prior liabilities remained unpaid.

Changes: None.

Comments regarding administrative actions, program review and audit findings: One commenter representing proprietary institutions questioned the provision in proposed § 668.177(a)(2) under which an institution would not be considered financially responsible if it had been limited, suspended, or terminated (LS&T) by the Secretary or by a guaranty agency. The commenter maintained that limitations by guaranty agencies could have nothing to do with the financial condition of the institution (for example, the practice of an agency to limit the level of its guarantees to a certain amount per year). Therefore, the commenter believed that these limitations, or any other action taken by guaranty agencies, fall beyond the scope of this provision. The commenter suggested that if a guaranty agency questions the financial condition of an institution, the agency should refer that institution to the Secretary before any action is taken.

Other commenters representing proprietary institutions opined that the proposed provisions under § 668.177(a)(3) are arbitrary. Under these provisions, the Secretary would consider that an institution is not financially responsible based on a material finding in an audit or program review in one of the previous five years. The commenters argued that such a finding might have nothing to do with the financial responsibility of an institution.

Several commenters noted that since the Secretary does not conduct program reviews of all institutions on a regular basis, the limitation on financial responsibility tied to the findings of the institution's two most recent program reviews should be changed to reflect a fixed period of time.

One commenter noted that erroneous program review findings that are settled in favor of an institution are sometimes not settled in a timely fashion. The commenter suggested that the Secretary delay making a determination that an institution is not financially responsible under the past performance standards until after the appeal process is completed.

Discussion: The Secretary reminds the commenters that in addition to satisfying the numeric standard regarding its financial condition (i.e., the composite score standard), to be financially responsible under the provisions in the HEA, an institution must demonstrate that it administers properly the title IV, HEA programs in which it participates and that it meets all of its financial obligations, including repayments to the Secretary for debts and liabilities arising from its participation in those programs. An institution that is the subject of an adverse action taken by the Secretary or a guaranty agency, or that had a material finding of a program violation in an audit or program review, has clearly mismanaged title IV, HEA program funds and is therefore not financially responsible under these provisions.

The Secretary agrees with the commenters who noted that the proposed past performance provision under which an institution is not financially responsible if that institution had a material finding in either of its two most recent program reviews should be changed because those reviews are not conducted of all institutions on a routine basis.

Changes: The past performance provision regarding program reviews under proposed § 668.177(a)(3)(ii) is relocated under § 668.174(a)(2) and revised to parallel the two-year compliance audit requirement.

Part 11. Comments Regarding Administrative Actions and Other Requirements

Comments regarding the procedures under which the Secretary initiates an LS&T action: A commenter representing proprietary institutions argued that the provision under proposed § 668.177(a)(3)(iii) is arbitrary and highly punitive, because the Secretary would determine that an institution is not financially responsible if the institution submits its financial statements a day late or the Secretary rejects the institution's financial statements. The commenter maintained that this provision is unnecessary since the Secretary already has recourse under § 668.178(a) to initiate an action to limit, suspend, or terminate an institution.

Several commenters from private non-profit institutions asserted that the Secretary should not take an action to limit, suspend, or terminate an institution unless (1) the institution fails to correct or cure deficiencies cited in an audit report within ninety days after receiving formal notification of those deficiencies from the Secretary, or (2) the institution fails to submit an audit report within 30 days after receiving formal notification that the Secretary has not received that audit report.

Discussion: Under the regulations, an institution is required to submit audits within a fixed time period, and an institution's failure to do so is a serious matter. The Secretary expects that institutions will work diligently to ensure that the combined financial statement and compliance audit is submitted on time. To the extent that the commenters suggest that an institution may inadvertently fail to submit an audit on time, that mistake is

routinely corrected when the institution is contacted by the Department and asked to provide the missing audit immediately.

The question of whether it may be appropriate to initiate an administrative action against an institution based upon deficiencies or program violations that are identified in an institution's audit is best resolved on a case-by-case basis. Furthermore, an institution should not wait for the Secretary to notify it of program violations identified in its own audit report before the institution takes steps to correct those violations.

Changes: None.

Comments regarding teach-out plans: Many commenters from proprietary institutions opposed any additional requirements relating to institutions on provisional certification, on the grounds that current requirements already provide the Secretary with sufficient oversight authority. The commenters specifically opposed the suggested provision that would require teach-out plans from institutions on provisional certification, arguing that earlier teach-out proposals failed because of serious implementation problems.

Discussion: The Secretary is still considering whether it is feasible to require institutions to routinely provide teach-out plans when a review of the financial statements shows that the institution does not demonstrate financial responsibility. Although the Secretary may ask for this information on a case-by-case basis where some heightened risk of closure is indicated, no broader requirement will be included in the regulations at this time.

Changes: None.

Part 12. Comments Regarding the Proposed Transition Period

Comments: Many commenters supported the concept of a transition period under proposed § 668.171 during which the Secretary would consider an institution to be financially responsible if it failed the proposed ratio standards but passed the current standards. However, the commenters suggested that the proposed one-year transition rule be extended to a two-year or three-year period. Some of these commenters agreed that a one-year transition period was necessary to ensure that the standards are not applied retroactively, but suggested that an additional year would be required to allow the Secretary to test and assess the impact of the standards. Other commenters stated that a longer transition period was necessary so that institutions could structure their operations to meet the standards. Several commenters recommended that the Secretary allow institutions to use either the current or proposed standards for an indefinite period of time.

Many commenters from the proprietary sector recommended that the Secretary allow institutions to use the exceptions to the general standards now contained under § 668.15(d) during the transition period.

Several commenters from the proprietary sector asked the Secretary to clarify how the transition period would work for institutions that have fiscal years ending December 31.

Discussion: The Secretary has considered the suggestions from the commenters to extend the transition period, but continues to believe that the proposed one-year window during which an institution may use either the current standards or the new standards is reasonable. Moreover, a number of changes have been made to the proposed regulations that will minimize any difficulties that an institution may encounter in adjusting to the new measures. For example, an institution whose composite score is less than 1.5 may continue to participate as a financially responsible institution for up to three consecutive years under the zone alternative so long as its composite score is greater than 1.0. Furthermore, by extending the comment period and delaying the issuance of final regulations until 1997, the final regulations will not go into effect until July 1, 1998. This delay in publication while additional comments were sought has also provided institutions with additional time to evaluate their operations under the ratio analysis framework that has been proposed and discussed with the community.

The Secretary agrees to allow an institution that does not satisfy the composite score standard for the transition year to demonstrate that it is financially responsible by satisfying the standards or alternative requirements under § 668.15 or by qualifying under an alternative standard in § 668.175 of these regulations. The Secretary clarifies that such an institution may use the transition-year alternative only once and only for its fiscal year beginning between July 1, 1997 and June 30, 1998. For any fiscal year beginning on or after the effective date of these regulations, July 1, 1998, an institution must satisfy the requirements under these regulations.

In the commenter's example, the transition-year alternative is available to an institution for its fiscal year beginning on January 1, 1998 and ending on December 31, 1998.

Changes: The transition-year provisions proposed under § 668.171(c) are relocated under § 668.175(e) and revised to provide that an institution may demonstrate that it is financially responsible by satisfying the requirements under §§ 668.15(b)(7), (b)(8), (d)(2)(ii), or (d)(3), as applicable.

Part 13. Comments Regarding Debt Payments

Comments: One commenter representing proprietary institutions questioned the need for the general standard regarding debt payments contained in the proposed § 668.172(a)(3), particularly in view of the proposed ratio methodology. The commenter maintained that there might be reasons why an institution would be late in paying debts or be in violation of a loan agreement, including disputes over the nature and amount of the debt. The commenter believed that in those cases, the violation or delinquency does not indicate financial instability. Another commenter recommended that the general standards contain a provision that allows for the resolution of disputes between an institution and a creditor who has filed suit on a debt that is 120 days past due. Along the same lines, another commenter noted that since there are no alternatives for an institution that is not current in its debt payments, the Secretary should not initiate an action to terminate such an institution without providing the institution an opportunity to rectify this situation.

Discussion: As a condition of demonstrating financial responsibility, an institution is expected to conduct its business affairs in a manner that enables the institution to pay its debts in a timely manner. When any creditor files suit against an institution to collect a debt that is more than 120 days late, the Secretary believes that there is a significantly increased risk that Federal funds could be used improperly, or that Federal funds held in the institution's bank account could be sought by a creditor through the legal system. Furthermore, since such a lawsuit between an institution and a creditor is unlikely to present Federal questions where the Department would be likely to intervene in the legal proceedings, it is reasonable to require the institution to be provisionally certified and post a small letter of credit. The Secretary believes that this additional protection to the taxpayers is warranted where an unpaid, or even disputed, debt has prompted a creditor to initiate a legal proceeding to obtain a judgment against the institution. When an institution fails to demonstrate financial responsibility under the regulations due to the filing of such a lawsuit, the institution would

be given an opportunity to be certified provisionally and post a surety unless other problems were identified that involved the institution's administration of the federal student aid programs.

Changes: None.

Part 14. Comments Regarding the Definition of Terms

Comments: Several commenters requested that the Secretary provide detailed definitions for the following terms used for the financial ratios under proposed § 668.173: intangibles, total expenses, income before taxes, total revenues (particularly if refunds, returns, and allowances are deducted), and long-term debt and total long-term debt (especially as to whether the last two terms include or exclude the current portion of the debt, and whether the terms include long-term debt owed stockholders or other related parties or entities). One of these commenters believed that the term ''income before taxes'' should be defined as ''income from continuing operations before extraordinary items and changes in accounting principles.''

One commenter asked whether total revenues include those items included under gross revenues or net revenues as those terms are used on financial statements. This commenter also asked how the definition of total expenses related to the captions ''operating expenses'' and ''other expenses and income'' on financial statements, and whether drop and withdrawal accounts, interest, and other non-operating expenses should be included in the definition of total expenses.

Another commenter asked for clarification of the term ''unrestricted income.'' This commenter asserted that under Statement of Financial Accounting Standards 117, unrestricted income can be defined either as total unrestricted income (tuition, fees, contributions, auxiliary revenues, etc.) before considering net assets released from restrictions, or it can be defined as unrestricted income plus any net assets released from restrictions.

Discussion: To assist in clarifying the final regulations, the Secretary provides definitions for the following terms:

Total Expenses—Expenses are outflows or other using up of assets or incurrences of liabilities (or a combination of both) from delivering or producing goods, rendering services, or carrying out other activities that constitute the entity's ongoing major or central operations. Losses are decreases in equity (net assets) from peripheral or incidental transactions of an entity and from all other transactions and other events and circumstances affecting the entity except those that result from expense or distributions to owners. Total expenses in the context of this final rule include both operating and non-operating expenses and losses, except extraordinary losses meeting the criteria of APB Opinion No. 30, paragraph 19. Therefore, total expenses for proprietary institutions includes items such as costs of sales, selling and administrative expenses (including interest and depreciation) and other non-operating losses. Total expenses for private non-profit institutions includes similar items of expense and is defined as the required line item in the Statement of Activities entitled Total Expenses for those institutions reporting under the new accounting standards FASB Statement 117.

Total Revenues—Revenues are inflows or other enhancements of assets of an entity or settlements of its liabilities (or combination of both) from delivering or producing goods, rendering services, or other activities that constitute the entity's ongoing major or central operations. Gains are increases in equity (net assets) from peripheral or incidental transactions of an entity and from all other transactions and other events and circumstances affecting the entity except those that result from revenues or investments by owners. Total revenues in the context of this final rule includes both revenues and gains, except extraordinary gains meeting the criteria of APB Opinion No. 30, paragraph 19. Therefore, total revenues for proprietary institutions includes items such as tuition and fees, bookstore revenues, investment gains, other income and miscellaneous revenue. Revenues are reported net of refunds, returns, allowances and discounts (including tuition discounts) and drop and withdrawals. Total revenues for private non-profit colleges and universities includes similar items of revenue and is defined as the required line item in the Statement of Activities typically entitled Total Unrestricted Income for those institutions reporting under the new accounting standards FASB Statement 117. Unrestricted income includes unrestricted revenues, gains and other support including net assets released from restrictions during the period.

The Secretary wishes to clarify that the definition of total revenues includes net assets released from restrictions of private non-profit colleges and universities. In accordance with the AICPA Audit and Accounting Guide for Not-for-Profit Organizations as of June 1, 1996, certain items such as investment gains may be reported net of fees with appropriate disclosure in the footnotes to the financial statements.

Income Before Taxes—Income before taxes is defined as income from operations before extraordinary items, discontinued operations, and changes in accounting principles. The Secretary wishes to clarify that the definition of income before taxes does not include income or loss from discontinued operations. However, the Secretary may consider the effect of extraordinary items, discontinued operations, and changes in accounting principle in the overall evaluation of financial responsibility.

Changes: None.

Part 15. Comments Regarding the Proposed Standards and Requirements for Institutions Undergoing a Change in Ownership

Comments regarding the proposed letter of credit and personal financial guarantee provisions: Several commenters believed that the Secretary took an extreme position that will prevent owners from selling their institutions by proposing under § 668.175 that a new owner either (1) submit a letter of credit equal to 50 percent of the title IV, HEA program funds that the Secretary estimates the institution will receive during its first year under new ownership, or (2) provide personal financial guarantees.

Some commenters opposed the requirement of financial guarantees for several reasons. First, the commenters maintained that since recent changes of ownership have resulted in financially stronger rather than financially weaker institutions, the guarantees are not necessary. Second, they believed that the guarantees would slow the process of obtaining approval from the Secretary for a change of ownership. Third, the commenters argued that the provision for personal financial guarantees is not common in the business world and would negate the concept of a corporation. Moreover, the commenters opined that personal financial liability should only be required in cases involving personal wrongdoing; in other cases, it only serves to discourage strong owners from buying financially troubled institutions.

Many other commenters from proprietary institutions stated that they would support the proposed rules for institutions that change ownership only if: (1) The new rules speed up the process under which the Secretary determines whether to allow those institutions to participate in the title IV, HEA programs, or (2) provide uninterrupted participation for institutions that change ownership.

However, the commenters did not believe the proposed rules would achieve either of these objectives.

Comments regarding the consolidating date of the acquisition balance sheet: Several commenters maintained that requiring a consolidating date of the acquisition balance sheet would be unnecessary, expensive, and time consuming. Some of these commenters asserted that such a requirement would limit the marketability of institutions, or destroy the value of small institutions, because it would require an institution to close its books as of the acquisition date and have a complete audit performed, resulting in large audit costs and losses of time. According to one of the commenters, these costs could be avoided for a publicly traded corporation if the Secretary would agree to determine financial responsibility from the information contained in the financial statements included as part of the corporation's quarterly reports to the SEC. The commenter noted that these financial statements would be no more than 90 days old, and believed that the Secretary could rely on their accuracy for two reasons: the SEC levies criminal penalties against corporations that file inaccurate statements, and the statements are reviewed by an independent CPA.

Another commenter requested the Secretary to clarify how the current requirement under which an institution provides an audited balance sheet when it applies for a change of ownership differs from the proposed requirement that the institution submit a consolidating date of acquisition balance sheet.

Comments containing alternative proposals for institutions undergoing a change in ownership: Several commenters suggested that an institution undergoing a change of ownership that meets the general requirements should be exempt from the letter of credit or personal financial guarantees requirements if the institution achieves the required ratio score based on a balance sheet audit or an audited financial statement that covers only part of a year. The commenters preferred this approach over the proposed requirements under which the Secretary would maintain the letter of credit or keep in place the personal financial guarantees until the institution completed a full fiscal year.

One commenter offered several ways to deal with changes of ownership. First, the commenter suggested that the Secretary charge a reasonable fee for processing change of ownership applications, believing that it is fair to compensate the Secretary for committing trained staff to process application requests timely. Moreover, the commenter opined that this suggestion would eliminate frivolous and unqualified requests. Second, the commenter believed that the Secretary should examine applications from existing owners purchasing existing institutions differently from new owners with no experience in the school business entering the business. In either case, the commenter argued that the Secretary should approve a change of ownership request without interrupting the acquired institution's title IV, HEA program funds if the owner satisfies certain conditions. For an existing owner, the owner must demonstrate that he or she has managed an institution participating in the title IV, HEA programs to the highest standards. According to the commenter, the owner's current institution must have: (1) A low cohort default rate (20 percent or lower), (2) an excellent job placement rate (80 percent or more), (3) less than 1 percent audit exceptions, (4) been in business for five years or more, and (5) resolved any actions taken by the Secretary, an accrediting agency, or the State.

For a new owner purchasing an existing institution, the commenter suggested that the Secretary (1) require that owner to submit a letter of credit (or cash) for an amount equal to three months of the amount of title IV, HEA program funds that the institution received in the prior year, and (2) limit any increase in the amount of title IV, HEA program funds the institution receives during its first 12 months under new ownership to 10 percent over the amount the institution received in the prior year.

Another commenter suggested lowering the percentage of the letter of credit, asserting that no business acquiring an institution could possibly post a letter of credit for 50 percent of the title IV, HEA program funds that the institution would receive.

Finally, a commenter from a proprietary institution suggested that the Secretary could establish standards for the Equity and Primary Reserve ratios for institutions that change ownership that are higher than the standards established for participating institutions.

Comments regarding other change of ownership issues: A commenter requested that the Secretary clarify whether the proposed requirements for an institution undergoing a change would eliminate the current provision under which that institution is provisionally certified.

Another commenter inquired whether the excluded transactions described under § 600.31(e) would continue to exempt an institution from the change of ownership provisions under proposed § 668.175.

One commenter argued that it was erroneous to assume that a change of ownership results in a change of control. The commenter believed that a change of ownership occurs when a corporation releases a majority of its stock on the market. However, the commenter reasoned that a change of control does not occur if a large number of shareholders acquire that stock since no shareholder acquires a controlling interest. Moreover, the commenter concluded the Secretary should not require a financial statement audit or surety if the corporation was financially responsible before such an event because the financial condition of the corporation does not change as a result of this event. Therefore, the commenter suggested that the Secretary amend proposed § 668.175(a) so that it applies only to a change of ownership that results in a new person or entity exercising substantial control over the institution, or if the institution's financial statement is affected by the change.

Comments regarding additional locations: Several commenters opposed the proposal under which the Secretary could require personal financial guarantees or letters of credit for additional locations of an institution, arguing that it is inappropriate to require such letters or guarantees in any situation other than one involving past misconduct. Moreover, the commenters believed that the Secretary should not consider the expansion of operations as an event that requires heightened scrutiny.

Another commenter added that it was inappropriate to single out additional locations for heightened scrutiny since other forms of expansion, including the rental of additional buildings or the expansion of housing or research facilities, could have an equal impact on an institution's financial situation. In any event, the commenter suggested that the guarantees should only remain in place until the institution demonstrates that it is financially responsible and that such guarantees should not exceed 50 percent of the amount of title IV, HEA program funds that would be received by the additional location.

One commenter asked that the Secretary clarify the types of financial surety that would be required for an additional location. The commenter stated that if the surety was limited to personal financial guarantees, a publicly

traded corporation could not add locations, because shareholders who are purely investors would also be required, but would refuse, to provide personal guarantees. Therefore, the commenter recommended that the Secretary accept instead irrevocable letters of credit.

Another commenter suggested that decisions regarding additional locations should be made by accrediting agencies in accordance with the regulations contained in § 602.27. Under this suggestion, if the accrediting agency determines that an institution is administratively capable and financially responsible, then the institution would be allowed to open the additional location without any other restrictions. If the accrediting agency determines otherwise, then the institution would not be allowed to open that location even if the institution is willing to provide a surety.

A commenter asserted that it was important to describe the conditions under which the Secretary would draw upon a surety provided when an institution adds an additional location, because these conditions will profoundly affect the cost of the surety. In particular, the commenter asked whether the Secretary would draw upon the surety only if an institution closed, or under other circumstances, and whether the amount drawn would be the amount equal to unpaid refunds and improperly disbursed title IV, HEA program funds, or some other amount.

Discussion: The Secretary thanks the commenters for their suggestions and recommendations under this Part, but notes that several issues raised by the commenters relating to institutional participation, application and certification procedures, and additional locations fall beyond the scope of the proposed financial responsibility regulations. Consequently, the Secretary could not amend the applicable sections of the regulations that address those areas and procedures. Moreover, because changes to those areas and procedures will likely affect how the Secretary determines whether institutions undergoing a change of ownership are financially responsible, and to harmonize any new financial standards with those changes, the Secretary will delay promulgating final financial responsibility regulations for those institutions. In the meantime, the financial responsibility of an institution that undergoes a change of ownership will be determined under current regulations and administrative procedures.

Changes: The Secretary withdraws the provisions under proposed § 668.175 that an institution undergoing a change in ownership would be financially responsible only if the persons or entities acquiring an ownership interest in that institution provide personal financial guarantees or letters of credit. The Secretary will in the future propose regulations regarding changes of ownership and other related issues.

Final Regulatory Flexibility Analysis

The Secretary has determined that a substantial number of small entities are likely to experience significant economic impacts from this regulation. Thus, the Regulatory Flexibility Act (RFA) required that an Initial Regulatory Flexibility Analysis (IRFA) of the economic impact on small entities be performed and that the analysis, or a summary thereof, be published in the Notice of Proposed Rulemaking. The IRFA was performed and a summary was published in the Notice of Proposed Rulemaking for this rule. This Final Regulatory Flexibility Analysis (FRFA) discusses the comments received on the IRFA and fulfills the other RFA requirements.

The Department of Education has a long history of providing compliance assistance to institutions participating in the Title IV, HEA programs, in the form of guidance, training, and access to staff for individualized assistance. The Department will provide similar support to institutions in implementing this new rule. This assistance fulfills the letter and the spirit of the RFA requirement that this assistance is provided to small entities.

Summary of Significant Issues Raised by the Public Comments on the IRFA, a Summary of the Assessment of the Department of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

In the notice of proposed rulemaking, the Secretary invited comments on the IRFA, particularly comments on the definition of small entities, the estimation of the number of institutions likely to experience economic impacts, and the estimated costs of alternative demonstrations of financial responsibility. No comments were received on these issues, but other comments on the RFA and small entities were received. These comments are discussed here.

Comments: Many commenters from the proprietary sector maintained that the Secretary had not met the burden of proof required in the RFA regarding the Department's reasons for taking action.

Discussion: The RFA requires the Secretary to publish a description of the reasons why action by the Department was taken and a succinct statement of the objectives of, and legal basis for, the final rule. In the next section of this FRFA and in the preamble, the Secretary describes why the Department took action. The Secretary believes this explanation satisfies the RFA requirements.

Changes: None.

Comments: A commenter representing proprietary institutions questioned the manner in which the first KPMG study was conducted. The commenter believed that small business interests were not considered since no representatives of small proprietary institutions were among those institutional representatives that assisted with the first KPMG study. Moreover, the commenter asserted that this omission, as well as the fact that the Secretary did not consider the comments submitted by a group of CPAs on behalf of proprietary institutions regarding the first KPMG report, violated the requirement in the RFA that the Secretary confer with representatives of small businesses.

Discussion: The Secretary has conferred extensively with representatives of all types of postsecondary institutions throughout the period of this rulemaking process. This consultation goes well beyond the RFA requirement that the Secretary confer with representatives before the final rule is published. This consultation is evidenced by the fact that the group of CPAs to whom this commenter referred had received the first KPMG report when that report was in its draft stage, and had time to consider and provide extensive comments on that draft report. The Secretary distributed a draft of that report to all sectors, including representatives of small proprietary institutions. The comments received were considered carefully by the Department and KPMG before the August 1996 KPMG report was issued, and considered again before the NPRM was published. During the comment period on this rule, the Secretary had extensive discussions with the postsecondary community, as discussed in the preamble. These discussions included several representatives of small for-profit and small non-profit institutions.

Changes: None.

Comments: Many commenters from proprietary institutions concluded from the discussion in the IRFA section of the NPRM that the ratio standards are weighted heavily against the for-profit sector.

Discussion: The Secretary feels that the ratio standards are correctly tailored

to measure financial health at different institutions. The final rule has been designed so that institutions across all sectors that demonstrate similar levels of financial health receive similar scores. Thus, a proprietary institution that earns a score of 2.0 will have approximately the same level of financial health as a non-profit institution with the same score. As discussed in the IRFA, the estimates of the number of institutions experiencing economic impacts used in that analysis were based on the best information available at that time. That information came from a judgmental sample of financial statements in which financially weak institutions were intentionally over-sampled in order to provide as clear a picture as possible of these institutions. The estimates contained in this FRFA were obtained from a non-judgmental sample of institutions and thus represent improved estimates of the number of institutions likely to experience economic impacts. It is true that institutions in the proprietary sector are more likely to experience negative economic impacts from this rule. The degree to which a higher proportion of proprietary institutions do not attain passing scores is consistent with the lower levels of financial health in that sector evidenced by the audited financial statements analyzed by the Department and KPMG.

Changes: The FRFA contains improved estimates of the number of institutions likely to experience economic impacts. These estimates are based on a larger and non-judgmental sample.

Comments: Several commenters from proprietary institutions asserted that the proposed standards favor large or publicly traded corporations at the expense of small and new institutions. Other commenters believed that many small institutions with good educational and compliance records that pass the current standards would fail the proposed standards. The commenters opined that this outcome points to a flaw in the manner in which the methodology treats small institutions. An accountant for a proprietary institution argued that because the proposed methodology does not provide an adjustment for size, it is unfair to compare an institution with $10 million in tuition revenue to an institution with $500,000 in tuition revenue by applying the same standards and criteria to both institutions.

Discussion: As discussed elsewhere in the preamble, the final methodology does account for the size of the institution by using ratios that consider an institution's financial strength in relation to certain characteristics of the institution. It is estimated that between 105 and 165 small institutions that pass the current standards would fail the new standards. The Secretary believes that, based on this more comprehensive and accurate measure, these institutions have a sufficiently poor financial condition to warrant additional oversight of the Federal funds administered by these institutions, irrespective of their educational and compliance records.

Changes: None.

Comments: A commenter representing private non-profit institutions asserted that the letter of credit alternative was not feasible for small, frugal institutions that are tuition-driven. The commenter suggested that these institutions should not be required to provide letters of credit, or that only those institutions that have audit or program review liabilities be required to provide a letter of credit. Several commenters from the proprietary sector stated that a small institution may not be able to afford the cost of obtaining a large letter of credit, or have available sufficiently large credit lines to secure a 50 percent letter of credit. The commenters stated that a more equitable alternative would be for the Secretary to expand the alternative methods of demonstrating financial responsibility for small entities to include a provision under which those entities could provide a letter of credit in the amount of five percent or 10 percent of their prior-year title IV, HEA program funds. The commenters also recommended that for all institutions, an alternative should be the provision of a letter of credit in an amount ranging from five percent to 50 percent of the institution's prior-year title IV funds, tied to the perceived shortfall in funds, or to the operating loss that triggered the institution's failure to meet the standards.

Discussion: The Secretary understands that small (and large) institutions that are in poor financial condition may have difficulty obtaining a 50 percent letter of credit. This requirement is only imposed on institutions whose ability to continue operations is highly uncertain. Furthermore, there are other alternatives by which institutions can continue to participate in the title IV, HEA programs without posting a 50 percent letter of credit. For instance, institutions can participate under provisional certification by posting a 10 percent letter of credit. Other alternative methods were considered and rejected, including the alternatives described by the commenters. These alternatives are discussed earlier.

Changes: This final rule contains the zone alternative, under which financially weak institutions may continue to participate without posting a letter of credit.

Comments: Several commenters representing proprietary institutions believed that personal financial guarantees are unfair and arbitrary, because the guarantees would expose the owners of small family businesses to the loss of personal assets, including their homes and savings.

Discussion: The proposed alternative of providing personal financial guarantees was intended to provide owners with additional options, and was available at the discretion of the owner of the institution. The provision of collateral is standard operating practice in the financial sector and this proposed alternative was offered to provide institutions with flexibility in meeting the financial responsibility standards. The Secretary does not feel that providing an alternative that can be exercised at the option of the small business owner is unfair or arbitrary. However, the resources of the Department can be better utilized in administering the provision associated with the zone alternative than in administering personal financial guarantees.

Changes: The personal financial guarantee alternative has been removed from the final rule.

Description of the Reasons Why Action by the Department Was Taken and a Succinct Statement of the Objectives of, and Legal Basis for, the Final Rule

The Secretary is directed by section 498(b) of the HEA to establish that institutions participating in title IV, HEA programs are financially responsible. The Department, as part of its regulatory reinvention process, has analyzed the current standards for institutions to demonstrate financial responsibility and found that improvements are both possible and needed. The tests of financial responsibility are being modified so that they more accurately reflect the financial health of the institutions participating in the programs. The modifications provide different tests for each postsecondary sector. Institutions are evaluated according to standards appropriate to their sector and financial practices and conditions. More information about the need and justification for this rule can be found elsewhere in the preamble.

Description and Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

The Secretary has applied the U.S. Small Business Administration (SBA) Size Standards to the set of institutions that will be affected by this rule. Postsecondary educational institutions are classified in the Standard Industry Classification (SIC) in Major Industry 82—Educational Services. Within this SIC, all subclassifications except Flight Training Schools have the same criterion for qualifying as a small business. This criterion is that the business have total annual revenue less than or equal to $5 million. Thus, for the purposes of analyzing this regulation, for-profit and non-profit businesses with total annual revenue less than or equal to $5 million are considered small entities. For public institutions, the SBA standard is that the governmental body that is responsible for the institution have a population less than 50,000. For instance, a postsecondary vocational institution that is operated by a county with a population under 50,000 would be considered a small governmental entity using the SBA Size Standard.

In order to determine the number of small institutions to which the rule will apply, an analysis was performed using a census of postsecondary educational institutions. This census is named the Integrated Postsecondary Educational Data System (IPEDS) and is maintained by the U.S. Department of Education's National Center for Education Statistics (NCES). All postsecondary educational institutions that participate in the title IV, HEA programs are required, as a condition of participation, to fully participate in the IPEDS data collections. The last year for which finance data were collected covered the 1993–94 academic year. These data were required to categorize the institutions by their total revenue. The actual data point that is collected is ''Total Current Fund Revenue,'' which is used as a proxy for Total Revenue. The differences between this measure and the measure used by SBA are considered negligible; in any case, this is the only measure available. For small governmental entities, data on the size of the population of the governing body was not available for this analysis. However, a decision was made to err on the side of including more institutions rather than run the risk of including too few in the ''small'' category. For that reason, any public institution that was controlled at any level below that of a state was considered a small institution for this part of the analysis. No adjustment was available for growth or shrinkage of the number of participating institutions. However, the analysis shows that a substantial number of small entities will be affected by the proposed rule and no adjustment factor would change that, so the question of adjusting to current program participation levels is not important for the determination of whether a substantial number of small entities would be affected by the proposed regulation.

The estimates are that this rule will apply to 1,690 small for-profit entities, 660 small non-profit entities, and 140 small governmental entities. The RFA directs that these small entities be the sole focus of the Regulatory Flexibility Analysis.

Estimate of the Number of Institutions Experiencing Economic Impacts From the Rule

There are no significant adverse economic impacts of these regulations on public entities. This is because public entities are assumed to satisfy the financial responsibility requirements by virtue of their backing by the full faith and credit of the State or other governmental body where they are located. The minimal reporting requirements contained in this rule for public entities to establish their public status do not represent a significant economic impact. It is estimated that this would represent four hours of time per institution. Using a loaded labor rate of $20.00 per hour, this would cost each small public institution $80.00. This is similar to the paperwork burden associated with the current rule with regard to public institutions, so no change in the economic impact on these entities is expected.

The small for-profit and small non-profit entities that would experience adverse economic impacts from this rule are those that would not pass the new financial responsibility test and would be required to provide additional surety to continue participating in the title IV, HEA programs, or to comply with the heightened monitoring required of institutions.

Any institution that does not pass the financial ratio test can post a letter of credit worth at least 50 percent of its previous year's title IV, HEA program funds. Institutions that use this alternative will be considered financially responsible.

Institutions that fail the financial ratio test can post a letter of credit worth at least 10 percent of their previous year's title IV, HEA program funds, comply with additional reporting requirements, provide early financial audits if requested, and participate under reimbursement or one of the cash monitoring payment methods. Institutions that use this alternative will not be considered financially responsible and will be provisionally certified to participate in the programs.

Institutions that fall into the zone can participate by complying with additional reporting requirements, providing early financial audits if requested, and participating under reimbursement or one of the cash monitoring payment methods. Institutions in the zone that use this alternative will be considered financially responsible. This alternative method of demonstrating financial responsibility for institutions in the zone is available for only three out of any four years. An institution which was in the zone for three years must pass the ratio test at the end of the third year or it will be considered to have failed the financial ratio test and must participate under one of the alternatives described above (50 percent letter of credit, or 10 percent letter of credit with provisional certification and heightened monitoring).

The Department contracted with KPMG to perform an analysis of the financial tests that will be conducted on audits submitted by participating institutions. Using the KPMG sample to infer to the population, the following estimates were obtained. An estimated total of 220–390 small institutions that failed the old financial responsibility test would have passed the new test or been eligible for the zone alternative, had it been in effect during this period. For these institutions, the proposed changes would have had a positive economic impact because they would have been spared the expense of an alternative demonstration of financial responsibility. At the same time, an estimated total of 280–415 small institutions that passed the old financial responsibility test would have failed or fallen into the zone under the new test. For these institutions, these changes would have had a negative impact because they would have had to go to the expense of posting surety or heightened monitoring, or both, as discussed in the next section. A fuller description of these institutions, broken down by the type of organization, is presented in Table 1.

TABLE 1. ESTIMATED NUMBER OF INSTITUTIONS EXPERIENCING ECONOMIC IMPACTS

Status with regard to old and new financial responsibility tests	Small for-profit institution	Medium and large for-profit institution	Small non-profit institution	Medium and large for-profit institution
Old test: Pass. New test: Pass (no economic impact)	1,300–1,400 56%–71%	75–125 29%–83%	300–350 50%–81%	875–950 53%–68%
Old test: Pass. New test: Zone (adverse economic impact)	150–200 6%–10%	15–25 6%–17%	25–50 4%–12%	20–40 1%–3%
Old test: Pass. New test: Fail (adverse economic impact)	100–150 4%–8%	15–25 6%–17%	5–15 1%–3%	10–20 0%–1%
Old test: Fail. New test: Pass (positive economic impact)	75–125 3%–6%	10–20 4%–13%	50–100 8%–23%	400–450 24%–32%
Old test: Fail. New test: Zone (positive economic impact)	75–125 3%–6%	5–15 2%–10%	20–40 3%–9%	50–100 3%–7%
Old test: Fail. New test: Fail (possible positive economic impact)	275–325 12%–16%	30–50 12%–33%	30–50 5%–12%	50–100 3%–7%

Source: Department and KPMG analysis from sample data.

Estimates of Economic Impacts

The economic impact of the new financial tests depends on the alternative method that the institution uses to continue participating in the title IV, HEA programs. It is impossible to determine what alternative these entities will choose. Of course, one alternative that is available to entities is to discontinue participation in the programs. Using the economic principle of profit-maximization (or cost-minimization for non-profit entities), entities that would choose to discontinue participation have demonstrated that their cost of withdrawal is lower than their cost of these alternative methods for demonstrating financial responsibility. Therefore, these costs represent estimates of maximum economic costs associated with the choice of alternative certification or withdrawal from the title IV, HEA programs. It is difficult to determine the cost of withdrawal from participation in these programs.

Post a Letter of Credit Equal to at Least 50 Percent of the Institution's Prior Year Title IV, HEA Program Funds

The cost of posting a letter of credit varies according to the particular financial situation of the institution employing this alternative. The cost also depends on the type of relationship that the institution has with its bank. The costs estimated here assume that the institution has no relationship with a bank that would allow the bank to rely on its institutional knowledge to more accurately determine the risk of having to pay out the letter of credit. Thus, the estimates here are overstated for at least some institutions that have such a relationship with their banks.

For the purposes of this analysis, costs will be estimated for a small institution of typical size. An institution with annual title IV revenue of $2 million would be required to post a letter of credit of $1 million. The bankers representing local, regional, and national commercial banks contacted by KPMG stated that they would charge a fee of between 0.75 percent and 1.25 percent for such an institution, or between $7,500 and $12,500. In addition, the bankers stated that the institution would be required to collateralize the letter of credit. Using an opportunity cost of the collateral of four points above the prime rate (12.5 percent), this would represent an estimated opportunity cost of $125,000. The bankers indicated that the fees and requirements would be similar for both proprietary and private non-profit institutions.

It is estimated that about one-fifth of the institutions that fail the financial responsibility test will choose to post a 50 percent letter of credit. This estimate represents the best professional judgment of Department program staff. Institutions that fail the old and new standards and are already participating with this alternative will not experience an economic impact from this provision. This estimate is based on the assumption that none of the institutions in the zone will choose to post a 50 percent letter of credit, since the other alternative for institutions in the zone has a lower economic impact. The letter of credit alternative is available for institutions in the zone under the statute. Some institutions may experience different economic costs than those estimated here and find the 50 percent letter of credit alternative more attractive than the other requirements in the zone alternative.

Post a Letter of Credit Equal to at Least 10 percent of the Institution's Prior Year Title IV Funds and Participate Under Provisional Certification

As discussed above, the costs of securing a letter of credit depend on the particular financial situation of the institution and the type of relationship that the institution has with its bank.

For the purposes of this analysis, costs will be estimated for a small institution of typical size. An institution with annual Title IV revenue of $2 million would be required to post a letter of credit of $200,000. The bankers contacted by KPMG stated that they would charge a fee of between 0.75 percent and 1.25 percent for such an institution, or between $1,500 and $2,500. In addition, the bankers stated that the institution would be required to collateralize the letter of credit. Using an opportunity cost of the collateral of four points above the prime rate (12.5 percent), this would represent an estimated opportunity cost of $25,000. The bankers indicated that the fees and requirements would be similar for both proprietary and private non-profit institutions.

It is estimated that about four-fifths of the institutions that fail the financial responsibility test will choose to post a 10 percent letter of credit. This estimate represents the best professional judgment of Department program staff. Institutions that fail the old and new standards, and are already participating with this alternative, will not experience an economic impact from this provision.

Additional Reporting

Institutions that fail the financial responsibility ratio test or use the zone alternative to demonstrate financial responsibility will be required to report significant adverse financial or oversight events to the Department. It is estimated

that about one-fifth of institutions using the zone alternative will have an average of 1.5 events per year that they would have to report to the Department. It is estimated that about one-third of institutions that fail the ratio test will have an average of two events per year that they would have to report to the Department.

Reporting each event is expected to take about 15 minutes. Using a loaded labor rate of $20.00 per hour, reporting each event will cost the institutions $5.00. An estimated one-fifth of the institutions using the zone alternative will experience an average economic impact of $7.50. An estimated one-third of the institutions that fail the ratio test will experience an average economic impact of $10.00.

These estimates represent the best professional judgment of Department program staff.

Early Submission of Audits

Institutions that fail the financial responsibility ratio test or use the zone alternative to demonstrate financial responsibility may be required to submit early financial audits to the Department, at the Department's discretion. It is expected that these institutions will be required to submit these audits within 60 days of the end of the fiscal year. It is estimated that the Department will exercise that discretion for about one-half of the institutions using the zone alternative, and about two-thirds of the institutions that fail the ratio test.

The only economic impact institutions will experience from being required to submit their audited financial statements early is any higher fees that may be charged to the institutions by their auditors. KPMG researched the types of fees that a national, regional and local accounting firm would typically charge for this service. It was estimated that a small institution with about $2.5 million in total revenue and one campus would be charged between $6,000 and $8,000 in additional fees for a combined financial and compliance audit performed in January or February. The accounting firms also stated that institutions with fiscal years that do not end on December 31 would probably not be subject to additional fees as long as they receive sufficient advance notice of this requirement.

Cash Monitoring, Type 1

Institutions that are required to obtain title IV, HEA program funds through the first type of cash monitoring will be required under § 668.162(e)(1) to credit students' accounts before drawing federal funds. The institution's compliance audit will contain verification that this did occur throughout the year. There is no additional paperwork associated with this option. There will be some minimal one-time costs associated with changing from the advance payment method to this payment method. It is difficult to estimate what changing payment systems might cost since it would vary depending on the administrative structure of the institution. It is expected that it might take a small institution an estimated 40 hours to reprogram its financial system and make other adjustments. Using a loaded labor rate of $50.00 per hour for this type of technical work, the estimated economic impact is $2,000. Since institutions are expected to credit students' accounts and draw federal funds in the same banking day, there should be no borrowing costs associated with this payment method. Under the advance payment system, institutions are allowed to keep up to $250 in interest earned from depositing federal funds in advance of disbursing it to students. Institutions that are no longer able to participate on advance payment would lose the portion of that $250 they were able to earn.

It is estimated that about three-fourths of the institutions participating under the zone alternative will be placed on this level of cash monitoring. It is estimated that about five-eighths of institutions who fail the ratio test and participate under the 10 percent letter of credit alternative will be placed on this level of cash monitoring.

Institutions that fail the old and the new test of financial responsibility and participate under provisional certification may experience a positive economic benefit from this provision. Under current rules, institutions can only participate under the current reimbursement system. To the degree that these institutions are allowed to participate using a less stringent type of cash monitoring than that available under current rules, they will experience a positive economic benefit.

Cash Monitoring, Type 2

Institutions that are required to obtain title IV, HEA program funds through the second type of cash monitoring will be required under § 668.162(e)(2) to credit students' accounts and provide some documentation of students and amounts before receiving federal funds. The institution's compliance audit will contain verification that this did occur throughout the year. Institutions will be required to document students and amounts and submit this to the Department. This is expected to represent about one hour of paperwork for the small institution and cost about $20.00 using a loaded labor rate of $20.00 per hour. As discussed above, there will be some one-time costs associated with changing from the advance payment method to this payment method, which are estimated at $2,000. Institutions are expected to credit students' accounts and receive federal funds within six days. Institutions will be receiving some or even all of the federal funds in the form of student charges, so they are not expected to be required to borrow the entire amount of the delayed funds. However, they will experience the economic impact of not having the opportunity to use these funds for that six-day period. The opportunity cost of capital is estimated here at the borrowing rate. It is assumed that institutions in such a situation could obtain a short-term loan at their bank for an annual interest rate of prime plus four points, or about 12.5 percent. This yields an economic cost of about $2,000 per million dollars of title IV, HEA program funds received annually. As discussed above, institutions would also lose up to $250 in interest fees on advance payments they may have been earning.

It is estimated that about one-eighth of the institutions participating under the zone alternative will be placed on this type of cash monitoring. It is estimated that about one-eighth of the institutions who fail the ratio test and participate under the 10 percent letter of credit alternative will be placed on this type of cash monitoring.

Institutions that fail the old and the new tests of financial responsibility and participate under provisional certification may experience a positive economic benefit from this provision. Under current rules, institutions can only participate under the current reimbursement system, under § 668.162(d). To the degree that these institutions are allowed to participate using a less stringent type of cash monitoring than that available under current practice, they will experience a positive economic benefit.

Reimbursement

Institutions that are required to obtain title IV, HEA program funds through the current reimbursement system will be required to credit students' accounts and provide supporting documentation to the Department before receiving federal funds. The institution's compliance audit will contain verification that this did occur throughout the year. Institutions will be required to compile the paperwork and

submit this to the Department. This is expected to represent about five hours of paperwork, that will cost about $100 using a loaded labor rate of $20.00 per hour. As discussed above, there will be some one-time costs associated with changing from the advance payment method to this payment method, which are estimated at $2,000. Institutions are expected to credit students' accounts and be reimbursed with federal funds within 24 banking days. As discussed in more detail above, there is an economic cost of not having the use of those funds for that 24 day period, which is estimated at $8,000 per million dollars of title IV, HEA funds received annually. As discussed above, institutions would also lose up to $250 in interest fees on advanced payments they may have been earning.

It is estimated that about one-eighth of the institutions participating under the zone alternative will be placed on reimbursement. It is estimated that about one-fourth of the institutions who fail the ratio test and participate under the 10 percent letter of credit alternative will be placed on reimbursement.

Optional Disclosure in Audited Financial Statement of HEA Institutional Grants

Institutions that would otherwise fail or be required to use the zone alternative that wish to have their HEA institutional grants excluded from the calculation of their ratios would be required to have the amount of the HEA institutional grant disclosed in a note to their financial statements, or in a separate attestation. KPMG researched the types of fees that a national, regional and local accounting firm would typically charge for this service. It was estimated that a small institution with about $2.5 million in total revenue and one campus would be charged about $300 for this information disclosed as a note to the financial statements, and between $2,000 and $3,000 if the institution chose to have this disclosed as a separate attestation. It is assumed that institutions will choose the note disclosure due to its lower cost.

It was not possible to estimate the number of institutions that could be able to take advantage of this option, since these data were not available from the audited financial statements analyzed here.

TABLE 2.—SUMMARY OF ESTIMATED ADVERSE ECONOMIC IMPACTS ON SMALL ENTITIES

Action (not all actions are required of all institutions)	Institutions that fail the ratio test	Institutions using the zone alternative
50 percent letter of credit	One-fifth of institutions will pay fees of $7,500 to $12,500 per million, plus estimated opportunity cost of $125,000 per million.	No institutions eligible for the zone alternative are expected to post letters of credit.
10 percent letter of credit	Four-fifths of institutions will pay fees of $7,500 to $12,500 per million, plus estimated opportunity cost of $125,000 per million.	No institutions eligible for the zone alternative are expected to post letters of credit.
Additional reporting	One-third of institutions will have average paperwork costs of about $10.	One-fifth of institutions will have average paperwork costs of about $7.50.
Early submission of audits	Two-thirds of institutions will have increased audit costs of between $6,000 and $8,000.	One-half of institutions will have increased audit costs of between $6,000 to $8,000.
Cash monitoring, type 1	Five-eighths of institutions who fail the ratio test and participate under the 10 percent letter of credit alternative will have: costs of changing payment system of about $2,000; and loss of interest revenue up to $250.	Three-fourths of institutions will have: costs of changing payment system of about $2,000; and loss of interest revenue up to $250.
Cash monitoring, type 2	One-eighth of institutions who fail the ratio test and participate under the 10 percent letter of credit alternative will have: paperwork costs of $20; costs of changing payment system of about $2,000; borrowing costs (or opportunity cost of capital) of about $2,000 per million dollars of Title IV funds received; and loss of interest revenue up to $250.	One-eighth of institutions will have: paperwork costs of $20; costs of changing payment system of about $2,000; borrowing costs (or opportunity cost of capital) of about $2,000 per million dollars of Title IV funds received; and loss of interest revenue up to $250.
Reimbursement	One-fourth of institutions who fail the ratio test and participate under the 10 percent letter of credit alternative will have: paperwork costs of $100; costs of changing payment system of about $2,000; borrowing costs (or opportunity cost of capital) of about $8,000 per million dollars of Title IV funds received.	One-eighth of institutions will have: paperwork costs of $100; costs of changing payment system of about $2,000; borrowing costs (or opportunity cost of capital) of about $8,000 per million dollars of Title IV funds received.
Action	Institutions that initially fail but employ optional disclosure to raise score into zone.	Institutions that initially fall into the zone but employ optional disclosure to raise score to passing.
Optional disclosure of HEA institutional grants	An unknown number of institutions will have an economic impact of $300.	An unknown number of institutions will have an economic impact of $300.

NOTE: All of the figures in this table are estimates. The previous discussion provides a complete explanation of how these estimates were made.

Description of Significant Alternatives Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Final Rule on Small Entities

While the Department considered alternative means of satisfying many specific provisions, as discussed in the Analysis of Comments and Changes to this final rule, there are no other significant alternatives that would satisfy the same legal and policy objectives while minimizing the impact on small entities. *The factual, policy, and legal reasons for selecting the alternative adopted in the final rule.*

The adopted approach balances regulatory reform values and improved accountability in a reasonable fashion. Consistent with the Secretary's Regulatory Relief Initiative, participating institutions are subject to the minimum requirements that adequately protect the Federal fiscal interest. A substantial number of institutions will experience a reduced regulatory burden as a result of these rules. The Secretary believes that the proposed approach is the least complicated and burdensome for small (and large) entities involved in the administration of the title IV, HEA programs while still allowing for the proper protection of the Federal fiscal interest and the interests of students and their parents.

For the purposes of performing this regulatory flexibility analysis, the alternative of ''no action'' could be considered a significant alternative. If the Secretary did not undertake any action in this area, small (and large) entities would not experience the economic impacts imposed by this regulation. However, as described in the preamble to this final rule, the Secretary believes that this action is required to further Department initiatives and to better protect the Federal fiscal interest. This is discussed further in the next section.

Why Each One of the Other Significant Alternatives to the Rule Considered by the Department Which Affect the Impact on Small Entities Was Rejected

The Department considered many alternatives to this rule. Significant alternatives that were considered but determined not to meet the policy objectives are discussed in the next section. The policy objectives for this rule are discussed at length in the preamble. These various alternatives might have had an effect on the impact on small entities to the degree that they might have led to a different result from the ratio test. Some of these alternatives are discussed at greater length elsewhere in the Analysis of Comments and Changes.

Case-by-Case Precipitous Closure Alternative

The Department considered performing a case-by-case analysis of institutions that marginally failed the regulatory standard (*i.e.*, the composite score standard) to determine if they were in danger of closing precipitously. This alternative was rejected for several reasons. This alternative would have required significantly more resources than the Department has available for such an activity and would have been difficult to enforce. This alternative could have conceivably reduced the impact on small entities, if there was additional information not available in the ratio approach that would have led an individualized analysis to determine that the institution was not in danger of precipitously closing. However, the fairness of such a system could be suspect and the policy goal of having a fair rule that is known and consistently applied would have been undermined. In addition, the Secretary believes that the ratio analysis takes the total financial condition into account, so that it would be an exceedingly rare event for an institution with a very low score to have sufficient financial strength to warrant continued participation. The zone alternative chosen employs as much case-by-case treatment as the Department considers appropriate and manageable. The alternative chosen gives the case management teams some discretion with regard to the stringency of the additional monitoring that will be required.

Continuous Improvement Zone Alternative

The Department considered requiring institutions to demonstrate continuous improvement to be eligible to use the zone alternative. This alternative was rejected for several reasons. In such a system, an institution would be required to have a score that was continuously rising. For instance, an institution with a score of 1.1 would have to score higher in the subsequent year in order to be able to use the zone alternative in a second year. The Secretary believes that the final score accurately reflects the institution's financial health. A continuous improvement model would mean, for instance, that two institutions with a score of 1.3 would be treated differently depending on their scores the previous year. An institution with a score of 1.3 in the current year that scored a 1.0 the previous year would have demonstrated improvement while the institution that scored 1.3 in both years would not have demonstrated improvement, leading to different regulatory results. The policy goal of treating institutions in a similar situation equitably would not have been satisfied if a continuous improvement model were chosen. The zone alternative chosen does require institutions to demonstrate improvement, in that institutions must score at or above the regulatory standard by the end of the third year. In addition, this option would add to the complexity of administering the rule.

Secondary Analysis

The Department considered various types of secondary analysis for institutions that marginally failed the ratio test. One type of secondary analysis that was considered was to calculate some additional ratios and assign bonus points for institutions with high values in these additional ratios. These alternatives were rejected for several reasons. Extensive analysis of the audited financial statements did not uncover any additional ratios that provided sufficient useful information about an institution's financial condition, such as the secondary reserve ratio or a ratio of equity to expenses. Other ratios were rejected because they lent themselves to manipulation, such as cash flow ratios or current ratios. Some ratios were rejected because they could not be calculated for all institutions, such as the Viability ratio or a debt service ratio.

Personal Financial Guarantees

The Department considered allowing institutions to demonstrate financial responsibility by providing personal financial guarantees at their option. This alternative was proposed in the NPRM, but rejected for several reasons. This proposed alternative was not considered to be desirable by the community. The resources that the Department would have devoted to administering this alternative were determined to be better employed in managing the zone alternative.

Requiring Institutions Only To Pass the Ratio Test for Most Years

The Department considered a methodology by which institutions would have only been required to pass the ratio test in two of three years, or in three of four years. This alternative was rejected for several reasons. Such a methodology would have allowed an institution to marginally pass for two years, while failing miserably the third year. However, an analysis of data of

closed institutions indicates that institutions that fail the ratio test should not be allowed to continue to participate without some additional surety to protect the Federal interest.

Analysis of Information Not on General Purpose Audited Financial Statements

The Department considered including information that was not available on audited financial statements. This alternative was rejected for several reasons. The Department does not have sufficient resources to determine the veracity of unaudited information that institutions would have provided under this alternative, such as enrollment data or similar types of information. The Department did consider requiring certain types of information that could have been attested to by the institution's auditor and disclosed in a note to the audited financial statement. KPMG advised the Department about the types of information that could be audited, and it was determined that the types of information that could have been attained using this method, combined with the difficulties in implementing a note disclosure, would not provide sufficient additional information beyond that contained in the ratio methodology chosen.

Conclusion

The Secretary concludes that a substantial number of small entities are likely to experience significant adverse economic impacts from the proposed rule, offset by significant positive economic effects on a slightly smaller number of small entities. As discussed in the section referring to the cost-benefit assessment of this proposed rule pursuant to Executive Order 12866, the Secretary has concluded that the costs are justified by the benefits. In this case, the benefits are reduced Federal fiscal liabilities as well as improved service to students participating in the title IV, HEA programs.

Paperwork Reduction Act of 1995

Sections 668.171(c), 668.172(c)(5), 668.174(b)(2)(i), 668.175(d)(2)(ii), 668.175(f)(2)(iii), and 668.175(g)(2)(i) contain information collection requirements. As required by the Paperwork Reduction Act of 1995, the U.S. Department of Education has submitted a copy of these sections to OMB for its review. (44 U.S.C. 3504(h)).

Assessment of Educational Impact

In the NPRM published September 20, 1996, the Secretary requested comment on whether the proposed regulations in this document would require transmission of information that is being gathered by, or is available from, any other agency or authority of the United States.

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

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List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Colleges and universities, Student aid, Reporting and recordkeeping requirements.

Dated: November 14, 1997.

Richard W. Riley,

Secretary of Education.

(Catalog of Federal Domestic Assistance Number: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Family Educational Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program: 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 Federal State Student Incentive Grant Program, and 84.268 Direct Loan Program)

The Secretary amends part 668 of title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

1. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1085, 1088, 1091, 1092, 1094, 1099c and 1141, unless otherwise noted.

Subpart B—Standards for Participation in the Title IV, HEA Programs

§ 668.13 [Amended]

2. Section 668.13 is amended by removing paragraphs (d) and (e), and by redesignating paragraph (f) as paragraph (d).

§ 668.23 [Amended]

3. Section 668.23 is amended by removing paragraph (f) and redesignating paragraphs (g) and (h) as paragraphs (f) and (g), respectively.

Subpart K—Cash Management

4. Section 668.162 is amended by revising paragraph (a)(1), and by adding a new paragraph (e) to read as follows:

§ 668.162 Requesting funds.

(a) *General.* (1) The Secretary has sole discretion to determine the method under which the Secretary provides title IV, HEA program funds to an institution. In accordance with procedures established by the Secretary, the Secretary may provide funds to an institution under the advance, reimbursement, just-in-time, or cash monitoring payment methods.

* * * * *

(e) *Cash monitoring payment method.* Under the cash monitoring payment method, the Secretary provides title IV, HEA program funds to an institution under the provisions described in paragraph (e)(1) or (e)(2) of this section. Under either paragraph (e)(1) or (e)(2) of this section, an institution must first make disbursements to students and parents for the amount of title IV, HEA program funds that those students and parents are eligible to receive, before the institution—

(1) Submits a request for funds under the provisions of the advance payment method described in paragraph (b) of this section, except that the institution's request may not exceed the amount of the actual disbursements the institution made to the students and parents included in that request; or

(2) Seeks reimbursement for those disbursements under the provisions of the reimbursement payment method described in paragraph (d) of this section, except that the Secretary may modify the documentation requirements and review procedures used to approve the reimbursement request.

5. Section 668.167 is amended by adding a new paragraph (f) to read as follows:

§ 668.167 FFEL program funds.

* * * * *

(f) *An institution placed under the cash monitoring payment method.* The Secretary may require an institution that is placed under the cash monitoring described under paragraph § 668.162(e), to comply with the disbursement and certification provisions under paragraph (d) of this section, except that the Secretary may modify the documentation requirements and review procedures used to approve the institution's disbursement or certification request.

6. A new subpart L is added to read as follows:

Subpart L—Financial Responsibility

Sec.
668.171 General.
668.172 Financial ratios.
668.173 Refund reserve standards.
668.174 Past performance.
668.175 Alternative standards and requirements.

§ 668.171 General.

(a) Purpose. To begin and to continue to participate in any title IV, HEA program, an institution must demonstrate to the Secretary that it is financially responsible under the standards established in this subpart. As provided under section 498(c)(1) of the HEA, the Secretary determines whether an institution is financially responsible based on the institution's ability to—

(1) Provide the services described in its official publications and statements;

(2) Administer properly the title IV, HEA programs in which it participates; and

(3) Meet all of its financial obligations.

(b) *General standards of financial responsibility.* Except as provided under paragraphs (c) and (d) of this section, the Secretary considers an institution to be financially responsible if the Secretary determines that—

(1) The institution's Equity, Primary Reserve, and Net Income ratios yield a composite score of at least 1.5, as provided under § 668.172 and Appendices F and G;

(2) The institution has sufficient cash reserves to make required refunds, as provided under § 668.173;

(3) The institution is current in its debt payments. An institution is not current in its debt payments if—

(i) It is in violation of any existing loan agreement at its fiscal year end, as disclosed in a note to its audited financial statements or audit opinion; or

(ii) It fails to make a payment in accordance with existing debt obligations for more than 120 days, and at least one creditor has filed suit to recover funds under those obligations; and

(4) The institution is meeting all of its financial obligations, including but not limited to—

(i) Refunds that it is required to make under § 668.22; and

(ii) Repayments to the Secretary for debts and liabilities arising from the institution's participation in the title IV, HEA programs.

(c) *Public institutions.* The Secretary considers a public institution to be financially responsible if the institution—

(1)(i) Notifies the Secretary that it is designated as a public institution by the State, local or municipal government entity, tribal authority, or other government entity that has the legal authority to make that designation; and

(ii) Provides a letter from an official of that State or other government entity confirming that the institution is a public institution; and

(2) Is not in violation of any past performance requirement under § 668.174.

(d) *Audit opinions and past performance provisions.* Even if an institution satisfies all of the general standards of financial responsibility under paragraph (b) of this section, the Secretary does not consider the institution to be financially responsible if—

(1) In the institution's audited financial statements, the opinion expressed by the auditor was an adverse, qualified, or disclaimed opinion, or the auditor expressed doubt about the continued existence of the institution as a going concern, unless the Secretary determines that a qualified or disclaimed opinion does not have a significant bearing on the institution's financial condition; or

(2) As provided under the past performance provisions in § 668.174(a) and (b)(1), the institution violated a title IV, HEA program requirement, or the persons or entities affiliated with the institution owe a liability for a violation of a title IV, HEA program requirement.

(e) *Administrative actions.* If the Secretary determines that an institution is not financially responsible under the standards and provisions of this section or under an alternative standard in § 668.175, or the institution does not submit its financial and compliance audits by the date permitted and in the manner required under § 668.23, the Secretary may—

(1) Initiate an action under subpart G of this part to fine the institution, or limit, suspend, or terminate the institution's participation in the title IV, HEA programs; or

(2) For an institution that is provisionally certified, take an action against the institution under the procedures established in § 668.13(d).

(Authority: 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109)

§ 668.172 Financial ratios.

(a) *Appendices F and G, ratio methodology.* As provided under Appendices F and G to this part, the Secretary determines an institution's composite score by—

(1) Calculating the result of its Primary Reserve, Equity, and Net Income ratios, as described under paragraph (b) of this section;

(2) Calculating the strength factor score for each of those ratios by using the corresponding algorithm;

(3) Calculating the weighted score for each ratio by multiplying the strength factor score by its corresponding weighting percentage;

(4) Summing the resulting weighted scores to arrive at the composite score; and

(5) Rounding the composite score to one digit after the decimal point.

(b) *Ratios.* The Primary Reserve, Equity, and Net Income ratios are defined under Appendix F for proprietary institutions, and under Appendix G for private non-profit institutions.

(1) The ratios for proprietary institutions are:

For proprietary institutions:

$$\text{Primary Reserve ratio} = \frac{\text{Adjusted Equity}}{\text{Total Expenses}}$$

$$\text{Equity ratio} = \frac{\text{Modified Equity}}{\text{Modified Assets}}$$

$$\text{Net Income ratio} = \frac{\text{Income Before Taxes}}{\text{Total Revenues}}$$

(2) The ratios for private non-profit institutions are:

$$\text{Primary Reserve ratio} = \frac{\text{Expendable Net Assets}}{\text{Total Expenses}}$$

$$\text{Equity Ratio} = \frac{\text{Modified Net Assets}}{\text{Modified Assets}}$$

$$\text{Net Income ratio} = \frac{\text{Change in Unrestricted Net Assets}}{\text{Total Unrestricted Revenues}}$$

(c) *Excluded items.* In calculating an institution's ratios, the Secretary—

(1) Generally excludes extraordinary gains or losses, income or losses from discontinued operations, prior period adjustments, the cumulative effect of changes in accounting principles, and the effect of changes in accounting estimates;

(2) May include or exclude the effects of questionable accounting treatments, such as excessive capitalization of marketing costs;

(3) Excludes all unsecured or uncollateralized related-party receivables;

(4) Excludes all intangible assets defined as intangible in accordance with generally accepted accounting principles; and

(5) Excludes from the ratio calculations Federal funds provided to an institution by the Secretary under program authorized by the HEA only if—

(i) In the notes to the institution's audited financial statement, or as a separate attestation, the auditor discloses by name and CFDA number, the amount of HEA program funds reported as expenses in the Statement of Activities for the fiscal year covered by that audit or attestation; and

(ii) The institution's composite score, as determined by the Secretary, is less than 1.5 before the reported expenses arising from those HEA funds are excluded from the Primary Reserve ratio.

(Authority: 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109)

§ 668.173 Refund reserve standards.

(a) *General.* The Secretary considers that an institution has sufficient cash reserves (as required under § 668.171(b)(2)) to make any refunds required under § 668.22 if the institution—

(1) Satisfies the requirements of a public institution under § 668.171(c)(1);

(2) Is located in a State that has a tuition recovery fund approved by the Secretary and the institution contributes to that fund; or

(3) Demonstrates that it makes its refunds timely, as provided under paragraph (b) of this section.

(b) *Timely refunds.* An institution demonstrates that it makes required refunds within the time permitted under § 668.22 if the auditor(s) who conducted the institution's compliance audits for the institution's two most recently completed fiscal years, or the Secretary or a State or guaranty agency that conducted a review of the institution covering those fiscal years—

(1) Did not find in the sample of student records audited or reviewed for either of those fiscal years that—

(i) The institution made late refunds to 5 percent or more of the students in that sample. For purposes of determining the percentage of late refunds under this paragraph, the auditor or reviewer must include in the sample only those title IV, HEA program recipients who received or should have received a refund under § 668.22; or

(ii) The institution made only one late refund to a student in that sample; and

(2) Did not note for either of those fiscal years a material weakness or a reportable condition in the institution's report on internal controls that is related to refunds.

(c) *Refund findings.* Upon a finding that an institution no longer satisfies a refund standard under paragraph (a)(1) or (2) of this section, or that the institution is not making its refunds timely under paragraph (b) of this section, the institution must submit an irrevocable letter of credit, acceptable and payable to the Secretary, equal to 25 percent of the total amount of title IV, HEA program refunds the institution made or should have made during its most recently completed fiscal year. The institution must submit this letter of credit to the Secretary no later than—

(1) Thirty days after the date the institution is required to submit its compliance audit to the Secretary under § 668.23, if the finding is made by the auditor who conducted that compliance audit; or

(2) Thirty days after the date that the Secretary, or the State or guaranty agency that conducted a review of the institution notifies the institution of the finding. The institution must also notify the Secretary of that finding and of the State or guaranty agency that conducted that review of the institution.

(d) *State tuition recovery funds.* In determining whether to approve a State's tuition recovery fund, the Secretary considers the extent to which that fund—

(1) Provides refunds to both in-State and out-of-State students;

(2) Allocates all refunds in accordance with the order required under § 668.22; and

(3) Provides a reliable mechanism for the State to replenish the fund should any claims arise that deplete the fund's assets.

(Authority: 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109)

§ 668.174 Past performance.

(a) *Past performance of an institution.* An institution is not financially responsible if the institution—

(1) Has been limited, suspended, terminated, or entered into a settlement agreement to resolve a limitation, suspension, or termination action initiated by the Secretary or a guaranty agency, as defined in 34 CFR part 682, within the preceding five years;

(2) In either of its two most recent compliance audits had an audit finding, or in a report issued by the Secretary had a program review finding for its current fiscal year or either of its preceding two fiscal years, that resulted in the institution's being required to repay an amount greater than 5 percent of the funds that the institution received under the title IV, HEA programs during the year covered by that audit or program review;

(3) Has been cited during the preceding five years for failure to submit in a timely fashion acceptable compliance and financial statement audits required under this part, or acceptable audit reports required under the individual title IV, HEA program regulations; or

(4) Has failed to resolve satisfactorily any compliance problems identified in audit or program review reports based upon a final decision of the Secretary issued pursuant to subpart G or H of this part.

(b) *Past performance of persons affiliated with an institution.* (1)(i) Except as provided under paragraph (b)(2) of this section, an institution is not financially responsible if a person who exercises substantial control over the institution, as described under 34 CFR 600.30, or any member or members of that person's family, alone or together—

(A) Exercises or exercised substantial control over another institution or a third-party servicer that owes a liability for a violation of a title IV, HEA program requirement; or

(B) Owes a liability for a violation of a title IV, HEA program requirement; and

(ii) That person, family member, institution, or servicer does not demonstrate that the liability is being repaid in accordance with an agreement with the Secretary.

(2) The Secretary may determine that an institution is financially responsible, even if the institution is not otherwise financially responsible under paragraph (b)(1) of this section, if—

(i) The institution notifies the Secretary, within the time permitted and in the manner provided under 34 CFR 600.30, that the person referenced in paragraph (b)(1) of this section exercises substantial control over the institution; and

(ii) The person referenced in paragraph (b)(1) of this section repaid to the Secretary a portion of the applicable liability, and the portion repaid equals or exceeds the greater of—

(A) The total percentage of the ownership interest held in the institution or third-party servicer that owes the liability by that person or any member or members of that person's family, either alone or in combination with one another;

(B) The total percentage of the ownership interest held in the institution or servicer that owes the liability that the person or any member or members of the person's family, either alone or in combination with one another, represents or represented under a voting trust, power of attorney, proxy, or similar agreement; or

(C) Twenty-five percent, if the person or any member of the person's family is or was a member of the board of directors, chief executive officer, or other executive officer of the institution or servicer that owes the liability, or of an entity holding at least a 25 percent ownership interest in the institution that owes the liability; or

(iii) The applicable liability described in paragraph (b)(1) of this section is currently being repaid in accordance with a written agreement with the Secretary; or

(iv) The institution demonstrates to the satisfaction of the Secretary why—

(A) The person who exercises substantial control over the institution should nevertheless be considered to lack that control; or

(B) The person who exercises substantial control over the institution and each member of that person's family nevertheless does not or did not exercise substantial control over the institution or servicer that owes the liability.

(c) *Ownership interest.* (1) An ownership interest is a share of the legal or beneficial ownership or control of, or a right to share in the proceeds of the operation of, an institution, an institution's parent corporation, a third-party servicer, or a third-party servicer's parent corporation. The term ''ownership interest'' includes, but is not limited to—

(i) An interest as tenant in common, joint tenant, or tenant by the entireties;

(ii) A partnership; and

(iii) An interest in a trust.

(2) The term ''ownership interest'' does not include any share of the ownership or control of, or any right to share in the proceeds of the operation of a profit-sharing plan, provided that all employees are covered by the plan.

(3) The Secretary generally considers a person to exercise substantial control over an institution or third-party servicer if the person—

(i) Directly or indirectly holds at least a 20 percent ownership interest in the institution or servicer;

(ii) Holds, together with other members of his or her family, at least a 20 percent ownership interest in the institution or servicer;

(iii) Represents, either alone or together with other persons under a voting trust, power of attorney, proxy, or similar agreement, one or more persons who hold, either individually or in combination with the other persons represented or the person representing them, at least a 20 percent ownership in the institution or servicer; or

(iv) Is a member of the board of directors, the chief executive officer, or other executive officer of—

(A) The institution or servicer; or

(B) An entity that holds at least a 20 percent ownership interest in the institution or servicer.

(4) The Secretary considers a member of a person's family to be a parent, sibling, spouse, child, spouse's parent or sibling, or sibling's or child's spouse.

(Authority: 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109)

§ 668.175 Alternative standards and requirements.

(a) *General.* An institution that is not financially responsible under the general standards and provisions in § 668.171, may begin or continue to participate in the title IV, HEA programs by qualifying under an alternate standard set forth in this section.

(b) *Letter of credit alternative for new institutions.* A new institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5, qualifies as a financially responsible institution by submitting an irrevocable letter of credit, that is acceptable and payable to the Secretary, for an amount equal to at least one-half of the amount of title IV, HEA program funds that the Secretary determines the institution will receive during its initial year of participation. A new institution is an institution that seeks to participate for the first time in the title IV, HEA programs.

(c) *Letter of credit alternative for participating institutions.* A

participating institution that is not financially responsible either because it does not satisfy one or more of the standards of financial responsibility under § 668.171(b), or because of an audit opinion described under § 668.171(d), qualifies as a financially responsible institution by submitting an irrevocable letter of credit, that is acceptable and payable to the Secretary, for an amount determined by the Secretary that is not less than one-half of the title IV, HEA program funds received by the institution during its most recently completed fiscal year.

(d) *Zone alternative.* (1) A participating institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5 may participate in the title IV, HEA programs as a financially responsible institution for no more than three consecutive years, beginning with the year in which the Secretary determines that the institution qualifies under this alternative. (i)(A) An institution qualifies initially under this alternative if, based on the institution's audited financial statement for its most recently completed fiscal year, the Secretary determines that its composite score is in the range from 1.0 to 1.4; and

(B) An institution continues to qualify under this alternative if, based on the institution's audited financial statement for each of its subsequent two fiscal years, the Secretary determines that the institution's composite score is in the range from 1.0 to 1.4.

(ii) An institution that qualified under this alternative for three consecutive years or for one of those years, may not seek to qualify again under this alternative until the year after the institution achieves a composite score of at least 1.5, as determined by the Secretary.

(2) Under this zone alternative, the Secretary—

(i) Requires the institution to make disbursements to eligible students and parents under either the cash monitoring or reimbursement payment method described in § 668.162;

(ii) Requires the institution to provide timely information regarding any of the following oversight and financial events—

(A) Any adverse action, including a probation or similar action, taken against the institution by its accrediting agency;

(B) Any event that causes the institution, or related entity as defined in the Statement of Financial Accounting Standards (SFAS) 57, to realize any liability that was noted as a contingent liability in the institution's or related entity's most recent audited financial statement;

(C) Any violation by the institution of any loan agreement;

(D) Any failure of the institution to make a payment in accordance with its debt obligations that results in a creditor filing suit to recover funds under those obligations;

(E) Any withdrawal of owner's equity from the institution by any means, including by declaring a dividend; or

(F) Any extraordinary losses, as defined in accordance with Accounting Principles Board (APB) Opinion No. 30.

(iii) May require the institution to submit its financial statement and compliance audits earlier than the time specified under § 668.23(a)(4); and

(iv) May require the institution to provide information about its current operations and future plans.

(3) Under the zone alternative, the institution must—

(i) For any oversight or financial event described under paragraph (d)(2)(ii) of this section for which the institution is required to provide information, provide that information to the Secretary by certified mail or electronic or facsimile transmission no later than 10 days after that event occurs. An institution that provides this information electronically or by facsimile transmission is responsible for confirming that the Secretary received a complete and legible copy of that transmission; and

(ii) As part of its compliance audit, require its auditor to express an opinion on the institution's compliance with the requirements under the zone alternative, including the institution's administration of the payment method under which the institution received and disbursed title IV, HEA program funds.

(4) If an institution fails to comply with the requirements under paragraphs (d)(2) or (3) of this section, the Secretary may determine that the institution no longer qualifies under this alternative.

(e) *Transition year alternative.* A participating institution that is not financially responsible solely because the Secretary determines that its composite score is less than 1.5 for the institution's fiscal year that began on or after July 1, 1997 but on or before June 30, 1998, may qualify as a financially responsible institution under the provisions in § 668.15(b)(7), (b)(8), (d)(2)(ii), or (d)(3), as applicable.

(f) *Provisional certification alternative.* (1) The Secretary may permit an institution that is not financially responsible to participate in the title IV, HEA programs under a provisional certification for no more than three consecutive years if—

(i) The institution is not financially responsible because it does not satisfy the general standards under § 668.171(b) or because of an audit opinion described under § 668.171(d); or

(ii) The institution is not financially responsible because of a condition of past performance, as provided under § 668.174(a), and the institution demonstrates to the Secretary that it has satisfied or resolved that condition.

(2) Under this alternative, the institution must—

(i) Submit to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary, for an amount determined by the Secretary that is not less than 10 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year;

(ii) Demonstrate that it was current on its debt payments and has met all of its financial obligations, as required under § 668.171(b)(3) and (b)(4), for its two most recent fiscal years; and

(iii) Comply with the provisions under the zone alternative, as provided under paragraph (d)(2) and (3) of this section.

(3) If at the end of the period for which the Secretary provisionally certified the institution, the institution is still not financially responsible, the Secretary may again permit the institution to participate under a provisional certification, but the Secretary—

(i) May require the institution, or one or more persons or entities that exercise substantial control over the institution, as determined under § 668.174(d), or both, to submit to the Secretary financial guarantees for an amount determined by the Secretary to be sufficient to satisfy any potential liabilities that may arise from the institution's participation in the title IV, HEA programs; and

(ii) May require one or more of the persons or entities that exercise substantial control over the institution, as determined under § 668.174(d), to be jointly or severally liable for any liabilities that may arise from the institution's participation in the title IV, HEA programs.

(g) *Provisional certification alternative for persons or entities owing liabilities.* (1) The Secretary may permit an institution that is not financially responsible because the persons or entities that exercise substantial control over the institution owe a liability for a violation of a title IV, HEA program requirement, to participate in the title

IV, HEA programs under a provisional certification only if—

(i)(A) The persons or entities that exercise substantial control, as determined under § 668.174(d), repay or enter into an agreement with the Secretary to repay the applicable portion of that liability, as provided under § 668.174(c)(2)(ii); or

(B) The institution assumes that liability, and repays or enters into an agreement with the Secretary to repay that liability;

(ii) The institution satisfies the general standards and provisions of financial responsibility under § 668.171 (b) and (d), except that institution must demonstrate that it was current on its debt payments and has met all of its financial obligations, as required under § 668.171(b)(3) and (b)(4), for its two most recent fiscal years; and

(iii) The institution submits to the Secretary an irrevocable letter of credit that is acceptable and payable to the Secretary, for an amount determined by the Secretary that is not less than 10 percent of the title IV, HEA program funds received by the institution during its most recently completed fiscal year.

(2) Under this alternative, the Secretary—

(i) Requires the institution to comply with the provisions under the zone alternative, as provided under paragraph (d)(2) and (3) of this section;

(ii) May require the institution, or one or more persons or entities that exercise substantial control over the institution, or both, to submit to the Secretary financial guarantees for an amount determined by the Secretary to be sufficient to satisfy any potential liabilities that may arise from the institution's participation in the title IV, HEA programs; and

(iii) May require one or more of the persons or entities that exercise substantial control over the institution to be jointly or severally liable for any liabilities that may arise from the institution's participation in the title IV, HEA programs.

(Authority: 20 U.S.C. 1094 and 1099c and section 4 of Pub. L. 95–452, 92 Stat. 1101–1109)

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7. A new Appendix F is added to read as follows:

Appendix F: Ratio Methodology for Proprietary Institutions
Section 1: Ratios and Ratio Terms

$$\text{Primary Reserve Ratio} = \frac{\text{Adjusted Equity}}{\text{Total Expenses}}$$

$$\text{Equity Ratio} = \frac{\text{Modified Equity}}{\text{Modified Assets}}$$

$$\text{Net Income Ratio} = \frac{\text{Income Before Taxes}}{\text{Total Revenues}}$$

Definitions:

Adjusted Equity = (total owner's equity) - (intangible assets) - (unsecured related-party receivables) - (net property, plant and equipment)* + (post-employment and retirement liabilities) + (all debt obtained for long-term purposes)**

Total Expenses excludes income tax, discontinued operations, extraordinary losses, or change in accounting principle.

Modified Equity = (total owner's equity) - (intangible assets) - (unsecured related-party receivables)

Modified Assets = (total assets) - (intangible assets) - (unsecured related-party receivables)

Income Before Taxes is taken directly from the audited financial statement

Total Pre-Tax Revenues = (total operating revenues) + (non-operating revenues and gains). Investment gains should be recorded net of investment losses. No revenues shown after income taxes (e.g., discontinued operations, extraordinary gains, or change in accounting principle) on the income statement should be included.

* The value of plant, property and equipment is net of accumulated depreciation, including capitalized lease assets.
** The value of all debt obtained for long-term purposes includes the short-term portion of the debt, up to the amount of net property, plant and equipment.

Section 2, Calculating the Ratios from the Balance Sheet and Income Statement

Balance Sheet

Line		
1	Cash	$ 190,000
2	Accounts Receivable	1,010,000
3	Prepaid Expenses	150,000
4	Inventories	130,000
5	Note Receivable from Affiliate	200,000
6	Investments	330,000
7	**Total Current Assets**	2,010,000
8	Property and Equipment, net	500,000
9	Amount Due from Owner	170,000
10	Goodwill	80,000
11	Organization Costs	70,000
12	Deposits	60,000
13	**Total Assets**	2,890,000
14	Accounts Payable	200,000
15	Accrued Expenses	330,000
16	Current Portion of Long-Term Debt	120,000
17	Deferred Revenue	650,000
18	**Total Current Liabilities**	1,300,000
19	Long-Term Debt, net of Current Portion	330,000
20	**Total Liabilities**	1,630,000
21	Contributed Capital	440,000
22	Retained Earnings	820,000
23	**Total Owner's Equity**	1,260,000
24	**Total Liabilities and Owner's Equity**	2,890,000

Statement of Income and Retained Earnings

Line		
25	Operating Income	$ 9,700,000
26	Non-Operating Income	300,000
27	**Total Income**	10,000,000
28	Cost of Goods Sold	6,800,000
29	Administrative Expenses	2,600,000
30	Depreciation Expense	60,000
31	Interest Expense	40,000
32	**Total Expenses**	9,500,000
33	Other: Gain on Sale of Investments	10,000
34	**Net Income Before Taxes**	510,000
35	Federal Income Taxes	153,000
36	**Net Income After Taxes**	357,000
37	Extraordinary Loss, net of tax	800,000
38	**Net Income**	(443,000)
39	Retained Earnings, beginning of year	1,263,000
22	**Retained Earnings, end of year**	820,000

Primary Reserve Ratio = (lines) $\frac{23\text{-}5\text{-}9\text{-}10\text{-}8+(16+19)^*}{32} = \frac{\$\ 760,000}{\$9,500,000} = 0.080$

Equity Ratio = (lines) $\frac{23\text{-}5\text{-}9\text{-}10}{13\text{-}5\text{-}9\text{-}10} = \frac{\$\ 810,000}{\$2,440,000} = 0.332$

Net Income Ratio = (lines) $\frac{34}{27+33} = \frac{\$\ 510,000}{\$10,010,000} = 0.051$

*Long-Term Debt (lines 16+19) cannot exceed Property and Equipment (line 8) in this formula

Section 3: Calculating the Composite Score

Step 1: Calculate the strength factor score for each ratio, by using the following algorithms:

	Example (for Proprietary institutions)
Primary Reserve strength factor score = 20 x* Primary Reserve ratio result:	20 x 0.080 = 1.600
Equity strength factor score = 6 x Equity ratio result:	6 x 0.332 = 1.992
Net Income strength factor score = 1 + (33.3 x Net Income ratio result):	1 + (33.3 x 0.051) = 2.698

If the strength factor score for any ratio is greater than or equal to 3, the strength factor score for that ratio is 3. If the strength factor score for any ratio is less than or equal to -1, the strength factor score for that ratio is -1.

Step 2: Calculate the weighted score for each ratio and calculate the composite score by adding the three weighted scores

Primary Reserve weighted score = 30% x Primary Reserve strength factor score:	0.30 x 1.600 = 0.480
Equity weighted score = 40% x Equity strength factor score:	0.40 x 1.992 = 0.797
Net Income weighted score = 30% x Net Income strength factor score:	0.30 x 2.698 = 0.809
Composite score = sum of all weighted scores:	0.480 + 0.797 + 0.809 = 2.086
Round the composite score to one digit after the decimal point to determine the final score:	2.1

* The symbol "x" denotes multiplication.

8. A new Appendix G is added to read as follows:

Appendix G: Ratio Methodology for Private Non-Profit Institutions
Section 1: Ratios and Ratio Terms

$$\text{Primary Reserve Ratio} = \frac{\text{Expendable Net Assets}}{\text{Total Expenses}}$$

$$\text{Equity Ratio} = \frac{\text{Modified Net Assets}}{\text{Modified Assets}}$$

$$\text{Net Income Ratio} = \frac{\text{Change in Unrestricted Net Assets}}{\text{Total Unrestricted Revenue}}$$

Definitions:

Expendable Net Assets = (unrestricted net assets) + (temporarily restricted net assets) - (annuities, term endowments, and life income funds that are temporarily restricted) - (intangible assets) - (net property, plant and equipment)* + (post-employment and retirement liabilities) + (all debt obtained for long-term purposes)**

Total Expenses is total unrestricted expenses taken directly from the audited financial statement

Modified Net Assets = (unrestricted net assets) + (temporarily restricted net assets) + (permanently restricted net assets) - (intangible assets) - (unsecured related-party receivables)

Modified Assets = (total assets) - (intangible assets) - (unsecured related-party receivables)

Change in Unrestricted Net Assets is taken directly from the audited financial statement

Total Unrestricted Revenue is taken directly from the audited financial statement (This amount includes net assets released from restriction during the fiscal year)

* The value of plant, property and equipment is net of accumulated depreciation, including capitalized lease assets.
** The value of all debt obtained for long-term purposes includes the short-term portion of the debt, up to the amount of net property, plant and equipment.

Section 2, Calculating the Ratios from the Balance Sheet and Statement of Activities

Balance Sheet

Line		Total
1	Cash and Cash Equivalents	$ 1,000,000
2	Accounts Receivable	6,000,000
3	Prepaid Expenses	1,500,000
4	Inventories	500,000
5	Contributions Receivable	2,000,000
6	Student Loans Receivable	8,000,000
7	Investments	6,000,000
8	Property and Equipment, net	50,000,000
9	Bond Insurance Costs	720,000
10	Goodwill	500,000
11	Deposits	20,000
12	**Total Assets**	76,240,000
13	Line of Credit	$ 500,000
14	Accounts Payable	2,000,000
15	Accrued Expenses	3,500,000
16	Deferred Revenue	650,000
17	Post-Retirement Benefits Liability	6,600,000
18	Bonds Payable	36,000,000
19	**Total Liabilities**	49,250,000
20	**Unrestricted Net Assets**	15,190,000
21	Annuities	300,000
22	John Doe Scholarship Fund	2,500,000
23	**Total Temp. Restricted Net Assets**	2,800,000
24	**Permanent Restr. Net Assets**	9,000,000
25	**Total Net Assets**	26,990,000
26	**Total Liabilities & Net Assets**	76,240,000

Statement of Activities

Line		column: a Unrestricted	b Temporarily Restricted	c Permanently Restricted	d Total
27	Tuition and Fees	$45,000,000			$45,000,000
28	Contributions	1,200,000	$ 300,000	$ 120,000	1,620,000
29	Auxiliary Enterprises	5,500,000			5,500,000
30	Net Assets Released from Restrictions	200,000			200,000
31	**Total Revenue**	51,900,000	300,000	120,000	52,320,000
32	Operating Expenses	38,000,000			38,000,000
33	Depreciation	5,000,000			5,000,000
34	Interest Expense	2,880,000			2,880,000
35	Auxiliary Enterprises	5,200,000			5,200,000
36	Non-Operating Expenses	900,000			900,000
37	Net Assets Released from Restrictions		200,000	---	200,000
38	**Total Expenses**	51,980,000	200,000	---	52,180,000
39	**Change in Net Assets**	(80,000)*	100,000	120,000	140,000
40	Net Assets at beginning of year	15,270,000	2,700,000	8,880,000	26,850,000
41	Net Assets at end of year	15,190,000	2,800,000	9,000,000	26,990,000

Primary Reserve Ratio = (lines) $\frac{20+23-21-10-8+18^{**}+17}{38a} = \frac{\$\ 9,790,000}{51,980,000} = 0.188$

Equity Ratio = (lines) $\frac{25-10}{12-10} = \frac{\$26,490,000}{75,740,000} = 0.350$

Net Income Ratio = (lines) $\frac{39a}{31a} = \frac{\$\ (80,000)}{51,900,000} = (0.0015)$

* In accounting statements, parentheses denote negative numbers (i.e., (80,000) equals negative 80,000).

** Long-Term Debt (line 18) cannot exceed Property and Equipment, net (line 8) in this formula.

Section 3: Calculating the Composite Score

Step 1: Calculate the strength factor score for each ratio, by using the following algorithms

	Example (for Private Non-Profit institutions)
Primary Reserve strength factor score = 10 x* Primary Reserve ratio result:	10 x 0.188 = 1.880
Equity strength factor score = 6 x Equity ratio result:	6 x 0.350 = 2.100
Because the Net Income ratio result is negative, the algorithm for negative net income is used -- Net Income strength factor score = 1 + (25 x Net Income ratio result):	1 + (25 x -0.0015) = 0.963

(Note: If the Net Income ratio result is positive, the following algorithm is used, Net Income strength factor score = 1 + (50 x Net Income ratio result) -- If the Net Income ratio result is 0, the Net Income strength factor score is 1).

If the strength factor score for any ratio is greater than or equal to 3, the strength factor score for that ratio is 3. If the strength factor score for any ratio is less than or equal to -1, the strength factor score for that ratio is -1.

Step 2: Calculate the weighted score for each ratio and calculate the composite score by adding the three weighted scores

Primary Reserve weighted score = 40% x Primary Reserve strength factor score:	0.40 x 1.880 = 0.752
Equity weighted score = 40% x Equity strength factor score:	0.40 x 2.100 = 0.840
Net Income weighted score = 20% x Net Income strength factor score:	0.20 x 0.963 = 0.193
Composite score = sum of all weighted scores:	0.752 + 0.840 + 0.193 = 1.785
Round the composite score to one digit after the decimal point to determine the final score:	1.8

* The symbol "x" denotes multiplication.

[FR Doc. 97-30859 Filed 11-24-97; 8:45 am]
BILLING CODE 4000-01-C

Federal Register

Tuesday
November 25, 1997

Part V

Department of Health and Human Services

Food and Drug Administration

International Conference on Harmonisation; Draft Guidance on Specifications: Test Procedures and Acceptance Criteria for New Drug Substances and New Drug Products: Chemical Substances; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 97D–0448]

International Conference on Harmonisation; Draft Guidance on Specifications: Test Procedures and Acceptance Criteria for New Drug Substances and New Drug Products: Chemical Substances

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a draft guidance entitled ''Q6A Specifications: Test Procedures and Acceptance Criteria for New Drug Substances and New Drug Products: Chemical Substances.'' The draft guidance was prepared under the auspices of the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). The draft guidance provides guidance on the selection of test procedures and the setting and justification of acceptance criteria for new chemical drug substances and new drug products produced from them. The draft guidance is intended to assist in the establishment of a single set of global specifications for new drug substances and new drug products.

DATES: Written comments by January 26, 1998.

ADDRESSES: Submit written comments on the draft guidance to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. Copies of the draft guidance are available from the Drug Information Branch (HFD–210), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4573.

FOR FURTHER INFORMATION CONTACT:

Regarding the guidance: Eric B. Sheinin, Center for Drug Evaluation and Research (HFD–800), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–5918, or

Neil D. Goldman, Center for Biologic Evaluation and Research (HFM–416), Food and Drug Administration, 8800 Rockville Pike, Rockville, MD 20852, 301–827–0377.

Regarding the ICH: Janet J. Showalter, Office of Health Affairs (HFY–20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–0864.

SUPPLEMENTARY INFORMATION: In recent years, many important initiatives have been undertaken by regulatory authorities and industry associations to promote international harmonization of regulatory requirements. FDA has participated in many meetings designed to enhance harmonization and is committed to seeking scientifically based harmonized technical procedures for pharmaceutical development. One of the goals of harmonization is to identify and then reduce differences in technical requirements for drug development among regulatory agencies.

ICH was organized to provide an opportunity for tripartite harmonization initiatives to be developed with input from both regulatory and industry representatives. FDA also seeks input from consumer representatives and others. ICH is concerned with harmonization of technical requirements for the registration of pharmaceutical products among three regions: The European Union, Japan, and the United States. The six ICH sponsors are the European Commission, the European Federation of Pharmaceutical Industries Associations, the Japanese Ministry of Health and Welfare, the Japanese Pharmaceutical Manufacturers Association, the Centers for Drug Evaluation and Research and Biologics Evaluation and Research, FDA, and the Pharmaceutical Research and Manufacturers of America. The ICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation of Pharmaceutical Manufacturers Associations (IFPMA).

The ICH Steering Committee includes representatives from each of the ICH sponsors and the IFPMA, as well as observers from the World Health Organization, the Canadian Health Protection Branch, and the European Free Trade Area.

In July 1997, the ICH Steering Committee agreed that a draft guidance entitled ''Q6A Specifications: Test Procedures and Acceptance Criteria for New Drug Substances and New Drug Products: Chemical Substances'' should be made available for public comment. The draft guidance is the product of the Quality Expert Working Group of the ICH. Comments about this draft will be considered by FDA and the Quality Expert Working Group. A related document for biotechnology derived products is the subject of a separate Expert Working Group.

In accordance with Good Guidance Practices (62 FR 8961, February 27, 1997), this document is now being called a guidance, rather than a guideline.

The draft guidance provides guidance on the selection of test procedures and the setting and justification of acceptance criteria for new drug substances of synthetic chemical origin, and new drug products produced from them, that have not been registered previously in the United States, the European Union, or Japan. The draft guidance is intended to assist in the establishment of a single set of global specifications for new drug substances and new drug products.

This draft guidance represents the agency's current thinking on the selection of test procedures and the setting and justification of acceptance criteria for new chemical drug substances and new drug products. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute, regulations, or both.

Interested persons may, on or before January 26, 1998, submit to the Dockets Management Branch (address above) written comments on the draft guidance. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The draft guidance and received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday. An electronic version of this guidance is available on the Internet at ''http://www.fda.gov/cder/guidance.htm''.

The text of the draft guidance follows:

Q6A Specifications: Test Procedures and Acceptance Criteria for New Drug Substances and New Drug Products: Chemical Substances[1]

Table of Contents

1. Introduction
   1.1 Specifications
   1.2 Objective of the Guidance
   1.3 Scope of the Guidance
2. General Concepts
   2.1 Periodic/Skip Testing
   2.2 Release vs. Shelf-Life Acceptance Criteria
   2.3 In-Process Tests

[1] This draft guidance represents the agency's current thinking on the selection of test procedures and the setting and justification of acceptance criteria for new chemical drug substances and new drug products. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute, regulations, or both.

2.4 Design and Development Considerations
2.5 Limited Data Available at Filing
2.6 Parametric Release
2.7 Alternative Procedures
2.8 Pharmacopoeial Tests and Acceptance Criteria
2.9 Evolving Technologies
2.10 Impact of Drug Substance on Drug Product Specifications
2.11 Reference Standard
3. Guidelines
3.1 Specifications: Definition and Justification
3.1.1 Definition of Specifications
3.1.2 Justification of Specifications
3.2 Universal Tests/Criteria
3.2.1 New Drug Substances
3.2.2 New Drug Products
3.3 Specific Tests/Criteria
3.3.1 New Drug Substances
3.3.2 New Drug Products
4. Glossary
5. References
6. Attachments: Decision Trees #1 Through #8

1. Introduction

1.1 Specifications

A specification is defined as a list of tests, references to analytical procedures, and appropriate acceptance criteria that are numerical limits, ranges, or other criteria for the tests described. It establishes the set of criteria to which a drug substance or drug product should conform to be considered acceptable for its intended use. ''Conformance to specifications'' means that the drug substance and/or drug product, when tested according to the listed analytical procedures, will meet the listed acceptance criteria. Specifications are binding quality standards that are agreed to between the appropriate governmental regulatory agency and the applicant.

Specifications are one part of a total control strategy for the drug substance and drug product designed to ensure product quality and consistency. Other parts of this strategy include thorough product characterization during development upon which specifications are based, adherence to good manufacturing practices (GMP's), and a validated manufacturing process, e.g., raw material testing, in-process testing, stability testing.

Specifications are chosen to confirm the quality of the drug substance and drug product rather than to establish full characterization, and should focus on those characteristics found to be useful in ensuring the safety and efficacy of the drug substance and drug product.

1.2 Objective of the Guidance

This guidance is intended to assist, to the extent possible, in the establishment of a single set of global specifications for new drug substances and new drug products. It provides guidance on the setting and justification of acceptance criteria and the selection of test procedures for new drug substances of synthetic chemical origin, and new drug products produced from them, that have not been registered previously in the United States, the European Union, or Japan.

1.3 Scope of the Guidance

The quality of drug substances and drug products is determined by their design, development, in-process controls, GMP controls, and process validation, and by specifications applied to them throughout development and manufacture. This guidance addresses specifications, i.e., those tests, procedures, and acceptance criteria used to assure the quality of the new drug substance and new drug product at release and during shelf life. Specifications are an important component of quality assurance, but are not its only component. All of the considerations listed above are necessary to ensure consistent production of drug substances and drug products of high quality.

This guidance addresses only the marketing approval of new drug products (including combination products); it does not address drug substances or drug products during the clinical research stages of drug development. Biological/biotechnological products, peptides, oligonucleotides, radiopharmaceuticals, fermentation and semisynthetic products derived therefrom, herbal products, and crude products of animal or plant origin are also not covered. A separate ICH guidance addresses specifications, tests, and procedures for biotechnological/biological products.

Guidance is provided with regard to acceptance criteria that should be established for all new drug substances and new drug products, i.e., universal acceptance criteria, and those that are considered specific to individual drug substances and/or dosage forms. This guidance reflects the current state of the art at the time it has been written, and should not be considered all-encompassing. New analytical technology, and modifications to existing technology, are continuously being developed. Such technologies should be used when justifiable.

Dosage forms addressed in this guidance include solid oral dosage forms, liquid oral dosage forms, and parenterals (small and large volume). This is not meant to be an all-inclusive list, or to limit the number of dosage forms to which this guidance applies. The dosage forms presented serve as models that may be applicable to other dosage forms that have not been discussed. The extended application of the concepts in this guidance to other dosage forms, e.g., inhalation dosage forms (powders, solutions, etc.), topical formulations (creams, ointments, gels), and transdermal systems, is encouraged.

2. General Concepts

The following concepts are important in the development and setting of harmonized specifications. They are not universally applicable, but each should be considered in particular circumstances. This guidance presents a brief definition of each concept and an indication of the circumstances under which it may be applicable. Generally, proposals to implement these concepts should be justified by the applicant and approved by the appropriate regulatory authority before being put into effect.

2.1 Periodic/Skip Testing: Periodic or skip testing is the performance of specified tests at release on preselected batches and/or at predetermined intervals, rather than on a batch-to-batch basis. This represents a less than full schedule of testing and should therefore be justified and presented to the regulatory authority prior to implementation. This concept may be applicable to, for example, dissolution (see section 2.4), residual solvents, and microbiological testing, e.g., for solid oral dosage forms. It is recognized that only limited data may be available at the time of submission of an application (see section 2.5). This concept may therefore sometimes be implemented postapproval in accordance with GMP.

2.2 Release Vs. Shelf-Life Acceptance Criteria: The concept of different acceptance criteria for release vs. shelf-life specifications applies to drug products only; it pertains to the establishment of more restrictive criteria for the release of a drug product than are applied to the shelf-life. Examples where this may be applicable include assay and impurity (degradation product) levels. In Japan and the United States, this concept may only be applicable to inhouse criteria, and not to the regulatory release criteria. In the European Union, there is a regulatory requirement for distinct specifications for release and for shelf-life.

2.3 In-Process Tests: In-process tests are tests that may be performed during the manufacture of either the drug substance or drug product, rather than as part of the formal battery of tests which are conducted prior to release. In-process tests that are used for the purpose of adjusting process parameters within an operating range, e.g., hardness and friability of tablet cores that will be coated, are not included in the specification. Certain tests conducted during the manufacturing process, where the acceptance criterion is identical to or tighter than the release requirement (e.g., pH of a solution), may be acceptable to satisfy specification requirements when the test is included in the specification.

2.4 Design and Development Considerations: The experience and data accumulated during the development of a new drug substance or product should form the basis for the setting of specifications. It may be possible to propose excluding or replacing certain tests on this basis. Some examples are:

- Microbiological testing for drug substances and solid dosage forms that have been shown during development not to support microbial viability or growth.
- Extractables from product containers where it has been reproducibly shown that either no extractables are found in the drug product or the levels meet accepted standards for safety.
- Particle size testing may fall into this category, may be performed as an in-process test, or may be performed as a release test, depending on its relevance to product performance.
- Dissolution testing for immediate release solid oral drug products made from very water soluble drug substances may be replaced by disintegration testing, if these products have been demonstrated during development to have consistently rapid drug release characteristics. (See Decision trees #7(1) through #7(4)).

2.5 Limited Data Available at Filing: It is recognized that only a limited amount of data

may be available at the time of filing, which can influence the process of setting acceptance criteria. As a result, it may be necessary to propose revised acceptance criteria as additional experience is gained with the manufacture of a particular drug substance or drug product (example: acceptance limits for a specific impurity). The basis for the acceptance criteria at the time of filing will focus necessarily on safety and efficacy.

2.6 Parametric Release: Parametric release can be used as an operational alternative to routine release testing for the drug product. Sterility testing for terminally sterilized drug products is one example. In this case, the release of a batch is based on results from monitoring specific parameters, e.g., temperature and pressure, during the terminal sterilization phase(s) of drug product manufacturing. These parameters can generally be more accurately controlled and measured, so that they are more reliable in predicting sterility assurance than is end-product sterility testing. It is important to note that the sterilization process should be adequately validated before parametric release is proposed. When parametric release is performed, the attribute which is indirectly controlled (e.g., sterility), together with a reference to the associated test procedure, still should be included in the specifications.

2.7 Alternative Procedures: Alternative procedures are those that may be used to measure an attribute when such procedures control the quality of the drug substance or drug product to an extent that is comparable or superior to the official procedure. Example: For tablets that have been shown not to degrade during manufacture, it may be permissible to use a spectrophotometric procedure for release as opposed to the official procedure, which is chromatographic. However, the chromatographic procedure should still be used to demonstrate compliance with the acceptance criteria during the shelf-life of the product.

2.8 Pharmacopoeial Tests and Acceptance Criteria: References to certain methods are found in pharmacopoeias in each region. Wherever they are appropriate, pharmacopoeial methods should be utilized. Whereas differences in pharmacopoeial methods and/or acceptance criteria have existed among the regions, a harmonized specification is possible only if the methods and acceptance criteria defined are acceptable to regulatory authorities in all regions. This guidance is dependent on the successful completion of harmonization of pharmacopoeial methods for several attributes commonly considered in the specifications for new drug substances or new drug products.

The following attributes are essentially harmonized with respect to analytical method and acceptance criteria, except where noted, across the European Pharmacopoeia (Ph. Eur.), Japanese Pharmacopoeia (JP), and United States Pharmacopeia (USP):

Sterility
Residue on Ignition/Sulfated Ash
Bacterial Endotoxins
Color/Clarity
Particulate Matter
Dissolution (apparatus)
Disintegration (apparatus)

To signify the harmonized status of these general methods, the pharmacopoeias will include a statement in the text that indicates that the methods and acceptance criteria from all three pharmacopoeias are considered equivalent and are, therefore, interchangeable. An appropriate reference to the harmonized method and acceptance criteria is considered acceptable for a specification in all three regions. For example, sterility data generated using the JP method, as well as the JP method itself and its acceptance criteria, are considered acceptable for registration in all three regions. An appropriate reference may be expressed as JP/Ph. Eur./USP.

Harmonization of the following attributes will be completed prior to approval of a step 4 guidance:

Dissolution (media and acceptance criteria)
Disintegration (media and acceptance criteria)
Uniformity of Mass
Uniformity of Content
Extractable Volume
Preservative Effectiveness (scope of test and acceptance criteria)
Microbial Contamination

2.9 Evolving Technologies: New analytical technology and modifications to existing technology are continuously being developed. Such technologies should be used when they are considered to offer additional assurance of quality, or are otherwise justifiable.

2.10 Impact of Drug Substance on Drug Product Specifications: In general, it should not be necessary to test the drug product for quality attributes uniquely associated with the drug substance. Example: It is normally not necessary to test the drug product for synthesis impurities that are controlled in the drug substance and are not degradation products. Refer to the ICH guidance ''Impurities in New Drug Products'' for detailed information.

2.11 Reference Standard: A reference standard, or reference material, is a substance prepared for use as the standard in an assay, identification, or purity test. The substance may be either the new drug substance or a known impurity. It has a quality appropriate to its use. For new drug substance reference standards intended for use in assays, the impurities should be adequately identified and/or controlled, and purity should be measured by a quantitative procedure.

3. Guidelines

3.1 Specifications: Definition and Justification

3.1.1 Definition of Specifications

A specification is defined as a list of tests, references to analytical procedures, and appropriate acceptance criteria that are numerical limits, ranges, or other criteria for the tests described. It establishes the set of criteria to which a new drug substance or new drug product should conform to be considered acceptable for its intended use. ''Conformance to specifications'' means that the drug substance and/or drug product, when tested according to the listed analytical procedures, will meet the listed acceptance criteria. Specifications are binding quality standards that are agreed to between the appropriate governmental regulatory agency and the applicant.

It is possible that, in addition to release tests, a specification may list in-process tests, periodic (skip) tests, and other tests which are not always conducted on a batch-by-batch basis. In such cases, the applicant should specify which tests are routinely conducted batch-by-batch, and which tests are not, with an indication and justification of the actual testing frequency. In this situation, the drug substance and/or drug product should meet the acceptance criteria if tested.

It should be noted that changes in the specification after approval of the application may need prior approval by the regulatory authority.

3.1.2 Justification of Specifications

When a specification is first proposed, justification should be presented for each procedure and each acceptance criterion included. The justification should refer to relevant development data, pharmacopoeial standards, test data for drug substances and drug products used in toxicology and clinical studies, and results from accelerated and long term stability studies, as appropriate. Additionally, a reasonable range of expected analytical and manufacturing variability should be considered. It is important to consider all of this information.

Approaches other than those set forth in this guidance may be applicable and acceptable. The applicant should justify alternative approaches. Such justification should be based on data derived from the new drug substance synthesis and/or the new drug product manufacturing process. This justification may consider theoretical tolerances for a given procedure or acceptance criterion, but the actual results obtained should form the primary basis for whatever approach is taken.

Test results from primary stability and scale-up/validation batches should be considered in setting and justifying specifications. If multiple manufacturing sites are planned, it may be valuable to consider data from these sites in establishing the initial tests and acceptance criteria. This is particularly true when there is limited initial experience with the manufacture of the drug substance or drug product at any particular site. If data from a single representative manufacturing site are used in setting tests and acceptance criteria, product manufactured at all sites should still comply with these criteria.

Presentation of test results in graphic format may be helpful in justifying individual acceptance criteria, particularly for assay values and impurity levels. Data from development work should be included in such a presentation, along with stability data available for new drug substance or new drug product batches manufactured by the proposed commercial processes. Justification for exclusion of a test from the specification should be based on development data and on process validation data (where available).

When only limited data are available, the initially approved tests and acceptance criteria should be reviewed as more

information is collected, with a view towards possible modification. This could involve loosening, as well as tightening, acceptance criteria as appropriate.

3.2 Universal Tests/Criteria

Implementation of the recommendations in the following section should take into account the ICH guidances ''Text on Validation of Analytical Procedures'' and ''Validation of Analytical Procedures: Methodology.''

3.2.1 New Drug Substances

The following tests and acceptance criteria are considered generally applicable to all new drug substances.

(a) *Description*: A qualitative statement about the state (e.g., solid, liquid) and color of the new drug substance. If any of these characteristics change during storage, this change should be investigated and appropriate action taken.

(b) *Identification*: Identification testing should optimally be able to discriminate between compounds of closely related structure that are likely to be present. Identification tests should be specific for the new drug substance, e.g., infrared spectroscopy (IR). Identification solely by chromatographic retention time, for example, is not regarded as being specific; however, a combination of tests into a single procedure, such as HPLC (high pressure/performance liquid chromatography)/UV (ultraviolet)-diode array, HPLC/MS (mass spectroscopy), or GC (gas chromatography)/MS may be acceptable. If the new drug substance is a salt, identification testing should be performed for the individual ions.

New drug substances which are optically active may also need specific identification testing. Please refer to section 3.3.1.(d) in this guidance for further discussion of this topic.

(c) *Assay*: A specific, stability-indicating procedure should be included to determine the content of the new drug substance. In many cases it is possible to employ the same procedure (e.g., HPLC) for both assay of the new drug substance and quantitation of impurities.

In cases where use of a nonspecific assay is justified, other supporting analytical procedures should be used to achieve overall specificity. For example, where titration is adopted to assay the drug substance, the combination of the assay and a suitable test for impurities can be used.

(d) *Impurities*: Organic and inorganic impurities and residual solvents are included in this category. Refer to the ICH guidances ''Impurities in New Drug Substances'' and ''Residual Solvents in Pharmaceuticals'' for detailed information.

Decision tree #1 addresses the extrapolation of meaningful limits on impurities from the body of data generated during development. At the time of filing, it is unlikely that sufficient data will be available to assess process consistency. Therefore, it is inappropriate to establish acceptance criteria that tightly encompass the batch data at the time of filing. (See section 2.5, limited data available at filing.)

3.2.2 New Drug Products

The following tests and acceptance criteria are considered generally applicable to all new drug products:

(a) *Description*: A qualitative description of the dosage form should be provided (e.g., size, shape, color). If any of these characteristics change during manufacture or storage, this change should be investigated and appropriate action taken. The acceptance criteria should include the final acceptable appearance. If color changes during storage, a quantitative procedure may be appropriate.

(b) *Identification*: Identification testing should establish the identity of the new drug substance(s) in the new drug product and should be able to discriminate between compounds of closely related structure which are likely to be present. Identity tests should be specific for the new drug substance, e.g., infrared spectroscopy. Identification solely by chromatographic retention time, for example, is not regarded as being specific; however, a combination of tests into a single procedure, such as HPLC/UV-diode array, may be acceptable.

(c) *Assay*: A specific, stability-indicating assay to determine strength should be included for all new drug products. In many cases it is possible to employ the same procedure (e.g., HPLC) for both assay of the new drug substance and quantitation of impurities. Results of content uniformity testing for new drug products can be used for quantitation of drug product strength, if the methods used for content uniformity are also appropriate as assays.

In cases where use of a nonspecific assay is justified, other supporting analytical procedures should be used to achieve overall specificity. For example, where titration is adopted to assay the drug substance, the combination of the assay and a suitable test for impurities can be used.

(d) *Impurities*: Organic and inorganic impurities and residual solvents are included in this category. Refer to the ICH guidances ''Impurities in New Drug Products'' and ''Residual Solvents in Pharmaceuticals'' for detailed information.

Organic impurities arising from degradation of the new drug substance should be monitored in the new drug product. Acceptance limits should be stated for individual specified degradation products, which may include both identified and unidentified degradation products as appropriate, and total degradation products. Process impurities from the new drug substance synthesis are normally controlled during drug substance testing, and therefore are not included in the total impurities limit. When it has been conclusively demonstrated via appropriate analytical methodology, with a significant body of data, that the drug substance does not degrade in the specific formulation, and under the specific storage conditions proposed in the new drug application, degradation product testing may be reduced or eliminated upon approval by the regulatory authorities.

Decision tree #2 addresses the extrapolation of meaningful limits on degradation products from the body of data generated during development. At the time of filing, it is unlikely that sufficient data will be available to assess process consistency. Therefore, it is inappropriate to establish acceptance criteria that tightly encompass the batch data at the time of filing. (See section 2.5, limited data available at filing).

3.3 Specific Tests/Criteria

In addition to the universal tests listed above, the following tests may be considered on a case by case basis for drug substances and/or drug products. Individual tests/criteria should be included in the specification when the tests have an impact on the quality of the drug substance and drug product for batch control. Tests other than those listed below may be needed in particular situations or as new information becomes available.

3.3.1 New Drug Substances

(a) *Physicochemical properties*: These are properties such as pH of an aqueous solution, melting point/range, and refractive index. The procedures used for the measurement of these properties are usually unique and do not need much elaboration, e.g., capillary melting point, Abbé refractometry. The tests performed in this category should be determined by the physical nature of the new drug substance and by its intended use.

(b) *Particle size*: For some new drug substances intended for use in solid or suspension drug products, particle size can have a significant effect on dissolution rates, bioavailability, and/or stability. In such instances, testing for particle size distribution should be carried out using an appropriate procedure, and acceptance criteria should be provided.

Decision tree #3 provides additional guidance on when particle size testing should be considered.

(c) *Solid state forms*: Some new drug substances exist in different solid state forms (polymorphs or solvates) that differ in their physical properties. Differences in these forms could, in some cases, affect the quality or performance of the new drug products. In cases where differences exist that have been shown to affect drug product performance, bioavailability, or stability, then the appropriate solid state should be specified.

Physico-chemical measurements and techniques are commonly used to determine whether multiple forms exist. Examples of these procedures are: Melting point (including hot-stage microscopy), solid state IR, X-ray powder diffraction, thermal analysis procedures (like DSC (differential scanning calorimetry), TGA (thermogravimetric analysis) and DTA (differential thermal analysis)), Raman spectroscopy, scanning electron microscopy, and solid state NMR (nuclear magnetic resonance spetroscopy).

Decision trees #4(1) through #4(3) provide additional guidance on when, and how, solid state forms should be monitored and controlled.

Note: These decision trees should be followed sequentially. Trees #1 and #2 consider whether polymorphism is exhibited by the drug substance and whether the different polymorphic forms can affect performance of the drug product. Tree #3 should only be applied when polymorphism has been demonstrated for the drug substance

and has been shown to affect these properties. Tree #3 considers the potential for change in polymorphic forms in the drug product and whether such a change has any effect on product performance.

It is generally technically very difficult to measure polymorphic changes in drug products. A surrogate test (e.g., dissolution) can generally be used to monitor product performance, and polymorph content should only be used as a test and acceptance criterion of last resort.

The decision trees focus on polymorphism, but the same decision process can be applied to other solid state criteria, such as hydration and solvation, where appropriate.

(d) *Tests for new drug substances that are optically active*: Chiral impurities are excluded from ICH guidances on ''Impurities in New Drug Substances'' and ''Impurities in New Drug Products'' because of practical difficulties in quantifying them at the qualification and identification thresholds given in those guidances. However, chiral impurities in chiral new drug substances and the resulting new drug products should be treated according to principles established in those guidances.

Decision tree #5 summarizes when and if chiral identity tests, impurity tests, and assays may be needed for both new drug substances and new drug products, according to the following concepts:

Drug Substance: Impurities. For chiral drug substances that are developed as a single enantiomer, control of the other enantiomer should be considered in the same manner as for other impurities. However, technical limitations may preclude the same limits of determination or qualification being applied. If it is technically difficult to effect control in the drug substance itself, assurance of control could be given by appropriate testing of a starting material or intermediate, with suitable justification.

Assay. An enantioselective determination of the drug substance should be part of the specification. It is considered acceptable for this to be achieved either through use of a chiral assay procedure or by the combination of an achiral assay together with appropriate methods of controlling the enantiomeric impurity.

Identity. The identity test(s) should be capable of distinguishing a single enantiomer from its opposite enantiomer. Where a drug substance is a racemate, the identity method should be capable of verifying the racemic nature and distinguishing it from either enantiomer.

Drug Product: Degradation products. Control of the other enantiomer in a drug product is necessary if that enantiomer has been shown to be a degradation product.

Assay. Where development studies have demonstrated that the enantiomer is not a degradation product, an achiral assay may be sufficient. However, a chiral assay is preferred or, alternatively, the combination of an achiral assay plus a procedure to control the presence of the opposite enantiomer.

Identity. An identity test should be established that is capable of verifying the presence of the correct enantiomer or the racemate, as appropriate.

(e) *Water content*: This test is important in cases where the new drug substance is known to be hygroscopic or degraded by moisture or when the drug substance is known to be a stoichiometric hydrate. The acceptance criteria may be justified with data on the effects of hydration or moisture absorption. In some cases, a Loss on Drying procedure may be adequate; however, a detection procedure that is specific for water (e.g., Karl Fischer titration) is preferred.

(f) *Inorganic impurities*: The need for inclusion of tests and acceptance criteria for inorganic impurities should be studied during development and based on knowledge of the manufacturing process. Where justified, procedures and acceptance criteria for sulfated ash/residue on ignition should follow pharmacopoeial precedents; other inorganic impurities may be determined by other appropriate procedures, e.g., atomic absorption spectroscopy.

(g) *Microbial limits*: There may be a need to specify the total count of aerobic microorganisms, the total count of yeasts and molds, and the absence of specific objectionable bacteria (e.g., Staphylococcus aureus, Escherichia coli, Salmonella, Pseudomonas aeruginosa). These should be suitably determined using pharmacopoeial procedures. In special cases, sterility testing or endotoxin testing may be appropriate. For example, the drug substance is manufactured as sterile (sterility testing appropriate) or will be used to formulate an injectable drug product (endotoxin testing appropriate).

Decision tree #6 provides additional guidance on when microbial limits should be included.

3.3.2 New Drug Products

Additional tests and acceptance criteria generally should be included for particular new drug products. The following selection presents a representative sample of both the drug products and the types of tests and acceptance criteria which may be appropriate. The specific dosage forms addressed include solid oral drug products, liquid oral drug products, and parenterals (small and large volume). Application of the concepts in this guidance to other dosage forms is encouraged. Note that issues related to optically active drug substances and to solid state considerations for drug products are discussed in section 3.3.1 of this guidance.

3.3.2.1 The following tests are applicable to tablets (coated and uncoated) and hard capsules. One or more of these tests may also be applicable to soft capsules and granules.

(a) *Dissolution/disintegration*: For rapidly dissolving products containing drugs that are highly soluble throughout the physiological pH range, disintegration testing may sometimes be sufficient. Disintegration testing is most appropriate when a relationship to dissolution has been established or when disintegration is shown to be more discriminating than dissolution. In such cases, dissolution testing may not always be necessary, or may be proposed as a skip test. It is expected that development information will be provided to support the robustness of the formulation and manufacturing process with respect to the selection of dissolution vs. disintegration testing.

Single-point measurements are normally considered to be suitable for immediate release dosage forms. For modified release dosage forms, appropriate test conditions and sampling procedures should be established. For example, multiple-time-point sampling should be performed for extended release dosage forms, and two-stage testing (using different media in succession or in parallel, as appropriate) may be appropriate for delayed release dosage forms. In these cases it is important to consider the populations of individuals who will be taking the drug product (e.g., achlorhydric elderly) when designing the tests and acceptance criteria.

Where multiple-point acceptance criteria are necessary, in vitro/in vivo correlation may be used to establish these criteria when human bioavailability data are available for formulations exhibiting different release rates. Where such data are not available, and drug release cannot be shown to be independent of in vitro test conditions, then acceptance criteria should be established on the basis of available batch data. Normally, the permitted variability in release rate at any given time point should not exceed a total numerical difference of +/-10 percent of the labeled content of drug substance (i.e., a total variability of 20 percent: a requirement of 50 +/-10 percent thus means an acceptable range from 40 to 60 percent) unless a wider range is supported by a bioequivalency study.

Decision trees #7(1) through #7(4) provide additional guidance on the use of dissolution and disintegration testing.

(b) *Hardness/friability*: It is normally appropriate to perform hardness and/or friability testing as an in-process control (see section 2.3). Under these circumstances, it is normally not necessary to include these attributes in the specification. If the characteristics of hardness and friability have a critical impact on drug product quality (e.g., chewable tablets), acceptance criteria should be included in the specification.

(c) *Uniformity of dosage units*: This term includes both uniformity of content and uniformity of mass; a pharmacopoeial procedure should be used. If appropriate, these tests may be performed as in-process controls; the acceptance criteria should be included in the specification.

(d) *Water content*: A test for water content should be included when appropriate. The acceptance criteria may be justified with data on the effects of hydration or water absorption on the drug product. In some cases, a Loss on Drying procedure may be adequate; however, a detection procedure which is specific for water (e.g., Karl Fischer titration) is preferred.

(e) *Microbial limits*: Microbial limit testing is seen as an attribute of GMP, as well as of quality assurance. In general, it is advisable to test the drug product unless its components are tested before manufacture and the manufacturing process is known, through validation studies, not to carry a significant risk of microbial contamination. It should be noted that, whereas this guidance does not directly address excipients elsewhere, the principles discussed here may be applicable to excipients as well as to new drug products. Skip testing may be an appropriate approach in both cases.

Acceptance criteria should be set for the total count of aerobic microorganisms, the total count of yeasts and molds, and the absence of specific objectionable bacteria (e.g., Staphylococcus aureus, Escherichia coli, Salmonella, Pseudomonas). These should be determined by suitable procedures, using pharmacopoeial procedures, and at a sampling frequency or time point in manufacture that is justified by data and experience. With acceptable scientific justification, it may be possible to propose no microbial limit testing for solid oral dosage forms.

Decision tree #8 provides additional guidance on the use of microbial limit testing.

3.3.2.2 *Oral liquids*: One or more of the following specific tests will normally be applicable to oral liquids and to powders intended for reconstitution as oral liquids.

(a) *Uniformity of dosage units*: This term includes both uniformity of content and uniformity of mass. Generally, acceptance criteria should be set for weight variation, fill volume, and/or uniformity of fill. Pharmacopoeial procedures should be used.

If appropriate, tests may be performed as in-process controls; however, the acceptance criteria should be included in the specification. This concept may be applied to both single-dose and multiple-dose packages.

The dosage unit is considered to be the typical dose taken by the patient. If the actual unit dose, as taken by the patient, is controlled, it may either be measured directly or calculated based on the total measured weight or volume of drug divided by the total number of doses expected. If dispensing equipment (such as medicine droppers or dropper tips for bottles) is an integral part of the packaging, this equipment should be used to measure the dose. Otherwise, a standard volume measure should be used. The dispensing equipment to be used is normally determined during development.

For powders for reconstitution, uniformity of mass testing is generally considered acceptable.

(b) *pH*: Acceptance criteria for pH should be provided where applicable and the proposed range justified.

(c) *Microbial limits*: Microbial limit testing is seen as an attribute of GMP, as well as of quality assurance. In general, it is advisable to test the drug product unless its components are tested before manufacture and the manufacturing process is known, through validation studies, not to carry a significant risk of microbial contamination. It should be noted that, whereas this guidance does not directly address excipients elsewhere, the principles discussed here may be applicable to excipients as well as to new drug products. Skip testing may be an appropriate approach in both cases. With acceptable scientific justification, it may be possible to propose no microbial limit testing for powders intended for reconstitution as oral liquids.

Acceptance criteria should be set for the total count of aerobic microorganisms, total count of yeasts and molds, and the absence of specific objectionable bacteria (e.g., Staphylococcus aureus, Escherichia coli, Salmonella, Pseudomonas). These should be determined by suitable procedures, using pharmacopoeial procedures, and at a sampling frequency or time point in manufacture which is justified by data and experience.

Decision tree #8 provides additional guidance on the use of microbial limit testing.

(d) *Antimicrobial preservative content*: For oral liquids needing an antimicrobial preservative, acceptance criteria for preservative content may be appropriate. These criteria should be based on the levels necessary to maintain microbiological product quality throughout the shelf-life. The lowest specified concentration of antimicrobial preservative should be demonstrated to be effective in controlling microorganisms by using a pharmacopoeial antimicrobial preservative effectiveness test.

Release testing for antimicrobial preservative content should normally be performed. Under certain circumstances, in-process testing may suffice in lieu of release testing. When antimicrobial preservative content testing is performed as an in-process test, the acceptance criteria should remain part of the specification.

Antimicrobial preservative effectiveness should be demonstrated during development, during scaleup, and throughout the shelf-life (e.g., in stability testing, see the ICH guidance ''Stability Testing of New Drug Substances and Products''), although chemical testing for preservative content is the attribute normally included in the specification.

(e) *Antioxidant preservative content*: Release testing for antioxidant content should normally be performed. Under certain circumstances, where justified by developmental and stability data, shelf-life testing may be unnecessary, and in-process testing may suffice in lieu of release testing. When antioxidant content testing is performed as an in-process test, the acceptance criteria should remain part of the specification. If only release testing is performed, this decision should be reinvestigated whenever either the manufacturing procedure or the container/closure system changes.

(f) *Extractables*: Generally, where development and stability data show no significant evidence of extractables, elimination of this test may be proposed. This should be reinvestigated if the container/closure system changes.

Where data demonstrate the need, tests and acceptance criteria for extractables from the container/closure system components (e.g., rubber stopper, cap liner, plastic bottle) are considered appropriate for oral solutions packaged in nonglass systems, or in glass containers with nonglass closures. The container/closure components should be listed, and data collected for these components as early in the development process as possible.

(g) *Alcohol content*: Where it is declared quantitatively on the label in accordance with pertinent regulations, the alcohol content should be specified. It may be assayed or calculated.

(h) *Dissolution*: In addition to the attributes recommended immediately above, it may be appropriate (e.g., insoluble drug substance) to include dissolution testing and acceptance criteria for oral suspensions and dry powder products for resuspension. The testing apparatus, media, and conditions should be pharmacopoeial, if possible, or otherwise justified. Dissolution procedures using either pharmacopoeial or non-pharmacopoeial apparatus and conditions should be validated.

Single-point measurements are normally considered suitable for immediate release dosage forms. Multiple-point sampling, at appropriate intervals, should be performed for modified release dosage forms. Acceptance criteria should be set based on the observed range of variation, and should take into account the dissolution profiles of the batches that showed acceptable performance in vivo. Developmental data should be considered when determining the need for either a dissolution procedure or a particle size distribution procedure.

Dissolution testing may be performed as an in-process test, or as a release test, depending on its relevance to product performance. The discussion of dissolution for solid oral dosage forms (above), and of particle size distribution (immediately following), should also be considered here.

(i) *Particle size distribution*: Quantitative acceptance criteria and a procedure for determination of particle size distribution may be appropriate for oral suspensions. Developmental data should be considered when determining the need for either a dissolution procedure or a particle size distribution procedure for these formulations.

Particle size distribution testing may be performed as an in-process test or as a release test, depending on its relevance to product performance. If these products have been demonstrated during development to have consistently rapid drug release characteristics, exclusion of a particle size distribution test from the specification may be proposed.

Particle size distribution testing may also be proposed in place of dissolution testing; justification should be provided. The acceptance criteria should include acceptable particle size distribution in terms of the percent of total particles in given size ranges. The mean, upper, and/or lower particle size limits should be well defined.

Acceptance criteria should be set based on the observed range of variation, and should take into account the dissolution profiles of the batches that showed acceptable performance in vivo, as well as the intended use of the product. The potential for particle growth should be investigated during product development; the acceptance criteria should take the results of these studies into account.

(j) *Redispersibility*: For oral suspensions which settle on storage (produce sediment), acceptance criteria for redispersibility may be appropriate. Shaking may be an appropriate test. The procedure (mechanical or manual) should be indicated. Time required to achieve resuspension by the indicated procedure should be clearly defined. Data generated during product development may be sufficient to justify skip lot testing or elimination of this attribute from the specification.

(k) *Rheological properties*: For relatively viscous solutions or suspensions, it may be appropriate to include rheological properties (viscosity) in the specification. The test and acceptance criteria should be stated. Data generated during product development may be sufficient to justify skip lot testing or elimination of this attribute from the specification.

(l) *Specific gravity*: For oral suspensions or relatively viscous or nonaqueous solutions, acceptance criteria for specific gravity may be appropriate. Testing may be performed as an in-process control.

(m) *Reconstitution time*: Acceptance criteria for reconstitution time should be provided for dry powder products which require reconstitution. The choice of diluent should be justified. Data generated during product development may be sufficient to justify skip lot testing or elimination of this attribute from the specification.

(n) *Water content*: For oral products requiring reconstitution, a test and acceptance criterion for water content should be proposed when appropriate. Loss on drying is generally considered sufficient if the effect of absorbed moisture vs. water of hydration has been adequately characterized during the development of the product. In certain cases, a more specific procedure (e.g., Karl Fischer titration) may be preferable.

3.3.2.3 *Parenteral Drug Products*: The following tests may be applicable to parenteral drug products.

(a) *Uniformity of dosage units*: This term includes both uniformity of content and uniformity of mass; a pharmacopoeial procedure should be used. Generally, acceptance criteria should be set for weight variation, fill volume, or uniformity of fill.

If appropriate, these tests may be performed as in-process controls; the acceptance criteria should be included in the specification. This test may be applied to both single-dose and multiple-dose packages.

For powders for reconstitution, uniformity of mass testing is generally considered acceptable.

(b) *pH*: Acceptance criteria for pH should be provided where applicable and the proposed range justified.

(c) *Sterility*: All parenteral products should have a test procedure and acceptance criterion for evaluation of sterility. Where data generated during development and validation justify parametric release, this approach may be proposed for terminally sterilized drug products.

(d) *Endotoxins*: A test procedure and acceptance criterion for endotoxins, using a procedure such as the limulus amoebocyte lysate test, should be included in the specification.

(e) *Pyrogens*: Pyrogenicity testing may be proposed as an alternative to endotoxin testing where justified.

(f) *Particulate matter*: Parenteral products should have appropriate acceptance criteria for particulate matter. This will normally include limits for visible particulates (also designated ''foreign matter'') and/or clarity of solution, as well as for subvisible particulates.

(g) *Water content*: For nonaqueous parenterals, and for parenteral products for reconstitution, a test procedure and acceptance criterion for water content should be proposed when appropriate. Loss on drying is generally considered sufficient for parenteral products if the effect of absorbed moisture vs. water of hydration has been adequately characterized during development. In certain cases, a more specific procedure (e.g., Karl Fischer titration) may be preferred.

(h) *Antimicrobial preservative content*: For parenteral products needing an antimicrobial preservative, acceptance criteria for preservative content may be appropriate. These criteria should be based on the levels necessary to maintain microbiological product quality throughout the shelf-life. The lowest specified concentration of antimicrobial preservative should be demonstrated to be effective in controlling microorganisms by using a pharmacopoeial antimicrobial preservative effectiveness test.

Release testing for antimicrobial preservative content should normally be performed. Under certain circumstances, in-process testing may suffice in lieu of release testing. When antimicrobial preservative content testing is performed as an in-process test, the acceptance criteria should remain part of the specification.

Antimicrobial preservative effectiveness should be demonstrated during development, during scaleup, and throughout the shelf-life (e.g., in stability testing, see the ICH guidance ''Stability Testing of New Drug Substances and Products''), although chemical testing for preservative content is the attribute normally included in the specification.

(i) *Antioxidant preservative content*: Release testing for antioxidant content should normally be performed. Under certain circumstances, where justified by developmental and stability data, shelf-life testing may be unnecessary and in-process testing may suffice in lieu of release testing. When antioxidant content testing is performed as an in-process test, the acceptance criteria should remain part of the specification. If only release testing is performed, this decision should be reinvestigated whenever either the manufacturing procedure or the container/closure system changes.

(j) *Extractables*: Control of extractables is considered significantly more important for parenteral products than for oral liquids. However, where development and stability data show no significant evidence of extractables, elimination of this test may be proposed. This should be reinvestigated if the container/closure system changes.

Where data demonstrate the need, acceptance criteria for extractables from the container/closure components are considered appropriate for parenteral products packaged in nonglass systems or in glass containers with elastomeric closures. This testing may be performed at release only, where justified by data obtained during development. The container/closure system components (e.g., rubber stopper) should be listed, and data collected for these components as early in the development process as possible.

(k) *Functionality testing of delivery systems*: Parenteral formulations packaged in prefilled syringes, autoinjector cartridges, or the equivalent, should have test procedures and acceptance criteria related to the functionality of the delivery system. These may include control of syringeability, pressure, and seal integrity (leakage), and/or parameters such as tip cap removal force, piston release force, piston travel force, and power injector function force. Data generated during product development may be sufficient to justify skip lot testing or elimination of some attributes from the specification.

(l) *Osmolality*: When the tonicity of a product is declared in its labeling, appropriate control of its osmolality should be performed. Data generated during development and validation may be sufficient to justify performance of this procedure as an in-process control, skip lot testing, or direct calculation of this attribute.

(m) *Particle size distribution*: Quantitative acceptance criteria and a procedure for determination of particle size distribution may be appropriate for injectable suspensions. Developmental data should be considered when determining the need for either a dissolution procedure or a particle size distribution procedure.

Particle size distribution testing may be performed as an in-process test or as a release test, depending on its relevance to product performance. If the product has been demonstrated during development to have consistently rapid drug release characteristics, exclusion of particle size controls from the specification may be proposed.

Particle size distribution testing may also be proposed in place of dissolution testing when development studies demonstrate that particle size is the primary factor influencing dissolution; justification should be provided. The acceptance criteria should include acceptable particle size distribution in terms of the percent of total particles in given size ranges. The mean, upper, and/or lower particle size limits should be well defined.

Acceptance criteria should be set based on the observed range of variation, and should take into account the dissolution profiles of the batches that showed acceptable performance in vivo and the intended use of the product. The potential for particle growth should be investigated during product development; the acceptance criteria should take the results of these studies into account.

(n) *Redispersibility*: For injectable suspensions which settle on storage (produce sediment), acceptance criteria for redispersibility may be appropriate. Shaking may be an appropriate test. The procedure (mechanical or manual) should be indicated. Time required to achieve resuspension by the indicated procedure should be clearly defined. Data generated during product development may be sufficient to justify skip lot testing or elimination of this attribute from the specification.

(o) *Reconstitution time*: Acceptance criteria for reconstitution time should be provided for all parenteral products which require reconstitution. The choice of diluent should be justified. Data generated during product development may be sufficient to justify skip lot testing or elimination of this attribute from the specification.

4. Glossary

Acceptance criteria: Numerical limits, ranges, or other suitable measures for acceptance of the results of analytical procedures.

Chiral: Not superposable with its mirror image, as applied to molecules, conformations, and macroscopic objects, such as crystals. The term has been extended to samples of substances whose molecules are chiral, even if the macroscopic assembly of such molecules is racemic.

Combination product: A drug product that contains more than one drug substance.

Degradation product: A molecule resulting from a chemical change in the drug molecule brought about over time and/or by the action of e.g., light, temperature, pH, water, or by reaction with an excipient and/or the immediate container/closure system. Also called decomposition product.

Enantiomers: Compounds with the same molecular formula as the drug substance, that differ in the spatial arrangement of atoms within the molecule and are nonsuperimposable mirror images.

Impurity: (1) Any component of the new drug substance that is not the chemical entity defined as the new drug substance. (2) Any component of the drug product that is not the chemical entity defined as the drug substance or an excipient in the drug product.

Identified impurity: An impurity for which a structural characterization has been achieved.

New drug product: A pharmaceutical product type, for example, tablet, capsule, solution, cream, that has not previously been registered in a region or Member State, and which contains a drug ingredient generally, but not necessarily, in association with excipients.

New drug substance: The designated therapeutic moiety, that has not previously been registered in a region or Member State (also referred to as a new molecular entity or new chemical entity). It may be a complex, simple ester, or salt of a previously approved drug substance.

Polymorphism: The occurrence of different crystalline forms of the same drug substance. This may include solvation or hydration products (also known as pseudopolymorphs) and amorphous forms.

Quality: The suitability of either a drug substance or drug product for its intended use. This term includes such attributes as the identity, strength, and purity of the article.

Racemate: A composite (solid, liquid, gaseous, or in solution) of equimolar quantities of two enantiomeric species. It is devoid of optical activity.

Reagent: A substance, other than a starting material or solvent, that is used in the manufacture of a new drug substance.

Solvent: An inorganic or an organic liquid used as a vehicle for the preparation of solutions or suspensions in the synthesis of a new drug substance or the manufacture of a new drug product.

Specification: A list of tests, references to analytical procedures, and appropriate acceptance criteria that are numerical limits, ranges, or other criteria for the tests described. It establishes the set of criteria to which a drug substance or drug product should conform to be considered acceptable for its intended use. ''Conformance to specifications'' means that the drug substance and/or drug product, when tested according to the listed analytical procedures, will meet the listed acceptance criteria. Specifications are binding quality standards that are agreed to between the appropriate governmental regulatory agency and the applicant.

Specific test: A test that is considered to be applicable to particular new drug substances or particular new drug products depending on their specific properties and/or intended use.

Specified impurity: An identified or unidentified impurity that is selected for inclusion in the new drug substance or new drug product specification and is individually listed and limited in order to assure the quality of the new drug substance or new drug product.

Unidentified impurity: An impurity that is defined solely by qualitative analytical properties (e.g., chromatographic retention time).

Universal test: A test that is considered to be potentially applicable to all new drug substances, or all new drug products (e.g., appearance, identification, assay, and impurity tests).

5. References

International Conference on Harmonisation, ''Impurities in New Drug Substances,'' 1995.

International Conference on Harmonisation, ''Impurities in New Drug Products,'' 1996.

International Conference on Harmonisation, ''Stability Testing of New Drug Substances and Products,'' 1994.

International Conference on Harmonisation, ''Text on Validation of Analytical Procedures,'' 1994.

International Conference on Harmonisation, ''Validation of Analytical Procedures: Methodology,'' 1996.

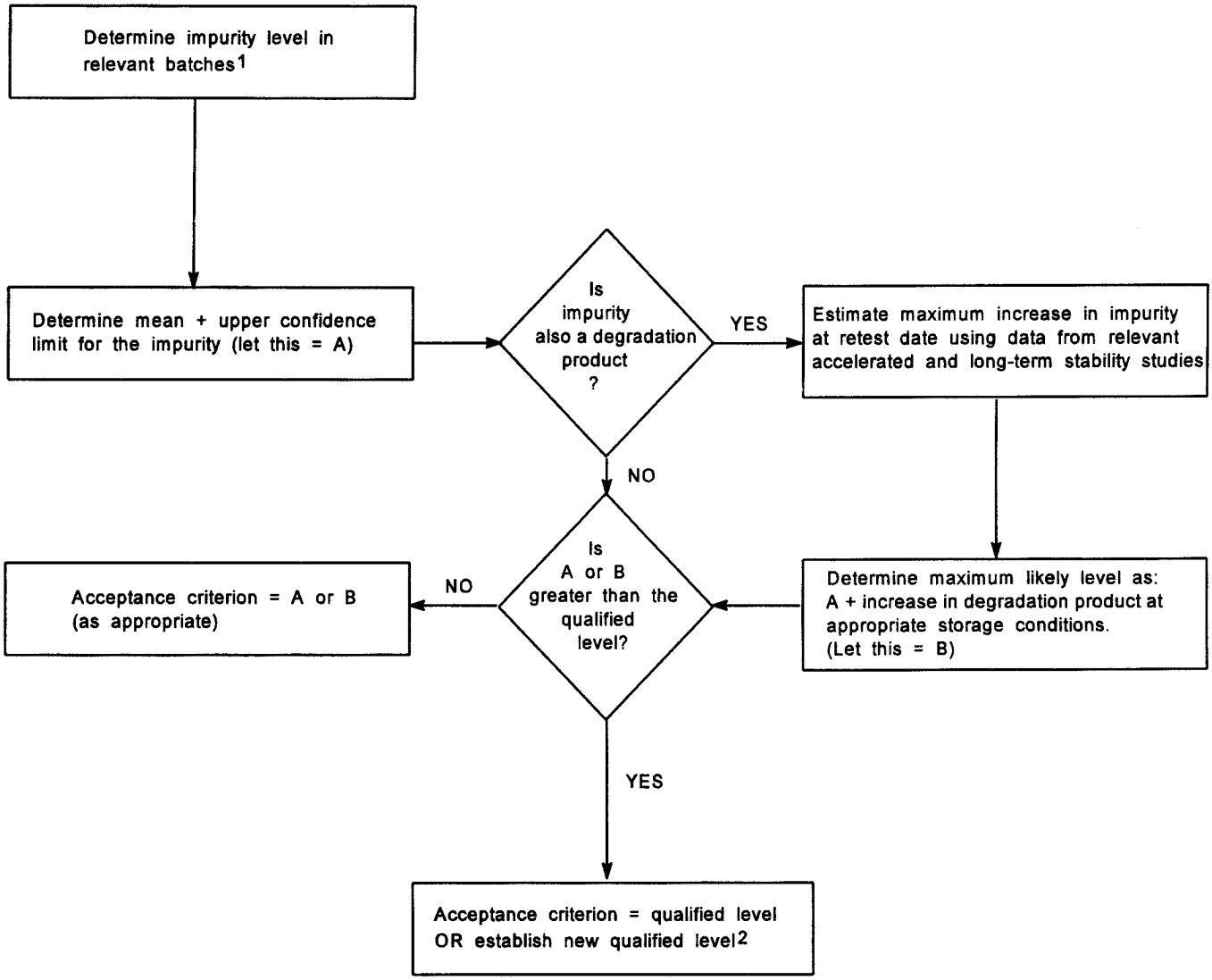
International Conference on Harmonisation, ''Residual Solvents in Pharmaceuticals,'' 1996.

6. Attachments: Decision Trees #1 through #8

For the decision trees referenced in this guidance, see the following pages.

BILLING CODE 4160–01–F

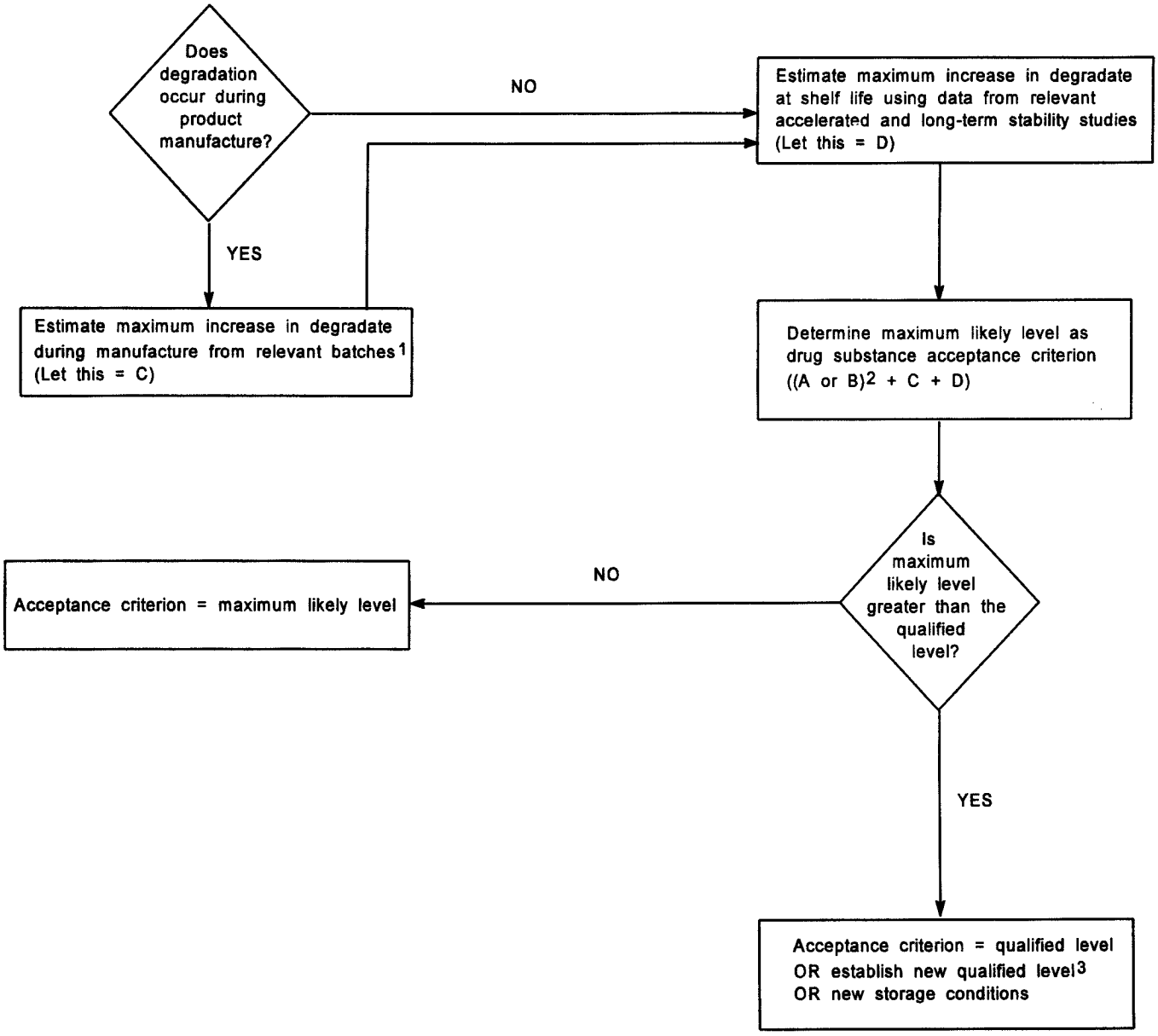
DECISION TREE #1: ESTABLISHING ACCEPTANCE CRITERIA FOR A SPECIFIED IMPURITY IN A NEW DRUG SUBSTANCE



1 Relevant batches are those from development, pilot and scale-up studies.
2 Refer to ICH Guidance on Impurities in New Drug Substances

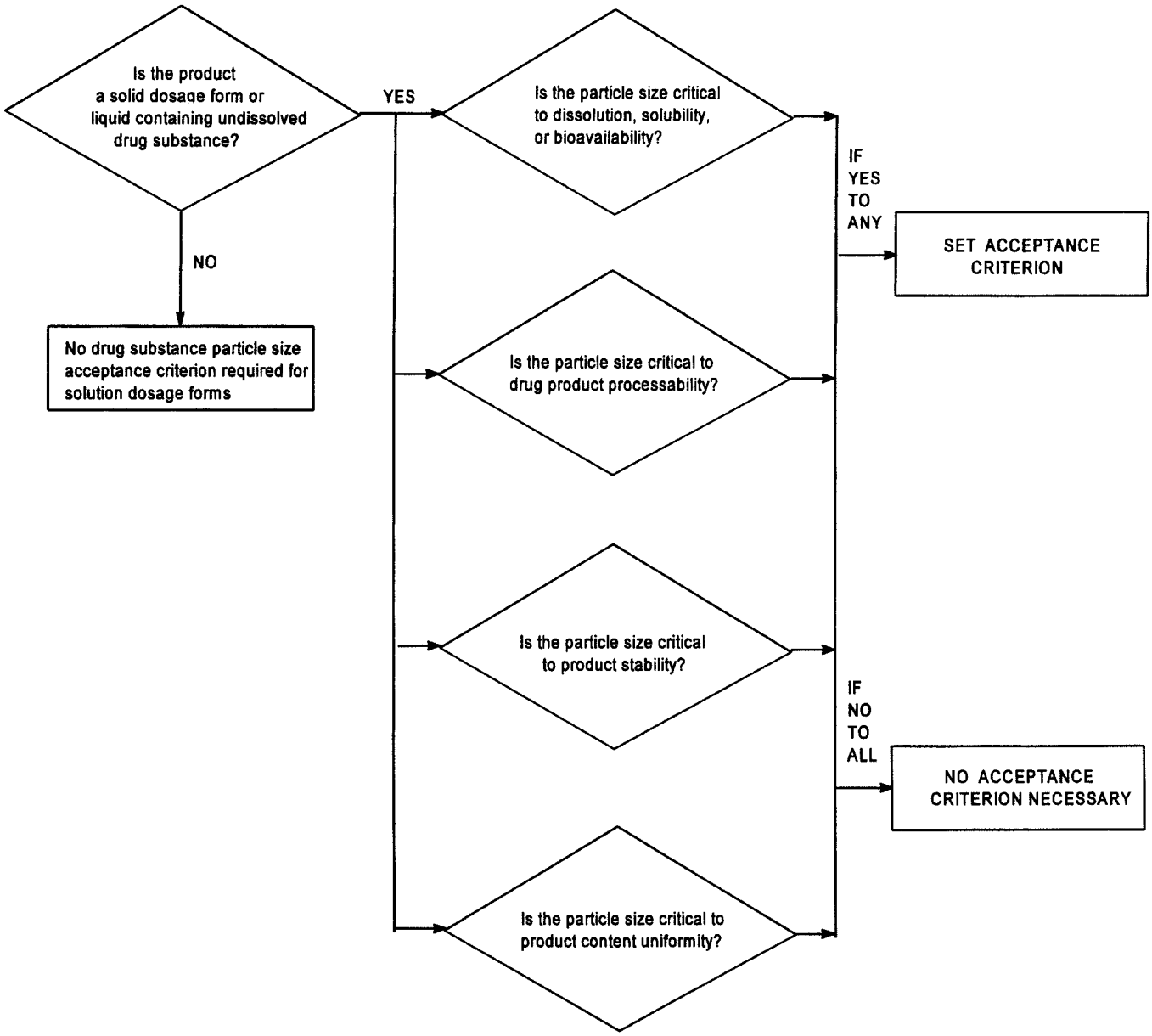
Definition: upper confidence limit = three times the standard deviation of batch analysis data

DECISION TREE #2: ESTABLISHING ACCEPTANCE CRITERIA
FOR A DEGRADATION PRODUCT IN A NEW DRUG PRODUCT



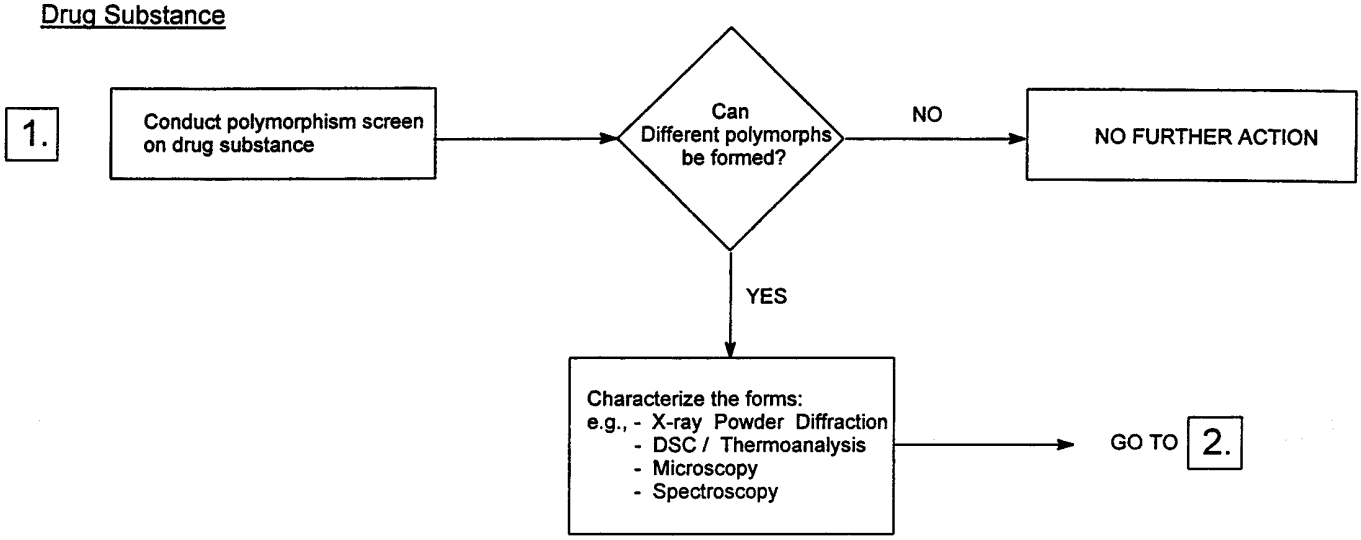
[1] Relevant batches are those from development, pilot and scale-up studies.
[2] Refer to Decision Tree 1
[3] Refer to ICH Guidance on Impurities in New Drug Substances

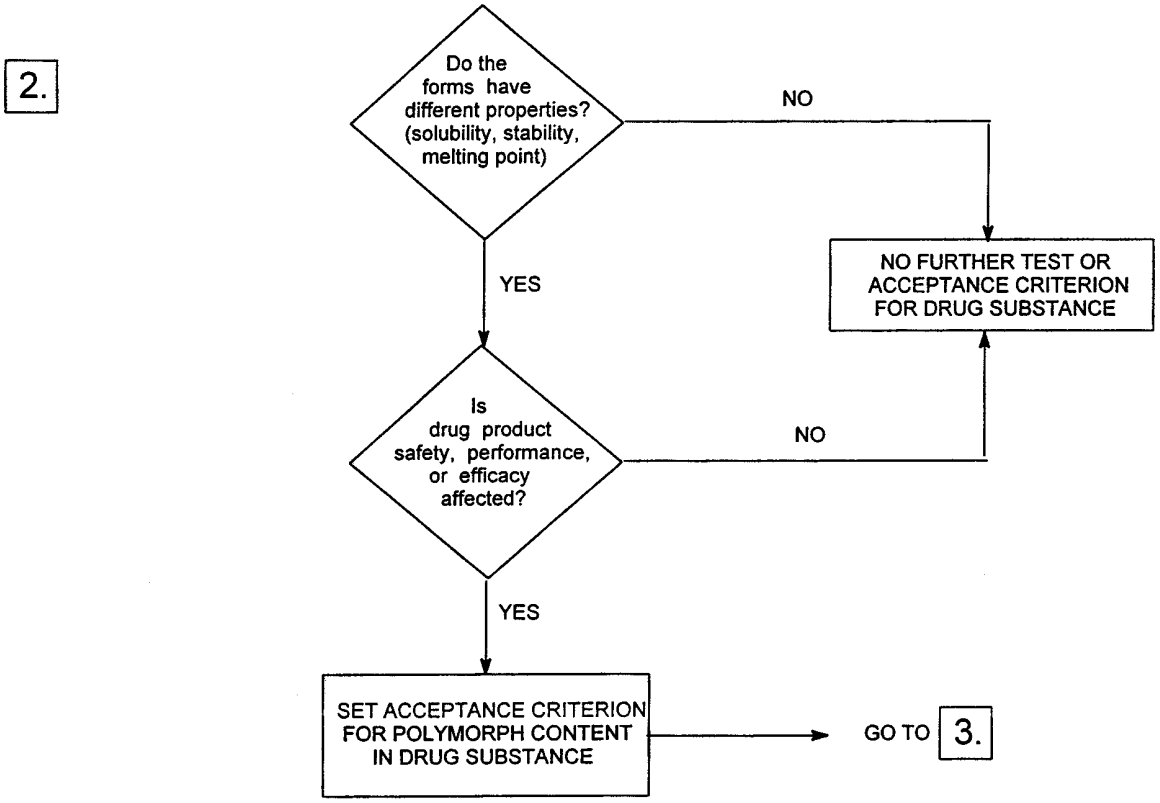
DECISION TREE #3: SETTING ACCEPTANCE CRITERIA
FOR
DRUG SUBSTANCE PARTICLE SIZE DISTRIBUTION



DECISION TREES #4: INVESTIGATING THE NEED TO SET ACCEPTANCE CRITERIA FOR POLYMORPHISM IN DRUG SUBSTANCES AND DRUG PRODUCTS

Drug Substance



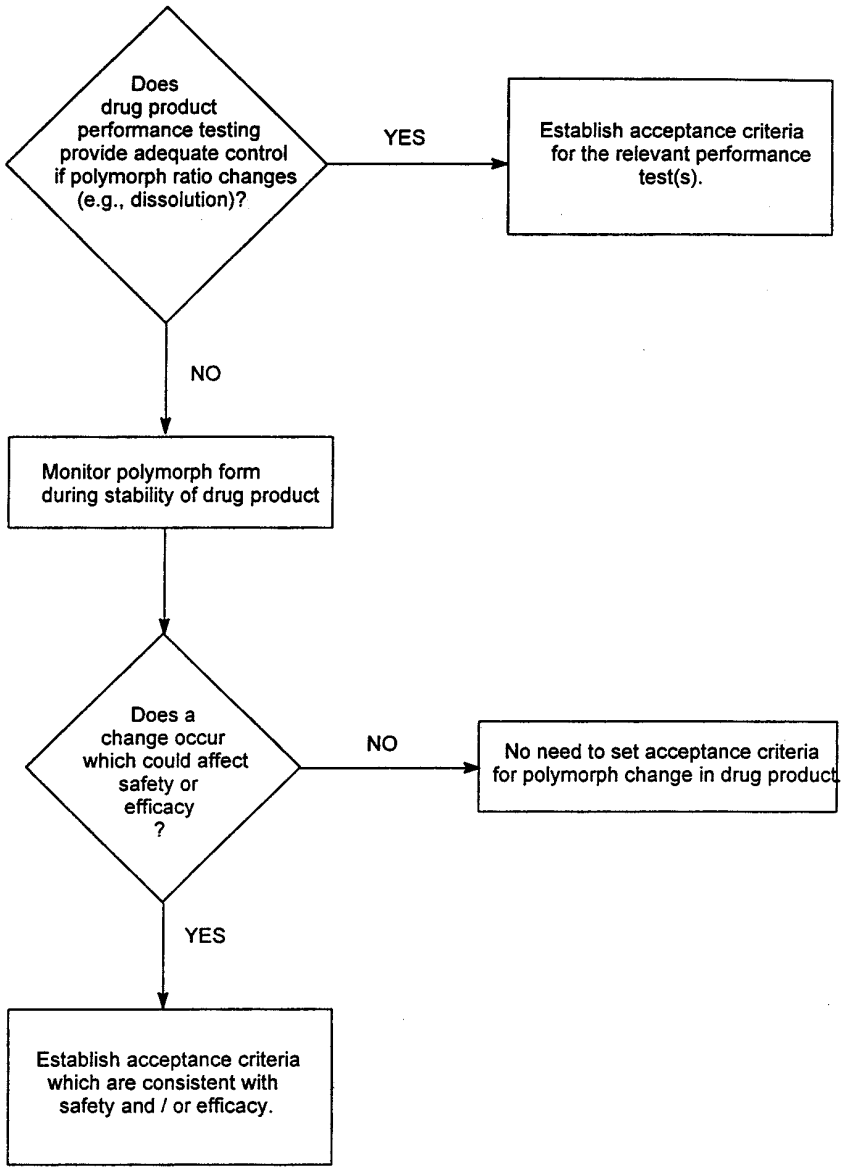


DECISION TREES #4: INVESTIGATING THE NEED TO SET ACCEPTANCE CRITERIA FOR POLYMORPHISM IN DRUG SUBSTANCES AND DRUG PRODUCTS

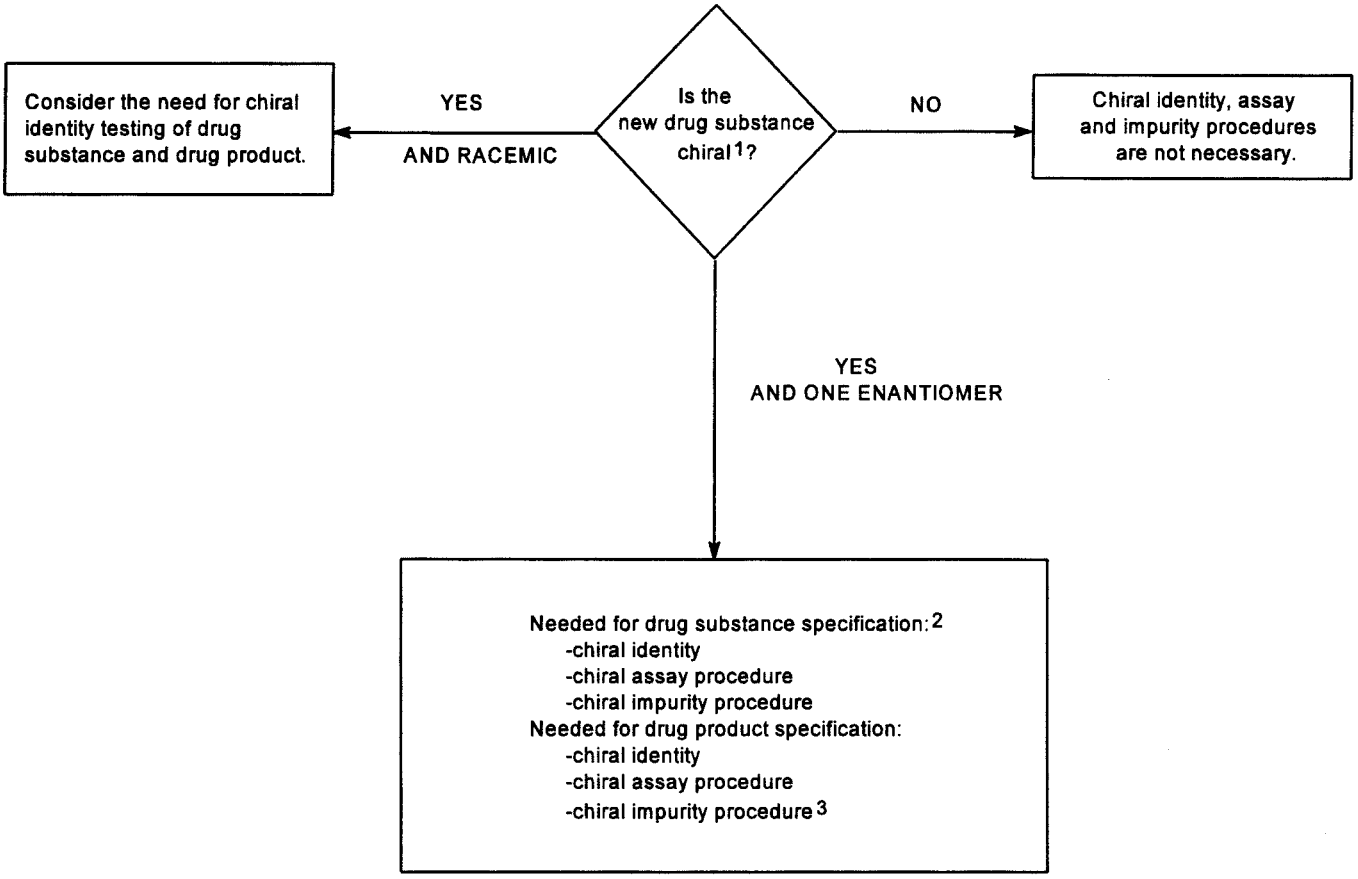
Drug Product - Solid Dosage Form or Liquid Containing Undissolved Drug Substance

N.B.: Undertake the following process only if technically possible to measure polymorph content in the drug product.

3.



DECISION TREE #5: ESTABLISHING IDENTITY, ASSAY AND CHIRAL IMPURITIES PROCEDURES IN A NEW DRUG PRODUCT CONTAINING A CHIRAL DRUG SUBSTANCE

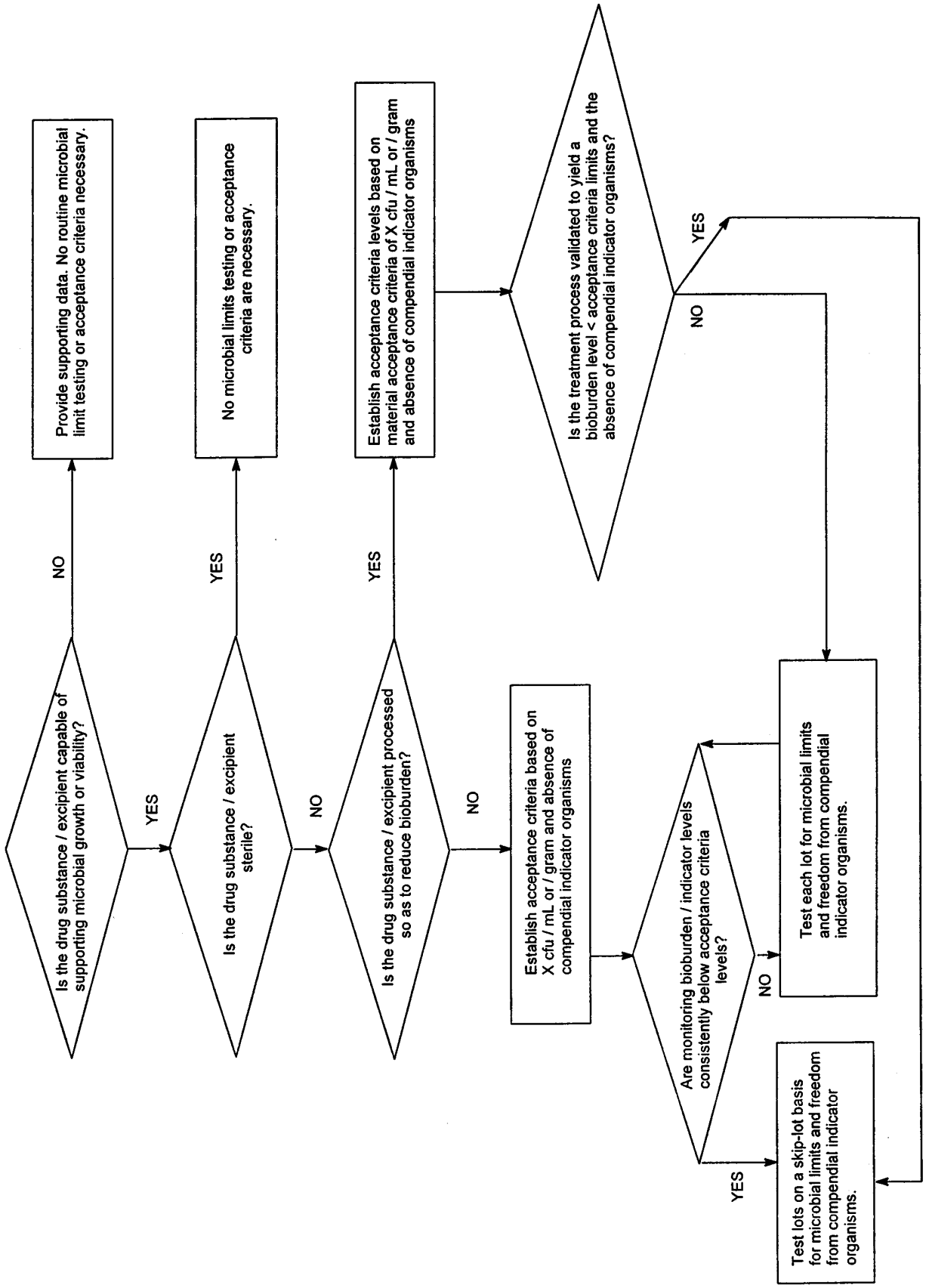


[1] Chiral substances of natural origin are not addressed in this Guidance.

[2] As with other impurities arising in and from raw materials used in drug substance synthesis, control of chiral quality could be established alternatively by applying limits to appropriate starting materials or intermediates when justified from development studies. This will be essentially the case when there are multiple chiral centers (e.g., three or more), or when measurement in drug substance at an appropriate sensitivity is technically impossible.

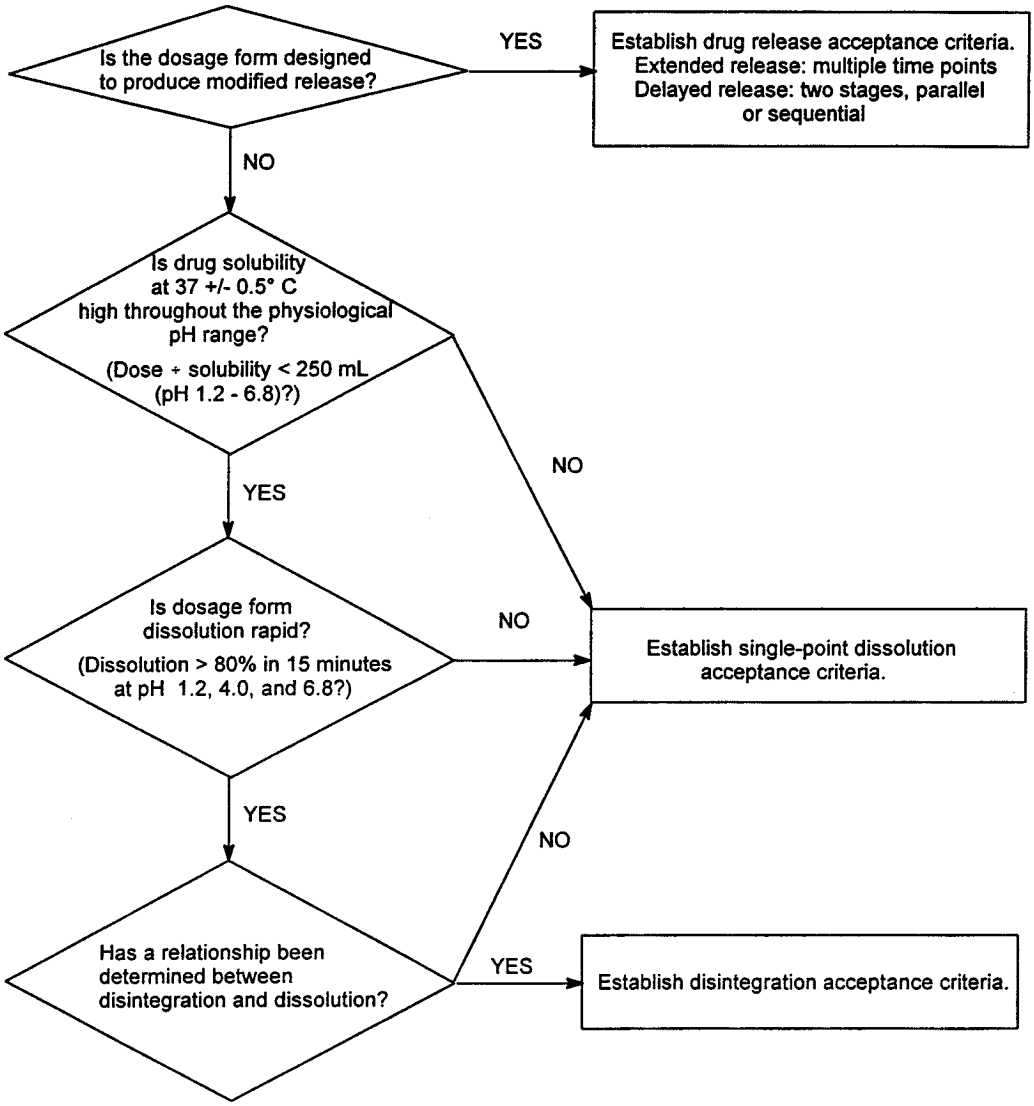
[3] A chiral assay may not be necessary if chiral impurity testing is done via a method which is equivalent to an assay procedure.

DECISION TREE #6: MICROBIOLOGICAL QUALITY ATTRIBUTES OF DRUG SUBSTANCE AND EXCIPIENTS



DECISION TREES #7: SETTING ACCEPTANCE CRITERIA FOR DRUG PRODUCT DISSOLUTION

1. What type of drug release acceptance criteria are appropriate?



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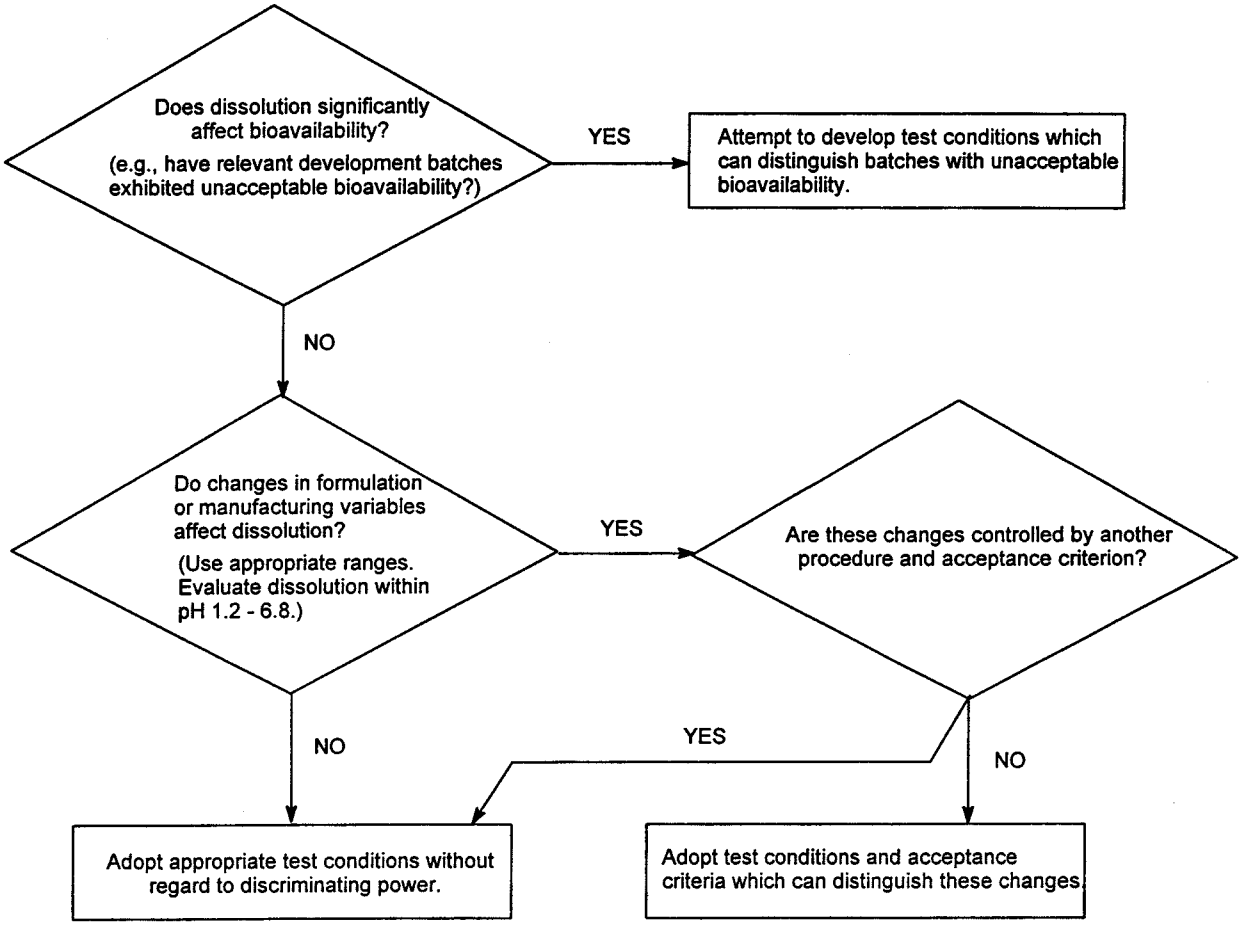
DECISION TREES #7: SETTING
ACCEPTANCE CRITERIA FOR
DRUG PRODUCT DISSOLUTION

2. What specific test conditions are appropriate? [immediate release]



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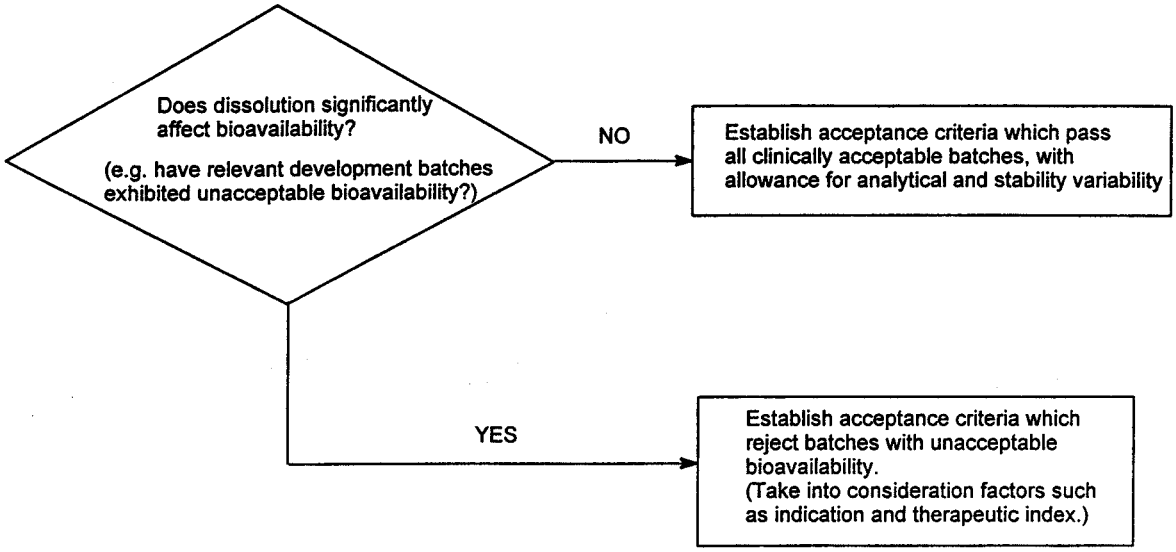
DECISION TREES #7: SETTING
ACCEPTANCE CRITERIA FOR
DRUG PRODUCT DISSOLUTION

3. What are appropriate acceptance criteria? [immediate release]



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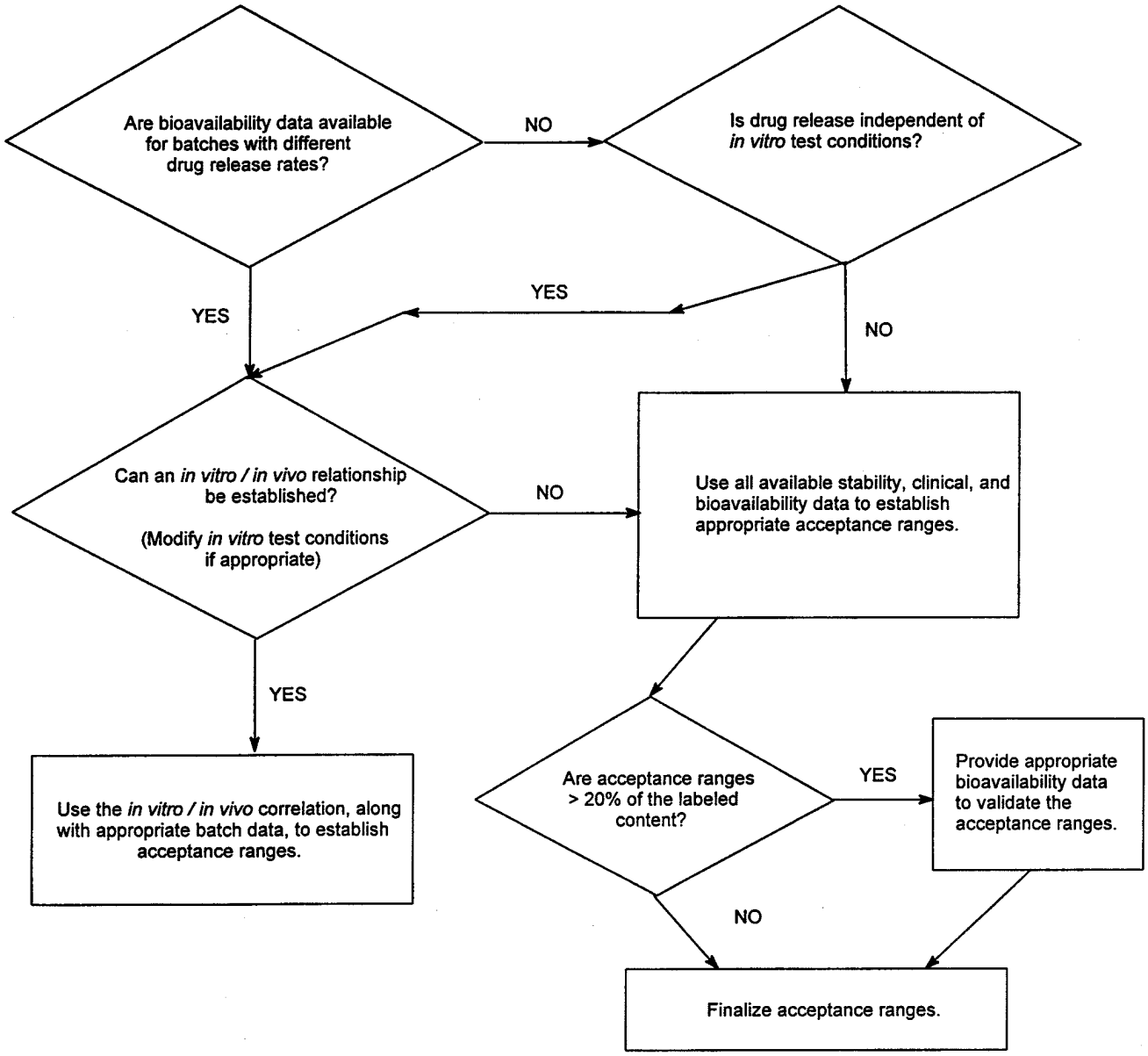
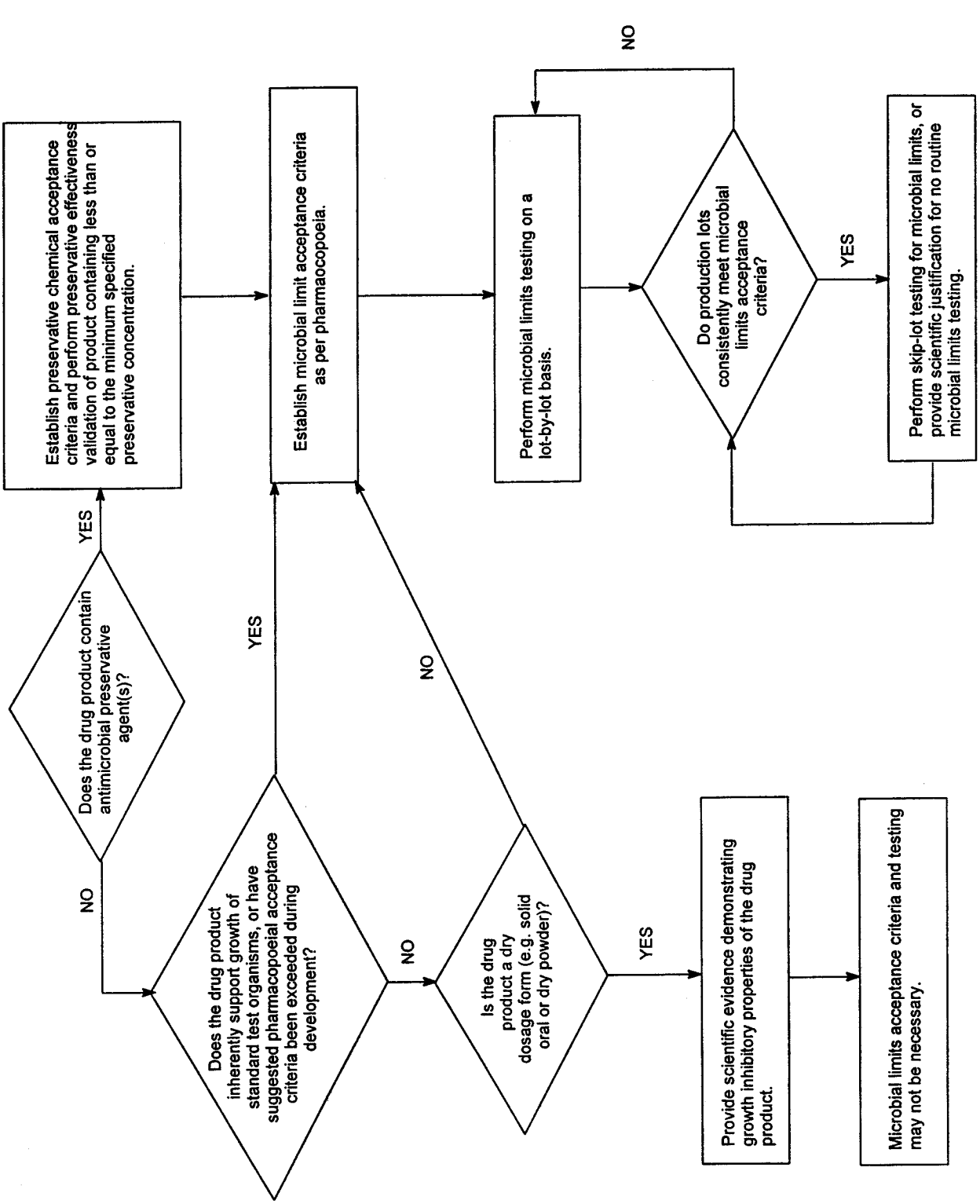
DECISION TREES #7: SETTING ACCEPTANCE CRITERIA FOR DRUG PRODUCT DISSOLUTION

4. What are appropriate acceptance ranges? [extended release]



DECISION TREE #8: MICROBIOLOGICAL QUALITY ATTRIBUTES OF NON-STERILE DRUG PRODUCTS



Dated: November 18, 1997.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 97–30916 Filed 11–24–97; 8:45 am]

BILLING CODE 4160–01–C

Federal Register

Tuesday
November 25, 1997

Part VI

Department of Housing and Urban Development

24 CFR Part 570

Community Development Block Grants: New York Small Cities Program; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 570

[Docket No. FR–4155–F–02]

RIN 2506–AB91

Community Development Block Grants: New York Small Cities Program

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Final rule.

SUMMARY: This rule amends the regulations for the Community Development Block Grants (CDBG) Small Cities Program for the State of New York. This rule eliminates the use of multiyear plans in the Small Cities Program for any NOFA published in calendar year 1997 or later. This rule also limits the maximum grant award under the annual Small Cities NOFA to any single, eligible unit of general local government to $400,000, except that counties may apply for a maximum of $600,000. HUD will honor grant awards for multiyear plans approved in response to NOFAs issued prior to calendar year 1997. In order to implement the reduction of grant limits, HUD intends to restrict competition under future annual Small Cities NOFAs to single purpose grants. This rule also makes minor technical and clarifying changes to the regulations.

EFFECTIVE DATE: December 26, 1997.

FOR FURTHER INFORMATION CONTACT: Cornelia Robertson Terry, State and Small Cities Division, Office of Community Planning and Development, Department of Housing and Urban Development, Room 7184, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708–1322 (voice). (This is not a toll-free number.) Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5300–5320) permits each State to elect to administer all aspects of the Community Development Block Grant (CDBG) Program annual fund allocation for the nonentitlement areas within its jurisdiction. The policies and procedures for HUD's CDBG Small Cities Program in 24 CFR part 570, subpart F, apply to grants for nonentitlement areas in States such as New York that did not elect to administer the CDBG Program.

Section 226 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1996 (Pub. L. 104–134; approved April 26, 1996) (the Act) requires that HUD issue proposed and final rules for the requirements of the CDBG program for the State of New York before issuing a Notice of Funding Availability for funds made available for fiscal year (FY) 1997. In accordance with section 226, HUD published a proposed rule on June 11, 1997 (62 FR 31944) in order to solicit public comments on the requirements of the New York CDBG Small Cities Program in 24 CFR part 570, subpart F. (Although §§ 570.429 and 570.430 also appear in subpart F and are set forth in this final rule, these sections only apply to the Small Cities Program in Hawaii.) HUD also solicited comments on two proposed changes to the New York Small Cities Program, as described below.

New York Small Cities Program Design

On June 11, 1997, HUD proposed to remove paragraph (a)(3) of § 570.421, and to add a new paragraph (f), which would eliminate the use of multiyear plans in the New York Small Cities Program for NOFAs published in calendar year 1997 or later. HUD will, however, continue to honor multiyear plans approved in response to NOFAs published prior to calendar year 1997. HUD also proposed to add a new paragraph (g) to the current regulations to provide that the maximum grant amount that HUD will award to an eligible unit of general local government in response to a NOFA for the annual Small Cities competition published in calendar year 1997 or later is $400,000, except that counties could apply for a maximum of $600,000 in HUD-administered Small Cities grant funds. HUD will, however, award larger grants as necessary to honor the terms of multiyear plans approved under the provisions of NOFAs published prior to calendar year 1997.

Discussion of Public Comments

The deadline for public comments on the July 11, 1997 proposed rule was July 11, 1997. HUD received only 10 comments.

Grant Limits

Several commenters offered support for HUD's proposal to limit maximum future grant amounts. These commenters included a private consultant and public and private housing and community development organizations. These commenters remarked that the grant limits will help spread the extremely limited funds to worthwhile projects in small communities across the State.

Other commenters disagreed, however, arguing that communities need larger comprehensive grants in order to avert infrastructure dilapidation or to provide substantial housing assistance or economic development. These commenters included a United States Senator, a State senator, and others that commented on behalf of local communities.

Although HUD recognizes that there are certain advantages of higher grant limits, HUD has determined that the grant limits contained in the June 11, 1997 proposed rule are appropriate and has adopted them in this final rule. In addition, in order to encourage units of general local government to act cooperatively to resolve regional problems that affect more than one locality, this final rule amends § 570.422 to provide that the grant limit for joint applications will be the maximum single purpose grant limit established in § 570.421(g) or a NOFA, multiplied by the number of participating governments in the cooperation agreement that was established to submit the joint application. For the purpose of determining such a multiple grant limit, and in order to receive such amount, this rule clarifies that a participating joint applicant must receive a substantial direct benefit from the activities proposed in the application and must not be acting solely on behalf of, or in conjunction with, another jurisdiction solely to raise the maximum grant amount that may be awarded. In addition, this rule provides that the statistics of each participant counted for maximum grant limits shall also be used for purposes of the selection factors referred to in § 570.421(a).

Multiyear Commitments

Some of the commenters agreed with HUD's proposal to eliminate the use of multiyear plans in the Small Cities Program. These commenters included a private consultant and public and private housing and community development organizations.

In response to previous suggestions from Small Cities grantees, HUD offered multiyear grant commitments in FY 1995, along with the increase in grant limits in FY 1996, to assist communities with longer term development programs within the context of a comprehensive strategy. These multiyear commitments assure continued funding during the second and/or third year, provided the applicant submits an acceptable application with the required

certifications and is able to demonstrate continued administrative capacity for carrying out grant activities, and sufficient appropriated funds are available. Multiyear plans are particularly beneficial for smaller communities, which lack full-time staff and must turn to high-priced consultants to prepare Small Cities applications each year.

The granting of multiyear commitments does not, however, unfairly reduce the pool of funds available for competition in future years. In the 5-year period from FY 1990 to FY 1994, prior to the offering of multiyear commitments, 46 communities received at least 3 annual grants. In effect, these 46 communities, based on the depth of their needs and the rating quality of their applications, had achieved a de facto multiyear status. In the last 2 fiscal years, the Small Cities Program has only extended multiyear commitments to 29 grantees (including 17 3-year commitments and 12 2-year commitments). Most of these multiyear commitments were awarded in single purpose grants to the smallest communities. Therefore, the multiyear commitments did not significantly change the availability of the funds, but reduced the administrative burden and cost of annual applications.

In response to the support of the commenters, however, this final rule eliminates the use of multiyear plans in the Small Cities Program for NOFAs published in calendar year 1997 or later, as provided in the June 11, 1997 proposed rule.

Small Cities Funds in Entitlement Communities

Two commenters remarked that Small Cities funds should not go to communities that are eligible for CDBG entitlement funds. Since the metropolitan areas are generally covered by entitlement funds, these commenters stressed that these areas should not also be able to make use of the Small Cities funds.

Under the current regulations, entitlement communities are not eligible applicants for Small Cities CDBG nonentitlement funds. Section 570.421(e) provides, however, that ''[a]n applicant may conduct eligible CDBG activities outside its boundaries. These activities must be demonstrated to be appropriate to meeting the applicant's needs and objectives, and must be consistent with State and local law.'' This provision allows a nonentitlement county, for example, to use funds in a metropolitan city or an urban county. HUD did not propose to change these requirements in the June 11, 1997 proposed rule.

As some of the commenters noted, the strength of the Small Cities CDBG Program is that local communities can and should determine how the funds should be used. HUD supports such local decisionmaking about how best to meet local needs. Therefore, HUD has decided not to change the current regulations regarding the use of Small Cities CDBG funds in entitlement areas in response to the two commenters.

Set-Asides

Two commenters expressed concern regarding the ''set-asides'' provided for in the Small Cities regulations for public service activities (§ 570.421(d)), imminent threats to public health and safety (§ 570.424), and economic development (§ 570.421(a)(5) of this rule; § 570.421(a)(6) of the regulations prior to the effectiveness of this rule). These commenters argue that such ''set-asides'' remove funds from the general competition that would otherwise be available for worthy community development activities.

Although HUD appreciates the comments received on these provisions, there is no set-aside for public services. The regulations merely provide that no more than 15 percent of the State's nonentitlement allocation may be used for public services. This provision is consistent with the CDBG program as a whole. This is not a new provision; HUD did not specifically propose changes to this provision in the June 11, 1997 proposed rule. HUD has never held a separate competition for ''public service'' grants and has no authority to do so under the regulations.

Imminent threat grants address health and safety related needs in communities. Only 15 percent of Small Cities funds may be used for such grants, and the actual percentage of imminent threat grants is far lower. This is not a new provision, and HUD proposed no changes to this provision. Therefore, notwithstanding the two comments received on this issue, this final rule retains the imminent threat set-aside to enable quick responses to disasters or emergencies that small cities face.

Section 570.421(a)(5) of this rule, which allows HUD to fund economic development grants under certain circumstances, is not a new provision, and HUD proposed no changes to that provision. Notwithstanding the two comments HUD received, HUD has determined that it should retain this provision.

Minor Technical Changes and Clarifications

HUD is also taking the opportunity in this final rule to make several minor technical changes and clarifications to the regulations for the Small Cities CDBG Program. These changes include correcting an inconsistency in § 570.430(a) regarding the limitation on planning and administrative costs in the Hawaii program. This paragraph refers to § 570.200(g) of the regulations for the Entitlement Program, under which the planning and administrative costs cap is calculated based on obligated funds. The Small Cities provision in § 570.430(a), however, had relied upon expenditures. This final rule corrects that provision so that it consistently relies upon obligated funds.

Findings and Certifications

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4223). The Finding is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 7th Street, SW, Washington, DC 20410.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication, and by approving it certifies that this rule would not have a significant economic impact on a substantial number of small entities. This rule would make limited changes that would not have a significant impact on small entities.

Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that this rule would not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule would make limited changes that would not have Federalism implications. As a result, this rule is not subject to review under the Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This rule would not impose any Federal mandates on any State, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

Catalogue of Federal Domestic Assistance

The Catalogue of Federal Domestic Assistance program number is 14.219, Community Development Block Grants—Small Cities Program.

List of Subjects in 24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs—education, Grant programs—housing and community development, Guam, Indians, Lead poisoning, Loan programs—housing and community development, Low and moderate income housing, New communities, Northern Mariana Islands, Pacific Islands Trust Territory, Pockets of poverty, Puerto Rico, Reporting and recordkeeping requirements, Small cities, Student aid, Virgin Islands.

Accordingly, for the reasons set out in the preamble, 24 CFR part 570 is amended as follows:

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

1. The authority citation for 24 CFR part 570 is revised to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301–5320.

2. Subpart F is revised to read as follows:

Subpart F—Small Cities Program

Sec.

570.420 General.
570.421 New York Small Cities Program design.
570.422 Applications from joint applicants.
570.423 Application for the HUD-administered New York Small Cities Grants.
570.424 Grants for imminent threats to public health and safety.
570.425 HUD review and actions on applications for New York State applicants.
570.426 Program income.
570.427 Program amendments.
570.428 Reallocated funds.
570.429 Hawaii general and grant requirements.
570.430 Hawaii program operation requirements.
570.431 Citizen participation.
570.432 Repayment of Section 108 loans.

Subpart F—Small Cities Program

§ 570.420 General.

(a) *HUD administration of nonentitlement CDBG funds.* Title I of the Housing and Community Development Act of 1974 permits each State to elect to administer all aspects of the Community Development Block Grant (CDBG) Program annual fund allocation for the nonentitlement areas within its jurisdiction. This subpart sets forth policies and procedures applicable to grants for nonentitlement areas in States that have not elected, in a manner and time prescribed by the Secretary, to administer the CDBG Program. States that elected to administer the program after the close of fiscal year 1984 cannot return administration of the program to HUD. A decision by a State to discontinue administration of the program would result in the loss of CDBG funds for nonentitlement areas in that State and the reallocation of those funds to all States in the succeeding fiscal year.

(b) *Scope and applicability.* (1) This subpart describes the policies and procedures of the Small Cities Program which apply to nonentitlement areas in States where HUD administers the CDBG Program. HUD currently administers the Small Cities Program in only two States—New York and Hawaii. This subpart principally addresses the requirements for New York, and §§ 570.429 and 570.430 identify special procedures applicable to Hawaii.

(2) The allocation of formula CDBG funds for use in nonentitlement areas of Hawaii and New York is as provided in subpart A of this part. The policies and procedures set forth in the following identified subparts of this part 570 apply to the HUD-administered Small Cities Program, except as modified or limited under the provisions thereof or this subpart:

(i) Subpart A—General Provisions;

(ii) Subpart C—Eligible Activities;

(iii) Subpart J—Grant Administration;

(iv) Subpart K—Other Program Requirements; and

(v) Subpart O—Performance Reviews.

(c) *Public notification requirements.* (1) Section 102 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3545) contains a number of provisions that are designed to ensure greater accountability and integrity in the provision of certain types of assistance administered by HUD. All competitive grants in the HUD-administered Small Cities Program in New York are affected by this legislation, and the requirements identified at 24 CFR part 4 apply to them. Imminent threat grants under § 570.424 and section 108 repayment grants under § 570.432 are not affected by section 102 as they are not competitive grants.

(2) The Hawaii HUD-administered Small Cities Program is not subject to section 102, since the funds are not distributed in a competitive manner.

(d) *Abbreviated consolidated plan.* Applications for the HUD-administered Small Cities Program which contain housing activities must include a certification that the proposed housing activities are consistent with the applicant's consolidated plan as described at 24 CFR part 91.

(e) *National and primary objectives.* (1) Each activity funded through the Small Cities Program must meet one of the following national objectives as defined under the criteria in § 570.208. Each activity must:

(i) Benefit low- and moderate-income families;

(ii) Aid in the prevention or elimination of slums or blight; or

(iii) Be an activity which the grantee certifies is designed to meet other community development needs having a particular urgency because existing conditions pose a serious and immediate threat to the health or welfare of the community where other financial resources are not available to meet such needs.

(2) In addition to the objectives described in paragraph (e)(1) of this section, with respect to grants made through the Small Cities Program, not less than 70 percent of the total of grant funds from each grant and Section 108 loan guarantee funds received under subpart M of this part within a fiscal year must be expended for activities which benefit low- and moderate-income persons under the criteria of §§ 570.208(a), or 570.208(d) (5) or (6). In the case of multiyear plans in New York State approved in response to NOFAs published prior to calendar year 1997, not less than 70 percent of the total funding for grants approved pursuant to a multiyear plan for a time period of up to 3 years must be expended for activities which benefit low- and moderate-income persons. Thus, 70 percent of the grant for year 1 of a multiyear plan approved in response to NOFAs published prior to calendar year 1997 must meet the 70 percent requirement, 70 percent of the combined grants from years 1 and 2 must meet the requirement, and 70 percent of the combined grants from years 1, 2, and 3 must meet the requirement. In determining the percentage of funds expended for such activity, the provisions of

§ 570.200(a)(3) (i), (iii), (iv), and (v) shall apply.

(Approved by the Office of Management and Budget under control number 2506–0060).

§ 570.421 New York Small Cities Program design.

(a) *Selection system*—(1) *Competitive applications.* Each competitive application will be rated and scored against at least the following factors:

(i) Need-absolute number of persons in poverty as further explained in the NOFA;

(ii) Need-percent of persons in poverty as further explained in the NOFA;

(iii) Program Impact; and

(iv) Fair Housing and Equal Opportunity, which may include the applicant's Section 3 plan and implementation efforts with respect to actions to affirmatively further fair housing. The NOFA described in paragraph (b) of this section will contain a more detailed description of these factors, and the relative weight that each factor will be given.

(2) In addition HUD reserves the right to establish minimal thresholds for selection factors and otherwise select grants in accordance with § 570.425 and the applicable NOFA.

(3) *Imminent threats to public health and safety.* The criteria for these grants are described in § 570.424.

(4) *Repayment of Section 108 loans.* The criteria for these grants are described in § 570.432.

(5) *Economic development grants.* HUD intends to use the Section 108 loan guarantee program to the maximum extent feasible to fund economic development projects in the nonentitlement areas of New York. In the event that there are not enough Section 108 loan guarantee funds available to fund viable economic development projects, if a project needs a grant in addition to a loan guarantee to make it viable, or if the project does not meet the requirements of the Section 108 program but is eligible for a grant under this subpart, HUD may fund Economic Development applications as they are determined to be fundable in a specific amount by HUD up to the sum set aside for economic development projects in a notice of funding availability, notwithstanding paragraph (g) of this section. HUD also has the option in a NOFA of funding economic development activities on a competitive basis, as a competitive application as described in paragraph (a)(1) of this section. In order for an applicant to receive Small Cities grant funds on a noncompetitive basis, the field office must determine that the economic development project will have a substantial impact on the needs identified by the applicant.

(b) *Notice of funding availability.* HUD will issue one or more Notice(s) of Funding Availability (NOFA) each fiscal year which will indicate the amount of funds available, the annual grant limits per grantee, type of grants available, the application requirements, and the rating factors that will be used for those grants which are competitive. A NOFA may set forth, subject to the requirements of this subpart, additional selection criteria for all grants.

(c) *Eligible applicants.* (1) Eligible applicants in New York are units of general local government, excluding: Metropolitan cities, urban counties, units of general local government which are participating in urban counties or metropolitan cities, even if only part of the participating unit of government is located in the urban county or metropolitan city. Indian tribes are also ineligible for assistance under this subpart. An application may be submitted individually or jointly by eligible applicants.

(2) Counties, cities, towns, and villages may apply and receive funding for separate projects to be done in the same jurisdiction. Only one grant will be made under each funding round for the same type of project to be located within the jurisdiction of a unit of general local government (e.g., both the county and village cannot receive funding for a sewer system to be located in the same village, but the county can receive funding for a sewer system that is located in the same village as a rehabilitation project for which the village receives funding). The NOFA will contain additional information on applicant eligibility.

(3) Counties may apply on behalf of units of general local government located within their jurisdiction when the unit of general local government has authorized the county to apply. At the time that the county submits its application for funding, it must submit a resolution by the governing body of the unit of local government that authorizes the county to submit an application on behalf of the unit of general local government. The county will be considered the grantee and will be responsible for executing all grant documents. The county is responsible for ensuring compliance with all laws, regulations, and Executive Orders applicable to the CDBG Program. HUD will deal exclusively with the county with respect to issues of program administration and performance, including remedial actions. The unit of general local government will be considered the grantee for the purpose of determining grant limits. The unit of general local government's statistics will be used for purposes of the selection factors referred to in § 570.421(a).

(d) *Public service activities cap.* Public service activities may be funded up to a maximum of fifteen (15) percent of a State's nonentitlement allocation for any fiscal year. HUD may award a grant to a unit of general local government for public service activities with up to 100 percent of the funds intended for public service activities. HUD will apply the 15 percent statewide cap to public service activities by funding public service activities in the highest rated applications in each NOFA until the cap is reached.

(e) *Activities outside an applicant's boundaries.* An applicant may conduct eligible CDBG activities outside its boundaries. These activities must be demonstrated to be appropriate to meeting the applicant's needs and objectives, and must be consistent with State and local law. This provision includes using funds provided under this subpart in a metropolitan city or an urban county.

(f) *Multiyear plans.* HUD will not make any new multiyear commitments for NOFAs published in calendar year 1997 or later. HUD will continue to honor the terms of the multiyear plans that were approved under the provisions of NOFAs published prior to calendar year 1997.

(g) *Maximum grant amount.* The maximum grant amount that will be awarded to a single unit of general local government in response to the annual Small Cities NOFA published in calendar year 1997 or later is $400,000, except that counties may apply for up to $600,000 in HUD-administered Small Cities funds. HUD may specify lower grant limits in the NOFA, which may include different limits for different types of grants available or different types of applicants. This paragraph (g) does not apply to multiyear plans that were approved under the provisions of NOFAs published prior to calendar year 1997, nor does it apply to grants awarded in connection with paragraphs (a)(3) through (a)(5) of this section. The maximum limits in this paragraph (g) apply to grants for economic development projects awarded under NOFAs in which there is no set-aside of funds for such projects.

§ 570.422 Applications from joint applicants.

Units of general local government may submit a joint application which addresses common problems faced by the jurisdictions, to the extent permitted

by the NOFA. A joint application must be pursuant to a written cooperation agreement submitted with the application. The cooperation agreement must authorize one of the participating units of government to act as the lead applicant which will submit the application to HUD, and must delineate the responsibilities of each participating unit of government with respect to the Small Cities Program. The lead applicant is responsible for executing the application, certifications, and grant agreement, and ensuring compliance with all laws, regulations, and Executive Orders applicable to the CDBG Program. HUD reserves the right to deal exclusively with the lead applicant with respect to issues of program administration and performance, including remedial actions. In the event of poor performance, HUD reserves the right to deny and/or restrict future funding to all units of general local government that are parties to the cooperation agreement. The maximum amount that may be awarded pursuant to a joint application is the maximum single grant limit established in a NOFA or pursuant to § 570.421(g) multiplied by the number of participants in the cooperation agreement, provided that for the purpose of determining such a multiple grant limit, and in order to receive such amount, a participating joint applicant must receive a substantial direct benefit from the activities proposed in the application, and must not be acting solely on behalf of, or in conjunction with, another jurisdiction for the sole purpose of raising the maximum grant amount that may be awarded. In addition, the statistics of each participant counted for maximum grant limits purposes shall also be used for purposes of the selection factors referred to in § 570.421(a).

§ 570.423 Application for the HUD-administered New York Small Cities Grants.

(a) *Proposed application.* The applicant shall prepare and publish a proposed application and comply with citizen participation requirements as described in § 570.431. The applicant should follow the citizen participation requirements of 24 CFR part 91 if it submits a complete consolidated plan.

(b) *Final application.* The applicant shall submit to HUD a final application containing its community development objectives and activities. This final application shall be submitted, in a form prescribed by HUD, to the appropriate HUD office. The application also must contain a priority nonhousing community development plan, in accordance with 24 CFR 91.235.

(c) *Certifications.* (1) Certifications shall be submitted in a form prescribed by HUD. If the application contains any housing activities, the applicant shall certify that the proposed housing activities are consistent with its abbreviated consolidated plan, as described at 24 CFR part 91.

(2) In the absence of evidence (which may, but need not, be derived from performance reviews or other sources) which tends to challenge in a substantial manner the certifications made by the applicant, the certifications will be accepted by HUD. However, if HUD does have available such evidence, HUD may require the submission of additional information or assurances before determining whether an applicant's certifications are satisfactory.

(d) *Thresholds.* The HUD Office may use any information available to it to make the threshold judgments required by the applicable NOFA, including information related to the applicant's performance with respect to any previous assistance under this subpart. The annual performance and evaluation report required under § 570.507(a) is the primary source of this information. The HUD Office may request additional information in cases where it is essential to make the required performance judgments.

(Approved by the Office of Management and Budget under control number 2506–0060).

§ 570.424 Grants for imminent threats to public health and safety.

(a) *Criteria.* The following criteria apply for an imminent threat to public health or safety:

(1) The Director of Community Planning and Development of the HUD office may, at any time, invite an application for funds available under this subpart in response to a request for assistance to alleviate an imminent threat to public health or safety that requires immediate resolution. HUD shall verify the urgency and the immediacy of the threat with an appropriate authority other than the applicant prior to acceptance of the application, and the Director of Community Planning and Development of the HUD Office shall review the claim to determine if, in fact, an imminent threat to public health or safety does exist. For example, an applicant with documented cases of disease resulting from a contaminated drinking water supply has an imminent threat to public health, while an applicant ordered to improve the quality of its drinking water supply over the next 2 years does not have an imminent threat within the definition of this paragraph (a). A natural disaster is prima facie evidence of an imminent threat to public health or safety. These funds are to be used to deal with those threats that represent a unique and unusual circumstance, not for the type of threat that occurs with frequency in a number of communities within the State of New York.

(2) The applicant does not have sufficient local resources, and other Federal or State resources are unavailable to alleviate the imminent threat.

(3) All imminent threat projects must meet the requirement of § 570.420(e).

(b) *HUD action.* (1) Fifteen percent of the funds allocated to New York State in the Small Cities Program may be reserved to alleviate imminent threats to the public health or safety unless a lesser amount is specified in a NOFA. Applications shall be submitted in accordance with § 570.423.

(2) Applications which meet the requirements of this section may be approved by the Director of Community Planning and Development of the HUD Office without competition.

(3) The only funds reserved for imminent threats to the public health or safety are those specified by this section as modified by the NOFA. After the funds have been depleted, HUD shall not consider further requests for grants relating to imminent threats during that fiscal year.

(c) *Letter to proceed.* Notwithstanding § 570.425(a)(3), after a determination has been made that an imminent threat exists, HUD may issue the applicant a letter to proceed to incur costs to alleviate the imminent threat. Reimbursement of such costs is dependent upon HUD approval of the final application.

(d) *Environmental review.* Pursuant to 24 CFR 58.34(a)(10), grants for imminent threats to public health or safety are excluded from some or all of the environmental review requirements of 24 CFR part 58, to the extent provided therein.

§ 570.425 HUD review and actions on applications for New York State applicants.

(a) *Final application submission*—(1) *Submission deadline.* HUD will establish a time period during which final applications must be submitted to the appropriate office. The dates for this period will be published in a notice in the **Federal Register**.

(2) *Incomplete applications.* Applications must contain the information required by HUD. Information relative to the application will not be accepted or considered if received after the submission deadline,

unless the information is specifically requested in writing by HUD.

(3) *Pre-agreement costs.* HUD authorizes a unit of general local government to incur costs during a Federal fiscal year in which a grant is made or the prior fiscal year for preparation of a CDBG grant application, planning costs eligible under § 570.205, environmental assessments, and project engineering and design costs for eligible activities under §§ 570.201 through 570.204 before the establishment of a formal grant relationship between the applicant and HUD. Costs of such activities for the funded application may be charged to the grant should it be funded, provided that the activities are undertaken in accordance with the requirements of this subpart, and 24 CFR part 58. It is understood that the incurring of costs described in this paragraph creates no obligation on HUD to approve the application.

(b) *HUD action on final application—* (1) *Review and notification.* Following the review of the applications, HUD will promptly notify each applicant of the action taken with regard to its application. Documentation which supports HUD's decisions on applications will be available to the public.

(2) *Conditional approval.* HUD may make a conditional approval, in which case the grant will be approved but the obligation and utilization of funds will be restricted. The reasons for the conditional approval and the actions necessary to remove the condition will be specified. Failure to satisfy the condition may result in a termination of the grant.

(3) HUD will not make a Small Cities grant when it is determined that the grant will only have a minimal or insignificant impact on the grantee.

(4) *Individual grant amounts.* In determining appropriate grant amounts to be awarded, HUD may take into account the size of the applicant, the level of demand, the scale of the activity proposed relative to need and operational capacity, the number of persons to be served, the amount of funds required to achieve project objectives and the administrative capacity of the applicant to complete the activities in a timely manner.

(c) *Streamlined application requirement for previous applicants.* HUD may provide pursuant to a NOFA that if an applicant notifies HUD in writing within the application period specified in a NOFA that it wishes to be so considered, HUD will consider unfunded applications from the prior round or competition that meet the threshold requirements of the NOFA. The applicant will have the option of withdrawing its application, or amending or supplementing the application for succeeding rounds of competition. If there is no significant change in the application involving new activities or alteration of proposed activities that will significantly change the scope, location or objectives of the proposed activities or beneficiaries, there will be no further citizen participation requirement to keep the application active for succeeding rounds of competition. Applicants availing themselves of the option to have an application from the previous round or competition reconsidered by HUD must submit a new abbreviated or full consolidated plan, if the new competitive funding round is in a different fiscal year than the funding round or competition for which the application was originally submitted.

§ 570.426 Program income.

(a) The provisions of § 570.504(b) apply to all program income generated by a specific grant and received prior to grant closeout.

(b) If the unit of general local government has another ongoing CDBG grant at the time of closeout, the program income will be considered to be program income of the ongoing grant. The grantee can choose which grant to credit the program income to if it has multiple open CDBG grants.

(c) If the unit of general local government has no open ongoing CDBG grant at the time of closeout, program income of the unit of general local government or its subrecipients which amounts to less than $25,000 per year will not be considered to be program income unless needed to repay a Section 108 guaranteed loan. When more than $25,000 of program income is generated from one or more closed out grants in a year after closeout, the entire amount of the program income is subject to the requirements of this part. This will be a subject of the closeout agreement described in § 570.509(c).

§ 570.427 Program amendments.

(a) *HUD approval of certain program amendments.* Grantees shall request prior HUD approval for all program amendments involving new activities or alteration of existing activities that will significantly change the scope, location, or objectives of the approved activities or beneficiaries. Approval is subject to the following:

(1) Programs or projects that include new or significantly altered activities are rated in accordance with the criteria for selection applicable at the time the original preapplication or application (whichever is applicable) was rated. The rating of the program or projects proposed which include the new or altered activities proposed by the amendment must be equal to or greater than the lowest rating received by a funded project or program during that cycle of ratings.

(2) Consideration shall be given to whether any new activity proposed can be completed promptly.

(3) If the grant was received on a noncompetitive basis, the proposed amended project must be able to be completed promptly, and must meet all of the threshold requirements that were required for the original project. If the proposal is to amend the project to a type of project that was rated competitively in the fiscal year that the noncompetitive project was funded, the new or altered activities proposed by the amendment must receive a rating equal to or greater than the lowest rating received by a funded project or program during that cycle of ratings.

(b) *Documentation of program amendments.* Any program amendments that do not require HUD approval must be fully documented in the grantee's records.

(c) *Citizen participation requirements.* Whenever an amendment requires HUD approval, the requirements for citizen participation in § 570.431 must be met.

§ 570.428 Reallocated funds.

(a) *General.* This section governs reallocated funds originally allocated for use under 24 CFR part 570, subpart F (Small Cities Program).

(b) *Assignment of funds to be reallocated.* Reallocated funds may be:

(1) Used at any time necessary for a Section 108 repayment grant under § 570.432;

(2) Added to the next Small Cities Program competition;

(3) Used to fund any application not selected for funding in the most recent Small Cities competition, because of a procedural error made by HUD; or

(4) Used to fund the most highly ranked unfunded application or applications from the most recent Small Cities Program competition.

(c) *Timing.* Funds which become available shall be used as soon as practicable.

§ 570.429 Hawaii general and grant requirements.

(a) *General.* This section applies to the HUD-administered Small Cities Program in the State of Hawaii.

(b) *Scope and applicability.* Except as otherwise provided in this section, the policies and procedures outlined in

subparts A, C, J, K, O of this part, and in §§ 570.420, 570.430, and 570.432, apply to the HUD-administered Small Cities Program in the State of Hawaii.

(c) *Grant amounts.* (1) For each eligible unit of general local government, a formula grant amount will be determined which bears the same ratio to the total amount available for the nonentitlement area of the State as the weighted average of the ratios between:

(i) The population of that eligible unit of general local government and the population of all eligible units of general local government in the nonentitlement areas of the State;

(ii) The extent of poverty in that eligible unit of general local government and the extent of poverty in all the eligible units of general local government in the nonentitlement areas of the State; and

(iii) The extent of housing overcrowding in that eligible unit of general local government and the extent of housing overcrowding in all the eligible units of general local government in the nonentitlement areas of the State.

(2) In determining the average of the ratios under this paragraph (c), the ratio involving the extent of poverty shall be counted twice and each of the other ratios shall be counted once. (0.25 + 0.50 + 0.25 = 1.00).

(d) *Adjustments to grants.* Grant amounts under this section may be adjusted where an applicant's performance is judged inadequate, considering:

(1) Capacity to utilize the grant amount effectively and efficiently;

(2) Compliance with the requirements of § 570.902(a) for timely expenditure of funds beginning with grants made in FY 1996. In making this calculation, all outstanding grants will be considered. For the FY 1995 grant the requirement is substantial compliance with the applicant's schedule or schedules submitted in each previously funded application;

(3) Compliance with other program requirements based on monitoring visits and audits.

(e) *Reallocation.* (1) Any amounts that become available as a result of adjustments under paragraph (d) of this section, or any reductions under subpart O of this part, shall be reallocated in the same fiscal year to any remaining eligible applicants on a pro rata basis.

(2) Any formula grant amounts reserved for an applicant that chooses not to submit an application shall be reallocated to any remaining eligible applicants on a pro rata basis.

(3) No amounts shall be reallocated under paragraph (e) of this section in any fiscal year to any applicant whose grant amount was adjusted under paragraph (d) of this section or reduced under subpart O of this part.

(f) *Required submissions.* In order to receive its formula grant under this subpart, the applicant must submit a consolidated plan in accordance with 24 CFR part 91. That part includes requirements for the content of the consolidated plan, for the process of developing the plan, including citizen participation provisions, for the submission date, for HUD approval, and for the amendment process.

(g) *Application approval.* HUD will approve an application if the jurisdiction's submissions have been made and approved in accordance with 24 CFR part 91 and the certifications required therein are satisfactory to the Secretary. The certifications will be satisfactory to the Secretary for this purpose unless the Secretary has determined pursuant to subpart O of this part that the grantee has not complied with the requirements of this part, has failed to carry out its consolidated plan as provided under § 570.903, or has determined that there is evidence, not directly involving the grantee's past performance under this program, that tends to challenge in a substantial manner the grantee's certification of future performance. If the Secretary makes any such determination, however, further assurances may be required to be submitted by the grantee as the Secretary may deem warranted or necessary to find the grantee's certification satisfactory.

(h) *Grant agreement.* The grant will be made by means of a grant agreement executed by both HUD and the grantee.

(i) *Conditional grant.* The Secretary may make a conditional grant in which case the obligation and use of grant funds for activities may be restricted. Conditional grants may be made where there is substantial evidence that there has been, or there will be, a failure to meet the performance requirements or criteria described in subpart O of this part. In such case, the conditional grant will be made by means of a grant agreement, executed by HUD, which includes the terms of the condition specifying the reason for the conditional grant, the actions necessary to remove the condition and the deadline for taking those actions. The grantee shall execute and return such an agreement to HUD within 60 days of the date of its transmittal. Failure of the grantee to execute and return the grant agreement within 60 days may be deemed by HUD to constitute rejection of the grant by the grantee and shall be cause for HUD to determine that the funds provided in the grant agreement are available for reallocation in accordance with section 106(c) of the Act. Failure to satisfy the condition may result in a reduction in the grant amount pursuant to § 570.911.

(Approved by the Office of Management and Budget under control number 2506–0060)

§ 570.430 Hawaii program operation requirements.

(a) *Limitation on planning and administrative costs.* For grants made with allocations prior to FY 1995, no more than 20 percent of the sum of the grant plus program income received during the grant period shall be expended for planning and program administrative costs. For grants received from allocations in FY 1995 and thereafter, a grantee will be considered to be in conformance with the requirements of § 570.200(g) if funds obligated for planning and administration during the most recently completed program year do not exceed 20 percent of the sum of the grant made for that program year and the program income received from post FY 1994 grants during that program year.

(b) *Performance and evaluation reports.* Grantees will follow the requirements of § 570.507(a) for entitlement grant recipients for all grants received in FY 1995 and thereafter. Grantees will continue following the requirements of § 570.507(a) for HUD-administered small cities grants for grants received prior to FY 1995 until those grants are closed out.

(c) *Grant closeouts.* Grants received prior to FY 1995 shall be closed out in accordance with the procedures in § 570.509. Grants received in FY 1995 and thereafter shall not be closed out individually. A grantee's entire program shall be closed upon program completion if a grantee ceases its participation in the Small Cities Program.

(d) *Public Services.* Starting with the FY 1996 grant, grantees may follow the provisions of § 570.201(e)(1) that refer to entitlement grantees, allowing grantees to use 15 percent of the program income received in the previous program year in addition to 15 percent of the grant amount for public services.

(e) *Compliance with the primary objective.* Starting with the FY 1995 grant, grantees may select a time period of one, two or three program years in which to meet the requirement that not less than 70 percent of the aggregate of CDBG fund expenditures be for activities benefitting low- and moderate-

income persons. Grants made from allocations prior to FY 1995 will be considered individually for meeting the primary objective, and expenditures for grants from pre-FY 1995 allocations made during and after FY 1995 will not be considered in determining whether the primary objective has been met for post-1994 allocations. If the State of Hawaii decides to administer the Community Development Block Grant Program for nonentitlement units of general local government in Hawaii, the State will be bound by the time period for meeting the primary objective that was chosen by each nonentitlement grantee within the State until those time periods have expired.

(f) *Program amendments for grants received prior to FY 1995.* Grantees must follow the requirements of 24 CFR 91.505 when amending their program with regard to grants received prior to FY 1995. For purposes of this paragraph (f), the term *consolidated plan* as used in 24 CFR 91.505 means an application submitted under the Hawaii program for pre-FY 1995 funds. Also for purposes of this paragraph (f), to comply with the requirements of 24 CFR 91.505, grantees must refer to their current citizen participation plans (adopted in accordance with 24 CFR 91.505) to determine the criteria for substantial amendment and the citizen participation process to be followed.

(Approved by the Office of Management and Budget under control number 2506–0020.)

§ 570.431 Citizen participation.

(a) *General.* An applicant that is located in a nonentitlement area of a State that has not elected to distribute funds shall comply with the citizen participation requirements described in this section, including requirements for the preparation of the proposed application and the final application. The requirements for citizen participation do not restrict the responsibility or authority of the applicant for the development and execution of its community development program.

(b) *Citizen participation plan.* The applicant must develop and follow a detailed citizen participation plan and must make the plan public. The plan must be completed and available before the application for assistance is submitted to HUD, and the applicant must certify that it is following the plan. The plan must set forth the applicant's policies and procedures for:

(1) Giving citizens timely notice of local meetings and reasonable and timely access to local meetings, information, and records relating to the grantee's proposed and actual use of CDBG funds including, but not limited to:

(i) The amount of CDBG funds expected to be made available for the coming year, including the grant and anticipated program income;

(ii) The range of activities that may be undertaken with those funds;

(iii) The estimated amount of those funds proposed to be used for activities that will benefit low- and moderate-income persons;

(iv) The proposed CDBG activities likely to result in displacement and the applicant's plans, consistent with the policies developed under § 570.606(b), for minimizing displacement of persons as a result of its proposed activities; and

(v) The types and levels of assistance the applicant plans to make available (or to require others to make available) to persons displaced by CDBG-funded activities, even if the applicant expects no displacement to occur;

(2) Providing technical assistance to groups representative of persons of low- and moderate-income that request assistance in developing proposals. The level and type of assistance to be provided is at the discretion of the applicant. The assistance need not include the provision of funds to the groups;

(3) Holding a minimum of two public hearings, for the purpose of obtaining citizens' views and formulating or responding to proposals and questions. Each public hearing must be conducted at a different stage of the CDBG program. Together, the hearings must address community development and housing needs, development of proposed activities and review of program performance. There must be reasonable notice of the hearings and the hearings must be held at times and accessible locations convenient to potential or actual beneficiaries, with reasonable accommodations including material in accessible formats for persons with disabilities. The applicant must specify in its plan how it will meet the requirement for hearings at times and locations convenient to potential or actual beneficiaries;

(4) Meeting the needs of non-English speaking residents in the case of public hearings where a significant number of non-English speaking residents can reasonably be expected to participate;

(5) Responding to citizen complaints and grievances, including the procedures that citizens must follow when submitting complaints and grievances. The applicant's policies and procedures must provide for timely written answers to written complaints and grievances within 15 working days of the receipt of the complaint, where practicable; and

(6) Encouraging citizen participation, particularly by low- and moderate-income persons who reside in slum or blighted areas, and in other areas in which CDBG funds are proposed to be used.

(c) *Publication of proposed application.* (1) The applicant shall publish a proposed application consisting of the proposed community development activities and community development objectives in order to afford affected citizens an opportunity to:

(i) Examine the application's contents to determine the degree to which they may be affected;

(ii) Submit comments on the proposed application; and

(iii) Submit comments on the performance of the applicant.

(2) The requirement for publishing in paragraph (c)(1) of this section may be met by publishing a summary of the proposed application in one or more newspapers of general circulation, and by making copies of the proposed application available at libraries, government offices, and public places. The summary must describe the contents and purpose of the proposed application, and must include a list of the locations where copies of the entire proposed application may be examined.

(d) *Preparation of a final application.* An applicant must prepare a final application. In the preparation of the final application, the applicant shall consider comments and views received related to the proposed application and may, if appropriate, modify the final application. The final application shall be made available to the public and shall include the community development objectives and projected use of funds, and the community development activities.

(e) *New York grantee amendments.* To assure citizen participation on program amendments to final applications that require HUD approval under § 570.427, the grantee shall:

(1) Furnish citizens information concerning the amendment;

(2) Hold one or more public hearings to obtain the views of citizens on the proposed amendment;

(3) Develop and publish the proposed amendment in such a manner as to afford affected citizens an opportunity to examine the contents, and to submit comments on the proposed amendment;

(4) Consider any comments and views expressed by citizens on the proposed amendment and, if the grantee finds it appropriate, modify the final amendment accordingly; and

(5) Make the final amendment to the community development program available to the public before its submission to HUD.

§ 570.432 Repayment of section 108 loans.

Notwithstanding any other provision of this subpart, a unit of general local government in a nonentitlement area where the State has not elected to administer the CDBG program shall be eligible for Small Cities Grant assistance hereunder for the sole purpose of paying any amounts due on debt obligations issued by such unit of general local government (or its designated public agency) and guaranteed by the Secretary pursuant to section 108 of the Act (see subpart M of this part). The award of grant assistance for such purpose shall be consistent with section 106(d)(3)(B) of the Act, in such amount, and subject to such conditions as the Secretary may determine. Since guaranteed loan funds (as defined in § 570.701) are required to be used in accordance with national and primary objective requirements, and other applicable requirements of this part, any grant made to make payments on the debt obligations evidencing the guaranteed loan shall be presumed to meet such requirements, unless HUD determines that the guaranteed loan funds were not used in accordance with such requirements. Any such determination by HUD shall not prevent the making of the grant in the amount of the payment due, but it may be grounds for HUD to take appropriate action under subpart O of this part based on the original noncompliance.

Dated: November 19, 1997.

Jacquie Lawing,

General Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. 97–30940 Filed 11–21–97; 10:06 am]

BILLING CODE 4210–29–P

Federal Register

Tuesday
November 25, 1997

Part VII

Department of Health and Human Services

Food and Drug Administration

International Conference on Harmonisation; Guidance on Nonclinical Safety Studies for the Conduct of Human Clinical Trials for Pharmaceuticals; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 97D–0147]

International Conference on Harmonisation; Guidance on Nonclinical Safety Studies for the Conduct of Human Clinical Trials for Pharmaceuticals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a guidance entitled ''M3 Nonclinical Safety Studies for the Conduct of Human Clinical Trials for Pharmaceuticals.'' The guidance was prepared under the auspices of the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). The guidance is intended to recommend international standards for and to promote harmonization of the nonclinical safety studies needed to support human clinical trials of a given scope and duration.

DATES: Effective November 25, 1997. Submit written comments at any time.

ADDRESSES: Submit written comments on the guidance to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. Copies of the guidance are available from the Drug Information Branch (HFD–210), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4573. Single copies of the guidance may be obtained by mail from the Office of Communication, Training and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), 1401 Rockville Pike, Rockville, MD 20852–1448 or by calling the CBER Voice Information System at 1–800–835–4709 or 301–827–1800. Copies may be obtained from CBER's FAX Information System at 1–888–CBER–FAX or 301–827–3844.

FOR FURTHER INFORMATION CONTACT:

Regarding the guidance: Robert E. Osterberg, Center for Drug Evaluation and Research (HFD–520), Food and Drug Administration, 9201 Corporate Blvd., Rockville, MD 20850, 301–827–2123.

Regarding ICH: Janet J. Showalter, Office of Health Affairs (HFY–20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–0864.

SUPPLEMENTARY INFORMATION: In recent years many important initiatives have been undertaken by regulatory authorities and industry associations to promote international harmonization of regulatory requirements. FDA has participated in many meetings designed to enhance harmonization and is committed to seeking scientifically based harmonized technical procedures for pharmaceutical development. One of the goals of harmonization is to identify and then reduce differences in technical requirements for drug development among regulatory agencies.

ICH was organized to provide an opportunity for tripartite harmonization initiatives to be developed with input from both regulatory and industry representatives. FDA also seeks input from consumer representatives and others. ICH is concerned with harmonization of technical requirements for the registration of pharmaceutical products among three regions: The European Union (EU), Japan, and the United States. The six ICH sponsors are the European Commission, the European Federation of Pharmaceutical Industries Associations, the Japanese Ministry of Health and Welfare, the Japanese Pharmaceutical Manufacturers Association, the Centers for Drug Evaluation and Research and Biologics Evaluation and Research, FDA, and the Pharmaceutical Research and Manufacturers of America. The ICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation of Pharmaceutical Manufacturers Associations (IFPMA).

The ICH Steering Committee includes representatives from each of the ICH sponsors and the IFPMA, as well as observers from the World Health Organization, the Canadian Health Protection Branch, and the European Free Trade Area.

In the **Federal Register** of May 2, 1997 (62 FR 24320), FDA published a draft tripartite guideline entitled ''Guideline on the Timing of Nonclinical Studies for the Conduct of Human Clinical Trials for Pharmaceuticals'' (M3). The notice gave interested persons an opportunity to submit comments by June 16, 1997.

After consideration of the comments received and revisions to the guidance, a final draft of the guidance was submitted to the ICH Steering Committee and endorsed by the three participating regulatory agencies on July 16, 1997.

In accordance with FDA's Good Guidance Practices (62 FR 8961, February 27, 1997), this document has been designated a guidance, rather than a guideline.

The guidance is intended to recommend international standards for and to promote harmonization of the nonclinical safety studies needed to support human clinical trials of a given scope and duration. The nonclinical safety study requirements for the marketing approval of pharmaceuticals usually include single and repeat dose toxicity studies, reproductive toxicity studies, genotoxicity studies, local tolerance studies, an assessment of carcinogenic potential, safety pharmacology studies, and pharmacokinetic studies. The guidance discusses these types of studies, their duration, and their relation to the conduct of human clinical trials. The guidance should facilitate the conduct of clinical trials and reduce the unnecessary use of animals and other resources, which in turn should promote safe and ethical development of drugs and the availability of new pharmaceuticals.

This guidance represents the agency's current thinking on nonclinical safety studies for the conduct of human clinical trials for pharmaceuticals. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute, regulations, or both.

As with all of FDA's guidances, the public is encouraged to submit written comments with new data or other new information pertinent to this guidance. The comments in the docket will be periodically reviewed, and, where appropriate, the guidance will be amended. The public will be notified of any such amendments through a notice in the **Federal Register**.

Interested persons may, at any time, submit written comments on the guidance to the Dockets Management Branch (address above). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance and received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday. An electronic version of this guidance is available on the Internet (http://www.fda.gov/cder/guidance.htm) or through the CBER home page (http://www.fda.gov/cber/cberftp.html).

The text of the guidance follows:

M3 Nonclinical Safety Studies for the Conduct of Human Clinical Trials for Pharmaceuticals[1]

1. Introduction

1.1 Objectives of the Guidance

The purpose of this document is to recommend international standards for and to promote harmonization of the nonclinical safety studies needed to support human clinical trials of a given scope and duration.

Harmonization of the guidance for nonclinical safety studies will help to define the current recommendations and reduce the likelihood that substantial differences will exist between regions.

This guidance should facilitate the timely conduct of clinical trials and reduce the unnecessary use of animals and other resources. This should promote safe and ethical development and availability of new pharmaceuticals.

1.2 Background

The recommendations for the extent of nonclinical safety studies to support the various stages of clinical development differ among the regions of Europe, the United States, and Japan. This raises the important question of whether there is scientific justification for these differences and whether it would be possible to develop a mutually acceptable guidance.

The present guidance represents the consensus that exists among the ICH regions regarding the scope and duration of nonclinical safety studies to support the conduct of human clinical trials for pharmaceuticals.

1.3 Scope of the Guidance

The nonclinical safety study recommendations for the marketing approval of a pharmaceutical usually include single and repeated dose toxicity studies, reproduction toxicity studies, genotoxicity studies, local tolerance studies, and for drugs that have special cause for concern or are intended for a long duration of use, an assessment of carcinogenic potential. Other nonclinical studies include pharmacology studies for safety assessment (safety pharmacology) and pharmacokinetic (absorption, distribution, metabolism, and excretion (ADME)) studies. These types of studies and their relation to the conduct of human clinical trials are presented in this guidance.

This guidance applies to the situations usually encountered during the conventional development of pharmaceuticals and should be viewed as providing general guidance for drug development. Animal safety studies and human clinical trials should be planned and designed to represent an approach that is scientifically and ethically appropriate for the pharmaceutical under development.

There have been marked changes in the kinds of therapeutic agents being developed (e.g., biotechnology-derived products), and the existing paradigms for safety evaluation may not always be appropriate or relevant. The safety evaluation in such cases should be considered on a case-by-case basis as described in the ICH guidance ''Safety Studies in Biotechnological Products'' (Ref. 1). Similarly, pharmaceuticals under development for indications in life-threatening or serious diseases without current effective therapy may also warrant a case-by-case approach to both the toxicological evaluation and clinical development to optimize and expedite drug development. In these cases, particular studies may be abbreviated, deferred, or omitted.

1.4 General Principles

The development of a pharmaceutical is a stepwise process involving an evaluation of both the animal and human safety information. The goals of the nonclinical safety evaluation include: A characterization of toxic effects with respect to target organs, dose dependence, relationship to exposure, and potential reversibility. This information is important for the estimation of an initial safe starting dose for the human trials and the identification of parameters for clinical monitoring for potential adverse effects. The nonclinical safety studies, although limited at the beginning of clinical development, should be adequate to characterize potential toxic effects under the conditions of the supported clinical trial.

Human clinical trials are conducted to demonstrate the efficacy and safety of a pharmaceutical, starting with a relatively low exposure in a small number of subjects. This is followed by clinical trials in which exposure usually increases by dose, duration, and/or size of the exposed patient population. Clinical trials are extended based on the demonstration of adequate safety in the previous clinical trial(s) as well as additional nonclinical safety information that is available as the clinical trials proceed. Serious adverse clinical or nonclinical findings may influence the continuation of clinical trials and/or suggest the need for additional nonclinical studies and a reevaluation of previous clinical adverse events to resolve the issue.

Clinical trials are conducted in phases for which different terminology has been utilized in the various regions. This document uses the terminology as defined in the ICH guidance ''General Considerations for Clinical Trials'' (Ref. 2). Clinical trials may be grouped by their purpose and objectives. The first human exposure studies are generally single dose studies, followed by dose escalation and short-term repeated dose studies to evaluate pharmacokinetic parameters and tolerance (Phase I studies—Human Pharmacology studies). These studies are often conducted in healthy volunteers but may also include patients. The next phase of trials consists of exploratory efficacy and safety studies in patients (Phase II studies—Therapeutic Exploratory studies). This is followed by confirmatory clinical trials for efficacy and safety in patient populations (Phase III studies—Therapeutic Confirmatory studies).

2. Safety Pharmacology

Safety pharmacology includes the assessment of effects on vital functions, such as cardiovascular, central nervous, and respiratory systems, and these should be evaluated prior to human exposure. These evaluations may be conducted as additions to toxicity studies or as separate studies.

3. Toxicokinetic and Pharmacokinetic Studies

Exposure data in animals should be evaluated prior to human clinical trials (Ref. 3). Further information on ADME in animals should be made available to compare human and animal metabolic pathways. Appropriate information should usually be available by the time the Phase I (Human Pharmacology) studies have been completed.

4. Single Dose Toxicity Studies

The single dose (acute) toxicity for a pharmaceutical should be evaluated in two mammalian species prior to the first human exposure (Note 1). A dose escalation study is considered an acceptable alternative to the single dose design.

5. Repeated Dose Toxicity Studies

The recommended duration of the repeated dose toxicity studies is usually related to the duration, therapeutic indication, and scale of the proposed clinical trial. In principle, the duration of the animal toxicity studies conducted in two mammalian species (one nonrodent) should be equal to or exceed the duration of the human clinical trials up to the maximum recommended duration of the repeated dose toxicity studies (Tables 1 and 2).

In certain circumstances, where significant therapeutic gain has been shown, trials may be extended beyond the duration of supportive repeated dose toxicity studies on a case-by-case basis.

5.1 Phase I and II Studies

A repeated dose toxicity study in two species (one nonrodent) for a minimum duration of 2 to 4 weeks (Table 1) would support Phase I (Human Pharmacology) and Phase II (Therapeutic Exploratory) studies up to 2 weeks in duration. Beyond this, 1-, 3-, or 6-month toxicity studies would support these types of human clinical trials for up to 1, 3, or 6 months, respectively. Six-month rodent and chronic nonrodent studies (Ref. 11) would support clinical trials of longer duration than 6 months.

[1] This guidance represents the agency's current thinking on nonclinical safety studies for the conduct of human clinical trials for pharmaceuticals. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute, regulations, or both.

Table 1.—DURATION OF REPEATED DOSE TOXICITY STUDIES TO SUPPORT PHASE I AND II TRIALS IN THE EU AND PHASE I, II, AND III TRIALS IN THE UNITED STATES AND JAPAN[1]

Duration of Clinical Trials	Minimum Duration of Repeated Dose Toxicity Studies	
	Rodents	Nonrodents
Single Dose	2–4 Weeks[2]	2 Weeks
Up to 2 Weeks	2–4 Weeks[2]	2 Weeks
Up to 1 Month	1 Month	1 Month
Up to 3 Months	3 Months	3 Months
Up to 6 Months	6 Months	6 Months[3]
> 6 Months	6 Months	Chronic[3]

[1] In Japan, if there are no Phase II clinical trials of equivalent duration to the planned Phase III trials, conduct of longer duration toxicity studies should be considered as given in Table 2.

[2] In the EU and the United States, 2-week studies are the minimum duration. In Japan, 2-week nonrodent and 4-week rodent studies are needed (Also see Note 2). In the United States, as an alternative to 2-week studies, single dose toxicity studies with extended examinations can support single dose human trials (Ref. 4).

[3] See Ref. 11. Data from 6 months of administration in nonrodents should be available before the initiation of clinical trials longer than 3 months. Alternatively, if applicable, data from a 9-month nonrodent study should be available before the treatment duration exceeds that which is supported by the available toxicity studies.

5.2 Phase III Studies

For the Phase III (Therapeutic Confirmatory) studies, the recommendations for the United States and Japan are the same as those in Table 1. In the EU, a 1-month toxicity study in two species (one nonrodent) would support clinical trials of up to 2 weeks duration (Table 2). Three-month toxicity studies would support clinical trials for up to 1 month duration, while 6-month toxicity studies in rodents and 3-month studies in nonrodents would support clinical trials of a duration up to 3 months. For longer term clinical trials, a 6-month study in rodents and a chronic study in nonrodents are recommended.

TABLE 2.—DURATION OF REPEATED DOSE TOXICITY STUDIES TO SUPPORT PHASE III TRIALS IN THE EU AND MARKETING IN ALL REGIONS[1]

Duration of Clinical Trials	Minimum Duration of Repeated Dose Toxicity Studies	
	Rodents	Nonrodents
Up to 2 Weeks	1 Month	1 Month
Up to 1 Month	3 Months	3 Months
Up to 3 Months	6 Months	3 Months
> 3 Months	6 Months	Chronic[2]

[1] The above table also reflects the marketing recommendations in the three regions except that a chronic nonrodent study is recommended for clinical use > 1 month.

[2] See Ref. 11.

6. Local Tolerance Studies

Local tolerance should be studied in animals using routes relevant to the proposed clinical administration. The evaluation of local tolerance should be performed prior to human exposure. The assessment of local tolerance may be part of other toxicity studies.

7. Genotoxicity Studies

Prior to first human exposure, in vitro tests for the evaluation of mutations and chromosomal damage are generally needed. If an equivocal or positive finding occurs, additional testing should be performed (Ref. 5).

The standard battery of tests for genotoxicity (Ref. 6) should be completed prior to the initiation of Phase II studies.

8. Carcinogenicity Studies

Completed carcinogenicity studies are not usually needed in advance of the conduct of clinical trials unless there is cause for concern. Conditions relevant for carcinogenicity testing are discussed in the ICH document (Ref. 7).

For pharmaceuticals developed to treat certain serious diseases, carcinogenicity testing, if needed, may be concluded postapproval.

9. Reproduction Toxicity Studies

Reproduction toxicity studies (Refs. 8 and 9) should be conducted as is appropriate for the population that is to be exposed.

9.1 Men

Men may be included in Phase I and II trials prior to the conduct of the male fertility study since an evaluation of the male reproductive organs is performed in the repeated dose toxicity studies (Note 2).

A male fertility study should be completed prior to the initiation of Phase III trials (Refs. 8 and 9).

9.2 Women Not of Childbearing Potential

Women not of childbearing potential (i.e., permanently sterilized, postmenopausal) may be included in clinical trials without reproduction toxicity studies provided the relevant repeated dose toxicity studies (which include an evaluation of the female reproductive organs) have been conducted.

9.3 Women of Childbearing Potential

For women of childbearing potential there is a high level of concern for the unintentional exposure of an embryo/fetus before information is available concerning the potential benefits versus potential risks. There are currently regional differences in the timing of reproduction toxicity studies to support the inclusion of women of childbearing potential in clinical trials.

In Japan, assessment of female fertility and embryo-fetal development should be completed prior to the inclusion of women of childbearing potential using birth control in any type of clinical trial. In the EU, assessment of embryo-fetal development should be completed prior to Phase I trials in women of childbearing potential and female fertility studies prior to Phase III trials.

In the United States, women of childbearing potential may be included in early, carefully monitored studies without reproduction toxicity studies provided appropriate precautions are taken to minimize risk. These precautions include pregnancy testing (for example, based on the b-subunit of HCG), use of a highly effective method of birth control (Note 3), and entry after a confirmed menstrual period. Continued testing and monitoring during the trial should be sufficient to ensure compliance with the measures not to become pregnant during the period of drug exposure (which may exceed the length of study). To support this approach, informed consent should include any known pertinent information related to reproductive toxicity, such as a general assessment of potential toxicity of pharmaceuticals with related structures or pharmacological effects. If no relevant information is available, the informed consent should clearly note the potential for risk.

In the United States, assessment of female fertility and embryo-fetal development should be completed before women of childbearing potential using birth control are enrolled in Phase III trials.

In the three regions, the pre- and postnatal development study should be submitted for marketing approval or earlier if there is cause for concern. For all regions, all female reproduction toxicity studies (Ref. 8) and the standard battery of genotoxicity tests (Ref. 6) should be completed prior to the inclusion, in any clinical trial, of women of childbearing potential not using highly effective birth control (Note 3) or whose pregnancy status is unknown.

9.4 Pregnant Women

Prior to the inclusion of pregnant women in clinical trials, all the reproduction toxicity studies (Refs. 8 and 9) and the standard battery of genotoxicity tests (Ref. 6) should be conducted. In addition, safety data from previous human exposure are generally needed.

10. Supplementary Studies

Additional nonclinical studies may be needed if previous nonclinical or clinical findings with the product or related products have indicated special safety concerns.

11. Clinical Trials in Pediatric Populations

When pediatric patients are included in clinical trials, safety data from previous adult human exposure would usually represent the most relevant information and should generally be available before pediatric clinical trials. The necessity for adult human data would be determined on a case-by-case basis.

In addition to appropriate repeated dose toxicity studies, all reproduction toxicity studies (Ref. 8) and the standard battery of genotoxicity tests (Ref. 6) should be available prior to the initiation of trials in pediatric populations. Juvenile animal studies should be considered on an individual basis when previous animal data and human safety data are insufficient.

The need for carcinogenicity testing should be addressed prior to long term exposure in pediatric clinical trials considering the length of treatment or cause for concern (Ref. 7).

12. Continuing Efforts to Improve Harmonization

It is recognized that significant advances in harmonization of the timing of nonclinical safety studies for the conduct of human clinical trials for pharmaceuticals have already been achieved and are detailed in this guidance. However, differences remain in a few areas. These include toxicity studies to support first entry into man and the recommendations for reproduction toxicity studies for women of childbearing potential. Regulators and industry will continue to consider these differences and work towards further improving the drug development process.

13. Endnotes

Note 1 For the conduct of single dose toxicity studies, refer to the ICH–1 recommendations (Ref. 10) and the regional guidances.

Note 2 There are currently regional differences for the minimum duration of repeated dose toxicity studies; 2 weeks in the EU and the United States, and 2 weeks nonrodent and 4 weeks rodent in Japan. In Japan, unlike the EU and the United States, the male fertility study has usually been conducted prior to the inclusion of men in clinical trials. However, an assessment of male fertility by careful histopathological examination in the rodent 4-week repeated dose toxicity study has been found to be more sensitive in detecting effects on male reproductive organs than fertility studies (Ref. 9), and is now recommended to be performed prior to the first clinical trial in Japan. In the EU and the United States, 2-week repeated dose studies are considered adequate for an overall assessment of the potential toxicity of a drug to support clinical trials for a short duration.

Note 3 A highly effective method of birth control is defined as one that results in a low failure rate (i.e., less than 1 percent per year) when used consistently and correctly, such as implants, injectables, combined oral contraceptives, some intrauterine contraceptive devices (IUD's), sexual abstinence, or a vasectomized partner. For subjects using a hormonal contraceptive method, information regarding the product under evaluation and its potential effect on the contraceptive should be addressed.

14. References

1. ICH Topic S6 Document ''Preclinical Testing of Biotechnology-Derived Pharmaceuticals.''

2. ICH Topic E8 Document ''General Considerations for Clinical Trials.''

3. ICH Harmonised Tripartite Guideline (S3A) Note for ''Toxicokinetics: The Assessment of Systemic Exposure in Toxicity Studies.''

4. FDA, ''Single Dose Acute Toxicity Testing for Pharmaceuticals; Revised Guidance,'' 61 FR 43934 to 43935, August 26, 1996.

5. ICH Harmonised Tripartite Guideline (S2A) ''Guidance on Specific Aspects of Regulatory Genotoxicity Tests.''

6. ICH Topic S2B document ''Standard Battery of Genotoxicity Tests.''

7. ICH Harmonised Tripartite Guideline (S1A) ''Guideline on the Need for Carcinogenicity Studies for Pharmaceuticals.''

8. ICH Harmonised Tripartite Guideline (S5A) ''Detection of Toxicity to Reproduction for Medicinal Products.''

9. ICH Harmonised Tripartite Guideline (S5B) ''Toxicity to Male Fertility.''

10. Arcy, P. F., and D. W. G. Harron, ''Proceeding of The First International Conference on Harmonisation, Brussels 1991,'' Queen's University of Belfast, pp. 183–184, 1992.

11. ICH Topic S4 Document ''Duration of Chronic Toxicity Testing in Animals (Rodent and Nonrodent Toxicity Testing).''

Dated: November 18, 1997.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 97–30913 Filed 11–24–97; 8:45 am]

BILLING CODE 4160–01–F

Federal Register

Tuesday
November 25, 1997

Part VIII

Department of Housing and Urban Development

24 CFR Part 5

Ceiling Rents for Public Housing; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 5

[Docket No. FR–3880–P–02]

RIN: 2577–AB75

Ceiling Rents for Public Housing

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would permit public housing agencies (PHAs) to adopt caps on total tenant payments for public housing projects or dwelling units that are assisted under the United States Housing Act of 1937 (1937 Act). The Balanced Budget Downpayment Act I (also known as the Continuing Resolution) amended the 1937 Act to permit the establishment of caps, or ceiling rents, on the income-based monthly total tenant payment that reflect the reasonable market value of the housing, but that are not less than the monthly costs: to operate the housing of the PHA; and to make a deposit to a replacement reserve (in the sole discretion of the PHA). The proposed rule would not amend HUD's Indian housing regulations. Further, this proposed rule would not apply to Section 8 assisted housing.

DATES: *Comments due date:* January 26, 1998.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Office of General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying during regular business hours (7:30 a.m.–5:30 p.m. Eastern Time) at the above address.

FOR FURTHER INFORMATION CONTACT: Linda Campbell, Director, Marketing and Leasing Management Division, Office of Public and Indian Housing, Room 4206, Department of Housing and Urban Development, 451 Seventh Street, SW Washington, DC 20410, telephone (202) 708–0744 (this is not a toll-free number). Hearing or speech-impaired individuals may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. *Total Tenant Payment*

Section 3(a)(1) of the U.S. Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act) establishes the monthly total tenant payment for tenants of public housing assisted under the 1937 Act as the highest of: (1) 30 percent of the family's monthly adjusted income; (2) 10 percent of the family's monthly income; or (3) if a family receives welfare assistance and the welfare assistance is subject to adjustment in accordance with actual housing costs, the portion of that assistance specifically designated for housing costs. Further, section 402(a) of the Balanced Budget Downpayment Act, I (Pub.L. 104–99, 110 Stat. 40, approved January 26, 1996) (also known as the Continuing Resolution), as amended by section 201(c) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 (Pub.L. 104–204, 110 Stat. 2874, approved September 26, 1996) requires that, notwithstanding section 3(a)(1) of the 1937 Act, each family assisted under the Public or Indian housing rental programs shall pay a monthly minimum rent of up to $50.

B. *Ceiling Rents Under Section 102 of the 1987 HCD Act*

Section 102 of the Housing and Community Development Act of 1987 (Pub.L. 100–242, 101 Stat. 1815, approved February 5, 1988) (1987 HCD Act) added a new section 3(a)(2) to the 1937 Act which allows the establishment of caps (''ceiling rents'') on the income-based monthly total tenant payment, as calculated under section 3(a)(1). Under section 102 of the 1987 HCD Act, the ceiling rents could not be greater than the income-based formula, and not less than the average monthly amount of debt service and operating expenses attributable to units of similar size in other housing projects owned and operated by the Public Housing Agency (PHA).

Ceiling rents are a useful tool in easing the rent burden on working families residing in public housing assisted under the 1937 Act. Working families are generally regarded as having positive effects on housing projects by providing leadership and acting as role models for other tenants. Higher income families are often the resident leaders who help to ensure that the units are well-maintained and drug-free. Working families also help create an economic and social mix that is desirable in preventing the isolation of the very poor in public housing projects. Without ceiling rents, these residents are often faced with the dilemma of leaving public housing or having total tenant payments that are above the market value of their units.

On March 15, 1989, HUD published a notice for public housing (54 FR 10733) announcing that it would consider applications from PHAs for waivers of the requirements of its regulations implementing section 3(a)(1) of the 1937 Act, so that PHAs could adopt ceiling rents for projects or dwelling units owned and operated by the PHAs.

C. Section 402(b) of the Continuing Resolution

Section 402(b) of the Continuing Resolution amended section 3(a)(2) of the 1937 Act. Specifically, the Continuing Resolution permits the establishment of ceiling rents that reflect the reasonable market value of the housing, but that are not less than the monthly costs: (1) to operate the housing of the PHA; and (2) to make a deposit to a replacement reserve (in the sole discretion of the PHA). A replacement reserve may be used for major expenditures, such as the acquisition of capitalized equipment and structural repairs. Section 402(b) of the Continuing Resolution does not mandate the establishment of a replacement reserve, but leaves the decision regarding the creation of such a reserve to each PHA.

Section 402(b)(2)(B) of the Continuing Resolution provides that pending HUD's issuance of final regulations implementing the changes to section 3(a)(2), a ''transition rule'' will be in effect. Under the ''transition rule,'' PHAs can implement ceiling rents, which must be not less than the monthly costs to operate the PHA's units and: (1) using the provisions of the prior law (i.e., section 3(a)(2) of the 1937 Act as it existed prior to the Continuing Resolution); (2) equal to Fair Market Rents (FMRs) for the area in which the unit is located; or (3) equal to the 95th percentile of total tenant payments paid for a unit of comparable size by tenants in the same housing development or a group of comparable developments totalling 50 units or more. HUD has issued nonregulatory guidance (Notice PIH 96–6, February 13, 1996) to assist those PHAs wishing to establish ceiling rents prior to the issuance of a final rule implementing the amendments made by the Continuing Resolution.

D. Effectiveness of Continuing Resolution Beyond Fiscal Year 1997

Section 402(f) of the Continuing Resolution limited the effectiveness of the ceiling rents and minimum rent

provisions to Fiscal Year (FY) 1996. Section 201(c)(2) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 (Pub. L. 104–204, 110 Stat. 2874, approved September 26, 1996) extended their effectiveness through FY 1997. Although section 402(b) of the Continuing Resolution will expire at the end of FY 1997 (September 30, 1997), HUD believes the burden of increased total tenant payments on many tenant families is significant enough to merit proceeding with the establishment of the necessary regulatory procedures for implementing ceiling rents. HUD is advocating the extension of the current statutory authority for ceiling rents.

II. This Proposed Rule

A. General

This proposed rule would amend HUD's regulations governing total tenant payments for its public housing programs (24 CFR part 5, subpart F) to implement the changes made by the Continuing Resolution to section 3(a)(2) of the 1937 Act. The proposed rule would not amend the corresponding requirements for HUD's Indian housing programs (24 CFR part 950). The Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. 104–330, 110 Stat. 4016; approved October 26, 1996) completely revises HUD's Indian housing programs. The regulations promulgated under the Native American Housing Assistance and Self-Determination Act of 1996 will address the applicability of the Continuing Resolution to HUD's Indian housing programs.

B. Applicability

This rule proposes to establish a new 24 CFR 5.614 which would describe the policies and procedures governing the establishment of ceiling rents. Section 5.614 would apply to public housing rental projects. It would not apply to: (1) homeownership programs (such as the Turnkey III program—24 CFR part 904); (2) applicants and tenants assisted under sections 10(c) and 23 of the 1937 Act as in effect before amendment by the Housing and Community Development Act of 1974 (42 U.S.C. 1410 and 1421b (1970 ed.)); or (3) the Section 8 Rental Voucher and Rental Certificate Programs.

C. Calculating Ceiling Rents

This proposed rule would permit a PHA to establish ceiling rents which reflect the reasonable market value of the housing and which are not less than the statutory minimum: the monthly cost to operate the housing of the PHA and to make a deposit to a replacement reserve (in the sole discretion of the PHA).

In determining the reasonable market value of the housing, a PHA may utilize: (1) the 95th percentile of the total tenant payments paid for a unit of comparable size by tenants in the same public housing development or group of comparable developments totalling 50 units or more or having at least 15 units of the same unit size (number of bedrooms) for which ceiling rents would be applied; (2) the FMRs for the area in which the unit is located; or (3) any other similar indicator of reasonable market value, such as a comparability study. The comparability study would have to analyze relevant factors for the community in which the unit is located, including unassisted rents for housing of similar age, location, condition, amenities, design, and size.

For purposes of determining the minimum ceiling rent, the average monthly operating expense would equal one-twelfth (1/12) of the sum of all annual operating expenses reported on the Statement of Operating Receipts and Expenditures (SORE) for the PHA's most recent fiscal year and the aggregate annual utility allowances for all tenant-paid utilities; minus the sum of excess utility charges and annual costs, if any, associated with units approved for deprogramming.

The sum of the operating expenses would be distributed over all of the PHA's public housing dwelling units, except those approved for deprogramming, whether or not ceiling rents are adopted for all units, with an adjustment only for unit size (number of bedrooms). Operating expenses would be allocated according to unit size with larger units receiving a larger portion of the operating expenses than smaller units.

Under this proposed rule, HUD would establish the two-bedroom unit as the base total tenant payment. The allocation of operating expenses for a particular unit will be calculated by multiplying the base total tenant payment by an adjustment factor. The adjustment factors will vary from 70 percent of the base total tenant payment for an efficiency to 182 percent of the base total tenant payment for a six-bedroom unit. HUD uses this method to adjust total tenant payments by unit size in establishing the FMRs (24 CFR 888.113(c).)

The Appendix to this proposed rule demonstrates how the statutory minimum is calculated in establishing ceiling rents.

D. Establishing Ceiling Rents

This proposed rule would permit a PHA to establish ceiling rents for: (1) all dwelling units in its inventory; (2) all of the units in one or more projects; or (3) some of its units in one or more projects, based on bedroom size. The rule would allow a PHA to implement, change the amount of, or revoke ceiling rents after giving reasonable notice to the affected tenants. If the amount of the ceiling rent is changed, the new amount would have to conform with the provisions of this rule.

Since section 402(b) of the Continuing Resolution authorizes, rather than mandates ceiling rents, a PHA has the discretion to decide whether to establish ceiling rents. If a PHA elects to establish ceiling rents, however, each tenant family admitted to or living in a dwelling unit subject to a ceiling rent is eligible for the ceiling rent. This proposed rule also provides that a family residing in a dwelling unit subject to a ceiling rent may not be charged an amount that exceeds the amount the family would pay under the income-based calculation of 24 CFR 5.613(a), as required by the Continuing Resolution. Therefore, a family residing in a dwelling unit with a ceiling rent will be charged the lesser of the income-based total tenant payment or the ceiling rent set for the unit; however, in all cases the family must pay the minimum rent established by the PHA.

A PHA must ensure that the ceiling rents it has established are not less than the statutory minimum (i.e., the monthly cost to operate the housing of the PHA and, in the sole discretion of the PHA, to make a deposit to any replacement reserve) at the time it prepares its Statement of Operating Receipts and Expenses each fiscal year, and must update the ceiling rents accordingly. PHAs are also reminded that in establishing ceiling rents, they must abide by Federal laws prohibiting discrimination on the basis of race, religion, sex, color, national origin, age, disability, and familial status.

The final rule may require that a PHA maintain records regarding its calculation and establishment of ceiling rents. Further, the final rule may require a PHA to notify HUD that it has established or revoked ceiling rents. HUD invites comment on what would be the least burdensome recordkeeping and notification methods

E. Continued Effectiveness of Existing Ceiling Rents

Section 102 of the 1987 HCD Act originally limited the effectiveness of ceiling rents for a period of 36 months.

This period was subsequently extended to 60 months by section 302 of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101–235; 103 Stat. 1987, approved December 15, 1989) (HUD Reform Act). Section 102 of the Housing and Community Development Act of 1992 (Pub. L. 102–550; 106 Stat. 3672, approved October 28, 1992) removed the 60 month limit and extended the ceiling rents in effect prior to the date of enactment of the HUD Reform Act without time limitation. Accordingly, this proposed rule would not impact the effectiveness of those ceiling rents that were approved by a HUD regulatory waiver under the March 15, 1989 **Federal Register** notice. These ceiling rents are valid indefinitely, as long as they cover current operating expenses and the PHA wants to have them. Further, HUD also considers any ceiling rents adopted under the transition rule and HUD Notice 96–6 as being valid for an indefinite period of time, as long as they cover current operating expenses and the PHA wants to have them (subject to the extension of the statutory authority for ceiling rents beyond September 30, 1997).

A PHA with HUD-approved ceiling rents under the March 15, 1989 **Federal Register** notice may opt to switch to PHA-adopted ceiling rents under the provisions of the transition rule (or later, under the provisions of HUD's final rule on ceiling rents). However, although ceiling rents adopted under the March 15, 1989 notice are valid for an indefinite period of time (so long as they cover current operating expenses and the PHA wants to have them), any ceiling rents adopted under the transition notice or HUD's final rule are valid only until September 30, 1997, unless extended by law.

III. Findings and Certifications

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, implementing section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection during business hours in the Office of the Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–0500.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism,* has determined that the policies contained in this rule have no Federalism implications, and that the policies are not subject to review under the Order. Specifically, this proposed rule would permit PHAs to adopt ceiling rents for public housing projects or dwelling units that are assisted under the 1937 Act. It will effect no changes in the current relationships between the Federal government, the States and their political subdivisions.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) has reviewed and approved this rule, and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. This proposed rule will have no adverse or disproportionate economic impact on small entities. Each PHA will make the decision whether to implement ceiling rents and is not expected to do so if ceiling rents will have a significant economic effect on the PHA. Furthermore, the procedures for administering ceiling rents should not entail significantly greater expense to the PHA than the PHA would normally incur in administering income-based rents.

Unfunded Mandates Reform Act

The Secretary has reviewed this rule before publication and by approving it certifies, in accordance with the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), that this rule does not impose a Federal mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

This proposed rule would not pose an environmental health risk or safety risk on children.

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *Regulatory Planning and Review.* OMB determined that this rule is a ''significant regulatory action,'' as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the proposed rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Room 10276, 451 Seventh Street, SW, Washington, DC 20410–0500.

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance Number for Public and Indian Housing is 14.850.

List of Subjects in 24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—Indians, Grant programs—low and moderate income housing, Indians, Individuals with disabilities, Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

Accordingly, 24 CFR part 5 would be amended as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

1. The authority citation for 24 CFR part 5 continues to read as follows:

Authority: 42 U.S.C. 3535(d), unless otherwise noted.

Subpart F—Income Limits, Annual Income, Adjusted Income, Rent, and Examinations for the Public Housing and Section 8 Programs

2. The authority citation for subpart F continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437f, 1437n, and 3535(d).

3. A new § 5.614 is added to read as follows:

§ 5.614 Ceiling rents for public housing.

(a) *Applicability.* This section applies to public housing rental projects. This section does not apply to:

(1) Homeownership programs, such as the Turnkey III program;

(2) Applicants and tenants assisted under sections 10(c) and 23 of the 1937 Act as in effect before amendment by the Housing and Community Development Act of 1974 (42 U.S.C. 1410 and 1421b (1970 ed.)); or

(3) Section 8 assisted housing.

(b) *Calculating ceiling rents.* (1) *General.* A PHA may establish caps on total tenant payments (as described in § 5.613) for the dwelling units described in § 5.614(c)(1) that reflect the

reasonable market value of the housing, but that are not less than:

(i) The average monthly amount of operating expenses attributed to units of similar size in public housing projects owned by the PHA; and

(ii) The monthly cost to make a deposit to a replacement reserve (in the sole discretion of the PHA).

(2) *Reasonable market value.* The reasonable market value of the housing is equal to:

(i) The 95th percentile of the total tenant payments paid for a unit of comparable size by tenants in the same public housing development or group of comparable developments totalling 50 units or more or having at least 15 units of the same unit size (number of bedrooms) for which ceiling rents would be applied;

(ii) The Fair Market Rents (FMRs) for the area in which the unit is located (See 24 CFR part 888); or

(iii) Any other similar indicator of reasonable market value utilized by the PHA, such as a comparability study.

(3) *Average monthly operating expenses.* The average monthly operating expenses is one-twelfth (1/12) of the sum of:

(i) All annual operating expenses reported on the Statement of Operating Receipts and Expenditures as of the end of the PHA's most recent fiscal year and the aggregate annual utility allowances for all tenant paid utilities; minus the sum of:

(ii) Excess utility charges and annual costs, if any, associated with units approved for deprogramming.

(4) *Distributing the average monthly amount of operating expenses.* The total average monthly amount of operating expenses must be distributed over all of the PHA's public housing dwelling units, except those approved for deprogramming, whether or not ceiling rents are proposed for all units, and adjusted only for unit size (i.e., number of bedrooms), in accordance with paragraph (b)(5) of this section.

(5) *Unit adjustment factors.* The adjustment for unit size is determined by using a percentage relationship based on the rent of a two-bedroom unit as an adjustment factor. Adjustment factors for all units are as follows:

(i) Zero-bedroom units (efficiencies)—0.70;

(ii) One-bedroom units—0.85;

(iii) Two-bedroom units—1.00;

(iv) Three-bedroom units—1.25;

(v) Four-bedroom units—1.40;

(vi) Five-bedroom units—1.61; and

(vii) Six-bedroom units—1.82.

(c) *Establishing ceiling rents.* (1) A PHA may establish ceiling rents for:

(i) All dwelling units in its inventory;

(ii) All of the units in one or more projects; or

(iii) Some of its units in one or more projects, based on bedroom size.

(2) A PHA may implement, change the amount of, or revoke ceiling rents after giving reasonable notice to the affected tenants. If the amount of the ceiling rent is changed, the new amount would have to conform with the provisions of this section.

(3) The total tenant payment of a family residing in a dwelling unit subject to a ceiling rent is the lesser of the income-based total tenant payment or the ceiling rent for such dwelling unit; however, the total tenant payment may not be lower than the minimum rent established by the PHA.

(4) A PHA must ensure that the ceiling rents it has established are not less than the statutory minimum (i.e., the monthly cost to operate the housing of the PHA and, in the sole discretion of the PHA, to make a deposit to any replacement reserve) at the time it prepares its Statement of Operating Receipts and Expenses each fiscal year, and must update the ceiling rents accordingly.

(5) In establishing ceiling rents, a PHA is reminded that it must abide by Federal laws prohibiting discrimination on the basis of race, religion, sex, color, national origin, age, disability, and familial status.

Date: August 22, 1997.

Kevin Emanuel Marchman,

Acting Assistant Secretary for Public and Indian Housing.

Appendix—to 24 CFR Part 5

Note: This appendix will not be codified in title 24 of the Code of Federal Regulations.

Example of Calculating the Statutory Minimum in Establishing Ceiling Rents

Step 1

1. Operating expenses (Line 620) from the Statement of Operating Receipts and Expenditures for the PHA's most recent fiscal year. _____ $190,000
2. Cost of utility allowances for tenant-paid utilities for the PHA's most recent fiscal year. _____ $30,000
3. Add line 1 and line 2. _____ $220,000
4. Excess utility charges (Line 070) from HUD–52599 for the PHA's most recent fiscal year. _____ $5,200
5. Costs associated with deprogramming units, if any, for the PHA's most recent fiscal year. _____ $0
6. Add line 4 and line 5. _____ $5,200
7. Subtract line 6 from line 3. _____ $214,800
8. Total average monthly operating expenses (line 7 divided by 12). _____ $17,900

Step 2

Number of units owned by PHA Times Adjustment Factor *

0-bedroom units 20 × 0.70	14
1-bedroom units 40 × 0.85	34
2-bedroom units 20 × 1.00	20
3-bedroom units 20 × 1.25	25
4-bedroom units 0 × 1.40	0
5-bedroom units 0 × 1.61	0
6-bedroom units 0 × 1.82	0
Total	93

* Whether or not a ceiling rent is proposed for these units.

Step 3

Calculate the two-bedroom minimum monthly rent:

1. Enter Line 8 from Step 1. _____ $17,900
2. Enter Total from Step 2. _____ 93
3. Calculate the 2-bedroom minimum monthly rent (line 1 divided by line 2) _____ $192.47
4. Calculate the minimum rent for other size units:

a. 0-bedroom (line 3 × .70)	$134.73
b. 1-bedroom (line 3 × .85)	$163.69
c. 3-bedroom (line 3 × 1.25)	$240.59
d. 4-bedroom (line 3 × 1.40)	N/A
e. 5-bedroom (line 3 × 1.61)	N/A
f. 6-bedroom (line 3 × 1.82)	N/A

[FR Doc. 97–30941 Filed 11–24–97; 8:45 am]

BILLING CODE 4210–33–P

Federal Register

Tuesday
November 25, 1997

Part IX

Department of Labor

Pension and Welfare Benefits Administration

29 CFR Part 2510

Amendment to the Definition of Plan Assets; Participant Contributions; Final Rule

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2510

RIN 1210–AA59

Final Rule Amending the Definition of Plan Assets; Participant Contributions

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a final rule amending the Department of Labor's regulation published in the **Federal Register** on August 7, 1996, that defines when participant contributions to a pension benefit plan become plan assets for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The amendment set forth in this notice harmonizes the Title I rules governing the definition of plan assets with the Internal Revenue Code (Code) rules governing the timing of deposits for Savings Incentive Match Plans for Employees (SIMPLE plans) that involve Individual Retirement Accounts (SIMPLE IRAs) and thereby simplifies compliance by small businesses.

EFFECTIVE DATE: This regulation is effective on November 25, 1997.

FOR FURTHER INFORMATION CONTACT: Rudy Nuissl, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC (202) 219–8671; or William W. Taylor, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC, (202) 219–9141. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: On March 27, 1997, the Department of Labor (the Department) published a notice of proposed rulemaking in the **Federal Register** at 62 FR 14760 (the ''proposal'') to amend a regulation which had been issued on August 7, 1996, at 61 FR 41220 (the ''1996 regulation'') defining when certain monies that a participant pays to, or has withheld by, an employer for contribution to a plan are ''plan assets'' for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the related prohibited transaction provisions of the Internal Revenue Code (the Code).[1] The purpose of the proposed amendment was to harmonize the 1996 regulation with the Code rules governing the timing of deposits for SIMPLE Plans that involve IRAs, in order to simplify compliance for small plans.

The 1996 Regulation

Section 2510.3–102(a) of the 1996 regulation sets forth a general rule which provides that the assets of a plan include amounts that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution to the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets. With respect to employee pension benefit plans covered by Title I of ERISA, section 2510.3–102(b) of the 1996 regulation further provides that in no event shall the date determined pursuant to section 2510.3–102(a) occur later than the 15th business day of the month following the month in which the participant contribution amounts are received by the employer or in which such amounts would otherwise have been payable to the participant in cash.

Except as provided in ERISA § 403(b), plan assets are required to be held in trust by one or more trustees.[2] ERISA § 403(a), 29 U.S.C. 1103(a). In addition, ERISA's fiduciary responsibility provisions apply to the management of plan assets. Among other things, these provisions make clear that the assets of a plan may not inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries, and defraying reasonable expenses of administering the plan. ERISA §§ 403–404, 29 U.S.C. 1103–1104. These provisions also prohibit a broad array of transactions involving plan assets. ERISA §§ 403–408, 29 U.S.C. 1106–1108. Employers who fail to transmit promptly participant contributions, and plan fiduciaries who fail to collect those amounts in a timely manner, will violate the requirement that plan assets be held in trust; in addition, such employers and fiduciaries may be engaging in prohibited transactions.

The Proposal

On August 20, 1996, the Small Business Job Protection Act of 1996 (the Act, Pub. L. 104–188) was signed into law. Section 1421 of the Act amended section 408(p) of the Code to provide that certain employers may establish SIMPLE plans. Under amended section 408(p) of the Code, an eligible employer may establish an employee pension benefit plan by making contributions to each eligible employee's SIMPLE IRA. Section 408(p)(5)(A)(i) of the Code provides that an employer must make salary reduction elective contributions to each eligible employee's SIMPLE IRA not later than the close of the 30-day period following the last day of the month with respect to which the contributions are to be made.[3] However, section 1421 of the Act did not amend Title I of ERISA, as it did the Code, with respect to when such participant contributions become assets of the plan.

In order to harmonize the Title I rules governing the definition of plan assets with section 408(p) of the Code, as amended by the Act, the Department proposed to amend 29 CFR 2510.3–102 to provide that salary reduction elective contributions under a SIMPLE plan that involves SIMPLE IRAs become plan assets as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event later than the 30th day following the month in which such amounts would otherwise have been payable to the participant in cash.

The Department explained in the preamble to the proposed rule that, while the amendment would preserve the general rule set forth in section 2510.3–102(a) of the 1996 regulation governing when participant contributions to employee pension benefit plans become plan assets, it would amend 29 CFR 2510.3–102(b) of the 1996 regulation by specifying that, for purposes of Title I of ERISA, the maximum period during which salary reduction elective contributions under a SIMPLE plan that involves SIMPLE IRAs may be treated as other than plan

[1] The Secretary of Labor has authority to issue regulations relating to most of section 4975 of the Internal Revenue Code pursuant to section 102 of Reorganization Plan No. 4 of 1978. 5 U.S.C. App. 165, 43 FR 47713, October 17, 1978. For the sake of clarity, the remainder of the preamble refers only to Title I of ERISA. However, these references apply to the corresponding provisions of section 4975 of the Code as well.

[2] ERISA § 403(b) contains a number of exceptions to the trust requirement for certain types of assets, including assets which consist of insurance contracts, and for certain types of plans. In addition, the Secretary has issued a technical release, T.R. 92–01, which provides that, with respect to certain welfare plans (e.g. cafeteria plans), the Department will not assert a violation of the trust or certain other reporting requirements in any enforcement proceeding, or assess a civil penalty for certain reporting violations involving such plans solely because of a failure to hold participant contributions in trust. 57 FR 23272 (June 2, 1992), 58 FR 45359 (Aug. 27, 1993).

[3] The Department has taken the position that contributions to an employee benefit plan made at the election of the participant, whether made pursuant to a salary reduction agreement or otherwise, constitute amounts paid to or withheld by an employer (i.e., participant contributions) within the scope of § 2510.3–102, without regard to the treatment of such contributions under the Internal Revenue Code. See 53 FR 29660 (Aug. 8, 1988).

assets is the same number of days as the period within which the employer is required to deposit withheld contributions under a SIMPLE plan that involves SIMPLE IRAs under section 408(p) of the Code, as amended by the Act. The Department further explained in the preamble to the proposed rule that, for all other pension plans covered under Title I of ERISA, including SIMPLE 401(k) plans that meet the requirements of section 401(k)(11) of the Code, the maximum period would remain 15 business days following the month in which participant contributions were received by the employer (for amounts that participants or beneficiaries pay to the employer) or would otherwise have been payable to the participants in cash (for amounts that the employer withholds from the participant's wages).

Discussion of the Comments and Final Rule

The Department received only one comment letter in response to the March 27, 1997, notice of proposed rulemaking. The commenter expressed concern with regard to the statement in the preamble to the proposal at 59 FR 14760 that ''employers who fail to transmit promptly participant contributions, and plan fiduciaries who fail to collect those amounts in a timely manner, will violate the requirement that plan assets be held in trust; in addition, such employers and fiduciaries may be engaging in prohibited transactions.'' Specifically, the commenter contended that this language is too broad and that financial institutions that are fiduciaries (by virtue of being investment advisers or otherwise) but have no control over when participant contributions are sent to them should not be subject to liability in connection with failures by employers to transmit participant contributions in a timely manner. The Department does not agree that the referenced preamble language should be modified or withdrawn. As noted at 61 FR 41226 in the preamble to the 1996 regulation, while it is the view of the Department that the plan sponsor (usually the employer) is primarily responsible for assuring that participant contributions are transmitted to the trustee in a timely manner, section 405(a)(3) of ERISA would impose a fiduciary duty on plan trustees in certain circumstances. See, for example, the guidance of ERISA's co-fiduciary liability provisions set forth in 29 CFR 2509.75–5. Similar considerations would be relevant with respect to plan fiduciaries who are not necessarily trustees and who do not have control over when participant contributions are sent to them but who are involved in the process of investing such contributions.

For the reasons set forth herein, the Department is by this notice adopting the amendment as proposed.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires each Federal agency to perform an initial regulatory flexibility analysis (IRFA) for all proposed rules unless the head of the agency certifies that the rule will not, if promulgated, have a significant impact on a substantial number of small entities. Small entities include small businesses, organizations, and governmental jurisdictions. The Department published an IRFA with regard to the proposed amendment in the March 27, 1997, notice of proposed rulemaking, in accordance with the requirements of 5 U.S.C. 603. In the IRFA, the Department explained the basis for its belief that the proposed rule would not have a significant economic effect on a substantial number of small entities. Because the final rule amending the 1996 regulation is identical to the proposal and because no comments were received from the public in response to the IRFA included in the March 27, 1997, notice of proposed rulemaking, the Department has made a final determination that this final rule will not have a significant effect on a substantial number of small entities.

Executive Order 12866

This regulatory action is not a ''significant rule'' within the meaning of Executive Order 12866 (58 FR 51735, Oct. 4, 1993) because it is not likely to result in: (1) An annual effect on the economy of $100 million or more, or an adverse effect on a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2) the creation of a serious inconsistency or interference with an action taken or planned by another agency; (3) a material alteration in the budgetary impacts of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raising of novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Paperwork Reduction Act

This final rule contains no information collection requirements which are subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3500 et seq.).

Unfunded Mandates Reform Act

For purposes of Title II of the Unfunded Mandates Reform Act of 1995, 5 U.S.C. 1531–1538, as well as Executive Order 12875, this final rule does not contain any federal mandate that may result in increased expenditures in either federal, State, local and tribal governments in the aggregate, or impose an annual burden exceeding $100 million on the private sector.

Congressional Review

The Department has determined that this final rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Statutory Authority

This final rule is adopted pursuant to the authority contained in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR 1978 Comp. 332 and under Secretary of Labor's Order No. 1–87, 52 FR 13139 (Apr. 21, 1987).

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Employee Retirement Income Security Act, Pensions, Plan assets.

Final Rule

For the reasons set out in the preamble, 29 CFR part 2510 is amended as forth below:

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

1. The authority for part 2510 continues to read as follows:

Authority: Secs. 3(2), 111(c), 505, Pub. L. 93–406, 88 Stat. 852, 894 (29 U.S.C. 1002(2), 1031, 1135) Secretary of Labor's Order No. 27–74, 1–86, 1–87, and Labor-Management Services Administration Order No. 2–9.

Section 2510.3–101 is also issued under sec. 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1978); 3 CFR 1978 Comp. 332, and sec. 11018(d) of Pub. L. 99–272, 100 Stat. 82.

Section 2510.3–102 is also issued under sec. 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1978); 3 CFR 1978 Comp. 332.

2. Paragraph (b) of § 2510.3–102, as published in the **Federal Register** on August 7, 1996 at 61 FR 41233, is revised to read as follows:

§ 2510.3–102 Definition of ''plan assets''—participant contributions.

* * * * *

(b) *Maximum time period for pension benefit plans.* (1) Except as provided in paragraph (b)(2), of this section, with respect to an employee pension benefit plan as defined in section 3(2) of ERISA, in no event shall the date determined pursuant to paragraph (a) of this section occur later than the 15th business day of the month following the month in which the participant contribution amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the 15th business day of the month following the month in which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages).

(2) With respect to a SIMPLE plan that involves SIMPLE IRAs (*i.e.*, Simple Retirement Accounts, as described in section 408(p) of the Internal Revenue Code), in no event shall the date determined pursuant to paragraph (a) of this section occur later than the 30th calendar day following the month in which the participant contribution amounts would otherwise have been payable to the participant in cash.

* * * * *

Signed at Washington, DC, this 20th day of November 1997.

Olena Berg,

Assistant Secretary for Pension and Welfare Benefits, U.S. Department of Labor.

[FR Doc. 97–30961 Filed 11–24–97; 8:45 am]

BILLING CODE 4510–29–M

Federal Register

Tuesday
November 25, 1997

Part X

The President

Proclamation 7053—National Farm-City Week, 1997

Proclamation 7054—National Family Week, 1997

Proclamation 7055—National Family Caregivers Week, 1997

Federal Register
Vol. 62, No. 227
Tuesday, November 25, 1997

Presidential Documents

Title 3—

The President

Proclamation 7053 of November 21, 1997

National Farm-City Week, 1997

By the President of the United States of America

A Proclamation

When Americans sit down to a meal each day, we sometimes take for granted the quality and variety of the food we eat. Our grocery stores, supermarkets, and restaurants offer us an enormous volume and selection of fruits, vegetables, meats, dairy products, and other food items, but we too often forget the hardworking men and women whose skill and effort put that food on our tables.

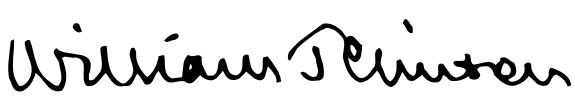
Strengthening our economy and providing food for people around the world, American agriculture is a leading global industry and a source of pride for our Nation. While producing an abundance of safe and affordable food and fiber, America's farmers and ranchers also provide a rich source of jobs in the United States. American agriculture employs more than 21 million people today, and agriculture-related industries continue to expand, pumping a trillion dollars into the American economy each year.

During the earliest days of our Nation, most of the crops farmers grew were used to feed their families or local consumers. Today, through advances in technology and marketing and through partnerships with agribusiness industries, research scientists, carriers, shippers, and retail distributors, America's farmers produce enough food and fiber to help meet the needs of people around the globe.

This week, as Americans gather with family and friends around the dinner table to give thanks for their many blessings, it is fitting that we count among those blessings the vital farm-city partnerships that have done so much to improve the quality of our lives. Rural and urban communities, working together to make the most of America's rich agricultural resources, continue to contribute immensely to the health and well-being of our people and to the vigor of our national economy.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim November 21 through November 27, 1997, as National Farm-City Week. I call upon citizens in urban and rural areas throughout the Nation to acknowledge and celebrate the achievements of all those who, working together, produce an abundance of agricultural products that strengthen and enrich our country.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of November, in the year of our Lord nineteen hundred and ninety-seven, and of the Independence of the United States of America the two hundred and twenty-second.



[FR Doc. 97–31218
Filed 11–24–97; 11:55 am]
Billing code 3195–01–P

Presidential Documents

Proclamation 7054 of November 21, 1997

National Family Week, 1997

By the President of the United States of America

A Proclamation

As we approach the end of the 21st century, our world is becoming increasingly complex, our society more mobile, and our pace of life more rapid. It is at times like this, full of dynamic challenge and change, that we need to remember the fundamental values and institutions that strengthen and uplift us. Among the most precious of these are our families.

Families come in many forms and sizes. They can number several generations or only one; they can include birth parents and stepparents, foster children and adopted children. Families are created by ties of blood or law, but they are sustained by ties of love and caring.

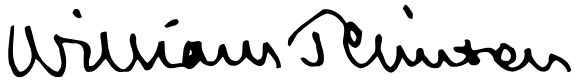
Few people in our lives will have so profound an effect on us as our family members. From the day we are born, the people who live with us, nurture us, and guide us play a crucial role in shaping the kind of men and women we become. They challenge us to look beyond ourselves and to respect and care for others. At their best, they help us to be our best. Families are the most basic—and the most important—unit of our society.

Recognizing this, we realize that many of our dreams for America begin with strong families. We want to be a caring people, and the lessons of tolerance, sharing, and compassion are best taught in the home. We want to be a peaceful people, and we look to families to teach our young people how to respect one another's differences and resolve disputes without resorting to violence. We want to be wise people, so we need families that value education and acknowledge the importance of lifelong learning.

Nothing is more important to our future than preserving and promoting strong, loving families. This week, as we gather with our own families to celebrate Thanksgiving, let us resolve to do all we can as individuals, and as a Nation to help families who are in need, to provide support and encouragement for troubled families, and to promote policies at the local, State, and Federal level that will help America's families to flourish.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim November 23 through November 29, 1997, as National Family Week. I call upon Federal, State, and local officials to honor American families with appropriate programs and activities; I encourage educators, community organizations, and religious leaders to celebrate the strength and values we draw from family relationships; and I urge all the people of the United States to reaffirm their family ties and to reach out to others in friendship and goodwill.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of November, in the year of our Lord nineteen hundred and ninety-seven, and of the Independence of the United States of America the two hundred and twenty-second.



[FR Doc. 97–31219
Filed 11–24–97; 11:55 am]
Billing code 3195–01–P

Presidential Documents

Proclamation 7055 of November 22, 1997

National Family Caregivers Week, 1997

By the President of the United States of America

A Proclamation

During this season of thanksgiving, when we reflect on the many blessings that have been bestowed on us as individuals and as a Nation, we are especially grateful for the love of our families and friends. One of the most profound ways in which that love is expressed is through the generous support provided by caregivers to those who need help if they are to remain in their homes and communities.

Caregivers reflect family and community life at its best. Thanks to their efforts, Americans with disabilities and a growing number of elderly Americans are able to stay in familiar surroundings and to maintain their dignity and independence. Caregivers not only enhance the quality of life for those they serve, but also greatly reduce the demands on the formal system of caregiving services in our Nation.

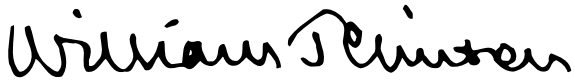
The statistics describing caregivers in America today tell an extraordinary story of generosity and compassion. Nearly one in four households is involved in caring for a relative or other loved one in need, providing a range of assistance from personal care to household help to transportation. Thirty percent of caregivers are caring for two or more people, and 64 percent hold down jobs while providing such care. Caregivers share not only their time, but also their resources, spending some $2 billion a month of their own assets for groceries, medicine, and other aid.

There is another side to caregiving in America today. Many older relatives now take care of children whose parents, for whatever reason, are no longer able to provide that care themselves. These generous men and women, who in many cases have already raised families and are looking forward to pursuing their own interests in retirement, embrace the challenges of parenting a new generation of young people. They give millions of our most vulnerable youth the opportunity to grow up in stable, loving homes.

These everyday heroes among us deserve our lasting gratitude and respect. This week, as we honor the many contributions that family caregivers make to the quality of our national life, let us resolve to work through our community, religious, social, business, and other organizations to offer programs and services that will provide caregivers the support and encouragement they need to carry out their vital responsibilities.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim November 23 through November 29, 1997, as National Family Caregivers Week. I call upon Government officials, businesses, communities, educators, volunteers, and all the people of the United States to acknowledge the invaluable efforts of caregivers this week and throughout the year.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of November, in the year of our Lord nineteen hundred and ninety-seven, and of the Independence of the United States of America the two hundred and twenty-second.



[FR Doc. 97–31220
Filed 11–24–97; 11:55 am]
Billing code 3195–01–P

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Federal Register

Vol. 62, No. 227

Tuesday, November 25, 1997

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FEDERAL REGISTER PAGES AND DATES, NOVEMBER

59275–59558 3
59599–59772 4
59773–59990 5
59991–60154 6
60155–60450 7
60451–60636 10
60637–60762 12
60763–60994 13
60995–61206 14
61207–61432 17
61433–61618 18
61619–61896 19
61897–62238 20
62239–62494 21
62495–62686 24
62687–62944 25

CFR PARTS AFFECTED DURING NOVEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
7046 59559
7047 59773
7048 60153
7049 60637
7050 60761
7051 62679
7052 62687
7053 62939
7054 62941
7055 62943

Executive Orders:
12938 (See notice of November 12, 1997) 60993
13067 59989

Administrative Orders:
Notice of November 12, 1997 60993

Memorandums:
November 4, 1997 60995

5 CFR

351 62495
430 62495
531 62495
1201 ..... 59991, 62689
1209 59992
2411 60997

Proposed Rules:
532 59300
630 59301
2411 61035

7 CFR

Ch. XIII 62827
1 61207
3 60451
29 60155
46 60998
301 ..... 60763, 61210, 61213, 61897, 62504
416 61898
457 61898
650 61215
729 62689
920 60156
922 60158
923 60158
924 60158
927 60999
931 62506
989 60764
1301 62810
1304 62810
1305 62810
1306 62810
1307 62810
1421 62689
1437 62693
1446 62689

Proposed Rules:
353 62699
1794 62527

8 CFR

204 60769
213a 60122
214 60122
299 60122

9 CFR

78 60639
92 60161
93 60161
94 ..... 60161, 61002, 61433
95 60161
96 60161
97 60161
98 60161
130 ..... 60161, 61005
310 61007
318 61619
331 61009
381 ..... 61007, 61009
417 61007

Proposed Rules:
94 61036
304 59304
308 59304
310 ..... 59304, 59305
319 62271
320 59304
327 59304
381 ..... 59304, 59305
416 59304
417 59304

10 CFR

13 59275
32 59275
50 59275
51 59275
55 59275
60 59275
72 59275
110 59275
431 59978

Proposed Rules:
2 60789

11 CFR

Proposed Rules:
100 60047

12 CFR

204 ..... 59775, 61620
225 60639
261 62508
271 61217
325 60161
566 62509
614 59779
619 59779

Proposed Rules:
3.....59944, 62234
204.....60671
208.....59944, 62234
225.....59944, 62234
325.....59944, 62234
567.....59944, 62234
792.....60799

13 CFR

Proposed Rules:
123.....62707

14 CFR

21.....62806
23.....61898
25.....59561, 60640
39 .....59277, 59280, 59565, 59566, 59780, 59781, 59993, 60161, 60451, 60642, 60643, 60644, 60645, 60772, 60773, 60775, 60777, 61010, 61222, 61223, 61434, 61436, 61438, 61704, 61706, 61908, 61910, 62239, 62513, 62514, 62708, 62721, 62723, 62725, 62726, 62728
71 .....59783, 60455, 60647, 60778, 60779, 61426, 61708, 61709, 61622, 61623, 62516, 62517
71.....60456, 62731
97 .....60647, 60651, 60653
255.....59784

Proposed Rules:
23.....61926
39 .....59310, 59826, 59827, 59829, 59830, 60047, 60049, 60183, 60184, 60186, 60188, 60189, 60191, 60193, 60807, 60808, 60810, 60813, 61703, 61704, 61706
61.....62486
71 .....60051, 60315, 60460, 60461, 60462, 60814, 61448, 61708, 61709, 61927
73.....60463
255.....59313, 60195

15 CFR

922.....62693

Proposed Rules:
303.....59829
960.....59317

16 CFR

403.....61225
1615.....60163
1616.....60163

Proposed Rules:
1700.....61928

17 CFR

15.....61226

Proposed Rules:
3.....59624
32.....59624
33.....59624
230.....61933, 62273
240.....61933, 62732
270.....61933
275.....61866, 61882
279.....61866

18 CFR

4.....59802
11.....61228
375.....59802

Proposed Rules:
284.....61459

19 CFR

101.....60164
122.....60164
133.....61231

Proposed Rules:
123.....61251
201.....61252

20 CFR

416.....59812
645.....61587

Proposed Rules:
404.....60672

21 CFR

16.....60614
173.....59281
510 .....60781, 61624, 61626, 62241
520 .....60656, 61624, 61626
522 .....61624, 62241, 62242
524.....61624
556.....62242
558 .....60657, 60781, 61011, 61624, 61627, 61911, 61912, 62243
809.....62243
864.....62243
900.....60614

Proposed Rules:
101.....61476
201.....61041
333.....61710
347.....61710
348.....61710
514.....59830
600.....59386
606.....59386

22 CFR

51.....62694

23 CFR

657.....62260

24 CFR

5.....61616
44.....61616
45.....61616
84.....61616
85.....61616
203.....60124
206.....60124
570.....62912

Proposed Rules:
5.....62928

25 CFR

Proposed Rules:
11.....61057

26 CFR

1.....60165
301.....62518
602.....62518

Proposed Rules:
1.....60196
301.....62538

27 CFR

47.....61232

28 CFR

50.....61628

29 CFR

2200.....61011
2204.....59568
2510.....62934
4001.....60426
4006.....60426
4022.....60426
4041.....60426
4044.....61012
4050.....60426

30 CFR

47.....60984
870.....60138
914.....59569
938.....60169
946.....60658

Proposed Rules:
50.....60673
75.....62732
707.....59639
870.....61585
874.....59639
918.....61712
920.....62273

31 CFR

1.....60781
357.....61912

Proposed Rules:
285.....62458

32 CFR

285.....61013
311.....59578
701.....61913

Proposed Rules:
199.....61058

33 CFR

100 .....60177, 60178, 61629
117.....62262
165.....60178, 61630

Proposed Rules:
100.....60197, 62733
110.....62734

34 CFR

668.....62830
701.....61428

Proposed Rules:
5b.....62670

36 CFR

4.....61631

Proposed Rules:
7.....60815
1190.....62275
1191.....62275

37 CFR

1.....61235
258.....62262, 62404

Proposed Rules:
2.....59640
3.....59640

38 CFR

17.....60783
21.....59579

Proposed Rules:
21.....60464, 62736

39 CFR

4.....61914
111.....60180, 61014

Proposed Rules:
111.....62540
232.....61481

40 CFR

52 .....59284, 59995, 59996, 60784, 61016, 61236, 61237, 61241, 61633, 61914, 62695
58.....59813
62.....60785
69.....61204
80.....59998, 60132
81 .....60001, 61237, 61241, 61916, 62739
123.....61170
180 .....60660, 61441, 61635, 61639, 61645
185.....61645
233.....61173
247.....60962
260.....59287
271 .....61175, 62262, 62521
300.....62521
721.....59579

Proposed Rules:
9.....61482
52 .....59331, 60052, 60318, 61483, 61942, 61948, 62740
58.....59840
60.....61065, 61483
61.....61483
62.....60817
63 .....60566, 60674, 61065, 61483
79.....60675
80.....60052
81.....62740
86.....61482
89.....61482
141 .....59388, 59486, 61953
142 .....59388, 59486, 61953
260.....59332
262.....62740
263.....62740
268.....60465
300 .....60058, 60199, 61715

41 CFR

105–60.....60014

42 CFR

424.....59818

43 CFR

11.....60457
1860.....59820
2760.....62266
3710.....59821

Proposed Rules:
4700.....60467

44 CFR

64 .....59290, 60662, 62267
65.....61247
67.....61248

Proposed Rules:
67.....61259
206.....62540, 62542

45 CFR

Proposed Rules:
270.....62124

271.....62124
272.....62124
273.....62124
274.....62124
275.....62124

46 CFR

383.....61647
586.....61648

Proposed Rules:

10.....60122, 61585
15.....60122
27.....60939

47 CFR

1 .....59822, 60025, 61447
5.....60664,
21.....60025, 60664
22.....60664
23.....60664
24.....60664
25.....59293, 61448
26.....60664
27.....60664
42.....59583
61.....59583
64.....60034
68.....61649
73 .....59605, 60664, 61692
74.....60025, 60664
76.....61016, 61034
78.....60664
80.....60664
87.....60664
90.....60664
95.....60664
97.....60664, 61447
101.....60664

Proposed Rules:

1.....60750
20.....60199
21.....60199, 60750
73 .....61719, 61719, 61720, 61721, 61953
74.....60199, 60750
76.....61065
90.....60199
36.....59842

48 CFR

1515.....60664
1552.....60664

Proposed Rules:

225.....59641
252.....59641

49 CFR

191.....61692
192 .....61692, 61695, 62543
195 .....61692, 61695, 62543
199.....59297
385.....60035
571.....62406
595.....62406

Proposed Rules:

350.....60817
701.....61070

50 CFR

17.....59605, 61916
622.....61700
660.....60788, 61700
679 .....59298, 59623, 60182, 60667, 61457

Proposed Rules:

17 .....59334, 60676, 61953, 62276
216.....61077
222.....59335
226.....62741
600.....59386
648.....60676, 62543
679 .....59844, 60060, 60677, 62545

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT NOVEMBER 25, 1997

AGRICULTURE DEPARTMENT

Commodity Credit Corporation

Loan and purchase programs:

Price support levels—

Peanuts; published 11-25-97

AGRICULTURE DEPARTMENT

Farm Service Agency

Farm marketing quotas, acreage allotments, and production adjustments:

Peanuts; published 11-25-97

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Ocean and coastal resource management:

Marine sanctuaries—

Monterey Bay National Marine Sanctuary, CA; published 11-25-97

ENVIRONMENTAL PROTECTION AGENCY

Air quality implementation plans; approval and promulgation; various States:

New Mexico; published 9-26-97

FEDERAL COMMUNICATIONS COMMISSION

Radio broadcasting:

Grandfathered short-spaced FM stations; published 9-26-97

LABOR DEPARTMENT

Pension and Welfare Benefits Administration

Employee Retirement Income Security Act:

Plan assets; participant contributions; published 11-25-97

MERIT SYSTEMS PROTECTION BOARD

Practices and procedures:

Exclusion from proceedings because of misconduct; judges' exercise of authority; published 11-25-97

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Acquisition regulations:

Alternative agricultural research and commercialization corporation; set-asides and preferences for products; comments due by 12-5-97; published 10-6-97

COMMERCE DEPARTMENT

International Trade Administration

Watches and watch movements:

Allocation of duty exemptions—

Virgin Islands, Guam, American Samoa, and Northern Mariana Islands; comments due by 12-5-97; published 11-5-97

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

Atlantic highly migratory species—

Meetings; comments due by 12-1-97; published 10-17-97

West Coast States and Western Pacific fisheries—

Pacific Coast groundfish; comments due by 12-4-97; published 11-19-97

COMMODITY FUTURES TRADING COMMISSION

Commodity option transactions:

Enumerated agricultural commodities; trade options; comments due by 12-4-97; published 11-4-97

DEFENSE DEPARTMENT

Acquisition regulations:

Employment prohibition on persons convicted of fraud or other DOD contract-related felonies; comments due by 12-1-97; published 10-2-97

DEFENSE DEPARTMENT

Defense Special Weapons Agency

Privacy Act; implementation; comments due by 12-1-97; published 10-3-97

ENERGY DEPARTMENT

Energy Efficiency and Renewable Energy Office

Consumer products; energy conservation program:

Water heaters—

Test procedures; comments due by 12-1-97; published 10-31-97

ENERGY DEPARTMENT

Hearings and Appeals Office, Energy Department

Hearings and appeals procedures:

Stay of decisions

Comment period extended; comments due by 12-2-97; published 10-3-97

ENVIRONMENTAL PROTECTION AGENCY

Air pollutants, hazardous; national emission standards:

Polyether polyols production; comments due by 12-3-97; published 11-12-97

Air programs:

Ambient air quality standards, national—

Regional haze standards for class I Federal areas (large national parks and wilderness areas); visibility protection; comments due by 12-5-97; published 10-23-97

Ambient air quality surveillance—

Lead ambient air quality monitoring; shift of focus from mobile sources to stationary point sources; comments due by 12-5-97; published 11-5-97

Lead ambient air quality monitoring; shift of focus from mobile sources to stationary point sources; comments due by 12-5-97; published 11-5-97

Air quality implementation plans; approval and promulgation; various States:

California; comments due by 12-3-97; published 11-3-97

Air quality planning purposes; designation of areas:

Texas; comments due by 12-1-97; published 10-6-97

Hazardous waste:

Project XL program; site-specific projects—

Molex, Inc., facility, Lincoln, NE; comments due by 12-3-97; published 11-3-97

Molex, Inc., facility, Lincoln, NE; comments due by 12-3-97; published 11-3-97

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:

2-propene-1-sulfonic acid, sodium salt, polymer with ethenol and ethenyl acetate, etc.; comments due by 12-1-97; published 10-1-97

Carfentrazone-ethyl; comments due by 12-1-97; published 9-30-97

Toxic substances:

Testing requirements—

Biphenyl, etc.; comments due by 12-1-97; published 9-26-97

FEDERAL COMMUNICATIONS COMMISSION

Common carrier services:

Commercial mobile radio services—

Calling party pays service option; comments due by 12-1-97; published 10-30-97

Federal-State Joint Board; jurisdictional separations reform and referral; comments due by 12-5-97; published 11-5-97

Frequency allocations and radio treaty matters:

Mobile satellite services—

455-456 and 459-460 MHz bands allocation; comments due by 12-1-97; published 10-31-97

Radio stations; table of assignments:

Arkansas; comments due by 12-1-97; published 10-22-97

New Hampshire; comments due by 12-1-97; published 10-22-97

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Animal drugs, feeds, and related products:

Food labeling—

Net quantity of contents; compliance; comments due by 12-1-97; published 10-6-97

Food for human consumption:

Dietary supplements containing ephedrine alkaloids; comments due by 12-2-97; published 9-18-97

Medical devices:

Obstetrical and gynecological devices—

In vitro fertilization devices and related assisted reproduction

procedures; reclassification; comments due by 12-3-97; published 9-4-97

INTERIOR DEPARTMENT
Land Management Bureau
Public administrative procedures:
Application procedures; comments due by 12-1-97; published 10-1-97

INTERIOR DEPARTMENT
Fish and Wildlife Service
Endangered and threatened species:
Findings on petitions, etc.—
Lesser prairie-chicken; comments due by 12-3-97; published 11-3-97
Recovery plans—
Grizzly bear; comments due by 12-1-97; published 10-28-97

INTERIOR DEPARTMENT
Watches and watch movements:
Allocation of duty exemptions—
Virgin Islands, Guam, American Samoa, and Northern Mariana Islands; comments due by 12-5-97; published 11-5-97

INTERIOR DEPARTMENT
Minerals Management Service
Outer Continental Shelf; oil, gas, and sulphur operations:
Oil and gas pipelines; designated locations where operating responsibility is transferred from producing operator to transporting operator; comments due by 12-1-97; published 10-2-97

JUSTICE DEPARTMENT
Drug Enforcement Administration
Records, reports, and exports of listed chemicals:
Iodine and hydrochloric gas (hydrogen chloride gas); comments due by 12-1-97; published 9-30-97

JUSTICE DEPARTMENT
Immigration and Naturalization Service
Immigration:
Aliens in U.S., proceedings to determine removability—
Deportation suspension, removal cancellation, and status adjustment cases; comments due by 12-1-97; published 10-3-97
Aliens—
Employment verification; acceptable documents designation; comments due by 12-1-97; published 9-30-97
Visa waiver pilot program—
Slovenia and Ireland; comments due by 12-1-97; published 9-30-97

JUSTICE DEPARTMENT
Executive Office for Immigration Review:
Permanent residence status adjustment applications; adjudication completion; comments due by 12-1-97; published 9-30-97

NUCLEAR REGULATORY COMMISSION
Byproduct material; domestic licensing:
Timepieces containing gaseous tritium light sources; distribution; comments due by 12-5-97; published 9-19-97
Production and utilization facilities; domestic licensing:
Nuclear power plants—
IEEE national consensus standard; comments due by 12-1-97; published 10-17-97

PERSONNEL MANAGEMENT OFFICE
Prevailing rate systems; comments due by 12-3-97; published 11-3-97
Retirement:
National Capital Revitalization and Self-Government Improvement Act—
Retirement, health, and life insurance coverage for District of Columbia employees; comments due by 12-1-97; published 9-30-97

POSTAL SERVICE
International Mail Manual:
Global package link (GPL) service—
Canada; comments due by 12-1-97; published 10-31-97

STATE DEPARTMENT
Visas; nonimmigrant documentation:
Visa waiver pilot program—
Probationary entry status eliminated, designation of Ireland as permanent participating country, and extention of program to Slovenia; comments due by 12-1-97; published 9-30-97

TRANSPORTATION DEPARTMENT
Coast Guard
Vessel identification system; comments due by 12-4-97; published 10-20-97

TRANSPORTATION DEPARTMENT
Federal Aviation Administration
Air traffic operating and flight rules:
Aircraft operator security; comments due by 12-1-97; published 8-1-97
Airport security; comments due by 12-1-97; published 8-1-97
Class B airspace; comments due by 12-1-97; published 10-30-97
Class E airspace; comments due by 12-1-97; published 10-17-97

TRANSPORTATION DEPARTMENT
Federal Transit Administration
Prohibited drug use and alcohol misuse prevention in transit operations:
Post-accident drug and alcohol test results taken by State and local law enforcement personnel; use by employers; comments due by 12-1-97; published 9-30-97

TREASURY DEPARTMENT
Thrift Supervision Office
Federal regulatory review:
Electronic operations; banking services delivered electronically; comments due by 12-2-97; published 10-3-97

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 ''P L U S'' (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/. Some laws may not yet be available.

H.R. 1086/P.L. 105–102

To codify without substantive change laws related to transportation and to improve the United States Code. (Nov. 20, 1997; 111 Stat. 2204)

H.R. 2813/P.L. 105–103

To waive time limitations specified by law in order to allow the Medal of Honor to be awarded to Robert R. Ingram of Jacksonville, Florida, for acts of valor while a Navy Hospital Corpsman in the Republic of Vietnam during the Vietnam conflict. (Nov. 20, 1997; 111 Stat. 2218)

H.J. Res. 91/P.L. 105–104

Apalachicola-Chattahoochee-Flint River Basin Compact (Nov. 20, 1997; 111 Stat. 2219)

H.J. Res. 92/P.L. 105–105

Alabama-Coosa-Tallapoossa River Basin Compact (Nov. 20, 1997; 111 Stat. 2233)

S. 669/P.L. 105–106

To provide for the acquisition of the Plains Railroad Depot at the Jimmy Carter National Historic Site. (Nov. 20, 1997; 111 Stat. 2247)

S. 858/P.L. 105–107

Intelligence Authorization Act for Fiscal Year 1998 (Nov. 20, 1997; 111 Stat. 2248)

S. 1231/P.L. 105–108

United States Fire Administration Authorization Act for Fiscal Years 1998 and 1999 (Nov. 20, 1997; 111 Stat. 2264)

S. 1347/P.L. 105–109

To permit the city of Cleveland, Ohio, to convey certain lands that the United States conveyed to the city. (Nov. 20, 1997; 111 Stat. 2268)

S. 1377/P.L. 105–110

To amend the Act incorporating the American Legion to make a technical correction. (Nov. 20, 1997; 111 Stat. 2270)

Last List November 24, 1997