12–3–97
Vol. 62 No. 232
Pages 63825–64130

federal register

Wednesday
December 3, 1997

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WASHINGTON, DC

WHEN: December 16, 1997 at 9:00 am.
WHERE: Office of the Federal Register
Conference Room
800 North Capitol Street, NW
Washington, DC
(3 blocks north of Union Station Metro)
RESERVATIONS: 202–523–4538

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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.

Rules and Regulations

Federal Register
Vol. 62, No. 232
Wednesday, December 3, 1997

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50 and 70

RIN 3150–AF87

Criticality Accident Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule with opportunity to comment.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations to provide light-water nuclear power reactor licensees with greater flexibility in meeting the requirement that licensees authorized to possess more than a small amount of special nuclear material (SNM) maintain a criticality monitoring system in each area where the material is handled, used, or stored. This action is taken as a result of the experience gained in processing and evaluating a number of exemption requests from power reactor licensees and NRC's safety assessments in response to these requests that concluded that the likelihood of criticality was negligible.

EFFECTIVE DATE: The final rule is effective February 17, 1998, unless significant adverse comments are received by January 2, 1998. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff.

Hand deliver comments to 11555 Rockville Pike, Maryland, between 7:30 am and 4:15 pm on Federal workdays.

Copies of any comments received may be examined at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC.

For information on submitting comments electronically, see the discussion under Electronic Access in the Supplementary Information section.

FOR FURTHER INFORMATION CONTACT: Stan Turel, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6234, e-mail spt@nrc.gov.

SUPPLEMENTARY INFORMATION:

Background

The Nuclear Regulatory Commission (NRC) is amending its regulations to provide persons licensed to construct or operate light-water nuclear power reactors with the option of either meeting the criticality accident requirements of paragraph (a) of 10 CFR 70.24 in handling and storage areas for SNM, or electing to comply with certain requirements that would be incorporated into 10 CFR Part 50. These are generally the requirements that the NRC has used to grant specific exemptions to the requirements of 10 CFR 70.24. In addition, the NRC is revising the current text of the section relating to seeking specific exemptions from regulations in 10 CFR 70.24(d) which provided that a licensee could seek an exemption to all or part of 10 CFR 70.24 for good cause because it is redundant to 10 CFR 70.14(a). A modified 10 CFR 70.24(d) is being added to provide that the requirements in paragraph (a) through (c) of 10 CFR Part 70.24 do not apply to holders of a construction permit or operating license for a nuclear power reactor issued pursuant to 10 CFR Part 50, or combined licenses issued under 10 CFR Part 52, if the holders comply with the requirements of 10 CFR 50.68 (b).

The Commission's regulations in 10 CFR 70.24 require that each licensee authorized to possess more than a small amount of SNM maintain a criticality monitoring system ''using gamma- or neutron-sensitive radiation detectors which will energize clearly audible alarm signals if accidental criticality occurs'' in each area in which such material is handled, used, or stored. The regulation also specifies sensitivity requirements for these monitors and details the training that licensees must conduct in connection with criticality monitor alarms. The purpose of this section is to ensure that if a criticality were to occur during the handling of SNM, personnel would be alerted and would take appropriate action.

Most nuclear power plant licensees were granted exemptions from 10 CFR 70.24 during the construction of their plants as part of the 10 CFR Part 70 license issued to permit the receipt of the initial core. Generally, these exemptions were not explicitly renewed when the 10 CFR Part 50 operating license, which now contained the combined Part 50 and Part 70 authority, was issued. The requirements in 10 CFR 70.24 prescribe the attributes required of the monitoring and alarm system. Compliance with these requirements may be unnecessary for commercial power reactors where the conditions which could lead to a criticality event are so unlikely that the probability of occurrence of an inadvertent criticality is negligible. The NRC anticipated that the regulation might be unnecessary for some licensees and included in 10 CFR 70.24(d) an invitation to any licensee to seek an exemption to the entire section or part of the section for good cause. A large number of exemption requests have been submitted by power reactor licensees and approved by the NRC based on safety assessments which concluded that the likelihood of criticality was negligible. Because of the experience gained in processing these exemption requests, the NRC concluded that the regulations should be amended to provide this flexibility without requiring licensees to go through the exemption process.

Discussion

At a commercial nuclear power plant, the reactor core, the fresh fuel delivery area, the fresh fuel storage area, the spent fuel pool, and the transit areas among these, are areas where amounts of SNM sufficient to cause a criticality exist. In addition, SNM may be found in laboratory and storage locations of these plants, but an inadvertent criticality is not considered credible in these areas due to the amount and configuration of the SNM. The SNM that could be assembled into a critical mass at a commercial nuclear power plant is only in the form of nuclear fuel. Nuclear power plant licensees have procedures and the plants have design features to prevent inadvertent criticality. The inadvertent criticality that 10 CFR 70.24 is intended to address could only occur during fuel-handling operations.

In contrast, at fuel fabrication facilities SNM is found and handled routinely in various configurations in addition to fuel. Although the handling of SNM at these facilities is controlled by procedures, the variety of forms of SNM and the frequency with which it is handled provides greater opportunity for an inadvertent criticality than at a nuclear power reactor.

At power reactor facilities with uranium fuel nominally enriched to no greater than five (5.0) percent by weight, the SNM in the fuel assemblies cannot go critical without both a critical configuration and the presence of a moderator. Further, the fresh fuel storage array and the spent fuel pool are in most cases designed to prevent inadvertent criticality, even in the presence of an optimal density of unborated moderator. Inadvertent criticality during fuel handling is precluded by limitations on the number of fuel assemblies permitted out of storage at the same time. In addition, General Design Criterion (GDC) 62 in Appendix A to 10 CFR Part 50 reinforces the prevention of criticality in fuel storage and handling through physical systems, processes, and safe geometrical configuration. Moreover, fuel handling at power reactor facilities occurs only under strict procedural control. Therefore, the NRC considers a fuel-handling accidental criticality at a commercial nuclear power plant to be extremely unlikely. The NRC believes the criticality monitoring requirements of 10 CFR 70.24 are unnecessary as long as design and administrative controls are maintained.

Because the NRC considers an inadvertent criticality to be unlikely at a nuclear power reactor, by this rulemaking it is granting nuclear power reactor licensees a choice—either meet the criticality monitoring requirements of 10 CFR 70.24 or in lieu of those criticality monitoring requirements meet certain criteria related to procedures, plant design, and fuel enrichment. These criteria are incorporated into section 50.68(b) of 10 CFR Part 50 by this direct final rule.

The three changes in the requirements are as follows:

(1) Section 50.68(a) provides that each holder of a construction permit or operating license for a nuclear power reactor issued under Part 50, or a combined license for a nuclear power reactor issued under Part 52 shall comply with either 10 CFR 70.24 or the seven requirements in section 50.68(b).

(2) Section 50.68(b) provides that each licensee as described in 50.68(a) shall comply with the seven listed requirements in lieu of maintaining a monitoring system capable of detecting a criticality as described in 10 CFR 70.24.

(3) The revised section 70.24(d) provides that the requirements in 10 CFR 70.24 (a) through (c) do not apply to holders of a construction permit or operating license for a nuclear power reactor issued pursuant to 10 CFR Part 50, or combined licenses issued under 10 CFR Part 52, if the holders comply with the requirements of paragraph (b) of 10 CFR 50.68.

Procedural Background

Because NRC considers these amendments to its rules to be noncontroversial and routine, public comment on these amendments is unnecessary. The amendments to the rules will become effective on February 17, 1998. However, if the NRC receives significant adverse comments on the companion proposal published concurrently in the proposed rules section of this **Federal Register** by January 2, 1998, then the NRC will publish a document that withdraws this action and will address the comments received in response to the amendments. Such comments will be addressed in a subsequent final rule. The NRC will not initiate a second comment period on this action.

Findings

Upon review of this rulemaking, that the changes and additions addressed by this rulemaking do not significantly affect the environmental cost-benefit balance that otherwise would justify the licensing of a light-water nuclear power reactor. The basis for this finding is that this rule is a codification of practices in place and does not significantly affect the cost-benefit balance for a light-water reactor.

Metric Policy

On October 7, 1992, the Commission published its final Policy Statement on Metrication. According to that policy, after January 7, 1993, all new regulations and major amendments to existing regulations were to be presented in dual units. The new addition and amendment to the regulations contain no units.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed regulation is the type of action described in categorical exclusion 10 CFR 51.22(c)(3). Therefore neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

Electronic Access

You may also provide comments via the NRC's interactive rulemaking web site 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 site, contact Ms. Carol Gallagher, (301) 415–6215; e-mail CAG@nrc.gov.

Paperwork Reduction Act Statement

This direct final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget, approval numbers 3150–0009 and 3150–0011.

Public Protection Notification

If an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

Regulatory Analysis

The structure of the current 10 CFR 70.24 is overly broad and places burden on a licensee to identify those areas or operations at its facility where the requirements are unnecessary, and to request an exemption if the licensee has sufficient reason to be relieved from the requirements. This existing structure has the potential to result in a large number of recurring exemption requests.

To relieve the burden on power reactor licensees of applying for, and the burden on the staff of granting recurring exemptions, this amendment permits power reactor facilities with nominal fuel enrichments no greater than 5 weight percent U–235 to be excluded from the scope of 10 CFR 70.24, provided they meet specific requirements being added to 10 CFR Part 50. This amendment is a result of the experience gained in processing and evaluating a number of exemption requests from power reactor licensees and NRC's safety assessments in response to these requests that concluded that the likelihood of criticality was negligible.

The only other viable option to this amendment is for the NRC to do nothing and allow the licensees to continue requesting exemptions. If nothing is done, the licensees will continue to incur the costs of submitting exemptions and NRC will incur the costs of reviewing them. Under this rule, an easing of burden on the part of

licensees results by their not having to request exemptions. Similarly, the NRC will not need to review and evaluate these exemption requests, resulting in an easing of burden for the NRC.

This rule is not a mandatory requirement, but an easing of burden action which results in regulatory efficiency. Also, the rule does not impose any additional costs on licensees, has no negative impact on the public health and safety, but will provide certain licensees savings, and savings to the NRC as well. Hence, the rule is shown to be cost beneficial.

The foregoing constitutes the regulatory analysis for this final rule.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. This rule affects only the licensees of nuclear power plants. These licensees, companies that are dominant in their service areas, do not fall within the scope of the definition of ''small entities'' set forth in the Regulatory Flexibility Act, 5 U.S.C. 601, or the size standards adopted by the NRC (10 CFR 2.810).

Backfit Analysis

The Commission has determined that a backfit analysis is not needed. This rule is a codification of practices in place by the NRC and is not a modification of or addition to systems, structures, components, or design of a facility; or the design approval or manufacturing license for a facility; or the procedures of organization required to design, construct or operate a facility; any of which may result from a new or amended provision in the Commission rules or the imposition of a regulatory staff position interpreting the Commission rules that is either new or different from a previously applicable NRC staff position (10 CFR Chapter I).

Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a ''major rule'' and has verified this determination with the Office of Information and Regulatory Affairs, Office of Management and Budget.

List of Subjects

10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire prevention, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 70

Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, the National Environmental Policy Act of 1969, as amended, and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR Parts 50 and 70.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for 10 CFR Part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended 1244, 1246, (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951, as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851). Sections 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. Section 50.68 is added under the center heading ''Issuance, Limitations, and Conditions of Licenses and Construction Permits'' to read as follows:

§ 50.68 Criticality accident requirements.

(a) Each holder of a construction permit or operating license for a nuclear power reactor issued under this part, or a combined license for a nuclear power reactor issued under part 52 of this chapter shall comply with either 10 CFR 70.24 of this chapter or requirements in paragraph (b).

(b) Each licensee shall comply with the following requirements in lieu of maintaining a monitoring system capable of detecting a criticality as described in 10 CFR 70.24:

(1) Plant procedures may not permit handling and transportation at any one time of more fuel assemblies than have been determined to be safely subcritical under the most adverse moderation conditions feasible by unborated water.

(2) The estimated ratio of neutron production to neutron absorption and leakage (k-effective) of the fresh fuel in the fresh fuel storage racks shall be calculated assuming the racks are loaded with fuel of the maximum permissible U–235 enrichment and flooded with pure water and must not exceed 0.95, at a 95 percent probability, 95 percent confidence level.

(3) If optimum moderation of fresh fuel in the fresh fuel storage racks occurs when the racks are assumed to be loaded with fuel of the maximum permissible U–235 enrichment and filled with low-density hydrogenous fluid, the k-effective corresponding to this optimum moderation must not exceed 0.98, at a 95 percent probability, 95 percent confidence level.

(4) If no credit for soluble boron is taken, the k-effective of the spent fuel storage racks loaded with fuel of the maximum permissible U–235 enrichment must not exceed 0.95, at a 95 percent probability, 95 percent confidence level, if flooded with pure water. If credit is taken for soluble boron, the k-effective of the spent fuel storage racks loaded with fuel of the maximum permissible U–235 enrichment must not exceed 0.95, at a 95 percent probability, 95 percent confidence level, if flooded with borated water, and the k-effective must remain below 1.0 (subcritical), at a 95 percent probability, 95 percent confidence level, if flooded with pure water.

(5) The quantity of SNM, other than nuclear fuel stored on site, is less than the quantity necessary for a critical mass.

(6) Radiation monitors, as required by GDC 63, are provided in storage and associated handling areas when fuel is present to detect excessive radiation levels and to initiate appropriate safety actions.

(7) The maximum nominal U–235 enrichment of the fresh fuel assemblies is limited to no greater than five (5.0) percent by weight.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

1. The authority citation for 10 CFR Part 70 continues to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282, 2297f); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246, (42 U.S.C. 5841, 5842, 5845, 5846).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93–377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234).

Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

2. In § 70.24, paragraph (d) is revised to read as follows:

§ 70.24 Criticality accident requirements.

* * * * *

(d) The requirements in paragraph (a) through (c) of this section do not apply to holders of a construction permit or operating license for a nuclear power reactor issued pursuant to part 50 of this chapter, or combined licenses issued under part 52 of this chapter, if the holders comply with the requirements of paragraph (b) of 10 CFR 50.68 of this chapter.

Dated at Rockville, Maryland this 14th day of November, 1997.

For the Nuclear Regulatory Commission.

L. Joseph Callan,

Executive Director for Operations.

[FR Doc. 97–31733 Filed 12–2–97; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 95–CE–99–AD; Amendment 39–10229; AD 96–24–17 R1]

RIN 2120–AA64

Airworthiness Directives; The Don Luscombe Aviation History Foundation Models 8, 8A, 8B, 8C, 8D, 8E, 8F, T–8F Airplanes; Correction

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document clarifies information in airworthiness directive (AD) 96–24–17, which applies to Don Luscombe Aviation History Foundation (Luscombe) Models 8, 8A, 8B, 8C, 8D, 8E, 8F, T–8F airplanes. AD 96–24–17 currently requires installing new inspection holes, modifying the wing tip fairings, and inspecting the wing spars for intergranular corrosion. The actions specified in AD 96–24–17 are intended to prevent wing spar failure from intergranular corrosion, which could result in structural failure of the wings and loss of control of the airplane. The AD was published with an Appendix providing an alternative method of compliance. Since issuance of AD 96–24–17, the FAA has re-examined the Appendix and has determined that clarification of certain inspections procedures is needed. This action clarifies the procedures specified in the Appendix of AD 96–24–17.

DATES: Effective January 27, 1997.

The incorporation by reference of the Don Luscombe Aviation History Foundation Recommendation #2, dated December 15, 1993, revised November 21, 1995, as listed in the regulations, was previously approved by the Director of the Federal Register as of January 27, 1997 (61 FR 66900, December 19, 1996).

FOR FURTHER INFORMATION CONTACT: Mr. Sol Davis, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, 3960 Paramount Boulevard, Lakewood, California 90712; telephone (562) 627–5233; facsimile (562) 627–5210.

SUPPLEMENTARY INFORMATION:

Discussion

On November 25, 1996, the FAA issued AD 96–24–17, Amendment 39–9841 (61 FR 66900, December 19, 1996), which applies to Luscombe Models 8, 8A, 8B, 8C, 8D, 8E, 8F, T–8F airplanes. This AD currently requires installing a total of four additional wing inspection holes in the metal covered wings to assist in conducting a more thorough examination of the wing spars, modifying the wing tip fairing so that it is removable, and providing easier access to the interior of the wings. A one time inspection for intergranular corrosion is required for both metal covered and fabric covered wings on these Luscombe 8 series airplanes in the areas of the front and rear spar extrusions of the wing installations.

Need for the Correction

AD 96–24–17 was published with an Appendix that provided an alternative method of compliance. The FAA has received reports that certain portions of the Appendix need clarification. Therefore, the FAA re-examined the procedures specified in the Appendix and has clarified items 2, 4, 6, 7, and 8, as well as clarifying a note regarding additional wing support.

Correction of Publication

This document clarifies the Appendix to AD 96–24-17, and adds the AD as an amendment to § 39.13 of the Federal Aviation Regulations (14 CFR 39.13).

The AD, as corrected, is being printed in its entirety for the convenience of affected operators. The effective date of the AD remains January 27, 1997, which is the effective date of the AD as originally issued.

Since this action only clarifies the Appendix instructions, it has no adverse economic impact and imposes no additional burden on any person. Therefore, the FAA has determined that prior notice and opportunity for public comment are unnecessary.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Correction

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 USC 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13, is amended by removing Airworthiness Directive (AD) 96–24–17, Amendment 39–9841 (61 FR

66900, December 19, 1996), and by adding a new AD to read as follows:

96–24–17 R1. The Don Luscombe Aviation History Foundation (formerly The Luscombe Aircraft Company): Amendment 39–10229; Docket No. 95–CE–99–AD. Revises AD 96–24–17, Amendment 39–9841.

Applicability: Models 8, 8A, 8B, 8C, 8D, 8E, 8F, and T–8F airplanes (all serial numbers), certificated in any category.

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

Compliance: Required within the next 12 calendar months after January 27, 1997 (the effective date of AD 96–24–17), unless already accomplished (compliance with AD 96–24–17).

To prevent wing spar failure from intergranular corrosion, which could result in structural failure of the wings and loss of control of the airplane, accomplish the following:

(a) For airplanes with metal covered wings:

(1) Install two additional wing inspection holes (left wing and right wing) using the Don Luscombe Aviation History Foundation (DLAHF) Kit #8007, Wing Access and Inspection Kit, in accordance with the Compliance Procedures section, paragraphs ''1B Metal Covered Wings.'', (a), (a1.) through (a9.), and (b.) of The Don Luscombe Aviation History Foundation Recommendation #2, dated December 15, 1993, revised November 21, 1995; and,

(2) Modify the wing tip fairing using the DLAHF Kit #8007, Wing Access and Inspection Kit, in accordance with the Compliance Procedures section, paragraphs ''1B Metal Covered Wings.'', (c), and (c1.) through (c5.) of The Don Luscombe Aviation History Foundation Recommendation #2, dated December 15, 1993, revised November 21, 1995.

(b) For all affected airplanes, inspect one time for intergranular corrosion in the areas of the front and rear spar extrusions of the wing installations and if corrosion is found, prior to further flight, replace the corroded part in accordance with the Compliance Procedures section, paragraph ''1A. Fabric Covered Wings.'' or paragraph ''2. Inspect'' of The Don Luscombe Aviation History Foundation Recommendation #2, dated December 15, 1993, revised November 21, 1995, whichever paragraph is applicable to the wing construction of the airplane.

(c) For airplanes with metal covered wings, an alternative method of compliance for the required modification in paragraphs (a)(1) and (a)(2) of this AD can be accomplished in accordance with the procedures contained in the Appendix to this AD, unless already accomplished (compliance with AD 96–24–17).

Note 2: Although not required by this AD, the FAA recommends inspection of the spars for other forms of corrosion which may be a result of nest residue from rodent, bird, or insect infestation within the cavity of the wing. Advisory Circular 43–4A, Corrosion Control for Aircraft, dated July 25, 1991, contains the recommended maintenance procedures for treatment of such corrosion.

(d) 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.

(e) An alternative method of compliance (AMOC) or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Los Angeles Aircraft Certification Office, 3960 Paramount Blvd., Lakewood, California, 90712. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles Aircraft Certification Office. AMOC's approved in accordance with AD 96–24–17, are considered approved as AMOC's with this AD, including:

(1) DLAHF Service Recommendation #2, dated December 15, 1993, Revised: September 9, 1997, is an AMOC for the wing modifications, wing-tip modifications, corrosion inspection and replacement requirements, and general inspection/modification requirements of paragraphs (a)(1), (a)(2), (b), and (f) of this AD, respectively.

(2) J. Norris Luscombe Service Recommendation #97–1, Revision dated September 10, 1997, is an AMOC for the alternative inspection procedures in the Appendix to this AD.

(3) DLAHF Service Recommendation #7, dated October 23, 1997 (no revision), is an AMOC for the wing modifications, wing-tip modification, corrosion inspection and replacement requirements, and general inspection/modification requirements of paragraphs (a)(1), (a)(2), (b), and (f) of this AD, respectively.

Note 3: Information concerning the existence of AMOC's with this AD, if any, may be obtained from the Los Angeles Aircraft Certification Office.

(f) The inspections and modifications required by this AD shall be done in accordance with The Don Luscombe Aviation History Foundation Recommendation #2, dated December 15, 1993, REVISED November 21, 1995. This incorporation by reference was previously approved by the Director of the Federal Register as of January 27, 1997 (61 FR 66900, December 19, 1996). Copies may be obtained from The Don Luscombe Aviation History Foundation, P.O. Box 63581, Phoenix, Arizona 85082. Copies may be inspected at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(g) This amendment (39–10229) becomes effective on January 27, 1997.

Appendix to AD 96–24–17 R1

I. Alternative Inspection Procedures for luscombe Model 8, 8A, 8B, 8C, 8D, 8E, 8F, T–8F Airplanes That Have Not Accomplished the Inspection in Accordance With the Procedures in the Don Luscombe Aviation History Foundation Recommendation #2, Dated December 15, 1993; Revised November 21, 1995

1. Remove ALL existing wing root fairings, wing inspection hole covers, and wing strut cover plates on both the right and left wing.

2. Loosen the rear wing spar root attach bolts on both the right and left wings (one each wing) to permit a small wing angulation.

3. Perform a visual inspection of the extruded rear spar aft face of the left and right wing.

4. Inspect the face of the aft rear spar from the root to the spliced sheet metal tip spar at the wing root fairing location.

Note: In the location under the forward spars, support both wings at normal height by any stable means, such as a ladder and padded lashed block. This will support the wing as the wing strut is removed. Avoid excess vertical angulation of the wing as this may stress the wing root attach point.

5. To permit removal of the wing strut, unbolt the wing strut and remove the strut carefully.

6. Using suitable light and the access gained by the wing strut hole, visually inspect the front of the rear spar and the rear of the front spar for abnormal bulges or erupted spar surfaces. (See also Note 2 in the body of AD 96–24–17 R1).

7. Remove the wing tip fairing by drilling out the rivets (using a #30 drill or smaller), and inspect the spars for abnormal bulges or erupted spar surfaces in the ''U channel attach area'' of each spar, and the outer lengths to the splices of the sheet metal spar extrusions. (See Note 2 in the body of AD 96–24–17 R1).

Note: Inspection of the front of the front spar may be performed by using the existing inspection holes and a ''light trolley'' on the upper aileron cable. The light trolley is made from a standard clear 110 volt bathroom night light connected to a candelabra socket lamp extension cord. Attach the light trolley to the upper aileron cable with a tie wrap, connect a wire of suitable length to the tie wrap and use this as a means to move the light along the face of the spar.

8. Replace rivets through the skin and front/rear spars with AN426 flush rivets to secure former, spar and skin. Install at least 6 rivnuts (3 on top/3 on bottom) through the skin and former. Reattach wing tip fairings with #8/32 rivnuts or #8/32 × 1/2 machine screws, through the fairing, skin, and formers.

9. Reassemble the wing strut on inspected wing, protecting the root joint by avoiding excess vertical deflection. Check the lock nuts for wear and replace as necessary.

Torque the strut ends and wing root bolts using adequate torque (do not over torque the attach fittings).

10. If evidence of intergranular corrosion is detected, remove and replace the corroded part with an airworthy part.

11. Upon completion of the inspection, replace the wing root fairings, wing inspection hole covers and wing strut covers.

Issued in Kansas City, Missouri on November 25, 1997.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–31680 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–CE–22–AD; Amendment 39–10225; AD 97–25–02]

RIN 2120–AA64

Airworthiness Directives; Mitsubishi Heavy Industries MU–2B Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to all Mitsubishi Heavy Industry (Mitsubishi) MU–2B series airplanes. This AD requires amending the Limitations Section of the airplane flight manual (AFM) to prohibit the positioning of the power levers below the flight idle stop while the airplane is in flight. This AFM amendment will include a statement of consequences if the limitation is not followed. This AD results from numerous incidents and five documented accidents involving airplanes equipped with turboprop engines where the propeller beta was improperly utilized during flight. The actions specified by this AD are intended to prevent loss of airplane control or engine overspeed with consequent loss of engine power caused by the power levers being positioned below the flight idle stop while the airplane is in flight.

EFFECTIVE DATE: January 21, 1998.

ADDRESSES: Information related to this AD may be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–CE–22–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: William Schinstock, Aerospace Engineer, Wichita Aircraft Certification Office, FAA, 1801 Airport Road, Wichita, Kansas 67209; telephone (316) 946–4162; facsimile (316) 946–4407.

SUPPLEMENTARY INFORMATION:

Events Leading to the Issuance of This AD

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all Mitsubishi Heavy Industry (Mitsubishi) MU–2B series airplanes was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on July 2, 1997 (62 FR 35696).

The NPRM proposed to require amending the Limitations Section of the AFM to prohibit the positioning of the power levers below the flight idle stop while the airplane is in flight, including a statement of consequences if the limitation is not followed. This AFM amendment shall consist of the following language:

> Positioning of power levers below the flight idle stop while the airplane is in flight is prohibited. Such positioning may lead to loss of airplane control or may result in an overspeed condition and consequent loss of engine power.

The NPRM was the result of numerous incidents and five documented accidents involving airplanes equipped with turboprop engines where the propeller beta was improperly utilized during flight.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the two comments received from the manufacturer, Mitsubishi Heavy Industries, Inc.

Comment Issue No. 1: Change the ''Explanation of the Provisions of the Proposed AD'' Section of the NPRM

Mitsubishi explains that the statement ''Since an unsafe condition has been identified that could exist or develop on other Mitsubishi MU–2B airplanes of the same type design,'' is misleading in that it leads the reader to believe that there is a design flaw with the MU–2B series airplanes. Mitsubishi includes proposed language to replace this phrase.

The FAA concurs that this statement could be misleading. This language is not repeated in the final rule so therefore no change is needed at this time. The FAA will keep Mitsubishi's comments in mind while drafting future AD's. No changes have been made to the final rule as a result of this comment.

Comment Issue No. 2: The Model MU–2B–26A Excluded From the NPRM

Mitsubishi states that the Model MU–2B–26A airplanes are excluded from the NPRM, and asks if this was an oversight on the FAA's part. Mitsubishi feels that these airplanes should be included in the AD.

Mitsubishi is correct in assuming that excluding the Model MU–2B–26A airplanes from the NPRM was an oversight. To add these airplanes in this rulemaking action would require the FAA to reopen the comment period and delay final rule action for all of the MU–2B series airplanes. The FAA will address the Model MU–2B–26A airplanes in a future rulemaking action. No changes have been made to the final rule as a result of this comment.

The FAA's Determination

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

Compliance Time of This AD

The FAA has determined that the compliance time of this AD should be specified in calendar time instead of hours time-in-service. While the condition addressed by this AD is unsafe while the airplane is in flight, the condition is not a result of repetitive airplane operation; the potential of the unsafe condition occurring is the same on the first flight as it is for subsequent flights. The compliance time of ''30 days after the effective date of this AD'' will not inadvertently ground airplanes and would assure that all owners/operators of the affected airplanes accomplish this AD in a reasonable time period.

Cost Impact

The FAA estimates that 437 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 1 workhour per airplane to incorporate the required AFM amendment, and that the average labor rate is approximately $60 an hour. Since an owner/operator who holds at least a private pilot's certificate can accomplish this AD, as authorized by sections 43.7 and 43.9 of the Federal Aviation Regulations (14 CFR 43.7 and 43.9), the only cost impact upon the public is the time it will take the affected airplane owner/operators to amend the AFM.

Regulatory Impact

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

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

97–25–02 Mitsubishi Heavy Industries: Amendment 39–10225; Docket No. 97–CE–22–AD.

Applicability: Models MU–2B, MU–2B–10, MU–2B–15, MU–2B–20, MU–2B–25, MU–2B–26, MU–2B–30, MU–2B–35, MU–2B–36, MU–2B–36A, MU–2B–40, and MU–2B–60 airplanes, all serial numbers, certificated in any category.

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

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

To prevent loss of airplane control or engine overspeed with consequent loss of engine power caused by the power levers being positioned below the flight idle stop while the airplane is in flight, accomplish the following:

(a) Amend the Limitations Section of the airplane flight manual (AFM) by inserting the following language:

Positioning of power levers below the flight idle stop while the airplane is in flight is prohibited. Such positioning may lead to loss of airplane control or may result in an overspeed condition and consequent loss of engine power.

(b) This action may be accomplished by incorporating a copy of this AD into the Limitations Section of the AFM.

(c) Amending the AFM, as required by this AD, may be performed by the owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7), and must be entered into the aircraft records showing compliance with this AD in accordance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).

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

(e) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Wichita Aircraft Certification Office (ACO), FAA, 1801 Airport Road, Wichita, Kansas. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Wichita ACO.

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

(f) Information related to this AD may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(g) This amendment (39–10225) becomes effective on January 21, 1998.

Issued in Kansas City, Missouri, on November 25, 1997.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–31675 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–CE–33–AD; Amendment 39–10224; AD 97–25–01]

RIN 2120–AA64

Airworthiness Directives; Raytheon Aircraft Company 58, 60, 90, 100, 200, and 300 Series and Model 2000 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to all Raytheon Aircraft Company (Raytheon) 58, 60, 90, 100, 200, and 300 series and Model 2000 airplanes (formerly referred to as Beech 58, 60, 90, 100, 200, and 300 series and Beech Model 2000 airplanes). This AD requires replacing certain AlliedSignal Aerospace outflow/safety valves in the pressurization system with new or serviceable valves. The AD results from a report of cracking and consequent failure of the affected outflow safety valves in the pressurization system. Investigation has revealed problems during the manufacturing process of certain AlliedSignal outflow/safety valves. The actions specified by this AD are intended to prevent outflow/safety valve cracking and consequent failure, which could result in rapid decompression of the airplane.

EFFECTIVE DATE: January 11, 1998.

ADDRESSES: Service information that applies to the proposed AD may be obtained from AlliedSignal Aerospace, Technical Publications, Department 65–70, P.O. Box 52170, Phoenix, Arizona 85072–2170. This information also may be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–CE–33–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: Michael D. Imbler, Aerospace Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946–4147; facsimile (316) 946–4407.

SUPPLEMENTARY INFORMATION:

Events Leading to the Issuance of This AD

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would

apply to all Raytheon 58, 60, 90, 100, 200, and 300 series and Model 2000 airplanes was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on August 4, 1997 (62 FR 41901). The NPRM proposed to require replacing any of the following AlliedSignal outflow/safety valves with new or serviceable valves:

Valve model	Valve serial numbers	Airplane models installed in
103570–26	80–223, 80–225 through 80–227, 80–229, and 80–230	2000.
103598–2	16–808, 39–2434, 45–747, 87–1600, and 116–1238	60(A), C90, and E90.
103598–15	128–11	58P.
103648–1	11–4913 through 11–4916, 12–3832, 20–3006, 22–4950, 12–3912, 30–3076, 39–2412, 41–4918, 41–4919, 61–3300, 101–4920, 101–4922 through 101–4924, 101–4926 through 101–4931, 101–4933, 101–4935, 101–4936, 101–4938, 101–4940, 101–4941, 121–3683, 121–4942, 129–2904, and 129–2920.	60, 90, A90, B90, C90, E90, 100, A100, and B100.
103648–3	21–1827, 71–1828, 71–1829, and 120–1823 through 101–1826	58P.
103648–4	10–4664 through 10–4667, 11–223, 11–3093, 11–3161, 11–4717 through 11–4721, 12–795, 12–3641, 12–4760, 15–4368, 21–3182, 21–3208, 21–4722 through 21–4728, 21–4730, 21–4732, 22–3688, 22–3706, 22–3733, 22–3736, 24–4232, 24–4241, 24–4252, 24–4255, 27–4498, 32–3756, 32–3777, 32–4761, 32–4762, 37–1087, 37–1113, 38–2417, 41–3227, 41–3237, 41–3261, 41–3274, 41–4733, 41–4734, 42–1475, 42–3830, 42–3838, 42–3840, 42–3850, 42–3851, 42–3877, 42–3882, 42–3883, 42–3890, 48–1557, 49–181, 50–2804, 51–4735, 51–4736, 59–2090, 60–2896, 61–3301, 61–4737, 61–4738, 62–3907, 62–3968, 62–3981, 62–2155, 70–2960, 71–4739, 71–4740, 72–3988, 72–3991, 72–3999, 74–4288, 74–4289, 74–4293, 74–4296, 76–4441, 77–4556, 77–4567, 79–2189, 79–2218, 79–2223, 81–3415, 87–1197, 87–1585, 89–2288, 95–4404, 99–2358, 99–2365, 99–2369, 99–2385, 99–2403, 99–2430, 104–4336, 107–1297, 110–3033, 111–3462, 111–3482, 111–3515, 111–4755, 116–4468, 116–4470, 119–2507, 119–2520, 120–3043, 120–3048, 120–3057, 120–4687 through 120–4692, 121–3562, 126–4490, 128–1776, and 129–4639.	200.
103648–5	10–325, 12–760, 12–799, 20–236, 21–1734, 21–1741 through 21–1744, 21–1746, 40–365, 21–1762, 41–1763, 60–243, 61–605, 77–1590, 90–461, 100–1712 through 100–1718, 100–1720 through 100–1726, 100–1728 through 100–1731, 105–149, 105–285, 109–1613, 109–1620, 116–1488, 121–1764, 126–1502, and 126–1511.	C90–1, C90A, and F90.
103648–6	101–1830, 101–1831, and 110–1822.	58P and 90.
103648–7	11–208, 14–1206, 17–2204, 21–2817, 21–2818, 21–2827, 21–2828, 22–2832, 23–1030, 23–1058, 24–1211, 24–1232, 25–1634, 30–2719, 31–346, 42–843, 51–397, 51–398, 51–409, 54–1253, 74–1320, 77–2349, 86–2136, 103–1129, 110–1171, 112–961, 112–1000, 113–1172, 113–1192, 114–1538, 118–2569, 119–2607, 119–2614, 101–2796 through 100–2806, and 100–2808 through 100–2815.	B200 and 300.
103648–13	12–410, 12–464, 12–465, and 70–386 through 70–400	300 and B300.

The NPRM resulted from a report of cracking and consequent failure of the affected outflow safety valves in the pressurization system. Investigation has revealed problems during the manufacturing process of certain AlliedSignal outflow/safety valves.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the one comment received on the proposal. No comments have been received regarding the FAA's estimate of the cost impact upon the public.

Comment Disposition

Raytheon states that the FAA made the following typographical errors in the Applicability section of the NPRM:

—Model B300 airplane serial numbers were referenced as F1–1 through F1–72 instead of FL–1 through FL–72; and

—Model 200T airplane serial numbers were referenced as B–1 through BT–32 instead of BT–1 through BT–32.

Raytheon requests that the FAA include the correct serial number designations for these airplanes in the final rule.

The FAA concurs with the commenter. The FAA inadvertently referenced the wrong serial numbers for the Models 200T and B300 airplanes. The final rule will reflect the correct serial number designations for these airplanes.

Similar Actions Required on the Affected Airplanes

On August 12, 1996, the FAA issued AD 96–17–10, Amendment 39–9719 (61 FR 42996, August 20, 1996), which requires replacing the outflow/safety valves with serviceable valves on certain Raytheon Model 400, 400A, MU–300–10, and 2000 airplanes, and 200, B200, 300, and B300 series airplanes. The FAA inadvertently included the Raytheon 200, B200, 300, and B300 series and Model 2000 airplanes in the applicability of AD 96–17–10. These airplanes are certificated under part 23 of the Federal Aviation Regulations (14 CFR part 23), and the FAA has determined that these airplanes should be addressed in this AD along with certain other Raytheon airplanes certificated under 14 CFR part 23. The Raytheon Models 400, 400A, and MU–300–10 airplanes are certificated under part 25 of the Federal Aviation Regulations (14 CFR part 25). The FAA is revising AD 96–17–10 in another action to retain the requirements for the airplanes certificated under 14 CFR part 25.

Compliance Time of This AD

The FAA has determined that an interval of 4 months is an appropriate compliance time to address the identified unsafe condition in a timely manner. This compliance time was deemed appropriate after considering the safety implications, the average utilization rate of the affected fleet, and the availability of the replacement parts. In addition, this compliance time will coincide with the compliance time originally included in AD 96–17–10 of 18 months after the effective date (effective date: September 24, 1996 plus 18 months = March 24, 1998). The 4-month compliance time of this AD will coincide with the compliance time included in AD 96–17–10. Both actions will be required around March 1998.

Cost Impact

The FAA estimates that 2,386 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 12 workhours per airplane to accomplish the required action, and that the average labor rate is approximately $60 an hour. AlliedSignal will provide parts at no cost to the owner/operator. Based on these figures, the total cost impact of this AD on US operators is estimated to be $1,717,920, or $720 per airplane. The FAA knows of no affected airplane owner/operator that has already accomplished the required action.

Regulatory Impact

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

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

97–25–01 Raytheon Aircraft Company: Amendment 39–10224; Docket No. 97–CE–33–AD.

Applicability: 58, 60, 90, 100, 200, and 300 series and Model 2000 airplanes (all serial numbers), certificated in any category. The following charts present airplane models and serial numbers that are equipped with AlliedSignal Aerospace outflow safety valves as referenced in either AlliedSignal Aerospace Service Bulletin 103570–21–4012, Revision 1, dated May 30, 1995; Service Bulletin 103648–21–4022, Revision 1, dated May 30, 1995; or Service Bulletin 103598–21–4024, Revision 1, dated May 30, 1995.

—The airplanes presented in the charts are affected by paragraph (a) of this AD.

—All airplanes are affected by paragraph (b) of this AD.

AIRPLANE MODELS AND SERIAL NUMBERS THAT ARE EQUIPPED WITH ALLIEDSIGNAL OUTFLOW VALVES

Models	Serial numbers
58P and 58PA	TJ–3 through TJ–497.
60 and A60	P–3 through P–246 with Kit No. 60–5024–1 S incorporated.
B60	P–247 through P–307 with Kit No. 60–5024–3 S incorporated.
B60	P–308 through P–596.
65–90, A90, B90, C90, and C90A	LJ–1 through LJ–1302.
E90	LW–1 through LW–347.
F90	LA–2 through LA–236.
100 and A100	B–1 through B–94, B–100 through B–204, and B–206 through B–247.
B100	BE–1 through BE–137.
200 and B200	BB–2, and BB–6 through BB–1419.
200C and B200C	BL–1 through BL–23, BL–25 through BL–57, and BL–61 through BL–137.
200T	BT–1 through BT–32.
200CT and B200CT	BN–1 through BN–4.
300	FA–1 through FA–220, and FF–1 through FF–19.
B300	FL–1 through FL–72.
B300C	FM–1, FM–2, and FM–3.
2000	NC–4 through NC–53.
H90 (T44A)	LL–1 through LL–61.
A100 (U–21F)	B–95 through B–99.
A100–1 (U21J)	BB–3, BB–4, and BB–5.
A200 (C12–A/C)	BD–1 through BD–30, and BC–1 through BC–75.
A200 (UC–12B)	BJ–1 through BJ–66.
A200CT (C–12D)	BP–1, BP–22, and BP–24 through BP–51.
A200CT (FWC–12D)	BP–7 through BP–11.
A200CT (RC–12D)	GR–1 through GR–13.
A200CT (C–12F)	BP–52 through BP–63.
A200CT (RC–12G)	FC–1, FC–2, and FC–3.
A200CT (RC–12H)	GR–14 through GR–19.
A200CT (RC–12K)	FE–1 through FE–9.
B200C (C–12F)	BL–73 through BL–112, and BL-118 through BL–123.
B200C (UC–12F)	BU–1 through BU–10.
B200C (RC–12F)	BU–11 and BU–12.
B200C (UC–12M)	BV–1 through BV–10.
B200C (RC–12M)	BV–11 and BV–12.
B200C (C–12F)	BP–64 through BP–71.
B200CT (FWC–12D)	FG–1 and FG–2.

APPLICABLE OUTFLOW SAFETY VALVES WITH APPLICABLE AIRPLANE MODELS

Valve model	Valve serial numbers	Airplane models installed in
103570–26	80–223, 80–225 through 80–227, 80–229, and 80–230	2000.
103598–2	16–808, 39–2434, 45–747, 87–1600, and 116–1238	60(A), C90, and E90.
103598–15	128–11	58P.
103648–1	11–4913 through 11–4916, 12–3832, 20–3006, 22–4950, 12–3912, 30–3076, 39–2412, 41–4918, 41–4919, 61–3300, 101–4920, 101–4922 through 101–4924, 101–4926 through 101–4931, 101–4933, 101–4935, 101–4936, 101–4938, 101–4940, 101–4941, 121–3683, 121–4942, 129–2904, and 129–2920.	60, 90, A90, B90, C90, E90, 100, A100, and B100.
103648–3	21–1827, 71–1828, 71–1829, and 120–1823 through 101–1826	58P.
103648–4	10–4664 through 10–4667, 11–223, 11–3093, 11–3161, 11–4717 through 11–4721, 12–795, 12–3641, 12–4760, 15–4368, 21–3182, 21–3208, 21–4722 through 21–4728, 21–4730, 21–4732, 22–3688, 22–3706, 22–3733, 22–3736, 24–4232, 24–4241, 24–4252, 24–4255, 27–4498, 32–3756, 32–3777, 32–4761, 32–4762, 37–1087, 37–1113, 38–2417, 41–3227, 41–3237, 41–3261, 41–3274, 41–4733, 41–4734, 42–1475, 42–3830, 42–3838, 42–3840, 42–3850, 42–3851, 42–3877, 42–3882, 42–3883, 42–3890, 48–1557, 49–181, 50–2804, 51–4735, 51–4736, 59–2090, 60–2896, 61–3301, 61–4737, 61–4738, 62–3907, 62–3968, 62–3981, 62–2155, 70–2960, 71–4739, 71–4740, 72–3988, 72–3991, 72–3999, 74–4288, 74–4289, 74–4293, 74–4296, 76–4441, 77–4556, 77–4567, 79–2189, 79–2218, 79–2223, 81–3415, 87–1197, 87–1585, 89–2288, 95–4404, 99–2358, 99–2365, 99–2369, 99–2385, 99–2403, 99–2430, 104–4336, 107–1297, 110–3033, 111–3462, 111–3482, 111–3515, 111–4755, 116–4468, 116–4470, 119–2507, 119–2520, 120–3043, 120–3048, 120–3057, 120–4687 through 120–4692, 121–3562, 126–4490, 128–1776, and 129–4639.	200.
103648–5	10–325, 12–760, 12–799, 20–236, 21–1734, 21–1741 through 21–1744, 21–1746, 40–365, 21–1762, 41–1763, 60–243, 61–605, 77–1590, 90–461, 100–1712 through 100–1718, 100–1720 through 100–1726, 100–1728 through 100–1731, 105–149, 105–285, 109–1613, 109–1620, 116–1488, 121–1764, 126–1502, and 126–1511.	C90–1, C90A, and F90.
103648–6	101–1830, 101–1831, and 110–1822	58P and 90.
103648–7	11–208, 14–1206, 17–2204, 21–2817, 21–2818, 21–2827, 21–2828, 22–2832, 23–1030, 23–1058, 24–1211, 24–1232, 25–1634, 30–2719, 31–346, 42–843, 51–397, 51–398, 51–409, 54–1253, 74–1320, 77–2349, 86–2136, 103–1129, 110–1171, 112–961, 112–1000, 113–1172, 113–1192, 114–1538, 118–2569, 119–2607, 119–2614, 101–2796 through 100–2806, and 100–2808 through 100–2815.	B200 and 300.
103648–13	12–410, 12–464, 12–465, and 70–386 through 70–400	300 and B300.

Note 1: The above outflow/safety valves are referenced in AlliedSignal Aerospace Service Bulletin 103570–21–4012, Revision 1, dated May 30, 1995; Service Bulletin 103648–21–4022, Revision 1, dated May 30, 1995; and Service Bulletin 103598–21–4024, Revision 1, dated May 30, 1995. In addition, Beechcraft Service Bulletin 2484, Revision 1, dated October, 1995, references the AlliedSignal service bulletins.

Note 2: This AD applies to each airplane 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 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 in the body of this AD, unless already accomplished.

To prevent outflow/safety valve cracking and consequent failure, which could result in rapid decompression of the airplane, accomplish the following:

(a) For the airplanes referenced in the ''Airplane Models and Serial Numbers That Are Equipped with AlliedSignal Outflow Valves'' table that is included in the ''Applicability'' section of this AD: Within the next 4 months after the effective date of this AD, replace (with a new or serviceable valve) any outflow/safety valve that does not have one of the following:

(1) The valve identification plate MOD RECORD stamped ''PCA'' (Poppet Change Accomplished); or

(2) A valve with an inked ATD Quality Assurance ''Functional Test (FT)'' stamp that is dated June 1992, or later.

(b) For all airplanes: As of the effective date of this AD, no person may install on any affected airplane any outflow/safety valve that is referenced in the ''Applicable Outflow Safety Valves With Applicable Airplane Models'' table that is included in the ''Applicability'' section of this AD.

(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.

(d) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Wichita Aircraft Certification Office (ACO), 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Wichita ACO.

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

(e) All persons affected by this directive may obtain copies of the documents referred to herein upon request to AlliedSignal Aerospace, Technical Publications, Department 65–70, P.O. Box 52170, Phoenix, Arizona 85072–2170; 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.

(f) This amendment (39–10224) becomes effective on January 11, 1998.

Issued in Kansas City, Missouri, on November 25, 1997.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–31676 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–CE–19–AD; Amendment 39–10227; AD 97–25–04]

RIN 2120–AA64

Airworthiness Directives; Cessna Aircraft Company Models 208, 208A, 208B, 425, and 441 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to all Cessna Aircraft Company (Cessna) Models 208, 208A, 208B, 425, and 441 airplanes. This AD requires amending the Limitations Section of the airplane flight manual (AFM) to prohibit the positioning of the power levers below the flight idle stop while the airplane is in flight. This AFM amendment will include a statement of consequences if the limitation is not followed. This AD results from numerous incidents and five documented accidents involving airplanes equipped with turboprop engines where the propeller beta was improperly utilized during flight. The actions specified by this AD are intended to prevent loss of airplane control or engine overspeed with consequent loss of engine power caused by the power levers being positioned below the flight idle stop while the airplane is in flight.

EFFECTIVE DATE: January 21, 1998.

ADDRESSES: Information related to this AD may be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–CE–19–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: William Schinstock, Aerospace Engineer, Wichita Aircraft Certification Office, FAA, 1801 Airport Road, Wichita, Kansas 67209; telephone (316) 946–4162; facsimile (316) 946–4407.

SUPPLEMENTARY INFORMATION:

Events Leading to the Issuance of This AD

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all Cessna Models 208, 208A, 208B, 425, and 441 airplanes was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on July 2, 1997 (62 FR 35708). The NPRM proposed to require amending the Limitations Section of the AFM to prohibit the positioning of the power levers below the flight idle stop while the airplane is in flight, including a statement of consequences if the limitation is not followed. This AFM amendment shall consist of the following language:

> Positioning of power levers below the flight idle stop while the airplane is in flight is prohibited. Such positioning may lead to loss of airplane control or may result in an overspeed condition and consequent loss of engine power.

The NPRM was the result of numerous incidents and five documented accidents involving airplanes equipped with turboprop engines where the propeller beta was improperly utilized during flight.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

The FAA's Determination

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

Compliance Time of This AD

The FAA has determined that the compliance time of this AD should be specified in calendar time instead of hours time-in-service. While the condition addressed by this AD is unsafe while the airplane is in flight, the condition is not a result of repetitive airplane operation; the potential of the unsafe condition occurring is the same on the first flight as it is for subsequent flights. The compliance time of ''30 days after the effective date of this AD'' will not inadvertently ground airplanes and would assure that all owners/operators of the affected airplanes accomplish this AD in a reasonable time period.

Cost Impact

The FAA estimates that 854 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 1 workhour per airplane to incorporate the required AFM amendment, and that the average labor rate is approximately $60 an hour. Since an owner/operator who holds at least a private pilot's certificate can accomplish this AD, as authorized by sections 43.7 and 43.9 of the Federal Aviation Regulations (14 CFR 43.7 and 43.9), the only cost impact upon the public is the time it will take the affected airplane owner/operators to amend the AFM.

Regulatory Impact

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

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

97–25–04 Cessna Aircraft Company: Amendment 39–10227; Docket No. 97–CE–19–AD.

Applicability: Models 208, 208A, 208B, 425, and 441 airplanes, all serial numbers, certificated in any category.

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

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

To prevent loss of airplane control or engine overspeed with consequent loss of engine power caused by the power levers being positioned below the flight idle stop while the airplane is in flight, accomplish the following:

(a) Amend the Limitations Section of the airplane flight manual (AFM) by inserting the following language:

> Positioning of power levers below the flight idle stop while the airplane is in flight is prohibited. Such positioning may lead to loss of airplane control or may result in an overspeed condition and consequent loss of engine power.

(b) This action may be accomplished by incorporating a copy of this AD into the Limitations Section of the AFM.

(c) Amending the AFM, as required by this AD, may be performed by the owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7), and must be entered into the aircraft records showing compliance with this AD in accordance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).

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

(e) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Wichita Aircraft Certification Office (ACO), FAA, 1801 Airport Road, Wichita, Kansas. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Wichita ACO.

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

(f) Information related to this AD may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(g) This amendment (39–10227) becomes effective on January 21, 1998.

Issued in Kansas City, Missouri, on November 25, 1997.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–31678 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–CE–20–AD; Amendment 39–10226; AD 97–25–03]

RIN 2120–AA64

Airworthiness Directives; Raytheon Aircraft Company 65, 90, 99, 100, 200, 300, 1900, and 2000 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to all Raytheon Aircraft Company (Raytheon) 65, 90, 99, 100, 200, 300, 1900, and 2000 series airplanes. This AD requires amending the Limitations Section of the airplane flight manual (AFM) to prohibit lifting or positioning the power levers below the flight idle stop while the airplane is in flight. This AFM amendment will include a statement of consequences if the limitation is not followed. This AD results from numerous incidents and five documented accidents involving airplanes equipped with turboprop engines where the propeller beta was improperly utilized during flight. The actions specified by this AD are intended to prevent nose down pitch and a descent rate leading to aircraft damage and injury to personnel caused by the power levers being positioned below the flight idle stop or the power levers being lifted while the airplane is in flight.

EFFECTIVE DATE: January 21, 1998.

ADDRESSES: Information related to this AD may be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–CE–20–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

FOR FURTHER INFORMATION CONTACT: William Schinstock, Aerospace Engineer, Wichita Aircraft Certification Office, FAA, 1801 Airport Road, Wichita, Kansas 67209; telephone (316) 946–4162; facsimile (316) 946–4407.

SUPPLEMENTARY INFORMATION:

Events Leading to the Issuance of This AD

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to the following was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on July 2, 1997 (62 FR 35704): Raytheon Models 65–90, 65–A90, 65–A90–1, 65–A90–3, 65–A90–4, B90, C90, C90(SE), C90A, C90B, E90, F90, H90, 99, 99A, A99, A99A, B99, C99, 100, A100, A100A, A100C, B100, 200, 200C, 200CT, 200T, A200, A200C, A200CT, B200, B200C, B200T, B200CT, 300, B300, B300C, 1900, 1900C, 1900D, and 2000 airplanes.

The NPRM proposed to require amending the Limitations Section of the AFM to prohibit lifting or positioning the power levers below the flight idle stop while the airplane is in flight, including a statement of consequences if the limitation is not followed. This AFM amendment shall consist of the following language:

> Do not lift the power levers in flight. Lifting the power levers in flight or moving the power levers in flight below the flight idle position could result in nose down pitch and a descent rate leading to aircraft damage and injury to personnel.

The NPRM was the result of numerous incidents and five documented accidents involving airplanes equipped with turboprop engines where the propeller beta was improperly utilized during flight.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

The FAA's Determination

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

Compliance Time of This AD

The FAA has determined that the compliance time of this AD should be specified in calendar time instead of hours time-in-service. While the condition addressed by this AD is unsafe while the airplane is in flight, the

condition is not a result of repetitive airplane operation; the potential of the unsafe condition occurring is the same on the first flight as it is for subsequent flights. The compliance time of ''30 days after the effective date of this AD'' will not inadvertently ground airplanes and would assure that all owners/operators of the affected airplanes accomplish this AD in a reasonable time period.

Cost Impact

The FAA estimates that 3,093 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 1 workhour per airplane to incorporate the required AFM amendment, and that the average labor rate is approximately $60 an hour. Since an owner/operator who holds at least a private pilot's certificate can accomplish this AD, as authorized by sections 43.7 and 43.9 of the Federal Aviation Regulations (14 CFR 43.7 and 43.9), the only cost impact upon the public is the time it will take the affected airplane owner/operators to amend the AFM or POH.

Regulatory Impact

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

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

97–25–03 Raytheon Aircraft Company: Amendment 39–10226; Docket No. 97–CE–20–AD.

Applicability: Models 65–90, 65–A90, 65–A90–1, 65–A90–3, 65–A90–4, B90, C90, C90(SE), C90A, C90B, E90, F90, H90, 99, 99A, A99, A99A, B99, C99, 100, A100, A100A, A100C, B100, 200, 200C, 200CT, 200T, A200, A200C, A200CT, B200, B200C, B200T, B200CT, 300, B300, B300C, 1900, 1900C, 1900D, and 2000 airplanes, all serial numbers, certificated in any category.

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

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

To prevent nose down pitch and a descent rate leading to aircraft damage and injury to personnel caused by the power levers being positioned below the flight idle stop or the power levers being lifted while the airplane is in flight, accomplish the following:

(a) Amend the Limitations Section of the airplane flight manual (AFM) by inserting the following language:

Do not lift the power levers in flight. Lifting the power levers in flight or moving the power levers in flight below the flight idle position could result in nose down pitch and a descent rate leading to aircraft damage and injury to personnel.

(b) This action may be accomplished by incorporating a copy of this AD into the Limitations Section of the AFM.

(c) Amending the AFM, as required by this AD, may be performed by the owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7), and must be entered into the aircraft records showing compliance with this AD in accordance with section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).

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

(e) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Wichita Aircraft Certification Office (ACO), FAA, 1801 Airport Road, Wichita, Kansas. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Wichita ACO.

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

(f) Information related to this AD may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(g) This amendment (39–10226) becomes effective on January 21, 1998.

Issued in Kansas City, Missouri, on November 25, 1997.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–31682 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 255

[Docket OST–96–1639]

RIN 2105–AC56

Fair Displays of Airline Services in Computer Reservations Systems (CRSs)

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Final rule.

SUMMARY: The Department is adopting two rules to further ensure that travel agents using computer reservations systems (CRSs) can obtain a fair and complete display of airline services. One rule will require each CRS to offer one display that lists flights without giving all on-line connections a preference over interline connections; the other rule will bar systems from creating displays that neither use elapsed time as a significant factor in selecting flights from the data base nor give single-plane flights a preference over connecting services in ranking flights. The Department believes that these rules are necessary to promote airline competition and ensure that travel agents and consumers can obtain a reasonable display of airline services. The Department is not now adopting

another display requirement that it had proposed—a requirement that any display offered by a system be based on criteria rationally related to consumer preferences—and will instead consider that proposal further as part of the Department's overall reexamination of its CRS rules. The Department is acting on the basis of informal complaints made by Frontier Airlines, Alaska Airlines, and Midwest Express Airlines.

DATES: These rules are effective February 2, 1998.

FOR FURTHER INFORMATION CONTACT: Thomas Ray, Office of the General Counsel, 400 Seventh St. SW., Washington, D.C. 20590, (202) 366–4731.

SUPPLEMENTARY INFORMATION: Airline travellers in the United States usually buy airline services through travel agencies, and travel agents almost always use a CRS to determine what airline services and fares are available and to make bookings. When a travel agent asks a CRS to show what services are available in a particular city-pair market, the system will display a listing of such services created according to the system's editing and ranking criteria for displays. Each of the CRSs operating in the United States is entirely or predominantly owned by one or more airlines or airline affiliates that would have the ability and incentive to use the systems to prejudice the competitive position of other airlines if the systems were not regulated. A prime method for prejudicing competition would be the use of display criteria that gave the services operated by the owner airline or airlines a higher display position than the position given competing airline services, even if the latter better met the consumer's travel needs. Since travel agents are more likely to book a flight when it has a better display position, display bias causes the airlines benefited by the bias to obtain more bookings than would be obtained if the display were neutral. To prevent the systems' airline owners from injuring airline competition through display bias (and other misuses of the systems), we adopted rules prohibiting display bias and other harmful CRS practices. 14 CFR part 255.

Our rules on display bias do not prohibit all potentially unfair and deceptive display practices, although they do specifically prohibit ranking and editing displays on the basis of carrier identity and impose certain other requirements on displays in order to limit the potential for bias. 14 CFR 255.4. When we last reexamined our CRS rules, there then seemed to be no need to engage in stricter regulation of displays. More recent experience indicates that further regulation is necessary. We therefore issued a notice of proposed rulemaking in this proceeding which proposed three additional display rules: a rule requiring each system to offer at least one display that did not give on-line connections a preference over interline connections, a rule requiring each display to be rationally related to consumer preferences, and a rule requiring each system to either give single-plane flights (such as one-stop flights) a display preference over connecting flights or to use elapsed time as a substantial element in the selection of flights from the database (for convenience, we will refer to these proposals respectively as the ''on-line preference rule'', the ''consumer preference rule'', and the ''elapsed time rule''). 61 FR 42208 (August 14, 1996).

After considering the comments on our proposal, we have determined to adopt the on-line preference and elapsed time rules but to consider the consumer preference rule further in our upcoming reexamination of the CRS rules, a proceeding begun by our publication of an advance notice of proposed rulemaking, 62 FR 47606 (September 10, 1997). Although we are not adopting the consumer preference rule now, that does not mean that systems may create unfair or deceptive displays as long as they comply with our rules' existing requirements. We have the authority under 49 U.S.C. 41712 to take enforcement action against unfair and deceptive practices in the marketing of airline transportation, including deceptive CRS displays, whether or not we adopt the proposed consumer preference rule. As we stated in the notice of proposed rulemaking, ''Other CRS editing and ranking abuses, if not covered by the rule, could be pursued in an enforcement context under the general prohibition against unfair and deceptive practices and unfair methods of competition in 49 U.S.C. 41712.'' 61 FR at 42215.

In this proceeding we are relying in part on the findings published in our 1991–1992 rulemaking, 57 FR 43780 (September 22, 1992) and 56 FR 12586 (March 26, 1991); the findings made in the earlier rulemaking conducted by the Civil Aeronautics Board, the agency that had been responsible for airline CRS issues; and on our staff's last study of the CRS business, *Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems*, prepared by the Secretary's Task Force on Competition in the Domestic Airline Industry (February 1990) (''*Marketing Practices*''). That study and our rulemaking notices present a detailed analysis of CRS operations and their impact on airline competition and consumers. We are also relying on the pleadings filed in Docket 48671 in connection with Galileo's use of its exemption authority to change the displays of single-plane flights in its Apollo CRS in a way that assertedly benefits the interests of Galileo's principal owners, United Air Lines and US Airways, at the expense of competing airlines like Alaska Airlines and Midwest Express Airlines, and misleads travel agents using the Apollo system and their customers.

Legal Authority for Adopting the Proposed Rules

We are adopting these rules, like our other CRS rules, under our statutory authority to prohibit unfair methods of competition and unfair or deceptive practices in the sale of air transportation. 49 U.S.C. 41712, formerly section 411 of the Federal Aviation Act (codified then as 49 U.S.C. 1381). We may adopt rules regulating CRS displays under both parts of the authority granted by 49 U.S.C. 41712, that is, in order to eliminate practices that prejudice airline competition and practices that are likely to mislead consumers and their travel agents.

The statute, modelled on section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, allows us to define practices that do not violate the antitrust laws as unfair methods of competition if they violate the spirit of the antitrust laws. The statute also gives us broad authority to prohibit deceptive practices in the sale of air transportation. We may prohibit practices that in our judgment tend to deceive a significant number of consumers without proof of actual deception, as the Seventh Circuit held in affirming the Civil Aeronautics Board's original CRS rules. *United Air Lines*, 766 F.2d 1107, 1113 (7th Cir. 1985).

We are adopting additional display rules in order to prevent travel agency customers from being deceived and to keep the airlines controlling the systems from using their control over CRS displays to unreasonably prejudice the competitive position of other airlines. The rules will strengthen airline competition by ensuring that CRS displays provide a reasonable and fair ranking of airline services. When a CRS offers a display that ranks airline services deceptively or unfairly for the benefit of its airline owners, the CRS makes it more difficult for airlines to compete on the basis of price and service with the airlines controlling the

system. The revenue loss estimates provided by Alaska and Midwest Express with respect to Apollo's changed displays, if accurate, suggest that an unreasonable and unfair display can cause substantial damage to competing airlines. 61 FR at 42212.

When consumers book airline flights on the basis of information provided by an unfair or deceptive display of airline services, they are likely to book inferior airline services because the display has hidden services that would better meet their travel needs. Our notice of proposed rulemaking discussed in particular how Apollo's treatment of single-plane flights has the potential to have that effect. 61 FR at 42212–42213. Our statute gives us the authority to prohibit conduct which has the potential to cause this kind of consumer deception.

The CRS Industry and CRS Displays

As we explained in the notice of proposed rulemaking, we have imposed regulations on CRSs because of their predominant role in the marketing of airline services. Travel agencies sell about seventy percent of all airline tickets, and travel agents almost always use a CRS to investigate airline service options for their customers and to make bookings. Each travel agency office, moreover, usually relies entirely or predominantly on one CRS. 61 FR at 42209; 57 FR at 43782–43783.

Each of the four CRSs operating in the United States is predominantly owned by one or more airlines or airline affiliates (airlines that directly or indirectly hold CRS ownership interests are referred to as ''vendor airlines''). The parent corporation of American Airlines owns the largest system, Sabre. Apollo, the second largest system, is operated by Galileo International, which is owned by United Air Lines, US Airways, Air Canada, and several European airlines. Both Sabre and Galileo have some public shareholders. Worldspan is owned by Delta Air Lines, Northwest Airlines, Trans World Airlines, and Abacus, a group of Asian airlines. System One is controlled by Amadeus, a major European CRS firm, in which Continental Air Lines has an ownership interest. 61 FR at 42209.

Many different airline service options are available in most markets. In addition, each screen in the display can only display around seven lines of information. If a travel agent wants to see additional service options, the agent must call up additional screens of information. As a result, a system must have some method for editing and ranking airline flights in constructing its displays. A system's choices of editing and ranking practices are important to airline competition, because a flight's display position affects the number of bookings made on the flight. Travel agents are more likely to book a flight when it has a higher display position and are most likely to book the first flight listed. The first flight in a display is booked more frequently in part because it is likely to be the flight that best meets the customer's needs, but, as the airlines owning the systems have long known, the flight will also be booked more often merely because of its better display position. 61 FR at 42209.

Because CRSs are essential for airline marketing, the airlines owning each system have an incentive to use it to prejudice the competitive position of rival airlines. Giving their own flights a better display position than the flights operated by competing airlines would be an effective method of distorting airline competition if there were no CRS rules. Thus, before CRS displays were regulated, each of the airline-owned systems biased its displays in favor of the owner airline. Consumers obviously suffer when a system hides or eliminates information on potentially attractive service options. 61 FR at 42209.

An airline that ''participates'' in a system—that is, that contracts with the system to make its flights saleable through the system—has little, if any, ability to cause the system to display its flights on a non-discriminatory basis. With a few exceptions, Southwest Airlines being the main one, all airlines must participate in each system in order to avoid losing a significant share of the bookings made by the travel agencies using that system. Each system in effect has a monopoly over electronic access to the great majority of its travel agency subscribers. 57 FR at 43783–43784.

Finally, while travel agencies have the right under our rules to use third-party software to create more useful displays for their employees and customers, relatively few agencies appear to be modifying the displays provided by their CRSs. As a result, the system's choice of editing and ranking criteria is likely to establish the display seen by most travel agents. 61 FR at 42215.

Regulatory Background

The Civil Aeronautics Board (''the Board'') adopted the original CRS rules in large part to prevent display bias. The Board determined that rules on display bias were necessary because travel agencies and their customers could neither prevent the systems from offering biased displays nor offset the effect of bias. The airlines participating in a system also did not have the power to keep the systems from biasing their displays. 49 FR 32540, 32543–32544, 32547–32548 (August 15, 1984).

The Board's principal rule against display bias prohibited each system from using carrier identity as a factor for editing and ranking airline services. Although the Board did not prescribe general editing and ranking criteria for CRS displays, the Board adopted several specific rules governing CRS displays in order to reduce each system's ability to create displays that would favor its airline owner or owners. These rules included requirements to use a minimum number of connect points in constructing displays of connecting services for any market. Section 255.4, adopted at 49 FR 32540.

Several of the airlines controlling CRSs responded to the Board's rules by finding new ways of improving the display position of their own flights at the expense of the flights of competing airlines. In particular, since the Board's rules applied only to each system's principal display, not to other displays offered by a CRS, some systems created biased secondary displays in order to regain the benefits of display bias. The Department later obtained each system's agreement not to offer biased secondary displays. *Marketing Practices* at 81–82.

The Board's prohibition of carrier-specific display criteria, however, did not prevent a system from giving its airline owners' flights a better display position by choosing facially-neutral display criteria that matched the predominant characteristics of their airline operations. A system's use of such criteria would benefit other airlines that had similar operating strategies, but it would harm those airlines that chose different strategies. 61 FR at 42209–42210, citing the Justice Department's Comments on the Advanced Notice of Proposed Rulemaking. Nonetheless, the systems' choices of such criteria would not necessarily harm consumers or prejudice airline competition.

At the beginning of the 1990s we held a rulemaking to reexamine the Board's rules. 57 FR 43780 (September 22, 1992) and 56 FR 12586 (March 26, 1991). We readopted them with several changes designed to promote competition in the airline and CRS businesses, including some changes strengthening the rules on CRS displays, although we did not adopt other changes proposed by commenters. We rejected arguments that we did not need to regulate CRS displays, including the argument that the systems' competition for travel agency subscribers would prevent display bias. 56 FR at 12602. And we pointed out how display criteria could

affect airline bookings by noting that American's request to reduce the use of elapsed time by other systems as a ranking factor could be explained by internal documents showing that the use of elapsed time tended to give American's flights a poorer display position. 56 FR at 12610–12611.

We did adopt additional rules where systems used display criteria that injured competition and consumers. Thus we amended the rules to prohibit biased secondary displays. 57 FR at 43802. We also adopted additional rules governing the display of connecting services. Some systems had arbitrarily limited the number of connect points that non-owner airlines could designate and imposed unreasonable and burdensome procedural requirements on requests to add connect points in constructing displays of connecting services. Our new rules prohibited such practices and increased the number of connect points that had to be used in displaying services in individual markets. We also reaffirmed each system's obligation to use non-discriminatory criteria for selecting connect points for displays. 56 FR at 12612–12613; 57 FR at 43807–43808.

In other areas we determined that the systems' practices did not appear to be causing substantial competitive harm and on that basis concluded that additional display rules were unnecessary. 56 FR at 12609; 57 FR at 43803. We recognized, as the Department of Justice pointed out, that vendors could be choosing seemingly neutral display criteria to improve the display position of their own flights. The systems' choice of display criteria nonetheless did not seem to be distorting competition. 56 FR at 12609; 57 FR at 43803. We also believed that the systems' competition for travel agency subscribers appeared to make additional display regulation unnecessary, since travel agency demands seemed to cause vendors to offer alternative displays. 57 FR at 43803. We did not propose or adopt a rule prescribing the ranking and editing criteria that must be used in CRS displays, in part for these reasons, in part because we doubted that there was a single best way for displaying airline services. 56 FR at 12609; 57 FR at 43803.

After considering whether to bar systems from giving on-line connections a preference over interline connections, we determined not to take such action. We noted, on the one hand, that travellers generally preferred on-line service, so the preference was consistent with consumer demands. On the other hand, the systems' use of the preference could overstate travellers' usual preference for on-line service. The on-line preference additionally appeared to place smaller airlines at a competitive disadvantage. 56 FR at 12609–12610. However, no U.S. airline asked us to prohibit the preference, and Alaska Airlines filed comments supporting it. 57 FR at 43804. At that time, however, all of the systems had at least one display that did not use an on-line preference, and Sabre had no display that used an on-line preference. 57 FR at 43803.

Finally, we declined to adopt the proposal by the Orient Airlines Association that we require each system to demonstrate that its ranking and editing criteria met consumer demands. We thought that that specific proposal was unwise, since it could require us to review and second-guess system decisions on display criteria. We also considered the proposal unnecessary, since it ''would be unlikely to lead to significant changes in the vendors' display algorithms.'' 57 FR at 43803. But, while we chose not to require vendors to demonstrate that they were basing their algorithms on consumer preferences, we expressly stated that the vendors would not have unlimited discretion to select display criteria. An airline dissatisfied with a vendor's algorithm could complain to us. 57 FR at 43803.

The Origins of Our Proposed Display Rules

We proposed the new display rules in this proceeding primarily in response to two informal complaints, one about the systems' on-line preference and the other about Apollo's treatment of single-plane flights.

Frontier Airlines had complained that Apollo gave an unreasonable preference to on-line connections. Frontier additionally charged that Apollo's treatment of connections between code-sharing partners (two airlines using one airline's code for both airlines' service) as on-line connections worsened the impact of the preference. The on-line preference injured Frontier's ability to compete in Denver markets where Frontier offered jet service in competition with a commuter airline operating under United's code and using turboprop aircraft, for Apollo treated connections between the commuter airline and United at Denver, United's hub, as on-line connections, while connections between Frontier and United at Denver were treated as interline connections and given a lower display position. Since United was the hub airline at Denver and thus provided most of the service beyond Denver, the display position of connections between Frontier and United under the on-line preference made it harder for Frontier to compete for travellers using Denver as a connecting point on their journeys. The connections between Frontier and United received such a low display position that many travel agents (and their customers) allegedly did not learn of Frontier's services. 61 FR at 42211–42212.

The other complaint—made by Alaska Airlines, Midwest Express Airlines, and the American Society of Travel Agents (''ASTA''), the largest travel agent trade association—concerned Apollo's treatment of single-plane flights. They complained that Apollo's displays made it harder to find single-plane flights that were superior to connecting services given a better display position by Apollo. This benefited the hub-and-spoke operations of Apollo's major U.S. owners, United and US Airways, at the expense of airlines like Alaska Airlines and Midwest Express Airlines that did not operate a hub-and-spoke route system. As we explained in detail in our notice of proposed rulemaking, the Apollo displays had that effect because they relied heavily on displacement time (the time difference between the traveller's requested departure time and the departure time of the flight being displayed) in ranking flights. 61 FR at 42212–42213.

We discussed several examples of Apollo displays that showed that Apollo's algorithm harmed airline competition and consumers by causing displays to list relatively inconvenient connecting services before more attractive single-plane flights. 61 FR at 42213. In addition, we pointed out that ASTA, the largest travel agency trade association, alleged that the Apollo displays ''make it harder for travel agents to find flights meeting the priority goals of air travel consumers.'' ASTA, moreover, stated that it had ''never heard or seen an argument that would overcome the consumer benefits of one-stop single-plane service over on-line connections and * * * only a compelling reason (which is difficult to imagine) would warrant displacing such superior services in favor of on-line connections of longer elapsed time.'' According to ASTA, ''[t]ravel agents should not have to search through five screens of information to find a one-stop single plane service with superior elapsed times to intervening connections,'' and ''[t]his waste of time is a disservice to agents and their clients with no apparent offsetting benefit.'' Furthermore, when single-plane flights receive the poor display position cited in Alaska's examples, ''the existence of

the one-stop flight may not become known to the agent at all.'' ASTA Reply (December 19, 1994) at 2–3, Docket 48671, quoted at 61 FR 42213.

We found Galileo's defense of the displays unpersuasive. Galileo argued that travel agents would be hurt if all single-plane flights were listed before all connecting services, because an agent must then scroll through the complete listing of single-plane flights before seeing any connecting services, even though few, if any, of the single-plane flights leave at the time desired by the agency customer. Galileo had provided no evidence that travel agents had complained when its displays listed all single-plane flights before displaying any connections, and in any event few markets have many single-plane flights. Order 94–8–5 at 16, cited at 61 FR 42213.

The Apollo displays therefore appeared to conflict with consumer preferences, since travellers tend to prefer the single-plane flights because they typically require less travel time than connecting services and because they avoid the inconveniences and risks of missed connections and lost baggage that can arise when travellers use connecting services. 61 FR at 42212. The displays also appeared to prejudice airline competition. Alaska thus estimated that it could lose $15 million in potential revenues each year as a result of the new Apollo displays, while Midwest Express estimated that its annual revenue losses would equal several million dollars. *See* Order 94–8–5 (August 3, 1994) at 17. Although we issued an order questioning the fairness of the displays, Order 94–8–5 (August 3, 1994), Galileo chose not to eliminate the features that generated the complaints from Alaska and others. 61 FR at 42212–42213.

Our Rulemaking Proposals

Galileo's conduct suggested to us that travel agent and consumer desires did not adequately check unreasonable CRS displays, thus allowing systems to create displays serving the interests of their airline owners while possibly denying the system's users reasonable displays of airline services. 61 FR at 42211. In addition to the concerns raised by Apollo's current displays, it seemed possible that other systems might adopt similar displays. We therefore decided to consider changing the CRS display rules to give non-vendor airlines (and travel agents) a greater assurance that they can obtain displays of airline services that are neither unfair nor deceptive.

We did not intend, however, to limit each system's ability to offer different displays to travel agents, since travel agents were likely to disagree on the factors that should be emphasized in editing and ranking airline services, in part because different travel agency customers would have different travel preferences, nor did we intend to tightly regulate CRS algorithms. 61 FR at 42213–42214.

We proposed the on-line preference rule, the consumer preference rule, and the elapsed time rule because we tentatively found that those rules would promote airline competition and enable travel agents and their customers to obtain fairer displays of airline services and that the proposals would not unduly burden the systems.

Rule Requiring a Display Without an On-Line Preference

Our proposed requirement that each system offer a display without an on-line preference would eliminate the ability of one of the large airlines owning a CRS to force the system to use an on-line preference in all displays of domestic airline services. This change should benefit airlines like Frontier that depend more on obtaining interline passengers. While one of the two displays offered by Apollo for services within North America did not have an on-line preference, the combination of that display's downgrading of single-plane flights and its heavy reliance on displacement time as the basis for selecting flights from the data base made the display difficult to use. Our proposed rule would require Sabre to recreate a display without an on-line preference for services within North America, since all of Sabre's current displays for such services used an on-line preference (at the time of our last rulemaking, none of Sabre's displays had an on-line preference, as noted above). 61 FR at 42214.

We recognized that an on-line preference was usually consistent with the preferences of many travellers, but we pointed out that it also benefited the airlines with CRS ownership interests. Each of those U.S. airlines was among the largest U.S. airlines and operated a hub-and-spoke route system—each operated a large number of flights connecting over a hub and relatively few point-to-point flights that do not either depart from or arrive at a hub. An airline operating a hub-and-spoke route system has little interest in capturing interline traffic, since its route structure and flight schedules are designed to keep travellers on its own connecting flights when nonstop and single-plane flights are unavailable. Such an airline benefits from CRS displays that show on-line connections before interline connections. 61 FR at 42211–42212.

The on-line preference could harm consumers in some cases, even though consumers usually prefer on-line connections. The on-line preference makes it harder for travel agents to find interline connections, which sometimes may offer the best service for consumers. For example, many consumers might find Frontier's faster jet service more attractive than the service offered by United's commuter airline affiliate. 61 FR at 42212.

In addition, as we discussed in our last rulemaking, the systems' on-line preferences may well overstate the attractiveness of on-line connections. Even without an on-line preference, on-line connections should normally appear before interline connections in a display that uses elapsed time as a principal ranking factor, because the airline offering on-line connecting service usually coordinates the flight arrival and departure times to minimize layover time at the intermediate airport. 56 FR at 12609. Since on-line connections do not necessarily offer the best service, however, the systems' use of algorithms that always give on-line connections a preference over interline connections will at times interfere with a travel agent's ability to find the best service for the agent's customers.

The Consumer Preference Rule

Our second rule proposal—the consumer preference rule—would require each system's display criteria to be rationally related to consumer preferences. We expected that such a rule would keep systems from offering unjustifiable displays. That would help both smaller airlines like Alaska and Midwest Express, which could not influence system decisions on displays, and consumers and their travel agents, who would no longer find it unreasonably difficult to see the best airline service. We expected that the rule would force Apollo to change its algorithms, for Apollo's current displays appeared to be contrary to the proposed rule's requirements. 61 FR at 42214.

We did not intend to engage in a detailed regulation of CRS displays if we adopted this proposed requirement. We expected to take enforcement action only when a system was using an algorithm that was likely to mislead a significant number of consumers by causing services that would best meet their travel needs to be displayed after significantly inferior services and if the display's criteria appeared designed to improve the display position of the services of the system's airline owners. We doubted that we would consider

complaints that a display violated this proposed rule if the system could show that its display criteria were consistent with the preferences of a substantial portion of travellers. 61 FR at 42214.

Elapsed Time Rule

As an alternative to, or in addition to, the consumer preference rule, we also proposed a rule specifically prohibiting the kinds of unfair displays created by Apollo's algorithm. That rule would prohibit an algorithm that neither used elapsed time as a significant factor in selecting service options from the database nor gave single-plane flights a preference over connections in ranking services in displays. In proposing this rule, we noted that adopting such a limited rule could be reasonable, since we had only received specific complaints about Apollo's editing and ranking criteria. We expected that this rule would require Apollo to change its displays, since its current displays do not use elapsed time as a factor in selecting flights from the database yet give single-plane flights no preference over connecting services. If Apollo used elapsed time as a significant factor in selecting flights from the database, single-plane flights would usually receive a better display position since such flights generally require less travel time than connecting services. This proposal accordingly would no longer cause connecting services to be given a better display position over single-plane flights requiring substantially less travel time. 61 FR at 42215.

Comments

In their comments Sabre, American, Galileo, Apollo Travel Services, United, Worldspan, Delta, TWA, and AAA opposed the proposals, primarily on the ground that further regulation of CRS displays is assertedly unnecessary. These parties generally argued that systems responded to subscriber demands in constructing their displays and could not offer a display that travel agents considered bad. Several of these parties additionally contended that no further CRS rules should be adopted until we complete our pending study of the CRS business. United and Apollo Travel Services argued that Apollo's treatment of single-plane services was reasonable.

Continental supported the on-line preference and consumer preference rules, and Amadeus supported the latter proposal. Alaska supported a rule requiring systems to list all single-plane flights before connecting services and to use elapsed time in ranking flights; Alaska also supported the consumer preference rule. Midwest Express agreed with Alaska that we should require single-plane flights to be displayed before connecting services, and it supported the elapsed time rule. Reno supported the on-line preference rule and argued that we should require systems to use elapsed time in ranking flights. Frontier believed that our proposals are inadequate, and it urged us to regulate display practices relating to code-sharing, for example, by requiring systems to treat connections between code-share partners as interline connections.

The Need To Regulate CRS Displays

For the reasons given below, we have determined to adopt the on-line preference rule and the elapsed time rule while deferring action on the consumer preference rule. Before explaining our basis for these specific decisions, we will discuss the overall objections made by some commenters to the rule proposals.

Several of the parties opposing our proposals contend that no additional regulation of CRS displays is necessary. They argue in particular that market forces—the demands of travel agencies for displays that allow them to respond efficiently and accurately to customer information requests—make it unnecessary and even counterproductive for us to impose new rules on displays.

We disagree with these contentions. As noted above, we found in our last rulemaking that the systems' competition for travel agency subscribers did not eliminate the need for display rules. 56 FR at 12602. No one has given us evidence refuting that finding. Despite the systems' competition with each other for subscribers, the systems tend to select display criteria that benefit the interests of their airline owners. The Apollo algorithms exemplify that. As explained in our notice of proposed rulemaking, Apollo has created displays that often show less convenient connecting services before more desirable single-plane flights. Apollo has never offered a satisfactory justification for these displays. The displays, moreover, seem to provide no offsetting advantages for travel agents and their customers. They do, however, provide obvious benefits for Apollo's owner airlines. If market forces determined the nature of CRS displays, as argued by the parties opposing our proposals, we doubt that Apollo would offer such displays. ASTA, after all, has continuously supported the complaints by Alaska, Midwest Express, and others about the Apollo displays.

Furthermore, the parties opposing our proposals have not presented a detailed analysis showing that subscriber demands have influenced CRS algorithms. While systems offer more than one display as a result of travel agency demands, the commenters opposing our proposals cited no other instances where a system changed its displays as a result of travel agency desires.

Even if subscriber demands at times influence CRS display choices, the systems nonetheless appear to have a significant ability to ignore them. Furthermore, even if travel agents were satisfied with the displays offered by the systems, their customers and non-vendor airlines suffer when systems offer displays that do not enable travel agents to efficiently find the best service for travellers.

We also note that the parties opposing the proposals have not denied that display position affects travel agent bookings and that the airlines owning the systems (directly or indirectly) have an incentive to use displays to benefit their own services. We note in that regard that the stronger opposition to our display rule current proposals has come not from the systems but from their airline owners.

American and United contend that industry developments have eliminated the need for more CRS regulation. They claim that airlines and consumers now have other options for the electronic communication of information and booking transactions, primarily the Internet. American Comments at 2–3; United Reply at 17.

We recognize, of course, that the Internet has given airlines new ways to communicate with consumers that bypass CRSs and travel agents, but, as American notes, relatively few consumers currently book airline travel through the Internet. American Comments at 2. As long as travel agencies remain the predominant method by which travellers obtain information on airline services and book seats, CRS regulation will remain essential for airline competition and ensuring that consumers receive accurate and fair advice on available service options. While travel agents can access airline information through Internet sites, as United claims, we believe that the greater efficiency of using CRSs will cause travel agents to continue relying on CRSs as the tool for giving customers information on the services offered by airlines in a market. We note, moreover, that some of the Internet booking services cited by American, such as the Microsoft website, use a CRS for providing

information and transaction capabilities to consumers. The impact of the Internet, however, is an issue that we intend to consider in detail in our upcoming examination of the CRS rules. 62 FR at 47610.

American also cites the rise of low-fare airlines that have by-passed CRS participation. American Comments at 3. In general, however, the low-fare airlines seem to have decided that CRS participation is necessary, as shown by the recent decisions of Western Pacific and ValuJet to distribute their services through CRSs and the earlier decisions by Frontier and Reno to use CRSs for distribution. 62 FR at 47608.

Sabre, citing the public's ownership of twenty percent of its stock, alleges that rules are unnecessary since it is no longer owned entirely by one airline. Sabre Comments at 4. We disagree. AMR, American's parent corporation, continues to own eighty percent of Sabre's stock and obviously has the ability to control Sabre's operations, subject to Sabre's obligations to its public shareholders.

Some parties opposing further display regulation additionally claim that our proposals represent a radical departure from our past policy of keeping our hands off CRS displays. According to them, in all earlier rulemakings we refused to engage in detailed regulation of CRS displays since we recognized that overseeing displays was unnecessary and likely to cause harm. *See, e.g.,* United Comments at 4–5. We think that these commenters have mischaracterized our past decisions on CRS displays.

We have, of course, been cautious about regulating CRS displays, since regulations can be burdensome and counter-productive. But a major predicate for our decision against adopting additional rules in our last major CRS rulemaking was our determination that the systems' choice of display criteria did not appear to be causing significant competitive harm. 57 FR at 43802, 43803. We have always recognized that the airlines controlling the systems have the incentive and some ability to create displays that favor their own services at the expense of competing services. 57 FR at 43802. We have also adopted specific display rules when that appeared necessary to prevent systems from offering misleading displays, such as our rule imposing detailed rules on the systems' choice of connecting points in constructing displays. Our recent experience with Apollo's displays suggests that the systems can and will adopt displays that cause competitive harm when doing so benefits their airline affiliates.

The Need To Act on the Display Proposals

We think that the record shows that the on-line preference and elapsed time rules should be adopted now to prevent on-going harm to consumers and airline competition. This is particularly true since Galileo ignored our past suggestion to create a more reasonable display and has resisted all complaints from airlines and travel agents about the current Apollo displays.

Several of the opponents argue, however, that we should delay a decision on our display proposals until the completion of our CRS study and our forthcoming reexamination of the CRS rules. Sabre Comments at 1–2; Delta Comments at 2–4. Their arguments in favor of delay are unpersuasive.

First, the record in this proceeding is adequate to enable us to make a final decision on the two rules we are adopting here. All of the parties have had an ample opportunity to address the issues in this proceeding by filing comments and reply comments on our notice of proposed rulemaking. Thus there is no need for us to delay our decision here until the completion of our CRS study.

Furthermore, deferring a decision on the on-line preference and elapsed time rules until the completion of the study and the major rulemaking would lead to a significant delay in remedying the competitive and consumer injury being addressed by these rules. We have decided to defer consideration of the consumer preference rule, but our immediate concerns with CRS displays should be resolved through the adoption of the on-line preference and elapsed time rules, thus making a final decision on the consumer preference rule less urgent. We are just beginning the reexamination of the CRS rules, and that proceeding will take substantial time to complete, as did our last major reexamination of the CRS rules. Midwest Express points out, moreover, that three years have passed since we originally questioned the fairness of the Apollo displays and that Galileo has not eliminated their problems. Midwest Express Comments at 12. This makes any further delay in resolving this issue unreasonable to the airlines and travel agents harmed by the display practices at issue.

The Need for Rules

Several parties contend that the notice of proposed rulemaking presents no case for adopting additional rules applicable to all systems, since the notice focuses on problems created by Apollo's current displays. Since there seems to be no apparent dissatisfaction with any other system's displays, these commenters contend that we should not adopt new rules covering all of the systems. In their view, we should take enforcement action against Galileo to compel it to correct its displays. Delta Comments at 8–9; TWA Comments at 3.

While our notice focused on the apparent problems with the Apollo displays, we noted the possibility that other systems might adopt algorithms that produce similarly misleading displays. We think that this potential for unreasonable displays is sufficient to justify the adoption of the additional rules creating unambiguous standards in these areas. We do not believe that we must wait until additional abuses occur before we can adopt rules. *Cf. GTE Service Corp.* v. *FCC,* 474 F.2d 724, 731–732 (2d Cir. 1973); *Mt. Mansfield Television, Inc.* v. *FCC,* 442 F.2d 470, 486–487 (2d Cir. 1971). And at this time the only system whose displays of services within North America all include an on-line preference is Sabre. We also note that the two rules will apparently affect only Sabre and Apollo, and Sabre will incur only the relatively small expense of recreating a display of North American services that, like Sabre's existing display of overseas services, has no on-line preference (by ''overseas'' in this rule we mean services not entirely within North America, such as transatlantic and transpacific services). Finally, the adoption of the elapsed time rule should promptly eliminate the problems with Apollo's displays, given the terms of the rule and the statements made in this proceeding by Galileo and United.

The Adoption of the On-Line Preference Rule

We have determined to adopt the first of our three proposals, the rule requiring each system to offer a display without an on-line preference. We are not requiring the display without the on-line preference to be the default display or the primary display, although it must be at least as easy to use as every other display offered by a system.

While consumers usually prefer on-line service, there are situations where interline connections may better meet a consumer's travel needs. In addition, the on-line preference gives an advantage to the hub-and-spoke services operated by larger airlines over the services of smaller airlines that have less extensive route systems. The on-line preference may also overstate consumer preferences for on-line

service. These problems will be alleviated if each system must offer a display without an on-line preference as an option for travel agents.

Our notice of proposed rulemaking described how the on-line preference makes it more difficult for consumers and their travel agents to learn about connections between United and Frontier's jet service, since the preference causes the connections between United and the service offered by United's code-sharing partners to receive a better display position. 61 FR at 42211–42212. Reno Air's comments provide additional examples where the on-line preference causes systems to give a lower display position to services that would better meet consumer needs than the on-line connections given a better display position. Reno, for example, stated that a traveller seeking to fly from Newark to Reno after 12:30 p.m. would see an Apollo display listing seventeen on-line connections before a connection between an American flight and a Reno flight, yet that connection arrives earlier than any of the on-line connecting services listed above it in the display and arrives more than four hours earlier than nine of them. Reno Comments at 3.

The cost of implementing this rule will be small. The only system that will have to create a new display is Sabre, which estimates the cost of doing so at $120,000. Sabre Comments at 5. We note, however, that the rule will only require Sabre to conform its display of services within North America with its display of overseas services, since the latter has no on-line preference. In addition, as noted above, Sabre previously offered displays without an on-line preference for North American services. 61 FR at 42210–42211.

We are not persuaded by the arguments against this rule. In particular, we think the adoption of this rule is consistent with the usual preference of travellers for on-line service. As we have explained, on-line connections should tend to receive a better display position than interline connections, since the airline operating the on-line connections normally coordinates the schedules to provide for more efficient service and shorter layovers for passengers. 61 FR at 42212. *See also* Reno Comments at 2. If, on the other hand, an on-line connection does not offer these advantages, as shown by Reno's examples, then we see no reason why every display offered by a system should give the on-line connection a better display position if there are interline connections offering more convenient arrival times and shorter layovers for travellers.

We also disagree with Sabre's argument that we should not adopt this rule since Sabre assertedly would offer a display without an on-line preference if travel agencies demanded it. Sabre Comments at 5. The systems, however, have never adopted display algorithms in response only to travel agency demands and instead tend to choose display criteria that benefit the system's airline owner or affiliate. Given the display shortcomings that can result from the on-line preference, notwithstanding consumer preferences for on-line service, we think the requirement to offer a display without an on-line preference is necessary to ensure that travel agents can access more useful displays and to better enable airlines to compete on service and price.

Deferral of Consumer Preference Rule

We have decided at this time to defer acting on the proposed rule that would require display criteria to be rationally related to consumer preferences. A number of parties, including some non-vendor airlines, asserted that this proposal was too vague to be useful. *See, e.g.,* Sabre Comments at 6–7; American Comments at 5–7; Galileo Comments at 3–6; United Comments at 15–16; Delta Comments at 14–15; AAA Comments at 3–4; Midwest Express Comments at 2. On the other hand, ASTA, one system, and some airlines supported it. Amadeus Comments at 2–3; Alaska Comments at 2; Continental Comments at 2–3.

We have determined that the proposal would better be considered as part of our overall reexamination of the rules. We also believe that the most serious current display problem—Apollo's treatment of single-plane services—should be eliminated by our adoption of the elapsed time rule. Thus there appears to be no immediate need to act on this proposal. We do intend, however, to consider the proposal further in the upcoming rulemaking, so no one should construe our deferral as a decision to abandon it. In that rulemaking we can consider modifications to the proposal that may potentially make it more effective and enforceable. In addition, even without the rule, we may still take action against anticompetitive or deceptive displays under our authority to prohibit unfair and deceptive practices in the marketing of airline transportation.

The Elapsed Time Rule

We are adopting the rule requiring systems to give single-plane flights a preference over connecting services if they do not make substantial use of elapsed time in selecting flight options from the database. We proposed this rule as an alternative to the consumer preference rule, since it would provide clearer standards for displays and eliminate the problems caused by Apollo's current displays. 61 FR at 42215.

Galileo and United state that our adoption of this proposal will substantially alleviate the dissatisfaction with Apollo's current displays. Galileo Comments at 6–7; United Comments at 3, 14. United thus states, ''United is confident that an adjustment of the Apollo display algorithm to incorporate elapsed time as a factor in selecting flights from the database will fully resolve the situations discussed in the Notice where the Department tentatively finds that the current algorithm produces unreasonable results.'' United Comments at 14.

United and Apollo Travel Services have tried to defend the Apollo displays. Their arguments are unconvincing. United relied primarily on the argument that single-plane flights are not invariably faster than connecting services and cited numerous examples of markets where there are some connecting services requiring less travel time than some single-plane flights. United Comments at 10–12; United Reply. While we assume that United's examples are accurate, in general single-plane flights should have a shorter elapsed travel time than connecting services. Furthermore, the examples of Apollo displays discussed in our notice of proposed rulemaking show that all too often Apollo gives a better display position to connecting services that require much more travel time than competing single-plane flights. 61 FR at 42213. Many other examples of similarly unreasonable Apollo displays exist. Alaska Comments at 7–10; Midwest Express Comments at 7–9; Reno Comments at 4–5.

United's argument, moreover, wrongly ignores the other advantages offered consumers by single-plane flights—a reduced risk of lost luggage and the elimination of the possibility of missed connections. Alaska Comments at 3. Furthermore, even if United's position is correct, our rule is consistent with it, since the rule encourages systems to make greater use of elapsed time in creating their displays.

United also argues that the Apollo algorithm can give travel agents notice on the first screens that additional airlines serve a market. United Comments at 7–9, citing our example of the Orange County-Seattle market. United's claim is unreasonable. Apollo's display of Orange County-Seattle

services gives a high display position to America West's connecting service, whose connection between an Orange County-Phoenix flight and a Phoenix-Seattle flight would enable a traveller to reach Seattle from Orange County. America West's connecting services benefit from the weight given displacement time in constructing the display. Other airlines, unlike America West, offer single-plane service in the market. The better display position given connecting services like those offered by America West causes the single-plane flights to be given a poorer position, even though they are likely to be preferred by most travellers. Few travellers would be interested in learning about America West's service in the market, when the single-plane flights offer a more convenient and faster way to reach Seattle. Moreover, in other cases the Apollo algorithm keeps travel agents from learning that an airline serves a market (and does so with single-plane flights that are often more convenient). Midwest Express Reply at 7, n. 4.

United also tried to defend the Apollo algorithm on the basis that the algorithm takes into account displacement time, a factor allegedly important to travellers because departure time is a major consideration in selecting service. United Comments at 8. We think United has overstated the importance of displacement time. *See* Reno Comments at 4. More importantly, the Apollo algorithm gives too little weight to elapsed time, a factor that it is usually more important to travellers. *See, e.g.,* Amadeus Comments at 6. And, as shown, ASTA, the travel agents' major trade association, has repeatedly complained that Apollo's current displays provide misleading and poor rankings of airline services. Though United claimed that ASTA's opinion is entitled to less weight than AAA's position, United Reply at 2, n. 1, we disagree, and in any event AAA did not even allege that Apollo's current displays are reasonable or useful.

Equally unpersuasive is Apollo Travel Services' claim that the Apollo displays cannot cause problems because travel agents can easily obtain an alternative display with a few keystrokes. Apollo Travel Services Comments at 7. Travel agents, as we have repeatedly noted, are often pressed for time and therefore unwilling to take additional steps to obtain better displays. *See, e.g.,* 57 FR at 43786; *Marketing Practices* at 69.

American and Sabre contend that this rule will be too vague, since it requires systems to use elapsed time as a ''significant factor'' in selecting flights from the database if single-plane flights are not given a preference over connecting flights in displays. American Comments at 8–9; Sabre Comments at 8. This objection is not substantial enough to defeat our proposal, since the rule will give systems some guidance. We are reluctant to be more precise, since that would be contrary to our long-standing wish to avoid regulating ranking and editing criteria in detail.

TWA objected to the proposal on the ground that Apollo allegedly does not have integrated displays and thus would not be covered by the rule. TWA Comments at 7. TWA has overlooked the definition of integrated displays given in our rules, 14 CFR 255.3. While we sometimes use the term ''integrated display'' to refer to displays that do not show all services within a category of services, such as non-stop flights, before another category of services, such as connecting flights, in this instance we are using the definition already given by the rules.

Alaska and Midwest Express asked us to modify our proposal so that it would require systems to always place single-plane flights above connecting services. Alaska Comments at 1; Midwest Express Comments at 1–2. We proposed to give systems the option either of displaying all single-plane flights before connections or of using elapsed time as a significant factor in selecting flights from the database. We did not propose a rule requiring systems to always give a better display position to single-plane flights. In addition, we have not received complaints about a Sabre display that does not give single-plane flights a preference over connecting flights; that display uses elapsed time in selecting flights from the database. United also observes that some single-plane flights are routed in a manner which does not give travellers convenient service. United Comments at 12, citing an Alaska San Diego-Seattle-Portland flight. However, if Alaska and others wish us to address this matter further in our overall reexamination of the rules, we will, of course, consider their comments.

Despite the objection of one commenter, we believe this rule is consistent with the systems' agreement not to rank nonstop flights on the basis of elapsed time, since the use of that factor had encouraged airlines to submit unrealistic flight schedules to the systems. *See* 56 FR at 12610. We have not prohibited the use of elapsed time in ranking connecting services, and we do not believe our rule will undermine the systems' agreement on the ranking of nonstop flights. Our concern in adopting this rule involves displays that sometimes list more convenient single-plane flights after less convenient connecting services.

Finally, United has proposed revising the language of the proposed rule so that it imposes an affirmative obligation on systems. United Comments at 15. We think that proposal is reasonable, so we will adopt it. As used in the revised language, ''or'' means ''or'' and ''and''.

Alternatives to Rulemaking

We explained in our notice of proposed rulemaking that consumers, travel agencies, and non-vendor airlines could not avoid the harm caused by displays that injure consumers and airline competition. Travel agents could only overcome Apollo's predetermined ranking of airline services either by taking the time to search through multiple screens or by requesting with additional keystrokes a display that lists single-plane flights before connecting services, but this additional work will be unattractive for many agents due to the time pressures of their job. Indeed, vendor airlines have an incentive to create displays giving their flights a better display position precisely because they know that travel agents often will not override the system's primary ranking of airline flights. Travel agencies also have little ability to switch systems if they become dissatisfied with the poor displays offered by the system they are currently using. 61 FR at 42215.

Travel agency customers have no independent ability to offset the harm caused by unreasonable CRS displays. They rely on the travel agent to tell them what services are available and do not usually see the display used by the agent. Since few agency offices use more than one system, travellers have no ability to ask the agent to use a different system. *Ibid.*

Similarly, non-vendor airlines have little control over an agent's use of CRS displays and no bargaining leverage with any system over display algorithms. *Ibid.*

While some of the commenters challenged these points, as discussed above, we are not persuaded by their objections. Among other things, we do not believe that the use of the Internet by consumers (and travel agents) is widespread enough to substantially reduce the impact of CRS practices on airline competition and the quality of information given consumers on airline service options. Moreover, many Internet sites use a CRS as a booking engine.

Rules Suggested by the Parties

Several of the parties suggested other rules. Frontier, for example, argues that we should require major airlines to

code-share and offer joint fares on a non-discriminatory basis with other airlines at their hubs, that we should require elapsed time to be the basis for ranking flights, or that we should prohibit code-sharing. Frontier Comments at 5. Amadeus (supported by Continental) urges us to regulate the displays offered by on-line computer services and Internet sites. Amadeus Comments at 8–15. Reno alleges that other CRS practices, such as high booking fees, injure airline competition. Reno Comments at 6–7.

We may adopt only the rules proposed by our notice of proposed rulemaking, so we could not adopt any of these suggested additional changes without first issuing a new notice of proposed rulemaking. Since we have begun a proceeding for the overall reexamination of our CRS rules, including the display rules, we think that the parties' additional proposals would best be considered in that proceeding. We note, moreover, that the advance notice specifically asks parties to comment on the Internet issue raised by Amadeus and the booking fee issue raised by Reno. 62 FR at 47610.

Regulatory Assessment

The two rules we are adopting are a significant regulatory action under section 3(f) of Executive Order 12866 and have been reviewed by the Office of Management and Budget under that order. Executive Order 12866 requires each executive agency to prepare an assessment of costs and benefits under section 6(a)(3) of that order. The rules are also significant under the regulatory policies and procedures of the Department of Transportation, 44 FR 11034.

We tentatively found that the proposed rules would benefit consumers, travel agents, and non-vendor airlines and that they would not impose significant costs on the systems. We asked commenters to give us more detailed information on the costs and benefits of the proposed rules. 61 FR at 42216.

The two rules that we are adopting should benefit airline competition and consumers. They will provide airlines a greater opportunity to obtain passengers on the basis of the quality of their service and their fares by reducing the possibility that unreasonable CRS display positions will determine the number of bookings received by an airline. In addition, the rules should make travel agency operations more efficient by enabling travel agents to find the best service with less work. The rules will benefit consumers by making it more likely that travel agencies will recommend more convenient airline service. By promoting airline competition, the rules will produce additional savings and other benefits for consumers.

The Department does not have enough information to enable it to quantify the potential benefits of the rule. However, giving travel agents and their customers a better ability to find the best available airline service can result in substantial consumer savings, as the Justice Department noted in its comments in our last CRS rulemaking. 56 FR 12606. Moreover, Alaska and Midwest Express have estimated that Apollo's display reduces their revenues by millions of dollars each year. If their estimates are valid, Apollo's current displays are also causing many travellers to take connecting services instead of one-stop flights that may be more convenient.

While we expect the two rules to provide significant benefits, we do not expect them to impose significant costs on the systems. The only system that provided an estimate on its programming expenses is Sabre, which states that the required creation of a display without an on-line preference will cost it $120,000. Sabre, however, until recently offered a display of North American services without an on-line preference; our rule will only require it to use the same criteria on this point as its displays of overseas services, which have no on-line preference. Galileo did not estimate the cost of the programming changes needed to comply with the elapsed time rule. We doubt that its reprogramming costs will be significant.

The Department does not believe that there are any alternatives to this proposed rule which would accomplish the goal of giving each participating carrier a greater opportunity to have its services fairly displayed in CRSs. These rules do not impose unfunded mandates or requirements that will have any impact on the quality of the human environment.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The act requires agencies to review proposed regulations that may have a significant economic impact on a substantial number of small entities. For purposes of this rule, small entities include smaller U.S. and foreign airlines and smaller travel agencies.

In our notice of proposed rulemaking we stated the reasons for proposing the additional CRS display rules and the objectives and legal basis for those proposals. We tentatively found that the proposals would give smaller airlines a better opportunity to obtain a fair display position in CRSs and thereby enable them to obtain more bookings and compete more successfully with larger airlines. We also determined that the proposals would benefit smaller travel agencies by making it easier for them to serve their customers more efficiently and to give them better advice on airline service options.

Several commenters submitted their views on the proposed rules' impact on small business entities. We considered their comments in deciding whether to make our proposals final.

We have determined to make final our tentative findings that the rule proposals would benefit smaller airlines and travel agencies. As explained earlier, the proposed rules will give smaller airlines a better opportunity to compete and will make it easier for travel agencies to serve their customers.

Our rules contain no direct reporting, record-keeping, or other compliance requirements that would affect small entities. There are no other federal rules that duplicate, overlap, or conflict with our proposed rules.

The Department certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. *et seq.*) that this regulation will not have a significant economic impact on a substantial number of small entities. The rule will enable travel agencies to operate more efficiently and will give smaller airlines a greater assurance that their services will be fairly displayed by the systems, as explained above. The rule will impose no requirements on smaller airlines or travel agencies and will not other wise increase their costs.

Paperwork Reduction Act

This proposal contains no collection-of-information requirements subject to the Paperwork Reduction Act, P.L. No. 96–511, 44 U.S.C. Chapter 35.

The rules we are adopting will have no 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 12812, we have determined that the rules do not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

List of Subjects in 14 CFR Part 255

Air carriers, Antitrust, Reporting and recordkeeping requirements.

Accordingly, the Department of Transportation amends 14 CFR Part 255, Carrier-owned Computer Reservations Systems, as follows:

PART 255—[AMENDED]

1. The authority citation for part 255 is revised to read as follows:

Authority: 49 U.S.C. 40101, 40102, 40105, 40113, 41712, recodifying 49 U.S.C. 1301, 1302, 1324, 1381, 1502 (1992 ed.).

2. Section 255.4(a) is revised to read as follows:

§ 255.4 Display of information.

(a) All systems shall provide at least one integrated display that includes the schedules, fares, rules and availability of all participating carriers in accordance with the provisions of this section. This display shall be at least as useful for subscribers, in terms of functions or enhancements offered and the ease with which such functions or enhancements can be performed or implemented, as any other displays maintained by the system vendor. No system shall make available to subscribers any integrated display unless that display complies with the requirements of this section.

(1) Each system must offer an integrated display that uses the same editing and ranking criteria for both on-line and interline connections and does not give on-line connections a system-imposed preference over interline connections. This display shall be at least as useful for subscribers, in terms of functions or enhancements offered and the ease with which such functions or enhancements can be performed or implemented, as any other display maintained by the system vendor.

(2) Each integrated display offered by a system must either use elapsed time as a significant factor in selecting service options from the database or give single-plane flights a preference over connecting services in ranking services in displays.

* * * * *

Issued in Washington, DC on November 26, 1997.

Rodney E. Slater,

Secretary of Transportation.

[FR Doc. 97–31674 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–62–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

Federal Sector Equal Employment Opportunity

CFR Correction

In title 29 of the Code of Federal Regulations, parts 900 to 1899, revised as of July 1, 1997, on page 275, in § 1614.204, in paragraph (d)(1), in the fourth line, ''shall be'' should read ''shall not be''.

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD05–97–082]

RIN 2115–AE47

Drawbridge Operation Regulations; New Jersey Intracoastal Waterway, Manasquan River

AGENCY: Coast Guard, DOT.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District has issued a temporary deviation from the regulation governing the operation of the Brielle Railroad Bridge across the New Jersey Intracoastal Waterway, Manasquan River at mile 0.9, in Point Pleasant, New Jersey. Beginning January 12 through March 13, 1998, this deviation allows the bridge to remain closed to navigation between the hours of 8 a.m. to 9:45 a.m.; 10 a.m. to 11:45 a.m.; 1 p.m. to 2 p.m.; and 2:15 p.m. to 3:30 p.m., Monday through Friday excluding holidays. This closure is necessary to facilitate extensive repairs and maintain the bridge's operational integrity while still providing for the reasonable needs of navigation.

DATES: The deviation is effective from 8 a.m. on January 12, 1998 until 3:30 p.m. on March 13, 1998.

SUPPLEMENTARY INFORMATION: The Brielle Railroad Bridge is owned and operated by New Jersey Transit (NJ Transit). On October 7, 1997, a letter was forwarded to the Coast Guard by NJ Transit requesting a temporary deviation from the normal operation of the bridge to implement extensive repairs. Presently, the draw is required to open on signal at all times. These repairs entail replacement or reinforcement of stringers, floor beams, laterals and bearings. Removing the existing rivets and installing bolts is a major portion of the work. To perform these repairs, and use equipment and labor safety, maintaining the drawbridge span in the closed position is needed part of the time.

Discussions with marine interests revealed that approximately four commercial party vessels transit through the bridge during the winter months. However, these vessels normally depart between the hours of 6 a.m. and 8 a.m. Vessels engaged in half day transits return around noon, with full day transits returning at 6 p.m. Therefore, these vessels are not expected to be negatively impacted by the temporary deviation.

From January 12 until March 13, 1998, this deviation allows the draw of the Brielle Railroad Bridge to remain closed to navigation between the hours of 8 a.m. to 9:45 a.m.; 10 a.m. to 11:45 a.m.; 1 p.m. to 2 p.m.; and 2:15 p.m. to 3:30 p.m., Monday through Friday excluding holidays.

Dated: November 12, 1997.

Roger T. Rufe, Jr.,

Vice Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. 97–31738 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF DEFENSE

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AI94

Veterans Education: Increased Allowances for the Educational Assistance Test Program

AGENCIES: Department of Defense and Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The law provides that rates of subsistence allowance and educational assistance payable under the Educational Assistance Test Program shall be adjusted annually by the Secretary of Defense based upon the average actual cost of attendance at public institutions of higher education in the twelve-month period since the rates were last adjusted. After consultation with the Department of Education, the Department of Defense has concluded that the rates for the 1997–98 academic year should be increased by 6% over the rates payable for the 1996–97 academic year. The

regulations dealing with these rates are amended accordingly.

EFFECTIVE DATE: December 3, 1997.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer, Assistant Director for Policy and Program Administration, Education Service, Veterans Benefits Administration, 202–273–7187.

SUPPLEMENTARY INFORMATION: The law (10 U.S.C. 2145) provides that the Secretary of Defense shall adjust the amount of educational assistance which may be provided in any academic year under the Educational Assistance Test Program, and the amount of subsistence allowance authorized under that program. The adjustment is to be based upon the twelve-month increase in the average actual cost of attendance at public institutions of higher education. As required by law, the Department of Defense has consulted with the Department of Education. The Department of Defense has concluded that these costs increased by 6% in the 1996–97 academic year. Accordingly, this revision changes 38 CFR 21.5820 and 21.5822 to reflect a 6% increase in the rates payable in the 1997–98 academic year.

Administrative Procedure Act

Pursuant to 5 U.S.C. 553 there is good cause for finding that notice and public procedure are impractical, unnecessary, and contrary to the public interest and there is good cause for dispensing with a 30 day delay of the effective date. The rates of subsistence allowance and educational assistance payable under the Educational Assistance Test Program are determined based on a statutory formula and, in essence, the calculation of rates merely constitutes a non-discretionary ministerial act.

The Secretary of Veterans Affairs and the Secretary of Defense have certified that these amended regulations will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Pursuant to 5 U.S.C. 605(b), the amended regulations, therefore, are exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

This certification can be made because the amended regulations directly affect only individuals. They will have no significant economic impact on small entities, i.e., small businesses, small private and nonprofit organizations and small governmental jurisdictions.

There is no Catalog of Federal Domestic Assistance number for the program affected by these regulations.

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, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Approved: October 17, 1997.

Hershel W. Gober,

Acting Secretary of Veterans Affairs.

Approved: November 13, 1997.

Normand G. Lezy,

Lieutenant General, USAF, Deputy Assistant Secretary (Military Personnel Policy).

For the reasons set out above, 38 CFR part 21 (subpart H) is amended as set forth below.

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart H—Educational Assistance Test Program

1. The authority citation for part 21, subpart H, continues to read as follows:

Authority: 10 U.S.C. chapter 107, Pub. L. 96–342.

§ 21.5820 [Amended]

2. In § 21.5820, paragraph (b)(1) is amended by removing ''1996–97'' and adding, in its place, ''1997–98'', and by removing ''$2,927'' and adding, in its place, ''$3,103''; paragraph (b)(2)(ii) is amended by removing ''1996–97'' and adding, in its place ''1997–98''; paragraph (b)(2)(ii)(A) is amended by removing ''$325.22'' and adding, in its place, ''$344.78'', and by removing ''$162.61'' and adding, in its place, ''$172.39''; paragraph (b)(2)(ii)(B) is amended by removing ''$10.84'' and adding, in its place, ''$11.49'', and by removing ''$5.42'', and adding, in its place, ''$5.75''; paragraph (b)(2)(ii)(C) is amended by removing ''increased'' both times it appears and adding, in its place, ''decreased''; paragraph (b)(3)(ii) is amended by removing ''1996–97'' and adding, in its place, ''1997–98''; paragraph (b)(3)(ii)(A) is amended by removing ''$325.22'' and adding, in its place, ''$344.78'', and by removing ''$162.61'' and adding, in its place, ''$172.39''; paragraph (b)(3)(ii)(B) is amended by removing ''$10.84'' and adding, in its place ''$11.49'', and by removing ''$5.42'' and adding, in its place, ''$5.75''; and paragraph (b)(3)(ii)(C) is amended by removing ''increased'' both times it appears and adding, in its place, ''decreased''.

§ 21.5822 [Amended]

3. In § 21.5822, paragraph (b)(1)(i) is amended by removing ''$729'' and adding, in its place, ''$773'' and by removing ''1996–97'' and adding in its place, ''1997–98''; paragraph (b)(1)(ii) is amended by removing ''$364.50'' and adding, in its place, ''$386.50'' and by removing ''1996–97'' and adding, in its place, ''1997–98''; paragraph (b)(2)(i) is amended by removing ''1996–97'' and adding, in its place, ''1997–98'' and by removing ''$729'' and adding, in its place, ''$773''; and paragraph (b)(2)(ii) is amended by removing ''1996–97'' and adding, in its place, ''1997–98'' and by removing ''$364.50'', and adding, in its place, ''$386.50''.

[FR Doc. 97–31627 Filed 12–2–97; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AH91

Veterans Education: Approval of Correspondence Programs or Courses

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the VA-administered educational assistance and educational benefits regulations concerning approval of programs of education pursued exclusively by correspondence and the correspondence portion of correspondence-residence courses for Department of Veterans Affairs (VA) training. A number of changes are made to conform to statutory changes. The regulations are also amended to require that the educational institution offering a correspondence program or course certify to the State approving agency (SAA) that at least 50 percent of those pursuing the program or course require six months or more to complete it based on the six-month period immediately preceding the educational institution's application for approval. The certification is to enable the SAA to determine whether the program or course meets the statutory requirement that at least 50 percent of those pursuing the program or course require six months or more to complete it. The regulations are also amended to expressly provide that the SAA may periodically review the program or course approvals already granted and that this determination would be based

on the records of the school for a two-year period reasonably related to the date on which such review is conducted. These periods are appropriate to determine compliance with the statutory requirements. Further, due to the deletion of the statutory basis for its adoption, the requirement that the program or course must require not less than six hours preparation per week over any 26-week period is deleted, and related requirements for SAAs are changed. In addition, this document clarifies that the provisions concerning enrollments in the program or course apply not only to eligible veterans, spouses, and surviving spouses, but also to reservists. Other changes are made for purposes of clarity.

DATES: Effective Date: January 2, 1998.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer, Assistant Director for Policy and Program Administration, Education Service, Veterans Benefits Administration, 202–273–7187.

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on July 1, 1997 (62 FR 35464), VA proposed to amend the ''Administration of Educational Assistance Programs'' regulations which are set forth in 38 CFR 21.4001 *et seq.* It was proposed to amend the regulations at §§ 21.4256 and 21.4279 to reflect amended statutory provisions contained in the Veterans' Benefits Improvement Act of 1994, Public Law 103–446. These provisions:

- Require that programs of education offered exclusively by correspondence or the correspondence portion of a correspondence-residence course may be approved for VA training only if they are offered by an accredited educational institution;
- Negate the prior regulatory requirement providing that the normal period required to complete a program of education by correspondence or the correspondence portion of a combination correspondence-residence course may not be less than six months; and
- Impose a requirement that at least 50 percent of those pursuing the program or course shall require six months or more to complete it.

In addition to these statutory requirements, VA proposed to:

- Require an SAA when reviewing an application for a new correspondence program or course approval to determine whether it meets the course completion requirements based on the six-month period immediately preceding the educational institution's application for approval;
- Permit SAAs to review periodically correspondence program or course approvals already granted to determine whether the completion requirement was met by examining a prior two-year period reasonably related to the date on which such review is conducted.
- Remove the regulatory requirement that a correspondence program or course must require at least six hours of preparation per week over any 26-week period;
- Require that correspondence-residence courses would have to meet the same course completion criteria as correspondence programs, including the time periods during which the SAA will determine whether the course completion criterion have been met; and
- Clarify that the provisions concerning enrollments in correspondence courses apply not only to eligible veterans, spouses, and surviving spouses, but also to reservists.

Interested persons were given 63 days to submit comments. We received no comments. Accordingly, based on the rationale set forth in the proposed rule document, we are adopting the provisions of the proposed rule as a final rule.

Paperwork Reduction Act of 1995

Information collection and recordkeeping requirements associated with this final rule (38 CFR 21.4256(a)(1), 21.4256(b)(3), and 21.4279) have been approved by OMB under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501–3520) and have been assigned OMB control numbers 2900–0575 and 0576. These regulations require that an educational institution offering a program of education by correspondence or the correspondence portion of a correspondence-residence course would have to certify to the SAA that at least 50 percent of those pursuing the program or course require six months or more to complete it in order to have that program or course approved for VA training. There is no VA form to collect this information; therefore, there is no corresponding form number.

VA is not authorized to impose a penalty on persons for failure to comply with information collection requirements which do not display a current OMB control number, if required.

Regulatory Flexibility Act

The Secretary of Veterans Affairs certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Although it is possible that small entities could be among the educational institutions affected by this rulemaking, this final rule would have only a minuscule effect on any educational institution. Pursuant to 5 U.S.C. 605(b), this final rule, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of §§ 603 and 604.

The Catalog of Federal Domestic Assistance numbers for programs affected by this final rule are 64.117, 64.120, and 64.124. This final rule will also affect the Montgomery GI Bill—Selected Reserve program, 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 expenses, Veterans, Vocational education, Vocational rehabilitation.

Approved: October 30, 1997.

Hershel W. Gober,

Acting Secretary of Veterans Affairs.

For the reasons set out above, 38 CFR part 21, subpart D, is amended as set forth below.

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart D—Administration of Educational Assistance Programs

1. The authority citation for part 21, subpart D, is revised to read as follows:

Authority: 10 U.S.C. ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 34, 35, 36, unless otherwise noted.

2. Section 21.4256 is revised to read as follows:

§ 21.4256 Correspondence programs and courses.

(a) *Approval of correspondence programs and courses.* (1) An educational institution desiring to enroll veterans under 38 U.S.C. chapter 30 or 32, spouses and/or surviving spouses under 38 U.S.C. chapter 35, and/or reservists under 10 U.S.C. chapter 1606 in a program of education to be pursued exclusively by correspondence, or in the correspondence portion of a combination correspondence-residence

course, may have the program or course approved only when the educational institution meets the requirements of §§ 21.4252(e), 21.4253, and 21.4279, as applicable.

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0575)

(Authority: 38 U.S.C. 3672(e))

(2) The application of an educational institution for approval of a program of education to be pursued exclusively by correspondence or the correspondence portion of a combined correspondence-residence course must demonstrate that the program or course is satisfactory in all elements. The educational institution must certify to the State approving agency that at least 50 percent of those pursuing the program or course require six months or more to complete it. For applications for approval that are pending approval by the State approving agency on February 2, 1995, and for applications received by the State approving agency after that date, the required certification shall be based on the experience of students who completed the program or course during the six-month period immediately preceding the educational institution's application for approval.

(Authority: 38 U.S.C. 3672(e))

(3) State approving agencies have the authority to review periodically the length of time needed to complete each approved correspondence program or approved correspondence-residence course in order to determine whether the program or course should continue to be approved. In implementing this authority, a State approving agency will examine the results over a prior two-year period reasonably related to the date on which such a review is conducted.

(Authority: 38 U.S.C. 3672(e))

(b) *Enrollment agreement.* (1) An educational institution offering a program of education to be pursued exclusively by correspondence must enter into an enrollment agreement with the veteran, spouse, surviving spouse, or reservist who wishes to receive educational assistance from VA while pursuing the program. The enrollment agreement shall disclose fully the obligations of the institution and the veteran, spouse, surviving spouse, or reservist, and shall display in a prominent place on the agreement the conditions for affirmance, termination, refund, and payment of the educational assistance by VA.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(a)(1), 3686(b))

(2) A copy of the agreement shall be given to the veteran, spouse, surviving spouse, or reservist when it is signed.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(b))

(3) The agreement shall not be effective unless the veteran, spouse, surviving spouse, or reservist after the expiration of 10 days after the agreement is signed, shall have signed and submitted to VA a written statement, with a signed copy to the institution, specifically affirming the agreement.

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0576)

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(b))

(c) *Mandatory refund policy.* (1) Upon notification of the educational institution by the veteran, spouse, surviving spouse, or reservist of an intention not to affirm the enrollment agreement, any fees paid by the individual shall be returned promptly in full to him or her.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(c))

(2) Upon termination of enrollment under an affirmed enrollment agreement for training in the accredited course by the veteran, spouse, surviving spouse, or reservist, without having completed any lessons, a registration fee not in excess of 10 percent of the tuition for the course or $50, whichever is less, may be charged him or her. When the individual terminates the agreement after completion of less than 25 percent of the lessons of the course, the institution may retain the registration fee plus 25 percent of the tuition. When the individual terminates the agreement after completing 25 percent but less than 50 percent of the lessons, the institution may retain the registration fee plus 50 percent of the tuition for the course. If 50 percent or more of the lessons are completed, no refund of tuition is required.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(c))

(3) Where the school either has or adopts an established policy for the refund of the unused portion of tuition, fees, and other charges subject to proration, which is more favorable to the veteran, spouse, surviving spouse, or reservist than the pro rata basis as provided in paragraph (b)(2) of this section, such established policy will be applicable.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(c))

(4) Any institution that fails to forward any refund due to the veteran, spouse, surviving spouse, or reservist within 40 days after receipt of a notice of termination or disaffirmance, shall be deemed, prima facie, to have failed to make a prompt refund as required by this section.

(Authority: 10 U.S.C. 16136(b); 38 U.S.C. 3686(c))

3. In § 21.4279, paragraph (a) introductory text and paragraph (a)(4) are revised, and paragraph (a)(5) is added, to read as follows:

§ 21.4279 Combination correspondence-residence program.

(a) *Requirements for pursuit.* A program of education may be pursued partly in residence and partly by correspondence for the attainment of a predetermined and identified objective under the following conditions:

* * * * *

(4) The educational institution offering the course is accredited by an agency recognized by the Secretary of Education; and

(5) The State approving agency has approved the correspondence-residence course and has verified compliance with the requirement of 38 U.S.C. 3672(e) and § 21.4256(a) that at least 50 percent of those pursuing the correspondence-residence course require six months or more to complete it.

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0575.)

(Authority: 38 U.S.C. 3672(e))

* * * * *

[FR Doc. 97–31628 Filed 12–2–97; 8:45 am]

BILLING CODE 8320–01–P

POSTAL SERVICE

39 CFR Part 111

Domestic Mail Manual; Miscellaneous Amendments

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This document describes the numerous amendments consolidated in the Transmittal Letter for Issue 53 of the Domestic Mail Manual, which is incorporated by reference in the Code of Federal Regulations, see 39 CFR 111.1. These amendments reflect changes in mail preparation requirements and other miscellaneous rules and regulations not previously published in the **Federal Register**.

EFFECTIVE DATE: January 1, 1998.

FOR FURTHER INFORMATION CONTACT: Patricia Bennett, (202) 268–6350.

SUPPLEMENTARY INFORMATION: The Domestic Mail Manual (DMM), incorporated by reference in title 39, Code of Federal Regulations, part 111, contains: the basic standards of the U.S. Postal Service governing its domestic mail services; descriptions of the mail classes and special services and conditions governing their use; and standards for rate eligibility and mail preparation. The document is amended and republished about every 6 months, with each issue sequentially numbered.

DMM Issue 53, the next edition of the DMM, is scheduled for release on January 1, 1998. That issue will include changes in Preferred postage rates for Periodicals and Standard Mail (A). The final rule containing the rates for these changes was published on July 25, 1997, in the **Federal Register** (62 FR 39946–39950), as approved on June 2, 1997, by the Board of Governors pursuant to its authority under 39 U.S.C. 3625(f), to implement rate changes effective at 12:01 a.m. on October 5, 1997 (Resolution No. 97–9).

DMM Issue 53 will also include the new weight limit for Bound Printed Matter. The final rule to increase the weight of Bound Printed Matter from 10 pounds to 15 pounds was published on October 1, 1997, in the **Federal Register** (62 FR 51372–51373), as approved on September 8, 1997, by the Board of Governors, to implement the Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on the Classification Changes, Bound Printed Matter, Docket No. MC97–3. This weight increase takes effect at 12:01 a.m. on October 5, 1997.

DMM Issue 53 will include the standards for the new Bulk Parcel Return Service (BPRS) and Shipper Paid Forwarding (SPF). BPRS, which takes effect on October 12, 1997, lowers the average cost of return service for machinable parcels weighing less than 1 pound. SPF, which allows mailers to pay forwarding postage directly through the use of the tracking capabilities of the existing electronic Address Change Service, takes effect on January 4, 1998. The new standards for BPRS and SPF were published on October 15, 1997, in the **Federal Register** (62 FR 53539–53541) as approved on October 6, 1997, by the Board of Governors on the Recommended Decision of the Postal Rate Commission in Docket No. MC97–2.

The following excerpt from section I010, Summary of Changes, of the transmittal for DMM Issue 53 covers the minor changes not previously described in final rules or in other interim or final rules published in the **Federal Register**. Announcements of these minor changes were first published in various issues of the Postal Bulletin, an official biweekly document published by the Postal Service. In addition, the revised contents of DMM Issue 53 are also presented.

Domestic Mail Manual Issue 53 Summary of Changes

Consolidation of Processing of Form 3510

D230.3.11, D230.6.2, E214.3.2, E214.3.4, E214.3.6, E214.3.7, E214.3.8, E270.8.1 and E270.9.1 amend the processing of Form 3510, Application for Additional Entry, Reentry, or Special Rate Request for Periodicals Publication. In order to improve customer satisfaction and to better utilize resources, postal processing of Form 3510 is being consolidated at the Memphis Rates and Classification Service Center (RCSC). Effective October 9, 1997 (PB 21956 (10–09–97)).

Content Identifier Numbers

Exhibit M032.1.3a changes certain international mail content identifier numbers (CINs) for barcoded tray and sack labels. Effective July 3, 1997 (PB 21949 (7–3–97)).

Envelopes and Pieces Sealed on All Sides

C810.1.0 and C810.7.5 clarify acceptable characteristics of automation letter-size mailpieces. Effective October 23, 1997 (PB 21957 (10–23–97)).

Folded Self-Mailers—Additional Options

C810.7.2 and C810.7.3 allow mailers to prepare letter-size self-mailers with the final fold positioned as the right side (leading edge) of the piece and to claim an automation rate. In addition, other tabbing form designs for self-mailers have been approved for automation rates. Effective June 5, 1997 (PB 21947 (6–5–97)).

Labeling List Changes

L002, L003, L005, L601, L602, L603, L604, and L801 are amended to reflect changes in mail processing operations. Effective July 3, 1997 (PB 21949 (7–3–97)).

L002, L004, L005, L102, L601, L602, L603, L604, L801, and L803 are amended to reflect changes in mail processing operations. Effective October 9, 1997 (PB 21956 (10–9–97)).

Non-Machinable Surcharge—Parcel Post

E620.2.5 clarifies that a non-machinable surcharge applies only to certain listed pieces of Parcel Post if pieces are mailed at the inter-BMC/ASF Parcel Post rates and no special handling fee is paid. Effective August 28, 1997 (PB 21953 (8–28–97)).

Post Office Box and Caller Service—McLean, VA 22103 ZIP Code Redesignated as Group C

Exhibit D910.5.3 and Exhibit D920.4.1 remove the entry ''McLean, VA 22103'' from the Group B category for post office box service and caller service to a Group C category. Effective June 8, 1997 (PB 21948 (6–19–97)).

Reusable Mailpieces—Optional Preparation

C010.6.3 and C010.6.4 incorporate optional preparation standards for reusable mailpieces that originate as permit imprint mailings. Effective August 14, 1997 (PB 21952 (8–14–97)).

List of Subjects in 39 CFR Part 111

Postal Service.

In consideration of the foregoing, 39 CFR part 111 is amended as set forth below:

PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 3001–3011, 3201–3219, 3403–3406, 3621, 3626, 5001.

2. The table at the end of § 111.3(f) is amended by adding at the end thereof a new entry to read as follows:

§ 111.3 Amendments to the Domestic Mail Manual.

* * * * *

(e) * * *

Transmittal letter for issue	Dated	Federal Register publication
* * * * * * *		
53	January 1, 1998	62 FR [INSERT PAGE NUMBER].

3. Section 111.5 is revised to read as follows:

§ 111.5 Contents of the Domestic Mail Manual.

A—ADDRESSING

A000 Basic Addressing

A010 General Addressing Standards
A040 Alternative Addressing Formats
A060 Detached Address Labels (DALs)

A800 Addressing for Automation

A900 Customer Support

A910 Mailing List Services
A920 Address Sequencing Services
A930 Other Services
A950 Coding Accuracy Support System (CASS)

C—CHARACTERISTICS AND CONTENT

C000 General Information

C010 General Mailability Standards
C020 Restricted or Nonmailable Articles and Substances
- C021 Articles and Substances Generally
- C022 Perishables
- C023 Hazardous Matter
- C024 Other Restricted or Nonmailable Matter

C030 Nonmailable Written, Printed, and Graphic Matter
- C031 Written, Printed, and Graphic Matter Generally
- C032 Sexually Oriented Advertisements
- C033 Pandering Advertisements

C050 Mail Processing Categories

C100 First-Class Mail

C200 Periodicals

C500 Express Mail

C600 Standard Mail

C800 Automation-Compatible Mail

C810 Letters and Cards
C820 Flats
C830 OCR Standards
C840 Barcoding Standards

D—DEPOSIT, COLLECTION, AND DELIVERY

D000 Basic Information

D010 Pickup Service
D020 Plant Load
D030 Recall of Mail
D040 Delivery of Mail
- D041 Customer Mail Receptacles
- D042 Conditions of Delivery

D070 Drop Shipment
- D071 Express Mail and Priority Mail
- D072 Metered Mail

D100 First-Class Mail

D200 Periodicals

D210 Basic Information
D230 Additional Entry

D500 Express Mail

D600 Standard Mail

D900 Other Delivery Services

D910 Post Office Box Service
D920 Caller Service
D930 General Delivery and Firm Holdout

E—ELIGIBILITY

E000 Special Eligibility Standards

E010 Overseas Military Mail
E020 Department of State Mail
E030 Mail Sent by U.S. Armed Forces
E040 Free Matter for the Blind and Other Handicapped Persons
E050 Official Mail (Franked)
E060 Official Mail (Penalty)
E070 Mixed Classes
E080 Absentee Balloting Materials

E100 First-Class Mail

E110 Basic Standards
E120 Priority Mail
E130 Nonautomation Rates
E140 Automation Rates

E200 Periodicals

E210 Basic Standards
- E211 All Periodicals
- E212 Qualification Categories
- E213 Periodicals Mailing Privileges
- E214 Reentry
- E215 Copies Not Paid or Requested by Addressee
- E216 Publisher Records

E230 Nonautomation Rates
E240 Automation Rates
E250 Destination Entry
E270 Preferred Periodicals

E500 Express Mail

E600 Standard Mail

E610 Basic Standards
- E611 All Standard Mail
- E612 Additional Standards for Standard Mail (A)
- E613 Additional Standards for Standard Mail (B)

E620 Nonautomation Nonpresort Rates
E630 Nonautomation Presort Rates
E640 Automation Rates
E650 Destination Entry
- E651 Regular, Nonprofit, and Enhanced Carrier Route Standard Mail
- E652 Parcel Post

E670 Nonprofit Standard Mail

F—FORWARDING AND RELATED SERVICES

F000 Basic Services

F010 Basic Information
F020 Forwarding
F030 Address Correction, Address Change, FASTforward℠, and Return Services

G—GENERAL INFORMATION

G000 The USPS and Mailing Standards

G010 Basic Business Information
- G011 Post Offices and Postal Services
- G013 Trademarks and Copyrights

G020 Mailing Standards
G030 Postal Zones
G040 Information Resources
- G041 Postal Business Centers
- G042 Rates and Classification Service Centers
- G043 Address List for Correspondence

G090 Experimental Classifications and Rates
- G091 Barcoded Small Parcels
- G092 Nonletter-Size Business Reply Mail

G900 Philatelic Services

L—LABELING LISTS

L000 General Use

L002 3-Digit ZIP Code Prefix Matrix
L003 3-Digit ZIP Code Prefix Groups—3-Digit Scheme Sortation
L004 3-Digit ZIP Code Prefix Groups—ADC Sortation
L005 3-Digit ZIP Code Prefix Groups—SCF Sortation

L100 First-Class Mail

L102 ADCs—Presorted Priority Mail

L600 Standard Mail

L601 BMCs—Machinable Parcels
L602 BMCs—DBMC Rates
L603 ADCs—Irregular Parcels
L604 Originating ADCs—Irregular Parcels

L800 Automation Rate Mailings

L801 AADCs—Letter-Size Mailings
L802 BMC/ASF Entry—Periodicals and Standard Mail (A)
L803 Non-BMC/ASF Entry—Periodicals and Standard Mail (A)

M—MAIL PREPARATION AND SORTATION

M000 General Preparation Standards

M010 Mailpieces
- M011 Basic Standards
- M012 Markings and Endorsements
- M013 Optional Endorsement Lines
- M014 Carrier Route Information Lines

M020 Packages and Bundles
M030 Containers
- M031 Labels
- M032 Barcoded Labels
- M033 Sacks and Trays

M040 Pallets
- M041 General Standards
- M045 Palletized Mailings

M050 Delivery Sequence
M070 Mixed Classes
- M071 Basic Information
- M072 Express Mail and Priority Mail Drop Shipment
- M073 Combined Mailings of Standard Mail Machinable Parcels

M074 Plant Load Mailings

M100 First-Class Mail (Nonautomation)

M120 Priority Mail
M130 Presorted First-Class Mail

M200 Periodicals (Nonautomation)

M500 Express Mail

M600 Standard Mail (Nonautomation)

M610 Single-Piece and Nonautomation Standard Mail (A)
M620 Enhanced Carrier Route Standard Mail
M630 Standard Mail (B)

M800 All Automation Mail

M810 Letter-Size Mail
M820 Flat-Size Mail

P—POSTAGE AND PAYMENT METHODS

P000 Basic Information

P010 General Standards
- P011 Payment

P012 Documentation
P013 Rate Application and Computation
P014 Refunds and Exchanges
P020 Postage Stamps and Stationery
P021 Stamped Stationery
P022 Adhesive Stamps
P023 Precanceled Stamps
P030 Postage Meters and Meter Stamps
P040 Permit Imprints
P070 Mixed Classes

P100 First-Class Mail

P200 Periodicals

P500 Express Mail

P600 Standard Mail

P700 Special Postage Payment Systems

P710 Manifest Mailing System (MMS)
P720 Optional Procedure (OP) Mailing System
P730 Alternate Mailing Systems (AMS)
P750 Plant-Verified Drop Shipment (PVDS)
P760 First-Class or Standard Mail Mailings With Different Payment Methods

R—RATES AND FEES

R000 Stamps and Stationery

R100 First-Class Mail

R200 Periodicals

R500 Express Mail

R600 Standard Mail

R900 Services

S—SPECIAL SERVICES

S000 Miscellaneous Services

S010 Indemnity Claims
S020 Money Orders and Other Services
S070 Mixed Classes

S500 Special Services for Express Mail

S900 Special Postal Services

S910 Security and Accountability
S911 Registered Mail
S912 Certified Mail
S913 Insured Mail
S914 Certificate of Mailing
S915 Return Receipt
S916 Restricted Delivery
S917 Return Receipt for Merchandise
S920 Convenience
S921 Collect on Delivery (COD) Mail
S922 Business Reply Mail (BRM)
S923 Merchandise Return Service
S924 Bulk Parcel Return Service
S930 Handling

I—INDEX INFORMATION

I000 Information

I010 Summary of Changes
I020 References
I021 Forms Glossary
I022 Subject Index

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 97–31599 Filed 12–2–97; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[FRL–5931–3]

Petition by the Commonwealth of the Northern Mariana Islands for Exemption From Anti-Dumping and Detergent Additization Requirements for Conventional Gasoline

AGENCY: Environmental Protection Agency.

ACTION: Notice of direct final decision.

SUMMARY: The Environmental Protection Agency (''EPA'' or ''the Agency'') is granting a petition by the Commonwealth of the Northern Mariana Islands (''CNMI'') for exemption from the anti-dumping requirements for gasoline sold in the United States after January 1, 1995. This action is being taken because of CNMI's unique geographic location and economic factors. If the gasoline anti-dumping exemption were not granted, CNMI would be required to import gasoline from a supplier meeting the anti-dumping requirements adding a considerable expense to gasoline purchased by the CNMI consumer. CNMI is in full attainment with the national ambient air quality standard for ozone. This action is not expected to cause harmful environmental effects to the citizens of CNMI. EPA is not granting CNMI's petition for exemption from the fuel detergent additization requirements that all gasoline sold in the U.S. after January 1, 1995 contain fuel detergents. CNMI did not show that these requirements were unreasonable or infeasible due to any unique local factors. The fuel detergent additization requirements are designed to prevent the build-up of deposits in gasoline engines and fuel supply systems. By controlling such desposits in CNMI's vehicles, harmful engine exhaust emissions will be reduced.

This action is being taken as a direct final decision because EPA believes that this decision is noncontroversial. The effects of this decision are limited to the Commonwealth of the Northern Mariana Islands.

DATES: This action will be effective on February 2, 1998, unless the Agency receives adverse or critical comments by January 2, 1998. If the Agency receives adverse comments, EPA will publish in the **Federal Register** timely notice withdrawing this action. In a separate action published in the **Federal Register** today, EPA is concurrently proposing approval of CNMI's petition for reasons discussed in this document. All correspondence should be directed to the addresses shown below.

ADDRESSES: Any persons wishing to submit comments should submit them (in duplicate, if possible) to the two dockets listed below, with a copy forwarded to Marilyn Winstead McCall, U. S. Environmental Protection Agency, Fuels and Energy Division, 401 M Street, S.W. (Mail Code: 6406J), Washington, DC 20460.

Materials relevant to this petition are available for inspection in public docket A–96–11 at the Air Docket Office of the EPA, room M–1500, 401 M Street, SW., Washington, DC 20460, (202) 260–7548, between the hours of 8:00 a.m. to 5:30 p.m. Monday through Friday. A duplicate public docket, A–NM–96 has been established at U.S. EPA Region IX, 75 Hawthorne Street, (Mail Code: A–2–1), 17th Floor, San Francisco, CA 94105, (415) 744–1225, and is available between the hours of 8:30 a.m. to noon, and 1 p.m. to 5 p.m., Monday through Friday. As provided in 40 CFR part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: Marilyn Winstead McCall at (202) 564–9029.

SUPPLEMENTARY INFORMATION:

I. Background

A. Regulated Entities

Entities potentially affected by this action are those involved with the production, distribution, and sale of conventional gasoline and gasoline detergent additives for gasoline used in CNMI. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Gasoline refiners and importers, gasoline terminals, detergent blenders, gasoline truckers, gasoline retailers and wholesale purchaser-consumers.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this decision. Other types of entities not listed could also be affected. To determine whether your organization is affected by this decision, you should carefully examine the applicability requirements in § 80.90, § 80.125, and § 80.161, Subparts E, F, and G of title 40 of the Code of Federal Regulations (CFR). If you have any questions regarding the applicability of this action to a particular entity, consult the person

listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Summary of CNMI's Petition

On July 12, 1995, the Honorable Froilan C. Tenorio, Governor of the Commonwealth of the Northern Mariana Islands, petitioned the Agency for an exemption from the requirements of regulations promulgated at 40 CFR 80 that require conventional gasoline meet certain anti-dumping specifications and detergent additization requirements. On December 15, 1993, EPA promulgated regulations on the production and sale of reformulated gasoline and gasoline that is not required to be reformulated, or ''conventional'' gasoline. For conventional gasoline, the gasoline produced by a refiner or importer is required to cause no more motor vehicle emissions than gasoline produced by that refiner or importer in 1990. This is commonly called the ''anti-dumping'' program. On October 14, 1994, and July 15, 1996, EPA promulgated regulations requiring that all gasoline contain fuel detergents. The fuel detergent additization regulations require that all gasoline sold or dispensed in the United States contain additives to prevent accumulation of deposits in vehicle engines and fuel supply systems, and that volumetric additive reconciliation records (''VAR'') and product transfer documents (''PTD'') be maintained by certain persons who add the required detergent to the gasoline and transfer the product to other persons. Since CNMI is in attainment for ozone, it is not required to offer reformulated gasoline. However, providers of gasoline in CNMI such as those listed in the table above are required to provide conventional gasoline that meets the anti-dumping provisions and the detergent additization requirements beginning January 1, 1995.

C. Statutory Provisions

Section 211(k) of the Clean Air Act requires that gasoline be reformulated to reduce motor vehicle emissions of toxic and tropospheric ozone-forming compounds, and that this reformulated gasoline be sold in the nine largest metropolitan areas with the most severe summertime ozone levels and other ozone nonattainment areas that opt into the program. Section 211(k)(8) prohibits conventional gasoline sold in the rest of the country from becoming any more polluting than it was in 1990. This requirement ensures that refiners do not ''dump'' fuel components into conventional gasoline that cause environmentally harmful emissions and that are restricted in reformulated gasoline. This requirement is referred to as the ''anti-dumping'' standards for conventional gasoline.[1]

Section 211(l) states that ''no person may sell or dispense to an ultimate consumer in the United States, and no refiner or marketer may directly or indirectly sell or dispense to persons who sell or dispense to ultimate consumers in the United States any gasoline which does not contain additives to prevent the accumulation of deposits in engines or fuel supply systems.'' This requirement is commonly referred to as the ''fuel additization'' or ''detergent additization'' regulation. The CNMI is defined as a state in these regulations.[2]

Section 325 of the Act provides that, upon petition by the Governor of Guam, American Samoa, the Virgin Islands, or the Commonwealth of the Northern Mariana Islands, the Administrator may exempt any person or source in such territory from various requirements of the Act. It states that ''such exemption may be granted if the Administrator finds that compliance with such requirements is not feasible or is unreasonable due to unique geographical, meteorological, or economic factors of such territory, or such other local factors as the Administrator deems significant.''

EPA previously granted CNMI an exemption from the sulfur content requirements for motor vehicle diesel fuels as specified in sections 211 (i) and (g) of the Act on May 19, 1994. That exemption was effective on July 18, 1994. A more in-depth description of CNMI's geographical, meteorological and economic characteristics are discussed in the notice of direct final decision granting that petition (*see* 59 FR 26129, May 19, 1994).

D. CNMI's Geographical, Meteorological, and Demographic Characteristics

CNMI consists of fourteen islands of volcanic origin located in the western part of the Pacific Ocean. The islands are part of the Mariana Archipelago (the southernmost island of which is Guam, a separate territory of the United States) and extend generally in a north-south orientation for 388 nautical miles, with a total dry land area of 176.5 square miles. The largest and most populated of the islands is Saipan (population approximately 40,000). Most of the remainder of the population is split between the islands of Tinian and Rota, each having a population of slightly more than 2,000 persons. CMNI is 5,280 miles from the mainland United States, 1,440 miles east of Manila, 1,150 miles south of Tokyo, and 108 miles north of Guam.

CNMI has a tropical climate, with consistently warm and humid weather. Prevailing winds blow from the east 55% of the time and from the northeast 25% of the time. The trade winds are strongest and most constant during the dry season when wind speeds average 15 to 25 miles per hour. In addition, during the rainy season, the islands are periodically hit by westward moving typhoons and heavy storm systems with wind speeds exceeding 100 miles per hour.

CNMI is in attainment with all primary and secondary ambient air quality standards (NAAQS), including the standard for ozone. The developed and populated areas of Saipan are located predominantly on the western side of the island. CNMI's petition states that, as a result, the winds from the east regularly disperse most air pollutants emitted from sources on the island over the Philippine Sea.

E. Economic Factors in CNMI

All motor vehicle gasoline is imported to CNMI and supplied by refineries in Singapore and Australia. Transportation costs dictate that the markets supplying gasoline to CNMI be limited to the Far East. It is estimated that there are 20,000 to 30,000 gasoline-powered vehicles in CNMI. Most are relatively new as the harsh, corrosive environment of CNMI tends to shorten a car's operational life. Average vehicle usage is estimated to be less than 1,000 miles per month.[3]

CNMI is significantly less affluent than the mainland United States. The annual per capita income in CNMI is less than $7,200 [4] compared to a national average of $14,420 [5]. Moreover, due to relatively high transportation costs, retail gasoline prices are already significantly higher in CNMI than in the continental U.S., ranging, in July 1995, from an average of about $1.60 per gallon on the island of Saipan to more than $1.80 per gallon on the islands of Rota and Tinian. For the same period, the national weekly average for a gallon of gasoline was approximately $1.18.[6]

[1] 40 CFR part 80, subparts E and F.

[2] 40 CFR part 80, subparts A and G.

[3] Letter dated August 7, 1996, from Eric Murdock, Hunton & Williams, Washington, D.C., supporting CNMI's petition.

[4] Final Rule, ''Commonwealth of the Northern Mariana Islands; Petition for Exemption from the Diesel Fuel Sulfur Requirements,'' 59 FR 26129, (May 19, 1994).

[5] Guam Department of Commerce.

[6] ''U. S. Sees Higher Gasoline Demand and Prices,'' *The New York Times*, April 11, 1996.

II. Clarification and Rationale for Exemption

A. Anti-Dumping Requirements (Subparts E and F)

Clarification

Section 211(k)(8) requires that average per gallon emissions of VOC, CO, NO_X, and toxics due to conventional gasoline produced by a refiner or importer not increase over 1990 levels for each refiner or importer. Since VOC and CO emission increases are expected to be controlled through other regulatory programs, the anti-dumping provisions are limited to regulating emissions of toxics and NO_X emissions.

Pursuant to Section 211(k)(8) of the Act, EPA adopted the regulations in Subpart E to address exhaust benzene, total exhaust toxics and NO_X emissions from conventional gasoline use. Under a simple emissions model, applicable from January 1, 1995 to January 1, 1998, a limit is set for sulfur, olefins and T90 as well as exhaust benzene. A more complex emissions model is required beginning January 1, 1998, with limits set on exhaust toxics and NO_X. All the limits are set as annual averages.

Compliance is measured by comparing emissions of a refiner's or importer's conventional gasoline against those of a baseline gasoline—either a baseline based on the quality of a refiner's 1990 gasoline or on a statutory baseline specified by the Clean Air Act. Subparts E and F require a refiner or importer that establishes a baseline to hire an independent auditor to verify its baseline parameters. EPA requires each refiner or importer to maintain records and to report to EPA certain information pertaining to production of conventional gasoline by February 1996, and every subsequent year. CNMI's petition states that importers would be required to demonstrate compliance with the anti-dumping requirements using the statutory baseline.

Rationale for Exemption From Anti-dumping Requirements

The burden of compliance with these requirements in CNMI will fall principally on the two major gasoline importing and marketing companies who import gasoline to CNMI. These companies also import the gasoline that is supplied in Guam. Therefore the gasoline supplied in CNMI is expected to have the same properties in terms of the anti-dumping parameters as the gasoline sold in Guam.[7]

Transportation costs dictate that the markets supplied by these refineries be limited to the Far East. These refineries have no reason to produce reformulated gasoline or conventional gasoline that meets the anti-dumping requirements. One importer states that the demand for gasoline in CNMI represents less than 1% of the total gasoline production of the Singapore refineries.

As in Guam, Singapore refineries currently supply CNMI's gasoline. Therefore, the quality is the same in CNMI as in Guam. Singapore refineries differ from the configurations of typical mainland U.S. refineries in that they do not have catalytic cracking capability (that is, the Singapore refineries do not employ fluid catalytic cracking or ''FCC'' units). As a result of these differences in plant configuration, the properties of the gasoline produced by the Singapore refineries would be expected to be quite different in some respects from the properties of gasoline produced by the typical mainland U. S. refinery (i.e., ''baseline'' conventional gasoline). Specifically, gasoline produced at the Singapore refineries would typically have lower concentrations of sulfur and olefins and relatively higher concentrations of benzene and aromatics.

As a result of these differences, the gasoline produced at the Singapore refineries cannot consistently satisfy the anti-dumping requirements when compared to statutory baseline gasoline, particularly for the winter season. This is not the result of any ''dumping'' of components restricted in reformulated gasoline; it is a reflection of differences in the quality of the gasoline produced in Singapore compared to that typically produced in the mainland U.S.

The two importers of gasoline to CNMI have indicated that the gasoline normally imported from the Singapore refineries is likely to contain benzene and aromatic concentrations that exceed the statutory baseline levels. Approximately 12,000,000 gallons of gasoline are consumed annually in CNMI.[8] As previously stated, the quality of the gasoline imported to CNMI is the same as that imported to Guam. If CNMI is not granted an exemption from the anti-dumping requirements, EPA calculates that gasoline, meeting the statutory baseline, could result during a compliance period in emitting approximately 4 tons of total toxic emissions in CNMI.

A simple cost effectiveness analysis indicates that the cost effectiveness of reducing the total toxic emissions would be over $200,000 per ton.[9] In EPA's Regulatory Impact Analysis for Reformulated Gasoline,[10] the Agency estimated that reducing total toxic emissions from combustion and use of gasoline under the reformulated gasoline program would cost approximately $55,000 per ton. Therefore, the cost effectiveness of using another gasoline supplier to reduce air toxics emissions in CNMI is several times higher than EPA's estimate for nationwide control of toxics in the federal reformulated gasoline program.

CNMI's petition states that overall compliance with the anti-dumping and fuel detergent requirements would require capital expenditures of $143,000 and annual operating costs of $212,500. These costs are entirely associated with gasoline and will therefore result in increases in the retail price of gasoline, estimated by the companies to be at least 1 to 2 cents per gallon.

In addition, the anti-dumping requirements could force importers to obtain gasoline from distant refineries, adding substantially to the transportation costs and resulting in a price increase at the retail level of as much as another 10 cents per gallon. The CNMI consumer is already paying a significantly higher price for gasoline than the consumer on the U. S. mainland. An additional 10 cents or more per gallon for gasoline would pose a significant economic burden to CNMI residents.

B. Fuel Additization Requirements—(Subpart G)

Clarification

Section 211(l) requires that, beginning January 1, 1995, no person may sell or dispense to an ultimate consumer in the United States, and no refiner or marketer may sell or dispense to persons who sell or dispense to ultimate consumers in the United States any gasoline which does not contain additives to prevent the accumulation of deposits in engines or fuel supply systems. EPA promulgated a rule on October 14, 1994, under which all gasoline (reformulated and conventional) sold or transferred to gasoline retail outlets or wholesale purchaser consumer facilities and all gasoline sold or transferred to ultimate consumers must be additized with a fuel

[7] Letters dated August 7, 1996 and October 8, 1996, from Eric Murdock, Hunton & Williams, Washington, D.C., supporting CNMI's petition.

[8] Letter dated October 8, 1996, from Eric Murdock, Hunton & Williams, Washington, D.C., supporting CNMI's petition.

[9] Computed from values in Guam petition based on proportional relationship (see 61 FR 53854 10/16/96).

[10] See Regulatory Impact Analysis for Reformulated Gasoline, EPA Air Dockets A–92–01 and A–92–12, 401 M Street, S.W., Washington, D.C. 20460.

detergent additive registered with the EPA, starting January 1, 1995. On July 5, 1996, EPA published a supplemental rule requiring testing and certification of the fuel detergents (61 FR 3510).

Fuel deposits in motor vehicle engines and fuel supply systems and their impacts on vehicle performance have been studied for many years. Fuel injector and intake valve deposits have been shown to have significant adverse effects on drivability, exhaust emissions and, in some cases, on fuel economy. Deposits in fuel injectors may undercut the effectiveness of engines' oxygen sensors in ensuring the best fuel/air ratio to control emissions. Carburetor deposits can cause improper enrichment of the fuel/air mixture, which can result in rough idling, stalling, poor acceleration, reduced fuel economy and higher emissions of hydrocarbons, carbon monoxide, and, in some cases, nitrogen oxides. The mechanisms by which intake valve deposits increase emissions are less clear. Adsorption and desorption of fuel on the intake valves can lead to improper fuel/air ratios across the cylinders, thereby interfering with the ability of the oxygen sensor to regulate proper mixture composition. Intake valve deposits might also increase emissions by interfering with the proper preparation and delivery of the fuel air mixture resulting in combustion inefficiency.

Under the current additization program, the detergent additive must be registered under 40 CFR Part 79, and must be added in concentration equal to or exceeding the level specified by the additive manufacturer as being effective in preventing deposits. Each facility where detergent additization is performed is required to create and maintain volumetric additive reconciliation (VAR) records to demonstrate that the gasoline has been additized to the proper concentration. Product transfer documentation (PTD) is required whenever title or custody to any gasoline or detergent is transferred, other than when additized gasoline is sold or dispensed at a retail outlet or wholesale purchaser-consumer facility to the consumer. Each gasoline refiner, importer, carrier, distributor, oxygenate blender or detergent blender who owns, leases, operates, controls or supervises the facility (including a truck or individual storage tank) is subject to these requirements.

Rationale for Denying Exemption

CNMI's petition states that of the two importers of gasoline, only one importer adds a detergent additive to all of the grades of gasoline that it sells in CNMI. The importer using detergents in all the gasoline it imports to CNMI adds a detergent additive (RT2276) to both grades it imports at a concentration of 19.1 gallons to every 42,000 gallons of gasoline. As mentioned in the notice of direct final decision on Guam's petition for exemption from the anti-dumping and gasoline detergent additization regulations, all importers and marketers of Guam's gasoline are now adding detergents to Guam's gasoline.[11] EPA, believes, therefore, that it is also feasible for the importer and its marketers not using detergents to add detergents to the gasoline it imports for consumption in CNMI.

Capital costs of compliance with the anti-dumping and additization requirements would be approximately $143,000, of which amount, the majority would be required for the additization requirements. Approximately $5,000 of this amount would be required for software modifications for the VAR and PTD requirements (for the importer that is not already adding detergents to its gasoline). Annual operating expenditures would amount to more than $212,000—approximately one-half of that amount would be required for operating expenses for the additization requirements for the two importers. These costs are comparable to the costs computed for the three importers of gasoline to Guam as described in the notice of direct final decision on Guam's petition for exemption from the anti-dumping and detergent additization requirements of conventional gasoline.[12]

EPA believes that the costs in CNMI of compliance with the requirements of Subpart G would be the same as compared to compliance costs in Guam. The Guam petition stated that the compliance cost would add between .6 to 1.4 cents to the cost of a gallon of gasoline. EPA estimated that the average incremental cost to consumers of compliance with the detergent requirements for the mainland United States would be 0.1 cent a gallon [13] with this cost being partially compensated for by the increased fuel economy and decreased maintenance requirements which improved deposit control is expected to provide. Over 90 percent of the total estimated cost of the program is associated with the price of the additional additive amounts needed to bring all gasoline up to the effective detergency levels which most of U.S. gasoline already contains. EPA believes that the cost to CNMI consumers will, most likely, closely parallel that projected for consumers in the mainland U.S.

Transportation costs associated with shipping detergent additive which complies with federal detergency requirements to CNMI are likely to be somewhat higher than in the mainland U.S. However, EPA believes that this differential in cost will have minimal effect due to the small volume of detergent additive estimated to be needed to achieve proper additization (approximately 0.4 to 0.6 gallons of detergent to 1,000 gallons of gasoline). In addition, EPA's estimate of the cost to the consumer of the detergent program assumed the average motorist drives 10,000 to 15,000 miles per year and consumes 400 to 600 gallons of gasoline. Given CNMI's small size, the average motorist would tend to drive less than the average motorist on the mainland which would tend to reduce the cost to a CNMI consumer relative to EPA's estimate. CNMI's petition states that average miles driven per year are less than 12,000. All things considered, the cost to the consumer of up to six dollars a year estimated for the U.S. as a whole, holds for CNMI as well. EPA believes that this would not be an unreasonable economic burden for the CNMI consumer. This is generally consistent with EPA's estimate of the cost of compliance with the detergent requirements for the mainland United States. In addition, one supplier is already adding detergents to all of the gasoline it imports to CNMI. Therefore only one importer's gasoline is not currently being additized.

Compliance costs associated with the record keeping (VAR and PTD) requirements of the detergent rule are the primary additional costs to be considered herewith. As in the Guam petition [14] EPA estimates that compliance with the record keeping requirements of Subpart G would add only a small portion—less than l cent—to the cost of a gallon of gasoline. EPA believes that this would not be an unreasonable economic burden for the CNMI consumer.

Start-up costs could be higher in CNMI than in other markets on the mainland where detergent additization has been an ongoing process for several years. EPA does not believe that start-up of this program will be significantly more difficult or expensive in CNMI compared to the rest of the U.S. Further, once compliance programs are established, the annual cost of compliance will be comparable to that in other areas. In summary, the small

[11] 61 Fed. Reg. 53854 (October 16, 1996).

[12] 61 FR 53854 (October 16, 1996).

[13] Final Rule on the Certification Standards for Deposit Control of Gasoline Additives, July 5, 1996, 61 FR 35353.

[14] 61 FR 53854 (October 16, 1996).

added cost to CNMI consumers, the fact that one of the two importers is now adding detergents to its gasoline, and the fact that the CNMI gasoline suppliers also supply Guam's gasoline of the same quality (see 61 FR 53854 (October 16, 1996)) which contains detergents lead EPA to conclude that an exemption from the requirements of Subpart G is not warranted.

III. Final Action

A. Anti-Dumping Provisions for Conventional Gasoline

EPA has decided to exempt the Commonwealth of the Northern Mariana Islands from compliance with the anti-dumping standards for conventional gasoline under section 211(k)(8). The Agency believes that compliance with the gasoline anti-dumping requirements is unreasonable given the significantly increased costs to consumers in CNMI in achieving compliance. These increased costs are directly attributable to CNMI's location and resulting inability of importers to comply with the anti-dumping requirements without significantly greater costs than those expected for importers in the U.S. mainland. Gasoline price increases of the magnitude expected to result from compliance with subparts E and F could be especially burdensome for the many citizens of CNMI whose incomes are modest.

In addition, despite its geographic remoteness from the mainland, compliance with the anti-dumping provisions might require that CNMI import conventional gasoline from the U.S. mainland, greatly increasing the cost of conventional gasoline. EPA finds that these economic factors are unique to the Commonwealth of the Northern Mariana Islands.

This exemption will apply to all persons in CNMI subject to the anti-dumping requirements in section 211(k)(8) of the Act, and subparts E and F of 40 CFR Part 80. This exemption is retroactive to January 1, 1995, and applies only to gasoline imported to CNMI for use in CNMI. EPA reserves the right to review and reopen this exemption in the future if conditions change to warrant such an action.

B. Fuel Detergent Additization

EPA is denying the petition from the Commonwealth of the Northern Mariana Islands for an exemption from the fuel detergent additization requirement that, after January 1, 1995, all conventional gasoline contain registered fuel additives that control fuel deposits as established in 40 CFR part 80, subpart G. CNMI has not demonstrated that unique local factors exist such that compliance with the detergent additization and record keeping requirements would be either infeasible or unreasonable.

IV. Public Participation and Effective Date

The Agency is publishing this action as a direct final decision because it views it as noncontroversial and limited to the Commonwealth of the Northern Mariana Islands. EPA anticipates no adverse or critical comments. Representatives of automobile and petroleum industry associations have indicated that their constituents will not be adversely affected by this direct final decision and therefore the Agency expects no adverse comments from the members of those associations. Similarly, the Agency does not expect adverse comments from the environmental community or state and local governments, since the environmental impact is very minimal.

This action will become effective February 2, 1998. If the Agency receives adverse or critical comments by January 2, 1998, EPA will publish a subsequent **Federal Register** document withdrawing this decision. In the event that adverse or critical comments are received, EPA is also publishing a notice of proposed decision in a separate action today, which proposes the same action contained in this direct final decision. Any adverse comments received by the date listed above will be addressed in a subsequent final decision. That final decision will be based on the relevant portion of the proposed final decision that is published today in the proposed rules section of this **Federal Register** and that is identical to this direct final decision. 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 February 2, 1998.

This procedure allows the opportunity for public comments and opportunity for oral presentation of data as required under section 307(d) of the Act. This procedure also provides an expedited procedure for final action where a decision is not expected to be controversial and no adverse comment is expected.

V. Executive Order 12866

Under Executive Order 12866,[15] the Agency must determine whether a regulation is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments of communities;

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

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

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.[16]

It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

VI. Impact on Small Entities

This action either eases or leaves unchanged requirements otherwise applicable to affected entities. Thus, EPA has determined that it will not result in a significant adverse impact on a substantial number of small entities.

VII. Paperwork Reduction Act

The Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, and implementing regulations, 5 CFR part 1320, do not apply to this action as it does not involve the collection of information as defined therein.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This decision would not have a significant impact on a substantial number of small entities because the overall impact of this decision is a net decrease in requirements on all entities including small entities. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

[15] 58 FR 51736 (October 4, 1993).

[16] *Id.* at section 3(f)(1)-(4).

IX. Unfunded Mandates

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

EPA has determined that the exemption in this notice does not include a federal mandate that may result in estimated costs of $100 million or more to those entities mentioned above. This federal action approves a request for exemption by petitioners in CNMI to reduce the cost of implementing the Clean Air Act. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector result from this action.

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

XI. Electronic Copies of Decision

A copy of this action is available on the Internet at www.epa.gov/OMSWWW under the title: ''EPA Decision to Grant Conventional Gasoline Anti-dumping Exemption to the Commonwealth of the Northern Mariana Islands.''

XII. Statutory Authority

Authority for the action described in this notice is in section 325(a)(1) (42 U.S.C. 7625–1(a)(1)) of the Clean Air Act as amended.

Dated: November 25, 1997.

Carol M. Browner,

Administrator.

[FR Doc. 97–31736 Filed 12–2–97; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300574; FRL–5754–1]

RIN 2070–AB78

Sodium Chlorate; Exemption From Pesticide Tolerance for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a time-limited exemption from the requirement of a tolerance for residues of sodium chlorate in or on wheat. This action is in connection with crisis exemptions declared by the states of Arkansas and Mississippi under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on wheat in Arkansas and Mississippi. This regulation establishes an exemption from the requirement of a tolerance for residues of sodium chlorate in this food commodity pursuant to section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996. The exemption will expire and is revoked on July 31, 1998.

DATES: This regulation is effective December 3, 1997. Objections and requests for hearings must be received by EPA on or before February 2, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300574], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300574], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 1132, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300574]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Libby Pemberton, Registration Division 7505C, Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: CM #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308–9364, e-mail: pemberton.libby@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA, on its own initiative, pursuant to section 408(e) and (l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) and (l)(6), is establishing an exemption from the requirement of a tolerance for residues of the defoliant/desiccant sodium chlorate, in or on wheat. This exemption will expire and is revoked on July 31, 1998. EPA will publish a document in the **Federal Register** to remove the revoked exemption from the Code of Federal Regulations.

I. Background and Statutory Authority

The Food Quality Protection Act of 1996 (FQPA) (Pub. L. 104–170) was signed into law August 3, 1996. FQPA amends both the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 301 *et seq*., and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq*. The FQPA amendments went into effect immediately. Among other things, FQPA amends FFDCA to bring all EPA pesticide tolerance-setting activities under a new section 408 with a new safety standard and new procedures. These activities are described below and discussed in greater detail in the final rule establishing the time-limited tolerance associated with the emergency exemption for use of propiconazole on sorghum (61 FR 58135, November 13, 1996) (FRL–5572–9).

New section 408(c)(2)(A)(i) of the FFDCA allows EPA to establish an

exemption from tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption from tolerance is ''safe.'' Section 408(c)(2)(A)(ii) defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. New section 408(c)(2)(B) requires EPA to take into account, among other relevant conditions, the considerations set forth in 408(c)(2)(C) and (D). Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that ''emergency conditions exist which require such exemption.'' This provision was not amended by FQPA. EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

Section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment.

Because decisions on section 18-related tolerances must proceed before EPA reaches closure on several policy issues relating to interpretation and implementation of the FQPA, EPA does not intend for its actions on such tolerance to set binding precedents for the application of section 408 and the new safety standard to other tolerances and exemptions.

II. Emergency Exemption for Sodium Chlorate on Wheat and FFDCA Tolerances

On May 27 and June 6, 1997, the states of Mississippi and Arkansas, respectively, availed themselves of the authority to declare the existence of a crisis situation within each state, thereby authorizing use under FIFRA section 18 of sodium chlorate on wheat as a defoliant or desiccant to aid in the harvest of wheat. A cool, wet spring delayed the wheat harvest in these states. Continued heavy rains resulted in the need for a harvest aid to desiccate winter weeds which developed in the thin stands of an already diminished wheat crop.

As part of its assessment of these crisis exemptions, EPA assessed the potential risks presented by residues of sodium chlorate in or on wheat. In doing so, EPA considered the new safety standard in FFDCA section 408(c)(2), and EPA decided that an exemption from the requirement for a tolerance under FFDCA section 408(l)(6) would be consistent with the new safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing this exemption from the requirement of a tolerance without notice and opportunity for public comment under section 408(e), as provided in section 408(l)(6). Although this exemption from the requirement of a tolerance will expire and is revoked on July 31, 1998, under FFDCA section 408(l)(5), residues of the pesticide remaining in or on wheat after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA. EPA will take action to revoke this exemption earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because this exemption from the requirement of a tolerance is being approved under emergency conditions EPA has not made any decisions about whether sodium chlorate meets EPA's registration requirements for use on wheat or whether a permanent exemption from the requirement of a tolerance for this use would be appropriate. Under these circumstances, EPA does not believe that this exemption serves as a basis for registration of sodium chlorate by a State for special local needs under FIFRA section 24(c). Nor does this exemption serve as the basis for any State other than Arkansas and Mississippi to use this pesticide on this crop under section 18 of FIFRA without following all provisions of section 18 as identified in 40 CFR part 166. For additional information regarding the emergency exemption for sodium chlorate, contact the Agency's Registration Division at the address provided above.

III. Risk Assessment and Statutory Findings

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity. Second, EPA examines exposure to the pesticide through the diet (e.g., food and drinking water) and through exposures that occur as a result of pesticide use in residential settings.

A. Toxicity

1. *Threshold and non-threshold effects.* For many animal studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects) and doses causing no observed effects (the ''no-observed effect level'' or ''NOEL'').

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOEL from the study with the lowest NOEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a ''safety factor'') of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100% or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter term risks, EPA calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This 100-fold MOE is based on the same rationale as the 100-fold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short-term and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based on the appropriate NOEL) will be carried out based on the nature of the carcinogenic response and the Agency's knowledge of its mode of action.

2. *Differences in toxic effect due to exposure duration.* The toxicological effects of a pesticide can vary with different exposure durations. EPA considers the entire toxicity data base, and based on the effects seen for different durations and routes of exposure, determines which risk assessments should be done to assure that the public is adequately protected from any pesticide exposure scenario. Both short and long durations of exposure are always considered. Typically, risk assessments include ''acute,'' ''short-term,'' ''intermediate term,'' and ''chronic'' risks. These assessments are defined by the Agency as follows.

Acute risk, by the Agency's definition, results from 1-day consumption of food and water, and reflects toxicity which could be expressed following a single oral exposure to the pesticide residues. High end exposure to food and water residues are typically assumed.

Short-term risk results from exposure to the pesticide for a period of 1-7 days, and therefore overlaps with the acute risk assessment. Historically, this risk assessment was intended to address primarily dermal and inhalation exposure which could result, for example, from residential pesticide applications. However, since enaction of FQPA, this assessment has been expanded to include both dietary and non-dietary sources of exposure, and will typically consider exposure from food, water, and residential uses when reliable data are available. In this assessment, risks from average food and water exposure, and high-end residential exposure, are aggregated. High-end exposures from all three sources are not typically added because of the very low probability of this occurring in most cases, and because the other conservative assumptions built into the assessment assure adequate protection of public health. However, for cases in which high-end exposure can reasonably be expected from multiple sources (e.g., frequent and widespread homeowner use in a specific geographical area), multiple high-end risks will be aggregated and presented as part of the comprehensive risk assessment/characterization. Since the toxicological endpoint considered in this assessment reflects exposure over a period of at least 7 days, an additional degree of conservatism is built into the assessment; i.e., the risk assessment nominally covers 1-7 days exposure, and the toxicological endpoint/NOEL is selected to be adequate for at least 7 days of exposure. (Toxicity results at lower levels when the dosing duration is increased.)

Intermediate-term risk results from exposure for 7 days to several months. This assessment is handled in a manner similar to the short-term risk assessment.

Chronic risk assessment describes risk which could result from several months to a lifetime of exposure. For this assessment, risks are aggregated considering average exposure from all sources for representative population subgroups including infants and children.

B. Aggregate Exposure

In examining aggregate exposure, FFDCA section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, residues in groundwater or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity are estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children. The TMRC is a ''worst case'' estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC exceeds the RfD or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are eaten are well below established tolerances.

Percent of crop treated estimates are derived from federal and private market survey data. Typically, a range of estimates are supplied and the upper end of this range is assumed for the exposure assessment. By using this upper end estimate of percent of crop treated, the Agency is reasonably certain that exposure is not understated for any significant subpopulation group. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups, to pesticide residues. For this pesticide, the most highly exposed population subgroup (children 1-6 years old) was not regionally based.

IV. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action, EPA has sufficient data to assess the hazards of sodium chlorate and to make a determination on aggregate exposure, consistent with section 408(b)(2), for a time-limited exemption from the requirement of a tolerance for residues of sodium chlorate on wheat. EPA's assessment of the dietary exposures and risks associated with establishing the tolerance exemption follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by sodium chlorate are discussed below.

1. *Acute toxicity.* No acute dietary endpoint was identified. This conclusion was based on a developmental toxicity study in which rats were dosed at the limit dose of 1,000 mg/kg/day without any ill effects to the dams or their fetuses.

2. *Short - and intermediate - term non-dietary toxicity.* The available acute

dermal and inhalation studies are of dilute mixtures with other active ingredients. The Toxicity Categories were III for the dermal studies, and IV for the inhalation studies. Aqueous sodium chlorate has been used as an antiseptic wash for the skin and mucous membranes. Considering the low toxicity of sodium chlorate, non-dietary exposure is not a concern.

3. *Chronic toxicity*. EPA has not established an RfD for sodium chlorate. For purposes of this exemption, based upon available toxicity data, an RfD for sodium chlorate of 0.1 milligrams/kilogram/day (mg/kg/day) was used. This RfD is based on a 90-day oral toxicity study in rats with a NOEL of 100 mg/kg/day and an uncertainty factor of 1,000 (10-fold each for inter and intra-species extrapolation, and use of a less-than-chronic endpoint) based on anemia, reticulocytosis, and depressed adrenal weights at the LOEL of 1,000 mg/kg/day.

4. *Carcinogenicity*. Sodium chlorate is used as a desiccant. Because it is chemically similar to chlorine dioxide and chlorite which are not carcinogenic, and dietary exposure is virtually eliminated by hydrolysis during cooking, carcinogenicity is not a concern.

B. Exposures and Risks

1. *From food and feed uses.* Exemptions from the requirement of tolerances have been established (40 CFR 180.1020) for the residues of sodium chlorate, in or on a variety of raw agricultural commodities, including corn, rice, safflower, and sorghum. Risk assessments were conducted by EPA to assess dietary exposures and risks from sodium chlorate as follows:

i. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure.

ii. *Chronic exposure and risk.* Field trial residue values were non-detectable at the limit of detection of 2 ppm, even at the 2× rate. The risk assessment assumed that 100% of all wheat commodities will contain sodium chlorate residues and those residues would all be at 2 ppm, which results in an overestimate of human dietary exposure. Additionally, residues of sodium chlorate would likely be substantially reduced through hydrolysis during cooking, although this reduction was not taken into account for this conservative risk assessment.

2. *From drinking water.* There is no established Maximum Concentration Level for residues of sodium chlorate in drinking water. No drinking water health advisory levels have been established for sodium chlorate.

Chronic exposure and risk. Because the Agency lacks sufficient water-related exposure data to complete a comprehensive drinking water risk assessment for many pesticides, EPA has commenced and nearly completed a process to identify a reasonable yet conservative bounding figure for the potential contribution of water-related exposure to the aggregate risk posed by a pesticide. In developing the bounding figure, EPA estimated residue levels in water for a number of specific pesticides using various data sources. The Agency then applied the estimated residue levels, in conjunction with appropriate toxicological endpoints (RfDs or acute dietary NOELs) and assumptions about body weight and consumption, to calculate, for each pesticide, the increment of aggregate risk contributed by consumption of contaminated water. While EPA has not yet pinpointed the appropriate bounding figure for exposure from contaminated water, the ranges the Agency is continuing to examine are all below the level that would cause sodium chlorate to exceed the RfD if the exemption being considered in this document were granted. The Agency has therefore concluded that the potential exposures associated with sodium chlorate in water, even at the higher levels the Agency is considering as a conservative upper bound, would not prevent the Agency from determining that there is a reasonable certainty of no harm if the exemption is granted.

3. *From non-dietary exposure.* Sodium chlorate is currently registered for use on the following residential non-food sites: wood treatment, outdoor turf, and ornamental perennials, shrubs, and trees. The available acute dermal and inhalation studies are of dilute mixtures with other active ingredients. The Toxicity Categories are III for the dermal studies, and IV for the inhalation studies. Aqueous sodium chlorate has been used as an antiseptic wash for the skin and mucous membranes. Agricultural workers would be exposed to aqueous solutions containing a low percentage of sodium chlorate. Considering the low toxicity of sodium chlorate, non-dietary exposure is not a concern.

4. *Cumulative exposure to substances with common mechanism of toxicity.* Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' The Agency believes that ''available information'' in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether sodium chlorate has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, sodium chlorate does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not

assumed that sodium chlorate has a common mechanism of toxicity with other substances.

C. Aggregate Risks and Determination of Safety for U.S. Population

1. *Chronic risk.* Using the very conservative TMRC exposure assumptions described above, EPA has concluded that aggregate exposure to sodium chlorate from food will utilize 3% of the RfD for the U.S. population. The major identifiable subgroup with the highest aggregate exposure is children (1-6 years old) discussed below. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to sodium chlorate in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the RfD. EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to sodium chlorate residues.

2. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential exposure.

D. Aggregate Risks and Determination of Safety for Infants and Children

1. *Safety factor for infants and children*— i. *In general.* In assessing the potential for additional sensitivity of infants and children to residues of sodium chlorate, EPA considered data from developmental toxicity studies in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from maternal pesticide exposure during gestation. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for pre-and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard 100-fold safety factor (usually 100 for combined inter-and intra-species variability)) and not the additional tenfold safety factor when EPA has a complete data base under existing guidelines and when the severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard safety factor.

ii. *Developmental toxicity studies.* In the developmental study in rats, the maternal (systemic) NOEL was >1,000 mg/kg/day. The developmental (fetal) NOEl was also >1,000 mg/kg/day.

iii. *Pre- and post-natal sensitivity.* Sodium chlorate is not a developmental toxicant in rats. EPA has already applied an additional 10-fold uncertainty factor (resulting in a total 1,000-fold uncertainty factor) to the NOEL used to set the RfD. This additional 10-fold uncertainty factor should be adequate to protect infants and children.

2. *Chronic risk.* Using the very conservative exposure assumptions described above, EPA has concluded that aggregate exposure to sodium chlorate from food will utilize from 1% of the RfD for nursing infants up to 6% for children 1-6 years old. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to sodium chlorate in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the RfD. EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to sodium chlorate residues.

V. Other Considerations

A. Metabolism In Plants and Animals

The metabolism of sodium chlorate in plants is adequately understood. The residue of concern is sodium chlorate and sodium chloride. The nature of the residue in animals is not applicable due to no reasonable expectation of transfer of residues to meat/milk/poultry/eggs.

B. Analytical Enforcement Methodology

Analytical methods for detecting and measuring the levels of the pesticide residue are not needed. The Agency proposes to establish an exemption from the requirement of a tolerance without any numerical limitation; therefore, the Agency has concluded that analytical methods are not required for enforcement purposes for sodium chlorate.

C. Magnitude of Residues

No detectable residues were found in wheat grain or straw from wheat treated at the 2× rate. Considering that no detectable residues were found in wheat grain, it is unlikely that significant residues will occur in the processed fractions of wheat. There is no likelihood of transfer of residues to meat/milk/poultry/eggs. Therefore, magnitude of the residue data in those commodities is not required.

D. International Residue Limits

No CODEX, Canadian, or Mexican maximum residue levels have been established for residues of sodium chlorate.

E. Rotational Crop Restrictions

Considering the phytotoxic nature of sodium chlorate, which would preclude the planting of a crop soon after treatment of a previous crop, coupled with the fact that residues are below the limit of quantitation shortly after application to target crops, EPA does not believe measurable residues would be detected in rotational crops. For the purposes of this section 18 use, rotational crop tolerances and/or plant back restrictions will not be necessary.

VI. Conclusion

Therefore, the exemption from the requirement of a tolerance is established for residues of sodium chlorate in wheat.

VII. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to ''object'' to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by February 2, 1998, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given

above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VIII. Public Record and Electronic Submissions

EPA has established a record for this rulemaking under docket control number [OPP–300574] (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 1132 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Electronic comments may be sent directly to EPA at:

opp-docket@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in **ADDRESSES** at the beginning of this document.

IX. Regulatory Assessment Requirements

This final rule establishes a time-limited exemption from the tolerance requirement under FFDCA section 408(l)(6). The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

In addition, since these tolerances and exemptions that are established under FFDCA section 408 (l)(6), such as the exemption in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950), and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

X. Submission to Congress and the General Accounting Office

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 21, 1997.

Linda A. Travers,

Acting Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority : 21 U.S.C. 346a and 371.

2. Section 180.1020 is amended by designating the existing text as paragraph (a) and by adding paragraph (b) to read as follows:

§ 180.1020 Sodium chlorate; exemption from the requirement of a tolerance.

* * * * *

(b) A time-limited exemption from the requirement of a tolerance is established for residues of the defoliant/desiccant in connection with use of the pesticide under section 18 emergency exemptions granted by EPA. The exemption will expire and is revoked on the date specified in the following table:

Commodity	Parts per million	Expiration/ revocation date
Wheat	NA	7/31/98

[FR Doc. 97–31547 Filed 12–2–97; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20 and 22

[WT Docket No. 96–162; FCC 97–352]

Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services and Implementation of Section 601(d) of the Telecommunications Act of 1996

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this *Report and Order*, the Commission modifies the current structural separation requirement for the provision of cellular service by the Bell Operating Companies (BOCs), and adopts a new requirement that all incumbent local exchange carriers (LECs) provide in-region broadband CMRS, including cellular services, through a CMRS affiliate, subject to the Commission's accounting and affiliate transactions rules. Rural telephone companies will be exempt from this requirement; however, a competing carrier, interconnected with the rural carrier, may petition the Commission to remove the exemption, or the Commission may do so on its own motion, where the rural telephone company has engaged in anti-competitive conduct, such as discrimination. Companies serving fewer than two percent of the nation's subscriber lines that seek to provide broadband CMRS may petition the Commission for suspension or modification of the requirement that broadband CMRS be provided through a separate affiliate. These safeguards are adopted to address concerns that recent developments in the CMRS market, such as direct competition among telecommunications carriers and the development of fixed wireless services, may increase the incentive for anti-competitive behavior by incumbent LECs. The separate affiliate requirement will sunset on January 1, 2002, unless the Commission determines that the competitive conditions in the local exchange market are such that continuation of these safeguards is in the public interest.

EFFECTIVE DATE: February 11, 1998.

FOR FURTHER INFORMATION CONTACT: David Krech, Commercial Wireless Division, Wireless Telecommunications Bureau, (202) 418–0620. For additional information concerning the information collections contained in this Order contact Dorothy Conway at (202) 418–7349, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This *Report and Order* in WT Docket No. 96–162, adopted September 30, 1997, and released October 3, 1997 (erratum released October 29, 1997), clarification Order (FCC 97–389) adopted October 24, 1997, and released October 27, 1997, is available for inspection and copying during normal business hours in the FCC Reference Center, Room 230, 1919 M Street N.W., Washington D.C. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington D.C. 20036 (202) 857–3800. Synopsis of the *Report and Order*:

I. Background

1. *Safeguards Under Section 22.903 for BOC Provision of Cellular Service.* Section 22.903 of the Commission's rules comprises two principal parts: the requirement that BOCs provide cellular service through a structurally separate corporation; and a series of restrictions on the separate affiliate, including restrictions on use and ownership of landline transmission facilities and requirements for the independent operation of the separate cellular affiliate through separate books of account, officers, operating, marketing, installation, and maintenance personnel and utilization of separate computer and transmission facilities in the provision of cellular service. This requirement was adopted in order to preserve the competitive potential of the non-wireline cellular provider, the Commission required the wireline carrier to provide its cellular service through a structurally separate affiliate, *i.e.*, an independent corporation with separate officers, separate books of account, and separate operating, marketing, installation, and maintenance personnel. The Commission also prohibited the wireline carrier's cellular affiliate from owning facilities for the provision of landline telephone service. These structural separation requirements were intended to prevent wireline carriers from using their market power in the local exchange market to engage in anti-competitive practices, such as improper cost allocation between the wireline carrier and its cellular affiliate and discrimination by the wireline carrier in favor of its cellular affiliate. The Commission also prohibited the wireline carrier's cellular affiliate from owning facilities for the provision of landline telephone service.

2. *Section 22.903 Separate Affiliate Not Required for LEC Provision of personal communications services (PCS) and specialized mobile radio (SMR).* Section 22.903 applies only to BOC provision of cellular service. Structural safeguards are not required for LEC, including BOC, provision of other CMRS, such as broadband PCS. *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90–314, *Second Report and Order*, 58 FR 59174 (Nov. 8, 1993), *recon.*, 59 FR 32830 (June 24, 1994) (*Broadband PCS Second Report and Order*); Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Service, GN Docket No. 93–252, *Report and Order*, 59 FR 18493 (April 19, 1994) (*CMRS Second Report and Order*). In addition, non-BOC LECs may provide cellular service without structural safeguards.

3. *Cincinnati Bell.* In *Cincinnati Bell Telephone* v. *FCC*, 69 F.3d 752 (6th Cir. 1995) the Sixth Circuit found that the Commission had failed to justify adequately the conclusion in the *Broadband PCS Second Report and Order* that the record was insufficient to repeal section 22.903. The Court held that, in light of the decision that all LECs, including BOCs, could provide broadband PCS without establishing a structurally separate affiliate, the Commission was required—but had failed—to give a reasoned explanation for the disparate treatment of BOC provision of cellular and PCS, as well as the disparity in BOC and non-BOC provision of cellular service.

4. *NPRM.* In the *NPRM, Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96–162, Notice of Proposed Rulemaking, Order on Remand, and Waiver Order*, 61 FR 46420 (Sept. 3, 1996), the Commission observed that the BOCs currently retain market power in the local exchange market because they control bottleneck facilities and serve the vast majority of customers within their service areas, and other carriers must seek interconnection from the BOC. To address this issue, the Commission proposed two alternatives to the existing structural safeguards for BOC cellular operations, and asked commenters to submit information regarding the costs of the structural separation requirement: (1) to retain the structural separations requirements of section 22.903 for BOC provision of in-region cellular service, but sunset the restrictions for a particular BOC when that BOC receives authorization to provide interLATA service originating in any in-region state; or (2) to eliminate the structural safeguards of section

22.903 immediately in favor of uniform safeguards for all Tier 1 LEC provision of broadband CMRS. With respect to both options, the Commission proposed to replace section 22.903 with safeguards similar to those adopted in the *Competitive Carrier Fifth Report and Order* proceeding. *See* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79–252, *Fifth Report and Order*, 49 FR 34824 (Sept. 4, 1984) (*Competitive Carrier Fifth Report and Order*). In that order, the Commission concluded that, in order to qualify for treatment as a nondominant carrier, an independent local exchange company must provide interstate interexchange services through a separate affiliate that (1) has separate books of account; (2) does not jointly own transmission or switching facilities with that local exchange company; and (3) acquires any services from the affiliated local exchange carrier at tariffed rates, terms, and conditions. In addition, the Commission subjected the affiliate to the Commission's joint cost and affiliate transaction rules. In the *NPRM*, the Commission proposed a similar framework of safeguards for Tier 1 LECs providing in-region broadband CMRS

II. Report and Order

A. General Issues Regarding Incumbent LEC Provision of CMRS

5. Section 22.903 was intended to apply only to cellular service; however, the anti-competitive practices it was meant to address are by their nature not unique to cellular service, but can occur any time a competing service provider requests interconnection with a local exchange network. That is because LECs that own CMRS subsidiaries have the incentive to engage in such anti-competitive practices in order to benefit their own CMRS subsidiaries and to protect their local exchange monopolies from wireless competition. At the same time, LEC control of bottleneck local exchange facilities, upon which competing CMRS providers must rely, gives LECs the opportunity to engage in anti-competitive behavior.

6. Improper cost allocation occurs when a LEC shifts costs from its CMRS subsidiary to its regulated local exchange service. Cost shifting has the effect of both subsidizing the LEC's CMRS subsidiary, thus giving the subsidiary a substantial competitive advantage over non-LEC affiliated CMRS providers, and of raising the costs borne by the LEC's captive local exchange ratepayers. *See* Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order in CC Docket No. 96–149 and Third Report and Order in CC Docket No. 96–61*, 62 FR 35974 (Jul. 3, 1997) (*Dom/Nondom Order*).

7. Requiring LECs to create a separate affiliate for the provision of CMRS services helps deter the LECs' incentive and ability to engage in anti-competitive practices and facilitates their detection. Arm's length transactions between LECs and their CMRS affiliates and the requirement that agreements be reduced to writing will help the Commission and competing CMRS providers to detect, and address, competitive abuses. Ease of detection will, in turn, deter a LEC from engaging in such abuses in the first place.

8. The Commission observes that in the past structural separation requirements were applied in the wireless context only to BOC provision of cellular service. In the *Broadband PCS Second Report and Order* and the *CMRS Second Report and Order* the Commission concluded that nonstructural accounting safeguards were sufficient to protect against improper cost allocations and interconnection discrimination by LECs providing PCS or other CMRS. Not only did the Commission, prior to divestiture, apply structural separation in the wireless context only to cellular service, but in formulating rules for cellular service, the Commission applied the structural separation rules only to the BOCs, and not to the non-BOC LECs, in the provision of cellular service. The Commission believes that the rules should treat similar services consistently and that any structural separation requirements should be uniform to avoid disparate treatment. Thus, the choices for achieving regulatory symmetry are either to extend the section 22.903 structural safeguards for BOC provided cellular service to all LECs and all CMRS services, or to eliminate section 22.903 in favor of less restrictive safeguards applicable to the provision of all broadband CMRS.

B. Separate Affiliate Requirements for In-Region Incumbent LEC Provision of CMRS

9. Anti-competitive interconnection practices, particularly discriminatory behavior, pose a substantial threat to full and fair competition in the CMRS marketplace, and all LECs, not just the BOCs, have the ability and incentive to engage in anti-competitive behavior. There are ways to lessen the threat of discrimination, predatory price squeezes, and cost misallocation that are less burdensome than the requirements currently imposed by section 22.903. For example, accounting safeguards, section 251 of the Communications Act, 47 U.S.C. 251, and related interconnection rules, and price cap regulation all serve to protect local exchange ratepayers from bearing the costs and risks of the telephone companies' other nonregulated activities and reduce the likelihood that LECs will raise interconnection rates in order to effect a predatory price squeeze. Such mechanisms do not, however, eliminate the possibility of interconnection discrimination.

10. In this *Report and Order*, the Commission requires that incumbent LECs offering in-region broadband CMRS services do so through a separate corporate affiliate. The CMRS affiliate must: (1) maintain separate books of account, and must maintain the books, records, and accounts in accordance with generally accepted accounting principles; (2) not jointly own transmission or switching facilities with the affiliated LEC that the affiliated LEC uses for the provision of local exchange services in the same in-region market; and (3) acquire any services from the affiliated LEC on a compensatory arm's length basis, as required by our affiliate transactions rules. The affiliate will be subject to the Commission's joint cost and affiliate transaction rules. Title II common carrier services or services, facilities, or network elements provided pursuant to sections 251 and 252 that are acquired from the affiliated LEC must be available to all other carriers, including CMRS providers, on the same terms and conditions.

11. *Applicability of Safeguards to Out-of-Region CMRS Operations.* The Commission's concerns regarding incumbent LEC provision of CMRS services extend only to the provision of in-region CMRS services because concerns regarding discrimination in interconnection arrangements are not present outside of an incumbent LEC's wireline service territory. In addition, the geographic separation between an incumbent LEC's in-region service area and out-of-region CMRS mitigates the potential for undetected improper allocation of costs. With regard to interconnection, the lack of control of ''bottleneck'' local facilities means that an incumbent LEC providing CMRS ''out-of-region'' is similar to any other provider of CMRS.

12. The Commission is not requiring any LEC to provide out-of-region CMRS offerings through a separate affiliate. To the extent there is potential for incumbent LECs that provide out-of-

region CMRS to engage in anti-competitive behavior or cost misallocations such potential is adequately addressed through accounting requirements and other non-structural safeguards.

13. The Commission also recognizes that CMRS license areas and incumbent LEC wireline service areas are not generally congruent. Moreover, non-BOC incumbent LECs, particularly smaller companies, do not necessarily have distinct service areas but may have discrete patches of coverage over a large area. With respect to CMRS, on the other hand, licensees typically have a well-defined geographic service area (*e.g.*, major trading area (MTA), basic trading area (BTA)) under our rules. The Commission observes that an incumbent LEC's incentives and ability to act anti-competitively are significantly attenuated where the area served by its bottleneck wireline facilities is a small fraction of the area served by its wireless operations. Indeed, in situations where there is de minimis overlap between the incumbent's wireline service area and its CMRS license area, that incumbent LEC is close to offering ''out-of-region'' services. Therefore, the Commission is applying ''in-region'' CMRS structural safeguards only to an incumbent LEC whose wireline service area substantially overlaps its CMRS license area. The Commission defines ''in-region'' CMRS to be a CMRS offering where 10 percent or more of the population covered by the CMRS service area is within the incumbent LEC's wireline service area. The Commission concludes that the standard 10 percent attribution criteria should apply with respect to ownership relationships between an incumbent LEC and an in-region CMRS licensee.

14. *Applicability of Safeguards to All Broadband CMRS Services and All In-Region Incumbent LECs.* The separate affiliate rules adopted herein will apply to all in-region LEC broadband CMRS operations because all incumbent LECs have the incentive and ability to discriminate against unaffiliated broadband CMRS providers of every type—not just cellular operators—where there is sufficient overlap between the incumbent LEC's wireline service area and the CMRS service area. Thus, limited safeguards applicable to all in-region incumbent LECs for all broadband CMRS services are necessary to promote competitive communications markets and to achieve regulatory symmetry.

15. Increased competition and convergence of services in the CMRS market has heightened the need for regulatory symmetry among commercial mobile radio services and among different kinds of CMRS providers. In applying a separate affiliate requirement to all in-region incumbent LEC provision of CMRS and not just BOC provision of cellular service, the Commission is imposing certain costs on, and limiting flexibility for, independent LECs, which were not previously subject to these requirements or to any of the other requirements of section 22.903. Nevertheless, the competitive concerns regarding the ownership and control of bottleneck facilities are significant so long as there is a substantial geographic overlap between the incumbent LEC's wireline local telephone service area and the LEC's CMRS service area. When that overlap passes the 10 percent overlap threshold, the benefits of preventing the competitive harm inherent in the incumbent LEC-CMRS relationship significantly outweigh the costs imposed by safeguards. To the extent that incumbent LECs are concerned that imposition of a separate affiliate requirement will impair their ability to offer integrated wireline and wireless services, the rules permit the creation of certain bundled and integrated service packages, either through an incumbent LEC's offering facilities and services to the CMRS affiliate on nondiscriminatory terms, or solely through the CMRS affiliate that is able to offer competitive local exchange service. Absent a separate affiliate requirement, it would be more difficult for the Commission and competitors to detect and prevent cost misallocation, discrimination and other anti-competitive behavior by incumbent LECs. Particularly with respect to interconnection, a separate affiliate requirement is an effective way to afford the requisite degree of ''transparency'' to enable competitors and the Commission to detect discrimination in interconnection. Without a separate affiliate requirement, non-affiliated CMRS providers would have greater difficulty determining whether their interconnection arrangements with the LEC are comparable to those between the LEC and its CMRS provider.

16. The Commission recognizes that this decision represents a departure from prior decisions in the *Broadband PCS Second Report and Order* and *CMRS Second Report and Order* where the Commission declined to impose structural safeguards for broadband PCS providers affiliated with LECs, and for LECs with CMRS affiliates, respectively. The Commission similarly declined to impose structural safeguards in the *SMR Wireline Order*, in which we permitted wireline carriers to obtain SMR licenses without restriction. The Commission's decision in this Report and Order strikes a different balance between the interest in fostering efficient provision of CMRS and the commitment to prevent unlawful discrimination and other anti-competitive practices by incumbent LECs than our decisions in the *Broadband PCS Second Report and Order, CMRS Second Report and Order, SMR Wireline Order,* and *Cellular Reconsideration Order.* These earlier decisions were not based on a full analysis of the competitive harms that might result from LEC provision of SMR, PCS, and cellular, particularly with respect to discrimination against unaffiliated competitors requesting interconnection.

17. *Basis for Level of Safeguards.* These structural safeguards are substantially similar to those recently adopted with regard to independent LEC provision of in-region interstate, domestic, interexchange service, and are similar to the separate affiliate requirements the Commission adopted in the *Competitive Carrier Fifth Report and Order.* These safeguards provide an adequate measure of transparency between an incumbent LEC's wireline and in-region CMRS operations so as to prevent improper cost allocations and to ensure that competing CMRS providers are receiving nondiscriminatory treatment. The affiliate transactions rules and the requirement of separate books of account are useful to detect and address potential misallocation of costs and/or assets between a LEC and its CMRS affiliate. Any transaction between the incumbent LEC and its CMRS affiliate becomes subject to the Commission's affiliate transactions rules, which serve to prevent cost misallocation. The Commission concludes that, while price cap regulation may reduce the incentive for misallocation of costs of the nonregulated wireless services, it does not entirely eliminate that incentive. The Commission's requirement that any services and facilities provided by the incumbent LEC to its CMRS affiliate must also be available to independent CMRS operators on the same prices, terms, and conditions ensures that these transactions between the incumbent and its CMRS affiliate will be arms-length transactions. The Commission anticipates that interconnection arrangements between the incumbent LEC and its CMRS affiliate will be undertaken pursuant to tariff or through section 251 negotiated or arbitrated

interconnection agreements that are available to all CMRS carriers.

18. *Differences between In-Region Incumbent LEC-CMRS Safeguards and Current BOC Cellular Safeguards.* In two critical respects, the requirements adopted herein are less stringent than the section 22.903 restrictions. First, the CMRS separate affiliate does not need to have separate officers and employees from the incumbent LEC. Second, the CMRS separate affiliate is permitted to own its own wireline local exchange facilities, and the CMRS affiliate may operate as a competitive local exchange carrier in its region. The only restriction on the wireline LEC activities of the CMRS affiliate is that the affiliate may not jointly own transmission and switching facilities that the affiliated LEC uses for the provision of local exchange service in the region. This safeguard is generally consistent with the proposal made in the *NPRM.* This does not preclude the CMRS affiliate from using the affiliated incumbent LEC's central office, switch, roof space or other facilities—the incumbent LEC and the CMRS affiliate are merely precluded from jointly owning such facilities. This does not preclude the affiliate from jointly using the LEC's landline facilities to provide integrated service (subject to applicable interconnection and other regulations). Such transactions between the CMRS affiliate and the incumbent LEC for joint use would be subject to the affiliate transaction rules and the requirement that any facilities or services an incumbent LEC makes available to its CMRS affiliate also be made available to independent CMRS operators on the same rates, terms, and conditions.

C. In-Region Safeguards Applicable to Rural and Certain Mid-Sized Incumbent LECs

19. In the 1996 Act Congress expressed particular concern about burdens placed on small and rural LECs. In determining where to draw the appropriate balance between concerns about burdens on LECs other than the largest LECs, Congress, in section 251 of the Communications Act, excluded two groups of LECs from the same good faith negotiation, interconnection, unbundling, resale, network disclosure and physical collocation requirements imposed on other LECs. First, rural telephone companies are exempt from the above-referenced section 251 requirements until such company receives a *bona fide* request for interconnection and the state commission acts to terminate the exemption. Second, local exchange carriers with fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide may petition a state commission for suspension or modification of requirements in section 251 (b) and (c).

20. The Commission finds that it is appropriate and equitable to exempt rural telephone companies from the separate affiliate requirement. A competing carrier, interconnected with the rural telephone company may petition the Commission to remove the exemption, or the Commission may do so on its own motion, where the rural telephone company has engaged in anti-competitive conduct, such as discrimination. We also find, consistent with Congress's treatment of LECs in section 251, that incumbent LECs with fewer than two percent of the nation's subscriber lines, may petition the Commission for suspension or modification of the separate affiliate requirement. The Commission will grant such a petition where petitioner can show that suspension or modification of the separate affiliate requirement is necessary to avoid a significant adverse economic impact on users of telecommunications services generally, or to avoid a requirement that would be unduly economically burdensome. In addition, petitioners must demonstrate that suspension or modification of the requirement is consistent with the public interest, convenience and necessity. Some LECs, especially rural telephone companies, might not have the resources to comply with the separate affiliate requirements and still provide CMRS. By reducing the regulatory burden on rural LECs the Commission will encourage the development of wireless services in areas where otherwise there may be no wireless service at all. Rural telephone companies may find it economical to use CMRS licenses to provide fixed wireless services in remote areas as an alternative means of extending the local exchange network to unserved or hard to serve areas. Moreover, under section 309(j)(3) of the Communications Act, 47 U.S.C. § 309(j)(3), the Commission is required to promote the development and rapid deployment of new technologies, products, and services for benefit of the public, including those residing in rural areas, and to disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Thus, foregoing a separate affiliate requirement for rural incumbent LECs and allowing these carriers to minimize any additional costs and reporting requirements promotes the goals set by Congress in section 309(j).

21. For similar reasons, the Commission will permit carriers serving fewer than two percent of the nation's subscriber lines to petition the Commission for suspension or modification of the separate affiliate requirement.

D. Joint Marketing

22. *Overview.* Section 601(d) of the 1996 Act provides: ''Notwithstanding section 22.903 of the Commission's regulations (47 CFR 22.903) or any other Commission regulation, a Bell operating company or any other company may, except as provided in sections 271(e)(1) and 272 of the Communications Act of 1934 as amended by this Act as they relate to wireline service, jointly market and sell commercial mobile services in conjunction with telephone exchange service, exchange access, intraLATA telecommunications service, interLATA telecommunications service, and information services.''

23. While section 601(d) negates section 22.903(e), the Commission retains authority to determine the permissible scope of LEC/CMRS joint marketing, including the rules to define the relationship between the affiliated entities engaged in such joint marketing. Section 601(d) expressly permits a BOC to market jointly and sell CMRS in conjunction with several types of landline services. Nothing in the plain language of section 601(d) prohibits or circumscribes the Commission from imposing conditions on, or defining the permissible scope of, such joint marketing. The authority to engage in joint marketing and sale of landline and CMRS services is expressly made subject to the provisions of section 272, which include separate affiliate requirements. The Commission requires that all incumbent LECs, other than LECs exempt from the separate affiliate rules, engaging in joint marketing of local exchange and exchange access and CMRS services, do so subject to the affiliate transactions rules (*i.e.*, governing the transaction between the company's wireline and wireless affiliates). Such CMRS activity will be classified as nonregulated under the Commission's accounting rules, and must be conducted on a compensatory, arm's-length basis. These agreements must be reduced to writing and must be made available for public inspection upon request. Pursuant to the procedures set forth in Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96–150, *Report and Order,*

62 FR 2927 (Jan. 21, 1997), concerning making agreements available for public inspection, the CMRS affiliate, at a minimum, must provide a detailed written description of the terms and conditions of the transaction on the Internet within ten days of the transaction through the company's home page. The broad access of the Internet will increase the availability and accessibility of this information to interested parties, while imposing a minimum burden. The Commission also requires that the description of the terms and conditions of the transaction be sufficiently detailed to allow evaluation of compliance with the accounting rules. This information must also be made available for public inspection at the principal place of business of the parties, and must include a certification statement identical to the certification statement currently required to be included with all Automated Reporting and Management Information Systems (ARMIS) reports.

E. Resale

24. The Commission's analysis with respect to authority to impose conditions on resale is necessarily quite similar to the analysis of such authority with respect to joint marketing. Section 601(d) clearly permits LECs to resell CMRS provided by their wireless affiliates, and as discussed above, the Commission retains authority to place conditions on, or define the scope of, resale of wireline and CMRS services. There is a considerable amount of CMRS spectrum capacity available in the open market. In addition, broadband CMRS providers (including LEC affiliates) are prohibited from restricting resale of their services or discriminating against resellers. In this environment, there is no reason to be particularly concerned about the terms and conditions in which the CMRS affiliate makes available CMRS to its incumbent LEC parent for resale. Therefore, the Commission does not believe it is appropriate to impose any further regulation upon incumbent LEC resale of its CMRS affiliate's CMRS, aside from other Commission rules such the accounting and affiliate transaction rules.

25. With respect to joint billing and collection, which is not currently prohibited under § 22.903, and other collateral activities that are currently prohibited under § 22.903, including joint installation, maintenance, and repair for BOC cellular and wireline local exchange services, the Commission is not imposing any restrictions at this time. Carriers must adhere to other applicable Commission rules such as accounting and affiliate transactions rules.

F. Customer Proprietary Network Information

26. Section 22.903(f) of the Commission's rules, 47 CFR 22.903(f), states that BOCs must not provide to their cellular separate affiliate any customer proprietary information, unless such information is publicly available on the same terms and conditions. The 1996 amendments to the Communications Act address telecommunications carriers' use, disclosure and permission of access to Customer Proprietary Network Information (CPNI) in general. Specifically, section 222(c)(1), 47 U.S.C. 222(c)(1), provides: ''PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS.—Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.'' Section 222(c)(2), 47 U.S.C. 222(c)(2), provides that, ''[a] telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.'' Section 222(c)(3), 47 U.S.C. 222(c)(3), allows a local exchange carrier to use, disclose, or permit access to aggregate customer information for purposes other than those described in section 222(c)(1) only if the LEC provides such information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request.

27. The Commission recently initiated a separate proceeding to consider the formulation of CPNI regulations pursuant to section 222 that would apply to all telecommunications carriers. *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96–115, *Notice of Proposed Rulemaking,* 61 FR 26483 (May 28, 1996) (*CPNI NPRM*). In the *CPNI NPRM,* the Commission sought comment on whether § 22.903(f) is inconsistent with section 222 of the Communications Act. The Commission also sought comment on whether § 22.903(f) should be eliminated even if the rule is consistent with section 222, on the grounds that § 22.903(f) is superfluous in light of section 222.

28. Based on the record, the ability to use CPNI obtained from the wireline monopoly service for marketing purposes is clearly a competitive advantage the BOC CMRS providers would be very interested in utilizing, and other carriers are equally anxious to obtain. So that the Commission does not prejudge any aspect of the CPNI rulemaking, however, the appropriate interpretation of the scope of section 222's CPNI protections is deferred to CC Docket No. 96–115. Accordingly, pending the decision in the CPNI proceeding, the Commission will not eliminate § 22.903(f) at this time, nor will § 22.903(f) be extended to non-BOC LECs and to all CMRS. The Commission will take appropriate action regarding § 22.903(f) upon resolution of the section 222 proceeding.

29. As described above, section 222 provides general requirements regarding a telecommunications carrier's use, disclosure and permission of access to CPNI. These statutory provisions are self-executing. Consequently, the requirements of section 222 are applicable to the provision of CPNI by all incumbent LECs to their CMRS affiliates. (We note that section 222 applies to all telecommunications carriers and not just incumbent LECs. For the purposes of this Report and Order, however, we address only the issue of section 222 as it applies to incumbent LECs and their CMRS affiliates. This in no way limits the statutory obligations of other telecommunications carriers under section 222.) Specifically, we expect all incumbent LECs and their CMRS affiliates to comply with the limitations on use, disclosure, and access to CPNI set forth in section 222(c) in their provision of CMRS and LEC services respectively. Further, we expect BOCs to continue to comply with § 22.903(f) of the Commission's rules with respect to BOC provision of CPNI to their cellular affiliates.

G. Network Information Disclosure

30. Section 251(c)(5) of the Communications Act, 47 U.S.C. 251(c)(5), imposes a duty on incumbent LECs to provide reasonable public notice of changes to the network necessary for the transmission and routing of services using that LEC's facilities or networks, as well as any other changes that would affect the

interoperability of those facilities and networks. The Commission tentatively concluded that no specific Part 22 rule pertaining to network information disclosure by the BOCs would be necessary or appropriate due to the requirement in section 251(c)(5). Incumbent LECs are required to ''provide public notice of changes in the information necessary for the transmission and routing of services'' using the incumbent LEC's CMRS facilities or networks, pursuant to section 251(c)(5). The Communications Act imposes on incumbent LECs the duty to provide reasonable public notice of changes in the information needed to transmit and route services using a LEC's facilities or networks. Incumbent LECs must provide reasonable public notice of any other changes that would affect the interoperability of those facilities or networks. Section 51.325(c) of the Commission's rules, 47 CFR 51.325(c), provides that until public notice has been given, an incumbent LEC may not disclose information about planned network changes to ''separate affiliates, separated affiliates, or unaffiliated entities.'' Accordingly, the Commission adopts the conclusion in the *NPRM* that no specific Part 22 rule pertaining to network information disclosure by the BOCs is needed.

VI. Conclusion

31. In this proceeding, the Commission has modified the rules to reflect the Congressionally mandated goal of consistent treatment of like services and to afford telecommunications providers flexibility in structuring service offerings in response to changing consumer demand. In so doing, the Commission has considered the increasing convergence of regulated wireline services and nonregulated wireless services and consumer demand for ''one-stop shopping'' for telecommunications customers. At the same time, the Commission is mindful of concerns that incumbent wireline providers, seeking to offer wireless services, may take advantage of their wireline market power to allocate costs improperly, discriminate against competitors, or engage in a predatory price squeeze, all to the detriment of consumers. The Commission believes that the approach adopted in this Report and Order, including requiring incumbent LECs to offer in-region broadband CMRS through a separate CMRS affiliate, appropriately balances the LECs' need for flexibility in an evolving marketplace with competitors' concerns regarding the incentive for anti-competitive behavior by incumbent LECs. Further, the goals of section 22.903 are fulfilled through the separate CMRS affiliate requirement and through other factors in the marketplace, including increasing competition and convergence, accounting safeguards, price cap regulation, new interconnection requirements and other existing rules. Rural telephone companies are exempt from the separate affiliate requirement, and companies serving fewer than two percent of the nation's subscriber lines that seek to provide broadband CMRS without forming a separate affiliate may petition the Commission for suspension or modification of that requirement.

32. The separate affiliate requirement will sunset on January 1, 2002, unless the Commission determines that the competitive conditions in the local exchange market are such that continuation of these safeguards is in the public interest.

IV. Procedural Matters and Ordering Clauses

A. Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, 5 U.S.C. 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*NPRM*) in WT Docket No. 96–162. The Commission sought written comments on the proposals in the *NPRM*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) for the Report and Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.

1. Need for and Purpose of the Action

The Report and Order in this docket sets forth a consistent regulatory framework for the provision of commercial mobile radio services (CMRS) by incumbent local exchange carriers (LECs) and their affiliates. This framework will treat all broadband CMRS, including cellular services, uniformly and is narrowly tailored to address specific concerns about potential anti-competitive use of bottleneck wireline local exchange facilities.

2. Issues Raised in Response to the IRFA

The Commission sought comment generally on the IRFA. No comments were submitted specifically in response to the IRFA.

3. Description and Estimates of the Number of Small Entities to Which the Rules Adopted in This Report and Order Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules. The RFA defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction,'' and the same meaning as the term ''small business concern'' under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities. Under the Small Business Act, a ''small business concern'' is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA). The SBA has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be small entities having fewer than 1,500 employees. This FRFA discusses generally the total number of small telephone entities potentially affected by this Report and Order.

The rules adopted in this Report and Order apply to all incumbent LECs offering in-region broadband CMRS. Incumbent LEC is defined in section 251(h)(1) of the Communications Act of 1934, as amended (Communications Act), 47 U.S.C. 251(h)(1), with respect to an area, as ''the local exchange carrier that (A) on the date of enactment of the Telecommunications Act of 1996, provided local exchange service in such area; and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 CFR 69.601(b)); or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).'' Rural telephone companies are exempt from the structural safeguards imposed in this Report and Order; however, a competing carrier, interconnected with the rural telephone company, may petition the Commission to remove the exemption, or the Commission may do so on its own motion, where the rural telephone company has engaged in anti-competitive conduct. In addition, companies serving fewer than two percent of the nation's subscriber lines may petition the Commission for

suspension or modification of the separate affiliate requirement.

Small incumbent LECs subject to these rules are either dominant in their field of operation or are not independently owned and operated, and, consistent with our prior practice, they are excluded from the definition of ''small entity'' and ''small business concerns.'' Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term ''small incumbent LECs'' to refer to any incumbent LECs that arguably might be defined by the SBA as ''small business concerns.''

The United States Bureau of the Census (''the Census Bureau'') reports that at the end of 1992 there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year. This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, wireless carriers, operator service providers, pay telephone operators, and resellers. It seems certain that some of the 3,497 telephone service firms may not qualify as small incumbent LECs because they are not incumbent LECs or they are not independently owned and operated. It seems reasonable to conclude that fewer than 3,497 telephone service firms would qualify as small incumbent LECs that may be affected by this Report and Order.

The SBA has developed a definition of small entities for telecommunications companies other than radiotelephone (Telephone Communications, Except Radiotelephone). The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992. According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons. Of the 2,321 non-radiotelephone companies listed by the Census Bureau, 2,295 were reported to have fewer than 1,000 employees. Thus, at least 2,295 non-radiotelephone companies might qualify as small entities or small incumbent LECs based on these statistics. As it seems certain that some of these carriers are not independently owned and operated, this figure necessarily overstates the actual number of non-radiotelephone companies that would qualify as small businesses under the SBA definition. Consequently, the Commission estimates that using this methodology there are fewer than 2,295 small entity telephone communications companies (other than radiotelephone companies) that may be affected by the proposed decisions and rules adopted in this Report and Order.

Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone companies. The most reliable source of information regarding the number of LECs nationwide of which the Commission is aware appears to be the data collected annually in the *TRS Worksheet.* According to the most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services. As some of these carriers have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are fewer than 1,347 small incumbent LECs that may be affected by the decisions and rules adopted in this Report and Order.

4. Reporting, Recordkeeping, and Other Compliance Requirements

The rule adopted in this Report and Order requires incumbent LECs offering in-region broadband CMRS services to do so through a separate corporate affiliate. The CMRS affiliate must:

(1) Maintain separate books of account, and must maintain the books, records, and accounts in accordance with generally accepted accounting principals (GAAP);

(2) Not jointly own transmission or switching facilities with the affiliated LEC that the affiliated LEC uses for the provision of local exchange services in the same in-region market; and

(3) Acquire any services from the affiliated LEC on a compensatory arm's length basis, as required by our affiliate transactions rules. The affiliate will be subject to the Commission's joint cost and affiliate transaction rules. Title II common carrier services or services, facilities, or network elements provided pursuant to sections 251 and 252 that are acquired from the affiliated LEC must be available to all other carriers, including CMRS providers, on the same terms and conditions.

This rule may require incumbent LECs to have additional reporting and recordkeeping with respect to transactions with the CMRS affiliate.

Affiliate transactions. Some incumbent LECs may now be required to comply with the affiliate transactions rules in Part 32 of the Commission's rules if they offer broadband CMRS through a separate affiliate and conduct transactions with the CMRS affiliate. Prior to the adoption of the rule in this Report and Order, the Commission required the BOCs to establish a separate affiliate for provision of cellular services, otherwise a separate affiliate was not required for LEC provision of broadband CMRS. Therefore, LECs that previously did not have a separate affiliate for broadband CMRS, and thus did not have affiliate transactions, will now have to establish a separate affiliate and comply with the Commission's affiliate transactions rules.

Joint marketing agreements. The rule adopted in this Report and Order requires all incumbent LECs and the CMRS affiliates engaging in joint marketing of local exchange and exchange access and CMRS to reduce all such agreements to writing and make the agreements available for public inspection upon request at the principal place of business of the affiliate and the incumbent LEC. The documentation also must include a certification statement identical to the certification statement currently required to be included with all Automated Reporting and Management Information Systems (ARMIS) reports. The affiliate must also provide a detailed written description of the terms and conditions of the transaction on the Internet within ten days of the transaction through the affiliate's home page.

5. Steps Taken To Minimize Burdens on Small Entities and Significant Alternatives Considered

The Commission sought to minimize burdens on small entities by providing an exemption for rural telephone companies. Rural telephone companies are exempted from the separate affiliate requirement; however, a competing local exchange carrier, interconnected with the rural telephone company, may petition the Commission to remove the exemption, or the Commission may do so on its own motion, if the rural telephone company has engaged in anti-competitive conduct.

The Commission sought to minimize burdens on small entities by permitting incumbent LECs with fewer than two percent of the nation's subscriber lines to petition the Commission for suspension or modification of the separate affiliate requirement. The Commission will grant such a petition if the incumbent LEC can demonstrate that suspension or modification of the separate affiliate requirement is necessary to avoid a significant adverse

economic impact on users of telecommunications services generally or to avoid a requirement that would be unduly burdensome, and consistent with the public interest, convenience, and necessity.

The Commission considered and rejected the proposals in the *NPRM*: (1) to retain, but sunset, section 22.903 of the Commission's rules, or (2) to require all Tier 1 (or Class A) LECs providing in-region broadband CMRS to file a safeguards plan. Neither of the proposals in the *NPRM* would impose additional regulation on Class B LECs. The Commission instead decided to impose structural separation regulations on all incumbent LECs providing broadband CMRS because anti-competitive interconnection practices, particularly discriminatory behavior, pose a substantial threat to full and fair competition in the CMRS marketplace, and all incumbent LECs have the ability and incentive to engage in anti-competitive behavior. The Commission observed that increased competition in the CMRS market and the possibility that CMRS in the future may substitute for wireline local loops may actually increase incumbent LECs' incentive to discriminate against unaffiliated CMRS providers. The Commission concluded that it was appropriate to apply structural safeguards to all incumbent LECs. As described above, however, the Commission has considered, and taken measures to address, the additional burdens these requirements might have on rural telephone companies and on those entities serving two percent of the nations' subscriber lines.

6. *Report to Congress*

The Commission shall send a copy of this Final Regulatory Flexibility Analysis with this Report and Order in a report to Congress pursuant to section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A).

B. Paperwork Reduction Act

This *Report and Order* contains a modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, has submitted this to Office of Management and Budget (OMB) for emergency approval under the Paperwork Reduction Act of 1995, Pub. L. No. 104–13.

Paperwork Reduction Act Comment Filing Procedures. Written comments by the public on the proposed and/or modified information collections are due on or before January 2, 1998. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before February 2, 1998. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725—17th Street, N.W., Washington, DC 20503 or via the Internet to fain__t@al.eop.gov.

Further Information: For additional information concerning the information collections contained in this *Notice of Proposed Rulemaking* contact Dorothy Conway at (202) 418–7349 or via the Internet at dconway@fcc.gov.

Supplementary Information

Title: Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services and Implementation of section 601(d) of the Telecommunications Act of 1996.

Type of Review: Revision of currently approved Collection.

Respondents:

Number of Respondents: We estimate up to 19.

Estimated Time Per Response: The average burden on the applicant is 6056 hours for the information necessary to maintain books of account of incumbent LEC's in-region CMRS affiliate separate from LEC's local exchange and other activities. The average burden on the applicant is 72 hours to conduct arms length transactions between the incumbent LEC and the CMRS affiliate. The average burden on the affiliate is 1 hour for making the written contracts available for public inspection at their principal place of business and posting a written description of the terms and conditions of the transaction in the Internet.

Total burden = 116,456 hours,

We estimate that up to five respondents may have to estabish separate affiliates and thus would incur start-up costs.

Estimated Cost Per Respondent: $200,600.

Total Respondent Costs: $1,003,000.

Needs and Uses: The Commission imposes the recordkeeping collection to ensure that incumbent LECs providing broadband CMRS in-region through a separate affiliate are in compliance with the Communications Act, as amended, and with Commission policies and regulations.

C. Authority

33. The above action is authorized under the Communications Act, 4(i), 303(r), 309(c), 309(j), and 332, 47 U.S.C. 154(i), 303(r), 309(c), 309(j), and 332, as amended.

D. Ordering Clauses

34. Accordingly, it is ordered that, pursuant to the authority of sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(g), 303(r), and 332(a), Part 22 of the Commission's Rules, 47 CFR Parts 20 and 22, is amended in the rule changes.

35. It is further ordered that the rules adopted in this *Report and Order* will be effective February 11, 1998.

List of Subjects in 47 CFR Parts 20 and 22

Communication common carriers, Reporting and recordkeeping requirements.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

Title 47 of the Code of Federal Regulations part 20 is amended as follows:

PART 20—COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for part 20 continues to read as follows:

Authority: Secs. 4, 251–52, 303, and 332, 48 Stat. 1066, 1062, as amended; 47 U.S.C. 154, 251–52, 303, and 332 unless otherwise noted.

2. Section 20.20 is added to read as follows:

§ 20.20 Conditions applicable to provision of CMRS service by incumbent Local Exchange Carriers.

(a) *Separate affiliate.* An incumbent LEC providing in-region broadband CMRS shall provide such services through an affiliate that satisfies the following requirements:

(1) The affiliate shall maintain separate books of account from its affiliated incumbent LEC. Nothing in this section requires the affiliate to maintain separate books of account that comply with part 32 of this chapter;

(2) The affiliate shall not jointly own transmission or switching facilities with its affiliated incumbent LEC that the affiliated incumbent LEC uses for the provision of local exchange service in the same in-region market. Nothing in this section prohibits the affiliate from sharing personnel or other resources or

assets with its affiliated incumbent LEC; and

(3) The affiliate shall acquire any services from its affiliated incumbent LEC for which the affiliated incumbent LEC is required to file a tariff at tariffed rates, terms, and conditions. Other transactions between the affiliate and the incumbent LEC for services that are not acquired pursuant to tariff must be reduced to writing and must be made on a compensatory, arm's length basis. All transactions between the incumbent LEC and the affiliate are subject to part 32 of this chapter, including the affiliate transaction rules. Nothing in this section shall prohibit the affiliate from acquiring any unbundled network elements or exchange services for the provision of a telecommunications service from its affiliated incumbent LEC, subject to the same terms and conditions as provided in an agreement approved under section 252 of the Communications Act of 1934, as amended.

(b) *Independence.* The affiliate required in paragraph (a) of this section shall be a separate legal entity from its affiliated incumbent LEC. The affiliate may be staffed by personnel of its affiliated incumbent LEC, housed in existing offices of its affiliated incumbent LEC, and use its affiliated incumbent LEC's marketing and other services, subject to paragraphs (a)(3) and (c) of this section.

(c) *Joint marketing.* Joint marketing of local exchange and exchange access service and CMRS services by an incumbent LEC shall be subject to part 32 of this chapter. In addition, such agreements between the affiliate and the incumbent LEC must be reduced to writing and made available for public inspection upon request at the principle place of business of the affiliate and the incumbent LEC. The documentation must include a certification statement identical to the certification statement currently required to be included with all Automated Reporting and Management Information Systems (ARMIS) reports. The affiliate must also provide a detailed written description of the terms and conditions of the transaction on the Internet within 10 days of the transaction through the affiliate's home page.

(d) Exceptions. (1) *Rural telephone companies.* Rural telephone companies are exempted from the requirements set forth in paragraphs (a), (b) and (c) of this section. A competing telecommunications carrier, interconnected with the rural telephone company, however, may petition the FCC to remove the exemption, or the FCC may do so on its own motion, where the rural telephone company has engaged in anticompetitive conduct.

(2) *Incumbent LECs with fewer than 2 percent of subscriber lines.* Incumbent LECs with fewer than 2 percent of the nation's subscriber lines installed in the aggregate nationwide may petition the FCC for suspension or modification of the requirements set forth in paragraphs (a), (b) and (c) of this section. The FCC will grant such a petition where the incumbent LEC demonstrates that suspension or modification of the separate affiliate requirement is

(i) Necessary to avoid a significant adverse economic impact on users of telecommunications services generally or to avoid a requirement that would be unduly economically burdensome, and

(ii) Consistent with the public interest, convenience, and necessity.

(e) *Definitions.* Terms used in this section have the following meanings:

Affiliate. ''Affiliate'' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership with, another person. For purposes of this section, the term ''own'' means to own and equity interest (or the equivalent thereof) of more than 10 percent.

Broadband Commercial Mobile Radio Service (Broadband CMRS). For the purposes of this section, ''broadband CMRS'' means Domestic Public Cellular Radio Telecommunications Service (part 22, subpart H of this chapter), Specialized Mobile Radio (part 90, subpart S of this chapter), and broadband Personal Communications Services (part 24, subpart E of this chapter).

Incumbent Local Exchange Carrier (Incumbent LEC). ''Incumbent LEC'' has the same meaning as that term is defined in § 51.5 of this chapter.

In-region. For the purposes of this section, an incumbent LEC's broadband CMRS service is considered ''in-region'' when 10 percent or more of the population covered by the CMRS affiliate's authorized service area, as determined by the 1990 census figures, is within the affiliated incumbent LEC's wireline service area.

Rural Telephone Company. ''Rural Telephone Company'' has the same meaning as that term is defined in § 51.5 of this chapter.

(f) *Sunset.* This section will no longer be effective after January 1, 2002.

Title 47 of the Code of Federal Regulations part 22, subpart H is amended as follows:

Subpart H—Cellular Radiotelephone Service

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

Authority: 47 U.S.C. 154, 303, unless otherwise noted.

4. Section 22.903 is revised to read as follows:

§ 22.903 Conditions applicable to former Bell Operating Companies.

Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell Corporation, U.S. West Inc., their successors in interest and affiliated entities (BOCs) may engage in the provision of cellular service only in accordance with the conditions in this section and § 20.20 of this chapter, unless otherwise authorized by the FCC. BOCs may, subject to other provisions of law, have a controlling or lessor interest in or be under common control with separate corporations that provide cellular service only under the following conditions:

(a) Through (e) [Reserved].

(f) *Proprietary information.* BOCs must not provide to any such separate corporation any customer proprietary information, unless such information is publicly available on the same terms and conditions.

(g) Reserved.

[FR Doc. 97–31713 Filed 12–2–97; 8:45 am]
BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 970908229–7277–02; I.D. 082797A]

RIN 0648–AJ55

Fisheries of the Northeastern United States; Amendment 10 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement the approved measures contained in Amendment 10 to the Fishery Management Plan for the Summer Flounder, Scup, and Black Sea Bass Fisheries (FMP). Approved measures of Amendment 10 include a continuation of the moratorium for commercial vessels; minimum mesh-size requirements throughout the body, extension, and codend of trawl nets for

the directed summer flounder fishery; removal of the requirement that a vessel land summer flounder during a 52-week period in order to retain a moratorium permit; and a prohibition of the transfer of summer flounder at sea. This action is intended to enhance the rebuilding of the summer flounder resource in accordance with the objectives of the FMP.

DATES: All measures are effective on January 1, 1998, except that the baseline date for measuring vessel upgrades in § 648.4(a)(3)(i)(C)(*1*) and (*2*) is effective January 2, 1998 and the gear restrictions in § 648.104(a)(1) are effective June 3, 1998.

ADDRESSES: Copies of Amendment 10, the environmental assessment, and the regulatory impact review are available from David R. Keifer, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115 Federal Building, 300 S. New Street, Dover, DE 19904-6790.

FOR FURTHER INFORMATION CONTACT: Richard A. Pearson, Fishery Policy Analyst, 978–281–9279.

SUPPLEMENTARY INFORMATION:

Background

Amendment 10 was prepared by the Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission), in consultation with the New England and South Atlantic Fishery Management Councils. A notice of availability for the amendment was published in the **Federal Register** on September 3, 1997 (62 FR 46470), and the proposed rule to implement Amendment 10 was published in the **Federal Register** on September 19, 1997 (62 FR 49195). The notice of availability and the proposed rule solicited public comments through November 3, 1997. All comments received by the end of the comment period, whether specifically directed to Amendment 10 or to the proposed rule, were considered in the approval decision on Amendment 10.

Amendment 10 proposed a number of changes to the summer flounder regulations. Details concerning the development of Amendment 10 were provided in the notice of proposed rulemaking and are not repeated here.

NMFS, on behalf of the Secretary of Commerce, has approved the measures that (1) modify the commercial minimum mesh size, (2) continue the moratorium on entry of additional commercial vessels, (3) remove the landing requirements applicable to permit retention, (4) modify the vessel replacement criteria, (5) allow federally permitted charter and/or party vessels to possess fillets less than the minimum size if in possession of a permit to do so issued by their state, and (6) prohibit transfer of summer flounder at sea. Amendment 10 also contains measures adopted by the Commission as part of its interstate management process. Defined as a compliance criterion, this measure would require states to document all summer flounder commercial landings in their state that are not otherwise included in the Federal monitoring of permit holders. This management measure is not part of the Federal regulatory process and is, therefore, not detailed in this rule. Details of this measure are described in Amendment 10, which is available from the Council (see **ADDRESSES**).

In addition, the Council re-evaluated in Amendment 10 the commercial quota system implemented by Amendment 2. During the public hearings for Amendment 10, the Council and Commission proposed several alternative quota allocation systems, with the status quo being the preferred alternative. After receiving and considering public comments, the Council and Commission voted to maintain the existing state-by-state commercial quota allocation system. The Council and Commission felt that the current system allows states the most flexibility in managing their quotas by implementing state subquotas and trip limits.

Disapproved Measure

After a review of Amendment 10, NMFS found that the *de minimus* status provision was not consistent with national standard 7, raised questions of consistency with national standard 1, and appeared inconsistent with other applicable law. This measure would require an annual examination of state landings to determine whether landings in that state during the preceding year for which data are available were less than 0.1 percent of the overall annual quota. This determination was to be based on landings for the last preceding year for which data are available. If a state met the 0.1 percent criterion, it would be granted *de minimus* status. This provision is intended to provide a small bycatch fishery in a state where summer flounder would otherwise be discarded. A state's failure to close its fishery when its quota is harvested would prevent the attainment of the fishing mortality rate goals in the FMP, since vessels without Federal permits fishing exclusively in that state's waters could continue to land summer flounder. This would result in overfishing and would render the measure inconsistent with national standard 1.

If *de minimus* status does not, at the very least, require a state to impose landing constraints, the provision would encourage owners of vessels that have not traditionally landed in that state to land amounts of summer flounder much greater than they could land in their home port states. This could result in the state's *de minimus* quota being rapidly exceeded and compound the overfishing situation if a *de minimus* state is not required to close its fishery when its *de minimus* quota is harvested.

Further, the standard established to determine *de minimus* status (examination of landings data for the last year for which data are available) would not allow for an accurate calculation of qualification. Landings in the intervening time period in the state under consideration for *de minimus* status could well exceed the threshold for such status. Thus, such a determination would not reflect accurately the true status of the state. The *de minimus* measure would impose an administrative burden or cost to make this annual determination, without conferring any demonstrable administrative or conservation benefit. This contravenes the requirements of national standard 7. It is unclear whether a *de minimus* state must close its state fishery when its quota is harvested.

For the reasons stated above, this measure would impose an administrative burden or cost to make this determination, without conferring any demonstrable administrative benefit. This contravenes the requirements of national standard 7. Further, the failure of a state to close its fishery when its quota is harvested would result in overfishing and would render the measure inconsistent with national standard 1. As a result of this review, NMFS has disapproved the *de minimus* measure.

Comments and Responses

Two comments on Amendment 10 were received. One comment was received from the North Carolina Division of Marine Fisheries (NCDMF) and another from a member of the fishing industry.

Comment 1: The NCDMF wrote to support all of the provisions in Amendment 10, including the state-by-state commercial quota allocation system, which, according to the comment, allows states to manage their fisheries in accordance with historical management practices such as trip limits, bycatch limits, and seasonal

closures. Although supportive of Amendment 10, NCDMF suggested that the revised minimum mesh-size requirement in the amendment should be implemented immediately upon approval because mesh of that size is available. NCDMF notes that a large portion of the annual summer flounder quota is taken during the first 6 months of the season, and delayed implementation of the measure will negate the desired conservation effect for the 1998 fishery.

Response: Amendment 10 specified that the Council would determine the date of effectiveness of the revised minimum mesh requirement based upon an assessment of the availability of net construction materials, which would help to alleviate any localized shortages of twine that might otherwise occur. The Council found that mesh is not available on a coastwide basis and recommended the 6-month delay. NMFS concurs.

Comment 2: A member of the fishing industry indicated dissatisfaction with the minimum mesh-size requirements of Amendment 10. The commenter wrote that the mesh-size requirements will inflict financial hardship on day boat trawlers of western Long Island, New York, and northern New Jersey because they will have to purchase new nets to fish for scup and black sea bass, rather than just changing codends to fish for these species as they currently do. The commenter disputed the justification given in Amendment 10 for requiring 5.5–inch (14.0–cm) mesh in the body, extension, and codend of summer flounder trawl nets by stating that the practice of constricting the codend of summer flounder nets to circumvent the minimum mesh-size regulations is not a problem. Also, the commenter expressed concern that if Amendment 10 is adopted, summer flounder will be the only species that requires regulated mesh in areas of the net other than the codend. Finally, the commenter was opposed to the fact that the minimum mesh-size regulations are not applicable to vessels in the summer flounder small-mesh exemption program.

Response: Current scup and black sea bass minimum mesh-size regulations apply only throughout the codend of the net. However, the black sea bass regulations allow the Council, in future years, to require minimum mesh size to be applied throughout the entire net. Also, it is not clear that the requirement will necessarily result in a need to purchase new nets to fish for scup and black sea bass. A fisher may still use the same net, albeit with a 5.5–inch (14.0–cm) mesh extension and body, to fish for these two species by changing only the codend to conform with the appropriate regulations. The reason for the change in the mesh regulations is that the Council is concerned about the ''choking off'' or the constriction of codends in trawl nets in the summer flounder fishery. The Council was concerned that continued poor compliance with mesh-size regulations would result in higher fishing mortality rates and in a decreased rate of stock recovery for summer flounder. Applying the minimum mesh-size throughout the codend, extension, and body of the net will eliminate this problem.

Summer flounder is not the only species where minimum mesh- size regulations apply to portions of the net other than the codend. There is ample precedence for this requirement. Most notably, the Northeast multispecies regulations require that vessels fishing under a multispecies day-at-sea use 6–inch (15.2– cm) square or diamond mesh throughout the entire net.

The minimum mesh-size requirements do not apply to vessels issued a summer flounder exemption permit, and fishing from November 1 to April 30 in the ''exemption area'' because the exemption is designed to allow vessels to retain a bycatch of summer flounder while operating in other small-mesh fisheries. The exemption allows for the prosecution of a traditional small- mesh fishery while minimizing discards of summer flounder. The existence of the exemption program is re-evaluated annually after a review of sea sampling data, and re-authorized if appropriate.

Changes From the Proposed Rule

NMFS notes that the Council recommended that May 13, 1997, be the baseline date for measuring vessel upgrades at the time of replacement. However, the baseline date was not specified when the Council held public hearings on Amendment 10, although it is a necessary adjunct required for administration of the replacement upgrade provision. Therefore, in order for all potentially affected fishery participants to have an equal notice of the baseline date, NMFS noted in the proposed rule its intent to link the baseline date to the rulemaking. However, the proposed rule was inconsistent in its description of the date proposed. In one section it proposed to use September 19, 1997—the date the proposed rule was published. In another, it proposed to use the date 30 days following publication of the final rule. NMFS received no comments on this matter. Therefore, this final rule establishes January 2, 1998 as the baseline, because, as a general matter, rules are to have prospective effect and some members of industry may have relied on that date rather than September 19, 1997.

In § 648.4, paragraph (a)(3)(i)(C)(*3*) is added, which indicates that a vessel's horsepower, length, gross registered tonnage (GRT), and net tonnage (NT) may be increased through replacement only once. If length, GRT, or NT is increased, an increase in the other two specifications must be performed at the same time, and this type of increase may be done separately from a horsepower increase. This provision is contained in Amendment 10, but was inadvertently omitted from the proposed rule. As such, a prior notice and opportunity for comment was provided through the notice of availability for Amendment 10. It has been added to this final rule to reflect the Council's intent.

Classification

This final rule has been determined to be not significant for purposes of E.O. 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule, if adopted, would not have a significant economic impact on a substantial number of small entities as follows:

The final rule implements Amendment 10 by revising a number of the regulations implementing the FMP and its amendments and by adding a number of new regulations. No public comments were received about the Council's economic analysis for Amendment 10 as it pertains to Regulatory Flexibility Act nor the certification made by the Assistant General Counsel for Legislation and Regulation of the Department of Commerce, that this rule would not have a significant economic impact on a substantial number of small entities, as mentioned in the proposed rule.

The final rule modifies the commercial minimum mesh size requirement, continues the moratorium on entry of additional commercial vessels, modifies the vessel replacement criteria, removes provisions that pertain to the expiration of the moratorium permit, and prohibits transfer of summer flounder at sea. Amendment 10 examined alternate state commercial quota allocation mechanisms. However, no change was made to the existing state-by-state system.

The requirement that minimum mesh size be applied throughout the net impacts an estimated 42 percent of the participants in the summer flounder fishery (443 of the 1,063 permit holders); the other 620 are already subject to requirements for minimum mesh throughout the net because they hold northeast multispecies vessel permits. Therefore, a substantial number of small entities (42 percent) are impacted by this rule. However, the compliance costs associated with the measure are not

significant under the Regulatory Flexibility Act. Costs were broken down into trip or variable costs (e.g., fuel, ice, food) and yearly or fixed costs (e.g., gear, insurance, engine and gear repair, electronic equipment expenses). Labor costs were not included in the analysis because labor is generally paid as a percentage of the total revenues after certain expenses are subtracted. Compliance costs are less than 1 percent of the total annual costs for offshore vessels and 1.45 percent for the smaller inshore vessels. Compliance costs reflect the cost of the gear conversion ranging from $775 for inshore vessels to $1,354 for offshore vessels versus annualized vessel costs ranging from $39,695 for vessels 5–50 in gross registered tonnage to $171,692 for vessels greater than 150 gross registered tons.

According to the Council, specific data are not available for quantitative analysis of other new measures (e.g., modification of vessel replacement criteria and prohibition of transfer of summer flounder at sea) in Amendment 10. A qualitative analysis conducted by the Council indicates that those measures would have no significant impact on a substantial number of small entities because of their implementation. The National Marine Fisheries Service (NMFS) reviewed this analysis, and since most measures proposed in Amendment 10 are administrative in nature, NMFS concurs that the new measures would result in no significant economic impacts on small entities. Additionally, the prohibition of transferring summer flounder at sea and the vessel replacement criteria, would make the FMP consistent with the Multispecies Fishery Management Plan, and therefore would create no additional impacts for industry participants who also participate in that fishery. Meanwhile, a qualitative examination of the effects of the extension, indefinitely, of the moratorium on new vessels and maintaining the state-by-state allocation system for the coastwide quota for the commercial fishery, indicates that these measures will not result in a significant economic impact on a substantial number of small entities. These measures should not cause more than 2 percent of the vessels or dealers to cease business operations, result in a loss of 5 percent or more of ex-vessel revenues for 20 percent or more of the participating vessels, nor change compliance costs. If the moratorium was allowed to expire then it's conceivable that enough new vessels would enter the fishery, so that a significant number of vessels already in the fishery would incur a loss of 5 percent or more in ex-vessel revenues. Similarly, if the state-by-state allocation of the commercial quota was not continued, then the states might lose enough flexibility so that some vessels would gain in ex-vessel revenues, but a substantial number of small entities might experience a significant loss in ex-vessel revenues.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: November 26, 1997.

Rolland Schmitten,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

2. In § 648.4, paragraph (a)(3)(i)(B)(*2*) is removed and reserved, and paragraphs (a)(3)(i)(C), (a)(5)(i)(A)(*2*), (a)(5)(i)(C), (a)(5)(ii)(A)(*2*), (a)(5)(ii)(C), (a)(6)(i)(A)(*2*), (a)(6)(i)(C) are revised to read as follows:

§ 648.4 Vessel and individual commercial permits.

(a) * * *

(3) * * *

(i) * * *

(C) *Replacement vessels.* To be eligible for a moratorium permit, the replacement vessel must meet the following criteria:

(*1*) The replacement vessel's horsepower may not exceed by more than 20 percent the horsepower of the vessel that was initially issued a moratorium permit as of January 2, 1998.

(*2*) The replacement vessel's length, GRT, and NT may not exceed by more than 10 percent the length, GRT, and NT of the vessel that was initially issued a moratorium permit as of January 2, 1998.

(*3*) A vessel's horsepower may be increased through replacement only once. A vessel's length, GRT, and NT may be increased through replacement only once. If any of these specifications is increased, any increase in the other two must be performed at the same time. This type of increase may be done separately from a horsepower increase.

* * * * *

(5) * * *

(i) * * *

(A) * * *

(*2*) The vessel is replacing such a vessel and the replacement vessel meets the requirements of paragraph (a)(5)(i)(C) of this section.

* * * * *

(C) *Replacement vessels.* To be eligible for a moratorium permit, the replacement vessel must be replacing a vessel of substantially similar harvesting capacity that is judged unseaworthy by the USCG, for reasons other than lack of maintenance, or that involuntarily left the fishery during the moratorium. Both the entering and replaced vessels must be owned by the same person. Vessel permits issued to vessels that involuntarily leave the fishery may not be combined to create larger replacement vessels.

* * * * *

(ii) * * *

(A) * * *

(*2*) The vessel is replacing such a vessel and meets the requirements of paragraph (a)(5)(i)(C) of this section.

* * * * *

(C) *Replacement vessels.* See paragraph (a)(5)(i)(C) of this section.

* * * * *

(6) * * *

(i) * * *

(A) * * *

(*2*) The vessel is replacing such a vessel and meets the requirements of paragraph (a)(5)(i)(C) of this section.

* * * * *

(C) *Replacement vessels.* See paragraph (a)(5)(i)(C) of this section.

* * * * *

3. In § 648.13, paragraph (d) is added to read as follows:

§ 648.13 Transfers at sea.

* * * * *

(d) All persons are prohibited from transferring or attempting to transfer at sea summer flounder from one vessel to another vessel.

4. In § 648.14, paragraph (j)(9) is added to read as follows:

§ 648.14 Prohibitions.

* * * * *

(j) * * *

(9) Offload, remove, or otherwise transfer, or attempt to offload, remove or otherwise transfer summer flounder from one vessel to another, unless that vessel has not been issued a summer flounder permit and fishes exclusively in state waters.

* * * * *

5. In § 648.103, paragraph (c) is revised to read as follows:

§ 648.103 Minimum fish sizes.

* * * * *

(c) The minimum sizes in this section apply to whole fish or to any part of a fish found in possession, e.g., fillets, except that party and charter vessels possessing valid state permits authorizing filleting at sea may possess fillets smaller that the size specified if all state requirements are met.

6. In § 648.104, paragraph (a)(1) is revised, and paragraph (f) is added to read as follows:

§ 648.104 Gear restrictions.

(a) * * * (1) Otter trawlers whose owners are issued a summer flounder permit and that land or possess 100 or more lb (45.4 or more kg) of summer flounder from May 1 through October 31, or 200 lb or more (90.8 kg or more) of summer flounder from November 1 through April 30, per trip, must fish with nets that have a minimum mesh size of 5.5–inch (14.0–cm) diamond or 6.0–inch (15.2–cm) square mesh applied throughout the body, extension(s), and codend portion of the net.

* * * * *

(f) The minimum net mesh requirement may apply to any portion of the net. The minimum mesh size and the portion of the net regulated by the minimum mesh size may be adjusted pursuant to the procedures in § 648.100.

[FR Doc. 97–31708 Filed 11–28–97; 2:01 pm]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 970429101–7101–01; I.D. 111097A]

Fisheries Off West Coast States and in the Western Pacific; West Coast Salmon Fisheries; Inseason Adjustments and Closures from the U.S.-Canadian Border to the U.S.-Mexican Border

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

ACTION: Inseason adjustments and closures; request for comments.

SUMMARY: NMFS announces the following inseason adjustments and closures in the recreational salmon fisheries. The regulation regarding compliance with minimum size or other special restrictions for the recreational salmon fishery off Washington, Oregon, and California, was modified from the annual management measures, beginning July 1, 1997. This action was necessary to allow recreational anglers to fish in accordance with management intent. For the recreational salmon fishery in the area from the Queets River to Leadbetter Point, WA, the bag limit was modified to two fish per day, and the area closure was rescinded so that the fishery was open 0 to 200 miles off shore, effective August 13, 1997, through September 4, 1997. This action was intended to liberalize measures for dampening chinook harvest associated with the small coho subarea quota due to sufficient numbers of fish remaining in the overall chinook quota north of Cape Falcon, OR. The recreational salmon fisheries were closed in the following areas: From the U.S.-Canadian border to Cape Alava, WA, at 2400 hours local time (l.t.), July 23, 1997; from Cape Alava to the Queets River, WA, at 2400 hours l.t., August 3, 1997; from the Queets River to Leadbetter Point, WA, at 2400 hours l.t., September 4, 1997; and from Leadbetter Point, WA, to Cape Falcon, OR, at 2400 hours l.t., August 7, 1997. These actions were necessary to conform to the 1997 management measures and was intended to ensure conservation of chinook and coho salmon.

DATES: Inseason adjustment from the U.S.-Canadian border to the U.S.-Mexican border effective 0001 hours l.t. July 1, 1997, through 2400 hours l.t., November 16, 1997. Inseason adjustment from the Queets River to Leadbetter Point, WA, effective 0001 hours l.t., August 13, 1997, through 2400 hours l.t., September 4, 1997. Closure from the U.S.-Canadian border to Cape Alava, WA, was effective at 2400 hours l.t., July 23, 1997, through 2400 hours l.t., September 25, 1997, at which time the season remains closed under the terms of the preseason announcement of the 1997 management measures. Closure from Cape Alava to the Queets River, WA, 2400 hours l.t., August 3, 1997, through 2400 hours l.t., September 25, 1997, at which time the season remains closed under the terms of the preseason announcement of the 1997 management measures. Closure from the Queets River to Leadbetter Point, WA, 2400 hours l.t., September 4, 1997, through 2400 hours l.t., September 25, 1997, at which time the season remains closed under the terms of the preseason announcement of the 1997 management measures. Closure from Leadbetter Point, WA, to Cape Falcon, OR, 2400 hours l.t., August 7, 1997, through 2400 hours l.t., September 25, 1997, at which time the season remains closed under the terms of the preseason announcement of the 1997 management measures. Comments will be accepted through December 17, 1997.

ADDRESSES: Comments may be mailed to William Stelle, Jr., Regional Administrator (Regional Administrator), Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070. Information relevant to this action is available for public review during business hours at the office of the Regional Administrator, Northwest Region, NMFS.

FOR FURTHER INFORMATION CONTACT: William Robinson, 206–526–6140.

SUPPLEMENTARY INFORMATION:

Inseason Adjustment From the U.S.-Canadian Border to the U.S.-Mexican Border

In the annual management measures for ocean salmon recreational fisheries (62 FR 24355, May 5, 1997), NMFS announced in Table 2 note C.4. that ''All salmon on board a vessel must meet the minimum size or other special requirements for the area being fished and the area in which they are landed if that area is open. Salmon may be landed in an area that is closed only if they meet the minimum size or other special requirements for the area in which they were caught.''

This regulation was problematic for recreational anglers. The area between Point Reyes and Pigeon Point, CA, from July 1 through September 1, was subject to a daily bag limit of the first two fish, and no size limits applied. Adjacent areas to the north (Point Arena to Point Reyes, CA) and to the south (Pigeon Point to the U.S.-Mexican border) were open during this period and were subject to a daily bag limit of two fish and a minimum size limit for chinook salmon. Given the proximity of fishing ports to the management boundaries separating these areas with different minimum size restrictions, recreational anglers leaving port in one management area who chose to fish in the adjacent area could have been in violation when landing their catch in their home port. It was not the intent to prohibit such activities by recreational anglers. The modification maintains the requirement that fish must meet the minimum size or other special requirements for the area being fished, but rescinds the requirement that they must also meet the minimum size or other special requirements for the area in which they are landed. Therefore, Table 2 note C.4. was modified to read ''All salmon on board a vessel must meet the minimum size or other special requirements for the area being fished. Salmon may be landed in an area that is closed only if they meet the minimum size or other special requirements for the area in which they were caught.''

Modification of limited retention regulations is authorized by 50 CFR 660.409(b)(1)(ii). The Regional Administrator consulted with representatives of the Pacific Fishery Management Council (Council), the Washington Department of Fish and Wildlife (WDFW), the Oregon

Department of Fish and Wildlife (ODFW), and the California Department of Fish and Game regarding this adjustment. The states of Washington, Oregon, and California have been managing the recreational fishery in state waters adjacent to this area of the exclusive economic zone in accordance with this Federal action. As provided by the inseason notice procedures of 50 CFR 660.411, actual notice to fishermen of this action was given prior to July 1, 1997, by telephone hotline numbers (206) 526–6667 and (800) 662–9825, and by U.S. Coast Guard Notice to Mariners broadcasts on Channel 16 VHF-FM and 2182 kHz. Because of the need for immediate action to modify the limited retention regulations before the July 1, 1997, opening of the season between Point Reyes and Pigeon Point, CA, NMFS determined that good cause existed for the action to be taken without affording a prior opportunity for public comment.

Inseason Adjustment From the Queets River to Leadbetter Point, WA

In the annual management measures for ocean salmon fisheries, NMFS announced that the recreational fishery in the subarea between the Queets River and Leadbetter Point, WA, would open July 21 and continue through the earlier of September 25 or attainment of the 14,000 coho subarea quota. Inseason management would be used to sustain season length and keep harvest within a guideline of 3,000 chinook. The recreational bag limit would be two fish per day, and the area from 0 to 3 miles off shore would be closed.

Concern was expressed that this year's relative abundance of coho to chinook might be lower and that the chinook guideline could be achieved first, thus leaving a large portion of the coho quota unharvested. To optimize angler opportunity to fish on the available coho stocks, it was necessary to dampen the harvest of chinook at the beginning of the season by setting an area closure of 0 to 3 miles off shore and changing the bag limit to two fish, only one of which may be a chinook (62 FR 43484, August 14, 1997).

The best available information on August 11 indicated that there were a sufficient number of fish in the overall chinook quota north of Cape Falcon, OR, such that the above measures were no longer needed. Hence, beginning at 0001 hours l.t., August 13, 1997, the daily bag limit for the recreational fishery in the subarea from Queets River to Leadbetter Point, WA, was reestablished back to two fish, and this area closure was rescinded so that the fishery was open from 0 to 200 miles off shore.

Modification of recreational bag limits and closed areas is authorized by regulations at 50 CFR 660.409(b)(1)(iii) and (v). The Regional Administrator consulted with representatives of the Council and the WDFW regarding this adjustment. The State of Washington managed the recreational fishery in state waters adjacent to this area of the exclusive economic zone in accordance with this Federal action. As provided by the inseason notice procedures of 50 CFR 660.411, actual notice to fishermen of this action was given prior to 0001 hours l.t., August 13, 1997, by telephone hotline numbers (206) 526–6667 and (800) 662–9825, and by U.S. Coast Guard Notice to Mariners broadcasts on Channel 16 VHF-FM and 2182 kHz. Because of the need for immediate action to liberalize the bag limit and area closure for this fishery, NMFS determined that good cause existed for this action to be taken without affording a prior opportunity for public comment.

Closures From the U.S.-Canadian Border to Cape Falcon, OR

Regulations governing the ocean salmon fisheries at 50 CFR 660.409(a)(1) state that when a quota for the commercial or the recreational fishery, or both, for any salmon species in any portion of the fishery management area is projected by the Regional Administrator to be reached on or by a certain date, the Secretary will, by an inseason action issued under 50 CFR 660.411, close the commercial or recreational fishery, or both, for all salmon species in the portion of the fishery management area to which the quota applies as of the date the quota is projected to be reached.

In the 1997 management measures for ocean salmon fisheries, NMFS announced that the recreational fishery in the area from the U.S.-Canadian border to Cape Alava, WA, would open on July 21 and continue through September 25, or attainment of the 550 chinook salmon subarea quota, whichever occurred first. Cape Alava to the Queets River, WA, would open on July 21 and continue through September 25, or attainment of the 800 coho salmon subarea quota, whichever occurred first. Queets River to Leadbetter Point, WA, would open on July 21 and continue through September 25, or attainment of the 14,000 coho salmon subarea quota, whichever occurred first. Leadbetter Point, WA, to Cape Falcon, OR, would open on July 21 and continue through September 25, or attainment of the 17,500 coho salmon subarea quota, whichever occurred first.

Throughout the season the best available information was used to determine when the salmon quotas had been reached based on catch and effort data and projections. To provide for an orderly shutdown of the recreational fishery in these areas, closure was made effective for: U.S.-Canadian border to Cape Alava, WA, at 2400 hours l.t., July 23; Cape Alava to the Queets River, WA, at 2400 hours l.t., August 3; Queets River to Leadbetter Point, WA, at 2400 hours l.t., September 4; and Leadbetter Point, WA, to Cape Falcon, OR, at 2400 hours l.t., August 7. The Regional Administrator consulted with representatives of the Council, the WDFW, and the ODFW. The states of Washington and Oregon managed the recreational fishery in state waters adjacent to this area of the exclusive economic zone in accordance with this Federal action. As provided by the inseason notification procedures of 50 CFR 660.411, actual notice to fishermen of this action was given prior to the actual closure times and dates, by telephone hotline number 206–526–6667 and 800–662–9825 and by U.S. Coast Guard Notice to Mariners broadcasts on Channel 16 VHF-FM and 2182 kHz. Because of the need for immediate action to stop the fishery upon achievement of the quota, NMFS determined that good cause existed for this action to be taken without affording a prior opportunity for public comment.

Classification

This action is authorized by 50 CFR 660.409 and 660.411 and is exempt from review under E.O. 12866.

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

Dated: November 26, 1997.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97–31679 Filed 12–2–97; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 961126334–7025–02, I.D. 112597C]

Fisheries of the Economic Exclusive Zone Off Alaska; Trawl Gear in the Gulf of Alaska

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

ACTION: Closure.

SUMMARY: NMFS is closing directed fishing for groundfish by vessels using trawl gear in the Gulf of Alaska (GOA), except for directed fishing for pollock by vessels using pelagic trawl gear in those portions of the GOA open to directed fishing for pollock. This action is necessary because the 1997 Pacific halibut prohibited species catch (PSC) limit for trawl gear in the GOA has been caught.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), November 26, 1997, until 1200 hrs, A.l.t., December 31, 1997.

FOR FURTHER INFORMATION CONTACT: Thomas Pearson, 907–486–6919.

SUPPLEMENTARY INFORMATION: The groundfish fishery in the GOA exclusive economic zone is managed by NMFS according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Fishing by U.S. vessels is governed by regulations implementing the FMP at subpart H of 50 CFR part 600 and 50 CFR part 679.

The Final 1997 Harvest Specifications of Groundfish for the GOA (62 FR 8179, February 24, 1997) established the 1997 Pacific halibut PSC limit for vessels using trawl gear at 2,000 metric tons (mt). The Administrator, Alaska Region, NMFS (Regional Administrator), has determined, in accordance with § 679.21(d)(7)(i), that vessels engaged in directed fishing for groundfish with trawl gear in the GOA have caught the 1997 Pacific halibut PSC limit. Therefore, NMFS is closing the directed fishery for groundfish by vessels using trawl gear in the GOA, except for directed fishing for pollock by vessels using pelagic trawl gear in those portions of the GOA that remain open to directed fishing for pollock.

Maximum retainable bycatch amounts may be found in the regulations at § 679.20(e) and (f).

Classification

This action responds to the best available information recently obtained from the fishery. It must be implemented immediately to prevent exceeding the 1997 trawl Pacific halibut PSC limit. Providing prior notice and an opportunity for public comment on this action is impracticable and contrary to public interest. The fleet has taken the 1997 trawl Pacific halibut PSC limit in the GOA. Further delay would only result in the 1997 trawl Pacific halibut PSC limit being exceeded and disrupt the FMP's objective of limiting trawl Pacific halibut mortality. NMFS finds for good cause that the implementation of this action cannot be delayed for 30 days. Accordingly, under U.S.C 553(d), a delay in the effective date is hereby waived.

This action is required by 50 CFR 679.21 and is exempt from review under E.O. 12866.

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

Dated: November 26, 1997.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97–31595 Filed 11–26–97; 3:13 pm]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 961107312–7021–02; I.D. 112497E]

Fisheries of the Exclusive Economic Zone Off Alaska; Bycatch Rate Standards for the First Half of 1998

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

ACTION: Pacific halibut and red king crab bycatch rate standards; request for comments.

SUMMARY: NMFS announces Pacific halibut and red king crab bycatch rate standards for the first half of 1998. Publication of these bycatch rate standards is necessary under regulations implementing the vessel incentive program. This action is necessary to implement the bycatch rate standards for trawl vessel operators who participate in the Alaska groundfish trawl fisheries. The intent of this action is to reduce prohibited species bycatch rates and promote conservation of groundfish and other fishery resources.

DATES: Effective 1201 hours, Alaska local time (A.l.t.), January 20, 1998, through 2400 hours, A.l.t., June 30, 1998. Comments on this action must be received at the following address no later than 4:30 p.m., A.l.t., January 2, 1998.

ADDRESSES: Comments should be mailed to the Assistant Regional Administrator, Sustainable Fisheries Division, NMFS, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Lori Gravel; or be delivered to 709 West 9th Street, Federal Building, Room 401, Juneau, AK.

FOR FURTHER INFORMATION CONTACT: Alan Kinsolving, 907–586–7228.

SUPPLEMENTARY INFORMATION: The domestic groundfish fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands management area (BSAI) and Gulf of Alaska (GOA) are managed by NMFS according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area and the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMPs). The FMPs were prepared by the North Pacific Fishery Management Council (Council) under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and are implemented by regulations governing the U.S. groundfish fisheries at 50 CFR part 679.

Regulations at § 679.21(f) implement a vessel incentive program to reduce halibut and red king crab bycatch rates in the groundfish trawl fisheries. Under the incentive program, operators of trawl vessels may not exceed Pacific halibut bycatch rate standards specified for the BSAI and GOA midwater pollock and ''other trawl'' fisheries, and the BSAI yellowfin sole and ''bottom pollock'' fisheries. Vessel operators also may not exceed red king crab bycatch standards specified for the BSAI yellowfin sole and ''other trawl'' fisheries in Bycatch Limitation Zone 1 (defined in § 679.2). The fisheries included under the incentive program are defined in regulations at § 679.21(f)(2).

Regulations at § 679.21(f)(3) require that halibut and red king crab bycatch rate standards for each fishery included under the incentive program be published in the **Federal Register**. The standards are in effect for specified seasons within the 6-month periods of January 1 through June 30, and July 1 through December 31. Because the Alaskan groundfish fisheries are closed to trawling from January 1 to January 20 of each year (§ 679.23(c)), the Administrator, Alaska Region, NMFS (Regional Administrator) is promulgating bycatch rate standards for the first half of 1998 effective from January 20, 1998, through June 30, 1998.

As required by § 679.21(f)(4), bycatch rate standards are based on the following information:

(A) Previous years' average observed bycatch rates;

(B) Immediately preceding season's average observed bycatch rates;

(C) The bycatch allowances and associated fishery closures specified under §§ 679.20 and 675.21;

(D) Anticipated groundfish harvests;

(E) Anticipated seasonal distribution of fishing effort for groundfish; and

(F) Other information and criteria deemed relevant by the Regional Administrator.

At its September 1997 meeting, the Council reviewed halibut and red king crab bycatch rates experienced by vessels participating in the fisheries under the incentive program during 1993–1997. Based on this and other information presented below, the Council recommended halibut and red king crab bycatch rate standards for the first half of 1998. These standards are unchanged from those specified for the past 4 years. The Council's recommended bycatch rate standards are listed in Table 1.

TABLE 1.—BYCATCH RATE STANDARDS, BY FISHERY AND QUARTER, FOR THE FIRST HALF OF 1998 FOR PURPOSES OF THE VESSEL INCENTIVE PROGRAM IN THE BSAI AND GOA

Fishery and quarter	1998 [1]
Halibut bycatch rate standards (kilogram (kg) of halibut/metric ton (mt) of groundfish catch	
BSAI Midwater pollock:	
Qt 1	1.0
Qt 2	1.0
BSAI Bottom pollock:	
Qt 1	7.5
Qt 2	5.0
BSAI Yellowfin sole:	
Qt 1	5.0
Qt 2	5.0
BSAI Other trawl:	
Qt 1	30.0
Qt 2	30.0
GOA Midwater pollock:	
Qt 1	1.0
Qt 2	1.0
GOA Other trawl:	
Qt 1	40.0
Qt 2	40.0
Zone 1 red king crab bycatch rate standards (number of crab/mt of groundfish catch)	
BSAI yellowfin sole:	
Qt 1	2.5
Qt 2	2.5
BSAI Other trawl:	
Qt 1	2.5
Qt 2	2.5

[1] 1998 bycatch rate standard.

Bycatch Rate Standards for Pacific Halibut

As in past years, the halibut bycatch rate standard recommended for the BSAI and GOA midwater pollock fisheries (1 kg halibut/mt of groundfish) is higher than the bycatch rates normally experienced by vessels participating in these fisheries. The recommended standard is intended to encourage vessel operators to maintain off-bottom trawl operations and limit further bycatch of halibut in the pollock fishery when halibut bycatch restrictions at § 679.21 prohibit directed fishing for pollock by vessels using non-pelagic trawl gear.

The recommended halibut bycatch rate standards for the BSAI ''bottom pollock'' fishery continue to approximate the average annual rates observed on trawl vessels participating in this fishery during 1993 (7.49 kg halibut/mt groundfish). Though the average bycatch rate has decreased since that time, the recommended halibut bycatch rate standards remain at a relatively high level to discourage unacceptably high halibut bycatch rates. During the first quarter of 1997, the average halibut bycatch rate in this fishery was only 1.35 kg halibut/mt groundfish. The pollock roe season begins January 20 and ends April 15. In 1997, the inshore and offshore component fisheries for pollock were closed 3 to 8 weeks prior to April 15, depending on the processing component and area. Directed fishing for pollock by the inshore and offshore component fisheries did not reopen until September 1, the start of the pollock nonroe season. Directed fishing for pollock by vessels participating in the community development quota program could continue after the end of roe season. However, the community development quota pollock fishery did not resume until just prior to September 1. As in past years, the directed fishing allowances specified for the 1998 pollock roe season likely will be reached before the end of the roe season on April 15.

Data available on halibut bycatch rates in the yellowfin sole fishery during the first and second quarters of 1997 showed an average bycatch rate of 6.1 and 5.0 kg halibut/mt of groundfish, respectively. As in past years, the Council has presumed that a bycatch rate standard of 5.0 kg halibut/mt of groundfish for the yellowfin sole fishery will continue to encourage vessel operators to take action to avoid excessively high bycatch rates of halibut.

For the ''other trawl'' fisheries, a 30-kg halibut/mt of groundfish bycatch rate standard was recommended for the BSAI and a 40-kg halibut/mt of groundfish bycatch rate standard was recommended for the GOA. Observer data collected from the 1997 BSAI ''other trawl'' fishery show first and second quarter halibut bycatch rates of 8.9 and 10.1 kg halibut/mt of groundfish, respectively. Observer data collected from the 1997 GOA ''other trawl'' fishery show first and second quarter halibut bycatch rates of 20.3 and 63.7 kg halibut/mt of groundfish, respectively.

With the exception of the GOA second quarter ''other trawl'' fishery, the average bycatch rates experienced by vessels participating in the GOA and BSAI ''other trawl'' fisheries generally have been lower than the Council's recommended bycatch rate standards for these fisheries. The Council determined that its recommended halibut bycatch rate standards for the ''other trawl'' fisheries, including the second quarter GOA fishery, would continue to provide an incentive to vessel operators to avoid unusually high halibut bycatch rates while participating in these fisheries and contribute towards an overall reduction in halibut bycatch rates experienced in the Alaska trawl fisheries. Furthermore, these standards would provide some leniency to those vessel operators that choose to use large mesh trawl gear as a means to reduce groundfish discard amounts. The bycatch rates of halibut and crab could increase for those vessels using large mesh sizes, but observer data do not exist on which to base a revised bycatch rate standard. The Council recommended maintaining the current bycatch rate standards for the ''other trawl'' fisheries until observer data becomes available that would provide a basis for bycatch rate standards for vessels using large mesh trawl gear.

Bycatch Rate Standards for Red King Crab

For the BSAI yellowfin sole and ''other trawl'' fisheries in Zone 1 of the Bering Sea subarea, the Council's recommended red king crab bycatch rate standard is 2.5 crab/mt of groundfish. This standard is unchanged since 1992. The red king crab bycatch rates experienced by the yellowfin sole fishery in Zone 1 during the first and second quarters of 1997 averaged 0.07 and 0.13 crab/mt of groundfish, respectively. The average bycatch rates of red king crab experienced in the ''other trawl'' fishery during the first and second quarter of 1997 were 0.40 and 0.02 crab/mt groundfish, respectively. The low 1997 red king crab bycatch rates primarily were due to trawl closures in Zone 1 that were implemented to reduce red king crab bycatch. The yellowfin sole and Pacific cod fisheries were closed in Zone 1 on May 13 and April 23, respectively,

because *C. bairdi* Tanner crab bycatch allowances were reached.

During 1997 through October, the total bycatch of red king crab by vessels participating in the yellowfin sole and ''other trawl'' fisheries is estimated at 48,000 crab, considerably less than the 100,000 red king crab bycatch limit established for the trawl fisheries in Zone 1. NMFS anticipates that the 1998 red king crab bycatch rates in Zone 1 will be similar to those experienced in 1997 and that the red king crab bycatch limit will remain unchanged.

In spite of anticipated 1998 red king crab bycatch rates being significantly lower than 2.5 red king crab/mt of groundfish, the Council recommended the red king crab bycatch rate standards be maintained at this level to avoid unusually high crab bycatch rates while providing some leniency to those vessel operators who choose to use large mesh trawl gear as a means to reduce groundfish discard amounts.

The Regional Administrator has determined that Council recommendations for bycatch rate standards are appropriately based on the information and considerations necessary for such determinations under § 679.21(f). Therefore, the Regional Administrator concurs in the Council's determinations and recommendations for halibut and red king crab bycatch rate standards for the first half of 1998 as set forth in Table 1. These bycatch rate standards may be revised and published in the **Federal Register** when deemed appropriate by the Regional Administrator pending his consideration of the information set forth at § 679.21(f)(4).

As required in § 679.2 and § 679.21(f)(5), the 1998 fishing months are specified as the following periods for purposes of calculating vessel bycatch rates under the incentive program:

Month 1: January 1 through January 31;
Month 2: February 1 through February 28;
Month 3: March 1 through March 28;
Month 4: March 29 through May 2;
Month 5: May 3 through May 30;
Month 6: May 31 through June 27;
Month 7: June 28 through August 1;
Month 8: August 2 through August 29;
Month 9: August 30 through October 3;
Month 10: October 4 through October 31;
Month 11: November 1 through November 28; and
Month 12: November 29 through December 31.

Classification

This action is taken under 50 CFR 679.21(f) and is exempt from OMB review under E.O. 12866.

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.* and 3631 *et seq.*

Dated: November 26, 1997.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97–31707 Filed 12–2–97; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 970611133–7263–02; I.D. 052997B]

RIN 0648–AJ36

Fisheries of the Exclusive Economic Zone Off Alaska; Improved Retention/ Improved Utilization

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to implement Amendment 49 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP). This final rule requires all vessels fishing for groundfish in the Bering Sea and Aleutian Islands Management Area (BSAI) to retain all pollock and Pacific cod beginning January 3, 1998, and all rock sole and yellowfin sole beginning January 1, 2003. This final rule also establishes a 15-percent minimum utilization standard for all at-sea processors beginning January 3, 1998, for pollock and Pacific cod and, beginning January 1, 2003, for rock sole and yellowfin sole. This action is necessary to respond to the fishing industry's socioeconomic needs that have been identified by the North Pacific Fishery Management Council (Council) and is intended to further the goals and objectives of the FMP.

DATES: Effective January 3, 1998.

ADDRESSES: Copies of Amendment 49 and the Environmental Assessment/ Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/ RIR/FRFA) prepared for this action may be obtained from NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori J. Gravel. Send comments regarding burden estimates or any other aspect of the data requirements, including suggestions for reducing the burdens, to NMFS and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503, Attn: NOAA Desk Officer.

FOR FURTHER INFORMATION CONTACT: Kent Lind, 907–586–7228.

SUPPLEMENTARY INFORMATION: The domestic groundfish fisheries in the exclusive economic zone of the BSAI are managed by NMFS under the FMP. The FMP was prepared by the Council under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Regulations governing the groundfish fisheries of the BSAI appear at 50 CFR parts 600 and 679.

At its September 1996 meeting, the Council adopted Amendment 49 to the FMP and recommended that NMFS prepare a rulemaking to implement the amendment. A notice of availability of Amendment 49 was published in the **Federal Register** on June 5, 1997 (62 FR 30835), and invited comment on the amendment through August 4, 1997. A proposed rule to implement Amendment 49 was published in the **Federal Register** on June 26, 1997 (62 FR 34429). Comments on the proposed rule were invited through August 11, 1997. A total of twelve letters of comment on the amendment and/or the proposed rule were received. Nine letters of comment were received by the end of the comment period on Amendment 49. Of these nine, two comments opposed Amendment 49, and seven comments supported approval but recommended changes to the proposed rule. Of the three letters of comment received after the end of the comment period on the amendment but before the end of the comment period on the proposed rule, two opposed Amendment 49 and implementation of the proposed rule. One supported approval of Amendment 49 but recommended changes to the proposed rule. Comments on both the amendment and the proposed rule are summarized and responded to in the Response to Comments section below.

Upon reviewing the reasons for Amendment 49 to the FMP and the comments on the proposed rule to implement it, NMFS determined that this action is necessary for the conservation and management of the groundfish fishery of the BSAI. NMFS approved Amendment 49 on September 3, 1997, under section 304(a) of the Magnuson-Stevens Act. Additional information on this action may be found in the preamble to the proposed rule and in the EA/RIR/FRFA.

The Council also adopted a parallel Amendment 49 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA) in June 1997 and recommended that NMFS prepare a rulemaking to extend the Improved

Retention/Improved Utilization (IR/IU) program to the GOA. A proposed rule to implement Amendment 49 in the GOA was published in the **Federal Register** on August 18, 1997 (62 FR 43977) with comments invited through October 2, 1997.

Response to Comments

Comment 1: The IR/IU program will severely disadvantage small entities to the benefit of large at-sea and shoreside processors. These impacts will be highly allocative and are an inappropriate result of an FMP amendment that has no conservation purpose but is intended solely to respond to the socioeconomic needs of the fishing industry.

Response: The purpose of this amendment is to reduce discards. The EA/RIR/FRFA prepared for Amendment 49 concluded that the action could impose significant economic impacts on a substantial number of small entities. The extent of the impact for a particular operation will be directly proportional to the level of discards of the four IR/IU species. Vessels or fisheries that currently discard IR/IU species at high rates will face a substantially greater burden than vessels or fisheries with lower discard rates of IR/IU species. The impact on a particular operation also is expected to vary inversely with the size and configuration of the operation, with larger processors more likely to have the space and infrastructure necessary to retain and process IR/IU species. Catcher/processors face greater space constraints than onshore processors, and are limited in their ability to expand due to vessel moratorium, license limitation, and U.S. Coast Guard load line requirements. As a result, the impacts of the IR/IU program are expected to fall most heavily on catcher/processors, especially smaller factory trawlers that lack the capacity to produce fishmeal.

During development of Amendment 49, the Council considered and rejected alternatives that might have mitigated impacts on smaller factory trawlers. Alternatives that would have established exemptions or phase-in periods based on vessel size were rejected because they would have diluted expected reductions in bycatch and discards and because they were thought to favor sectors of the industry with high discard rates. The Council believed that an inevitable and appropriate consequence of any discard reduction program is that the compliance burden would be proportionate to the current bycatch and discard rate of a particular operation.

NMFS currently is assisting with industry efforts to develop more selective fishing gear and fishing techniques to reduce the adverse economic impacts of Amendment 49. NMFS approved a large-scale fishing experiment in the BSAI during August 1997 to test experimental trawl gear designed to reduce pollock bycatch in flatfish trawl fisheries. Initial results from the experiment have been promising and will be made available to the public in late 1997. These and other efforts may assist the industry in significantly reducing the effects of Amendment 49 on certain trawl fisheries. Amendment 49 provides incentives for the Alaska groundfish industry to develop innovative solutions for reducing bycatch that also could be applicable to other fisheries throughout the United States and the world.

Comment 2: The EA/RIR/IRFA does not calculate net economic benefits or contain a cost benefit analysis as required under E.O. 12866.

Response: The Office of Information and Regulatory Affairs of the Office of Management and Budget has concurred with NMFS' determination that this rule is not significant for purposes of Executive Order 12866. Accordingly, the requirements of section 6(a)(3)(B) and (C), e.g., formal benefit/cost analysis, are not applicable to this regulatory action. However, the requirements of section 1(b), The Principles of Regulation, are applicable, including principle 6 which requires ''each agency [to] assess both the costs and the benefits of the intended regulation and recognizing that some costs and benefits are difficult to quantify, propose, or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.'' NMFS has fully complied with this requirement.

NMFS has noted repeatedly during the 4 years of analysis for Amendment 49 that the cost data necessary to conduct a rigorous, quantitative net benefit analysis are not available. When the industry has been invited to provide such data, it has declined to do so. Therefore, NMFS prepared an analysis on the basis of the best available scientific information. This largely gross revenue analysis was supplemented with qualitative assessments of the probable response of the affected sectors, the probable environmental response, as well as the potential price and market response, to the proposed action. Review and advice was sought from the Council's Advisory Panel and Scientific and Statistical Committee as well as other experts, from within the industry and outside the industry, in an effort to test the conclusions of the analysis against their respective experience and expertise. Given the limitations on data, these experts consistently affirmed the analytical approach as well as the findings of the analysis. The EA/RIR/FRFA meets the rigor with which benefits and costs of amendments to the FMP have been analyzed, historically.

Comment 3: The IR/IU program may not satisfy Magnuson-Stevens Act provisions that require management programs ''to the extent practicable and in the following priority—(A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided.'' If no restrictions are placed on the production of fishmeal, many operations will have little incentive to reduce their bycatch of undersize fish and unwanted species. To satisfy this requirement, the program must demonstrate that such reductions are the result of increased avoidance of the types of unwanted pollock, Pacific cod, rock sole, and yellowfin sole that fishermen currently harvest. If the proposed program simply causes industry to retain and use bycatch without increasing the avoidance of these fish, the statutory requirement to minimize or avoid bycatch will remain unfulfilled.

Response: The Magnuson-Stevens Act defines the term ''bycatch'' as ''fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards.'' Because the IR/IU program requires 100 percent retention of the four IR/IU species, bycatch of these species, as defined in the Magnuson-Stevens Act, will largely be eliminated in the groundfish fisheries of the BSAI.

With respect to the issue of ''avoidance,'' the IR/IU program will provide significant incentives for all sectors of the industry to avoid unwanted harvest of IR/IU species. While operations that have the capacity to produce fishmeal may face less immediate incentives to avoid unwanted harvest of IR/IU species, the EA/RIR/FRFA concluded that the IR/IU program will provide an incentive for all sectors of the industry, including those with fishmeal processing capacity, to avoid the unwanted harvest of IR/IU species. This is so because processing fishmeal draws resources away from the production of higher value products. However, most catcher/processors and motherships with fishmeal processing capacity were designed to operate in the midwater pollock fishery. When participating in that fishery, these vessels already retain nearly 100 percent of their pollock and have little unwanted harvest of other groundfish

species. Consequently, the IR/IU program is expected to have less impact on these operations.

Operations that participate in less selective bottom trawl fisheries and that do not have the capacity to produce fish meal will have a significant incentive to avoid the harvest of unwanted or un-targeted IR/IU species due to the cost of holding less valuable species in lieu of more valuable species. The Council expects that the economic incentive produced by the IR/IU program will generate innovative gear and fishing techniques as operators develop methods to comply with full retention requirements in a cost-effective manner. Currently, an association of factory trawlers configured for head-and-gut (H&G) processing is testing experimental fishing gear designed to reduce unwanted harvests of pollock and Pacific cod in flatfish fisheries.

The Council considered and rejected various proposals to limit production of fishmeal. Such proposals were considered to be unreasonably restrictive and of questionable benefit. A limit on fishmeal production would impose substantial additional costs on operations that have developed fishmeal plants for the purpose of processing fish waste, yet such limits would not increase benefits to the nation.

Comment 4: Section 313(f) of the Magnuson-Stevens Act requires that in implementing section 303(a)(11), the Council shall ''submit conservation and management measures to lower, on an annual basis, for a period of not less than 4 years, the total amount of economic discards occurring in the fisheries under its jurisdiction.'' If the proposed IR/IU program is to satisfy this requirement, it must meet two criteria. First it must demonstrate annual reductions in the total amount of economic discards over a 4-year period. The proposed IR/IU program will result in a 1-year reduction in economic discards of pollock and Pacific cod, with no further reductions scheduled until 5 years later when a one time reduction in rock sole and yellowfin sole will be required. To satisfy the statutory requirement, the Council must identify where and how reductions in economic discards are to occur in years two, three, and four.

Response: See response to comment 3. The IR/IU program prohibits economic discards of pollock and Pacific cod beginning January 1, 1998, making additional reductions unnecessary for those species. With respect to bycatch of other species, the IR/IU program is but one element of the Council and NMFS's ongoing efforts to reduce bycatch and is not intended to reduce all forms of bycatch occurring in the groundfish fisheries off Alaska. Other existing bycatch reduction programs include time and area closures, prohibited species catch limits, gear restrictions, support for gear research, and the vessel incentive program. Additional bycatch reduction programs are also under consideration by the Council.

Comment 5: The IR/IU proposal does not meet the goals identified by the Council's problem statement. Amendment 49 will fail to meet the Council's first goal to assure the long-term health of the fish stocks. The EA/RIR/IRFA concludes that the program, as designed, will fail to provide any conservation or positive environmental impact while most likely resulting in a decrease of long-term economic benefits to the nation. Of the industry sectors operating in the North Pacific, only the pollock and crab fleets lack a long-term stable fisheries-based economy due to limited stocks. This plan does nothing to address the waste of crab in the directed crab fisheries and will simply encourage more meal production rather than increase the supply of pollock available for surimi and fillet production.

Amendment 49 also will fail to meet the Council's second goal: reducing bycatch, minimizing waste, and improving utilization of fish resources. While some short attention was paid to defining waste, the EA/RIR/IRFA did not sufficiently analyze the real question raised by the program: Will we expend more resources and receive less benefit from our fish resources by implementing the proposal? The proposed IR/IU program will encourage continued economic loss and waste by (1) allowing fish that are currently discarded to be turned into meal, and (2) encouraging the use of resources to produce products worth less than the cost of production.

Response: See response to comments 3 and 4. Amendment 49 is only one of many efforts by the Council to reduce bycatch and ensure the long-term health of fish stocks. The Council is considering other efforts to reduce groundfish and crab bycatch including time and area closures, prohibited species catch limits, research into more selective fishing gear, and a vessel incentive program. The EA/RIR/FRFA prepared for Amendment 49 concluded that the program would provide a net benefit to the nation through a reduction in discards and improved utilization of species once they are harvested. The Council concurred in this conclusion as demonstrated by its unanimous vote to adopt Amendment 49.

Comment 6: While both of NMFS's **Federal Register** notices and the EA/RIR/IRFA analysis conclude that there will be no environmental benefit resulting from Amendment 49, Council on Environmental Quality (CEQ) regulations implementing NEPA still require the preparation of an environmental impact statement (EIS) for this major Federal action. CEQ regulations state that events which trigger an EIS include such indirect effects as changes in the use of ecosystems, and changes in historic and social effects, whether or not they are indirect or cumulative (40 CFR 1508.8(b)). An action also is significant when the effect on the human environment is highly controversial (40 CFR 1508.27(b)(4)) or is precedent setting (40 CFR 1508.27(b)(6)). The fact that the primary stated goal of the program is to avoid public censure of ''waste'' at the national level implies that this proposal is controversial. The EA/RIR/IRFA finds that the IR/IU program will significantly disadvantage an historic user group and is even intended solely for the purpose of meeting social needs. It certainly stands to establish a precedent for the nation. In other words, the EA/RIR/IRFA's findings clearly and unambiguously demonstrate that the IR/IU program is a major Federal action significantly impacting the human environment; therefore NEPA requires the preparation of an EIS.

Response: NMFS has determined that Amendment 49 will not affect significantly the quality of the human environment. Therefore, the preparation of an EIS on the final action is not required under section 102(2)(c) of NEPA or CEQ's implementing regulations. This finding of no significant impact is contained in the EA/RIR/IRFA for Amendment 49. Nevertheless, NMFS is currently preparing a broader EIS on the groundfish fisheries of the BSAI. This EIS will consider the impacts of the current groundfish management system including the IR/IU program.

Comment 7: The IRFA was flawed in that several reasonable traditional alternatives, currently used by NMFS and the State, were summarily rejected without discussion by the Council and were not analyzed in the IRFA. The Regulatory Flexibility Act (RFA) requires a description of ''any significant alternatives . . . which minimize any significant economic impact'' (5 U.S.C. 603(c)). The IRFA doesn't even mention an industry proposal to exempt unmarketable undersize fish from the proposed rule. Minimum size limits are currently used

in the halibut, crab, herring, and salmon fisheries. The Council has refused to consider industry proposals to only require retention of fish greater than 1.0 or 1.5 lb citing enforcement concerns. A minimum size standard applied to the IR/IU program would make this an effective program for reducing waste. The EA/RIR/IRFA itself bases its cost/benefit calculations on a set of minimum marketable sizes. Amendment 49, as proposed, should not be approved by NMFS, but should, instead, be returned to the Council for serious consideration of a viable alternative to mitigate the impact on the small H&G catcher/processors. The fact that, in effect, only one alternative was considered for improved retention is a serious defect in the analysis, and the fact that improved retention was considered a different option than improved utilization are disturbing attempts at arguing that three options were considered rather than one option and the *status quo*. Because the option of using traditional size restrictions is available, this alternative should be considered as viable for the purposes of analysis even if the Council did not intend to select that alternative.

Response: A wide variety of alternatives was considered during development of the IR/IU program. These alternatives were analyzed in a series of Council documents beginning with an Implementation Issues Analysis dated September 11, 1995. These documents were incorporated by reference into the final EA/RIR/FRFA. The Council considered and rejected minimum size limits for retention of IR/IU species because an exemption allowing the discard of undersize fish would have diluted the incentives for vessel operators to avoid the bycatch of juvenile fish in the first place. See also response to comment 12.

The RFA as supplemented contains the required discussion of alternative that will have less impact on small entities and the reasons such alternatives were rejected.

Comment 8: Much of the ''full utilization'' achieved by shore-based plants results from the production of fishmeal. The Environmental Protection Agency (EPA) has stated that shoreside pollock fishmeal processors lead the industry in terms of pollutant discharges. In contrast, the EPA found that discharges of seafood wastes to deeper unimpounded offshore waters by mobile at-sea processors do not create the same kinds of problematic waste piles as do shore-based processors (U.S. EPA, Response to Comments, Seafood Processors in Alaska, NPDES General Permit No. AK–G52–0000 (1995)). An IR/IU program that allows meal to meet the increased utilization standard creates a pollution concern. Any IR/IU program should be designed to avoid or minimize rather than increase the impact of processing wastes on the ocean ecosystem.

Response: The potential environmental degradation resulting from shore-based groundfish processing varies on a case-by-case basis depending on the form of the discharged material and the location of the discharge. For this reason, the EPA no longer regulates shore-based surimi and fishmeal processors in the BSAI under the general permit cited in the comment. In general, fishmeal processing transforms the waste stream from solid to liquid form, which may have greater or lesser impacts on the environment depending on the location of the discharge. In many instances, liquid waste from fishmeal processing may have less impact on the environment than solid waste because it disperses more rapidly. As a result, the EPA now regulates each shore-based surimi and fishmeal processor under a separate NPDES permit which establishes limits on both solid and liquid waste discharges. Shore-based processors must continue to operate under the terms of their NPDES permits once the IR/IU program becomes effective.

Comment 9: If fishermen are required to retain and market juvenile, diseased, or damaged fish, the reputation of Alaska seafood products on the world market will be damaged.

Response: The final rule does not place restrictions on types of products a vessel may produce from IR/IU species, nor does it restrict the industry to production of products for human consumption. Small, damaged, or diseased fish may be processed into fishmeal, fish oil, minced fish, or other products not intended for human consumption. Operations with the capacity to produce fishmeal will have little difficulty processing fish that may not be fit for human consumption. Operations without the capacity to produce fishmeal may find it more difficult to handle such fish. However, NMFS does not expect processors to deliberately undermine the marketability of their food grade products by including fish that may be unsuitable for that purpose. NMFS expects that most operators will comply with the IR/IU program by developing a range of products and use below food grade fish to produce products not intended for human consumption.

Comment 10: Amendment 49 should allow for the live release of bycatch, as encouraged by the Magnuson-Stevens Act. Vessel operators using longline, pot, and jig gear have the ability to carefully release bycatch. While pollock and Pacific cod have closed swim bladders and may not survive release, flatfish have open swim bladders and will survive.

Response: Longline, pot, and jig vessels do not encounter bycatch of rock sole and yellowfin sole in quantities sufficient to warrant a special exemption for those gear types. NMFS catch statistics indicate that longline, pot, and jig vessels operating in the BSAI encounter only negligible amounts of rock sole and yellowfin sole. Longline bycatch of these species averages 0.0 percent for rock sole and 0.2 percent for yellowfin sole as a percentage of total catch. Bycatch of these species by pot and jig vessels is virtually unreported. Consequently, a full retention requirement for rock sole and yellowfin sole is expected to have a negligible effect on vessels using longline, pot, and jig gear.

Comment 11: The final rule should contain exemptions for diseased, contaminated, parasite-ridden, or damaged fish. Contaminated, diseased, parasite-ridden, or damaged fish are inevitably encountered in the course of fishing and processing activities. Retention of such fish is in conflict with Food and Drug Administration (FDA) Hazard Analysis Critical Control Point (HACCP) requirements. In fact, the HACCP plans drafted by many companies actually require the discard of fillet products with large amounts of parasites in them.

Response: NMFS recognizes that some fish may enter a processing facility that may be below food grade (see response to comment 9). However, the final rule does not limit the type of products a processor may produce from its retained catch, nor does it establish a minimum recovery rate for each fish. The 15-percent minimum utilization rate requirement in the final rule applies to a vessel's aggregate production from each IR/IU species during a fishing trip, rather than each individual fish. Many processors in the BSAI currently utilize damaged and parasite ridden fish in a variety of products such as fishmeal, fish oil, minced fish, and bait that are not intended for human consumption.

Federal HACCP regulations require processors to address food safety hazards in their HACCP plans. However, nothing in the HACCP regulations requires processors to discard fish that are below food grade. Such fish may be utilized in a variety of non-food products. Seafood processors that currently rely on discarding of whole fish to comply with

HACCP requirements will need to modify their HACCP plans to comply with the provisions of the IR/IU program.

The Council and NMFS considered and rejected various exemptions for damaged and parasite-ridden fish for a variety of reasons. An exemption allowing discards of fish that are damaged in the course of handling and processing could undermine the effectiveness of the IR/IU program and render it unenforceable. NMFS believes that such an exemption would provide an incentive for processors to deliberately damage quantities of IR/IU species that they would prefer not to retain and process for economic reasons.

NMFS does not have statistics on the percentage of fish that are rendered unsuitable for food products as a result of parasites. Various parasites are commonly encountered in BSAI groundfish catches, and processors have developed various techniques for parasite removal during processing. An exemption that would allow discarding of fish with parasites could undermine the effectiveness of the IR/IU program and allow wholesale discards of marketable fish because some form of parasite is likely to be encountered in most pollock and Pacific cod.

The Council and NMFS recognize that retention of damaged fish may pose a problem for certain sectors of the industry. Processors with the capacity to produce fishmeal are unlikely to be affected because damaged and parasite-ridden fish are suitable for fishmeal processing. Processors without fishmeal plants may find it more difficult to produce marketable products from damaged fish. To address these concerns, the Council voted to establish an IR/IU implementation committee composed of representatives from industry, conservation groups, and management agencies. This IR/IU implementation committee will be charged with examining problems that surface during implementation of the IR/IU program and providing the Council and NMFS with recommendations for changes and modifications to the program that may prove necessary. NMFS intends to work closely with the Council and industry during implementation of Amendment 49 to further refine aspects of the program as problems become apparent during implementation.

Comment 12: The proposed IR/IU program should contain exemptions for undersize fish. Most fish processing equipment is limited to processing fish within certain size ranges. For technological reasons, some processors may be unable to process fish that fall outside these size parameters. A minimum size standard would increase the net economic benefits to the nation as a result of the IR/IU program by not imposing costs on industry to process unmarketable undersize fish.

Response: Processors with fishmeal plants will have no difficulty processing undersize or juvenile fish. However, NMFS recognizes that processors without fishmeal plants may be forced to process undersize fish into products of little or no value, such as whole frozen fish. During early development of the IR/IU program, the Council considered and rejected exemptions for juvenile fish because an exemption allowing the discard of undersize fish would not have provided vessel operators an incentive to avoid the bycatch of juvenile fish in the first place. The intent of the IR/IU program is to provide industry with incentives to develop more selective fishing techniques, and that objective is also underscored in the Magnuson-Stevens Act. To that end, NMFS is currently sponsoring research into more selective fishing gear such as larger mesh codends and trawl escape panels, and believes that fishing selectivity will improve as vessel operators endeavor to avoid bycatch of juvenile fish. To the extent that vessel operators are able to avoid the capture of juvenile fish in the first place, the impacts of the full retention requirement will be reduced.

Comment 13: The IR/IU program should not require the retention and utilization of previously-caught fish which may be brought on board a vessel through fishing or retrieval of lost gear. For example, last year a vessel retrieved a codend that had been lost in a pollock fishery 4 months earlier. The codend was still full of pollock (approximately 80 mt). The fish had begun to putrefy and the gas caused the codend to float to the surface. The vessel that retrieved the codend had to bring the fish on board to dump the codend. According to the proposed rule, that vessel would have been required to retain all pollock brought on board the vessel without distinction as to their condition or the circumstances involved. During the yellowfin sole fishery, dead yellowfin sole commonly are caught that had been previously discarded by other vessels. Under the IR/IU program, discard of IR/IU species may be required for a vessel to comply with directed fishing closures. Vessels should not be required to retain and utilize dead and putrefying fish that were previously caught and discarded by other vessels.

Response: NMFS agrees. The final rule has been modified to allow for the discard of previously caught fish. Vessel operators should not log previously caught fish as part of their round-weight catch of an IR/IU species. NMFS daily fishing logbooks and daily cumulative production logbooks already provide discard code 97 for previously discarded (decomposed) fish taken with trawl gear in current fishing efforts. This code also should be used when logging discards of previously caught IR/IU species.

Comment 14: Since the purpose of the IR/IU program is to reduce waste in the groundfish fishery, NMFS should review the advisability of maintaining the current restrictions on the amount of pollock roe a vessel is allowed to have on board at any point in time. Those restrictions were adopted as an indirect method of prohibiting the practice of roe-stripping. Although well intended, and supported by industry at the time they were initially imposed, the current regulations have actually resulted in the discarding of roe during time periods of peak roe recovery. Such a result is incongruous in light of current efforts to reduce waste in the fishery—especially in view of the discarding restrictions incorporated in Amendment 49. NMFS should reconsider the need for the roe retention limits once IR/IU regulations go into effect and, if possible, increase the amount of retainable roe so as to avoid situations where vessels are required to discard the most valuable of all products produced by the pollock fishery.

Response: NMFS agrees. The current regulations governing retention of pollock roe were adopted by NMFS in 1990 to implement Amendment 13/19 to the groundfish fishery management plans for the BSAI and GOA. Amendment 13 to the BSAI FMP states:

> Roe-stripping is prohibited, and the Regional Director is authorized to issue regulations to limit this practice to the maximum extent practicable. It is the Council's policy that the pollock harvest shall be utilized to the maximum extent possible for human consumption.

Among the options considered by the Council during analysis of Amendments 13/19 was an option that would have required full utilization of pollock, a more restrictive option than the prohibition on roe stripping that was adopted by the Council at that time. The IR/IU program established by Amendment 49 in effect implements the more restrictive roe-stripping prohibition originally rejected by the Council for Amendment 13. Consequently, previously adopted regulations that limit roe-stripping through maximum retainable percentages may be redundant and unnecessary. For that reason, NMFS

intends to work with the Council and the Council's IR/IU implementation committee to determine if existing limits on roe retention continue to serve a purpose after implementation of the IR/IU program.

Comment 15: The IR/IU program should contain a provision to allow trawlers to bleed codends when necessary for vessel safety. On occasion a vessel may accidentally harvest more fish than can be safely brought on board. Vessel operators should not be faced with either bringing the fish on board and risking the safety of the entire crew and vessel, or violating IR/IU regulations by discarding the portion of the catch that cannot be brought on board safely.

Response: The Council's IR/IU industry committee considered and rejected proposals to allow codend bleeding. The IR/IU committee believed that this practice should stop, and that a prohibition on bleeding codends would provide an incentive for fishermen to fish in a more cautious manner when their holds are near capacity. In addition, many catcher vessels have the capacity to carry excess catch on deck safely, although fish retained in such a manner (without refrigeration) may not be desired by the processor to which they are delivering. NMFS Enforcement and the U.S. Coast Guard generally are not in a position to evaluate whether a particular instance of discarding was motivated by legitimate safety concerns or by economic reasons. Nevertheless, should a vessel operator believe it necessary for the safety of the vessel to bleed a codend, the amount of discards should be entered into the vessel's daily fishing log along with a description of the extenuating circumstances. NMFS will review such instances on a case-by-case basis with consideration given to the extent of the violation and possible mitigating circumstances.

Comment 16: The IR/IU program should provide a buffer between maximum retainable bycatch (MRB) percentages under the directed fishing standards and the IR/IU minimum retention requirements. Under the proposed rule, the combination of these two standards results in a single point (20 percent for pollock and Pacific cod and 35 percent for rock sole and yellowfin sole) that a vessel operator must achieve to comply with both standards simultaneously. Without onboard scales, no catcher vessel can retain precisely 20 percent of an IR/IU species. This is true for both vessels that partially sort their catch on board and for those that pump fish directly into refrigerated seawater. This situation is an untenable position for a catcher vessel and differs greatly from the situation for a catcher/processor, which may meet both standards by monitoring the number of cases of product on board and maintaining appropriate ratios. If MRB requirements take precedence over IR/IU requirements then the proposed rule should lower the retention standard when an IR/IU species is closed to directed fishing to provide a range of 15 to 20 percent for pollock and Pacific cod and 25 to 35 percent for rock sole and yellowfin sole within which catcher vessels could retain or discard IR/IU species at their option.

Response: The Council, through its IR/IU industry committee, considered and rejected a proposal to provide a buffer between IR/IU retention requirements and MRB amounts. The IR/IU industry committee recommended, instead, that this issue be reexamined once the program is underway and that possible solutions could be developed at that time if necessary.

When an IR/IU species is closed to directed fishing, the IR/IU program does not require a vessel operator to retain exactly the MRB amount for that species. Rather, the program simply requires the retention of all catch of that species up to the MRB amount in effect for that species. A vessel operator who maintains a bycatch rate below the MRB percentage in effect for an IR/IU species will avoid the difficult scenario described in the comment. The avoidance of bycatch is an underlying objective of the Magnuson-Stevens Act and one objective of the IR/IU program is to encourage vessel operators to simply avoid the harvest of IR/IU species when those species are closed to directed fishing. To that end, NMFS is actively promoting the development of more selective gear technologies and is assisting industry efforts to identify and avoid areas with high bycatch rates. NMFS believes that attempts should first be made to avoid excessive bycatch of IR/IU species closed to directed fishing before retention standards are relaxed to accommodate discards of such bycatch.

Comment 17: The 15-percent minimum utilization rate standard in the proposed rule depends on accurate estimates of a vessel's total catch. We are concerned that measurement error by observers in the calculation of total catch of each IR/IU species may make a vessel accountable for processing more fish than it actually caught. Due to the vagaries of species composition sampling, an observer's estimate of total catch of an IR/IU species during a specific haul may differ from the vessel's actual catch by a significant percentage. Based on our experience with the accuracy of species composition sampling, this ''phantom fish'' problem could occur to a significant degree.

Response: NMFS recognizes the problems associated with calculating the total catch of each IR/IU species on a haul-by-haul basis. However, the IR/IU program does not depend on observer estimates of total catch of each IR/IU species for monitoring and enforcement of the 15-percent minimum utilization rate. Instead, each processor is required to log its total catch weight of each IR/IU species on a haul-by-haul basis. NMFS logbooks will be revised to accommodate collection of this data. When verifying compliance with the 15-percent minimum utilization rate, a catcher/processor's logged round-weight catch of an IR/IU species will be compared against the weight of products produced from that IR/IU species.

At this point, NMFS has not established specific guidelines or procedures for measurement of the round-weight catch of IR/IU species on board vessels. Vessel operators are free to measure their round-weight catch of each IR/IU species in the manner they determine to be most appropriate to their circumstances. When observers are present, vessel operators are free to use the observer's estimate of total catch, or they may independently measure the round-weight catch of each IR/IU species.

NMFS chose not to base monitoring and enforcement of the 15-percent utilization standard on observer estimates of round-weight catch because not all vessels have 100-percent observer coverage, and observers, when present, may not sample every haul. If observer estimates were used to monitor compliance with the IR/IU program, then vessels without observer coverage would, in effect, be exempt from the program. Nevertheless, NMFS may use observer data as well as any additional information that may be available to verify the accuracy of a vessel's logged round-weight catch of IR/IU species. The deliberate under-logging of round-weight catch to evade minimum utilization requirements is a violation of NMFS recordkeeping and reporting requirements and would be subject to enforcement action.

Comment 18: As indicated in the EA/RIR/IRFA, implementation of the IR/IU program requires parallel State of Alaska (State) regulations for onshore processors. In the absence of parallel State regulations, catcher vessels will be placed in an untenable position if onshore processors refuse to accept their

catch and Federal regulations prohibit them from discarding at sea. Therefore, implementation of the IR/IU program should be delayed until State IR/IU regulations are in place.

Response: The State is currently developing a parallel IR/IU program that would establish retention and utilization requirements for onshore processors, and require onshore processors to accept deliveries of IR/IU species. The Alaska Department of Fish and Game (ADF&G) has indicated that under existing State statutes that prohibit roe stripping and waste of pollock, the State has authority to implement IR/IU regulations to govern onshore processing of pollock. ADF&G has indicated that the State is proceeding with implementation of IR/IU regulations to govern onshore processing of pollock that would be effective January 3, 1998. However, ADF&G has indicated that parallel IR/IU regulations to govern onshore processing of Pacific cod may not be in place until mid-1998 because a statutory change is necessary before the State can regulate onshore processing of Pacific cod.

At the September 1997 Council meeting, NMFS met with representatives for catcher vessel operators and concluded that parallel State regulations for pollock will address the concerns of the catcher vessel fleet on an interim basis provided the State also proceeds with parallel State regulations for Pacific cod. Catcher vessel operators are most concerned about being able to deliver pollock bycatch to processors that have not traditionally processed pollock in the past. Catcher vessel operators indicate that they are much less concerned about finding onshore markets for Pacific cod.

Comment 19: The EA/RIR/IRFA clearly concludes that adoption of parallel IR/IU regulations by the State is critical to the success of the program. The State, acting through the Commissioner of Fish and Game, recently argued in Alaska Superior Court that regulations allowing the roe stripping of salmon and discard of 100 percent of the salmon carcasses were legal under the Alaska anti-waste statute (*Callaghan* v. *Alaska,* No. 3AN–96–8963 Civ., Slip Op. (3d Super. Ct. Alaska July 14, 1997)). In *Callaghan*, the State Attorney General justified the discard of salmon citing the Commissioner of Fish and Game's finding that harvesters ''might not harvest these salmon because of lack of markets.'' In finding for the State, the Court relied in part on a finding by the Commissioner of Fish and Game that ''catching and processing the entire fish would result in a financial loss'' (*Id*. at 8). In short, the State prevailed arguing that (1) it is not waste to discard unmarketable fish, and (2) ADF&G and the State Attorney General are justified in not enforcing the State of Alaska anti-waste laws. We believe, therefore, that NMFS cannot reasonably conclude that the State of Alaska will implement or enforce parallel IR/IU regulations for onshore processors. Without implementation and enforcement of parallel State regulations, the IR/IU program should be disapproved.

Response: See response to comment 18. Throughout Council development of the IR/IU program, the State has expressed its intent to promulgate parallel IR/IU regulations for onshore processors. The State was a principal proponent of the IR/IU program throughout the Council process, and NMFS has no reason to believe that the State will fail to follow through with its commitment to implement parallel IR/IU regulations for onshore processors.

Comment 20: NMFS' ability to determine if the proposed IR/IU program satisfies the law and meets the intent of the Council depends on its ability to monitor and measure the extent to which vessels avoid bycatch. However, the proposed program includes no such monitoring mechanism. In fact, throughout the proposed amendment, and also the proposed rule, limitations and difficulties associated with monitoring, enforcement, and compliance with the program are prominent. There is no explicit discussion of a monitoring system geared to assess the efficacy of the program. Further, at the June 1997 Council meeting, representatives of NMFS recognized that the program does not include suitable methods by which to measure its success in meeting stated intent or satisfying legal requirements.

This lack of a monitoring program is directly counter to the draft regulations NMFS will soon propose to help Councils implement bycatch reduction requirements. The proposed revisions to the guidelines for Magnuson-Stevens Act national standards include the following section for bycatch reduction requirements:

Implementation and monitor selected [bycatch reduction] management measures. Effects of implemented measures should be evaluated routinely. Monitoring systems should be established prior to fishing under the selected management measures. Where applicable, implementation plans should be developed and coordinated with industry and other concerned organizations to identify opportunities for cooperative data collection, coordinating data management for cost efficiency and avoidance of duplicate effort.

Response: Monitoring and evaluation of the IR/IU program will be accomplished primarily through the use of existing sources of data on the catch, retention, and utilization of IR/IU species in the BSAI. The groundfish fisheries of the BSAI are among the most extensively monitored fisheries in the United States and are subject to the most extensive observer coverage requirements of any fishery in the United States. NMFS's groundfish monitoring program gathers data from a variety of sources including observer reports, industry-submitted weekly production reports, NMFS daily fishing logbooks, and ADF&G fish tickets. These data sources will enable NMFS to assess the effectiveness of the IR/IU program on a fleet-wide basis. Where necessary, existing data collection programs are being adjusted to accommodate the collection of data necessary for monitoring the IR/IU program. For example, NMFS catcher vessel daily fishing logbook, catcher/processor daily fishing logbook and mothership cumulative production logbooks are being revised to accommodate the collection of round-weight catch data for IR/IU species on a haul-by-haul basis.

Changes From the Proposed Rule

Four changes were made from the proposed rule in response to comments:

1. A provision was added at § 679.27(h) to allow for the discard of previously caught fish.

2. The prohibition on discard of products from IR/IU species at § 679.27(e) was revised to allow the discard of products when necessary to comply with a directed fishing closure.

3. The definition of ''fishing trip'' at § 679.2 was revised to specify that it applies to the IR/IU program as well as to directed fishing closures.

4. The proposed rule contained separate utilization requirements based on a fishing trip for catcher/processors and a reporting week for motherships. In the final rule, these were combined into a single utilization standard based on a fishing trip for both catcher/processors and motherships.

Summary of the Final Rule and Guide to Compliance

The following section in question-and-answer format describes and summarizes the requirements of the final rule and is intended to serve as a compliance guide for vessel owners and operators.

Who Must Comply With IR/IU Regulations?

If you own or operate a vessel fishing for groundfish in the BSAI or processing groundfish harvested in the BSAI, you must comply with the IR/IU regulations regardless of your vessel's size, gear type, or target fishery. Because the Magnuson-Stevens Act does not authorize NMFS to regulate onshore processing of fish, these requirements do not apply to onshore processors. Parallel regulations to extend IR/IU requirements to onshore processors will be issued by the State of Alaska.

Which Species Must Be Retained?

The IR/IU program defines four groundfish species as IR/IU species: pollock, Pacific cod, rock sole, and yellowfin sole. Retention and utilization requirements apply to pollock and Pacific cod beginning January 3, 1998. The requirements will apply to rock sole and yellowfin sole beginning January 1, 2003. The purpose of the 5-year delay for rock sole and yellowfin sole is to provide industry with sufficient time to develop more selective fishing techniques and/or markets for these fish.

What Are the Retention Requirements for Catcher Vessels When Directed Fishing Is Open?

The retention requirements for all vessels are set out in table format at § 679.27(c)(2). If you own or operate a catcher vessel, and directed fishing for an IR/IU species is open, you must retain all fish of that species brought on board your vessel until the fish are lawfully transferred or sold to an authorized party such as a processor operating with a Federal processor permit. This requirement applies to all IR/IU species you have caught as well as all IR/IU species you have received via transfer from another vessel.

What Are the Retention Requirements for Catcher Vessels When Directed Fishing Is Closed?

If you own or operate a catcher vessel and an IR/IU species is closed to directed fishing, you must retain all fish of that species up to the MRB amount in effect for that species. If your catch of an IR/IU species exceeds the MRB amount in effect for that species, your catch in excess of the MRB amount must be discarded. Because the MRB amount for a vessel is a running total based on the retained catch of species open to directed fishing, you may find it necessary to discard excess bycatch of an IR/IU species during the early part of a fishing trip and may not subsequently encounter any additional bycatch of that IR/IU species during the fishing trip. In such an instance, you would be in compliance with the IR/IU program even though the percentage of that IR/IU species in your delivery may be below the MRB and you discarded catch of that species earlier in the fishing trip.

The simplest way to simultaneously comply with directed fishing closures and the IR/IU retention requirements is to avoid excessive bycatch of IR/IU species that are closed to directed fishing. If you catch less than the MRB percentage for an IR/IU species, you simply retain your entire catch of that species and avoid the difficulty associated with calculating how much fish to discard. While NMFS encourages vessel operators to avoid bycatch of IR/IU species that are closed to directed fishing, at times avoidance may be difficult. Vessel operators who frequently exceed the MRB amount in effect for an IR/IU species are encouraged to develop appropriate catch measurement techniques, such as measured fish-hold volumes or on-board scales. At this point, NMFS has not established standards for measurement of catch on catcher vessels and intends to seek input from industry on appropriate and cost-effective measurement techniques.

What Are the Retention Requirements for Catcher/Processors When Directed Fishing Is Open?

If you own or operate a catcher/processor and directed fishing for an IR/IU species is open, you must retain a primary product from all fish of that species brought on board your vessel until such products are lawfully transferred to an authorized party. This includes all fish you have caught as well as all fish you have received via transfer from another vessel. You may use any primary product, except roe, to meet this minimum retention requirement. The IR/IU program does not limit or define the types of primary products that must be produced from each IR/IU species, provided that all primary and ancillary products are logged in your daily cumulative production logbook (DCPL). In addition, whole fish may be considered a product for the purpose of this program provided that they are logged as whole fish in your DCPL.

What Are the Retention Requirements for Catcher/Processors When Directed Fishing Is Closed?

If you own or operate a catcher/processor and an IR/IU species is closed to directed fishing, you must retain a primary product from all fish of that species brought on board your vessel up to the point that the round-weight equivalent of primary products from that species equals the MRB amount for that species. The simplest way to meet this requirement is to avoid bycatch of an IR/IU species that is closed to directed fishing so that your production from that species does not approach the MRB percentage in effect for that species.

To monitor your vessel's compliance, you must track, on a running basis, both the round-weight equivalent of primary products from your basis species, i.e., those species open to directed fishing, and the round-weight equivalent of your primary products from the IR/IU species closed to directed fishing. As long as the round-weight equivalent of your primary products from the IR/IU species closed to directed fishing is at or below the MRB amount in effect for that species, you must retain a primary product from all catch of that species. If during the course of a fishing trip you find that you have exceeded the MRB amount for an IR/IU species, you are permitted to discard product from that species, if necessary, to bring your operation into compliance with the directed fishing closure. This is the only instance in which you are permitted to discard products from IR/IU species.

What Is the Definition of a Fishing Trip?

The definition of a fishing trip used to monitor compliance with the IR/IU program is the same definition of a fishing trip currently used to monitor compliance with directed fishing closures. You are engaged in a fishing trip from the time you begin or resume harvesting, receiving, or processing groundfish in an area until: (1) You offload or transfer all fish or fish product from your vessel; (2) you enter or leave an area where a different directed fishing prohibition applies; or (3) you come to the end of a weekly reporting period, whichever comes first. This definition of fishing trip applies to catcher vessels, catcher processors, and motherships.

What Are the Retention Requirements for Motherships?

The retention requirements for motherships and catcher/processors are identical. No distinction is made between IR/IU species that you have caught and IR/IU species you have received through transfer or delivery from another vessel.

Under What Circumstances May IR/IU Species Be Released Before They Are Brought on Board?

The intentional discard of IR/IU species prior to bringing them on board

your vessel, such as bleeding codends or shaking fish off longlines, is prohibited. However, NMFS recognizes that some escapement of fish from fishing gear does occur in the course of fishing operations. Therefore, incidental escapement of IR/IU species, such as fish squeezing through mesh or accidently dropping off longlines, will not be considered a violation unless the escapement is intentionally caused by action of the vessel operator or crew.

What if I Must Bleed a Codend for the Safety of My Vessel?

The IR/IU program contains no exemption to allow the bleeding of codends for safety reasons. NMFS urges vessel operators to fish in a cautious manner when their fish holds are near capacity to avoid catching more fish than can be retained safely. If you believe that circumstances require you to bleed a codend or otherwise discard IR/IU species for the safety of your vessel, you must log the amount of discard in your daily fishing logbook (DFL) and describe the circumstances surrounding the incident. Failure to log such an incident is a violation of NMFS recordkeeping and reporting requirements. NMFS will review such incidents on a case-by-case basis with consideration given to the extent of the violation and possible mitigating circumstances.

Must I Retain Bycatch of Decomposed Fish Previously Discarded by Other Operations?

You may discard any bycatch of previously discarded fish. When you encounter such fish, they should not be recorded in your logbook as part of your round-weight catch of an IR/IU species. Discards of previously discarded fish should be logged using discard code 97, which is for discards of previously discarded, i.e., decomposed, fish taken with trawl gear in current fishing efforts.

May I Discard Any Products Produced From IR/IU Species?

Discard of retained products from an IR/IU species is prohibited unless discarding of product is necessary to comply with a directed fishing closure.

May I Discard Fish or Products Transferred From Another Vessel?

The retention requirements of the IR/IU program apply to all fish brought on board your vessel, regardless of whether they were harvested by your vessel or transferred from another vessel. You are prohibited from discarding any products produced from IR/IU species that were transferred to you from another vessel.

May I Use IR/IU Species as Bait?

IR/IU species may be used as bait provided the bait is physically attached to authorized fishing gear when deployed. Dumping IR/IU species as loose bait (e.g., chumming) is prohibited.

How Is the 15-Percent Minimum Utilization Rate Calculated When Directed Fishing Is Open?

If directed fishing for an IR/IU species is open, your total weight of retained or lawfully transferred products produced from IR/IU species harvested or received by your vessel during a fishing trip must equal or exceed 15-percent of your round-weight catch of that species during the same fishing trip.

How Is the 15-Percent Minimum Utilization Rate Calculated When Directed Fishing Is Closed?

When directed fishing for an IR/IU species is closed, your total weight of retained or lawfully transferred products produced from IR/IU species harvested or received by your vessel during a fishing trip must equal or exceed either 15-percent of the MRB amount in effect for that species or 15-percent of the round-weight catch of that species, whichever is lower. You are only required to utilize those fish that you are required to retain under the retention requirements of the IR/IU program. For example, if you have minimal bycatch of an IR/IU species closed to directed fishing (below the MRB amount), your total weight of retained products must equal or exceed 15-percent of your round-weight catch of that species. If your bycatch of an IR/IU species closed to directed fishing is high enough that you are forced to discard a portion of your catch to avoid exceeding the MRB amount, the 15-percent utilization rate would be applied against the MRB amount and not against your total catch of that species prior to discarding. You must simultaneously comply with both the retention and utilization requirements of the IR/IU program. Compliance with one standard in the absence of the other would be a violation.

How Do Utilization Requirements Differ Between Catcher/Processors and Motherships?

The only difference between the utilization requirements for catcher/processors and motherships is that the 15-percent minimum utilization rate is applied during the course of a fishing trip for catcher/processors and during the course of a reporting week for motherships. For the purpose of the IR/IU program, NMFS has defined the term ''fishing trip'' in the same manner as it is defined for the purpose of monitoring directed fishing closures.

How Do I Calculate My Round-Weight Catch of IR/IU Species?

If you operate a catcher vessel or catcher processor, you must record the round-weight catch of all IR/IU species on a haul-by-haul basis. If you operate a mothership, you must record the round weight of all IR/IU species received on a delivery-by-delivery basis. If you have an observer aboard your vessel, you are free to use the observer's estimates of round-weight catch of each IR/IU species, but you are not required to do so. At this point, NMFS has not established specific guidelines or procedures for measurement of the round-weight catch of IR/IU species on board vessels. Vessel operators are free to measure their round-weight catch of each IR/IU species in the manner they determine to be most appropriate to their circumstances. However, NMFS may verify the accuracy of a vessel's reported round-weight catch of IR/IU species by comparison to observer data and by any other means that may be available. Deliberate under-logging of the round-weight catch of an IR/IU species is a violation of NMFS recordkeeping and reporting requirements and is subject to enforcement action.

What Changes to Recordkeeping and Reporting Requirements Are Included in the IR/IU Program?

This final rule includes changes to existing recordkeeping requirements to aid the monitoring and enforcement of the IR/IU program. Beginning January 3, 1998, all catcher vessels and catcher/processors that are currently required to maintain NMFS logbooks are required to log the round-weight catch of pollock and Pacific cod in the NMFS catcher vessel DFL or catcher/processor DCPL on a haul-by-haul or set-by-set basis. Motherships are required to log the receipt round weight of pollock and Pacific cod in the mothership DCPL on a delivery-by-delivery basis. Beginning January 1, 2003, this requirement will extend to rock sole and yellowfin sole. These changes are necessary to provide vessel operators and enforcement agents with round-weight information for each IR/IU species in order to monitor compliance with the IR/IU program.

Additional Technical Changes to Existing Regulations

The definition of ''fishing trip'' at § 679.2 is revised to specify that it applies to the IR/IU program as well as to directed fishing closures. This change

is necessary to clarify the meaning of the term ''fishing trip'' as it applies to the IR/IU program.

The definition of ''round weight or round-weight equivalent'' at § 679.2 is revised by restricting the definition to ''round-weight equivalent''. The term ''round weight'' is already defined by NMFS in regulations appearing at 50 CFR part 600 and does not need to be re-defined in regulations at § 679.2.

The prohibition on discard of pollock product at § 679.20(g)(5)(ii) is revised to allow the discard of product when necessary to comply with a directed fishing closure. This change is necessary to prevent a conflict with the regulations at § 679.20(i) that implement the IR/IU program.

Regulations at § 679.50 (c) and (d), which specify observer coverage requirements for motherships based on ''round weight or round-weight equivalent'' of groundfish processed, are revised by removing the term ''round weight.'' Observer coverage requirements for motherships during a calendar month would be based only on the round-weight equivalent of groundfish processed. This change is necessary because the terms ''round weight'' and ''round-weight equivalent'' would no longer be synonymous under the final rule.

Classification

The Administrator, Alaska Region, NMFS, determined that Amendment 49 is necessary for the conservation and management of the groundfish fishery of the BSAI and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act. The collection of this information has been approved by the Office of Management and Budget, OMB Control Number 0648–0213.

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

Public comment is sought regarding: Whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology.

An RIR was prepared for this final rule that describes the management background, the purpose and need for action, the management action alternatives, and the social impacts of the alternatives. The RIR also estimates the total number of small entities affected by this action and analyzes the economic impact on those small entities.

An FRFA has been prepared for this action and consists of the EA/RIR/FRFA and the preambles to the proposed and final rules implementing this action. The analysis examines the economic effects of this final rule by fishery and gear type and makes the following conclusions: (1) The economic effects of the final rule on vessels using longline, jig, and pot gear would not be significant; (2) the economic effects of the final rule on trawl catcher vessels and shore-based processors would not be significant; and (3) the economic effects of the final rule on trawl catcher/processor operations may or may not be significant depending upon the fishery as well as the size and processing capacity of the vessel in question.

Under the category of trawl catcher/processors, the economic effects on vessels participating in the pollock, sablefish, Greenland turbot, rockfish, and Atka mackerel fisheries would not be significant. However, the economic effects on vessels participating in the Pacific cod, rock sole, yellowfin sole, flathead sole and ''other'' flatfish fishery would be significant. The reason is that the bycatch of IR/IU species in these fisheries is substantial. The quantity of additional retained catch that operators in these fisheries would be required to handle under the final rule would impose significant operational costs on these fisheries, taken as a whole. This is especially true for products for which markets are limited or undeveloped (e.g., small Pacific cod, male rock sole, and H&G pollock). Current prices for these products may be insufficient to cover the costs of their production.

In general, the impacts on any individual factory trawler operation would vary inversely with the size and configuration of the vessel, hold capacity, processing capability, markets and market access, as well as the specific composition and share of the total catch of the four IR/IU species. The burden would tend to fall most heavily upon the smallest, least diversified operations among the current fleet. In addition, the groundfish vessel moratorium, proposed license limitation program, and U.S. Coast Guard load-line requirements severely limit reconstruction to increase vessel size and/or processing capacity. These restrictions are expected to further limit the ability of smaller catcher/processors to adapt to the proposed IR/IU program.

NMFS data indicate that in 1995, 44 at-sea processors participated in the BSAI Pacific cod trawl fishery (4 motherships and 40 catcher/processors); 38 at-sea processors participated in the BSAI rock sole fishery (2 motherships and 36 catcher/processors); 48 at-sea processors participated in the BSAI yellowfin sole fishery (4 motherships and 44 catcher/processors); 19 catcher/processors participated in the flathead sole fishery; and 23 at-sea processors participated in the ''other'' flatfish fishery (1 mothership and 22 catcher/processors).

In selecting its preferred alternative for Amendment 49, the Council minimized the economic impact of the IR/IU program on small entities in a variety of ways. First, the Council adopted 5-year delay in the effective date for rock sole and yellowfin sole to provide industry with sufficient time to develop more selective fishing techniques and/or markets for fish that are currently being discarded. Second, the Council rejected utilization alternatives that would have limited product forms or placed limits on fishmeal production, in order to allow industry more flexibility in complying with the utilization requirements of the IR/IU program. Finally, the Council rejected monitoring alternatives that would have imposed substantial costs in the form of increased observer coverage requirements or required a full time compliance monitor aboard all vessels. For reasons set forth in this preamble above, alternatives that would have further minimized economic impacts on small entities were rejected.

This final rule has been determined to be not significant for the purposes of E.O. 12866.

The Administrator, Alaska Region, NMFS determined that fishing activities conducted under this rule would not affect endangered and threatened species listed or critical habitat designated pursuant to the Endangered Species Act in any manner not considered in prior consultations on the groundfish fisheries of the BSAI.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: November 26, 1997.

David L. Evans,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 679 is amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq,* 1801 *et seq.,* and 3631 *et seq.*

2. In § 679.2, the definitions of ''IR/IU'' and ''IR/IU species'' are added in alphabetical order, paragraph (1) in the definition of ''Fishing trip'' is revised and the definition and heading of ''Round weight or round-weight equivalent'' are revised to read as follows:

§ 679.2 Definitions.

* * * * *

Fishing trip means: (1) With respect to groundfish directed fishing closures or the IR/IU program, an operator of a vessel is engaged in a fishing trip from the time the harvesting, receiving, or processing of groundfish is begun or resumed in an area until:

(i) The effective date of a notification prohibiting directed fishing in the same area under § 679.20 or § 679.21;

(ii) The offload or transfer of all fish or fish product from that vessel;

(iii) The vessel enters or leaves an area where a different directed fishing prohibition applies; or

(iv) The end of a weekly reporting period, whichever comes first.

* * * * *

IR/IU means the improved retention/improved utilization program set out at § 679.27.

IR/IU species means any groundfish species that is regulated by a retention or utilization requirement set out at § 679.27.

* * * * *

Round-weight equivalent means the weight of groundfish calculated by dividing the weight of the primary product made from that groundfish by the PRR for that primary product as listed in Table 3 of this part, or, if not listed, the weight of groundfish calculated by dividing the weight of a primary product by the standard PRR as determined using the best available evidence on a case-by-case basis.

* * * * *

3. In § 679.5, paragraphs (c)(3)(ii)(G) and (e)(2)(ii)(F) are added to read as follows:

§ 679.5 Recordkeeping and reporting.

* * * * *

(c) * * *

(3) * * *

(ii) * * *

(G) The round-weight catch of pollock and Pacific cod.

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(F) The receipt round weight of pollock and Pacific cod.

* * * * *

4. In § 679.20, paragraph (g)(5)(ii) is revised to read as follows:

§ 679.20 General Limitations.

* * * * *

(g) * * *

(5) * * *

(ii) *No discard of processed product.* Any pollock product that has been processed may not be discarded at sea unless such discarding is necessary to meet other requirements of this part.

* * * * *

5. Section 679.27 is added to subpart B to read as follows:

§ 679.27 Improved Retention/Improved Utilization Program.

(a) *Applicability.* The owner or operator of a vessel that is required to obtain a Federal fisheries or processor permit under § 679.4 must comply with the IR/IU program set out in this section while fishing for groundfish in the BSAI, fishing for groundfish in waters of the State of Alaska that are shoreward of the BSAI, or when processing groundfish harvested in the BSAI.

(b) *IR/IU species.* The following species are defined as ''IR/IU species'' for the purposes of this section:

(1) Pollock.

(2) Pacific cod.

(3) Beginning January 1, 2003, rock sole.

(4) Beginning January 1, 2003, yellowfin sole.

(c) *Minimum retention requirements*—(1) *Definition of retain on board.* Notwithstanding the definition at 50 CFR 600.10, for the purpose of this section, to retain on board means to be in possession of on board a vessel.

(2) The following table displays minimum retention requirements by vessel category and directed fishing status:

If you own or operate a	And	You must retain on board until lawful transfer
(i) Catcher vessel	(A) Directed fishing for an IR/IU species is open	all fish of that species brought on board the vessel.
	(B) Directed fishing for an IR/IU species is prohibited	all fish of that species brought on board the vessel up to the MRB amount for that species.
	(C) Retention of an IR/IU species is prohibited	no fish of that species.
(ii) Catcher/ processor	(A) Directed fishing for an IR/IU species is open	a primary product from all fish of that species brought on board the vessel.
	(B) Directed fishing for an IR/IU species is prohibited	a primary product from all fish of that species brought on board the vessel up to the point that the round-weight equivalent of primary products on board equals the MRB amount for that species.
	(C) Retention of an IR/IU species is prohibited	no fish or product of that species.
(iii) Mothership	(A) Directed fishing for an IR/IU species is open	a primary product from all fish of that species brought on board the vessel.
	(B) Directed fishing for an IR/IU species is prohibited	a primary product from all fish of that species brought on board the vessel up to the point that the round-weight equivalent of primary products on board equals the MRB amount for that species.
	(C) Retention of an IR/IU species is prohibited	no fish or product of that species.

(d) *Bleeding codends and shaking longline gear.* Any action intended to discard or release an IR/IU species prior to being brought on board the vessel is prohibited. This includes, but is not limited to bleeding codends and shaking or otherwise removing fish from longline gear.

(e) *At-sea discard of product.* Any product from an IR/IU species may not be discarded at sea, unless such discarding is necessary to meet other requirements of this part.

(f) *Discard of fish or product transferred from other vessels.* The retention requirements of this section apply to all IR/IU species brought on board a vessel, whether harvested by that vessel or transferred from another vessel. At-sea discard of IR/IU species or products that were transferred from another vessel is prohibited.

(g) *IR/IU species as bait.* IR/IU species may be used as bait provided that the deployed bait is physically secured to authorized fishing gear. Dumping of unsecured IR/IU species as bait (chumming) is prohibited.

(h) *Previously caught fish.* The retention and utilization requirements of this section do not apply to incidental catch of dead or decomposing fish or fish parts that were previously caught and discarded at sea.

(i) *Minimum utilization requirements.* If you own or operate a catcher/processor or mothership, the minimum utilization requirement for an IR/IU species harvested in the BSAI is determined by the directed fishing status for that species according to the following table:

If * * *	then your total weight of retained or lawfully transferred products produced from your catch or receipt of that IR/IU species during a fishing trip must * * *
(1) directed fishing for an IR/IU species is open,	equal or exceed 15 percent of the round-weight catch or round-weight delivery of that species during the fishing trip.
(2) directed fishing for an IR/IU species is prohibited,	equal or exceed 15 percent of the round-weight catch or round-weight delivery of that species during the fishing trip or 15 percent of the MRB amount for that species, whichever is lower.
(3) retention of an IR/IU species is prohibited,	equal zero.

6. In § 679.50, paragraphs (c)(1)(i), (c)(1)(ii), (c)(3) introductory text, (d)(1), and (d)(2) are revised to read as follows:

§ 679.50 Groundfish Observer Program applicable through December 31, 1997.

* * * * *

(c) * * *

(1) * * *

(i) A mothership of any length that processes 1,000 mt or more in round-weight equivalent of groundfish during a calendar month is required to have an observer aboard the vessel each day it receives or processes groundfish during that month.

(ii) A mothership of any length that processes from 500 mt to 1,000 mt in round-weight equivalent of groundfish during a calendar month is required to have an observer aboard the vessel at least 30 percent of the days it receives or processes groundfish during that month.

* * * * *

(3) *Assignment of vessels to fisheries.* At the end of any fishing trip, a vessel's retained catch of groundfish species or species groups for which a TAC has been specified under § 679.20, in round-weight equivalent, will determine to which fishery category listed under paragraph (c)(2) of this section the vessel is assigned.

* * * * *

(d) * * *

(1) Processes 1,000 mt or more in round-weight equivalent of groundfish during a calendar month is required to have an observer present at the facility each day it receives or processes groundfish during that month.

(2) Processes 500 mt to 1,000 mt in round-weight equivalent of groundfish during a calendar month is required to have an observer present at the facility at least 30 percent of the days it receives or processes groundfish during that month.

* * * * *

[FR Doc. 97–31711 Filed 12–2–97; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 62, No. 232
Wednesday, December 3, 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

RIN 3150–AE26

Industry Codes and Standards; Amended Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) regulations require that nuclear power plant owners 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), 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 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.

The NRC proposes to amend 10 CFR 50.55a to revise the requirements for construction, inservice inspection (ISI), and inservice testing (IST) of nuclear power plant components. For construction, the proposed rule would permit the use of Section III, Division 1, of the ASME BPV Code, 1989 Addenda through the 1996 Addenda, for Class 1, Class 2, and Class 3 components with six proposed limitations and a modification.

For ISI, the proposed amendment would require licensees to implement Section XI, Division 1, of the ASME BPV Code, 1995 Edition with the 1996 Addenda, for Class 1, Class 2, and Class 3 components with five proposed limitations. Licensees would be permitted to implement: Code Case N–513 which addresses flaws in low and moderate energy Class 3 piping; Code Case N–523 which addresses the temporary use of mechanical clamps in Class 2 and 3 piping; and Subsection IWE and Subsection IWL, 1995 Edition with the 1996 Addenda.

The proposed rule would expedite implementation of Appendix VIII, ''Performance Demonstration for Ultrasonic Examination Systems,'' to Section XI, Division 1, with three proposed modifications. An expedited implementation schedule would also be required for a proposed modification to Section XI which addresses volumetric examination of the Class 1 high pressure safety injection (HPSI) system in pressurized water reactors (PWRs).

For IST, the proposed amendment would require licensees to implement the 1995 Edition with the 1996 Addenda of the ASME Code for Operation and Maintenance of Nuclear Power Plants (OM Code) for Class 1, Class 2, and Class 3 pumps and valves with one limitation and one modification. 10 CFR 50.55a has been clarified with respect to which pumps and valves are to be included in a licensee's IST program. Licensees would be permitted to implement: Code Case OMN–1 with one modification in lieu of stroke time testing; Appendix II (which is an alternative to the check valve condition monitoring program provisions contained in Subsection ISTC of the OM Code) with three proposed modifications; and Subsection ISTD for the IST of snubbers. Finally, based upon supporting information received since the last rulemaking, the modification presently in § 50.55a for containment isolation valve inservice testing has been deleted.

The Statement of Considerations concludes by clarifying the NRC position regarding ASME Code Interpretations, and discussing NRC Direction Setting Issue Number 13 (DSI–13) with regard to NRC endorsement of industry codes and standards.

DATES: Submit comments by March 3, 1998. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Comments may be sent to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. ATTN: Rulemaking and Adjudications Staff. Hand deliver comments to 11545 Rockville Pike, Rockville, Maryland, 20852, between 7:30 am and 4:15 pm on Federal workdays.

You may also provide comments 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 website, contact Ms. Carol Gallagher, (301) 415–5905; e-mail CAG@nrc.gov.

Single copies of this proposed rulemaking may be obtained by written request or telefax to 301–415–2260 or from Frank C. Cherny, Division of Engineering Technology, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–6786, or Wallace E. Norris, Division of Engineering Technology, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–6796. Certain documents related to this rulemaking, including comments received, may be examined at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC. These same documents may also be viewed and downloaded via the interactive rulemaking website as established by NRC for this rulemaking.

FOR FURTHER INFORMATION CONTACT: Frank C. Cherny, Division of Engineering Technology, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–6786, or Wallace E. Norris, Division of Engineering Technology, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–6796.

SUPPLEMENTARY INFORMATION:

1. Background

The NRC is proposing to amend 10 CFR 50.55a, which defines the requirements for applying industry codes and standards to nuclear power plants. Section 50.55a presently requires that nuclear power plant owners (1) construct Class 1, Class 2, and Class 3 components in accordance with the rules provided in the 1989 Edition of 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, and Class 3 components in accordance with the rules provided in the 1989 Edition of Section XI, Division 1, ''Requirements for Inservice Inspection of Nuclear Power Plant Components,'' of the ASME BPV Code with certain limitations and modifications, (3) inspect Class MC (metal containment) and Class CC (concrete containment) components in accordance with the rules provided in the 1992 Edition with the 1992 Addenda of Section XI, Division 1, with certain modifications, and (4) test Class 1, Class 2, and Class 3 pumps and valves in accordance with the rules provided in the 1989 Edition of Section XI, Division 1, of the ASME BPV Code with certain limitations and modifications. Every 120 months licensees are required to update their ISI and IST programs to meet the version of Section XI incorporated by reference into § 50.55a and in effect 12 months prior to the start of a new 120-month interval.

The NRC proposes to amend 10 CFR 50.55a to revise the requirements for construction, ISI, and IST of nuclear power plant components. For construction, the proposed rule would permit the use of Section III, Division 1, of the ASME BPV Code, 1989 Addenda through the 1996 Addenda, for Class 1, Class 2, and Class 3 components. Six proposed limitations to the implementation of Section III are included which address the issues of engineering judgement, Section III materials, weld leg dimensions, seismic design, quality assurance, and independence of inspection. A modification has been included addressing the applicable Code version for new construction.

For ISI, the proposed amendment would require licensees to implement Section XI, Division 1, of the ASME BPV Code, 1995 Edition with the 1996 Addenda, for Class 1, Class 2, and Class 3. Five proposed limitations to the implementation of Section XI are included which address the issues of engineering judgement, quality assurance, Class 1 piping, Class 2 piping, and reconciliation of replacement items. Licensees would be permitted to implement Code Case N–513 which addresses flaws in low and moderate energy Class 3 piping, and Code Case N–523 which addresses the temporary use of mechanical clamps in Class 2 and 3 piping. Licensees would also be permitted to implement Subsection IWE and Subsection IWL, 1995 Edition with the 1996 Addenda.

The proposed rule would expedite implementation of Appendix VIII, ''Performance Demonstration for Ultrasonic Examination Systems,'' to Section XI, Division 1. Three proposed modifications to the implementation of Appendix VIII are included to address the issues of personnel qualification, specimen set cracks, and specimen set microstructure. An expedited implementation schedule would also be required for a proposed modification to Section XI which addresses volumetric examination of the Class 1 high pressure safety injection (HPSI) system in pressurized water reactors (PWRs).

For IST, the proposed amendment would require licensees to implement the 1995 Edition with the 1996 Addenda of the ASME Code for Operation and Maintenance of Nuclear Power Plants (OM Code) for Class 1, Class 2, and Class 3 pumps and valves. 10 CFR 50.55a has been clarified with respect to which pumps and valves are to be included in a licensee's IST program. A proposed limitation is included which addresses the issue of quality assurance (QA). A proposed modification to the implementation of the OM Code is included which addresses stroke time testing. Licensees would be permitted to implement Code Case OMN–1 with one modification in lieu of stroke time testing. In addition, Appendix II to the OM Code is an alternative to the check valve condition monitoring program provisions contained in Subsection ISTC of the OM Code. Three proposed modifications to the implementation of Appendix II are included which supplement the appendix check valve condition monitoring program. Licensees would be permitted to use Subsection ISTD for the IST of snubbers. Finally, based upon supporting information received since the last rulemaking, the modification presently in § 50.55a for containment isolation valve inservice testing has been deleted.

The mechanism for endorsement of the ASME standards, which has been used since the first endorsement in 1971, has been to incorporate by reference the ASME BPV Code rules into § 50.55a. The regulation identifies which editions and addenda of the BPV Code have been approved for use by the NRC. On August 6, 1992 (57 FR 34666), the NRC published a final rule in the **Federal Register** to amend 10 CFR Part 50, ''Domestic Licensing of Production and Utilization Facilities.'' This final rule amended § 50.55a to incorporate by reference the 1986 Addenda, 1987 Addenda, 1988 Addenda, and 1989 Edition of Section III, Division 1, and the 1986 Addenda, 1987 Addenda, 1988 Addenda, and 1989 Edition of Section XI, Division 1, of the BPV Code, with specified modifications. The amendment imposed an augmented examination of reactor vessel shell welds. The amendment also separated the requirements for IST of pumps and valves from those for ISI of other components by placing the requirements for inservice testing in a

separate paragraph. For IST of pumps and valves, the regulation, through its incorporation by reference of the 1989 Edition of Section XI, endorsed Part 1, ''Requirements for Inservice Performance Testing of Nuclear Power Plant Pressure Relief Devices,'' Part 6, ''Inservice Testing of Pumps in Light-Water Reactor Power Plants,'' and Part 10, ''Inservice Testing of Valves in Light-Water Reactor Power Plants,'' of ASME/ANSI OMa–1988 to ASME/ANSI OM–1987.

On August 8, 1996 (61 FR 41303), the NRC published a final rule in the **Federal Register** to amend 10 CFR 50.55a to incorporate by reference for the first time ASME Section XI, Division 1, Subsection IWE, ''Requirements for Class MC and Metallic Liners of Class CC Components of Light-Water Cooled Power Plants,'' and Subsection IWL, ''Requirements for Class CC Concrete Components of Light-Water Cooled Power Plants.'' Subsection IWE provides criteria for visual inspection of the surface of metal containments, the steel liners of concrete containments, pressure-retaining bolts, and seals and gaskets. Subsection IWL provides criteria for visual inspection of concrete pressure-retaining shells and shell components and for the examination of unbonded post-tensioning systems.

2. Summary of Proposed Revisions to § 50.55a

The revisions to § 50.55a which would result from adoption of the 1989 Addenda through the 1996 Addenda have been divided into three groups based on the proposed implementation schedule (i.e., 120-month update, expedited, and voluntary). For each of these groups, it is indicated in parentheses whether or not particular items are considered a backfit under 10 CFR 50.109 as discussed in Section 8. Backfit Analysis. This section provides a list of each revision and its implementation schedule, followed by a discussion of the proposed revisions.

2.1 List of Each Revision and Implementation Schedule

120-Month Update [in accordance with § 50.55a(g)(4)(i) and § 50.55a(f)(4)(i)]
Section XI (Not A Backfit)
Class 1, 2, and 3 Components, Including Supports
Limitations
Engineering Judgement
Quality Assurance
Class 1 Piping
Class 2 Piping
Reconciliation of Quality Requirements
OM Code (Not A Backfit)
Class 1, 2, and 3 Pumps and Valves
Clarification of Safety-Related Valves
Limitation
Quality Assurance
Modification
Stroke Time Testing
Expedited Implementation [after 6 months from the date of the final rule—Backfit]
Section XI
Appendix VIII (including three modifications)
Personnel Qualification
Specimen Set Cracks
Specimen Set Microstructure
Class 1 Piping Volumetric Examination
Voluntary Implementation [may be used when final rule published]
Section III (Not A Backfit)
Class 1, 2, and 3 Components
Limitations
Engineering Judgement
Section III Materials
Weld Leg Dimensions
Seismic Design
Quality Assurance
Independence of Inspection
Modification
Applicable Code Version for New Construction
Section XI (Not A Backfit)
Subsections IWE and IWL, 1995 Edition with the 1996 Addenda
Flaws in Class 3 Piping; Mechanical Clamping Devices
Limitation on Scope
OM Code (Not A Backfit)
Code Case OMN–1
Limitation on Length of Test Interval
Appendix II (including three modifications)
Valve Opening and Closing Functions
Limitation of Length of Initial Test Interval
Condition Monitoring Program
Subsection ISTD
Containment Isolation Valves

2.2 Discussion

2.3 120-Month Update

2.3.1 Section XI

2.3.1.1 Class 1, 2, and 3 Components, Including Supports

Section 50.55a(b)(2) together with § 50.55a(g)(4) of the proposed rule would require that licensees implement the 1995 Edition with the 1996 Addenda of Section XI, Division 1, for Class 1, Class 2, and Class 3 components and their supports. Five proposed limitations would be included to address NRC positions on the use of Section XI.

2.3.1.2 Limitations

2.3.1.2.1 Engineering Judgement

The first proposed limitation to the implementation of Section XI would address an NRC position with regard to the Foreword in the 1992 Addenda through the 1996 Addenda of the BPV Code. That Foreword addresses the use of ''engineering judgement'' for ISI activities not specifically considered by the Code. Proposed paragraph 50.55a(b)(2)(xi) would require that when a licensee relies on engineering judgement for activities or evaluations of components or systems within the scope of § 50.55a that are not directly addressed by the BPV Code, the licensee must receive NRC approval for those activities or evaluations pursuant to 10 CFR 50.55a(a)(3).

2.3.1.2.2 Quality Assurance

The second proposed limitation to the implementation of Section XI pertains to the use of NQA–1 with Section XI. Section XI references the use of either NQA–1 or the Owner's Appendix B Quality Assurance Program (10 CFR Part 50, Appendix B, ''Quality Assurance Criteria for Nuclear Power Plants and Fuel Processing Plants'') as part of its individual requirements for a QA program. At present, § 50.55a endorses the 1989 Edition of the ASME Code which references NQA–1–1979 for Section XI. The 1996 Addenda of the ASME Code references NQA–1–1992 for Section XI.

The NRC has reviewed the requirements of NQA–1, 1986 Addenda through the 1992 Addenda, that are part of the incorporation by reference of Section XI, and has determined that by itself, NQA–1 would not adequately describe how to satisfy the requirements of 10 CFR Part 50, Appendix B, ''Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants,'' since there are various aspects of operational phase QA and administrative controls which are not addressed by NQA–1.

10 CFR 50.34(b)(6)(ii) requires that ''The information on the controls to be used for a nuclear power plant or a fuel reprocessing plant shall include a discussion of how the applicable requirements of Appendix B will be satisfied.'' This information is required to be submitted to the NRC as part of the Final Safety Analysis Report (FSAR). Standard Review Plan (SRP) 17.2, ''Quality Assurance During the Operations Phase,'' states that ''The QA program description presented in the FSAR must discuss how each criterion of Appendix B will be met.'' Further, the SRP states ''The acceptance criteria include a commitment to comply with the regulatory positions presented in the appropriate issue of the Regulatory Guides including the requirements of ANSI Standard N45.2.12 and the Branch

Technical Position listed in subsection V of SRP Section 17.1. Thus, the commitment constitutes an integral part of the QA program description and requirements.'' The NRC has determined that the provisions of NQA–1, 1986 Addenda through the 1992 Addenda, would not satisfy the criteria specified in SRP 17.2 for describing how the requirements of Appendix B will be satisfied for operational activities. There are numerous areas where American National Standards Institute (ANSI) standards or NRC regulatory positions, which have been long-standing cornerstones of an Owner's QA Program, are either nonmandatory or missing altogether from the NQA–1 provisions. However, the Owner's Section XI QA Program, which has been approved by the NRC, is adequate. Thus, the Commission has determined that the requirements of NQA–1, 1986 Addenda through the 1992 Addenda, are acceptable for use in the context of Section XI, as permitted by IWA–1400, provided the licensee utilizes its 10 CFR Part 50, Appendix B, QA program in conjunction with Section XI. Changes to a licensee's QA program shall be made in accordance with 10 CFR 50.54(a). Further, where NQA–1 and Section XI do not address the commitments contained in the licensee's Appendix B QA program description, such commitments shall be applied to Section XI activities. Proposed § 50.55a(b)(2)(xii) contains the requirement addressing licensee's commitments related to Section XI.

2.3.1.2.3 Class 1 Piping

The third proposed limitation to the implementation of Section XI would require licensees to use the rules for Section XI IWB–1220, ''Components Exempt from Examination,'' that are contained in the 1989 Edition in lieu of the rules in the 1989 Addenda through the 1996 Addenda. These later Code addenda contain provisions of Code Cases N–198–1, ''Exemption from Examination for ASME Class 1 and Class 2 Piping Located at Containment Penetrations;'' N–322, ''Examination Requirements for Integrally Welded or Forged Attachments to Class 1 Piping at Containment Penetrations;'' and N–324, ''Examination Requirements for Integrally Welded or Forged Attachments to Class 2 Piping at Containment Penetrations;'' which were found to be unacceptable. Because the NRC had previously determined the Code cases to be unacceptable, they were not endorsed in any revision of Regulatory Guide 1.147, ''Inservice Inspection Code Case Acceptability—ASME Section XI, Division 1.'' The provisions of Code Case N–198–1 were determined by the NRC to be unacceptable because industry experience has shown that welds in service-sensitive BWR stainless steel piping, many of which are located in Containment Penetrations, are subjected to an aggressive environment (BWR water at reactor operating temperatures) and will experience Intergranular Stress Corrosion Cracking. Exempting these welds from examination could result in conditions which reduce the required margins to failure to unacceptable levels. The provisions of Code Cases N–322 and N–324 were determined to be unacceptable because some important piping was exempted from inspection. Access difficulties was the basis in the Code cases for exempting these areas from examination, but the NRC developed the break exclusion zone design and examination criteria utilized for most containment penetration piping expecting not only that Section XI inspections would be performed but that augmented inspections would be performed. These design and examination criteria are contained in Branch Technical Position MEB 3–1, an attachment of NRC Standard Review Plan 3.6.2, ''Determination of Rupture Locations and Dynamic Effects Associated with the Postulated Rupture of Piping.'' Thus, proposed § 50.55a(b)(2)(xiii) would require licensees to use the rules for IWB–1220 that are contained in the 1989 Edition in lieu of the rules in the 1989 Addenda through the 1996 Addenda.

2.3.1.2.4 Class 2 Piping

The fourth proposed limitation to the implementation of Section XI, contained in § 50.55a(b)(2)(xiv), would confine implementation of Section XI IWC–1220, ''Components Exempt from Examination,'' IWC–1221, ''Components Within RHR (Residual Heat Removal), ECC (Emergency Cool Cooling), and CHR (Containment Heat Removal) Systems or Portions of Systems,'' and IWC–1222, ''Components Within Systems or Portions of Systems Other Than RHR, ECC, and CHR Systems,'' 1989 Addenda through the 1996 Addenda. The provisions of Code Case N–408–3, ''Alternative Rules for Examination of Class 2 Piping,'' were incorporated into Subsection IWC in the 1989 Addenda. These provisions contain rules for determining which Class 2 components are subject to volumetric and surface examination. The NRC had previously determined that the provisions of the Code Case were acceptable if the licensee defined the Class 2 piping subject to volumetric and surface examination and received approval prior to implementation. Approval was required to ensure that safety significant components in the Residual Heat Removal, Emergency Core Cooling, and Containment Heat Removal systems are not exempted from appropriate examination requirements. Thus, the requirements contained in IWC–1220, IWC–1221, and IWC–1222, 1989 Addenda through the 1996 Addenda, for determining the components subject to examination and establishing examination requirements for Class 2 piping may be used if the licensee defines the Class 2 piping subject to volumetric and surface examination, and submits this information to the NRC for approval pursuant to § 50.55a(a)(3).

2.3.1.2.5 Reconciliation of Quality Requirements

The fifth proposed limitation to the implementation of Section XI addresses reconciliation of replacement items [§ 50.55a(b)(2)(xx)(A)] and the definition of Construction Code [§ 50.55a(b)(2)(xx)(B)]. Changes to IWA–4222, ''Reconciliation of Owner's Requirements,'' in the 1995 Addenda would permit a replacement item produced at a facility not having a 10 CFR Part 50, Appendix B qualified program to be used in safety-related applications. With regard to the definition of Construction Code, a new definition of Construction Code appeared in IWA–9000, ''Glossary,'' in the 1993 Addenda. Due to the changes made in IWA–4200 in the 1995 Addenda, the change in definition could result in standards being utilized which do not contain any QA requirements, or contain QA requirements that do not fully comply with Appendix B. Thus, when implementing the 1995 Addenda through the 1996 Addenda, § 50.55a(b)(2)(xx)(A) would require reconciliation of replacement items to the original QA requirements. Section 50.55a(b)(2)(xx)(B) would require a licensee to reconcile replacement items to the Construction Code and to the QA requirements as described in the Owner's QA program.

Section XI Article IWA–4000 provides rules and requirements for the repair and replacement of pressure retaining components and their supports. Versions of IWA–4000 previous to the 1995 Addenda permitted a licensee to purchase a replacement item to the standards of the original Construction Code or a later version, provided that the technical requirements of an item such as design and fabrication, as well as the nontechnical requirements (identified as administrative requirements in IWA–4222) such as QA

and Authorized Inspection of the later version were reconciled with those of the original Construction Code and Owner's Requirements. Reconciliation ensures that the replacement item meets certain standards of quality so that it is satisfactory for the specified design and operating conditions. In the 1995 Addenda, the provisions of Code Case N–554, ''Alternative Requirements for Reconciliation of Replacement Items,'' were incorporated into an extensive rewrite of IWA–4200. As a result of these changes to IWA–4200, specifically IWA–4222(a)(2), the nontechnical requirements for Class 1, 2, and 3 safety-related replacement items would no longer need to be reconciled which may result in noncompliance with 10 CFR Part 50, Appendix B. NRC regulations require that any item which performs a safety-related function must meet Appendix B. Appendix B invokes, among other things, controls on suppliers of safety-related items. By not requiring reconciliation of the administrative requirements, the provisions in IWA–4222(a)(2) of the 1995 Addenda through the 1996 Addenda, would allow vendors having a QA program which does not meet Appendix B to be utilized, and may result in noncompliance with Appendix B. These deficiencies could be resolved if the Code provided for commercial grade item dedication in accordance with 10 CFR Part 21, ''Reporting of Defects and Noncompliance.'' However, IWA–4222 does not address commercial grade dedication. In addition, it should be pointed out that a separate Code Case which provides an alternative for a specific provision in IWA–4200, Code Case N–567, ''Alternative Requirements for Class 1, 2, and 3 Replacement Components,'' was modified to require the reconciliation of nontechnical requirements before the Code Case was approved. Therefore, an inconsistency exists between the Code and a Code Case. Thus, when implementing the 1995 Addenda through the 1996 Addenda, § 50.55a(b)(2)(xx)(A) would require reconciliation of replacement items to the original QA requirements.

The provisions of the Code in IWA–4222(a)(2) discussed above address newly manufactured replacement parts. A further limitation on the use of Article IWA–4200 in the 1995 Addenda through the 1996 Addenda is contained in § 50.55a(b)(2)(xx)(B). IWA–4222(b) addresses the use of items from a facility which was shutdown or for which construction was halted. IWA–4222(b) permits the use of either the administrative requirements of the Construction Code of the item being replaced or the administrative requirements of the Construction Code of the item being used for replacement. However, the definition of ''Construction Code'' was changed in the 1993 Addenda. In versions of Section XI previous to the 1993 Addenda, Construction Code was defined in IWA–9000, ''Glossary,'' as ''the body of technical requirements that governed the construction of the item.'' Included in the body of technical requirements that governed the construction of the item was a requirement to reconcile the Owner's specification requirements, which included NRC regulatory requirements, and applicable Owner design and procurement specifications that invoke technical and nontechnical requirements (e.g., 10 CFR Part 50, Appendix B). In the 1993 Addenda, the definition became nationally recognized Codes such as ASME, Specifications such as the American Society of Testing and Materials (ASTM), and designated Code Cases. Either definition of Construction Code would include the original Construction Codes for the design and construction of piping, such as B31.1, ''Power Piping,'' and B31.7, ''Nuclear Piping,'' and those for the design and construction of storage tanks, such as the American Petroleum Institute (API) 620, ''Design and Construction of Large, Welded, Low-Pressure Storage Tanks,'' and API 650, ''Welded Steel Tanks for Oil Storage.'' However, many of these standards utilized for construction do not contain any QA requirements, or they contain QA requirements that do not fully comply with Appendix B. Therefore, in order to satisfy Appendix B, QA requirements similar to or meeting Appendix B were invoked in the Owner's original procurement documents. Thus, when implementing IWA–4200 (including subparagraphs IWA–4221, IWA–4222, IWA–4223, IWA–4224, and IWA–5224), § 50.55a(b)(2)(xx)(B) would require a licensee to reconcile replacement items to the Construction Code and to the QA requirements as described in the Owner's QA program.

2.3.2 OM Code (120-Month Update)

2.3.2.1 Class 1, 2, and 3 Pumps and Valves

The proposed amendment to § 50.55a(f)(4) would require that IST of pumps and valves be performed in accordance with the ASME ''Code for Operation and Maintenance of Nuclear Power Plants'' (OM Code). A proposed new section, § 50.55a(b)(3), would specify the editions and addenda of the OM Code that have been incorporated by reference into § 50.55a. Paragraph 50.55a(b)(3) together with § 50.55a(f)(4) of the proposed rule would require that licensees implement the 1995 Edition with the 1996 Addenda of the OM Code. Existing § 50.55a(f)(1) has been modified to clarify which pumps and valves are to be included in the IST program. One proposed limitation to implementation of the OM Code addressing QA, and one proposed modification of the OM Code addressing stroke time testing have been included.

2.3.2.2 Background—OM Code

Until 1990, the ASME Code requirements addressing IST of pumps and valves were contained in Section XI Subsections IWP (pumps) and IWV (valves). The provisions of IWP and IWV were last incorporated by reference into § 50.55a in a final rulemaking published on August 6, 1992 (57 FR 34666). In 1990, the ASME published the initial edition of the OM Code which provides rules for IST of pumps and valves. The requirements contained in the 1990 Edition are identical to the requirements contained in the 1989 Edition of Section XI Subsections IWP (pumps) and IWV (valves). The ASME Board on Nuclear Codes and Standards has transferred responsibility for rules on IST from Section XI to the OM Committee. As such, the Section XI rules for inservice testing of pumps and valves that are presently incorporated by reference into NRC regulations are no longer being updated by Section XI.

The ASME 1990 Edition of the OM Code consists of one section (Section IST) entitled ''Rules for Inservice Testing of Light-Water Reactor Power Plants.'' This section is divided into four subsections, ISTA, ''General Requirements,'' ISTB, ''Inservice Testing of Pumps in Light-Water Reactor Power Plants,'' ISTC, ''Inservice Testing of Valves in Light-Water Reactor Power Plants,'' and ISTD, ''Examination and Performance Testing of Nuclear Power Plant Dynamic Restraints (Snubbers).'' The IST of snubbers is governed by plant technical specifications and, thus, has never been included in § 50.55a. Therefore, this proposed rule only requires implementation of Subsections ISTA, ISTB, and ISTC. However, § 50.55a(b)(3)(v) would permit licensees to implement Subsection ISTD of the 1996 Addenda by making a change to their technical specifications in accordance with applicable NRC requirements.

2.3.2.3 Clarification of Safety-Related Valves

The existing § 50.55a(f)(1) has been interpreted by some licensees to mean that all safety-related pumps and valves regardless of ASME Code Class (or equivalent) were to be included in the IST program. The NRC proposes to modify this paragraph to clarify that the provisions of § 50.55a(f)(1) apply only to pumps and valves in steam, water, air, and liquid radioactive waste systems that perform a function to shut down the reactor, maintain the reactor in a safe shutdown condition, mitigate the consequences of an accident, or provide overpressure protection for such systems.

2.3.2.4 Limitation

2.3.2.4.1 Quality Assurance

The limitation to the implementation of the OM Code pertains to the use of NQA–1, ''Quality Assurance Requirements for Nuclear Facilities,'' with the OM Code. The OM Code references the use of either NQA–1 or the Owner's Appendix B Quality Assurance Program as part of its individual requirements for a QA program. At present, § 50.55a endorses NQA–1–1979 for the OM Code. The 1996 Addenda also endorses NQA–1–1979. Thus, the 1996 OM Code has not endorsed a later version of NQA–1. Because this rulemaking would incorporate the OM Code by reference into § 50.55a for the first time, a limitation is included to address the same issues discussed previously in the Section XI section on QA.

The NRC has determined that the provisions of NQA–1, 1979 Addenda, would not adequately describe how to satisfy the requirements of Appendix B as satisfied by § 50.34(b)(6)(ii). Further, there are various aspects of operational phase QA and administrative controls which are not addressed by NQA–1. There are numerous areas where American National Standards Institute (ANSI) standards or NRC regulatory positions, which are specified in SRP 17.2, are either nonmandatory or missing altogether from the NQA–1 provisions. However, the Owner's QA Program, which has been approved by the NRC, is adequate. Thus, the NRC has determined that the requirements of NQA–1–1979, that are part of the incorporation by reference of the OM Code, is acceptable for use in the context of the OM Code, as permitted by ISTA 1.4, provided the licensee utilizes its 10 CFR Part 50, Appendix B, QA program in conjunction with the OM Code. Changes to licensee's QA program shall be made in accordance with 10 CFR 50.54. Further, where NQA–1 and the OM Code do not address the commitments contained in the licensee's Appendix B QA program description, such commitments shall be applied to OM Code activities. Proposed § 50.55a(b)(3)(i) addresses licensee's commitments related to the OM Code.

2.3.2.5 Modification

2.3.2.5.1 Stroke Time Testing

Proposed § 50.55a(b)(3)(ii) would require that the stroke time testing requirement of Subsection ISTC of the OM Code applicable for motor-operated valves (MOVs) be supplemented with programs that licensees have previously committed to perform, prior to issuance of this amendment to § 50.55a, for demonstrating the design basis capability of MOVs. Stroke time testing of MOVs has been specified in ASME Section XI and is currently required by § 50.55a(f). This same testing is required by the OM Code. This testing is a useful tool and complements other tests used to verify MOV function. Variation in measured stroke times can indicate valve degradation. Additionally, periodic stroking provides valve exercise and some measure of on-demand reliability. However, as discussed in NRC Generic Letter (GL) 89–10 ''Safety-Related Motor-Operated Valve Testing and Surveillance'' dated June 28, 1989, it is now recognized that the stroke time testing alone is not sufficient to provide assurance of MOV capability under design-basis conditions.

Subsequent to licensees implementing programs pursuant to GL 89–10, the NRC issued Generic Letter 96–05, ''Periodic Verification of Design-Basis Capability of Safety-Related Motor-Operated Valves,'' on September 18, 1996. This generic letter requested licensees to establish a program, or to ensure the effectiveness of their current program, to verify on a periodic basis that safety-related motor-operated valves continue to be capable of performing their safety functions within the current licensing bases of the facility. Prior to issuance of this rule, licensees have made licensing commitments pursuant to GL 96–05 that have been reviewed by the NRC staff. Most licensees have committed to participate in the Joint Owners Group (JOG) Program on MOV Periodic Verification. The JOG program includes three phases: (1) licensees will establish an interim static diagnostic testing program developed by JOG with a test frequency based on margin and safety significance; (2) JOG will coordinate a dynamic testing program over the next 5 years that includes approximately 150 MOVs with participating licensees each testing a few MOVs three times over this interval; and (3) based on the results of the dynamic testing program, JOG will establish a long-term periodic test program. Proposed § 50.55a(b)(3)(ii) would require that licensees supplement the stroke time testing requirements of the OM Code with these commitments.

2.4 Expedited Implementation

2.4.1 Appendix VIII

The proposed rule would require that licensees expedite implementation of mandatory Appendix VIII, ''Performance Demonstration for Ultrasonic Examination Systems,'' to Section XI, 1995 Edition with the 1996 Addenda. Three proposed modifications would be included to address NRC positions on the use of Appendix VIII. Licensees would be required to implement Appendix VIII, including the modifications, for all examinations of the pressure vessel, piping, nozzles, and bolts and studs which occur after 6 months from the date of the final rule. The proposed rule would not require any change to a licensee's ISI schedule for examination of these components, but would require that the provisions of Appendix VIII be used for all examinations after that date rather than the ultrasonic testing (UT) procedures and personnel requirements presently being utilized by licensees.

Appendix VIII provides the requirements for performance demonstration for ultrasonic testing (UT) procedures, equipment, and personnel used to detect flaws and size flaws. Its requirements are applicable to all UT performed for Class 1, Class 2, and Class 3 items (i.e., reactor vessel, nozzles, piping, and bolting and studs). These requirements are also to be utilized when implementing the augmented inservice inspection program for reactor vessel shell welds presently required by § 50.55a(g)(6)(ii)(A). The NRC has reviewed the 1995 Edition with the 1996 Addenda of Appendix VIII and has determined that the provisions contained in this appendix should be used with three modifications (addressed below). This mandatory appendix would normally be adopted as part of the routine 120-month update specified in § 50.55a(g)(4), but because of the importance of the Appendix VIII program, the NRC has determined that its requirements should be implemented after 6 months from the date of the final rule. The performance demonstration requirements in Appendix VIII would

substantially improve the ability of an examiner to detect and characterize flaws in examined components. UT procedures and personnel requirements are presently contained in Section XI but, as detailed in the documented evaluation required by § 50.109(a)(4), personnel qualified to Appendix VIII are significantly better at detecting flaws. The industry's Performance Demonstration Initiative (PDI) established a process in accordance with Appendix VIII for reactor vessel, nozzle, piping, and bolting examinations. PDI has received considerable support from the industry, and every licensee has contributed financially. The majority of the cost of PDI was in setting up the samples, which has been completed. Proposed § 50.55a(g)(6)(ii)(C)(*1*) would require licensees to utilize the improved requirements in Appendix VIII for all examinations of reactor vessels (including nozzles), piping, and bolting performed after 6 months from the date of the final rule. To date, the PDI program has qualified over 300 individuals for piping and five teams for vessel examinations. Thus, the NRC does not believe that a 6-month implementation period would result in hardship.

2.4.1.1 Modifications

2.4.1.1.1 Appendix VIII Personnel Qualification

The first proposed modification of Appendix VIII relates to its requirement that ultrasonic examination personnel meet the requirements of Appendix VII, ''Qualification of Nondestructive Examination Personnel for Ultrasonic Examination,'' to Section XI. Appendix VII first appeared in Section XI in the 1988 Addenda and was incorporated by reference into § 50.55a in a final rule published on August 6, 1992 (57 FR 34666). The NRC believes that the requirement in Appendix VII–4240 for personnel to receive a minimum of 10 hours of training on an annual basis is inadequate. Proposed § 50.55a(b)(2)(xvii) would require that all personnel qualified for performing ultrasonic examinations in accordance with Appendix VIII receive 40 hours of annual training which includes laboratory work and examination of flawed specimens. Signals can be difficult to interpret, and as detailed in the regulatory analysis for this rulemaking, experience and studies indicate that the examiner must practice on a frequent basis to maintain the capability for proper interpretation. In addition, these studies have shown that this capability begins to diminish within approximately 6 months if skills are not maintained. Thus, 10 hours of annual training is not sufficient practice to maintain skills. The NRC believes that a minimum of 40 hours of annual training, not 10 hours, is required to maintain an examiner's abilities in this highly specialized skill area. The NRC expects that licensees would distribute the training over the course of the year to ensure that interpretation skills do not diminish.

2.4.1.1.2 Appendix VIII Specimen Set Cracks

The second proposed modification of Appendix VIII would require that all flaws in the specimen sets used for performance demonstration for piping, vessels, and nozzles be cracks. For piping, Appendix VIII requires that all of the flaws in a specimen set be cracks. However, for vessels and nozzles, Appendix VIII would allow as many as 50% of the flaws to be notches. For the purpose of demonstrating nondestructive examination (NDE) capabilities, notches are not realistic representations of service induced cracks. An inspector cannot properly interpret service induced cracks by qualifying with specimens containing notches. Notches are easier to detect than flaws because notches have a higher amplitude and simpler signal characteristics. Notches are easier to interpret and, in fact, the probability of detecting notches can be much higher than the probability of detecting cracks under similar conditions. In addition, Appendix VIII provides a screening test that uses a relatively small sample size containing few flaws. If some of the flaws are replaced by notches that are unrealistic, the screening test becomes ineffective. Because of these considerations, the flaws in the specimen sets utilized for piping by EPRI for the PDI are all cracks. The regulatory analysis for this rulemaking contains a detailed discussion of the importance of using cracks in the specimens. Thus, proposed § 50.55a(b)(2)(xiii) would require that all flaws in the specimen sets used for performance demonstration be cracks.

2.4.1.1.3 Appendix VIII Specimen Set Microstructure

The third proposed modification of Appendix VIII would require that all specimens for single-side tests contain microstructures like the components to be inspected and flaws with non-optimum characteristics consistent with field experience that provide realistic challenges to the UT technique. Appendix VIII does not distinguish specimens for two-sided examinations from those used for single-sided examination.

Appendix VIII was originally developed using UT lessons learned from two-sided examinations of welds. This UT experience provided the input for designing specimens and selecting, locating, and characterizing flaws. Studies have shown that defect characteristics such as shape, size, depth, tilt angle, skew angle, roughness, and crack tip affect the probability of detecting a particular flaw. For example, it was demonstrated in one particular study (Reference 22 in the documented evaluation) that a particular flaw was over three times more reflective in one direction, thus easier to detect, than in the opposite direction. Specimens designed for two-sided examination may not have defects which are appropriate for single-sided performance demonstration; i.e., the specimens may not adequately test an examiners proficiency in detecting flaws. Therefore, in order to proceed with the effort of qualifying UT systems (equipment, procedures, and personnel) for single-sided examinations, proposed § 50.55a(b)(2)(xx) would require the industry to develop sets of specimens that contain microstructures similar to the types found in the components to be inspected and flaws with non-optimum characteristics, such as skew, tilt, and roughness, consistent with field experience that provide realistic challenges for single-sided performance demonstration.

2.4.2 Generic Letter on Appendix VIII

A draft generic letter was published in the **Federal Register** (61 FR 69120) for public comment on December 31, 1996, to alert the industry to the importance of using equipment, procedures, and examiners capable of reliably detecting and sizing flaws in the performance of comprehensive examinations of reactor vessels and piping. The generic letter stated that even though the need for improvement clearly existed, the staff had reached the conclusion that immediate backfitting of Appendix VIII in advance of this proposed rulemaking was not warranted. This conclusion was based on consideration of defense-in-depth measures, Code margins in component design, leakage monitoring systems, and also that Appendix VIII was already being applied to selected piping subject to intergranular stress corrosion cracking. The NRC received 16 comment letters on the generic letter.

The comments generally were very similar and can be summarized in the following five items: (1) it is inappropriate to request licensees to voluntarily commit to a program in a

generic letter; (2) the urgency for licensee's to voluntarily commit to implementing Appendix VIII is inconsistent with the statement in the generic letter that a safety concern does not exist that would warrant immediate backfitting in advance of the rulemaking; (3) the performance-based qualification program of Appendix VIII should be approved an alternative to the current ASME Code, and Appendix VIII as implemented by PDI should be recognized as an acceptable alternative for Appendix VIII; (4) the NRC should provide guidance on incorporating Appendix VIII and/or PDI into plant-specific ISI programs; and (5) the generic letter would request that licensees update their UT ISI and augmented inspection commitments to a Code edition not yet referenced in the regulations.

With regard to the first comment, the NRC disagrees that it is inappropriate to request licensees to voluntarily commit to a program in a generic letter. This is one mechanism available to the NRC for alerting licensees, for example, to degraded conditions which may unacceptably affect the function of safety-related components. The second comment takes the generic letter statement out of context. What the generic letter actually stated was that a safety concern did not exist to warrant immediate backfitting in advance of the rulemaking because of defense-in-depth measures, Code margins in design, and that Appendix VIII was already being applied to selected piping subject to intergranular stress corrosion cracking. The NRC strongly disagrees that Appendix VIII and Appendix VIII as implemented by PDI should be alternatives to the present Code rules. As detailed in the documented evaluation for backfitting Appendix VIII, it has been demonstrated that examiners previously considered qualified under Section XI generally have marginal UT skills. This was evident from the discouragingly low percentage of examiners initially satisfying the screening criteria for detecting flaws under the PDI program. Comment four regarding guidance on incorporating Appendix VIII into present ISI programs, and comment five regarding Code edition are automatically resolved in a rulemaking format.

At the time the generic letter was issued, this proposed rulemaking was still under development. The purpose of the generic letter was to alert the industry to the (1) generally poor performance in detecting flaws and (2) the Commission's intent to endorse Appendix VIII via rulemaking. Publication of a final rule would obviate the need for the generic letter.

2.4.3 Class 1 Piping Volumetric Examination

A proposed modification of Section XI would require licensees of pressurized water reactor plants to supplement the surface examination of Class 1 High Pressure Safety Injection Systems (HPSI) piping as required by Examination Category B–J of Table IWB–2500–1 for nominal pipe sizes (NPS) between 4 (inches) and 1+ (inches), with a volumetric (ultrasonic) examination. This requirement is proposed because (1) inside diameter cracking of HPSI piping in the subject size range has been previously discovered (as detailed in NRC Generic Letter 85–20, ''High Pressure Injection/ Make-Up Nozzle Cracking in Babcock and Wilcox Plants,'' and in NRC Information Notice 97–46, (''Unisolable Crack in High-Pressure Injection Piping,''), (2) failure of this line could result in a small break loss of coolant accident while directly affecting the system designed to mitigate such an event, and (3) volumetric examinations are already required by the Code for Class 2 portions of this system (Table IWC–2500–1, Examination Category C–F–1) within the same NPS range. Thus, not only are the requirements between Class 1 and Class 2 inconsistent (with the Class 1 portions being subject to less stringent testing requirements as compared with Class 2 portions of the same type of piping), but operating experience has shown that these reactor coolant pressure boundary (RCPB) pipe examinations need to be more comprehensive. Proposed § p50.55a(b)(2)(xv) would require licensees to supplement the Section XI required surface examination for the Class 1 portion of the HPSI system with volumetric examination in order to ensure the integrity of the reactor coolant pressure boundary as required by General Design Criteria (GDC) 14, 10 CFR Part 50, Appendix A, or similar provisions in the licensing basis for these facilities, and Criteria II and XVI of 10 CFR Part 50, Appendix B. Licensees would be required to perform the volumetric examination during any ISI program inspection of the HPSI system performed after 6 months from the date of the final rule. Utilization of licensee's existing ISI schedules will result in the volumetric examinations being implemented in a reasonable period of time while not impacting lengths of outages or requiring facility shutdown solely for performance of these examinations.

2.5 Voluntary Implementation

2.5.1 Section III

The NRC has reviewed the 1989 Addenda, 1990 Addenda, 1991 Addenda, 1992 Edition, 1992 Addenda, 1993 Addenda, 1994 Addenda, 1995 Edition, and 1996 Addenda of Section III, Division 1, for Class 1, Class 2, and Class 3 components, and has determined that they are acceptable for voluntary use with six proposed limitations. In addition, § 50.55a would be modified to ensure consistency between § 50.55a and NCA–1140.

The version of Section III utilized by licensees is chosen prior to construction. Section 50.55a permits licensees to use the original construction code during the operational phase or voluntarily update to a later version which has been endorsed by § 50.55a. Accordingly, the proposed limitations to Section III become effective only when a licensee voluntarily updates to a later version. The modification would only apply to a applicant for a new construction permit.

2.5.1.1 Limitations

2.5.1.1.1 Engineering Judgement

The first proposed limitation to the implementation of Section III would establish an NRC restriction with regard to the Foreword in the 1992 Addenda through the 1996 Addenda of the BPV Code. That Foreword addresses the use of ''engineering judgement'' for construction activities not specifically considered by the Code. Proposed paragraph 50.55a(b)(1)(i) would require that when a licensee relies on engineering judgement for activities or evaluations of components or systems within the scope of § 50.55a that are not directly addressed by the BPV Code, the licensee must receive NRC approval for those activities or evaluations pursuant to § 50.55a(a)(3).

2.5.1.1.2 Section III Materials

The second proposed limitation to the implementation of Section III pertains to a reference to Section II, ''Materials,'' Part D, ''Properties.'' Section II, Part D, contained many printing errors in the 1992 Edition. These errors were corrected in the 1992 Addenda. Proposed § 50.55a(b)(1)(ii) would require that Section II, 1992 Addenda, be applied when using the 1992 Edition of Section III. The limitation is necessary to ensure that users of the Code use the design stresses intended by the ASME Code.

2.5.1.1.3 Weld Leg Dimensions

The third proposed limitation to the implementation of Section III would

correct a conflict in the design and construction requirements in Subsection NB (Class 1 Components), Subsection NC (Class 2), and Subsection ND (Class 3) of Section III, 1989 Addenda through the 1996 Addenda of the BPV Code. Two equations in NB–3683.4(c)(1), Footnote 11 to Figure NC–3673.2(b)–1, and Figure ND–3673.2(b)–1 were modified in the 1989 Addenda and are no longer in agreement with Figures NB–4427–1, NC–4427–1, and ND–4427–1. This change results in a different weld leg dimension depending on whether the dimension is derived from the text or calculated from the figures. Thus, to ensure consistency, proposed § 50.55a(b)(1)(iii) would require that licensees use the 1989 Edition for the above referenced paragraphs and figures in lieu of the 1989 Addenda through the 1996 Addenda.

2.5.1.1.4 Seismic Design

The fourth proposed limitation to the implementation of Section III pertains to new requirements for piping design evaluation contained in the 1994 Addenda through the 1996 Addenda of the BPV Code. The NRC has determined that changes to subarticles NB–3200, ''Design by Analysis,'' NB–3600, ''Piping Design,'' NC–3600, ''Piping Design,'' and ND–3600, ''Piping Design,'' of Section III for Class 1, 2, and 3 piping design evaluation for reversing dynamic loads (e.g., earthquake and other similar type dynamic loads which cycle about a mean value) are unacceptable. The new requirements are based on the premise that loads such as earthquake loads are not capable of producing collapse or gross distortion of a component. The requirements, in part, are based on General Electric evaluations of the test data performed under sponsorship of the Electric Power Research Institute (EPRI) and the NRC. However, NRC evaluations of the data do not support the changes and indicate lower margins than those estimated in earlier evaluations. The ASME has established a special working group to reevaluate the bases for the seismic design for piping. Thus, in proposed § 50.55a(b)(1)(iv), licensees would be permitted to use articles NB–3200, NB–3600, NC–3600, and ND–3600, in the 1989 Addenda through the 1993 Addenda, but would be prohibited from using these requirements in the 1994 Addenda through the 1996 Addenda.

2.5.1.1.5 Quality Assurance

The fifth proposed limitation to the implementation of Section III pertains to the use of NQA–1, ''Quality Assurance Requirements for Nuclear Facilities,'' with Section III. Section III references NQA–1 as part of its individual requirements for a QA program by integrating portions of NQA–1 into the QA program defined in NCA–4000, ''Quality Assurance.'' At present, § 50.55a endorses the 1989 Edition of the ASME Code which references NQA–1–1986 for Section III. The 1996 Addenda of the ASME Code references NQA–1–1992 for Section III.

The NRC has reviewed the requirements of NQA–1, 1986 Addenda through the 1992 Addenda, that are part of the incorporation by reference of Section III, and has determined that the provisions of NQA–1 are acceptable for use in the context of Section III activities. Portions of NQA–1 are integrated into Section III administrative, quality, and technical provisions which provide a complete QA program for design and construction. NQA–1 by itself would not adequately describe how to satisfy the requirements of 10 CFR Part 50, Appendix B, ''Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants.'' The additional criteria contained in Section III, such as nuclear accreditation, audits, and third party inspection, establishes a complete program and satisfies the requirements of Appendix B (i.e., the provisions of Section III integrated with NQA–1). Because licensees may voluntarily choose to apply later provisions of Section III, proposed § 50.55a(b)(1)(v) contains a limitation which would require that the edition and addenda of NQA–1 specified by NCA–4000 of Section III be used in conjunction with the administrative, quality, and technical provisions contained in the edition of Section III being utilized.

2.5.1.1.6 Independence of Inspection

The sixth proposed limitation to the implementation of Section III would prohibit licensees from using subparagraph NCA–4134.10(a), ''Inspection,'' in the 1995 Edition through the 1996 Addenda. Prior to this edition and addenda, NCA–4134.10(a) required that the provisions of NQA–1, ''Quality Assurance Program Requirements for Nuclear Facilities,'' Basic Requirement 10, ''Inspection,'' and Supplement 10S–1, ''Supplementary Requirements for Inspection,'' be utilized without exception. In the 1995 Edition, NCA–4134.10(a) was modified so that paragraph 2 of Supplement 10S–1 and the requirements for independence of inspection were no longer required. Supplement 10S–1, 2.1, states that ''Inspection Personnel shall not report directly to the immediate supervisors who are responsible for performing the work being inspected.'' Subparagraph 2.2 states ''Each person who verifies conformance of work activities for purposes of acceptance shall be qualified to perform the assigned task.'' By exempting Supplement 10S–1 paragraph 2 from the requirements of NCA–4134.10, Section III could promote noncompliance with 10 CFR 50, Appendix B, ''Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants,'' Criterion 1, ''Organization.'' This criterion requires that persons performing QA functions report to a management level such that authority and organizational freedom, including sufficient independence from cost and schedule when opposed to safety considerations, are provided. Thus, in proposed § 50.55a(b)(1)(vi), licensees would be permitted to use the provisions contained in NCA–4134.10(a), in the 1989 Addenda through the 1994 Addenda, but would be prohibited from using these provisions in the 1995 Edition through the 1996 Addenda.

2.5.1.2 Modification

2.5.1.2.1 Applicable Code Version for New Construction

The proposed modification of Section III addresses a possible conflict between NCA–1140 and § 50.55a for new construction. NCA–1140 of Section III requires that the length of time between the date of the edition and addenda used for new construction and the docket date of the nuclear power plant be no greater than three years. Paragraph 50.55a(b)(1) requires that the edition and addenda utilized be incorporated by reference into the regulations. The possibility exists that the edition and addenda required by the ASME Code to be used for new construction would not be incorporated by reference into § 50.55a. In order to resolve this possible discrepancy, the NRC proposes to modify existing §§§ 50.55a(c)(3)(i), 50.55a(d)(2)(i), and 50.55a(e)(2)(i), to permit an applicant for a construction permit to use the latest edition and addenda which has been incorporated by reference into § 50.55a(b)(1) if the requirements of the ASME Code and the regulations cannot simultaneously be satisfied.

2.5.2 Section XI (Voluntary Implementation)

Licensees would be permitted to update from the 1992 Edition with the 1992 Addenda of Subsection IWE and Subsection IWL to the 1995 Edition with the 1996 Addenda. In addition, licensees could implement Code Case

N–513, ''Evaluation Criteria for Temporary Acceptance of Flaws in Class 3 Piping,'' and Code Case N–523–1, ''Mechanical Clamping Devices for Class 2 and 3 Piping.''

2.5.2.1 Subsection IWE and Subsection IWL

Many of the provisions in Section XI Subsection IWL, ''Requirements for Class CC Concrete Components of Light-Water Cooled Power Plants,'' pertaining to the inspection of the tendons of concrete containments were based on guidance contained in Regulatory Guide 1.35, ''Inservice Inspection of Ungrouted Tendons in Prestressed Concrete Containments.'' A final rule published on August 8, 1996 (61 FR 41303) incorporated by reference the 1992 Edition with the 1992 Addenda of Subsection IWE, ''Requirements for Class MC and Metallic Liners of Class CC Components of Light-Water Cooled Power Plants,'' and Subsection IWL. At that time, there were several key positions in the regulatory guide addressing the trending of prestress losses, unanticipated tendon elongation, grease leakage, and excessive water in the sampled sheathing filler grease not addressed in Subsection IWL because the ASME Code committees had not yet completed consideration of these positions. Due to the importance of these positions, the final rule addressed them in paragraphs 50.55a(b)(2)(ix)(A) through 50.55a(b)(2)(ix)(D)(3). In addition, the final rule contained § 50.55a(b)(2)(ix)(E) which addressed the occurrence of degradation in inaccessible areas of containments.

Since publication of the 1992 Addenda, the ASME Code committees have completed their consideration of those regulatory guide positions. Most have been incorporated into subsequent edition and addenda, and the 1995 Edition with the 1996 Addenda addresses all of the modifications listed above except grease leakage and degradation in inaccessible areas. Thus, licensees would be required to utilize the modifications presently in § 50.55a addressing grease leakage and degradation in inaccessible areas. The NRC has determined that the provisions contained in Subsection IWE and Subsection IWL, 1995 Edition with the 1996 Addenda Code, in conjunction with the modifications, would be acceptable.

The final rule published on August 8, 1996 (61 FR 41303) incorporated Subsection IWE and Subsection IWL into § 50.55a for the first time. The final rule contained a requirement for licensees to develop and implement a containment ISI program within five years. Each plant had a pre-existing ISI program to address Class 1, Class 2, and Class 3 components. The rule left it to the licensee's discretion whether to have two separate ISI programs, or merge the containment ISI program with the pre-existing program.

It has been over a year since the final rule was issued, and some licensees have begun the development of a containment ISI program to comply with the required 5-year implementation period. This containment ISI program will be based on the 1992 Edition with the 1992 Addenda as required by the final rule. However, other licensees have indicated that they will request NRC approval pursuant to § 50.55a(a)(3) to use later editions and addenda of Subsection IWE and Subsection IWL before this proposed rule becomes final. Thus, to provide flexibility, § 50.55a(b)(2)(vi) has been modified. Licensees would be permitted to implement either the presently required 1992 Edition with the 1992 Addenda, or the latest containment examination provisions; i.e., 1995 Edition with the 1996 Addenda.

For those licensees implementing the 1992 Edition with the 1992 Addenda, all of the modifications contained in paragraphs 50.55a(b)(2)(ix)(A) through 50.55a(b)(2)(ix)(D)(3) must be applied as presently required by § 50.55a. Licensees wishing to implement the 1995 Edition with the 1996 Addenda would be required to apply paragraphs 50.55a(b)(2)(ix)(A), 50.55a(b)(2)(ix)(D)(3), and 50.55a(b)(2)(ix)(E). Paragraph § 50.55a(b)(2)(ix) would thus be modified. According to § 50.55a(g)(6)(ii)(B)(1), the containment examinations performed during the 5-year implementation period are those examinations which are required by Subsection IWE during the first period of what will be the first containment inspection interval. (Since Subsection IWL is based on a 5-year schedule, standard Section XI periods do not apply for the examination of concrete containments and their post-tensioning systems). With completion of the first period examinations, the second period of the first containment ISI interval would begin. The end of the third period completes the first containment ISI interval, a containment ISI 120-month update has been completed, and the second containment ISI interval would begin.

As licensees have begun developing their containment ISI programs, the NRC has received requests to clarify the implementation schedule for ISI of concrete containments and their post-tensioning systems. The current wording of § 50.55a(g)(6)(ii)(B)(2) requiring licensees to implement ''the inservice examinations which correspond to the number of years of operation which are specified in Subsection IWL'' has created confusion regarding whether the first examination of concrete is required to meet the examination schedule in Section XI, Subsection IWL, IWL–2410, which is based on the date of the Structural Integrity Test (SIT), or may be performed at any time between September 9, 1996 and September 9, 2001. According to § 50.55a(g)(6)(ii)(B)(2) of the final rulemaking, the first examination of concrete may be performed at any time between September 9, 1996, and September 9, 2001. The date of the first examination of concrete is not conditional upon compliance with Subsection IWL–2410 or the SIT. The purpose of the italicized words is to maintain the present 5-year schedule for examination of the post-tensioning system as operating plants transition to Subsection IWL. For operating reactors, there is no need to repeat the 1, 3, 5-year implementation cycle.

Section 50.55a(g)(6)(ii)(B)(2) also stated that the first examination performed shall serve the same purpose for operating plants as the preservice examination specified for plants not yet in operation. The affected plants are presently operating, but they will be performing the examination of concrete under Subsection IWL for the first time. Because the plants are operating, a Section XI preservice examination cannot be performed. Therefore, the first concrete examination is to be an inservice examination which will serve as the baseline (the same purpose for operating plants as the preservice examination specified for plants not yet in operation). With completion of this first examination of concrete, the second five-year Subsection IWL ISI period would begin. Likewise, examinations of the post-tensioning system at the nth year (e.g., the 15th year post-tensioning system examination), if performed to the requirements of Subsection IWL, are to be performed to the ISI requirements, not the preservice requirements.

The NRC has also been requested to clarify the schedule for future examinations of concrete and their post-tensioning systems at both operating and new plants. There is no requirement in Subsection IWL to perform the examination of the concrete and the examination of the post-tensioning system at the same time. The examination of the concrete under Subsection IWL and the examination of

the liner plates of concrete containments under Subsection IWE may be performed at any time during the 5-year expedited implementation. This examination of the concrete and liner plate provides the baseline for comparison with future containment ISI. Coordination of these schedules in future examinations is left to each licensee. New plants would be required to follow all of the provisions contained in Subsection IWL, i.e., satisfy the preservice examination requirements and adopt the 1, 3, 5-year examination schedule ISI schedule.

2.5.2.2 Flaws in Class 3 Piping

Proposed § 50.55a(b)(2)(xvi) would permit licensees to use Code Case N–513, ''Evaluation Criteria for Temporary Acceptance of Flaws in Class 3 Piping,'' and Code Case N–523–1, ''Mechanical Clamping Devices for Class 2 and 3 Piping.'' Section XI contains repair methods for pipes with a flaw exceeding acceptable limits. These repairs restore the integrity of the flawed piping. There are certain cases, however, where a Section XI Code repair may be impractical for a flaw detected during plant operation (i.e., a plant shutdown would be required to effect the Code repair). For many safety-related piping systems, immediate repair is required regardless of plant status. However, it has been determined that under certain conditions, temporary acceptance of flaws, including through-wall leaking, of low and moderate energy Class 3 piping is acceptable provided that the conditions are met, and the repair is effected during the next outage. At present, licensees must request NRC staff approval to defer Section XI Code repair for these Class 3 moderate energy (200 xF, 275 psig) piping systems. The NRC has reviewed Code Case N–513 and Code Case N–523–1 and has determined that Code Case N–523–1 is acceptable. Code Case N–513 is acceptable except for the scope and Section 4.0.

Section 1.0(a) of the Scope to Code Case N–513 limits the use of the requirements to Class 3 piping. However, Section 1.0(c) would allow the flaw evaluation criteria to be applied to all sizes of ferritic steel and austenitic stainless steel pipe and tube. Without some limitation on the scope of the Code Case, the flaw evaluation criteria could be applied to components such as pumps and valves, original construction deficiencies, and pressure boundary leakage; applications for which the criteria should not be utilized. Thus, the NRC has determined that the Code Case shall not be applied to: (1) components other than pipe and tube, such as pumps, valves, expansion joints, and heat exchangers; (2) the discovery and repair of flaws or deficiencies remaining from original construction; (3) leakage through a flange gasket; (4) threaded connections employing nonstructural seal welds for leakage prevention (through seal weld leakage is not a structural flaw, thread integrity must be maintained); and (5) degraded socket welds. A proposed limitation would be added in § 50.55a(b)(2)(xvi)(B) which would preclude the use of Code Case N–513 for these applications.

The first paragraph of Section 4.0 of Code Case N–513 contains the flaw acceptance criteria. The criteria provide a safety margin based on service loading conditions. The second paragraph of Section 4.0, however, would permit a reduction of the safety factors based on a detailed engineering evaluation. No criteria or guidance is given for justifying a reduction, or limiting the amount of reduction. The acceptance criteria of the first paragraph are based on sound principles. The second paragraph would allow ever finer calculation until the available margins became unacceptably low. A limitation would be added in proposed § 50.55a(b)(2)(xvi)(A) requiring that when implementing Code Case N–513, the specific safety factors in the first paragraph of Section 4.0 be satisfied. The use of Code Case N–513, with the limitations, and Code Case N–523–1 would obviate the need for licensees to request approval for deferring repairs, thus saving NRC and licensee resources.

2.5.3 OM Code (Voluntary Implementation)

Licensees would be permitted to implement Code Case OMN–1 in lieu of stroke time testing as required in Subsection ISTC. Licensees would also be permitted to implement Appendix II as an alternative to the condition monitoring program provisions contained in Subsection ISTC. However, licensees choosing to implement Appendix II would be required to apply the three proposed modifications to Appendix II to supplement check valve condition monitoring. In addition, licensees would be permitted to use Subsection ISTD for the IST of snubbers.

2.5.3.1 Code Case OMN–1

An alternative to the provisions contained in § 50.55a(b)(3)(ii) is included in proposed § 50.55a(b)(3)(iii) which would permit licensees to voluntarily implement ASME Code Case OMN–1, ''Alternative Rules for Preservice and Inservice Testing of Certain Electric Motor Operated Valve Assemblies in LWR Power Plants.'' The NRC has determined that for motor-operated valves, Code Case OMN–1 is acceptable in lieu of Subsection ISTC, except for leakage rate testing (ISTC 4.3) which must continue to be performed. As indicated in Attachment 1 to GL 96–05, the Code case meets the intent of the generic letter, but with certain limitations which were discussed in the generic letter. The NRC supports the OMN–1 maximum motor-operated valve test interval of 10 years based on current knowledge and experience, but believes it prudent to require that licensees evaluate the information obtained for each motor-operated valve during the first five years of use of the Code case, or three refueling outages (whichever is longer) to validate assumptions made in justifying a longer test interval. These limitations on the use of OMN–1 would be added to the rule as a modification in § 50.55a(b)(3)(iii)(A). Thus, Code Case OMN–1 is acceptable in lieu of Subsection ISTC, other than leakage rate testing requirements, with the modification that five years or three refueling outages (whichever is longer) from initial implementation of Code Case OMN–1, the adequacy of the test interval for each motor-operated valve must be evaluated and adjusted as necessary.

In addition, as noted in GL 96–05, licensees are cautioned when implementing Code Case OMN–1 that the benefits of performing a particular test should be balanced against the potential adverse effects placed on the valves or systems caused by this testing. Code Case OMN–1 specifies that an IST program should consist of a mixture of static and dynamic testing. While there may be benefits to performing dynamic testing, there are also potential detriments to its use (i.e., valve damage). Licensees should be cognizant of this for each MOV when selecting the appropriate method or combination of methods for the IST program.

2.5.3.2 Appendix II

Paragraph ISTC 4.5.5 of Subsection ISTC permits the Owner to use Appendix II, ''Check Valve Condition Monitoring Program,'' of the OM Code, as an alternative to the testing or examination provisions of ISTC 4.5.1 through ISTC 4.5.4. If an Owner elects to use Appendix II, the provisions of Appendix II become mandatory. However, upon reviewing the appendix, the NRC has determined that the requirements in Appendix II must be supplemented. The first area that the NRC believes requires supplementation is the demonstration of acceptable valve performance. Appendix II requires no testing or examination of the check

valve obturator movement to both the open and closed positions. Testing or examination of the check valve obturator in one direction only cannot assure the unambiguous detection of a functionally degraded check valve. The valve obturator must be tested or examined in both the opening and closing directions to assess its condition and confirm acceptable performance. Proposed § 50.55a(b)(3)(iv)(A) would require bi-directional testing of check valves.

Length of test interval is the second area of Appendix II where the NRC believes the rules must be supplemented. Appendix II was first incorporated into the OM Code in the 1996 Addenda. Thus, the operating experience database does not yet exist to support long term test intervals for the condition monitoring concept. Under the current check valve IST program, most valves are tested quarterly during plant operation. The interval for certain valves has been extended to refueling outages. Under the appendix, a licensee would be able to extend the interval without limit. A policy of prudent and safe interval extension dictates that any additional interval extension must be limited to one fuel cycle, and this extension must be based on sufficient experience to justify the additional time. Interval changes or extensions must be justified and limited within the existing performance and experience database. Condition monitoring and the current experience data base may qualify some valves for an initial extension to every other fuel cycle, while trending and evaluation of the data may dictate that the testing interval for some valves be reduced. Extensions of IST intervals must consider plant safety and be supported by trending and evaluating both generic and plant-specific performance data to ensure the component is capable of performing its intended function over the entire IST interval. Proposed § 50.55a(b)(3)(iv)(B) would limit the time between the initial test or examination and second test or examination to two fuel cycles or three years (whichever is longer), with additional extensions limited to one fuel cycle, and the total interval would be limited to a maximum of 10 years. An extension or reduction in the interval between tests or examinations would have to be supported by trending and evaluation of performance data.

The final area in Appendix II which the Commission believes should be supplemented is the requirement applicable to a licensee who discontinues a condition monitoring program. A licensee who discontinues use of Appendix II, under IST 4.5.5 is required to return to the requirements of IST 4.5.4. However, the NRC believes the requirements of IST 4.5.1 through IST 4.5.4 must be also met. Hence, if the monitoring program is discontinued, proposed § 50.55a(b)(3)(iii)(C) would require a licensee to implement the provisions of IST 4.5.1 through IST 4.5.4.

2.5.3.3 Subsection ISTD

The IST of dynamic restraints or snubbers is governed by plant technical specification and, thus, has never been included in § 50.55a. However, the NRC has reviewed Subsection ISTD, 1995 Edition with the 1996 Addenda, and has determined that the provisions for IST of snubbers are an acceptable alternative to the requirements contained in the plant technical specifications. Subsection ISTD, 1996 Addenda, includes new provisions for service life monitoring of snubbers. The new provisions require that the service lives of snubbers be predicted and evaluated to ensure that the service life will not be exceeded before the next scheduled refueling outage. These new provisions simply formalize preventative maintenance practices presently found in most plants. Because the IST of snubbers is governed by plant technical specifications, Subsection ISTD is not included in the proposed mandatory requirements of the rulemaking, but licensees may choose to voluntarily implement Subsection ISTD, 1995 Edition with the 1996 Addenda, by processing a change to their technical specifications. This proposed modification is contained in § 50.55a(b)(3)(v).

2.5.3.4 Containment Isolation Valves

The proposed amendment would delete the existing modification in § 50.55a(b)(2)(vii) for IST of containment isolation valves (CIVs), which was added to the regulations in a rulemaking effective on August 6, 1992 (57 FR 34666). That rulemaking incorporated by reference, among other things, the 1989 Edition of ASME Section XI, Subsection IWV that endorsed Part 10 of ASME/ANSI OMa1988 for valve inservice testing. A modification to the testing requirements of Part 10 related to CIVs was included in the rulemaking indicating that paragraphs 4.2.2.3(e) and 4.2.2.3(f) of Part 10 were to be applied to CIVs. As noted in the ''Supplementary Information'' for the August 6, 1992 rulemaking, the ASME Operations and Maintenance (OM) Committee had initiated action to: (1) perform a comprehensive review of OM Part 10 CIV testing requirements and acceptance standards; and (2) develop a basis document that would provide, as a minimum, a documented basis for not including the requirements for analysis of leakage rates and corrective actions in Part 10 for those CIVs that do not provide a reactor coolant system pressure isolation function. The NRC made a commitment via the Supplementary Information to reevaluate the need for the modification to Section XI, Subsection IWV, following review of this OM Committee basis document. This basis document was transmitted to the NRC in a letter from Steve Weinman, Secretary, OM Committee, to Eric S. Beckjord, Director, Office of Nuclear Regulatory Research, dated February 16, 1994. The NRC has determined that the requirements of 10 CFR 50, Appendix J, ensure adequate identification analysis, and corrective actions for leakage monitoring of CIVs, and that the existing modification in § 50.55a(b)(2)(vii) should be deleted. The regulatory analysis for this proposed rule contains a detailed discussion of the basis document findings and the NRC staff evaluation.

2.6 ASME Code Interpretations

The ASME issues Interpretations to clarify provisions of the BPV and OM Codes. Requests for Interpretations are submitted by users, and after appropriate committee deliberations and balloting, responses are issued by the ASME. Generally, the NRC agrees with these interpretations. When the NRC incorporates by reference specific editions and addenda into its regulations, the NRC has a certain understanding of those editions and addenda. Because an Interpretation is issued subsequent to issuance of the provision to which it refers, the Interpretation may affect that understanding. While the NRC acknowledges that the ASME is the official interpreter of the Code, the NRC will not accept ASME interpretations that, in NRC's opinion, are contrary to NRC requirements or may adversely impact facility operations. Interpretations have been issued which in some cases, conflicted with or were inconsistent with NRC requirements. These resulted in enforcement actions. Of particular concern are Code Interpretations that may be implemented following initiation of enforcement action by the NRC. ASME Code Interpretations were discussed in Part 9900, Technical Guidance, of the NRC Inspection Manual. Part 9900 provides that licensees should exercise caution when applying Interpretations as they are not specifically part of the

incorporation by reference into § 50.55a and have not received NRC approval.

2.7 DSI–13

Since 1992, when the Commission last revised § 50.55a to endorse new ASME Code Editions and addenda (57 FR 34666), several developments have occurred which have raised some fundamental issues with respect to the Commission's endorsement of ASME Codes. First, on October 21, 1993, Entergy Operations, Inc. submitted a request that would relieve it from updating its ISI and IST programs to the last ASME Code edition and addenda incorporated by reference into § 50.55a. The underlying premise of the request was that a licensee should not be required to upgrade its ISI and IST program without considering whether the costs of the upgrade are warranted in light of the increased safety afforded by the updated Code edition and addenda. Though the request was later withdrawn, the underlying premise resulted in NRC reconsideration of the 120-month update. Requiring Code updates every 120-months is still under active consideration. However, the proposed rule has been prepared under the traditional approach; i.e., licensees would be required to update their ISI and IST programs every 120-months to the latest edition and addenda incorporated by reference into § 50.55a. If a decision is reached subsequent to publication of the proposed rule that is adverse to this approach, this position will be corrected prior to publication of the final rule.

Second, the National Technology Transfer and Advancement Act of 1995, PL 104–113, was signed into law on March 7, 1996. The Act directs federal agencies to achieve greater reliance on technical standards developed by voluntary consensus standards development organizations. Finally, the Commission commenced a Strategic Assessment and Rebaselining Initiative. One of the issues addressed in this effort was Direction Setting Issue (DSI) 13, which raised the question, ''In performing its regulatory responsibilities, what consideration should the NRC give to industry activities.'' A draft paper addressing DSI–13 was published for public comment on September 16, 1996, after which the Commission held public meetings to facilitate understanding of the issues and receive comments on the DSI–13 draft paper. Based on the public comments, the Commission has directed the NRC Staff to address how industry initiatives should be evaluated, and to evaluate several issues related to NRC endorsement of industry codes and standards. As part of this evaluation, the Staff is addressing issues relevant to the NRC's endorsement of the ASME Code, including periodic updating, the impact of 10 CFR 50.109 (the Backfit Rule), and streamlining the process for NRC review and endorsement of the ASME Code.

2.8 Steam Generators

ASME Code requirements for repair of heat exchanger tubes by sleeving were added to Section XI in the 1989 Addenda. Minimum Code requirements for tube sleeving was added to the Code so that licensees would not have to develop sleeving programs and have them approved by the NRC on a case-by-case basis. The NRC has reviewed the Code requirements for sleeving and determined that they are acceptable. However, it should be recognized that there are other relevant requirements, and that a considerable amount of effort is presently being expended due to the number of occurrences of degraded steam generator tubing. For example, licensees are required by either 10 CFR 50.55a(f) or by the plant technical specifications to perform periodic inservice inspections and to repair (e.g., sleeving) or remove from service (by installing plugs in the tube ends) all tubes found to contain flaws exceeding the plugging limit (i.e., tube repair criteria). In addition, current technical specifications contain operational leakage limits. Licensee's have frequently found it necessary to implement measures beyond minimum Code and technical specification requirements to ensure adequate tube integrity when significant degradation problems are encountered. Thus, the NRC determination that the sleeving requirements are acceptable should be kept in perspective.

3. Finding of No Significant Environmental Impact

Based upon an environmental assessment, the Commission has determined, under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule, if adopted, would not have a significant effect on the quality of the human environment and therefore an environmental impact statement is not required.

The proposed rule is one part of a regulatory framework directed to ensuring pressure boundary integrity and the operational readiness of pumps and valves. The proposed rule incorporates provisions contained in the BPV Code and the OM Code for the construction, inservice inspection, and inservice testing of components used in nuclear power plants, has been updated to incorporate improved technology and methodology. Therefore, in the general sense, the proposed rule would have a positive impact on the environment.

The proposed rule would impose the Section XI 1995 Edition with the 1996 Addenda. As most of the technical changes to this edition/addenda merely incorporate improved technology and methodology, imposition of these requirements is not expected to either increase or decrease occupational exposure. However, imposition of paragraphs IWF–2510, Table IWF–2500–1, Examination Category F–A, and IWF–2430, would result in fewer supports being examined which would decrease the occupational exposure compared to present support inspection plans. It is estimated that an examiner receives approximately 100 millirems for every 25 supports examined. Adoption of the new provisions is expected to decrease the total number of supports to be examined by approximately 115 per unit per interval. Thus, the reduction in occupational exposure is estimated to be 460 millirems per unit each inspection interval or 50.14 rems for 109 units.

The proposed rule would impose Appendix VIII to Section XI, 1995 Edition with the 1996 Addenda, BPV Code, for the first time and would expedite its implementation. Appendix VIII provides rules for the performance demonstration of ultrasonic examination systems, procedures, and personnel. Implementation of this appendix should result in a decrease in occupational exposure. Appendix VIII qualified procedures and personnel should reduce repeat ultrasonic testing (UT), which could reduce occupational exposure. In addition, flaws should be detected at an earlier stage of growth resulting in less extensive repair operations, which could further reduce occupational exposure.

The proposed rule would incorporate by reference into the regulations the 1995 Edition with the 1996 Addenda of the OM Code. Imposition of the OM Code is not expected to either increase or decrease occupational exposure. The types of testing associated with the 1995 Edition with the 1996 Addenda of the OM Code are essentially the same as the OM standards contained in the 1989 Edition of Section XI referenced in a final rule published on August 6, 1992 (57 FR 34666).

Actions required of applicants and licensees to implement the proposed rule are of the same nature as those applicants and licensees have been performing for many years. Therefore, this action should not increase the

potential for a negative environmental impact.

The NRC has sent a copy of the Environmental Assessment and the proposed rule to every State Liaison Officer and requested their comments on the Environmental Assessment. The environmental assessment is available for inspection at the NRC Public Document Room, 2120 L Street NW (Lower Level), Washington, DC. Single copies of the environmental assessment are available from Frank C. Cherny, Division of Engineering Technology, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–6786, or Wallace E. Norris, Division of Engineering Technology, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–6796.

4. Paperwork Reduction Act Statement

This proposed rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule has been submitted to the Office of Management and Budget for review and approval of the paperwork requirements.

The public reporting burden for this information collection is estimated to average 67 person-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. The U.S. Nuclear Regulatory Commission is seeking public comment on the potential impact of the information collections contained in the proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?
2. Is the estimate of burden 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?

Send comments on any aspect of this proposed collection of information, including suggestions for further reducing the burden, to the Information and Records Management Branch (T–6 F33), U.S. Nuclear Regulatory Commission, Washington DC 20555–0001, or by Internet electronic mail at BJS1@NRC.Gov; and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB–10202, (3150–0011), Office of Management and Budget, Washington DC 20503.

Comments to OMB on the information collections or on the above issues should be submitted by January 2, 1998. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Public Protection Notification

The NRC 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.

5. Regulatory Analysis

The Commission has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The draft analysis is available for inspection in the NRC Public Document Room, 2120 L Street NW (Lower Level), Washington DC. The Commission requests public comment on the draft analysis. Single copies of the analysis may be obtained from Frank C. Cherny, Division of Engineering Technology, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–6786, Wallace E. Norris, Division of Engineering Technology, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–6796.

6. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule affects only the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of ''small entities'' set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121.

7. Backfit Analysis

The Nuclear Regulatory Commission (NRC) regulations, 10 CFR 50.55a, requires 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 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. Licensees are required to update every 120 months to the version of Section XI incorporated by reference into § 50.55a 12 months prior to the start of a new ten year interval.

The proposed amendment to § 50.55a would require licensees to update ISI in accordance with Section XI of the ASME BPV Code and IST in accordance with the ASME OM Code. Licensees would be required to implement the 1995 Edition with the 1996 Addenda of (1) Section XI, Division 1 for Class 1, Class 2, Class 3, Class MC, and Class CC components; (2) the ''Code for Operation and Maintenance of Nuclear Power Plants'' (OM Code) for Class 1, Class 2, and Class 3 pumps and valves; and (3) Appendix VIII, ''Performance Demonstration for Ultrasonic Examination Systems,'' to Section XI, Division 1. As permitted by § 50.55a(a)(3), licensees may voluntarily update to the 1989 Addenda through the 1996 Addenda of Section III of the BPV Code, with limitation. In addition, the modification for containment isolation valve inservice testing that applied to the 1989 Edition of the BPV Code has been deleted. Licensees will continue to be required to update their ISI and IST programs every 120 months to the version of Section XI and the OM Code incorporated by reference and in effect at least 12 months prior to the start of a new 120-month interval.

The NRC position on the routine 120-month update to § 50.55a has consistently been that 10 CFR 50.109 does not require a backfit analysis of the routine 120-month update to § 50.55a. The basis for the NRC position is that, (1) Section III, Division 1, update applies only to new construction (i.e., the edition and addenda to be used in the construction of a plant are selected based upon the date of the construction permit and are not changed thereafter, except voluntarily by the licensee), (2) licensees understand that § 50.55a requires that they update their inservice inspection program every 10 years to the latest edition and addenda of Section XI that were incorporated by reference in § 50.55a and in effect 12 months before

the start of the next inspection interval, and (3) endorsing and updating references to the ASME Code, a national consensus standard developed by the participants (including the NRC) with broad and varied interests, is consistent with both the intent and spirit of the backfit rule (i.e., NRC provides for the protection of the public health and safety, and does not unilaterally impose undue burden on applicants or licensees). Finally, to ensure that any interested member of the public that may not have had an opportunity to participate in the national consensus standard process is able to communicate with the NRC, proposed rules are published in the **Federal Register**.

The provisions for IST of pumps and valves were originally contained in Section XI Subsections IWP and IWV. Section XI, 1989 Edition was incorporated by reference in the August 6, 1992 rulemaking (57 FR 34666). The 1990 OM Code standards, Parts 1, 6, and 10 of ASME/ANSI–OM–1987, are identical to Section XI, 1989 Edition. This proposed amendment is an administrative change simply referencing the 1995 Edition with the 1996 Addenda of the OM Code. Therefore, imposition of the 1995 Edition with the 1996 Addenda of the OM Code is not a backfit.

Appendix VIII, ''Performance Demonstration for Ultrasonic Examination Systems,'' to Section XI would be used to demonstrate the qualification of personnel and procedures for performing nondestructive examination of welds in components of systems that include the reactor coolant system and the emergency core cooling systems in nuclear power facilities. Appendix VIII would greatly enhance the reliability of detection and sizing of cracks and flaws, and it delineates a method for qualification of the personnel and procedures. The appendix would normally be imposed by the 120-month update requirement, but because of its importance, implementation of Appendix VIII is being expedited by the rulemaking. Because of the expedited implementation schedule, the imposition of Appendix VIII is being considered a backfit. Licensees would be required to implement Appendix VIII, including the modifications, for all examinations of the pressure vessel, piping, nozzles, and bolts and studs which occur after 6 months from the date of the final rule. The proposed rule would not require any change to a licensee's ISI schedule for examination of these components, but would require that the provisions of Appendix VIII be used for all examinations after that date rather than the UT procedures and personnel requirements presently being utilized by licensees.

The NRC has concluded, on the basis of the documented evaluation required by § 50.109(a)(4), that imposition of Appendix VIII, which would greatly enhance the overall level of assurance of the safety and reliability of ultrasonic examination techniques in detecting and sizing flaws, is necessary to bring the facilities described into compliance with GDC 14, 10 CFR Part 50, Appendix A, or similar provisions in the licensing basis for these facilities, and Criteria II and XVI, of 10 CFR Part 50, Appendix B.

The modification to Section XI to require licensees to supplement the surface examination of the Class 1 portion (RCPB) of the HPSI system with volumetric examination would ensure the integrity of the reactor coolant system pressure boundary and maintenance of emergency core cooling system operability. The operability of this system is necessary to ensure the protection of the public health and safety, and the NRC has concluded, on the basis of the documented evaluation required by § 50.109(a)(4), that licensees must supplement the Section XI required surface examination for the Class 1 portion of the HPSI system with volumetric examination in order to ensure the integrity of the reactor coolant pressure boundary as required by GDC 14, 10 CFR Part 50, Appendix A, or similar provisions in the licensing basis for these facilities, and Criteria II and XVI, of 10 CFR Part 50, Appendix B. Volumetric examination would be required during any ISI program inspection of the HPSI system performed after 6 months from the date of the final rule.

GDC 14, ''Reactor coolant pressure boundary,'' (RCPB) or similar provisions in the licensing basis for these facilities, specify that the RCPB be designed, fabricated, erected, and tested so as to have an extremely low probability of abnormal leakage, or rapidly propagating failure, and of gross rupture. There has recently been an occurrence of gross rupture in the Class 1 portion of a HPSI system, and a number of occurrences of abnormal leakage in the RCPB in other plants.

Imposition of Appendix VIII and the HPSI volumetric examination is also necessary to bring the facilities described into compliance with Criteria II, ''Quality Assurance Program,'' and Criteria XVI, ''Corrective Actions,'' of Appendix B to 10 CFR Part 50. Criteria II requires, in part, that a QA program shall take into account the need for special controls, processes, test equipment, tools, and skills to attain the required quality and the need for verification of quality by inspection and test. Evidence indicates that there are shortcomings in the qualifications of personnel and procedures in ensuring the reliability of the examinations. These safety significant revisions to the Code include specific requirements for UT performance demonstration, with statistically based acceptance criteria for blind testing of UT systems (procedures, equipment, and personnel) used to detect and size flaws. Criteria XVI requires that measures shall be established to assure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, defective material and equipment, and nonconformances are promptly identified and corrected. In analyzing the occurrences of pipe break and leakage, it is apparent that the RCPB is subject to certain types of degradation. Information gathered by the NRC staff indicates that many licensees have not reacted to this serious safety concern by performing more comprehensive examinations. The NRC believes that there is a basis for reasonably concluding that such degradation could occur in virtually all PWRs. Because of the serious degradation which has occurred, and the belief that additional occurrences of noncompliance with GDC 14, and Criteria II and XVI will be reported, the NRC has determined that imposition of Appendix VIII and volumetric examination of the HPSI system 6 months after the final rule has been published under the compliance exception to § 50.109(a)(4)(i) is appropriate, therefore, a backfit analysis is not required and the cost-benefit standards of § 50.109(a)(3) do not apply. A complete discussion is contained in the documented evaluation.

The rationale for application of the backfit rule and the backfit justification for the various items contained in this proposed rule are contained in the regulatory analysis and documented evaluation. The regulatory analysis and documented evaluation are available for inspection at the NRC Public Document Room, 2120 L Street NW (Lower Level), Washington, DC. Single copies of the regulatory analysis and documented evaluation are available from Frank C. Cherny, Division of Engineering Technology, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–6786, or Wallace E. Norris, Division of Engineering Technology, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission,

Washington, DC 20555–0001, Telephone: 301–415–6796.

List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Fire prevention, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalties, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 50.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. Section 50.55a is amended by removing and reserving paragraphs (b)(2)(vii) and (g)(4)(iv), adding paragraphs (b)(2)(xi) through (b)(2)(xx), (b)(3), (g)(6)(ii)(A)(*6*), and (g)(6)(ii)(C), and revising the introductory text of paragraph (b), paragraph (b)(1), the introductory text of paragraph (b)(2), paragraphs (b)(2)(iv), (b)(2)(vi), (b)(2)(viii), the introductory text of paragraph (b)(2)(ix), paragraphs (c)(3), (d)(2), (e)(2), the introductory text of paragraph (f), paragraphs (f)(1), (f)(2), (f)(3)(iii), (f)(3)(iv), the introductory text of paragraph (f)(4), paragraphs (g)(1), (g)(3)(i), the introductory text of paragraph (g)(4), paragraphs (g)(6)(ii)(A)(*1*), (g)(6)(ii)(A)(*2*), and Footnotes 5 and 7 to read as follows:

§ 50.55a Codes and standards.

* * * * *

(b) The ASME Boiler and Pressure Vessel Code, and the ASME Code for Operation and Maintenance of Nuclear Power Plants, which are referenced in the following paragraphs, were approved for incorporation by reference by the Director of the Federal Register. A notice of any changes made to the material incorporated by reference will be published in the **Federal Register**. Copies of the ASME Boiler and Pressure Vessel Code and the ASME Code for Operation and Maintenance of Nuclear Power Plants may be purchased from the American Society of Mechanical Engineers, United Engineering Center, 345 East 47th Street, New York, NY 10017. They are also available for inspection at the NRC Library, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland 20852–2738.

(1) As used in this section, references to Section III of the ASME Boiler and Pressure Vessel Code refer to Section III, Division 1, and include editions through the 1995 Edition and addenda through the 1996 Addenda, subject to the following limitations and modifications:

(i) Engineering judgement. When a licensee relies on engineering judgment for activities or evaluations of components or systems within the scope of 10 CFR 50.55a that are not directly addressed by the ASME Boiler and Pressure Vessel Code, the NRC must approve the activities or evaluations pursuant to 10 CFR 50.55a(a)(3).

(ii) Section III Materials. When applying the 1992 Edition of Section III, licensees shall apply the 1992 Edition with the 1992 Addenda of Section II of the ASME Boiler and Pressure Vessel Code.

(iii) Weld leg dimensions. When applying the 1989 Addenda through the 1996 Addenda of Section III, licensees shall not apply paragraph NB–3683.4(c)(1), Footnote 11 to Figure NC–3673.2(b)–1, and Figure ND–3673.2(b)–1, and shall continue to use the requirements in the 1989 Edition for this paragraph and figures.

(iv) Seismic design. Licensees may use Articles NB–3200, NB–3600, NC–3600, and ND–3600 through the 1993 Addenda, subject to the limitation specified in (b)(1)(iii) of this section. Licensees shall not use the provisions in the 1994 Addenda through the 1996 Addenda for these Articles.

(v) Quality assurance. When applying editions and addenda later than the 1989 Edition of Section III, the requirements of NQA–1, ''Quality Assurance Requirements for Nuclear Facilities,'' 1986 Edition through the 1992 Addenda are acceptable for use provided that both NQA–1 and the quality assurance provisions specified in NCA–4000 are used in conjunction with the administrative, quality, and technical provisions contained in the edition and addenda of Section III being utilized.

(vi) Independence of inspection. Licensees shall not apply NCA–4134.10(a) of Section III, 1995 Edition with the 1996 Addenda, and shall use NCA–4134.10(a), 1994 Addenda.

(2) As used in this section, references to Section XI of the ASME Boiler and Pressure Vessel Code refer to Section XI, Division 1, and include editions through the 1995 Edition and addenda through the 1996 Addenda, subject to the following limitations and modifications:

* * * * *

(iv) Pressure-retaining welds in ASME Code Class 2 piping (applies to Tables IWC–2520 or IWC–2520–1, Category C–F).

(A) Appropriate Code Class 2 pipe welds in Residual Heat Removal Systems, Emergency Core Cooling Systems, and Containment Heat Removal Systems, must be examined. When applying editions and addenda up to the 1983 Edition through the Summer 1983 Addenda of Section XI of the ASME Code, the extent of examination for these systems must be determined by the requirements of paragraph IWC–1220, Table IWC–2520 Category C–F and C–G, and paragraph IWC–2411 in the 1974 Edition and Addenda through the Summer 1975 Addenda.

(B) For a nuclear power plant whose application for a construction permit was docketed prior to July 1, 1978, when applying editions and addenda up to the 1983 Edition through the Summer 1983 Addenda of Section XI of the ASME Code, the extent of examination for Code Class 2 pipe welds may be determined by the requirements of paragraph IWC–1220, Table IWC–2520 Category C–F and C–G and paragraph IWC–2411 in the 1974 Edition and Addenda through the Summer 1975 Addenda of Section XI of the ASME Code or other requirements the Commission may adopt.

* * * * *

(vi) Effective edition and addenda of Subsection IWE and Subsection IWL, Section XI. Licensees shall use either the 1992 Edition with the 1992 Addenda or the 1995 Edition with the 1996 Addenda of Subsection IWE and Subsection IWL as modified and supplemented by the requirements in § 50.55a(b)(2)(ix) and § 50.55a(b)(2)(x).

(vii) [Reserved]

(viii) Section XI References to OM Part 4, OM Part 6 and OM Part 10 (Table IWA–1600–1). When using Table IWA–1600–1, ''Referenced Standards and Specifications'' in the Section XI, Division 1, 1987 Addenda, 1988 Addenda, or 1989 Edition, the specified ''Revision Date or Indicator'' for ASME/ANSI OM Part 4, ASME/ANSI Part 6, and ASME/ANSI Part 10 shall be the OMa–1988 Addenda to the OM–1987 Edition. These requirements have been incorporated into the 1990 Edition of the OM Code which is incorporated by reference in paragraph (b)(3) of this section.

(ix) Examination of concrete containments. Licensees applying Subsection IWL, 1992 Edition with the 1992 Addenda, shall apply all of the modifications in this paragraph. Licensees choosing to apply the 1995 Edition with the 1996 Addenda shall apply paragraphs (b)(2)(ix)(A), (D)(3), and (E) of this section.

* * * * *

(xi) Engineering judgment. When a licensee relies on engineering judgment for activities or evaluations of components or systems within the scope of 10 CFR 50.55a that are not directly addressed by the ASME Boiler and Pressure Vessel Code, the NRC must approve the activities or evaluations pursuant to 10 CFR 50.55a(a)(3).

(xii) Quality Assurance. When applying Section XI editions and addenda later than the 1989 Edition, the requirements of NQA–1, ''Quality Assurance Requirements for Nuclear Facilities,'' 1979 Addenda through the 1989 Edition are acceptable as permitted by IWA–1400 of Section XI, provided the licensee utilizes its 10 CFR Part 50, Appendix B, quality assurance program, in conjunction with Section XI requirements. Changes to licensee's quality assurance program shall be made in accordance with 10 CFR 50.54(a). In addition, where NQA–1 and Section XI do not address the commitments contained in the licensee's Appendix B quality assurance program description, such commitments shall be applied to Section XI activities.

(xiii) Class 1 piping. Licensees shall not apply IWB–1220, ''Components Exempt from Examination,'' of Section XI, 1989 Addenda through the 1996 Addenda, and shall apply IWB–1220, 1989 Edition.

(xiv) Class 2 piping. Prior to applying the provisions of IWC–1220, ''Components Exempt from Examination,'' IWC–1221, ''Components Within RHR, ECC, and CHR Systems or Portions of Systems,'' and IWC–1222, ''Components Within Systems or Portions of Systems Other Than RHR, ECC, and CHR Systems,'' 1989 Addenda through the 1996 Addenda, licensees shall define the Class 2 piping subject to volumetric and surface examination, and submit this information for approval by the NRC staff pursuant to § 50.55a(a)(3) prior to implementation.

(xv) Class 1 piping volumetric examination. When performing weld examinations of High Pressure Safety Injection Systems, as required by Table IWB–2500–1, Examination Category B–J, Item Numbers B9.20, B9.21, and B9.22, all licensees of pressurized water reactor facilities shall perform volumetric examination of the Class 1 portion of the system after [insert 6 months from the date of the final rule].

(xvi) Flaws in Class 3 piping moderate energy (200 xF, 275 psig) piping. Licensees may use the provisions of Code Case N–513, ''Evaluation Criteria for Temporary Acceptance of Flaws in Class 3 Piping,'' Rev 0, and Code Case N–523–1, ''Mechanical Clamping Devices for Class 2 and 3 Piping.'' Licensees choosing to apply Code Case N–523–1 shall apply all of its provisions. Licensees choosing to apply Code Case N–513 shall apply all of its provisions subject to the following:

(A) When implementing Code Case N–513, the specific safety factors in paragraph 4.0 must be satisfied.

(B) Code Case N–513 shall not be applied to:

(*1*) Components other than pipe and tube, such as pumps, valves, expansion joints, and heat exchangers;

(*2*) The discovery and repair of flaws or deficiencies remaining from original construction;

(*3*) Leakage through a flange gasket;

(*4*) Threaded connections employing nonstructural seal welds for leakage prevention (through seal weld leakage is not a structural flaw, thread integrity must be maintained); and

(*5*) Degraded socket welds.

(xvii) Appendix VIII personnel qualification. All personnel qualified for performing ultrasonic examinations in accordance with Appendix VIII shall receive 40 hours of annual training that includes laboratory work and examination of flawed specimens.

(xviii) Appendix VIII specimen set cracks. All flaws in the specimen sets used for performance demonstration for piping, vessels, and nozzles shall be cracks.

(xix) Appendix VIII specimen set microstructure. All specimens for single-side tests shall contain microstructures of the type found in components to be inspected, and flaws with non-optimum characteristics consistent with field experience that provide realistic challenges to the UT techniques.

(xx) Reconciliation of Quality Requirements. The following limitations apply when implementing Section XI, IWA–4200, 1995 Addenda through the 1996 Addenda:

(A) Licensees shall not apply IWA–4200, of Section XI, 1995 Addenda through the 1996 Addenda, for reconciliation of the administrative requirements for replacement items, and shall reconcile the administrative requirements with the original Construction Code and the Owner's requirements as required by the 1995 Edition.

(B) Licensees shall not apply the definition of Construction Code in IWA–9000, ''Glossary,'' 1993 Addenda through the 1996 Addenda, and shall apply the definition of Construction Code in IWA–9000, 1992 Edition.

(3) As used in this section, references to the OM Code refer to the ASME Code for Operation and Maintenance of Nuclear Power Plants, and include addenda through the 1996 Addenda and editions through the 1995 Edition subject to the following limitations and modifications:

(i) *Quality Assurance.* When applying editions and addenda of the OM Code, 1990 and later, the requirements of NQA–1, ''Quality Assurance Requirements for Nuclear Facilities,'' 1979 Addenda, are acceptable as permitted by ISTA 1.4 of the OM Code, provided the licensee utilizes its 10 CFR Part 50, Appendix B, quality assurance program, in conjunction with the OM Code requirements. Changes to licensee's quality assurance program shall be made in accordance with 10 CFR 50.54(a). In addition, where NQA–1 and the OM Code do not address the commitments contained in the licensee's Appendix B quality assurance program description, such commitments shall be applied to OM Code activities.

(ii) Stroke time testing. Licensees shall comply with the provisions on stroke time testing in OM Code ISTC 4.2, 1995 Edition with the 1996 Addenda, and the programs developed under their licensing commitments for demonstrating design basis capability of motor-operated valves.

(iii) Code Case OMN–1. As an alternative to § 50.55a(b)(3)(ii), licensees may use Code Case OMN–1, ''Alternative Rules for Preservice and Inservice Testing of Certain Electric Operated Valve Assemblies in LWR Power Plants,'' Rev. 0, 1995 Edition with the 1996 Addenda, in conjunction with ISTC 4.3, 1995 Edition with the 1996 Addenda. Licensees choosing to apply the Code case shall apply all of its provisions.

(A) The adequacy of the test interval for each valve shall be evaluated and adjusted as necessary but not later than five years or three refueling outages (whichever is longer) from initial implementation of ASME Code Case OMN–1.

(B) [Reserved]

(iv) Appendix II. The following modifications apply when implementing Appendix II, ''Check Valve Condition Monitoring Program,'' of the OM Code, 1995 Edition with the 1996 Addenda:

(A) Valve opening and closing functions must be demonstrated when flow testing or examination methods (nonintrusive, or disassembly and inspection) are used;

(B) The initial interval for tests and associated examinations shall not exceed two fuel cycles or 3 years, whichever is longer; any extension of this interval shall not exceed one fuel cycle per extension with the maximum interval not to exceed 10 years; trending and evaluation of existing data shall be used to reduce or extend time the interval between tests.

(C) If the Appendix II condition monitoring program is discontinued, then the requirements of ISTC 4.5.1 through 4.5.4 shall be implemented.

(v) Subsection ISTD. Licensees may use Subsection ISTD, OM Code, 1995 Edition with the 1996 Addenda, by making a change to their technical specifications in accordance with applicable NRC requirements. Licensees choosing to apply the subsection shall apply all of its provisions.

(c) * * *

(3) The Code Edition, Addenda, and optional Code Cases to be applied to components of the reactor coolant pressure boundary must be determined by the provisions of paragraph NCA–1140, Subsection NCA of Section III of the ASME Boiler and Pressure Vessel Code, but:

(i) The edition and addenda applied to a component must be those which are incorporated by reference in paragraph (b)(1) of this section, and, in case of conflict between paragraph (b)(1) of this section and paragraph NCA–1140, the latest edition and addenda incorporated by reference in paragraph (b)(1) of this section shall be applied,

(ii) The ASME Code provisions applied to the pressure vessel may be dated no earlier than the Summer 1972 Addenda of the 1971 edition,

(iii) The ASME Code provisions applied to piping, pumps, and valves may be dated no earlier than the Winter 1972 Addenda of the 1971 edition, and

* * * * *

(d) * * *

(2) The Code Edition, Addenda, and optional Code Cases6 to be applied to the systems and components identified in paragraph (d)(1) of this section must be determined by the rules of paragraph NCA–1140, Subsection NCA of Section III of the ASME Boiler Vessel and Pressure Code, but:

(i) The edition and addenda must be those which are incorporated by reference in paragraph (b)(1) of this section, and, in case of conflict between paragraph (b)(1) of this section and paragraph NCA–1140, the latest edition and addenda incorporated by reference in paragraph (b)(1) of this section shall be applied,

(ii) The ASME Code provisions applied to the systems and components may be dated no earlier than the 1980 Edition, and

(iii) The ASME Code Cases6 must have been determined suitable for use by the NRC.

(e) * * *

(2) The Code Edition, Addenda, and optional Code Cases6 to be applied to the systems and components identified in paragraph (e)(1) of this section must be determined by the rules of paragraph NCA–1140, Subsection NCA of Section III of the ASME Boiler and Pressure Vessel Code, but:

(i) The edition and addenda must be those which are incorporated by reference in paragraph (b)(1) of this section, and, in case of conflict between paragraph (b)(1) of this section and paragraph NCA–1140, the latest edition and addenda incorporated by reference in paragraph (b)(1) of this section shall be applied,

(ii) The ASME Code provisions applied to the systems and components may be dated no earlier than the 1980 Edition, and

(iii) The ASME Code Cases must have been determined suitable for use by the NRC.

(f) Inservice testing requirements. Requirements for inservice inspection of Class 1, Class 2, Class 3, Class MC, and Class CC components (including their supports) are located in § 50.55a(g).

(1) For a boiling or pressurized water-cooled nuclear power facility whose construction permit was issued prior to January 1, 1971, pumps and valves must meet the test requirements of paragraphs (f)(4) and (f)(5) of this section to the extent practical. Pumps and valves which are part of the reactor coolant pressure boundary must meet the requirements applicable to components which are classified as ASME Code Class 1. Other pumps and valves in steam, water, air, and liquid-radioactive-waste systems that perform a function to shut down the reactor or maintain the reactor in a safe shutdown condition, mitigate the consequences of an accident, or provide overpressure protection for such systems (in meeting the requirements of the 1986 Edition, or later, of the Boiler and Pressure Vessel or OM Code), must meet the test requirements applicable to components which are classified as ASME Code Class 2 or Class 3.

(2) For a boiling or pressurized water-cooled nuclear power facility whose construction permit was issued on or after January 1, 1974, pumps and valves which are classified as ASME Code Class 1 and Class 2 must be designed and be provided with access to enable the performance of inservice tests for operational readiness set forth in editions of Section XI of the ASME Boiler and Pressure Vessel Code and Addenda6 in effect 6 months prior to the date of issuance of the construction permit. The pumps and valves may meet the requirements set forth in subsequent editions of this code and addenda which are incorporated by reference in paragraph (b) of this section, subject to limitations and modifications listed therein.

(3) * * *

(iii)(A) Pumps and valves, in facilities whose construction permit was issued before [insert effective date of the final rule], which are classified as ASME Code Class 1 must be designed and be provided with access to enable the performance of inservice testing of the pumps and valves for assessing operational readiness set forth in Section XI of editions of the ASME Boiler and Pressure Vessel Code and Addenda6 applied to the construction of the particular pump or valve or the Summer 1973 Addenda, whichever is later.

(B) Pumps and valves, in facilities whose construction permit is issued on or after [insert effective date of the final rule], which are classified as ASME Code Class 1 must be designed and be provided with access to enable the performance of inservice testing of the pumps and valves for assessing

operational readiness set forth in editions and addenda of the ASME OM Code referenced in paragraph (b)(3) of this section at the time the construction permit is issued.

(iv)(A) Pumps and valves, in facilities whose construction permit was issued before [insert effective date of rule], which are classified as ASME Code Class 2 and Class 3 must be designed and be provided with access to enable the performance of inservice testing of the pumps and valves for assessing operational readiness set forth in Section XI of editions of the ASME Boiler and Pressure Vessel Code and Addenda6 applied to the construction of the particular pump or valve or the Summer 1973 Addenda, whichever is later.

(B) Pumps and valves, in facilities whose construction permit is issued on or after [insert effective date of the final rule], which are classified as ASME Code Class 2 and 3 must be designed and be provided with access to enable the performance of inservice testing of the pumps and valves for assessing operational readiness set forth in editions and addenda of the ASME OM Code referenced in paragraph (b)(3) of this section at the time the construction permit is issued.

* * * * *

(4) Throughout the service life of a boiling or pressurized water-cooled nuclear power facility, pumps and valves which are classified as ASME Code Class 1, Class 2 and Class 3 must meet the inservice test requirements, except design and access provisions, set forth in the ASME OM Code and addenda that become effective subsequent to editions and addenda specified in paragraphs (f)(2) and (f)(3) of this section and that are incorporated by reference in paragraph (b) of this section, to the extent practical within the limitations of design, geometry and materials of construction of the components.

* * * * *

(g) * * *

(1) For a boiling or pressurized water-cooled nuclear power facility whose construction permit was issued before January 1, 1971, components (including supports) must meet the requirements of paragraphs (g)(4) and (g)(5) of this section to the extent practical. Components which are part of the reactor coolant pressure boundary and their supports must meet the requirements applicable to components which are classified as ASME Code Class 1. Other pressure vessels, piping, pumps and valves, and their supports in steam, water, air, and liquid-radioactive-waste systems that provide pressure boundary integrity for systems that perform a function to shut down the reactor or maintain the reactor in a safe shutdown condition, or mitigate the consequences of an accident, must meet the requirements applicable to components which are classified as ASME Code Class 2 or Class 3.

* * * * *

(3) * * *

(i) Components (including supports) which are classified as ASME Code Class 1 must be designed and be provided with access to enable the performance of inservice examination of such components and must meet the preservice examination requirements set forth in Section XI of editions of the ASME Boiler and Pressure Vessel Code and Addenda6 applied to the construction of the particular component.

* * * * *

(4) Throughout the service life of a boiling or pressurized water-cooled nuclear power facility, components (including supports) which are classified as ASME Code Class 1, Class 2 and Class 3 must meet the requirements, except design and access provisions and preservice examination requirements, set forth in Section Xl of editions of the ASME Boiler and Pressure Vessel Code and Addenda that become effective subsequent to editions specified in paragraphs (g)(2) and (g)(3) of this section and that are incorporated by reference in paragraph (b) of this section, to the extent practical within the limitations of design, geometry and materials of construction of the components. Components which are classified as Class MC pressure retaining components and their integral attachments, and components which are classified as Class CC pressure retaining components and their integral attachments must meet the requirements, except design and access provisions and preservice examination requirements, set forth in Section XI of the ASME Boiler and Pressure Vessel Code and Addenda that are incorporated by reference in paragraph (b) of this section, subject to the limitation listed in paragraph (b)(2)(vi) and the modifications listed paragraph (b)(2)(ix) and (b)(2)(x) of this section, to the extent practical within the limitation of design, geometry and materials of construction of the components.

* * * * *

(iv) [Reserved]

(6) * * *

(ii) * * *

(A)(*1*) All previously granted reliefs under § 50.55a to licensees for the extent of volumetric examination of reactor vessel shell welds specified in Item BI.10 of Examination Category B–A, ''Pressure Retaining Welds in Reactor Vessel,'' in Table IWB–2500–1 of Subsection IWB in applicable edition and addenda of Section XI, Division 1, of the ASME Boiler and Pressure Vessel Code, during the inservice inspection interval in effect on September 8, 1992 are hereby revoked, subject to the specific modification in § 50.55a(g)(6)(ii)(A)(*3*)(*iv*) for licensees that defer the augmented examination in accordance with § 50.55a(g)(6)(ii)(A)(*3*).

(*2*) All licensees shall augment their reactor vessel examination by implementing once, as part of the inservice inspection interval in effect on September 8, 1992, the examination requirements for reactor vessel shell welds specified in Item 81.10 of Examination Category B–A, ''Pressure Retaining Welds in Reactor Vessel,'' in Table IWB–2500–1 of Subsection IWB of the 1989 Edition of Section XI, Division 1, of the ASME Boiler and Pressure Vessel Code, subject to the conditions specified in § 50.55a(g)(6)(ii)(A)(*3*) and (*4*). The augmented examination, when not deferred in accordance with the provisions of § 50.55a(g)(6)(ii)(A)(*3*), shall be performed in accordance with the related procedures specified in the Section XI edition and addenda applicable to the inservice inspection interval in effect on September 8, 1992, and may be used as a substitute for the reactor vessel shell weld examination scheduled for implementation during the inservice inspection interval in effect on September 8, 1992. For the purpose of this augmented examination, ''essentially 100%'' as used in Table IWB–2500–1 means more than 90 percent of the examination volume of each weld, where the reduction in coverage is due to interference by another component, or part geometry.

* * * * *

(*6*) Augmented examinations of reactor vessel shell welds that are performed in accordance with § 50. 55a(g)(6)(ii)(A) after [insert 6 months from the date of the final rule] must be performed in accordance with § 50.55a(g)(6)(ii)(C).

* * * * *

(C) *Application of Appendix VIII to Section Xl Examinations.*

(*1*) All reactor vessel (including nozzles) ultrasonic examinations, all piping ultrasonic examinations, and all bolting ultrasonic examinations performed after *insert 6 months from the date of the final rule* must be

performed in accordance with Appendix VIII of Section Xl, Division 1, 1995, Edition with the 1996 Addenda of the ASME Boiler and Pressure Vessel Code.

(*2*) [Reserved]

* * * * *

[5] For ASME Code Editions and Addenda issued prior to the Winter 1977 Addenda, the Code Edition and Addenda applicable to the component is governed by the order or contract date for the component, not the contract date for the nuclear energy system. For the Winter 1977 addenda and subsequent editions and addenda the method for determining the applicable Code editions and addenda is contained in Paragraph NCA–1140 of Section III of the ASME Code.

* * * * *

[7] For purposes of this regulation the proposed IEEE–279 became ''in effect'' on August 30, 1968, and the revised issue IEEE–279–1971 became ''in effect'' on June 3, 1971. Copies may be obtained from the Institute of Electrical and Electronics Engineers, United Engineering Center, 345 East 47th St., New York, NY 10017. Copies are available for inspection at the NRC Library, Two White Flint North, 11545, Rockville Pike, Rockville, Maryland 20852–2738.

* * * * *

Dated at Rockville, MD this 27th day of October 1997.

For the Nuclear Regulatory Commission.

L. Joseph Callan,

Executive Director for Operations.

[FR Doc. 97–31588 Filed 12–2–97; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50 and 70

RIN 3150–AF87

Criticality Accident Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations to provide light-water nuclear power reactor licensees with greater flexibility in meeting the requirement that licensees authorized to possess more than a small amount of special nuclear material (SNM) maintain a criticality monitoring system in each area where the material is handled, used, or stored. This action is taken as a result of the experience gained in processing and evaluating a number of exemption requests from power reactor licensees and NRC's safety assessments in response to these requests that concluded that the likelihood of criticality was negligible.

DATES: Comments on the proposed rule must be received on or before January 2, 1998.

ADDRESSES: Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudication Staff. Hand deliver comments to 11555 Rockville Pike, Maryland, between 7:45 am and 4:15 pm on Federal workdays.

Copies of any comments received may be examined at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC.

For information on submitting comments electronically, see the discussion under Electronic Access in the Supplementary Information section.

FOR FURTHER INFORMATION CONTACT: Stan Turel, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6234, e-mail spt@nrc.gov.

SUPPLEMENTARY INFORMATION: For additional information see the Direct Final Rule published in the rules section of this **Federal Register**.

Procedural Background

Because NRC considers this action noncontroversial and routine, we are publishing this proposed rule concurrently as a direct final rule. The direct final rule will become effective on February 17, 1998. However, if the NRC receives significant adverse comments on the direct final rule by January 2, 1998, then the NRC will publish a document that withdraws the direct final rule. If the direct final rule is withdrawn, the NRC will address in a Final Rule the comments received in response to the proposed revisions in a subsequent final rule. Absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period for this action in the event the direct final rule is withdrawn.

Electronic Access

You may also provide comments via the NRC's interactive rulemaking web site 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 site, contact Ms. Carol Gallagher, (301) 415–6215; e-mail CAG@nrc.gov.

List of Subjects

10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire prevention, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 70

Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, the National Environmental Policy Act of 1969, as amended, and 5 U.S.C. 553, the NRC is considering adopting the following amendments to 10 CFR Parts 50 and 70.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for 10 CFR Part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended 1244, 1246, (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951, as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851). Sections 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. Section 50.68 is added under the center heading ''Issuance, Limitations, and Conditions of Licenses and Construction Permits'' to read as follows:

§ 50.68 Criticality accident requirements.

(a) Each holder of a construction permit or operating license for a nuclear power reactor issued under this part, or a combined license for a nuclear power reactor issued under part 52 of this chapter shall comply with either 10 CFR 70.24 of this chapter or requirements in paragraph (b).

(b) Each licensee shall comply with the following requirements in lieu of maintaining a monitoring system capable of detecting a criticality as described in 10 CFR 70.24:

(1) Plant procedures may not permit handling and transportation at any one time of more fuel assemblies than have been determined to be safely subcritical under the most adverse moderation conditions feasible by unborated water.

(2) The estimated ratio of neutron production to neutron absorption and leakage (k-effective) of the fresh fuel in the fresh fuel storage racks shall be calculated assuming the racks are loaded with fuel of the maximum permissible U–235 enrichment and flooded with pure water and must not exceed 0.95, at a 95 percent probability, 95 percent confidence level.

(3) If optimum moderation of fresh fuel in the fresh fuel storage racks occurs when the racks are assumed to be loaded with fuel of the maximum permissible U–235 enrichment and filled with low-density hydrogenous fluid, the k-effective corresponding to this optimum moderation must not exceed 0.98, at a 95 percent probability, 95 percent confidence level.

(4) If no credit for soluble boron is taken, the k-effective of the spent fuel storage racks loaded with fuel of the maximum permissible U–235 enrichment must not exceed 0.95, at a 95 percent probability, 95 percent confidence level, if flooded with pure water. If credit is taken for soluble boron, the k-effective of the spent fuel storage racks loaded with fuel of the maximum permissible U–235 enrichment must not exceed 0.95, at a 95 percent probability, 95 percent confidence level, if flooded with borated water, and the k-effective must remain below 1.0 (subcritical), at a 95 percent probability, 95 percent confidence level, if flooded with pure water.

(5) The quantity of SNM, other than nuclear fuel stored on site, is less than the quantity necessary for a critical mass.

(6) Radiation monitors, as required by GDC 63, are provided in storage and associated handling areas when fuel is present to detect excessive radiation levels and to initiate appropriate safety actions.

(7) The maximum nominal U–235 enrichment of the fresh fuel assemblies is limited to no greater than five (5.0) percent by weight.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

1. The authority citation for 10 CFR Part 70 continues to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282, 2297f); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246, (42 U.S.C. 5841, 5842, 5845, 5846).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93–377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234).

Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

2. In § 70.24, paragraph (d) is revised to read as follows:

§ 70.24 Criticality accident requirements.

* * * * *

(d) The requirements in paragraph (a) through (c) of this section do not apply to holders of a construction permit or operating license for a nuclear power reactor issued pursuant to part 50 of this chapter, or combined licenses issued under part 52 of this chapter, if the holders comply with the requirements of paragraph (b) of 10 CFR 50.68 of this chapter.

Dated at Rockville, Maryland this 14th day of November, 1997.

For the Nuclear Regulatory Commission.

L. Joseph Callan,

Executive Director for Operations.

[FR Doc. 97–31732 Filed 12–2–97; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 96–SW–22–AD]

Airworthiness Directives; Eurocopter France (Formerly Aerospatiale, Society Nationale Industrielle, Sud Aviation) Model SA–365N, SA–365N1, AS–365N2, and SA–366G1 Helicopters

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 Eurocopter France (formerly Aerospatiale, Society Nationale Industrielle, Sud Aviation) Model SA–365N, SA–365N1, AS-365N2, and SA–366G1 helicopters. This proposal would require an inspection of the transmission deck for cracks; repair of any cracked transmission decks; and replacement of the transmission deck support beams (support beams) with redesigned support beams. This proposal is prompted by several reports of cracks in the transmission deck and support beams. The actions specified by the proposed AD are intended to detect cracks that reduce the strength of the main gearbox strut attachment and could result in failure of the main gearbox mounting, and subsequent loss of control of the helicopter.

DATES: Comments must be received by February 2, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 96–SW–22–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (972) 641–3460, fax (972) 641–3527. This information may be examined at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Mathias, Aerospace Engineer, FAA, Rotorcraft Directorate, ASW–111, 2601 Meacham Blvd., Fort Worth, Texas

76137, telephone (817) 222–5123, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

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

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 96–SW–22–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Discussion

The Direction Generale De L'Aviation Civile (DGAC), which is the airworthiness authority for France recently notified the FAA that an unsafe condition may exist on Eurocopter France SA–365N, SA–365N1, AS–365N2, and SA–366G1 helicopters. The DGAC advises that cracks were discovered in one of the two support beams under the transmission deck and in the transmission deck itself.

Eurocopter France has issued Telex Service No. 10011, dated February 24, 1995, which specifies checks for cracks in the transmission deck and transmission deck support beams, to be accomplished within 50 hours following receipt of the Telex Service. The Telex Service applies to affected aircraft that have 4,000 or more flying hours. The DGAC classified this service bulletin as mandatory and issued AD 95–067–038(B), and AD 95–068–017(B), both dated April 12, 1995, in order to assure the continued airworthiness of these helicopters in France.

Subsequently, Eurocopter France issued Eurocopter Service Bulletin 05.00.36 on November 14, 1995. Eurocopter Service Bulletin 05.00.36 recommends replacement of the current transmission support beams, part numbers (P/N) 365A21–3365–49 and 365A21–3365–CY with redesigned support beams P/N 365A21–3365–JE–01 and 365A21–3365–JF–01, at major maintenance intervals specified by the service bulletin.

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

Since an unsafe condition has been identified that is likely to exist or develop on other Eurocopter France Model SA–365N, SA–365N1, AS–365N2, and SA–366G1 helicopters of the same type design registered in the United States, the proposed AD would require inspections of the transmission deck, repair of any cracks that are found, and replacement of the support beams, P/N 365A21–3365–49 and 365A21–3365–CY, with redesigned support beams, P/N 365A21–3365–JE–01 and 365A21–3365–JF–01. For Model AS–365N2 helicopters, the inspections must be accomplished before or upon the accumulation of 2,000 hours time-in-service (TIS), or within 50 hours TIS after the effective date of this AD, whichever occurs later. For Model SA–365N, SA–365N1, and SA–366G1 helicopters, the inspections must be accomplished upon the accumulation of 4,000 hours TIS, or within 50 hours TIS after the effective date of this AD, whichever occurs later. The support beams must be replaced with reinforced beams whether or not cracks are found in the transmission deck or the currently installed support beams. If cracks are found in the transmission deck; the repairs must be accomplished.

After any cracks that are found in the transmission deck have been repaired and after replacing the support beams, clean, prime, and paint the affected areas of the transmission deck and the replacement support beams in accordance with the referenced service information.

The FAA estimates that 137 helicopters of U.S. registry would be affected by this proposed AD, that it would take approximately 50 work hours per helicopter to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $5,000 per helicopter. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $1,096,000.

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 a new airworthiness directive to read as follows:

Eurocopter France (Formerly Aerospatiale, Society Nationale Industrielle, Sud Aviation): Docket No. 96–SW–22–AD.

Applicability: Model SA–365N, SA–365N1, AS–365N2, and SA–366G1 helicopters, certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To detect cracks that reduce the strength of the main gearbox strut attachment and could result in failure of the main gearbox mounting, and subsequent loss of control of the helicopter, accomplish the following:

(a) For Model SA–365N, SA–365N1, and SA–366G1 helicopters, on or before attaining 4,000 hours time-in-service (TIS), or within 50 hours TIS after the effective date of this AD, whichever occurs later; and for Model SA–365N2 helicopters, on or before attaining 2,000 hour TIS, or within 50 hours TIS after the effective date of this AD, whichever occurs later; perform the following:

(1) Inspect the transmission deck for cracks using a dye-penetrant inspection method, in accordance with paragraph BB of Eurocopter France Telex Service No. 10011, dated February 24, 1995. If a crack is found in the transmission deck, repair prior to further flight.

Note 2: A FAA-approved repair solution can be initiated by contacting the American Eurocopter Technical Support Department, ATTN: Manager, telephone: 972–641–3460, fax: 972–641–3527.

(2) Replace the currently installed transmission deck support beams, part numbers (P/N) 365A21–3365–49 and 365A21–3365–CY, with reinforced transmission deck support beams, P/N 365A21–3365–JE–01 and 365A21–3365–JF–01, in accordance with the Accomplishment Instructions in Eurocopter France Service Bulletin No. 05.00.36, Rev. 1, dated December 16, 1996.

(b) After completion of paragraphs (a)(1) and (a)(2) of this AD, clean, prime and paint the affected areas of the transmission deck and the reinforced support beams in accordance with paragraph BB 2A of Eurocopter France Telex Service No. 10011, dated February 24, 1995.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Rotorcraft Standards Staff, FAA, Rotorcraft Directorate. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Rotorcraft Certification Office.

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

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

Note 4: The subject of this AD is addressed in Direction Generale De L'Aviation Civile (France) AD 95–068–017(B) and AD 95–067–038(B), both dated April 12, 1995.

Issued in Fort Worth, Texas, on November 24, 1997.

Eric Bries,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 97–31614 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–CE–72–AD]

RIN 2120–AA64

Airworthiness Directives; Raytheon Aircraft Company Models B200, B200C, and B200T Airplanes

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 Raytheon Aircraft Company (Raytheon) Models B200, B200C, and B200T airplanes (formerly referred to as Beech Models B200, B200C, and B200T airplanes). The proposed AD would require replacing the wiring for the engine fire detector system with fire resistant wiring. The proposed AD is the result of the discovery during aircraft production of the potential for the existing engine fire detector system wiring on the affected airplanes to fail because of high heat and/or fire. The actions specified by the proposed AD are intended to prevent failure of the engine fire detector system if high heat and/or fire stopped an electrical signal between the engine fire detectors and the engine fire warning annunciator lights located in the cockpit, which could result in passenger injury in the event of an airplane fire.

DATES: Comments must be received on or before February 4, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–CE–72–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 the Raytheon Aircraft Company, P.O. Box 85, Wichita, Kansas 67201–0085. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Mr. Randy Griffith, Aerospace Engineer, Wichita Aircraft Certification Office, FAA, 1801 Airport Road, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946–4145; facsimile (316) 946–4407.

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. 97–CE–72–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–72–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

Raytheon recently advised the FAA that an unsafe condition could exist on certain Raytheon Models B200, B200C, and B200T airplanes. Raytheon reports that the current wiring on a certain engine fire protection system could fail under certain conditions. When the engine fire detector system was changed from an optical system to a heat sensing system, the engine fire detector wiring was not furnished with the engine fire detector. The wiring for these new systems consisted of four wires that were routed from the engine firewall connector to the engine fire detector connector as part of each engine's wire harness assembly.

In May 1997, Raytheon issued Engineering Change Record 9896 and Engine Fire Detector Harness Kit, part number 101–3208–1, which specifies the design and provides the procedures for replacing the existing engine fire protector system wiring with fire resistant wiring.

Aircraft equipped with the heat sensing fire protector system before this change order and modification were developed utilize non-fire resistant wiring. This condition, if not corrected, could result in failure of the engine fire detector system if high heat and/or fire stopped an electrical signal between the engine fire detectors and the engine fire warning annunciator lights located in the cockpit, which could result in passenger injury in the event of an airplane fire.

Relevant Service Information

Raytheon has issued Mandatory Service Bulletin No. 2701, Issued: May, 1997, which specifies the incorporation of Engine Fire Detector Harness Kit, part number 101–3208–1. This kit consists of the parts and instructions to replace the wiring for the engine fire detector system with fire resistant wiring.

The FAA's Determination

After examining the circumstances and reviewing all available information related to the incidents described above, including the service information previously referenced, the FAA has determined that AD action should be taken to prevent failure of the engine fire detector system if high heat and/or fire stopped an electrical signal between the engine fire detectors and the engine fire warning annunciator lights located in the cockpit, which could result in passenger injury in the event of an airplane fire.

Explanation of the Provisions of the Proposed AD

Since an unsafe condition has been identified that is likely to exist or develop in other Raytheon Models B200, B200C, and B200T airplanes (formerly referred to as Beech Models B200, B200C, and B200T airplanes) of the same type design, the FAA is proposing an AD. The proposed AD would require replacing the wiring for the engine fire detector system with fire resistant wiring by incorporating Engine Fire Detector Harness Kit, part number 101–3208–1. Accomplishment of the proposed modifications would be required in accordance with the service information previously referenced.

Cost Impact

The FAA estimates that 77 airplanes in the U.S. registry would be affected by the proposed AD, that it would take approximately 4 workhours per airplane to accomplish the proposed modification, and that the average labor rate is approximately $60 an hour. Parts will be provided by the manufacturer at no cost to the owners/operators of the affected airplanes. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $18,480, or $240 per airplane. These figures are based on the presumption that no owner/operator of the affected airplanes has incorporated the proposed modification.

Raytheon has informed the FAA that approximately 40 kits have been shipped from the Raytheon Aircraft Authorized Service Center. Presuming that each of the 40 kits is incorporated on an affected airplane, this would reduce the cost impact of the proposed AD by $9,600 from $18,480 to $8,880.

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:

Raytheon Aircraft Company: Docket No. 97–CE–72–AD.

Applicability: The following model and serial number airplanes, certificated in any category:

Model	Serial Nos.
B200	BB–1439, BB–1444 through BB–1447, BB–1449, BB–1450, B–1452, BB–1453, BB–1455, BB–1456, and BB–1458 through BB–1512;
B200C	BL–139 and BL–140;
B200C (C–12R)	BW–1 through BW–5; and
B200T	BT–35 through BT–38.

Note 1: This AD applies to each airplane 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 airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an

alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required within the next 200 hours time-in-service after the effective date of this AD, unless already accomplished.

To prevent failure of the engine fire detector system if high heat and/or fire stopped an electrical signal between the engine fire detectors and the engine fire warning annunciator lights located in the cockpit, which could result in passenger injury in the event of an airplane fire, accomplish the following:

(a) Replace the existing engine fire protection system wiring with fire resistant wiring by incorporating Engine Fire Detector Harness Kit, part number 101–3208–1. Accomplish this replacement in accordance with the instructions included with the above kit, as referenced in Raytheon Mandatory Service Bulletin No. 2701, Issued: May, 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 airplane 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, Wichita Aircraft Certification Office (ACO), 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Wichita ACO.

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

(d) All persons affected by this directive may obtain copies of the document referred to herein upon request to the Raytheon Aircraft Company, P.O. Box 85, Wichita, Kansas 67201–0085; or may examine this document at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Issued in Kansas City, Missouri, on November 26, 1997.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–31681 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 97–ACE–14]

Proposed Revocation of Class E Airspace; Minneapolis, KS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to remove the Class E airspace area at Minneapolis City County Airport, Minneapolis, KS. The VHF Omnidirectional Range/Distance Measuring Equipment (VOR/DME) Standard Instrument Approach Procedure (SIAP) to Runway (RWY) 34 was canceled on August 14, 1997. This was the only SIAP to Minneapolis City County Airport and was canceled due to lack of evidence as to the need by the community and absence of utilization by other users in the local area. In addition, there is not an Airport Layout Plan (ALP) or an engineer's drawing available. The Director, Division of Aviation for Kansas, concurred with canceling the SIAP. The intended effect of this rule is to remove Class E airspace extending upward from 700 feet above the surface for Minneapolis City County Airport, Minneapolis, KS.

DATES: Comments must be received on or before January 15, 1998.

ADDRESSES: Send comments on the proposal in triplicate to: Manager, Airspace Branch, ACE–520, Federal Aviation Administration, Airspace Docket No. 97–ACE–14, 601 East 12th Street, Kansas City, MO 64106.

The official docket may be examined in the Office of the Regional Counsel for the Central Region at the same address between 9:00 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

An informal docket may also be examined during normal business hours in the office of the Manager, Airspace Branch, Air Traffic Division, at the address listed above.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Airspace Branch, ACE–520C, Federal Aviation Administration, 601 East 12th Street, Kansas City, Missouri 64106; telephone (816) 426–3408.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 97–ACE–14.'' The postcard will be date/time stamped and returned to the commenter. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NRPM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA–230, 800 Independence Avenue, SW, Washington, DC 20591, or by calling (202) 267–3484. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2A, which describes the procedures.

The Proposal

The FAA proposes to amend 14 CFR part 71 (part 71) to remove the Class E airspace extending upward from 700 feet above the surface at the Minneapolis City County Airport, Minneapolis, KS. The area will be removed from appropriate aeronautical charts. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9E, dated September 16, 1997, and effective September 17, 1997, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this

document will be removed subsequently from the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation (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) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES, AND REPORTING POINTS

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9E, Airspace Designations and Reporting Points, dated September 10, 1997, and effective September 16, 1997, is amended as follows:

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

* * * * *

ACE KS E5 Minneapolis, KS [Removed]

* * * * *

Issued in Kansas City, MO, on October 7, 1997.

Christopher R. Blum,

Acting Manager, Air Traffic Division, Central Region.

[FR Doc. 97–31705 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 97–AAL–11]

Proposed Revocation of Class E Airspace; Wrangell, AK, and Petersburg, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to revoke the Class E surface area airspace at Wrangell, AK, and Petersburg, AK. Plans to develop Required Navigation Performance (RNP) instrument approach procedures at these airports have been cancelled or delayed indefinitely. Consequently, the surface areas at Wrangell Airport and Petersburg James A Johnson Airport are no longer necessary for air traffic operations. Adoption of this proposal would result in the affected airspace reverting to Class G.

DATES: Comments must be received on or before January 20, 1998.

ADDRESSES: Send comments on this proposal in triplicate to: Manager, Operations Branch, AAL–530, Docket No. 97–AAL–11, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587.

The official docket may be examined in the Office of the Assistant Chief Counsel for the Alaskan Region at the same address.

An informal docket may also be examined during normal business hours in the Office of the Manager, Operations Branch, Air Traffic Division, at the address shown above and on the Internet at Alaskan Region's homepage at http://www.alaska.faa.gov/at or at address http://162.58.28.41/at.

FOR FURTHER INFORMATION CONTACT: Robert van Haastert, Operations Branch, AAL–538, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number: (907) 271–5863; email: Robert.van.Haastert@faa.dot.gov; Internet: http://www.alaska.faa.gov/at or at http://162.58.28.41/at.

SUPPLEMENTARY INFORMATION:

Background

In May 1996, rulemaking actions were initiated to create surface area airspace at the Wrangell Airport and the Petersburg James A Johnson Airport to support new RNP instrument approach procedures. Alaska Airlines planned to develop RNP approaches to runways 27 and 9 at Wrangell Airport, and for runways 4 and 22 at Petersburg James A Johnson Airport. These new RNP approaches were to be designed with minimums below 700 feet Above Ground Level (AGL). The establishment of surface areas at both airports was requested and the Notice of Proposed Rulemaking (NPRM) was published June 24, 1996 (61 FR 32372). No comments to the NPRM were received and the Final Rule was published October 16, 1996 (61 FR 53844), establishing new surface areas for Wrangell Airport and Petersburg James A Johnson Airport. After the Juneau Sectional Aeronautical Chart, 37th edition, was published on April 24, 1997, the FAA received one Congressional Inquiry and additional letters of concern and objections to the surface areas at both airports. Letters have been received from Sunrise Aviation INC., Nordic Air, Temsco Helicopters INC., Pacific Wing INC., Taquan Air, and Hawkair Aviation Services LTD objecting to the establishment of these surface areas without an apparent purpose and usage. Alaska Airlines has indicated to the FAA their RNP instrument approach development for Wrangell Airport and Petersburg James A Johnson Airport has been delayed and development of new RNP approaches is not scheduled in the immediate future.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 97–AAL–11.'' The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light

of comments received. All comments submitted will be available for examination in the Operations Branch, Air Traffic Division, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Operations Branch, AAL–530, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2A, which describes the application procedure.

The Proposal

The FAA is considering an amendment to 14 CFR part 71 to remove the Class E airspace at Wrangell, AK, and Petersburg, AK. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as surface areas for an airport are published in paragraph 6002 of FAA Order 7400.9E, *Airspace Designations and Reporting Points*, dated September 10, 1997, and effective September 16, 1997, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be removed subsequently from the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(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) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9E, *Airspace Designations and Reporting Points*, dated September 10, 1997, and effective September 16, 1997, is to be amended as follows:

Paragraph 6002 The Class E airspace areas listed below are designated as a surface area for an airport

* * * * *

AAL AK E2 Petersburg, AK [Removed]

* * * * *

AAL AK E2 Wrangell, AK [Removed]

* * * * *

Issued in Anchorage, AK, on November 5, 1997.

Willis C. Nelson,

Manager, Air Traffic Division, Alaskan Region.

[FR Doc. 97–31697 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[FRL–5931–4]

Petition by the Commonwealth of the Northern Mariana Islands for Exemption From Anti-Dumping and Detergent Additization Requirements for Conventional Gasoline

AGENCY: Environmental Protection Agency.

ACTION: Proposed notice of decision.

SUMMARY: The Environmental Protection Agency (''EPA'' or ''the Agency'') is proposing to grant a petition by the Commonwealth of the Northern Mariana Islands (''CNMI'') for exemption from the anti-dumping requirements for gasoline sold in the United States after January 1, 1995. This action is being taken because of CNMI's unique geographic location and economic factors. If the gasoline anti-dumping exemption were not granted, CNMI would be required to import gasoline from a supplier meeting the anti-dumping requirements adding a considerable expense to gasoline purchased by the CNMI consumer. CNMI is in full attainment with the national ambient air quality standard for ozone. This action is not expected to cause harmful environmental effects to the citizens of CNMI. EPA is not granting CNMI's petition for exemption from the fuel detergent additization requirements that all gasoline sold in the United States after January 1, 1995 contain fuel detergents. CNMI did not show that these requirements were unreasonable or infeasible due to any unique local factors. The fuel detergent additization requirements are designed to prevent the build-up of deposits in gasoline engines and fuel supply systems. By controlling such desposits in CNMI's vehicles, harmful engine exhaust emissions will be reduced.

DATES: Comments on this proposed final decision must be received in writing by January 2, 1998.

ADDRESSES: Materials relevant to this petition are available for inspection in public docket A–96–11 at the Air Docket Office of the EPA, room M–1500, 401 M Street, SW, Washington, D.C. 20460, (202) 260–7548, between the hours of 8:00 a.m. to 5:30 p.m., Monday through Friday. A duplicate public docket, A–NM–96, has been established at U.S. EPA Region IX, 75 Hawthorne Street (Mail Code: A–2–1), 17th Floor, San Francisco, CA 94105, (415) 744–1225, and is available between the hours of 8:30 a.m. to noon, and 1 p.m. to 5 p.m., Monday through Friday. As provided in 40 CFR part 2, a reasonable fee may be charged for copying services.

Comments should be submitted (in duplicate if possible) to the two dockets listed above, with a copy forwarded to Marilyn Winstead McCall, U.S. Environmental Protection Agency, Fuels and Energy Division, 401 M Street, SW (Mail Code: 6406J), Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Marilyn Winstead McCall at (202) 233–9029.

SUPPLEMENTARY INFORMATION: For more detailed information on this proposal, please see EPA's Notice of Direct Final Decision published in the Final Rules section of this **Federal Register** which

approves CNMI's petition for exemption from the gasoline anti-dumping regulations, but does not approve CNMI's petition for exemption from the fuel detergent additization regulations. The Agency views this final decision as a noncontroversial action for the reasons discussed in the Notice of Direct Final Decision published in today's **Federal Register**, and because it believes the effects of this decision are limited to the Commonwealth of the Northern Mariana Islands. If no adverse or critical comments are received in response to this proposed decision, no further action is contemplated in relation to this decision. If EPA receives adverse or critical comments, EPA will withdraw the Notice of Direct Final Decision by publishing an appropriate document in the **Federal Register**, and all public comments received will be addressed in a subsequent document. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this action should do so at this time.

Dated: November 25, 1997.

Carol M. Browner,

Administrator.

[FR Doc. 97–31737 Filed 12–2–97; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 62, No. 232

Wednesday, December 3, 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.

BROADCASTING BOARD OF GOVERNORS

Sunshine Act Meeting

DATE AND TIME: December 9, 1997; 9:30 a.m.

PLACE: Cohen Building, Room 3321, 330 Independence Ave., S.W., Washington, D.C. 20547.

CLOSED MEETING: The members of the Broadcasting Board of Governors (BBG) will meet in closed session to review and discuss a number of issues relating to U.S. Government-funded non-military international broadcasting. They will address internal procedural, budgetary, and personnel issues, as well as sensitive foreign policy issues relating to potential options in the U.S. international broadcasting field. This meeting is closed because if open it likely would either disclose matters that would be properly classified to be kept secret in the interest of foreign policy under the appropriate executive order (5 U.S.C. 552b.(c)(1)) or would disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action. (5 U.S.C. 552b.(c)(9)(B)) In addition, part of the discussion will relate solely to the internal personnel and organizational issues of the BBG or the International Broadcasting Bureau. (5 U.S.C. 552b.(c) (2) and (6))

CONTACT PERSON FOR MORE INFORMATION: Persons interested in obtaining more information should contact Brenda Thomas at (202) 401–3736.

Dated: December 1, 1997.

David W. Burke,

Chairman.

[FR Doc. 97–31789 Filed 12–1–97; 11:49 am]

BILLING CODE 8230–01–M

DEPARTMENT OF COMMERCE

International Trade Administration

[C–201–810]

Cut-to-Length Steel Plate From Mexico; Rescission of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Rescission of Countervailing Duty Administrative Review.

SUMMARY: On September 25, 1997, in response to a request from the respondent, the Department of Commerce initiated an administrative review of the countervailing duty order on cut-to-length steel plate from Mexico. The review covers the period January 1, 1996 through December 31, 1996. In accordance with 19 CFR 351.213(d)(1), the Department is now rescinding this review because the respondent has withdrawn its request for review.

EFFECTIVE DATE: December 3, 1997.

FOR FURTHER INFORMATION CONTACT: Robert Copyak or Constance Cunningham, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On August 29, 1997, the Department received a request for an administrative review of the countervailing duty order from Altos Hornos de Mexico S.A. de C.V. (''AHMSA''), for the period January 1, 1996 through December 31, 1996. On September 25, 1997, the Department published in the **Federal Register** (62 FR 50292) a notice of ''Initiation of Countervailing Duty Administrative Review'' initiating the administrative review. On November 4, 1997, AHMSA withdrew its request for review.

The applicable regulation, 19 CFR 351.213(d)(1), stipulates that the Secretary may permit a party that requested an administrative review to withdraw the request within 90 days of the date of publication of notice of initiation of the requested review. In this case, the respondent has withdrawn its request within the 90 day period. No other interested party requested a review, and we have received no other submissions regarding AHMSA's withdrawal of its request for review. Therefore, we are rescinding this review of the countervailing duty order on cut-to-length steel plate from Mexico.

This notice is published in accordance with 19 CFR 351.213(d)(4).

Dated: November 21, 1997.

Louis Apple,

Acting Deputy Assistant Secretary, Group II, Import Administration.

[FR Doc. 97–31601 Filed 12–2–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–557–806]

Extruded Rubber Thread From Malaysia; Rescission of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Rescission of Countervailing Duty Administrative Review.

SUMMARY: On September 25, 1997, in response to a request from the respondents, the Department of Commerce initiated an administrative review of the countervailing duty order on extruded rubber thread from Malaysia. The review covers the period January 1, 1996 through December 31, 1996. In accordance with 19 CFR 351.213(d)(1), the Department is now rescinding this review because the respondents have withdrawn their request for review.

EFFECTIVE DATE: December 3, 1997.

FOR FURTHER INFORMATION CONTACT: Robert Copyak or Constance Cunningham, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On August 29, 1997, the Department received a request for an administrative

review of the countervailing duty order from the Government of Malaysia, Heveafil Sdn. Bhd., Filmax Sdn. Bhd., Rubberflex Sdn. Bhd., Filati Lastex Sdn. Bhd., and Rubfil Sdn. Bhd. for the period January 1, 1996 through December 31, 1996. On September 25, 1997, the Department published in the **Federal Register** (62 FR 50292) a notice of ''Initiation of Countervailing Duty Administrative Review'' initiating the administrative review. On November 5, 1997, the respondents withdrew their request for review.

The applicable regulation, 19 CFR 351.213(d)(1), stipulates that the Secretary may permit a party that requested an administrative review to withdraw the request within 90 days of the date of publication of notice of initiation of the requested review. In this case, the respondents have withdrawn their request within the 90 day period. No other interested party requested a review, and we have received no other submissions regarding the respondents' withdrawal of their request for review. Therefore, we are rescinding this review of the countervailing duty order on extruded rubber thread from Malaysia.

This notice is published in accordance with 19 CFR 351.213(d)(4).

Dated: November 21, 1997.

Louis Apple,

Acting Deputy Assistant Secretary, Group II, Import Administration.

[FR Doc. 97–31602 Filed 12–2–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

U.S. Automotive Parts Advisory Committee; Closed Meeting

AGENCY: International Trade Administration, Commerce.

ACTION: Closed meeting of U.S. Automotive Parts Advisory Committee.

SUMMARY: The U.S. Automotive Parts Advisory Committee (the ''Committee'') advises U.S. Government officials on matters relating to the implementation of the Fair Trade in Auto Parts Act of 1988. The Committee: (1) Reports annually to the Secretary of Commerce on barriers to sales of U.S.-made auto parts and accessories in Japanese markets; (2) assists the Secretary in reporting to the Congress on the progress of sales of U.S.-made auto parts in Japanese markets, including the formation of long-term supplier relationships; (3) reviews and considers data collected on sales of U.S.-made auto parts to Japanese markets; (4) advises the Secretary during consultations with the Government of Japan on these issues; and (5) assists in establishing priorities for the Department's initiatives to increase U.S.-made auto parts sales to Japanese markets, and otherwise provide assistance and direction to the Secretary in carrying out these initiatives. At the meeting, committee members will discuss specific trade and sales expansion programs related to U.S.-Japan automotive parts policy.

DATE AND LOCATION: The meeting will be held on January 15, 1998 from 10:30 a.m. to 3:00 p.m. at the U.S. Department of Commerce in Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Dr. Robert Reck, Office of Automotive Affairs, Trade Development, Room 4036, Washington, D.C. 20230, telephone: (202) 482–1418.

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Administration, with the concurrence of the General Counsel formally determined on July 5, 1994, pursuant to Section 10(d) of the Federal Advisory Act, as amended, that the series of meetings or portions of meetings of the Committee and of any subcommittee thereof, dealing with privileged or confidential commercial information may be exempt from the provisions of the Act relating to open meeting and public participation therein because these items are concerned with matters that are within the purview of 5 U.S.C. 552b (c) (4) and (9) (B). A copy of the Notice of Determination is available for public inspection and copying in the Department of Commerce Records Inspection Facility, Room 6020, Main Commerce.

Dated: November 21, 1997.

Henry P. Misisco,

Director, Office of Automotive Affairs.

[FR Doc. 97–31624 Filed 12–2–97; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Associated Form, and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Section 211.273, Substitutions for Military or Federal Specifications and Standards, and related clause in DFARS 252.211–7005; OMB Number 0704–0398.

Type of Request: Extension.

Number of Respondents: 257.

Responses Per Respondent: 3.

Annual Responses: 771.

Average Burden Per Response: 1 hour.

Annual Burden Hours: 771.

Needs and Uses: The information collection permits offerors to propose Single Process Initiative (SPI) processes in lieu of military or Federal specifications and standards cited in DoD solicitations for previously developed items. The information will be used by the Government to identify and verify Government acceptance of an SPI process as a valid replacement for a military or Federal specification or standard cited in a solicitation. Respondents are offerors responding to DoD solicitations for previously developed items that cite military or Federal specifications or standards when the offeror has a management or manufacturing process that has been previously accepted by DoD, under SPI, as a valid replacement for a military or Federal specification or standard.

Affected Public: Business or other for-profit; Not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Mr. Peter N. Weiss.

Written comments and recommendations on the proposed information collection should be sent to Mr. Weiss at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DoD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: November 26, 1997.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 97–31605 Filed 12–2–97; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board Task Force on Submarine of the Future

ACTION: Notice of advisory committee meetings.

SUMMARY: The Defense Science Board Task Force on Submarine of the Future will meet in closed session on December 5, 1997 at Science Applications International Corporation (SAIC), 4001 N. Fairfax Drive, Arlington, Virginia; and on December 22, 1997 and January 5–6, 1998 at SAIC, 8301 Greensboro Drive, McLean, Virginia. In order for the Task Force to obtain time sensitive classified briefings, critical to the understanding of the issues, this meeting is scheduled on short notice.

The mission of the Defense Science Board is to advise the Secretary of Defense through the Under Secretary of Defense for Acquisition and Technology on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings the Task Force will assess the nation's need for attack submarines in the 21st century.

In accordance with Section 10(d) of the Federal Advisory Committee Act, P.L. No. 92–463, as amended (5 U.S.C. App. II, (1994)), it has been determined that these DSB Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) (1994), and that accordingly these meetings will be closed to the public.

Dated: November 26, 1997.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 97–31606 Filed 12–2–97; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board Task Force on Underground Facilities

ACTION: Notice of advisory committee meetings.

SUMMARY: The Defense Science Board Task Force on Underground Facilities will meet in closed session on December 17–18, 1997 and January 28–29, 1998, at Strategic Analysis, Inc., 4001 N. Fairfax Drive, Arlington, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense through the Under Secretary of Defense for Acquisition and Technology on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings the Task Force will address the threat to U.S. interests posed by the growth of underground facilities in unfriendly nations. The Task Force should investigate technologies and techniques to meet the international security and military strategy challenges posed by these facilities.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Pub. L. No. 92–463, as amended (5 U.S.C. App. II (1994)), it has been determined that these DSB Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) (1994), and that accordingly these meetings will be closed to the public.

Dated: November 26, 1997.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 97–31607 Filed 12–2–97; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board Task Force on Nuclear Deterrence

ACTION: Notice of advisory committee meetings.

SUMMARY: The Defense Science Board Task Force on Nuclear Deterrence will meet in closed session on December 17–18, 1997 at Headquarters, Strategic Command, Offutt AFB, Omaha, Nebraska.

The mission of the Defense Science Board is to advise the Secretary of Defense through the Under Secretary of Defense for Acquisition and Technology on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting the Task Force will address the U.S. ability to deter and prevent the effective use of weapons of mass destruction against U.S. territory, forces, and allies.

In accordance with Section 10(d) of the Federal Advisory Committee Act, P.L. No. 92–463, as amended (5 U.S.C. App. II, (1994)), it has been determined that this DSB Task Force meeting concerns matters listed in 5 U.S.C. § 552b(c) (1) (1994), and that accordingly this meeting will be closed to the public.

Dated: November 26, 1997.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 97–31608 Filed 12–2–97; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board Task Force on Defense Technology Base of the 21st Century

ACTION: Notice of advisory committee meetings.

SUMMARY: The Defense Science Board Task Force on Defense Technology Base of the 21st Century will meet in closed session on December 16–17, 1997 at Strategic Analysis, Inc., 4001 N. Fairfax Drive, Arlington, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense through the Under Secretary of Defense for Acquisition and Technology on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting the Task Force will address the issues involved in assuring that the U.S. has adequate/appropriate technology base from which to develop sustained military superiority for the 21st century; such a base includes technology developed by DoD, but also access to technology developed elsewhere as well as an assured stream of scientists and engineers that will develop technology and build military materiel. Many internal and external changes influence DoDs options.

In accordance with Section 10(d) of the Federal Advisory Committee Act, P.L. No. 92–463, as amended (5 U.S.C. App. II, (1994)), it has been determined that this DSB Task Force meeting concerns matters listed in 5 U.S.C. § 552b(c)(1) (1994), and that accordingly this meeting will be closed to the public.

Dated: November 26, 1997.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 97–31609 Filed 12–2–97; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Department of the Army

Army Science Board; Notice of Open Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–483), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Date of Meeting: December 9, 1997.

Time of Meeting: 0830–1630.

Place: Boeing Helicopter Factory, Mesa, AZ.

Agenda: The Army Science Board's (ASB) Issue Group Study on ''Army Avionics Modernization Methodologies'' will meet for discussions on the Boeing avionics modernization methodologies, Army avionics science and technology programs, and open systems architecture. This meeting will be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. For further information, please contact our office at (703) 695–0781.

Wayne Joyner,

Program Support Specialist, Army Science Board.

[FR Doc. 97–31630 Filed 12–2–97; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army

Army Science Board; Notice of Open Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Date of Meeting: December 11 & 12, 1997.

Time of Meeting: 0800–1600, December 11, 1997. 0800–1400, December 12, 1997.

Place: USA John F. Kennedy Special Warfare Center & School, Fort Bragg, NC.

Agenda: The Army Science Board's (ASB) Issue Group Study on ''Human Behavior in Combat'' will visit the Walter Reed Army Institute of Research to discuss various human and organizational behavior issues with the Department of Neuropsychiatry. These meetings will be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. For further information, please contact our office at (703) 695–0781.

Wayne Joyner,

Program Support Specialist, Army Science Board.

[FR Doc. 97–31631 Filed 12–2–97; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army

Army Science Board; Notice of Open Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Date of Meeting: December 10, 1997.

Time of Meeting: 0900–1600.

Place: 5201 Leesburg Pike, Falls Church, VA.

Agenda: The Army Science Board's (ASB) Issue Group Study on ''Hit-to-Kill Interceptor Lethality—Phase II'' will meet for briefings on biological defense from staff of the Joint Program Office for Biological Defense. Members will also continue planning for final report preparation. This meeting will be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. For further information, please call our office at (703) 695–0781.

Wayne Joyner,

Program Support Specialist, Army Science Board.

[FR Doc. 97–31632 Filed 12–2–97; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army

Army Science Board; Notice of Closed Meeting

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Date of Meeting: December 15–19, 1997.

Time of Meeting: 0830–1600 (both days).

Place: Pentagon, Washington, DC.

Agenda: The Army Science Board's (ASB) Ad Hoc Study on ''Independent Assessment of the Technical Maturity of the Aerostat Demonstration Program'' will meet for briefings and discussions on advanced JLENS sensor concepts. These meetings will be closed to the public in accordance with Section 552b(c) of Title 5, U.S.C., specifically subparagraph (1) thereof, and Title 5, U.S.C., Appendix 2, subsection 10(d). The classified and unclassified matters to be discussed are so inextricably intertwined so as to preclude opening any portion of these meetings. For further information, please contact our office at (703) 695–0781.

Wayne Joyner,

Program Support Specialist, Army Science Board.

[FR Doc. 97–31633 Filed 12–2–97; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

ACTION: Submission for OMB review; comment request.

SUMMARY: The Deputy Chief Information Officer, Office of the Chief Information Officer, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 2, 1998.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Dan Chenok, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Patrick J. Sherrill, Department of Education, 600 Independence Avenue, SW., Room 5624, Regional Office Building 3, Washington, DC 20202–4651.

FOR FURTHER INFORMATION CONTACT: Patrick J. Sherrill (202) 708–8196. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Deputy Chief Information Officer, Office of the Chief Information Officer, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment at the address specified above. Copies of the requests are available from Patrick J. Sherrill at the address specified above.

Dated: November 26, 1997.

Gloria Parker,

Deputy Chief Information Officer, Office of the Chief Information Officer.

Office of Special Education and Rehabilitative Services

Type of Review: Reinstatement.
Title: Annual Report of Independent Living Services for Older Individuals who are Blind.
Frequency: Annually.
Affected Public: Individuals or households; State, local or Tribal Gov't; SEAs or LEAs.
Annual Reporting and Recordkeeping Hour Burden:
Responses: 55.
Burden Hours: 440.
Abstract: Section 752(I)(2)(A) of the Rehabilitation Act Amendments of 1992 (Attachment A) requires each grantee under this program to submit an annual report to the Commissioner of the Rehabilitation Services Administration (RSA) on essential demographic, service and outcome information. The information collected by RSA will be used to evaluate the program, including the new Government Performance and Results Act (GEPRA) requirements, and make recommendations to Congress. It provides RSA with a uniform and efficient method of monitoring the program for compliance with statutory regulatory requirements and to determine substantial progress required for funding of all non-competing continuation discretionary grants. The respondents are State Vocational Rehabilitation Agencies.

Office of Postsecondary Education

Type of Review: New.
Title: Application for Strengthening Historically Black Colleges and Universities Program.
Frequency: Annually.
Affected Public: Not-for-profit institutions; State, local or Tribal Gov't; SEAs or LEAs.
Annual Reporting and Recordkeeping Hour Burden:
Responses: 115.
Burden Hours: 2,106.
Abstract: The information is required to institutions of higher education designated as Historically Black Colleges and Universities and Qualified Graduate Programs, Title II, Part B of the Higher Education Act of 1965, as amended. This information will be used in the evaluation process to determine whether proposed activities are consistent with legislated activities and to determine dollar share of Congressional appropriation.

[FR Doc. 97–31663 Filed 12–2–97; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Energy Research

Biological and Environmental Research Advisory Committee Renewal (Previously Health and Environmental Research Advisory Committee)

AGENCY: Department of Energy.

ACTION: Notice of renewal.

SUMMARY: Pursuant to Section 14(a)(2)(A) of the Federal Advisory Committee Act, 5 U.S.C.A. App. 2, and section 101–6.1015(a), title 41, of the Code of Federal Regulations, and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the Biological and Environmental Research Advisory Committee, previously named the Health and Environmental Research Advisory Committee, has been renewed for a two-year period beginning in November 1997. The Committee will provide advice to the Director, Office of Energy Research, on the Biological and Environmental Research Program managed by the Office of Biological and Environmental Research.

The renewal of the Biological and Environmental Research Advisory Committee has been determined to be essential to the conduct of the Department of Energy business and to be in the public interest in connection with the performance of duties imposed upon the Department of Energy by law. The Committee will operate in accordance with the provisions of the Federal Advisory Committee Act, the Department of Energy Organization Act (Pub. L. No. 95–91), and rules and regulations issued in implementation of those Acts.

Further information regarding this Advisory Committee can be obtained from Mrs. Rachel M. Samuel, at (202) 586–3279.

Issued in Washington, D.C. on November 21, 1997.

James N. Solit,

Advisory Committee Management Officer.

[FR Doc. 97–31709 Filed 12–2–97; 8:45 am]

BILLING CODE 6450–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER97–4730–000]

Alpha Energy Corporation; Notice of Filing

November 26, 1997.

Take notice that on November 20, 1997, Alpha Energy Corporation tendered for filing an amendment in the above-referenced docket.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before December 9, 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.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31646 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER97–4442–000]

Central Power and Light Company, West Texas Utilities Company, Public Service Company of Oklahoma and Southwestern Electric Power Company; Notice of Filing

November 26, 1997.

Take notice that on November 14, 1997, Central Power and Light Company (CPL), West Texas Utilities Company (WTU), Public Service Company of Oklahoma (PSO) and Southwestern Electric Power Company (SWEPCO) (collectively, ''CSW Operating Companies'') submitted for filing an amendment to their September 2, 1997 filing in the above referenced proceeding. The amendment contains unexecuted network integration transmission service agreement between WTU and PSO/SWEPCO.

The CSW Operating Companies state that a copy of this filing has been served

on the Public Utility Commission of Texas, the Arkansas Public Service Commission, the Louisiana Public Service Commission, the Oklahoma Corporation Commission and all parties to Docket No. ER97–4442–000.

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 9, 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.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31645 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–181–007]

CNG Transmission Corporation; Notice of Compliance Tariff Filing

November 26, 1997.

Take notice that on November 21, 1997, CNG Transmission Corporation (CNG), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets:

1st Revised 2nd Revised Sheet No. 386
First Revised Sheet No. 386A

CNG requests effective dates of June 1, 1997 for Sheet No. 386, and November 10, 1997, for Sheet No. 386A.

CNG states that the purpose of this filing is to comply with the directives of the Commission's November 12 Letter Order: to adopt certain GISB standards verbatim in the tariff or to add these standards to Section 31 of its General Terms and Conditions, and to provide a status report on further development of CNG's electronic communication systems as required by the Commission's September 15, 1997, order in the above-referenced proceedings.

CNG states that copies of its filing have been mailed to all parties to the captioned proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31655 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OA97–459–000]

Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc.; Notice of Filing

November 26, 1997.

Take notice that on November 21, 1997, Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc. (collectively ComEd), tendered for filing revisions to its standards of conduct.

ComEd states that copies of its filing have been mailed to each person designated on the official service listed in this proceeding and the Illinois Commerce 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 or 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 18 CFR 385.214). All such motions or protests should be filed on or before December 5, 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.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31634 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER97–1238–001]

CSW Power Marketing, Inc.; Notice of Filing

November 26, 1997.

Take notice that on June 19, 1997, CSW Power Marketing, Inc. tendered its revised statement of policy and code of conduct with respect to the relationship with CSW Operating Companies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with 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 5, 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.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31642 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–96–000]

Granite State Gas Transmission, Inc.; Notice of Request Under Blanket Authorization

November 26, 1997.

Take notice that on November 19, 1997, Granite State Gas Transmission, Inc. (Granite State) 300 Friberg Parkway, Westborough, MA. 01581–5039, filed in the above docket a request pursuant to Sections 157.205 and 157.211(a)(2) of the Commission's Regulations, under the Natural Gas Act (18 CFR 157.205

and 157.211(a)(2)) for authorization under Granite State's blanket certificate issued in Docket No. CP82–515–000 pursuant to Section 7 of the Natural Gas Act, to construct and operate new metering and associated appurtenant facilities for use in providing deliveries of transportation gas to a new bakery owned and operated by J.J. Nissen, Inc. (Nissen), in Biddeford, Maine, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Granite State indicates that Nissen, a large commercial bakery, is constructing a new plant adjacent to Granite State's pipeline in Biddeford, Maine. Granite State has an existing delivery point for deliveries for the account of Northern Utilities, Inc., at the Biddeford Industrial Park. The new delivery point will be constructed next to the existing delivery point in Granite State's existing right-of-way. The facility will include a 4-inch turbine meter, two 2-inch Fisher regulators, a 4-inch Safeco filter and miscellaneous piping and fencing.

According to Granite State, the estimated cost of the new delivery point is $74,900, which will be reimbursed by Nissen. Granite State further states that it will provide interruptible transportation for deliveries to Nissen at the new delivery; maximum daily deliveries are estimated to be 500 Dth. Granite State states that the construction and operation of the new delivery point is not prohibited by its tariff and that the interruptible transportation service for Nissen will not adversely affect Granite State's ability to provide its maximum daily delivery obligations for its firm transportation shippers.

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.

Linwood A. Watson Jr.,

Acting Secretary.

[FR Doc. 97–31639 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–97–000]

Great Lakes Gas Transmission Limited Partnership; Notice of Application

November 26, 1997.

Take notice that on November 19, 1997, Great Lakes Gas Transmission Company Limited Partnership (Great Lakes), One Woodward Avenue, Suite 1600, Detroit, Michigan 48226, filed in Docket No. CP98–97–000 under Section 7(c) of the Natural Gas Act, for authority to construct and operate 3.9 miles of 36-inch loop pipeline in Kittson and Itasca Counties, Minnesota, along with a side tap in St. Louis County, Minnesota, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Great Lakes states that the estimated cost of the proposed facilities is $8,597,000 and that they will be used to transport 6,000 dekatherms per day (dth/d) for the City of Duluth, Minnesota (Duluth) and 500 dth/d for Northwest Natural of Cass County, Inc. (Northwest). Great Lakes states that its agreement with Northwest provides for firm transportation between the Canadian border near St. Vincent, Minnesota (Emerson interconnect) and Great Lake's Carlton, Minnesota delivery point. Great Lake's agreement with Duluth provides for firm transportation between the Emerson interconnect and either the Carloton delivery point or the new line tap to be located in St. Louis County, Minnesota. Great Lakes proposes to place the facilities in service on November 1, 1999.

Any person desiring to participate in the hearing process or to make any protest with reference to said application should on or before December 17, 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 proceeding. The Commission's rules require that protestors provide copies of their protests to the party or parties directly involved. 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.

A person obtaining intervenor status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by every one of the intervenors. An intervenor can file for rehearing of any Commission order and can petition for court review of any such order. However, an intervenor must submit copies of comments or any other filing it makes with the Commission to every other intervenor in the proceeding, as well as 14 copies with the Commission.

A person does not have to intervene, however, in order to have comments considered. A person, instead, may submit two copies of comments to the Secretary of the Commission. Commenters will be placed on the Commission's environmental mailing list, will receive copies of environmental documents and will be able to participate in meetings associated with the Commission's environmental review process. Commenters will not be required to serve copies of filed documents on all other parties. However, commenters will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek rehearing or appeal the Commission's final order to a federal court.

The Commission will consider all comments and concerns equally, whether filed by commenters or those requesting intervenor status.

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 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 Great Lakes to appear or be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31640 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER97–1827–001]

Illinois Power Company; Notice of Filing

November 26, 1997.

Take notice that on November 14, 1997, Illinois Power Company (''Illinois Power''), filed an amendment to its compliance filing in the above-captioned docket.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests must be filed on or before December 9, 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.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31643 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–373–005]

Koch Gateway Pipeline Company; Notice of Filing

November 26, 1997.

Take notice that on November 21, 1997, Koch Gateway Pipeline Company (Koch) tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, certain revised tariff sheets, to become effective December 1, 1997:

Koch states that the above referenced tariff sheets are being filed to move into effect the revised rates, pursuant to the Commission's directives in this proceeding.

Koch also states that it has served copies of the instant filing upon each affected customer, interested state commission's and other parties.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's rules and regulations. All such protests must be filed as provided by Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31657 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP95–175–006]

Mojave Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

November 26, 1997.

Take notice that on November 24, 1997, Mojave Pipeline Company (Mojave) tendered for filing a compliance filing pursuant to the Commission's Order on Initial Decision issued November 3, 1997 in this proceeding.

Mojave states that the filing contains workpapers demonstrating that the calculation of the adjusted cost of service in compliance with the order results in rates higher than the currently effective tariff rates.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests should be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31653 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–57–000]

Northern Border Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

November 26, 1997.

Take notice that on November 21, 1997, Northern Border Pipeline Company (Northern Border) tendered for filing to become part of Northern Border Pipeline Company's FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to become effective January 1, 1998:

Twelfth Revised Sheet Number 156
Eleventh Revised Sheet Number 157

Northern Border proposes to decrease the Maximum Rate from 3.744 cents per 100 Dekatherm-Miles to 3.735 cents per 100 Dekatherm-Miles and to decrease the Minimum Revenue Credit from 2.279 cents per 100 Dekatherm-Miles to 1.616 cents per 100 Dekatherm-Miles. The revised Maximum Rate and Minimum Revenue Credit are being filed in accordance with Northern Border's Tariff provisions under Rate Schedule IT–1.

The herein proposed changes do not result in a change in Northern Border's total revenue requirement.

Northern Border states that copies of this filing have been sent to all of Northern Border's contracted shippers and interested state regulatory commissions.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.214 and Section 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public

inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31660 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–275–009]

Northern Natural Gas Company; Notice of Proposed Changes In FERC Gas Tariff

November 26, 1997.

Take notice that on November 21, 1997, Northern Natural Gas Company (Northern), tendered for filing to become part of Northern's FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets proposed to become effective on December 1, 1997:

Sixth Revised Sheet No. 54
Sixth Revised Sheet No. 61
Sixth Revised Sheet No. 62
Sixth Revised Sheet No. 63
Sixth Revised Sheet No. 64

Northern states that the above-listed tariff sheets are being filed to establish the Mainline fuel retention percentages and unaccounted-for percentage on Northern's system to be effective from December 1, 1997 through May 31, 1998, as agreed to by the active parties in these dockets at a settlement conference on November 13, 1997.

Northern states that copies of the filing were served upon Northern's customers and interested State Commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed on or before in accordance with Section 154.210 of the Commission's Regulations. All protests will be considered by the Commission in determining the appropriate action to be taken in this proceeding, but will not serve to make protestant a party to the proceeding. Copies of this filing are on file with the Commission and are available for inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31656 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GT98–6–000]

Northwest Pipeline Corporation; Notice of Proposed Changes in FERC Gas Tariff and Filing of Non-Conforming Service Agreement

November 26, 1997.

Take notice that on November 21, 1997, Northwest Pipeline Corporation (Northwest) tendered for filing and acceptance (1) a non-conforming service agreement with Kimball Energy Corporation (Kimball) effective November 1, 1997, and (2) First Revised Sheet No. 364 of its FERC Gas Tariff, Third Revised Volume No. 1, to be effective November 1, 1997.

Northwest states that the service agreement is non-conforming because it includes provisions that establish priorities of service for Kimball that are subordinate to other firm shippers. The tariff sheet is submitted to add such agreement to the list of non-conforming service agreements contained in Northwest's tariff, and to remove from the list the service agreement with U.S. Gas Transportation, Inc., which has expired.

Any person desiring to be heard or protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31647 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP94–220–016]

Northwest Pipeline Corporation; Notice of Refund Report

November 26, 1997.

Take notice that on November 21, 1997, Northwest Pipeline Corporation (Northwest) filed a refund report pursuant to Section 5.1 of its Stipulation and Agreement of Settlement (Settlement) filed on November 14, 1995 in its Docket No. RP94–220 general rate proceeding. The Settlement was accepted and approved by the Commission on February 16, 1996.

Northwest states that the refund covers the period from November 1, 1996 through February 28, 1997.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed on or before December 4, 1997. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31651 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER97–705–001]

Promark Energy, Inc., Notice of Filing

November 26, 1997.

Take notice that on March 31, 1997, Promark Energy, Inc. tendered for filing its compliance filing in the above-referenced docket.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before December 5, 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.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31641 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP92–132–056]

Tennessee Gas Pipeline Company; Notice of Refund Report

November 26, 1997.

Take notice that on November 24, 1997, Tennessee Gas Pipeline Company (Tennessee) tendered for filing the Refund Report in the captioned proceeding related to the period between October 1, 1994 and August 13, 1997.

Tennessee states that in accordance with the Commission's directive in its October 23, 1997 Order in this docket that it has netted the amounts it is owed by Flagg under its contract for service to Flagg against the refunds owed. Tennessee submits that as a result of such netting, no refunds are owed to Flagg.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC, 20426, in accordance with § 385.211 of the Commission's Regulations. All such protests must be filed on or before December 4, 1997. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31649 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP92–132–057]

Tennessee Gas Pipeline Company; Notice of Proposed Changes In FERC Gas Tariff

November 26, 1997.

Take notice that on November 24, 1997, Tennessee Gas Pipeline Company (Tennessee) tendered for filing to become part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the following Revised Tariff Sheets, to become effective commencing October 1, 1994:

Third Substitute First Revised Sheet No. 26
Second Substitute Second Revised Sheet No. 26
Substitute First Revised Substitute Second Revised Sheet No. 26
Substitute First Revised Third Revised Sheet No. 26
Substitute Fifth Revised Sheet No. 26
Substitute Sixth Revised Sheet No. 26
Substitute Seventh Revised Sheet No. 26
First Revised Seventh Revised Sheet No. 26
Second Substitute Ninth Revised Sheet No. 26
Third Substitute Alternate First Revised Sheet No. 181
Substitute Second Revised Sheet No. 181
Second Substitute Third Revised Sheet No. 181
Fourth Revised Sheet No. 181

Tennessee states that the filing is being made in compliance with the Commission's determination in its October 23, 1997 Order in this docket that the rate which Tennessee was charging Flagg Energy Development Corporation (Flagg) was not just and reasonable and with its requirement that Tennessee file tariff sheets in order to ''reinstate the prior rate for Flagg.''

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with § 385.211 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31650 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–56–000]

Tennessee Gas Pipeline Company; Notice of Tariff Filing

November 26, 1997.

Take notice that on November 21, 1997, Tennessee Gas Pipeline Company (Tennessee) tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the following revised tariff sheets, with an effective date of January 15, 1998:

Fourth Revised Sheet No. 405A
Fourth Revised Sheet No. 405B
Fourth Revised Sheet No. 405C

Tennessee states that these tariff sheets set forth revisions to Tennessee's tariff provisions concerning the net present value (NPV) system for awarding generally available capacity on its system. Tennessee states that each of the tariff revisions is intended to facilitate the awarding of capacity to the party which values it the most.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 24026, in accordance with 18 CFR Sections 385.211 and 385.214 of the Commission's Rules and Regulations. All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to this 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 available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31659 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–513–000]

Texaco Natural Gas Company v. Sea Robin Pipeline Company; Notice of Technical Conference

November 26, 1997.

The filing in the above captioned proceeding raises issues that should be addressed in a technical conference.

Take notice that the technical conference will be held on Thursday, December 11, 1997, at 1:00 p.m., in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

All interested parties and Staff are permitted to attend.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31658 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER97–3113–002]

Texas Utilities Electric Company; Notice of Filing

November 26, 1997.

Take notice that, on November 14, 1997, Texas Utilities Electric Company (''TU Electric'') tendered for filing an open-access Tariff for Transmission Service To, From and Over Certain HVDC Interconnections (''TFO Tariff'') and amendments to four transmission service agreements with Central Power and Light Company, West Texas Utilities Company, Public Service Company of Oklahoma and Southwestern Electric Power Company, previously designated as Rate Schedule FERC Nos. Two through Five, in compliance with the Commission's October 15, 1997 ''Order Accepting Revised Transmission Tariffs for Filing, As Modified, and Granting Waiver of Notice Requirements''.

Copies of the filing were served on all parties of record.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with 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 9, 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.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31644 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–58–000]

Transcontinental Gas Pipe Line Corporation; Notice of Proposed Changes in FERC Gas Tariff

November 26, 1997.

Take notice that on November 21, 1997, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing certain revised tariff sheets to its FERC Gas Tariff, Third Revised Volume No. 1 which tariff sheets are enumerated in Appendix A attached to the filing. The referenced tariff sheets are proposed to be effective December 21, 1997.

Transco states that the purpose of the instant filing is to revise certain of Transco's currently effective tariff sheets to (i) correct various spelling, punctuation, wording, and reference errors, (ii) provide for a daily capacity release rate for volumetric releases associated with the Maiden Lateral surcharge, (iii) change Section 5.2(g) of the General Terms and conditions to more accurately reflect Transco's practice when making metering adjustments and (iv) update the Form of Service Agreements to include an effective time of 9:00 a.m. Central clock time and to change the effective and termination date fields to be usable for the year 2000 and beyond, all as further described in Attachment 1 to the filing.

Transco states that copies of the filing are being mailed to its affected customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31661 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR98–2–000]

Ultramar Diamond Shamrock Corporation, Complainant v. SFPP, L.P., Respondent; Notice of Complaint

November 26, 1997.

Take notice that on November 21, 1997, pursuant to Rule 206 of the Rules of Practice and Procedure of the Commission, 18 CFR 385.206, Sections 9, 13, and 15 of the Interstate Commerce Act (ICA), 49 U.S.C. app. §§ 9, 13, and 15 (1994), and Section 1803 of the Energy Policy Act of 1992, Ultramar Diamond Shamrock Corporation (Ultramar Diamond) filed a complaint against SFPP, L.P. (SFPP), as part of Ultramar Diamond's motion to intervene in Docket No. OR98–1–000.

Ultramar Diamond asserts that SFPP violated and continues to violate Section 1(5), 2, 3(1), 4, 6, and 8 of the ICA by: (a) establishing and charging unjust and unreasonable rates for its jurisdictional services; (b) charging unduly discriminatory or preferential rates and charges for its jurisdictional services; and (c) assessing untariffed rates and charges for jurisdictional interstate services. 49 U.S.C. app. §§ 1(5), 2, 3(1), 4, 6, and 8 (1994).

Ultramar Diamond requests that the Commission (1) examine the rates and charges collected by SFPP for its jurisdictional interstate service, (2) order refunds to Ultramar Diamond to the extent the Commission finds that such rates or charges were unlawful, (3) determine just, reasonable, and nondiscriminatory rates for SFPP's jurisdictional interstate service; and award Ultramar Diamond reasonable attorneys' fees in accordance with the ICA, including Sections 8, 9, 15, and 16

of the ICA, and such other relief as may be appropriate in this proceeding.

Any person desiring to be heard or to protest said complaint should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214, 385.211. All such motions or protests should be filed on or before December 22, 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. Answers to this complaint shall be due on or before December 22, 1997.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31648 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP95–136–008]

Williams Natural Gas Company; Notice of Refund Report

November 26, 1997.

Take notice that on November 21, 1997, Williams Natural Gas Company (WNG) tendered for filing a report of refunds made to customers on November 6 and 11, 1997.

WNG states that pursuant to Commission order issued October 22, 1997, in Docket No. RP95–136–007, it is filing a report of additional refunds to KMGA and City Utilities of Springfield, including applicable interest through November 6, 1997. In addition to amounts withheld for past due PODB penalties in Docket No. RP95–136, WNG states that it also refunded to KMGA amounts WNG had withheld for past due PODB penalty amounts from the GRI refund made August 22, 1996, in Docket No. RP96–143.

On November 11, 1997, WNG states that it also made refunds to certain other customers whose refund in RP95–136 was offset by past due PODB penalty amounts.

WNG states that a copy of its filing was served on all participants listed on the service list maintained by the Commission in the docket referenced above and on interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed on or before December 4, 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 proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31652 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–387–004]

Williams Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

November 26, 1997.

Take notice that on November 21, 1997, Williams Natural Gas Company (WNG) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets to be effective November 1, 1997:

Substitute First Revised Sheet Nos. 103 and 112

Second Substitute First Revised Sheet No. 229B

WNG states that this filing is being made to comply with the October 22, 1997, order on rehearing in Docket No. RP96–387–002. WNG was required to file within 30 days of the date of issuance of the order revised tariff sheets to: (1) continue the existing 5% tolerance level at receipt points, and (2) continue the existing tariff provision under Rate Schedules TSS and STS that the ⅓–⅔ ratio of flowing supplies to storage withdrawals applies only when deliveries are at the MDTQ.

WNG states that a copy of its filing was served on all participants listed on the service list maintained by the Commission in the docket referenced above and on all jurisdictional customers and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commissions Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–31654 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. DR98–6–000, et al.]

Interstate Power Company, et al.; Electric Rate and Corporate Regulation Filings

November 24, 1997.

Take notice that the following filings have been made with the Commission:

1. Interstate Power Company

[Docket No. DR98–6–000]

Take notice that on November 14, 1997, Interstate Power Company (Interstate), filed an Application for approval of depreciation rates pursuant to Section 302 of the Federal Power Act and Rule 204 of the Commission's Rules of Practice and Procedure.

Comment date: December 19, 1997, in accordance with Standard Paragraph E at the end of this notice.

2. KLT Power Inc.

[Docket No. EG98–1–000]

On November 21, 1997, KLT Power Inc. (Applicant), whose business address is 1201 Walnut, Kansas City, MO 64106 filed with the Federal Energy Regulatory Commission an amendment to its application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's Regulations.

Comment date: December 15, 1997, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the amended application.

3. U.S. Power & Light, Inc.; Bonneville Fuels Management Corporation; Energy Marketing Services, Inc.; Preferred Energy Services, Inc.; Monterey Consulting Associates, Inc.; and Thicksten Grimm Burgum, Inc.

[Docket Nos. ER96–105–008] ER96–659–007; ER96–734–004; ER96–2141–005; ER96–2143–004; and ER96–2241–005 (not consolidated)]

Take notice that the following informational filings have been made with the Commission and are on file and available for public inspection and copying in the Commission's Public Reference Room:

On November 7, 1997, U.S. Power & Light Inc., filed certain information as required by the Commission's February 6, 1995, order in Docket No. ER96–105–000.

On November 13, 1997, Bonneville Fuels Management Corporation filed certain information as required by the Commission's February 8, 1996, order in Docket No. ER96–659–000.

On November 7, 1997, Energy Marketing Services, Inc., filed certain information as required by the Commission's February 13, 1996, order in Docket No. ER96–734–000.

On November 7, 1997, Preferred Energy Services, Inc., filed certain information as required by the Commission's August 13, 1996, order in Docket No. ER96–2141–000.

On November 10, 1997, Monterey Consulting Associates, Incorporated filed certain information as required by the Commission's August 8, 1996, order in Docket No. ER96–2143–000.

On November 7, 1997, Thicksten Grimm Burgum, Inc., filed certain information as required by the Commission's September 16, 1996, order in Docket No. ER96–2241–000.

4. Eclipse Energy Inc.; Cenerprise, Inc.; TexPar Energy, Inc.; J.L. Walker and Associates, Alliance Power Marketing; Inc., Mid-American Power LLC; and AC Power Group, Inc.

[Docket Nos. ER94–1099–014, ER94–1402–014, ER95–62–011, ER95–1261–009, ER96–1818–007, ER96–1858–006, and ER97–2867–001 (consolidated)]

Take notice that the following informational filings have been made with the Commission and are on file and available for public inspection and copying in the Commission's Public Reference Room:

On October 24, 1997, Eclipse Energy Inc., filed certain information as required by the Commission's June 15, 1994, order in Docket No. ER94–1099–000.

On October 15, 1997, Cenerprise, Inc., filed certain information as required by the Commission's December 7, 1994, order in docket No. ER94–1402–000.

On October 7, 1997, Tex Par Energy, Inc., filed certain information as required by the Commission's December 27, 1994, order in Docket No. ER95–62–000.

On October 7, 1997, J.L. Walker and Associates filed certain information as required by the Commission's August 7, 1995, order in Docket No. ER95–1261–000.

On October 7, 1997, Alliance Power Marketing, Inc., filed certain information as required by the Commission's June 17, 1996, order in Docket No. ER96–1818–000.

On October 24, 1997, Mid-American Power LLC filed certain information as required by the Commission's July 16, 1996, order in Docket No. ER96–1858–000.

On October 20, 1997, AC Power Group, Inc., filed certain information as required by the Commission's July 8, 1997, order in Docket No. ER97–2867–000.

5. Cataula Generating Co., L.P.

[Docket No. ER97–1686–003]

On October 30, 1997, Cataula Generating Co., L.P. (Cataula), 7500 Old Georgetown Road, Bethesda, Maryland 20814, filed a Notification of Change in Status to reflect its plans under § 203 of the Federal Power Act to take part in a transaction by which it will become a wholly-owned indirect subsidiary of PG&E Corporation (PGC). Cataula also provided notice that an affiliate, USGen New England, Inc., has entered into agreements with New England Power Company and Narragansett Electric Company to purchase certain generation assets and jurisdictional facilities.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

6. TransCanada Energy Ltd.

[Docket No. ER95–692–010]

Take notice that on November 6, 1997, TransCanada Energy Ltd. (TCE), 111–5th Avenue S.W., Calgary, Alberta Canada T2P 3Y6, filed a Notification of Change in Status to reflect the plans of one affiliate, TransCanada OSP Holdings Ltd, to purchase an indirect interest in public utilities and the plans of another affiliate, TransCanada Power Marketing Ltd., to acquire USGen New England, Inc., Rights and obligations under certain power purchase and sales contracts.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97–31715 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER97–4367–000, et al.]

PacifiCorp, et al.; Electric Rate and Corporate Regulation Filings

November 25, 1997.

Take notice that the following filings have been made with the Commission:

1. PacifiCorp

[Docket No. ER97–4367–000]

Take notice that on November 6, 1997, PacifiCorp tendered for filing in accordance with 18 CFR Part 35 of the Commission's Rules and Regulations, a Long-Term Firm Point-To-Point Transmission Service Agreement and a Network Integration Transmission Service Agreement between Black Hills Corporation and PacifiCorp's Transmission Function under PacifiCorp's Open Access Transmission Tariff, FERC Electric Tariff, First Revised Volume No. 11.

Copies of this filing were supplied to PacifiCorp's Merchant Function, Black Hills Corporation, the Washington Utilities and Transportation Commission and the Public Utility Commission of Oregon.

A copy of this filing may be obtained from PacifiCorp's Regulatory Administration Department's Bulletin Board System through a personal computer by calling (503) 464–6122 (9600 baud, 8 bits, no parity, 1 stop bit).

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

2. Northeast Utilities Service Company

[Docket No. ER98–533–000]

Take notice that on November 4, 1997, Northeast Utilities Service Company (NUSCO) tendered for filing a Service Agreement with Energis Resources under the NU System Companies' Sale for Resale, Tariff No. 7.

NUSCO states that a copy of this filing has been mailed to Energis Resources.

NUSCO requests that the Service Agreement become effective October 31, 1997.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

3. Minnesota Power & Light Company

[Docket No. ER98–534–000]

Take notice that on November 4, 1997, Minnesota Power & Light Company (MP) tendered for filing a report of short-term transactions that occurred during the quarter ending September 30, 1997, under MP's WCS–2 Tariff which was accepted for filing by the Commission in Docket No. ER96–1823–000.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

4. The Dayton Power and Light Company

[Docket No. ER98–535–000]

Take notice that on November 4, 1997, The Dayton Power and Light Company (Dayton) submitted service agreements establishing NP Energy Inc., as a customer under the terms of Dayton's Market-Based Sales Tariff.

Dayton requests an effective date of one day subsequent to this filing for the service agreements. Accordingly, Dayton requests waiver of the Commission's notice requirements. Copies of the filing were served upon NP Energy Inc., and the Public Utilities Commission of Ohio.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

5. PJM Interconnection, L.L.C.

[Docket No. ER98–536–000]

Take notice that on November 4, 1997, PJM Interconnection, L.L.C. (PJM), tendered for filing 43 executed service agreements for non-firm point-to-point service under the PJM Open Access Tariff. Because the agreements were filed more than 30 days after service commenced, PJM requests an effective date of November 5, 1997 for the agreements, and states that it has refunded to customers the time value of any revenues that PJM collected prior to this date.

Copies of this filing were served upon the parties to the service agreements, the regional transmission owners in PJM, and each of the state utility commissions in the PJM service area.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

6. Western Energy Marketers, Inc.

[Docket No. ER98–537–000]

Take notice that on November 4, 1997, Western Energy Marketers, Inc. (Western), tendered for filing a Petition For Acceptance Of Initial Rate Schedule, Waivers, and Blanket Authority. The Petition requests acceptance of Western Rate Schedule FERC No. 1, under which Western will engage in wholesale electric power and energy transactions as a marketer, the granting of certain blanket approvals, including the authority to sell electricity at market based rate; and the waiver of certain Commission Regulations.

Western is not currently subject to any state regulatory commission nor is it selling power to any person pursuant to the proposed rate schedule. Accordingly, no copies have been served on other parties.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

7. Bruin Energy, Inc.

[Docket No. ER98–538–000]

Take notice that on November 4, 1997, Bruin Energy, Inc. (Bruin), petitioned the Commission for acceptance of Bruin Rate Schedule FERC No. 1; the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission Regulations.

Bruin intends to engage in wholesale electric power and energy purchases and sales as a marketer. Bruin is not in the business of generating or transmitting electric power. Bruin is a wholly-owned subsidiary of Mack Oil Company, Inc., which, through its affiliates, distributes petroleum products.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

8. Metropolitan Edison Company and Pennsylvania Electric Company

[Docket No. ER98–540–000]

Take notice that on November 3, 1997, Metropolitan Edison Company and Pennsylvania Electric Company (d/b/a GPU Energy) filed executed Retail Transmission Service Agency Agreements between GPU Energy and (1) Southern Energy Trading and Marketing, Inc., dated October 31, 1997, and (2) DTE-CoEnergy, L.L.C., dated October 31, 1997.

GPU Energy requests a waiver of the Commission's notice requirements for good cause shown and an effective date of November 1, 1997, for the Retail Transmission Service Agency Agreements.

GPU Energy will be serving a copy of the filing on the Pennsylvania Public Utility Commission.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

9. Central Illinois Public Service Company

[Docket No. ER98–541–000]

Take notice that on November 4, 1997, Central Illinois Public Service Company (CIPS), submitted an executed umbrella short-term firm transmission service agreement, dated October 9, 1997, establishing LG&E Energy Marketing Inc., as a customer under the terms of CIPS' Open Access Transmission Tariff.

CIPS requests an effective date of October 9, 1997, for the service agreement with LG&E Energy Marketing Inc. Accordingly, CIPS requests waiver of the Commission's notice requirements. Copies of this filing were served on LG&E Energy Marketing Inc., and the Illinois Commerce Commission.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

10. Central and South West Services, Inc. As Agent for Central Power and Light Company, West Texas Utilities Company, Public Service Company of Oklahoma, and Southwestern Electronic Power Company

[Docket No. ER98–542–000]

Take notice that on November 4, 1997, Central and South West Services, Inc., as agent for Central Power and Light Company (CPL), West Texas Utilities Company (WTU), Public Service Company of Oklahoma (PSO), and Southwestern Electric Power Company (SWEPCO) (the CSW Operating Companies) filed with the Federal Energy Regulatory Commission a Market-Based Rate Power Sales Tariff to sell power at market-based rates, an application for blanket authorizations and for certain waivers of the Commission's Regulations. The CSW Operating Companies intend to engage

in transactions in which the CSW Operating Companies sell electricity at rates and on terms and conditions that are negotiated with the purchasing party.

The CSW Operating Companies have requested expedited action on its filing so that the Commission may accept the CSW Operating Companies' rate schedule for filing to become effective as soon as possible. The CSW Operating Companies have also served a copy of the application on the Public Utility Commission of Texas, the Louisiana Public Service Commission, the Arkansas Public Service Commission, and the Oklahoma Corporation Commission.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

11. Deseret Generation & Transmission Cooperative

[Docket No. ER98–543–000]

Take notice that on November 4, 1997, Deseret Generation & Transmission Cooperative (Deseret), tendered for filing a Notice of Termination of Rate Schedule FERC No. 6 (Power Sale Agreement with PacifiCorp). Rate Schedule FERC No. 6, will terminate by its own terms on December 31, 1997. PacifiCorp has recently informed Deseret that it intends to allow the agreement to terminate by its own terms.

Deseret requests that this notice become effective on December 31, 1997.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

12. Allegheny Power Service Corporation, on Behalf of Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company (Allegheny Power)

[Docket No. ER98–544–000]

Take notice that on November 3, 1997, Allegheny Power Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power), filed Supplement No. 26 to add ConAgra Energy Services, Inc., DTE Energy Trading, Inc., and Horizon Energy Company to Allegheny Power Open Access Transmission Service Tariff which has been submitted for filing by the Federal Energy Regulatory Commission in Docket No. OA96–18–000. The proposed effective date under the Service Agreements is November 1, 1997.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

13. Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company

[Docket No. ER98–549–000]

Take notice that on November 5, 1997, Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (d/b/a GPU Energy), filed an executed Service Agreement between GPU Energy and QST Energy Trading (QST), dated November 3, 1997. This Service Agreement specifies that QST has agreed to the rates, terms and conditions of GPU Energy's Operating Capacity and/or Energy Sales Tariff (Sales Tariff) designated as FERC Electric Tariff, Original Volume No. 1. The Sales Tariff was accepted by the Commission by letter order issued on February 10, 1995 in Jersey Central Power & Light Co., Metropolitan Edison Co., and Pennsylvania Electric Co., Docket No. ER95–276–000 and allows GPU Energy and QST to enter into separately scheduled transactions under which GPU Energy will make available for sale, surplus operating capacity and/or energy at negotiated rates that are no higher than GPU Energy's cost of service.

GPU Energy requests a waiver of the Commission's notice requirements for good cause shown and an effective date of November 3, 1997, for the Service Agreement.

GPU Energy has served copies of the filing on regulatory agencies in New Jersey and Pennsylvania.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

14. Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company

[Docket No. ER98–550–000]

Take notice that on November 5, 1997, Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (d/b/a GPU Energy), filed an executed Service Agreement between GPU Energy and DTE Co-Energy (DTE), dated November 3, 1997. This Service Agreement specifies that DTE has agreed to the rates, terms and conditions of GPU Energy's Operating Capacity and/or Energy Sales Tariff (Sales Tariff) designated as FERC Electric Tariff, Original Volume No. 1. The Sales Tariff was accepted by the Commission by letter order issued on February 10, 1995, in Jersey Central Power & Light Co., Metropolitan Edison Co. and Pennsylvania Electric Co., Docket No. ER95–276–000 and allows GPU Energy and DTE to enter into separately scheduled transactions under which GPU Energy will make available for sale, surplus operating capacity and/or energy at negotiated rates that are no higher than GPU Energy's cost of service.

GPU Energy requests a waiver of the Commission's notice requirements for good cause shown and an effective date of November 3, 1997, for the Service Agreement.

GPU Energy has served copies of the filing on regulatory agencies in New Jersey and Pennsylvania.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

15. Illinois Power Company

[Docket No. ER98–551–000]

Take notice that on November 5, 1997, Illinois Power Company (Illinois Power), 500 South 27th Street, Decatur, Illinois 62526, tendered for filing a Power Sales Tariff, Service Agreement under which Public Service Electric and Gas Company will take service under Illinois Power Company's Power Sales Tariff. The agreements are based on the Form of Service Agreement in Illinois Power's tariff.

Illinois Power has requested an effective date of October 6, 1997.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

16. Carolina Power & Light Company

[Docket No. ER98–552–000]

Take notice that on November 5, 1997, Carolina Power & Light Company (Carolina), tendered for filing an executed Service Agreement between Carolina and the following Eligible Entity: Northeast Utilities Service Company. Service to the Eligible Entity will be in accordance with the terms and conditions of Carolina's Tariff No. 1, for Sales of Capacity and Energy.

Copies of the filing were served upon the North Carolina Utilities Commission and the South Carolina Public Service Commission.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

17. UtiliCorp United, Inc.

[Docket No. ER98–553–000]

Take notice that on November 5, 1997, UtiliCorp United, Inc., tendered for filing on behalf of its operating division, Missouri Public Service, a Service Agreement under its Power Sales Tariff, FERC Electric Tariff Original Volume No. 10, with Marshall Board of Public Works. The Service Agreement provides for the sale of capacity and energy by Missouri Public Service to Marshall Board of Public Works pursuant to the tariff, and for the sale of capacity and energy by Marshall Board of Public Works to Missouri Public Service.

UtiliCorp requests waiver of the Commission's Regulations to permit the Service Agreement to become effective in accordance with its terms.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

18. Additional Signatories to PJM Interconnection, L.L.C. Operating Agreement

[Docket No. ER98–554–000]

Take notice that on November 5, 1997, the PJM Interconnection, L.L.C. (PJM), filed on behalf of the Members of the LLC, membership applications of Allegheny Energy Solutions, AES Power, Inc., NorAm Energy Management, Inc., and Southern Energy Retail Trading and Marketing, Inc. PJM requests an effective date of October 28, 1997.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

19. Montaup Electric Company

[Docket No. ER98–555–000]

Take notice that on November 3, 1997, Montaup Electric Company (Montaup), tendered for filing Waiver of Forecast Billing Rate Filing for Purchased Capacity Adjustment Clause for Calendar Year 1998.

Comment date: December 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

20. PP&L, Inc.

[Docket No. ER98–558–000]

Take notice that on November 5, 1997, PP&L, Inc. (formerly known as Pennsylvania Power & Light Company) (PP&L), filed a Service Agreement dated November 3, 1997, with New Energy Ventures, LLC (NEV) under PP&L's FERC Electric Tariff, Original Volume No. 5. The Service Agreement adds NEV as an eligible customer under the Tariff.

PP&L requests an effective date of November 5, 1997, for the Service Agreement.

PP&L states that copies of this filing have been supplied to NEV and to the Pennsylvania Public Utility Commission.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

21. PacifiCorp

[Docket No. ER98–559–000]

Take notice that on November 5, 1997, PacifiCorp, tendered for filing the Pacific Northwest Coordination Agreement dated June 18, 1997.

PacifiCorp states that the Pacific Northwest Coordination Agreement dated June 18, 1997, is intended by the Parties signing the Pacific Northwest Coordination Agreement dated June 18, 1997, to replace the Pacific Northwest Coordination Agreement dated September 15, 1964, which expires by its terms on June 30, 2003. PacifiCorp further states that the Pacific Northwest Coordination Agreement dated June 18, 1997, is an agreement providing for the sale and exchange of capacity and energy from hydroelectric and/or thermal resources, and for storage of water for hydroelectric generation, all for the purpose of coordinating and maximizing productive and ecologically sound use of the hydroelectric potential of the Columbia River hydroelectric system.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

22. San Diego Gas & Electric Company

[Docket No. ER98–560–000]

Take notice that on November 5, 1997, San Diego Gas & Electric Company (SDG&E), tendered for filing and acceptance, pursuant to 18 CFR 35.13, Service Agreements (Service Agreements) with the following entities for Point-To-Point Transmission Service under SDG&E's Open Access Transmission Tariff (Tariff) filed in compliance with FERC Order No. 888A:

1. Kansas City Power & Light Company
2. Minnesota Power Company
3. PECO Energy Company—Power Team
4. Western Resources
5. Williams Energy

SDG&E filed the executed Service Agreements with the Commission in compliance with applicable Commission Regulations. SDG&E also provided Sheet No. 114 (Attachment E) to the Tariff, which is a list of current subscribers. SDG&E requests waiver of the Commission's notice requirement to permit an effective date of December 15, 1997.

Copies of this filing were served upon the Public Utilities Commission of the State of California and all interested parties.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

23. Atlantic City Electric Company

[Docket No. ER98–562–000]

Take notice that on November 5, 1997, Atlantic City Electric Company (Atlantic Electric), tendered for filing service agreements under which Atlantic Electric will sell capacity and energy to Ontario Hydro, New Energy Ventures, LLC (New Energy), and NP Energy, Inc. (NP) under Atlantic Electric's market-based rate sales tariff. Atlantic Electric requests the agreements be accepted to become effective on November 6, 1997.

Atlantic Electric states that a copy of the filing has been served on Ontario Hydro, New Energy, and NP.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

24. TransCanada Power Marketing Ltd.)

[Docket No. ER98–564–000]

Take notice that on November 5, 1997, TransCanada Power Marketing Ltd. (TCPM), tendered for filing pursuant to Rule 205 of the Commission's rules of Practice and Procedure, 18 CFR 385.205, a Petition requesting Commission approval for (1) TCPM's FERC Electric Rate Schedule No. 1; (2) a blanket authorization for TCPM to make wholesale sales of electric power at market rates; and (3) a waiver of certain Commission Regulations.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

25. PacifiCorp

[Docket No. ER98–565–000]

Take notice that on November 6, 1997, PacifiCorp, tendered for filing in accordance with 18 CFR Part 35 of the Commission's Rules and Regulations, the annual facilities charge calculation under, PacifiCorp Rate Schedule FERC No. 298.

PacifiCorp requests that an effective date of December 31, 1997, be assigned to the annual facilities charge calculation.

Copies of this filing were supplied to Southern California Edison Company, Pacific Gas & Electric Company, the Washington Utilities and Transportation Commission, the Public Utility Commission of Oregon and the Public

Utilities Commission of the State of California.

A copy of this filing may be obtained from PacifiCorp's Regulatory Administration Department's Bulletin Board System through a personal computer by calling (503) 464–6122 (9600 baud, 8 bits, no parity, 1 stop bit).

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

26. PacifiCorp

[Docket No. ER98–567–000]

Take notice that on November 6, 1997, PacifiCorp, tendered for filing in accordance with 18 CFR Part 35 of the Commission's Rules and Regulations, Service Agreements with Flathead Electric Cooperative, Inc., under PacifiCorp's FERC Electric Tariff, Original Volume No. 12.

Copies of this filing were supplied to the Public Utility Commission of Oregon and the Washington Utilities and Transportation Commission.

A copy of this filing may be obtained from PacifiCorp's Regulatory Administration Department's Bulletin Board System through a personal computer by calling (503) 464–6122 (9600 baud, 8 bits, no parity, 1 stop bit).

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

27. PacifiCorp

[Docket No. ER98–568–000]

Take notice that on November 6, 1997, PacifiCorp, tendered for filing in accordance with 18 CFR Part 35 of the Commission's Rules and Regulations, Revisions to PacifiCorp's Rate Schedule FERC No. 236. These revisions include a Letter Agreement, dated September 29, 1997, and the Second Restated and Amended Power Sales Agreement dated September 29, 1997, between PacifiCorp and Black Hills Corporation.

Copies of this filing were supplied to PacifiCorp's Merchant Function, Black Hills Corporation, the Washington Utilities and Transportation Commission and the Public Utility Commission of Oregon.

A copy of this filing may be obtained from PacifiCorp's Regulatory Administration Department's Bulletin Board System through a personal computer by calling (503) 464–6122 (9600 baud, 8 bits, no parity, 1 stop bit).

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

28. Montaup Electric Company

[Docket No. ER98–569–000]

Take notice that on November 6, 1997, Montaup Electric Company (Montaup) filed 1) executed unit sales service agreements under Montaup's FERC Electric Tariff, Original Volume No. III; and 2) executed service agreements for the sale of system capacity and associated energy under Montaup's FERC Electric Tariff, Original Volume No. 4. The service agreements under both tariffs are between Montaup and following companies:

1. Aquila Power Corporation (Aquila)
2. Constellation Power Source, Inc. (CPS)
3. Duke/Louis Dreyfus LLC (DLDLLC)

Montaup requests a waiver of the sixty-day notice requirement so that the service agreements may become effective as of November 6, 1997.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

29. Southern Indiana Gas and Electric Company

[Docket No. ER98–571–000]

Take notice that on November 6, 1997, Southern Indiana Gas and Electric Company (SIGECO), tendered for filing two (2) service agreements for market based rate power sales under its Market Based Rate Tariff wit the following entities:

1. ConAgra Energy Services, Inc.
2. Southern Minnesota Municipal Power Agency

Copies of the filing were served upon each of the parties to the service agreements.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

30. Southern Indiana Gas and Electric Company

[Docket No. ER98–572–000]

Take notice that on November 6, 1997, Southern Indiana Gas and Electric Company (SIGECO), tendered for filing two (2) service agreements for non-firm transmission service under Part II of its Transmission Services Tariff with the following entities:

1. Sonat Power Marketing L.P.
2. Southern Energy Trading and Marketing, Inc.

Copies of the filing were served upon each of the parties to the service agreements.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

31. Aurora Power Resources, Inc.

[Docket No. ER98–573–000]

Take notice that on November 6, 1997, Aurora Power Resources, Inc. (APRI), petitioned the Commission for acceptance of APRI Rate Schedule FERC No. 1; the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission Regulations. APRI intends to engage in wholesale electric power and energy purchases and sales as a marketer. APRI is not in the business of generating or transmitting electric power. APRI is a privately held corporation.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

32. Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company

[Docket No. ER98–574–000]

Take notice that on November 6, 1997, Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (d/b/a GPU Energy), filed an executed Service Agreement between GPU Energy and Wheeled Electric Power Company (WEP), dated October 31, 1997. This Service Agreement specifies that WEP has agreed to the rates, terms and conditions of GPU Energy's Operating Capacity and/or Energy Sales Tariff (Sales Tariff) designated as FERC Electric Tariff, Original Volume No. 1. The Sales Tariff was accepted by the Commission by letter order issued on February 10, 1995 in Jersey Central Power & Light Co., Metropolitan Edison Co., and Pennsylvania Electric Co., Docket No. ER95–276–000 and allows GPU Energy and WEP to enter into separately scheduled transactions under which GPU Energy will make available for sale, surplus operating capacity and/or energy at negotiated rates that are no higher than GPU Energy's cost of service.

GPU Energy requests a waiver of the Commission's notice requirements for good cause shown and an effective date of October 31, 1997, for the Service Agreement.

GPU Energy has served copies of the filing on regulatory agencies in New Jersey and Pennsylvania.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

33. MAC Power Marketing L.L.C.

[Docket No. ER98–575–000]

Take notice that on November 6, 1997, MAC Power Marketing L.L.C. (MAC Power), petitioned the Federal Energy Regulatory Commission to grant certain blanket authorizations, to waive certain of the Commission's Regulations and to issue an order accepting MAC

Power's FERC Electric Rate Schedule No. 1.

MAC Power intends to engage in power marketing transactions, purchasing and reselling electricity at wholesale. MAC Power does not own or control electric generating or transmission facilities or have any franchised service territories. MAC Power is a subsidiary of Marubeni America Corporation, a trading company.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

34. Additional Signatories to PJM Interconnection, L.L.C. Operating Agreement

[Docket No. ER98–576–000]

Take notice that on November 6, 1997, the PJM Interconnection, L.L.C. (PJM), filed on behalf of the Members of the LLC, membership applications of American Energy Solutions. PJM requests an effective on the day after received by FERC.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

35. Additional Signatories to PJM Interconnection, L.L.C. Operating Agreement

[Docket No. ER98–577–000]

Take notice that on November 6, 1997, the PJM Interconnection, L.L.C. (PJM), filed on behalf of the Members of the LLC, membership applications of New Energy Ventures, L.L.C. PJM requests an effective on the date after received by FERC.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

36. Florida Power Corporation

[Docket No. ER98–578–000]

Take notice that on November 6, 1997, Florida Power Corporation (FPC), tendered for filing a service agreement between Electric Clearinghouse, Inc., and FPC for service under FPC's Market-Based Wholesale Power Sales Tariff (MR–1), FERC Electric Tariff, Original Volume No 8. This Tariff was accepted for filing by the Commission on June 26, 1997, in Docket No. ER97–2846–000. The service agreement is proposed to be effective October 10, 1997.

Comment date: December 8, 1997, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97–31714 Filed 12–2–97; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[NCEA–CD–97–1015; FRL–5931–2]

Air Quality Criteria for Carbon Monoxide

AGENCY: Environmental Protection Agency.

ACTION: Call for information.

SUMMARY: The National Center for Environmental Assessment, of the U.S. Environmental Protection Agency (EPA), is undertaking to update and revise, where appropriate, the EPA's Air Quality Criteria for Carbon Monoxide (CO) as required under sections 108 and 109 of the Clean Air Act.

Since completion of the 1991 criteria document for carbon monoxide, the EPA has continued to follow the scientific literature and compile information that may be relevant to the next periodic review of the National Ambient Air Quality Standards for CO (CO NAAQS). Interested parties are invited to assist the EPA in developing and refining its scientific information base to help ensure that all relevant information is considered in updating the Air Quality Criteria for CO. Identification of new information in the following areas will be particularly useful: effects of exposure on laboratory animals and humans; effects on the global climate; chemistry and physics; sources and emissions; transformation and transport in the environment; and ambient concentrations.

To be considered for inclusion in the criteria document and in the next periodic review of the CO NAAQS, submitted information should have been published, accepted for publication, or presented at a public scientific meeting.

DATES: All communications and information should be submitted by December 31, 1997.

ADDRESSES: Communications should be addressed to the Project Manager for CO, National Center for Environmental Assessment (MD–52), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711.

FOR FURTHER INFORMATION CONTACT: Diane H. Ray, National Center for Environmental Assessment (MD–52), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone: 919–541–3637; facsimile: 919–541–1818; e-mail: ray.diane@epamail.epa.gov.

Dated: November 25, 1997.

William H. Farland,

Director, National Center for Environmental Assessment.

[FR Doc. 97–31734 Filed 12–2–97; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–66247; FRL 5755–8]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with Section 6(f)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations.

DATES: Unless a request is withdrawn by June 1, 1998, orders will be issued cancelling all of these registrations.

FOR FURTHER INFORMATION CONTACT: By mail: James A. Hollins, Office of Pesticide Programs (7502C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location for commercial courier, delivery, telephone number and e-mail: Rm. 216, Crystal Mall No. 2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 305–5761; e-mail: hollins.james@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

Section 6(f)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, provides that a pesticide registrant may, at any time,

request that any of its pesticide registrations be cancelled. The Act further provides that EPA must publish a notice of receipt of any such request in the **Federal Register** before acting on the request.

II. Intent to Cancel

This Notice announces receipt by the Agency of requests to cancel some 36 pesticide products registered under section 3 or 24(c) of FIFRA. These registrations are listed in sequence by registration number (or company number and 24(c) number) in the following Table 1.

TABLE 1 — REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product Name	Chemical Name
000100–00647	D.Z.N. Diazinon 1% M.E. Insecticide	*O,O*-Diethyl *O*-(2-isopropyl-6-methyl-4-pyrimidinyl)phosphorothioate
000100–00648	D.Z.N. Diazinon 1/2% ME Insecticide	*O,O*-Diethyl *O*-(2-isopropyl-6-methyl-4-pyrimidinyl)phosphorothioate
000100–00649	D.Z.N. 2.0 M.E.C.	*O,O*-Diethyl *O*-(2-isopropyl-6-methyl-4-pyrimidinyl)phosphorothioate
000100–00652	D.Z.N. MG–2	*O,O*-Diethyl *O*-(2-isopropyl-6-methyl-4-pyrimidinyl)phosphorothioate
000100 TX–83–0017	Geigy Diazinon 14G (14.3% Granular) Insecticide	*O,O*-Diethyl *O*-(2-isopropyl-6-methyl-4-pyrimidinyl)phosphorothioate
000200–00152	Devoe All-Weather Penetrating Clear Wood Preservative F	3-Iodo-2-propynyl butylcarbamate
000264 WA–85–0008	Mocap Nematacide-Insecticide 10% Granular	*O*-Ethyl *S,S*-dipropyl phosphorodithioate
000352 ID–95–0009	Du Pont Vydate L Insecticide/Nematicide	Oxamimidic acid, *N',N'*-dimethyl-*N*-((methylcarbamoyl)oxy)-1-thio-methyl ester
000352 ID–95–0019	Du Pont Vydate L Insecticide/Nematicide	Oxamimidic acid, *N',N'*-dimethyl-*N*-((methylcarbamoyl)oxy)-1-thio-methyl ester
000352 OR–81–0033	Vydate L Oxamyl Insecticide/Nematicide	Oxamimidic acid, *N',N'*-dimethyl-*N*-((methylcarbamoyl)oxy)-1-thio-methyl ester
000352 OR–84–0020	Vydate L Insecticide Nematicide	Oxamimidic acid, *N',N'*-dimethyl-*N*-((methylcarbamoyl)oxy)-1-thio-methyl ester
000352 WV–96–0001	Du Pont Vydate L Insecticide/Nematicide	Oxamimidic acid, *N',N'*-dimethyl-*N*-((methylcarbamoyl)oxy)-1-thio-methyl ester
000769–00714	SMCP 1% Dursban Granular	*O,O*-Diethyl *O*-(3,5,6-trichloro-2-pyridyl)phosphorothioate
001022–00271	Weed-Free G	5-Bromo-3-sec-butyl-6-methyluracil 3-(3,4-Dichlorophenyl)-1,1-dimethylurea
001621–00016	Tanglefoot Bird Repellent	Polybutene
002155–00053	T.B.H. Formula No. 6	5-Bromo-3-sec-butyl-6-methyluracil
002155–00099	Eradicate Concentrate	5-Bromo-3-sec-butyl-6-methyluracil, lithium salt
004822–00294	Raid Fogger Plus A	*N*-Octyl bicycloheptene dicarboximide
		(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20% Pyrethrins
		Ethyl 2-(*p*-phenoxyphenoxy)ethyl carbamate
004822–00334	Johnson Raid Formula D46 Roach Baits	Ethyl 2-(*p*-phenoxyphenoxy)ethyl carbamate
004822–00377	Raid Fumigator F	Ethyl 2-(*p*-phenoxyphenoxy)ethyl carbamate
004822–00381	Raid Flea Killer VII Plus Egg Stop Formula	(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%
		(3-Phenoxyphenyl)methyl *d-cis* and *trans**2,2-dimethyl-3-(2-methylpropenyl)cyclopro
		Ethyl 2-(*p*-phenoxyphenoxy)ethyl carbamate
004822–00438	Rapid Flea Killer Plus Carpet Spray II	*N*-Octyl bicycloheptene dicarboximide
		(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%
		Pyrethrins
		(1-Cyclohexene-1,2-dicarboximido)methyl 2,2-dimethyl-3-(2-methylpropenyl)cycloprop
		Ethyl 2-(*p*-phenoxyphenoxy)ethyl carbamate
005383–00018	Troysan Polyphase Anti-Mildew	3-Iodo-2-propynyl butylcarbamate
005383–00051	Troysan Polyphase Anti-Mildew P–80	3-Iodo-2-propynyl butylcarbamate
005383–00052	Troysan Polyphase Anti-Mildew P–40	3-Iodo-2-propynyl butylcarbamate
005383–00076	Troysan Polyphase P–20 S	3-Iodo-2-propynyl butylcarbamate
005813–00013	Clorox Toilet Bowl Cleaner	Hydrogen chloride (hydrochloric acid, anhydrous)

TABLE 1 — REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Product Name	Chemical Name
		Didecyl dimethyl ammonium chloride
		Octyl decyl dimethyl ammonium chloride
		Dioctyl dimethyl ammonium chloride
010182–00115	Paraquat Concentrate 3	1,1'-Dimethyl-4,4'-bipyridinium dichloride
010352–00049	Aqucar 536 Water Treatment Microbiocide	Glutaraldehyde
010827–00063	Ind-Sol 288 Liquid Weed Killer	5-Bromo-3-sec-butyl-6-methyluracil, lithium salt
034704 WA–90–0034	Dimethoate 2.67 EC	*O,O*-Dimethyl *S*-((methylcarbamoyl)methyl)phosphorodithioate
034913–00021	Weed Blast 4-H Weed Killer	5-Bromo-3-sec-butyl-6-methyluracil
045639–00049	Mitac EC	*N'*-(2,4-Dimethylphenyl)-*N*-(((2,4-dimethylphenyl)imino)methyl)-*N*-methylmethanimidamide
045639–00074	Carzol SP	*m*-(((Dimethylamino)methylene)amino)phenyl-*N*-methylcarbamate, hydrochloride
062719 NM–87–0006	Treflan TR-10 Granules	Trifluralin (α,α,α-trifluro-2,6-dinitro-*N,N*-dipropyl-*p*-toluidine) (Note: α = alpha)
068608 AZ–94–0012	Treflan E. C.	Trifluralin (α,α,α-trifluro-2,6-dinitro-*N,N*-dipropyl-*p*-toluidine) (Note: α = alpha)

Unless a request is withdrawn by the registrant within 180 days of publication of this notice, orders will be issued cancelling all of these registrations. Users of these pesticides or anyone else desiring the retention of a registration should contact the applicable registrant directly during this 180–day period. The following Table 2 includes the names and addresses of record for all registrants of the products in Table 1, in sequence by EPA Company Number.

TABLE 2 — REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA Company No.	Company Name and Address
000100	Novartis Crop Protection, Inc., Box 18300, Greensboro, NC 27419.
000200	Glidden Co., Product Safety & Toxicology, 16651 Sprague Rd., Strongsville, OH 44136.
000264	Rhone-Poulenc Ag Co., Box 12014, Research Triangle Park, NC 27709.
000352	E. I. Du Pont De Nemours & Co, Inc., Barley Mill Plaza, Walker's Mill, Wilmington, DE 19880.
000769	SureCo Inc., 10012 N. Dale Mabry, Suite 221, Tampa, FL 33618.
001022	IBC Mfg. Co, c/o Sangeeta V. Khattar, 5966 Heisley Rd., Mentor, OH 44060.
001621	Tanglefoot Co., 314 Straight Ave., S.W., Grand Rapids, MI 49504.
002155	I. Schneid, 1429 Fairmont Ave. N.W., Atlanta, GA 30318.
004822	S.C. Johnson & Son Inc., 1525 Howe Street, Racine, WI 53403.
005383	Lewis & Harrison, Agent For: Troy Chemical Corp., 122 C St., NW., Ste 740, Washington, DC 20001.
005813	The Clorox Co., c/o PS&RC, Box 493, Pleasanton, CA 94566.
010182	Zeneca Ag Products, Box 15458, Wilmington, DE 19850.
010352	Union Carbide Corp., Box 670, Bound Brook, NJ 08805.
010827	Chemical Specialties Inc., P.O. Box 312, San Marcos, TX 78666.
034704	Cherie Garner, Agent For: Platte Chemical Co., Inc., Box 667, Greeley, CO 80632.
034913	Landis International Inc., Agent For: SSI Mobley Co., Inc., Box 5126, Valdosta, GA 31603.
045639	Agrevo USA Co., Little Falls Centre One, 2711 Centerville Rd., Wilmington, DE 19808.
062719	DowElanco, 9330 Zionsville Rd., 308/3E, Indianapolis, IN 46268.
068608	John Nelson, University of Arizona, 37860 W. Smith Enke Rd., Maricopa, AZ 85239.

III. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to James A. Hollins, at the address given above, postmarked before June 1, 1998. This written withdrawal of the request for cancellation will apply only to the applicable 6(f)(1) request listed in this notice. If the product(s) have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling. The withdrawal request must also include a commitment to pay any reregistration fees due, and to fulfill any applicable unsatisfied data requirements.

IV. Provisions for Disposition of Existing Stocks

The effective date of cancellation will be the date of the cancellation order. The orders effecting these requested cancellations will generally permit a registrant to sell or distribute existing stocks for 1 year after the date the cancellation request was received. This policy is in accordance with the Agency's statement of policy as prescribed in **Federal Register** (56 FR 29362) June 26, 1991; [FRL 3846–4]. Exceptions to this general rule will be made if a product poses a risk concern, or is in noncompliance with reregistration requirements, or is subject to a data call-in. In all cases, product-specific disposition dates will be given in the cancellation orders.

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Unless the provisions of an earlier order apply, existing stocks already in the hands of dealers or users can be distributed, sold or used legally until they are exhausted, provided that such further sale and use comply with the EPA-approved label and labeling of the affected product(s). Exceptions to these general rules will be made in specific cases when more stringent restrictions on sale, distribution, or use of the products or their ingredients have already been imposed, as in Special Review actions, or where the Agency has identified significant potential risk concerns associated with a particular chemical.

List of Subjects

Environmental protection, Pesticides and pests, Product registrations.

Dated: November 17, 1997.

Connie A. Haaser,

Acting Director, Information Resources and Services Division, Office of Pesticide Programs.

[FR Doc. 97–31415 Filed 12–2–97; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[PF–774; FRL–5751–9]

Notice of Filing of Pesticide Petitions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of pesticide petitions proposing the establishment of regulations for residues of certain pesticide chemicals in or on various food commodities.

DATES: Comments, identified by the docket control number PF–774, must be received on or before January 2, 1998.

ADDRESSES: By mail submit written comments to: Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticides Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person bring comments to: Rm. 1132, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under ''SUPPLEMENTARY INFORMATION.'' No confidential business information should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as ''Confidential Business Information'' (CBI). CBI should not be submitted through e-mail. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 1132 at the address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Treva Alston, Registration Division (7505W), Office of Pesticide Programs, 401 M St., SW., Washington, DC 20460. Office location, telephone number and e-mail address: Rm. 4W55 4th floor, CS1, 2800 Crystal Drive, Arlington VA, (703) 308-8373, e-mail: alston.traver@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA has received pesticide petitions as follows proposing the establishment and/or amendment of regulations for residues of certain pesticide chemicals in or on various food commodities under section 408 of the Federal Food, Drug, and Comestic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that these petitions contain data or information regarding the elements set forth in section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

The official record for this notice of filing, as well as the public version, has been established for this notice of filing under docket control number [PF–774] (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located at the address in ''ADDRESSES'' at the beginning of this document.

Electronic comments can be sent directly to EPA at:

opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in Wordperfect 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket number [PF-774] and appropriate petition number. Electronic comments on notice may be filed online at many Federal Depository Libraries.

List of Subjects

Environmental protection, Agricultural commodities, Food additives, Feed additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 20, 1997.

James Jones,

Acting Director, Registration Division, Office of Pesticide Programs.

Summaries of Petitions

Petitioner summaries of the pesticide petitions are printed below as required by section 408(d)(3) of the FFDCA. The summaries of the petitions were prepared by the petitioners and represent the views of the petitioners. EPA is publishing the petition summaries verbatim without editing them in any way. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

1. GlobeTech Industries Corporation

PP 7E4810

EPA has received a pesticide petition (PP 7E4810) from GlobeTech Industries Corporation, 57 Pratt Street, Suite 504, Hartford, CT 06103 proposing pursuant to section 408(d) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 346a(d), to amend 40 CFR part 180 to establish an exemption from the requirement of a tolerance for Crezasin when used as an inert ingredient in pesticide formulations applied to growing crops.

EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Toxicological Profile

The toxicity of Crezasin has been studied in Russia and the territories of the Former USSR for a period of 20 years on insects (bees, silkworms,) birds (chickens, ducks, turkeys), rabbits, dogs, sheep, swine and cattle and on an international level with companies from Japan, Mongolia, France, USA, Bulgaria, Hungary, and Poland. The results of experiments on the toxic effects of Crezasin on different animals indicate that the preparation has low toxicity with weakly defined cumulation and has a high index of safe application, LD_{50}= 3,600 +/- 320 milligrams/kilogram in laboratory female mice and LC_{50}= 6,570 +/- 150 milligrams/kilogram in laboratory female rats. The 50% lethal concentration (LC_{50}) of Crezasin in water for Daphnia is 221.5 milligrams/liter.

B. Aggregate Exposure

The usage pattern for Crezasin includes an economical effect on a limited number of agriculture cultures including potatoes, tomatoes, grapes and cereal grains (wheat, barley and oats). Practical usage of Crezasin is for the treatment of seeds and foliar spraying of plants. Rates of seed treatment of agricultural crops is between 2 - 10 grams per metric tons of seeds. Applications higher than 10 grams/ton can result in a reduced economic benefit of usage. For spraying of growing plants, the recommended dosage rates are between 0.32 x 10^{-4} moles/liter (100 mg/liter) and 0.06 x10^{-4} moles/liter (20 mg/liter) of Crezasin, with working solution rates up to 166 liters/acre (400 liters/hectare). Application rates higher than 10^{-4} moles/liter have resulted in a reduced economic benefit. The usage of Crezasin in ornamental plants, lawn care and other decorative public landscaping has not resulted in an economical or biological benefit, and thus its usage would not be found in these applications.

Relating to the mobility and persistence in soils. Crezasin is considered easily soluble in water at 100 grams/liter at pH 7, 25 degrees C. Crezasin is considered moderately stable in water, at pH 7, 25 degrees C, 50% hydrolysis of Crezasin in water is observed in 8.59 days, 95% hydrolysis is observed in 43.5 days. The constant of hydrolysis in neutral water is: C_1^{25} = 0.05 day^{-1}. The persistence of Crezasin in soils, pH 5 - 8, organic matter content 1% - 4%, at 20 degrees C: 50% Crezasin degradation is observed in 16 days and 90% degradation is observed in 23.5 days.

C. Safety Determination

Based on the very low level of substance toxicity, relatively short period of environmental fate and its usage pattern which results in low concentration usage, Crezasin exhibits very minimal risk exposure both in dietary and non-occupational exposures to children.

D. International Tolerances

There are no Codex maximum residue levels established for residues of Crezasin.

2. GlobeTech Industries Corporation

PP 7E4811

EPA has received a pesticide petition (PP 7E4811) from GlobeTech Industries Corporation, 57 Pratt Street, Suite 504, Hartford, CT 06103. proposing pursuant to section 408(d) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 346a(d), to amend 40 CFR part 180 to establish an exemption from the requirement of a tolerance for Mival when used as an inert ingredient in pesticide formulations applied to growing crops.

EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Toxicological Profile

The toxicity of Mival has been studied in Russia and the territories of the Former USSR for a period of 20 years on insects (bees, silkworms,) birds (chickens, ducks, turkeys), rabbits, dogs, sheep, swine and cattle and on an international level with companies from Japan, Mongolia, France, USA, Bulgaria, Hungary, and Poland. The results of experiments on the toxic effect of Mival on different animals indicate that the preparation has low toxicity with weakly defined cumulation and has a high index of safe application, LD_{50}= 2,300 +/- 240 milligrams/kilogram in laboratory mice and LD_{50}= 4,150 +/- 520 milligrams/kilogram in laboratory rats. In reservoir waters, the unaffecting dosage to the chemical characteristics of water and microbiological plant and animal life is 10 milligrams/liter.

B. Aggregate Exposure

The usage pattern for Mival includes an economical effect on a limited number of agriculture cultures including cotton, potatoes, tomatoes, corn, and cereal grains (wheat, barley and oats). Practical usage of Mival is for the treatment of seeds and foliar spraying of plants. Rates of seed treatment of agricultural crops is between 2 - 10 grams per metric tons of seeds. Applications higher than 10 grams/ton can result in a reduced economic benefit of usage for all cultures. For spraying of growing plants, the recommended dosage rates are between 10^{-4} moles/liter (225 mg/liter) and 2 x 10^{-4} moles/liter (450 mg/liter) of Mival, with working solution rates up to 100 liters/acre.). Application rates higher than 2 x10^{-4} moles/liter have resulted in a reduced economic benefit. The usage of Mival in ornamental plants, lawn care and other decorative public landscaping has not resulted in an economical or biological benefit, and thus its usage would not be found in these applications.

Relating to the mobility and persistence in soils. Mival is considered easily soluble in water at 1 gram/liter at pH 7, 20 degrees C. Usage of Mival in concentrations higher the 1 gm/liter must be accompanied by an acceptable solvent. Based on the usage requirements of Mival, such concentrations will lead to a negating effect of the biological benefits of its usage on plants. Mival is considered unstable in water, at pH 7, 25 degrees C, 50% hydrolysis of Mival in water is observed in 10-12 hours, 90% hydrolysis is observed in 48 hours. The constant of hydrolysis in neutral water is: C_1^{25} = 9.73 +/- 0.02 liter*mole*sec. The persistence of Mival in soils, pH 5 - 8, organic matter content 1% - 4%, at 20 degrees C: 50% Mival degradation is observed in 5 days, and 90% degradation is observed in 21 days.

C. Safety Determination

Based on the very low level of substance toxicity, relatively short period of environmental fate and its usage pattern, Mival exhibits very minimal risk exposure both in dietary and non-occupational exposures to children.

D. International Tolerances

There are no Codex maximum residue levels established for residues of Mival.

[FR Doc. 97–31549 Filed 12–2–97; 8:45 am]
BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[PF–780; FRL–5756–1]

Notice of Filing of Pesticide Petitions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of pesticide petitions proposing the establishment of regulations for residues of certain pesticide chemicals in or on various food commodities.

DATES: Comments, identified by the docket control number PF–780, must be received on or before January 2, 1998.

ADDRESSES: By mail submit written comments to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticides Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person bring comments to: Rm. 1132, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under ''SUPPLEMENTARY INFORMATION.'' No confidential business information should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as ''Confidential Business Information'' (CBI). CBI should not be submitted through e-mail. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 1132 at the address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: The product manager listed in the table below:

Product Manager	Office location/telephone number	Address
Joanne Miller (PM 23) ...	Rm. 237, CM #2, 703–305–6224, e-mail:miller.joanne@epamail.epa.gov.	1921 Jefferson Davis Hwy, Arlington, VA
James Tompkins (PM 25).	Rm. 239, CM #2, 703–305–5697, e-mail: tompkins.james@epamail.epa.gov.	1921 Jefferson Davis Hwy, Arlington, VA.

SUPPLEMENTARY INFORMATION: EPA has received pesticide petitions as follows proposing the establishment and/or amendment of regulations for residues of certain pesticide chemicals in or on various food commodities under section 408 of the Federal Food, Drug, and Comestic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that these petitions contain data or information regarding the elements set forth in section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

The official record for this notice of filing, as well as the public version, has been established for this notice of filing under docket control number [PF–780] (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located at the address in ''ADDRESSES'' at the beginning of this document.

Electronic comments can be sent directly to EPA at:
opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in Wordperfect 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket number (insert docket number) and appropriate petition number. Electronic comments on notice may be filed online at many Federal Depository Libraries.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 21, 1997

Peter Caulkins,

Acting Director, Registration Division, Office of Pesticide Programs.

Summaries of Petitions

Petitioner summaries of the pesticide petitions are printed below as required by section 408(d)(3) of the FFDCA. The summaries of the petitions were prepared by the petitioners and represent the views of the petitioners. EPA is publishing the petition summaries verbatim without editing them in any way. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

1. Valent U.S.A. Corporation

PP 7F4873

EPA has received a pesticide petition (PP 7F4873) from Valent U.S.A. Corporation, 1333 N. California Blvd., Walnut Creek, CA 94596. proposing pursuant to section 408(d) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of clethodim in or on the raw agricultural commodities tuberous and corm vegetables (crop subgroup 1-C) at 1.0 parts per million (ppm), potato flakes/granules at 2.0 ppm, sunflower seed at 5.0 ppm, sunflower meal at 10.0 ppm, canola seed at 0.5 ppm, and canola meal at 1.5 ppm. The crop subgroup 1-C tolerance should replace the 0.5 ppm tolerance that already exists for clethodim in/or potato tubers which was based on data from Canada. The

proposed analytical method for these commodities is EPA-RM-26D-3, a high-performance liquid chromatography (HPLC) method. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant metabolism*. Clethodim is used for postemergent control of grasses in a wide variety of crops including cotton, soybeans, sugar beets, onions, tomatoes, etc. Plant metabolism studies have been performed in carrots, soybeans, and cotton. Studies were performed with clethodim radiolabeled in the ring structure and in the side chain to follow both parts of the molecule.

The major metabolic pathway in plants is initial sulfoxidation to form clethodim sulfoxide followed by further sulfoxidation to form clethodim sulfone; elimination of the chloroallyloxy side chain to give the imine sulfoxide and sulfone; and hydroxylation to form the 5-OH sulfoxide and 5-OH sulfone. Clethodim sulfoxide and clethodim sulfone conjugates were also detected as major or minor metabolites, depending on plant species and subfractions. Once cleaved from clethodim, the chloroallyloxy moiety udergoes extensive metabolism to eliminate the chlorine atom and incorporate the three-carbon moieties into natural plant components.

Based on these metabolism studies, the residues of concern in crops are clethodim and its metabolites containing the cyclohexene moiety, and their sulfoxides and sulfones.

2. *Analytical method*. Adequate analytical methodology is available for detecting and measuring levels of clethodim and its metabolites in crops. For most commodities, the primary enforcement method is EPA-RM-26D-3, an HPLC method capable of distinguishing clethodim from the structurally related herbicide sethoxydim. However, for milk natural interferences prevent adequate quantitation of clethodim moieties and the common-moiety method (RM-26B-2) is the primary enforcement method with EPA-RM-26D-3 as the secondary method if needed to determine whether residues are clethodim or sethoxydim. Both of these methods have successfully undergone petition method validations at EPA.

3. *Magnitude of residues*. Clethodim is the active ingredient in SELECT 2 EC Herbicide (EPA Reg. No. 59639-3) and SELECT Herbicide (also known as PRISM and ENVOY Herbicides, EPA Reg. No. 59639-78). Tolerances have been established for residues in cotton, soybean, sugar beet, onion (dry bulb), and animal commodities, and tolerances are expected soon for alfalfa, peanut, dry bean, and tomato commodities. A summary of available field residue data for the pending tolerances on tuberous and corm vegetables (crop subgroup 1-C), sunflower, and canola commodities is presented below.

In 17 field trials, potatoes were treated with two post-emergent applications of 0.25 lb. a.i./A each, approximately 14–days apart, and harvested approximately 30 days after the last application. Trials were performed in EPA Regions 1, 2, 3, 5, 9, 10, and 11. Residues for potato tuber samples ranged from < 0.1 ppm to 0.80 ppm total clethodim. The highest average field trial (HAFT) residue was 0.775 ppm. The average residue value for all trials, excluding samples less than the limit of detection, was 0.42 ppm. Two processing studies were also performed for potatoes. Residues were found to concentrate in flakes, but not wet peel or chips. The average concentration factor for flakes was 2.4. Since potato is the only representative crop for crop subgroup 1-C per 40 CFR 180.41, these data support time-limited tolerances of 1.0 ppm in tuberous and corm vegetables (crop subgroup 1-C) and 2.0 ppm in flakes/granules.

In 8 field trials, sunflowers were treated with two post-emergent applications of 0.25 lb. a.i./A each. Sunflower seeds were harvested 56 to 72 days after the last application. Trials were performed in EPA Regions 5, 7, and 8. Residues for sunflower seed samples ranged from 0.46 ppm to 4.4 ppm total clethodim. The highest average field trial (HAFT) residue was 4.2 ppm. The average residue level was 1.6 ppm. A processing study was also performed for sunflowers. Residues were found to concentrate in meal, but not in refined oil. The concentration factor for meal was 2.1. These data support tolerances of 5.0 ppm in sunflower seed and 10.0 ppm in sunflower meal.

In 18 field trials, canola or rape was treated with one post-emergent application of 0.11 to 0.32 lb. a.i./A and harvested approximately 70 to 98 days after the application. Most of the trials were performed in Canada in growing regions adjacent to the U.S. areas where canola is grown. These data were used to support a maximum residue level in Canada and are being cited in order to harmonize maximum residue levels between the U.S. and Canada and remove the existing trade barrier. Residues in canola seed samples ranged from < 0.05 ppm to 0.54 ppm. The highest average field trial (HAFT) residue was 0.505 ppm. The average residue value for all trials, including samples less than the limit of detection at one-half the limit, was 0.162 ppm. A processing study was also performed for canola and residues were found to concentrate in meal, but not in crude oil. Since the highest residues were the result of application rates higher than those proposed for the U.S., these data support tolerances of 0.5 ppm in canola seed and 1.5 ppm in canola oil.

B. Toxicological Profile

1. *Acute toxicity*. Clethodim Technical is slightly toxic to animals following acute oral (Toxicity Category III), dermal (Toxicity Category IV), or inhalation exposure (Toxicity Category IV under current guideline interpretation). Clethodim is a moderate eye irritant (Category III), a severe skin irritant (Category II), and does not cause skin sensitization in the modified Buehler test in guinea pigs. In addition, an acute oral no-observed effect level (NOEL) has been determined in rats to be 300 milligrams/kilograms (mg/kg). Since this NOEL is significantly higher than the lowest chronic NOEL of 1 mg/kg/day, chronic exposures are expected to be of the most concern and this summary will focus on repeated exposures.

2. *Genotoxicty*. Clethodim Technical did not induce gene mutation in microbial in vitro assays. A weak response in an in vitro assay for chromosome aberrations was not confirmed when clethodim was tested in an in vivo cytogenetics assay up to the maximally tolerated dose level, nor was the response observed in vitro using technical material of a higher purity. No evidence of unscheduled DNA synthesis was seen following in vivo exposure up to a dose level near the LD_{50} (1.5 g/kg). This evidence indicates that clethodim does not present a genetic hazard to intact animal systems.

3. *Reproductive and developmental toxicity*. No reproductive toxicity was observed with Clethodim Technical at feeding levels up to 2,500 ppm. Developmental toxicity was observed in two rodent species, but only at maternally toxic dose levels. In rats, the developmental NOEL was 300 mg/kg/day while the maternal toxicity NOEL was only 150 mg/kg/day. In rabbits, the developmental NOEL was >300 mg/kg/day and the maternal NOEL was only 25 mg/kg/day. Valent therefore does not

consider clethodim to be a reproductive or developmental hazard. These studies also indicate that clethodim does not adversely affect endocrine function.

4. *Subchronic toxicity*. High doses of Clethodim Technical cause decreased body weights, increased liver size (increased weight and cell hypertrophy), and anemia (decreased erythrocyte counts, hemoglobin, or hematocrit) in rats and dogs. No observable effect levels have been determined to be 100 mg/kg/day for a 4-week dermal study in rats, 200 to 1,000 ppm for 4- or 5-week feeding studies in rats or mice, 500 ppm in a 13-week feeding study in rats, and 25 mg/kg/day in a 90-day oral study in dogs.

5. *Chronic toxicity and oncogenicity*. In chronic studies conducted in rats, mice, and dogs, compound-related effects noted at high doses included decreased body weight, increased liver size (liver weight and hypertrophy), and anemia (decreased hemoglobin, hematocrit, and erythrocyte count). Bone marrow hyperplasia was observed in dogs at the highest dose tested. No treatment-related increases in incidence of neoplasms were observed in any study. Chronic NOELs were 200 ppm for an 18-month feeding study in mice and 500 ppm for a 24-month study in rats. The lowest NOEL is from the 1-year oral dog study and is 1 mg/kg/day clethodim technical. Based on this study and a 100-fold safety factor, the reference dose (RfD) for clethodim was determined to be 0.01 mg/kg/day. Valent believes that clethodim is not carcinogenic. These studies also indicate that clethodim does not adversely affect endocrine function.

6. *Animal metabolism*. The *in vivo* metabolism of clethodim in rats was tested at a high dose (468 mg/kg), low dose (4.4 mg/kg), and a low dose (4.8 mg/kg) following 14-days of treatment with Clethodim Technical. A single oral dose of [14C]-clethodim was given to each rat and expired carbon dioxide and excreta were collected over the next 2- and 7-days, respectively, to determine radiolabel recovery. Several organs and tissues, and the remaining carcass, were collected after sacrifice to determine radiolabel recovery. In all treatment groups, nearly all of the radiolabel was eliminated in the urine (87-93%), feces (9-17%), and carbon dioxide (0.5-1%) and less than 1% of the dose was recovered in the organs and tissues after 7- days.

Elimination was rapid as most of the recovered dose was eliminated within 48 hours. The low dose groups eliminated clethodim slightly faster than the high dose group, and repeated exposure to clethodim prior to radiolabel dosing did not affect the rate of elimination or distribution of recovered radiolabel. There were no apparent sex differences with respect to elimination or distribution of metabolites.

The primary excretory metabolites were identified as clethodim sulfoxide (48-63%), clethodim *S*-methyl sulfoxide (6-12%), clethodim imine sulfoxide (7-10%), and clethodim 5-hydroxy sulfoxide (3-5%). Minor metabolites included clethodim oxazole sulfoxide (2-3%), clethodim trione sulfoxide (1%), clethodim (1%), clethodim 5-hydroxy sulfone (0.3-1%), clethodim sulfone (0.1-1%), aromatic sulfone (0.2-0.7%), and *S*-methyl sulfone (0-0.4%).

7. *Dermal penetration*. The dermal penetration of SELECT 2 EC Herbicide, the end-use product, was tested on unabraded, shaved skin of rats. Single doses of approximately 0.05, 0.5, and 5.0 mg of radiolabeled (14C-clethodim) SELECT 2 EC Herbicide, were applied topically to 10 cm^2 sites on the dorsal trunk. After 2, 10, or 24 hours, urine, feces, volatiles, scrubbings of the skin, skin at treatment site, blood, several tissues, and the carcass were collected and counted for radioactivity. Clethodim was found to be slowly absorbed through the skin in a time-dependent manner. The percent of dose absorbed increased with length of exposure and decreased with increasing dose. 10-hour absorption rates ranged from 7.5% to 30.0%. Most of the absorbed material was found in the urine and carcass, and most of the unabsorbed material was found in the skin scrubbings indicating that material was still on the skin surface.

8. *Metabolite toxicology*. 2 metabolites of clethodim, clethodim imine sulfone (RE-47719) and clethodim 5-hydroxy sulfone (RE-51228), have been tested in toxicity screening studies to evaluate the potential impact of these metabolites on the toxicity of clethodim. In general, these metabolites were found to be less toxic than Clethodim Technical for acute and oral toxicity studies; reproduction and teratology screening studies; and several mutagenicity studies.

C. Aggregate Exposure

1. *Dietary exposure*—i. *Food*. Clethodim is approved for use in the production of commercial agricultural crops including cotton, soybeans, sugar beets, and onions (dry bulb). Approval is expected soon for several additional crops. Dietary exposures are expected to represent the major route of exposure to the public. Since chronic exposures are of more concern than acute exposures for clethodim, this summary will focus primarily on chronic issues. Chronic dietary assessments for clethodim have been conducted by the registrant for all currently approved crops, all pending crops, and the crops proposed in this petition (tuberous and corm vegetables, sunflower, and canola).

In Valent's assessment, anticipated residues were used for all crop and animal commodities. Anticipated residue levels were the mean levels found in crop field trial data after treatment with the maximum recommended rate and harvested at minimum allowable intervals. These values are, therefore, slightly conservative. An assessment was performed assuming 100% of crop treated (still conservative) as well as assuming a more realistic percent of crop treated based on market survey data for existing uses or market projections for proposed uses. Adjusting for percent of crop treated is justified because most of treated commodities are combined in central locations and broadly distributed to the public; none of the clethodim tolerances or uses are limited to specific regions in the U.S.; and the primary concern is with chronic dietary exposure which minimizes the variance of single serving residues. The results of these assessments are summarized below in the Safety Determination section and indicate that chronic dietary exposures for existing and proposed uses of clethodim are well below the reference dose in either case.

ii. *Drinking water*. Since clethodim is applied outdoors to growing agricultural crops, the potential exists for clethodim or its metabolites to leach into groundwater. Drinking water, therefore, represents a potential route of exposure for clethodim and should be considered in an aggregate exposure assessment.

Based on available studies used in EPA's assessment of environmental risk for clethodim (memo from E. Brinson Conerly dated June 26, 1990), clethodim itself was classified as mobile in soil, but very non-persistent, representing a minimal groundwater concern. Metabolites of clethodim were also classified as mobile, but are slightly more persistent (half-lives up to 30– days versus up to 3-days for parent). Regarding clethodim metabolites, the Agency concluded that the ''potential for groundwater contamination may be somewhat higher than for clethodim but would still be expected to be relatively low in most cases due to their moderately low persistence''.

There is no established Maximum Concentration Level for residues of clethodim in drinking water under the Safe Drinking Water Act.

Based on this information, Valent believes that clethodim appears to represent an insignificant risk for exposure through drinking water.

2. *Non-dietary exposure*. Clethodim is currently approved for the commercial production of agricultural crops including soybeans, cotton, sugar beets, onions, and ornamental plants as well as for use on non-crop areas. The new uses proposed in this notice of filing are all agricultural crops. While there is a potential for clethodim to be used in non-crop areas (e.g. around parks and rights-of-way) where the public does spend some time, the likelihood of significant exposure is very small. First, this grass herbicide cannot be sprayed on lawns where the public does spend significant amounts of time, but instead must be used where there is no crop or around ornamental plants that are tolerant to the chemical. The public does not spend significant amounts of time in these areas. And second, clethodim is not persistent in the environment so the potential for public exposure is short term. Therefore, Valent believes that the potential for non-occupational exposure to the general public, other than through the diet or drinking water, is insignificant.

D. Cumulative Effects

There is one other pesticide compound registered in the United States, sethoxydim, which is structurally related to clethodim and has similar effects on animals. Sethoxydim is approved for use on a variety of agricultural crops, in non-crop areas, and around the home. This chemical should be considered in an aggregate exposure assessment along with clethodim. Dietary exposure is expected to represent the major route of exposure for sethoxydim as well as for clethodim.

The reference dose for sethoxydim is 0.09 mg/kg/day based on the 1–year dog feeding study NOEL and a 100-fold safety factor. This in on the same order of magnitude as clethodim, 0.01 mg/kg/day, which is also based on a 1–year dog study and a 100-fold safety factor.

A discussion of the cumulative effects from clethodim and sethoxydim exposures is presented below in the Safety Determination section.

E. Safety Determination

1. *U.S. population*. Using the dietary exposure assessment procedures described above for clethodim, chronic dietary exposures resulting from existing and proposed uses of clethodim were compared to the reference dose (RfD) of clethodim. In Valent's conservative assessment (using anticipated residues and assuming 100% treated for all crops), exposure for the U.S. population would occupy 13.6% of the RfD and non-nursing infants (< 1–year) are most highly exposed with total exposure occupying 32.3% of the RfD. Exposure to children 1 to 6 years old would occupy 27.1% of the RfD. In Valent's realistic analysis (using anticipated residues and estimated percent of crop treated for all crops), exposure for the U.S. population would occupy only 0.6% of the RfD and non-nursing infants are still the highest and would be at only 1.6% of the RfD.

For sethoxydim, recent EPA dietary assessments have been performed in conjunction with the extension of several time-limited tolerances. In a Final Rule published in the **Federal Register** of April 11, 1997 (62 FR 17735) (FRL-5598-7), EPA estimated that exposure to all existing tolerances for sethoxydim would occupy 36% of the sethoxydim RfD for the U.S. population and 72% of the RfD for the most exposed subpopulation of children aged 1– to 6-years. The assumptions used were conservative and the final rule stated that ''actual risks using more realistic assumptions would likely result in significantly lower risk estimates.''

Since clethodim and sethoxydim have similar toxicological effects in mammals, the contributions to the individual reference doses may need to be considered in an aggregate exposure assessment. The EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. Directly summing the results of the conservative sethoxydim and the conservative clethodim contributions to RfD would be approaching 100%. However, reliable information is not available to indicate that directly summing the percent of RfD for these two chemicals is the most appropriate thing to do. Since using realistic assumptions for clethodim, including adjustment for percent of crop treated, result in large decreases in dietary risk (about 20-fold) Valent expects that the sethoxydim risk estimates would also be reduced significantly. Therefore, Valent believes that the cumulative chronic dietary risk of sethoxydim and clethodim is likely to be well below the 100% level for all population subgroups.

Regarding drinking water exposures, sethoxydim is similar to clethodim representing a minimal risk for leaching into groundwater due to its rapid degradation in the environment. There is no established Maximum Concentration Level for residues of sethoxydim in drinking water under the Safe Drinking Water Act.

Regarding non-occupational exposures, sethoxydim is registered for use in non-crop areas and around the home and may have some potential for exposure to the general public. However, as discussed for clethodim, sethoxydim cannot be applied to grass where public contact is expected and sethoxydim is not persistent in the environment. Valent therefore expects that non-occupational exposures to the public be minimal for sethoxydim.

In summary, dietary exposure for clethodim and sethoxydim are each expected to occupy less than 10% of their RfD's when anticipated residue levels and percent of crop treated values are considered. Exposures through the drinking water or other non-occupational routes are expected by Valent to be minimal. Collectively, Valent believes that the aggregate risks associated with the uses of these two chemicals is small and demonstrates a reasonable certainty of no harm to the public.

2. *Infants and children*. As discussed above, dietary exposure for clethodim and sethoxydim is greatest for children ages 1–6-years or non-nursing infants less than 1–year old. However, using a realistic approach to estimating exposures, exposures are expected to be below 10% of the RfD for each chemical even for infants and children. The databases for clethodim and sethoxydim are complete relative to current pre- and post-natal toxicity testing requirements including developmental toxicity studies in two species and multi-generation reproduction studies in rats. Reproduction and developmental effects have been found in toxicology studies for clethodim and sethoxydim, but the effects were seen at levels that were also maternally toxic. This indicates that developing animals are not more sensitive than adults. FQPA requires an additional safety factor of up to 10 for chemicals which represent special risks to infants or children. Clethodim and sethoxydim do not meet the criterion for application of an additional safety factor for infants and children. Valent believes that this demonstrates a reasonable certainty of no harm to children and infants from the proposed uses of clethodim.

F. International Tolerances

Although some have been proposed, there are no Mexican or Codex tolerances or maximum residue limits established for clethodim on potatoes, sunflower, or canola commodities. In

Canada, there are maximum residue limits established for potato tubers at 0.5 ppm and canola oil at 0.1 ppm. The use rates proposed for the use on tuberous and corm vegetables (crop subgroup 1-C) may exceed the 0.5 ppm level in tubers so a higher level is necessary. In Canada, canola oil is the only canola commodity considered for a residue limit since this is the commodity consumed by humans. In the U.S., a tolerance is not being proposed for the processed commodity canola oil since concentration did not occur in the processing study. Consequently, residue in oil up to 0.5 ppm would be allowed in the U.S. However, the residue data indicate that residues in oil are not expected to exceed 0.1 ppm and Valent does not believe this would represent a barrier against exporting U.S.-treated canola oil into Canada.

2. Zeneca Ag Products

PP 6F4609

EPA has received a pesticide petition (PP 6F4609) from Zeneca Ag Products, 1800 Concord Pike, P.O. Box 15458, Wilmington, DE 19850. proposing pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of diquat dibromide in or on the raw agricultural commodity dried shelled pea and bean (except soybean) subgroup (seed) at 0.80 ppm. The proposed analytical method is a spectrophotometric method measuring absorption following derivitisation of the diquat with alkaline sodium dithionite. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant metabolism*. The metabolism of diquat in plants is adequately understood. The residue of concern in plants is diquat per se. No further plant metabolism data are necessary for this proposed use.

2. *Analytical method*. The method of analysis is a spectrophotometic method measuring absorption following derivitisation of the diquat with alkaline sodium dithinoite.

3. *Magnitude of residues*. Dry Pea - Six residue field trials were conducted during 1994 in California, Idaho, Oregon, Texas, and Washington. The seed samples were analyzed for the active ingredient diquat. Diquat residues in dry pea seed ranged from 0.05 to 0.56 ppm.

Lentil - Five residue field trials were conducted during 1994 in Idaho, North Dakota, and Washington. The seed samples were analyzed for the active ingredient diquat. Diquat residues in lentil seed ranged from < 0.05 to 0.54 ppm.

Dry Bean - Eight residue field trials were conducted during 1994 in California, Colorado, Idaho, Michigan, Minnesota, North Dakota, Nebraska, and New York. The bean seed were analyzed for the active ingredient diquat. Diquat residues were less than the limit of quantitation (<0.05 ppm) in all the bean seed samples.

B. Toxicological Profile

1. *Acute toxicity*. In studies using laboratory animals, diquat dibromide has been shown generally to be of moderate toxicity. It can cause slight to severe eye irritation and has been placed in Toxicity Category II for acute dermal eye irritation effects. It is slightly acutely toxic by the oral and inhalation routes and has been placed in Toxicity Category III for these effects. Diquat dibromide causes slight dermal irritation and has been placed in Toxicity Category IV for this effect. It is not a skin sensitizer.

2. *Genotoxicty*. Diquat dibromide was negative for mutagenicity in the following test: 1 gene mutation (Ames), 2 structural chromosome aberration (mouse micronucleus and dominant lethal in mice) and 1 other genotoxic effects (unscheduled DNA synthesis in rat hepatocytes *in vitro*). Diquat was positive in 1 gene mutation test (mouse lymphoma cell assay) and in 1 chromosome aberration test (human blood lymphocytes, depending on the concentration of diquat dibromide and the presence or absence of the metabolic activation system). EPA has concluded that Diquat does not appear to present a mutagenicity concern in (in vivo) studies and for heritable risk considerations based on available information.

3. *Reproductive and developmental toxicity*. In a rat multigeneration study, diquat was fed at dose levels equivalent to 0, 16, 80 or 400/240 ppm of diquat cation. There was evidence of toxicity in both adults and offspring at 400/240 ppm diquat. A low incidence of toxicity was seen at 80 ppm in the adult rats only. Based on the findings, the NOEL and LOEL for systemic toxicity are 16 ppm (0.8 mg/kg/day) and 80 ppm (4 mg/kg/day), respectively, expressed as diquat cation. The NOEL and LOEL for reproductive toxicity are 80 ppm (4 mg/kg/day) and 400/240 ppm (20/12 mg/kg/day) respectively, expressed as diquat cation.

In a developmental toxicity study in rabbits, diquat dibromide was administered by gavage at dose levels of 0, 1, 3, or 10 mg/kg/day. There was no evidence to suggest that diquat was teratogenic to the rabbit at any dose level tested. Based on the findings, the NOEL and LOEL for maternal toxicity are 1 mg/kg/day and 3 mg/kg/day, respectively, expressed as diquat cation. The developmental toxicity NOEL and LOEL are, respectively, 3 mg/kg/day and 10 mg/kg/day, expressed as diquat cation.

In a developmental toxicity study in the rat, diquat dibromide was administered by oral gauge dose levels of 0, 4, 12 or 40 mg/kg/day. Diquat was not a rat teratogen at any of the dose levels tested. Maternal toxicity and foetotoxicity were in evidence at 40 mg/kg/day with mild and transient maternal toxicity persisting to the lowest dose level tested (4 mg/kg/day). The developmental toxicity NOEL and LOEL are, respectively, 12 mg/kg/day and 40 mg/kg/day expressed as diquat cation.

4. *Subchronic toxicity*. A supplemental subchronic dermal toxicity study using rabbits exposed to technical diquat dibromide at doses of 0, 20, 40, 80, or 160 mg/kg/day with a toxicological NOEL and LOEL for systemic toxicity, for both sexes, of 20 mg/kg/day and 40 mg/kg/day, respectively.

A repeated dermal toxicity study using rats exposed to technical diquat dibromide at doses of 0, 5, 20, 40 or 80 mg/kg of body weight/day with a toxicological NOEL and LOEL for systemic toxicity, for both sexes, of 5 mg/kg/day and 20 mg/kg/day, respectively.

An inhalation study using rats resulted in increase in lung weight, lung/body weight and lung/brain weight, lung lesions, and mottling and reddening of the lungs in females; however, all effects except the latter were reversible. A second inhalation study using rats showed no effects on any of the parameters examined at a dose of 0.1 µg/l. Based on both studies the NOEL and LOEL on inhalation exposure are 0.1µg/L and 0.49 µg/L, respectively.

5. *Chronic toxicity*.— i. *2–Year rat study*. - A chronic feeding carcinogenicity study was conducted on rats which were fed diets containing 0, 5, 15, 75 or 375 ppm of diquat cation. The systemic NOEL for both sexes was 15 ppm (0.58 mg/kg/day for males and

0.72 mg/kg/day for females, expressed as diquat cation); and the systemic LOEL was 75 ppm (2.91 mg/kg/day for males and 3.64 mg/kg/day for females, expressed as diquat cation).

ii. *1–Year dog study*. - A chronic dog study was conducted on beagles which were fed diets containing 0, 0.5, 2.5, or 12.5 mg/kg/day, expressed as diquat cation. The systemic NOEL for both sexes was 0.5 mg/kg/day and systemic LOEL was 2.5 mg/kg/day.

iii. *2–Year mice study*. - A chronic feeding/carcinogenicity study was conducted on mice which were fed diets containing 0,30,100 or 300 ppm, expressed as diquat cation. The systemic NOEL for both sexes was 30 ppm. The systemic LOEL was 100 ppm. Zeneca believes that diquat was not carcinogenic in this study.

The carcinogenic potential of diquat dibromide was evaluated by the Health Effects Division Reference Dose (RfD)/ Peer Review Committee on March 31, 1994. The Committee classified diquat dibromide into Group E (evidence of noncarcinogenicity for humans, based on a lack of evidence of carcinogenicity in acceptable studies with two animal species, rat and mouse.

6. *Animal metabolism*. The reregistration requirements for animal metabolism are fulfilled. The qualitative nature of the residue in animals is adequately understood based on acceptable poultry, ruminant, and fish metabolism studies. There are no animal feed items associated with this proposed use. The diquat metabolism and magnitude of residue in animals is not germane to this petition.

7. *Metabolite toxicology*. The qualitative nature of the residue in plants is adequately understood based on an acceptable potato metabolism study and rat bioavailabilty study. The terminal residue of concern in plants is diquat per se. The qualitative nature of the residue in animals is adequately understood.

C. Aggregate Exposure

Diquat is a non-selective, contact herbicide with both food and non-food uses. As such, aggregate non-occupational exposure would include exposures resulting from consumption of potential residues in food and water, as well as from residue exposure resulting from non-crop use around trees, shrubs, lawns, walks, driveways, etc. Thus, the possible human exposure from food, drinking water and residential uses has been assessed below.

1. *Dietary exposure*— i. *Food*. Acute dietary - The EPA did not identify an acute toxicity endpoint of concern for diquat in the Reregistration Eligibility Decision (RED) document, and determined that an acute dietary risk assessment is not required for this chemical.

ii. *Chronic dietary*. For purposes of assessing the potential chronic dietary exposure, Zeneca has estimated the aggregate exposure based on Theoretical Maximum Residue Contribution (TMRC) for all existing tolerances and the proposed tolerances of diquat on dry beans and dry peas at 0.8 ppm. The TMRC is obtained by multiplying the tolerance level residues (existing and proposed) by the consumption data which estimates the amount of those food products eaten by various population subgroups. Exposure of humans to residues could also result if such residues are transferred to meat, milk, poultry or eggs. The following assumptions were used in conducting this exposure assessment: 100% of the crops were treated, the RAC residues would be at the level of the tolerance, and certain processed food residues would be at anticipated (average) levels based on processing studies. In addition, residues of diquat in tap water at the Maximum Contaminant Level (MCL) of 0.02 ppm was included in the dietary assessment. These conservative assumptions result in a ''worst-case'' risk assessment and a significant overestimate of actual human exposure. An assessment was also performed using Anticipated Residues Contributions (ARC) derived from field trial data for sorghum, soybeans, potatoes, dry beans and peas. The ARC assessment also included percent crop treated data as cited in the July 1995 Diquat RED, as well as market projections for dry beans and peas. The resulting TMRC for the US population is 0.002946 mg/kg body weight/day (58.9% of the RfD). For this same group, the Anticipated Residue Contribution (ARC) is 0.000711 mg/kg body weight/ day (14.2% RfD). For children ages 1 to 6 and non-nursing infants the TMRC was 0.004571 mg/kg body-weight/day (91.4% RfD) and 0.003620 mg/kg body-weight/day (72.4% RfD), respectively. For these same groups the ARC was 0.001513 mg/kg body-weight/day (30.3% RfD) for children ages 1 to 6, and 0.002795 mg/kg body-weight/day (55.9% RfD) for non-nursing infants. None of the subgroups assessed exceeded 100% of the RfD.

iii. *Drinking water*. In examining aggregate exposure, FQPA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures. The primary non-food sources of exposure the Agency looks at, include drinking water (whether from groundwater or surface water), is exposure through pesticide use in gardens, lawns, etc (residential uses).

The lifetime health advisory and maximum contaminant level (MCL) set by EPA for diquat are the same and given as 0.02 parts per million (ppm) as required under the Drinking Water Regulations under the Safe Drinking Water Act. Drinking water which meets the EPA standard is associated with little to no risk and should be considered safe. Inclusion of MCL level residues of diquat in water in the dietary assessment demonstrated a safe exposure level to all subgroups in the US population. The Agency no longer establishes tolerances for residues in potable water; the tolerance for diquat dibromide has been replaced with a designated maximum contaminant level goal (MCLG) of 0.02 ppm for residues of diquat in potable water.

The primary route of environmental dissipation of diquat is strong adsorption to soil particles. Diquat does not hydrolyse or photodegrade and is resistant to microbial degradation under aerobic and anaerobic conditions. There were no major degradates isolated from any of the environmental fate studies. When used as an aquatic herbicide, diquat is removed from the water column by adsorption to soil sediments, aquatic vegetation, and organic matter. Adsorbed diquat is persistent and immobile, and is not expected to be a ground-water contaminant. The environmental fate data base for diquat is complete for reregistration of diquat dibromide.

2. *Non-dietary exposure*. As a non-selective, contact herbicide, homeowner use of diquat will consist primarily of spot spraying of weeds around trees, shrubs, walks, driveways, flower beds, fence lines, etc. The potential for exposure following application as a spot treatment in residential gardens, driveway edges, patios, etc. is low due to the limited frequency and duration of exposure. The exposures which would result from the use of diquat are determined to be of an intermittent nature. Any exposures to diquat would result from dermal exposure. These exposures are not expected to pose any acute toxicity concerns. Based on the US EPA National Home and Garden Pesticide Use Survey (RTI/5100/17-01F, March 1992), the average homeowner is expected to use non-selective herbicides only about four times a year. Thus, these exposure have not been factored into a chronic exposure assessment. Also, diquat has extremely low skin permeation, is not volatile, presenting

no inhalation risk, and has rapid and strong binding characteristics to leaf surfaces and soil. The Agency concludes that non-occupational and non-dietary exposure to diquat will not be significant and has not been aggregated with dietary exposures in estimating chronic risk.

D. Cumulative Effects

The only other compound in the bipyridilium chemical family is paraquat dichloride. Since diquat dibromide and paraquat dichloride have different toxicological endpoints and therefore do not have a common mode of action, there is no need for an assessment of cumulative effects.

E. Safety Determination

1. *U.S. population*. The proposed uses utilize 58.9% of the RfD for the general U.S. population, based on the assumptions of 100% crop treated, MCL level residues in tap water and all residues at tolerance levels; 72.4% of the RfD for non-nursing infants under 1-year old, 19.6% of the RfD for nursing infants under 1-year old; 91.4% of the RfD for children 1-6 years old; and 71.5% of the RfD for children 7-12 years old. An additional risk assessment for residential uses is unnecessary because there is no evidence for toxicological concern via the dermal or inhalation routes of exposure. Given diquat's strong binding characteristics, exposure via drinking water is highly unlikely. Zeneca concludes that there is reasonable certainty that no harm will occur from aggregate exposure to diquat.

2. *Infants and children*. FFCDA section 408 provides that EPA shall apply an additional ten fold margin of exposure for infants and children in the case of threshold effects to account for pre- and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of exposure will be safe for infants and children. EPA believes that reliable data support using the standard margin of exposure (usually 100 x for combined inter- and intra-species variability) and not the additional tenfold margin of exposure when EPA has a complete data base under existing guidelines and when the severity of the potential effect in infants and children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard margin of exposure.

Risk to infants and children was determined by the use of a rat multigeneration reproduction study and developmental toxicity studies in rabbits and rats. The reproduction study provides information on potential effects from exposure on the reproductive capability of mating parents and on systemic toxicity. The developmental studies provide information on the potential for adverse effects from exposure on the developing organism during prenatal development.

The toxicological data base for evaluating pre- and post-natal toxicity for diquat is considered to be complete. In the rat reproduction study, systemic toxicity to the mating parents was observed at 4 and 20/12 mg diquat cation/kg body weight/day, and reproductive effects in the form of decreased pups per litter and decreased body weight gain were seen at 20/12 mg/kg/day. Given that the effects seen in the pups and litters were at doses that clearly affected the parents at this dose level and below, diquat is considered not to affect reproductive performance without significantly compromising the health of the parental animals.

Developmental effects in the rat and rabbit studies, including decreased body weights, kidney and liver effects, and delayed ossification, were only observed at the highest doses tested and are considered to be related to the significant maternal toxicity exhibited at these dose levels. There was no evidence in these studies that diquat caused teratogenic effects.

Furthermore, the RfD is currently based on effects seen at 0.5 mg/kg/day in the dog. Effects seen at maternally toxic doses in the rat developmental study were 80 times higher, and in the rabbit study were 20 times higher than the level on which the RfD is based. Thus, Zeneca does not believe the effects seen in these studies are of such a concern to require an additional safety factor. Accordingly, Zeneca concludes that the RfD has an adequate margin of protection for infants and children and there is reasonable certainty that no harm will occur to infants and children from aggregate exposure to diquat.

F. International Tolerances

Codex lists diquat cation in dry beans and peas at 0.2 ppm. Diquat is listed in Canada in beans and peas at 0.1 ppm. There are no Mexican maximum residue limits for diquat on dry beans or peas.

3. E.I. DuPont de Nemours and Co., Inc.

PP 7F4849

EPA has received a pesticide petition (PP 7F4849) from E.I. DuPont de Nemours and Co., Inc. (DuPont), Barley Mill Plaza, P.O. Box 80083, Wilmington, DE 19880-0038. proposing pursuant to section 408(d) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of for azafenidin, 2-[2,4-dichloro-5-(2-propynyloxy) phenyl]-5,6,7,8-tetrahydro-1,2,4-triazolo [4,3-*a*] pyridin-3(*2H*)-1 in or on the raw agricultural commodities of the crop grouping of citrus, grapes, sugarcane and sugarcane molasses. The proposed analytical method involves homogenization, filtration, partition and cleanup with analysis by gas chromatography using mass selective detection. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant metabolism*. The qualitative nature of the residues of azafenidin in citrus, grapes and sugarcane is adequately understood for the purposes of registration. Metabolic pathways in grapefruit, grapes and sugarcane are similar, consisting of rapid O-dealkylation and production of hydroxyl derivatives, with subsequent formation of glucuronide and sulfate.

2. *Analytical method*. The proposed analytical method involves homogenization, filtration, partition and cleanup with analysis by gas chromatography using mass selective detection.

3. *Magnitude of residues*. DuPont proposes establishing tolerances for residues azafenidin, 2-[2,4-dichloro-5-(2-propynyloxy)phenyl]-5,6,7,8-tetrahydro-1,2,4-triazolo[4,3-*a*]pyridin-3(*2H*)-1 (Milestone*) in or on the agricultural commodities of the crop grouping of citrus at 0.1 ppm, grapes at 0.02 ppm, sugarcane at 0.02 ppm and sugarcane molasses at 0.1 ppm .

B. Toxicological Profile

1. *Acute toxicity*. Technical azafenidin has been placed in acute toxicology category III based on overall results from several studies. Results from the following studies indicate toxicology category III: acute dermal toxicity (LD_{50} > 2,000kg; rabbits) and eye irritation (effects reversible within 72 hours; rabbits). Acute oral toxicity (LD_{50} > 5,000 mg/kg; rats), acute inhalation toxicity (LC_{50} > 5.4 mg/L, rats) and skin irritation (slight effects resolved within 48 hours; rabbits) results were assigned toxicology category IV. Technical azafenidin is not a dermal sensitizer.

An acute neurotoxicity study was conducted in rats administered

azafenidin via gavage at 0, 100, 300 or 900 mg/kg. Azafenidin was not neurotoxic at any dose. The systemic NOEL was 100 mg/kg for males and females based on reduced food consumption and body weights at 300 mg/kg and above.

2. *Genotoxicty*. Technical azafenidin was negative for genotoxicity in a battery of *in vitro* and *in vivo* tests. These tests included the following: mutagenicity in bacterial (Ames test) and mammalian (CHO/HGPRT assay) cells; *in vitro* cytogenetics (chromosomal aberration in human lymphocytes); *in vivo* cytogenetics (bone marrow micronucleus assay in mice); and unscheduled DNA synthesis in rat primary hepatocytes.

3. *Reproductive and developmental toxicity*. A 2-generation reproduction study was conducted in rats with dietary technical azafenidin concentrations of 0, 5, 30, 180 or 1,080 ppm. The NOEL was 30 ppm (1.7 to 2.8 mg/kg/day for P_1 and F_1 males and females and their offspring). This was based on the following effects at 180 ppm (10.1 to 17.8 mg/kg/day for P_1 and F_1 males and females and/or their offspring): slight reductions in mean body weights for F_1 males and females; reductions in mean gestation body weight gain and implantation efficiency; slightly increased gestation lengths; decreased offspring survival, body weights and other indices of offspring health; and increased incidence of diarrhea among F_1 parental males.

A developmental study was conducted in rats administered technical azafenidin by gavage at 0, 3, 8, 16 or 24 mg/kg/day. Azafenidin was not teratogenic. The NOEL was 16 mg/kg/day based on the following observations at 24 mg/kg/day: reduced maternal body weight, increased resorptions, reductions in litter size and fetal weights and increased sternebral variations. The maternal effects consisted of transient body weight reductions; however, the nature of these effects suggested that fetal resorptions contributed to these weight reductions.

A developmental study was conducted in rabbits administered technical azafenidin by gavage at 0, 12, 36, 100 or 300 mg/kg/day. Azafenidin was not teratogenic. The NOELs for maternal and offspring toxicity were 12 and 100 mg/kg/day, respectively. The maternal NOEL was based on reduced body weight at 36 and 100 mg/kg/day and mortality at higher doses. Excessive maternal toxicity at 300 mg/kg/day precluded a Crop field trial residue data from citrus, grape and sugarcane studies show that the proposed tolerances on these commodities will not be exceeded when Milestone* is used as directed. Assessment of developmental effects at this level. However, the developmental NOEL was considered to be 100 mg/kg/day since there were no indications of fetal toxicity up to and including this dose level.

4. *Subchronic toxicity*. A 90–day study in mice was conducted at dietary concentrations of 0, 50, 300, 900 or 1,500 ppm. The NOEL was 300 ppm (47.2 and 65.8 mg/kg/day for male and female mice, respectively). This was based on reduced body weight gain in males and microcytic and hypochromic anemia in males and females at 900 ppm (or 144 and 192 mg/kg/day for males and females, respectively).

Technical azafenidin was administered in the diets of rats at 0, 50, 300, 900 or 1,500 ppm for 90 days. The NOEL was 300 ppm (24.2 and 28.2 mg/kg/day for male and female rats, respectively). This was based on methemoglobinemia and microcytic and hypochromic anemia in males and females at 900 ppm (or 71.9 and 83.8 mg/kg/day for male and female rats, respectively).

Dogs were administered technical azafenidin in their diets at 0, 10, 60, 120 or 240 ppm for 90–days. The NOEL was 10 ppm (0.34 and 0.33 mg/kg/day for males and females, respectively). This was based on enlarged hepatocytes and increased serum alkaline phosphatase and alanine aminotransferase activities at 60 ppm (2.02 and 2.13 mg/kg/day for male and female dogs, respectively).

A 90–day subchronic neurotoxicity study was conducted in rats at 0, 50, 750 or 1,500 ppm. There were no neurological effects observed in this study. The NOEL for systemic toxicity was 50 ppm (3.0 mg/kg/day) and 750 ppm (54.5 mg/kg/day) for male and female rats, respectively. These were based on reduced food consumption and body weights and increased incidences of clinical signs of toxicity at the higher doses.

A 28–day dermal study was conducted in rats at 0, 80, 400 or 1,000 mg/kg/day. There was no dermal irritation or systemic toxicity among males or females at the highest dose tested. The NOEL was > 1,000 mg/kg/day.

5. *Chronic toxicity*. An 18–month mouse study was conducted with dietary concentrations of 0, 10, 30, 300 or 900 ppm technical azafenidin. This product was not oncogenic in mice. The systemic NOEL was 300 ppm (39.8 and 54.1 mg/kg/day for males and females, respectively). This was based on hepatotoxicity among males and reduced body weights and food efficiency among females at 900 ppm (or 122 and 163 mg/kg/day for males and females, respectively).

A 2–year chronic toxicity/oncogenicity study was conducted in rats fed diets that contained 0, 5, 15, 30, 300 or 900 ppm technical azafenidin. This product was not oncogenic in rats. The systemic NOEL was 300 ppm (12.1 and 16.4 mg/kg/day males and females, respectively). The NOEL was defined by microcytic, hypochromic and hemolytic anemia and mortality at 900 (or 35.2 and 50.2 mg/kg/day for male and female rats, respectively).

Technical azafenidin was administered for 1–year to dogs at dietary concentrations of 0, 5, 10, 120 and 360 ppm. The NOEL was 10 ppm (0.30 mg/kg/day for males and females). This was based on observations of altered hepatocyte morphology, hydropic degeneration and elevated alanine aminotransferase and alkaline phosphatase at 30 ppm (0.86 and 0.87 mg/kg/day for male and female dogs, respectively) and above.

6. *Animal metabolism*. The metabolism of azafenidin in animals (rat and goat) is adequately understood and is similar among the species evaluated. Azafenidin was readily absorbed following oral administration, extensively metabolized and rapidly eliminated in the urine and feces. The terminal elimination half-life in plasma was 40 hours in rats. Less than 1% of the administered dose was present in rat tissues at 120 hours. There were no volatile metabolites of azafenidin. The major metabolic pathways in the rat and goat consisted of rapid O-dealkylation and production of hydroxyl derivatives, subsequent formation of glucuronide and sulfate conjugates and elimination of these conjugates in feces and urine. There was no evidence of accumulation of azafenidin or its metabolites in the tissues of either species or in the goat's milk.

7. *Metabolite toxicology*. There is no evidence that the metabolites of azafenidin identified in animal or plant metabolism studies are of any toxicological significance. The existing metabolism studies indicate that the metabolites formed are unlikely to accumulate in humans or in animals that may be exposed to these residues in the diet. The fact that no quantifiable residues were found in edible portions of treated crops further indicates that exposures to and accumulation of metabolites are unlikely.

C. Aggregate Exposure

1. *Food*—i. *Acute dietary exposure*. Since there were no acute affects appropriate for assessment of the general population, the NOEL of 16 mg/

kg/day from the rat developmental toxicity study was used to assess acute dietary risk for females 13–years of age and older. Exposures were estimated using the DEEM computer software (version 5.03b, Novigen Sciences, Inc, 1997). The proposed azafenidin tolerances for the raw agricultural commodities and processed fractions that were used in the calculations included: grapes, 0.02 ppm; citrus, 0.1 ppm; and sugarcane - 0.02 ppm for cane sugar and 0.1 ppm for molasses. The following exposures indicate margins of exposure > 11,000 at the 95th percentile and provides a reasonable certainty that no harm to the individual or the developing child will occur under these conservative exposure assumptions (i.e., all labeled crops are treated, residues are present at the proposed tolerances and there is no reduction of residues prior to consumption of these food commodities).

Subpopulations	Exposure - 95th Percentile (mg/kg/day)	MOE[a]
13+/Pregnant; Not Nursing.	0.000868	86,800
13+/Nursing	0.001384	11,561
13 - 19/ Not Pregnant; Not Nursing.	0.001119	14,561
20+/Not Pregnant; Not Nursing.	0.000832	0.19,231
13 - 50 Years ..	0.000938	17,056

[a] MOE - Margin of Exposure = NOEL from rat developmental study (16 mg/kg/day) divided by the 95th percentile exposure.

ii.*Chronic dietary exposure.* A Reference Dose (RfD) of 0.003 mg/kg/day has been proposed based on the NOEL from the most sensitive chronic study (NOEL of 0.3 mg/kg/day from the 1–year dog study) and applying a 100-fold uncertainty factor. General and subpopulation exposures were estimated using the DEEM computer software (version 5.03b, Novigen Sciences, Inc, 1997). The following proposed azafenidin tolerances for the raw agricultural commodities and processed fractions were used in the calculations: grapes, 0.02 ppm; citrus, 0.1 ppm; and sugarcane - 0.02 ppm for cane sugar and 0.1 ppm for molasses. Exposure assessments assumed 100% of the crops were treated with azafenidin, that residues were present at the tolerance level and that no residues were removed prior to consumption of treated crops. These assessments indicated adequate margins of exposure for all subpopulations and that only 21% or less of the RfD was utilized by any group. For example, the TMRCs were 0.000237 mg/kg/day (7.9% RfD) for the general population and 0.000619 mg/kg/day (20.6% RfD) for the subpopulation with the highest potential exposure, children ages 1 through 6 years.

2. *Drinking water.* Other potential dietary sources of exposure of the general population to pesticides are residues in drinking water. There is no Maximum Contaminant Level established for residues of azafendidin. The petitioner is reporting to the Environmental Fate and Groundwater Branch of EPA (EFGWB) the interim results of a prospective groundwater monitoring study conducted at a highly vulnerable site. Based on the preliminary results of this study the petitioner does not anticipate residues of azafenidin in drinking water and exposure from this route is unlikely. However, given that less than 21% of the RfD is attained by the TMRC for the population subgroup with the highest theoretical dietary exposure (children 1-6 years of age), there is ample allowance for safe exposure to azafenidin via drinking water should it ever be detected.

3. *Non-dietary exposure.* Azafenidin is proposed for use in weed control in selective non-food crop situations including certain temperate woody crops, and in non-crop situations including industrial sites and unimproved turf areas. Azafenidin is not be used in on residential temperate woody plantings, or on lawns, walkways, driveways, tennis courts, golf courses, athletic fields, commercial sod operations, or other high maintenance fine turf grass areas, or similar areas. Any non-occupational exposure to azafenidin is likely to be negligible.

C. Cumulative Effects

The herbicidal activity of azafenidin is due to its inhibition of an enzyme involved with synthesis of the porphyrin precursors of chlorophyll, protoporphyrinogen oxidase. Mammals utilize this enzyme in the synthesis of heme. Although there are other herbicides that also inhibit this enzyme, there is no reliable information that would indicate or suggest that azafenidin has any toxic effects on mammals that would be cumulative with those of any other chemicals. In addition there is no valid methodology for combining the risks of adverse effects of overexposures to these compounds.

D. Safety Determination

1. *U.S. population.* Based on the completeness and reliability of this azafenidin toxicology database and using the conservative aggregate exposure assumptions presented earlier, it has been concluded that azafenidin products may be used with a reasonable certainty of no harm relative to exposures from food and drinking water. A chronic RfD of 0.003 mg/kg/day has been proposed from the NOEL of the most sensitive chronic dietary study and the use of a 100-fold uncertainty factor. The TMRC determined for proposed tolerances in citrus, grapes and sugar cane utilized only 7.9% of the RfD (an exposure of 0.000237 mg/kg/day). Although there was no data to accurately assess potential exposures through drinking water, the small fraction of the RfD utilized for food by the general and subpopulations indicate that is unlikely that aggregate exposures will exceed acceptable limits. In addition, the use patterns and physical chemical properties of azafenidin suggest that the potential for significant concentrations in drinking water are remote. It has been concluded that the aggregate exposure for the proposed tolerances on citrus, grapes and sugar cane provide a reasonable certainty of no harm to the general population. Because of effects observed in the rat developmental toxicology study, an acute safety determination based on margins of exposure was calculated from the NOEL of 16 mg/kg/day. The subpopulation potentially at risk was considered to be females 13–years of age and older. However, based on the MOEs presented previously of >11,000 at the 95th exposure percentile, it was concluded that these potential dietary exposures represented a reasonable certainty of no harm for this group. An MOE of 100 or greater is generally considered protective.

2. *Infants and children.* In assessing the potential for additional sensitivity of infants and children to residues of azafenidin, data from the previously discussed developmental and multigeneration reproductive toxicity studies were considered. Developmental studies are designed to evaluate adverse effects on the developing organism resulting from pesticide exposure during pre-natal development. Reproduction studies provide information relating to reproductive and other effects on adults and offspring from pre-natal and post-natal exposures to the pesticide. The rat reproduction and developmental studies indicated developmental effects in this species at exposures that produced minimal maternal effects. A clear dose-response and developmental NOEL has been defined for these effects. FFDCA section

408 provides that EPA may apply an additional uncertainty factor for infants and children in the case of threshold effects to account for pre- and post-natal toxicity and the completeness of the database. The additional uncertainty factor may increase the MOE from the usual 100- up to 1,000-fold. Based on current toxicological data requirements, the database for azafenidin relative to pre- and post-natal effects for children is complete. In addition, the NOEL of 0.3 mg/kg/day in the 1–year dog study and upon which the RfD is based is much lower than the NOELs defined in the reproduction and developmental toxicology studies. Conservative assumptions utilized to estimate aggregate dietary exposures of infants and children to azafenidin (0.000619 mg/kg/day) demonstrated that only 20.6% of the RfD was utilized for the proposed tolerances. Based on these exposure estimates and the fact that MOEs in excess of 1,000-fold exist relative to the NOELs in the rat reproduction study (NOEL = 1.7 mg/kg/day and MOE = 2,746) and the rat developmental toxicity study (NOEL = 16 mg/kg/day and MOE = 25,848), the extra 10-fold uncertainty factor is not warranted for these groups. Therefore, it may be concluded that there is reasonable certainty that no harm will result to infants and children from aggregate exposures to azafenidin].

E. International Tolerances

There are no established Canadian, Mexican or Codex MRLs for azafenidin. Compatibility is not a problem.

[FR Doc. 97–31542 Filed 12–2–97; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2240]

Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings

November 28, 1997.

Petitions for reconsideration and clarification have been filed in the Commission's rulemaking proceedings listed in this Public Notice and published pursuant to 47 CFR Section 1.429(e). The full text of these documents are available for viewing and copying in Room 239, 1919 M Street, N.W., Washington, D.C. or may be purchased from the Commission's copy contractor, ITS, Inc. (202) 857–3800. Oppositions to these petitions must be filed December 18, 1997. See Section 1.4(b)(1) of the Commission's rule (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Investigation of Special Access Tariffs of Local Exchange Carriers (CC Docket No. 85–166, Phase I).

Number of Petitions Filed: 1.

Subject: Amendments of Parts 73 and 74 of the Commission's Rules To Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit (MM Docket No. 96–58).

Number of Petitions Filed: 4.

Subject: Anthony T. Easton (WT Docket No. 97–199).

Number of Petitions Filed: 1.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 97–31592 Filed 12–2–97; 8:45 am]

BILLING CODE 6712–01–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.: 202–010689–068.
Title: Transpacific Westbound Rate Agreement (''TWRA'').
Parties:
American President Lines, Ltd.
Hapag-Lloyd Container Linie GmbH
Kawasaki Kisen Kaisha, Ltd.
A.P. Moller-Maersk Line
Mitsui O.S.K. Lines, Ltd.
Neptune Orient Lines, Ltd.
Nippon Yusen Kaisha Line
Orient Overseas Container Line, Inc.
P&O Nedlloyd Limited
P&O Nedlloyd Lijnen, B.V.
Sea-Land Service, Inc.
Synopsis: The proposed modification authorizes the parties to consider and act upon proposals and recommendations of the Equipment Interchange Discussion Agreement (FMC Agreement No. 202–011284) with respect to activities within the scope of the TWRA agreement.

Dated: November 26, 1997.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 97–31670 Filed 12–2–97; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL MARITIME COMMISSION

Request for Additional Information

Agreement No.: 203–011075–041
Title: Central America Discussion Agreement
Parties:
Concorde Shipping, Inc.
Global Reefer Carriers Ltd.
Dole Fresh Fruit
King Ocean Central America, S.A.
Crowley American Transport, Inc.
Seaboard Marine, Ltd.
A.P. Moller-Maersk Line
Sea-Land Service, Inc.
NPR, Inc.
Synopsis: Notice is hereby given that the Federal Maritime Commission, pursuant to section 6(d) of the Shipping Act of 1984 (46 U.S.C. app. 1701–1720), has requested additional information from the parties to the Agreement as required by the Act. This action extends the review period as provided in section 6(c) of the Act

Dated: November 28, 1997.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 97–31671 Filed 12–2–97; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 16, 1997.

A. Federal Reserve Bank of Cleveland (Jeffery Hirsch, Banking Supervisor) 1455 East Sixth Street, Cleveland, Ohio 44101-2566:

1. Andrew Godby, Melvin Godby, Sr., Custodian; Bill David Godby, David H. Godby, Custodian; Christopher L. Godby, David H. Godby, Custodian; The Clell Dean Godby Living Trust, Clell Dean Godby, Trustee; David H. Godby; Joshua H. Godby; Melodie Godby; Melvin M. Godby, Sr.; Melvin M. Godby, Jr.; Vicki Godby; Clellan Prewitt; and Leora Prewitt, all of Somerset, Kentucky; to acquire voting shares of First Commerce Bancorp, Inc., Somerset, Kentucky, and thereby indirectly acquire Cumberland Security Bank, Inc., Somerset, Kentucky.

B. Federal Reserve Bank of Kansas City (D. Michael Manies, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. Jack L. Grimmett, Jr. and Robert B. Grimmett, Pauls Valley, Oklahoma; to acquire voting shares of Valley Bancshares, Inc., Pauls Valley, Oklahoma, and thereby indirectly acquire Pauls Valley National Bank, Pauls Valley, Oklahoma.

2. Alan C. Porter, Chester Nebraska; Warren V. Porter, Houston, Texas; and Timothy H. Porter, Olathe, Kansas; to acquire voting shares of Chester Insurance Agency, Inc., Chester, Nebraska, and thereby indirectly acquire State Bank of Chester, Chester, Nebraska.

C. Federal Reserve Bank of Dallas (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Western Bank, Las Cruces, Employee Stock Ownership Plan, Western Bank, Bruce Streett, Samuel Goldman, and Kelly Dunn, Trustees, all of Las Cruces New Mexico; to acquire voting shares of Western Bancshares of Las Cruces, Inc., Carlsbad, New Mexico, and thereby indirectly acquire Western Bank, Las Cruces, New Mexico.

Board of Governors of the Federal Reserve System, November 26, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–31664 Filed 12–2–97; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 29, 1997.

A. Federal Reserve Bank of New York (Betsy Buttrill White, Senior Vice President) 33 Liberty Street, New York, New York 10045-0001:

1. Lakeland Bancorp, Inc., Oak Ridge, New Jersey; to acquire 100 percent of the voting shares of Metropolitan State Bank, Montville, New Jersey.

B. Federal Reserve Bank of Chicago (Philip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690-1413:

1. Citizens Financial Corporation, Chicago, Illinois; to become a bank holding company by acquiring 100 percent of the voting shares of Citizens Bank & Trust Company of Chicago, Chicago, Illinois.

Board of Governors of the Federal Reserve System, November 26, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–31665 Filed 12–2–97; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:00 a.m., Monday, December 8, 1997.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Joseph R. Coyne, Assistant to the Board; 202–452–3204.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at http://www.bog.frb.fed.us for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: November 28, 1997

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–31769 Filed 11–28–97; 4:41 pm]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Statement of Organization, Functions and Delegations of Authority; Program Support Center

Part P, (Program Support Center) of the Statement of Organization, Functions and Delegations of Authority for the Department of Health and Human Services (60 FR 51480, October 2, 1995 as amended most recently at 62 FR 36823, July 9, 1997) is amended to reflect changes in Chapters PC, PE and PF within Part P, Program Support Center, Department of Health and Human Services (HHS). The Program Support Center (PSC) is transferring several information technology functions within the *Information Technology Service (PF)* to other Services within the PSC. The *Division of Systems and Network Management* is abolished and its functions are being transferred to the *Administrative Operations Service, Division of Technical Support.* The functions of the *Division of Information Systems and Technology* are being amended and the Division is being transferred to the *Financial Management Service.*

Under *Part P, Section P–20, Functions,* change the following:.

Under *Chapter PF, Information Technology Service (PF),* delete the titles and functional statements for the *Division of Systems and Network Management (PFC)* and the *Division of Information Systems and Technology (PFH) in their entirety.*

Under *Chapter PE, Administrative Operations Service (PE),* delete item (9) in its entirety and insert a new item (9) as follows: ''(9) a wide range of voice, data, and video services.''

Delete the functional statement in its entirety for the *Division of Technical Support (PEF)* and insert the following: ''The Division manages the Telecommunications Improvement Project and provides a variety of support services for HHS and other customers located in the Washington, D.C. Metropolitan Area and nationwide. (1) Provides the following: voice, data, and video services; visual aids and graphic art services; photography services; library services; printing and reproduction, including operation of copy centers; mail and messenger services; support services for conference room facilities; and (2) carries out printing management and records management responsibilities for the PSC.''

Under *Chapter PC, Financial Management Service (PC),* after the statement for the *Division of Financial Operations (PCE),* add the following title and functional statement:

Division of Information Systems and Technology (PCF) (1) Provides fee-for-service information technology (IT) support to HHS OPDIVs and other Government agencies. Services include providing information from the HHS personnel/payroll system and providing technological support in utilizing evolving IT areas; (2) provides analysis, design, development, implementation and ongoing support of information reporting in various areas, such as personnel and payroll; and (3) provides analysis, design, development, implementation and support in utilizing evolving technology.

This reorganization is effective upon date of signature.

Dated: November 21, 1997.

Lynnda M. Regan,

Director, Program Support Center.

[FR Doc. 97–31718 Filed 12–2–97; 8:45 am]

BILLING CODE 4160–17–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA–372]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Health Care Financing Administration, HHS. In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: Extension of a currently approved collection; *Title of Information Collection:* Annual Report on Home and Community Based Services Waivers and Supporting Regulations in 42 CFR 440 and 441; *Form No.:* HCFA–372 (OMB# 0938–0272); *Use:* States request waivers in order for beneficiaries to have the option of receiving hospital services in their homes. States with an approved waiver under section 1915(c) of the Act are required to submit the HCFA–372 or HCFA–372(S) annually in order for HCFA to: (1) verify that State assurances regarding waiver cost-neutrality are met, and (2) determine the waiver's impact on the type, amount and cost of services provided under the State plan and health and welfare of recipients.; *Frequency:* Annually; *Affected Public:* State, local or tribal government; *Number of Respondents:* 50; *Total Annual Responses:* 223; *Total Annual Hours:* 16,725.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: HCFA, Office of Information Services, Information Technology Investment Management Group, Division of HCFA Enterprise Standards, Attention: Louis Blank, Room C2–26–17, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: November 24, 1997.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA Office of Information Services, Information Technology Investment Management Group, Division of HCFA Enterprise Standards.

[FR Doc. 97–31623 Filed 12–2–97; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[HCFA–1024–N]

Medicare Program; December 15, 1997, Meeting of the Practicing Physicians Advisory Council

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice of meeting.

SUMMARY: In accordance with section 10(a) of the Federal Advisory Committee Act, this notice announces a meeting of the Practicing Physicians Advisory Council. This meeting is open to the public.

DATES: The meeting is scheduled for December 15, 1997, from 8:30 a.m. until 5 p.m. E.S.T.

ADDRESSES: The meeting will be held in Room 800, 8th Floor, Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Jeffrey Kang, M.D., Executive Director, Practicing Physicians Advisory Council, Room 435–H, Hubert H. Humphrey Building, 200 Independence Avenue, S.W., Washington, DC 20201, (202) 690–7874.

SUPPLEMENTARY INFORMATION: The Secretary of the Department of Health and Human Services (the Secretary) is mandated by section 1868 of the Social Security Act to appoint a Practicing Physicians Advisory Council (the Council) based on nominations submitted by medical organizations representing physicians. The Council meets quarterly to discuss certain proposed changes in regulations and

carrier manual instructions related to physicians' services, as identified by the Secretary. To the extent feasible and consistent with statutory deadlines, the consultation must occur before publication of the proposed changes. The Council submits an annual report on its recommendations to the Secretary and the Administrator of the Health Care Financing Administration not later than December 31 of each year.

The Council consists of 15 physicians, each of whom has submitted at least 250 claims for physicians' services under Medicare or Medicaid in the previous year. Members of the Council include both participating and nonparticipating physicians, and physicians practicing in rural and underserved urban areas. At least 11 members must be doctors of medicine or osteopathy authorized to practice medicine and surgery by the States in which they practice. Members have been invited to serve for overlapping 4-year terms. In accordance with section 14 of the Federal Advisory Committee Act, terms of more than 2 years are contingent upon the renewal of the Council by appropriate action before the end of the 2-year term.

The Council held its first meeting on May 11, 1992.

The current members are: Richard Bronfman, D.P.M.; Wayne R. Carlsen, D.O.; Gary C. Dennis, M.D.; Catalina E. Garcia, M.D.; Mary T. Herald, M.D.; Ardis Hoven, M.D.; Sandral Hullett, M.D.; Jerilynn S. Kaibel, D.C.; Marie G. Kuffner, M.D.; Marc Lowe, M.D.; Katherine L. Markette, M.D.; Derrick K. Latos, M.D.; Susan Schooley, M.D.; Maisie Tam, M.D.; and Kenneth M. Viste, Jr., M.D. The chairperson is Kenneth M. Viste, Jr., M.D.

Council members will receive an update on documentation guidelines, physician practice expense, private contracting, physician self referral rules, privacy and confidentiality, regional labaratory carriers, and other issues related to implementation of the Balanced Budget Amendment.

Individuals or organizations that wish to make 5-minute oral presentations on the agenda issues should contact the Executive Director by 12 noon, December 4, 1997, to be scheduled. The number of oral presentations may be limited by the time available. A written copy of the oral remarks should be submitted to the Executive Director no later than 12 noon, December 10, 1997. Anyone who is not scheduled to speak may submit written comments to the Executive Director by 12:00 noon, December 10, 1997. The meeting is open to the public, but attendance is limited to the space available.

(Section 1868 of the Social Security Act (42 U.S.C. 1395ee) and section 10(a) of Pub. L. 92–463 (5 U.S.C. App. 2, section 10(a)); 45 CFR Part 11)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: November 27, 1997.

Nancy-Ann Min DeParle,

Administrator, Health Care Financing Administration.

[FR Doc. 97–31594 Filed 12–2–97; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Opportunity for a Cooperative Research and Development Agreement (CRADA) for the Scientific and Commercial Development of Transgenic Mice That Express Human Cytochrome P450 Genes

AGENCY: National Institutes of Health, PHS, DHHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (DHHS) seeks an agreement with a pharmaceutical or biotechnology company to effectively pursue the development and characterization of transgenic mice that express human cytochrome P450 genes CYP2D6 and CYP3A4. The National Cancer Institute has data suggesting that these animals may be useful in drug development, carcinogen bioassays for risk assessment, and the determination of genetic regulatory mechanisms.

ADDRESSES: Proposals and questions about this opportunity may be addressed to Robert Dell'Orco, Ph.D., Technology Development and Commercialization Branch, National Cancer Institute, Executive Plaza South, Suite 450, 6120 Executive Blvd., Rockville, MD 20852, tel: 301–496–0477, fax: 301–402–2117.

DATES: In view of the important priority of developing new drugs for the treatment of cancer and methods for determining carcinogenic risk, interested parties should notify this office in writing not later that January 2, 1998. Respondents will then be provided an additional 30 days for filing of formal proposals.

SUPPLEMENTARY INFORMATION: ''Cooperative Research and Development Agreement'' or ''CRADA'' means the anticipated joint agreement to be entered into by NCI pursuant to the Federal Technology Transfer Act of 1986 and Executive Order 12591 of April 10, 1987 as amended by the National Technology Transfer Advancement Act of 1995 to collaborate on the specific research project described below.

The National Cancer Institute seeks an agreement with a pharmaceutical or biotechnology company for joint development and evaluation of transgenic mice that express human cytochrome P450 genes CYP2D6 and CYP3A4 in a tissue specific manner that reflects the expression in humans. These two human P450 enzymes are involved in the metabolism of over 75% of the drugs that are now on the market; however, these two enzymes are poorly conserved between rodents and humans. This poor conservation precludes the use of unmodified rodent model systems for the analysis of new drugs with respect to their metabolism by these two enzymes. The development of a human P450 transgenic mouse system will allow for the determination of human metabolism and toxicity of new drugs, the prediction of drug interactions, and the definition of pharmacokinetic parameters in an intact animal system. Additionally, such a system would avoid the utilization of human liver tissue samples which forms the basis of the current methods used in the pharmaceutical industry. The animal model would also form the basis of carcinogen bioassays for human risk assessment and allow for the analysis of P450 gene regulation. In the proposed studies, the animals will be used to determine the tissue specific degradation of drugs. Drugs known through in vitro metabolism studies to be metabolized by CPY2D6 and CYP3A4 will be administered to the transgenic mice, and their pharmacokinetics will be studied.

The Laboratory of Metabolism has many years of experience in cloning and characterizing human P450 genes. More recently, the laboratory has developed a series of knockout and transgenic mice to study various aspects of the role of cytochrome P450 enzymes in carcinogenesis and drug metabolism; and the development of transgenic mice with the human CYP2D6 and CYP3A4 enzymes is a continuation of the laboratory's commitment to this research area. The Laboratory of Metabolism is interested in establishing a CRADA with a company to assist in the continuing development of transgeic animals containing human cytochrome P450 enzymes to study known drug substrates and proprietary drug candidates. The Government will

provide all available expertise and information to date giving the company full access to existing data and data developed pursuant to the CRADA.

The successful company will provide the necessary scientific, financial and organizational support to characterize and test the animals.

Background information is available from the above-referenced address. Patent applications and pertinent information not yet publicly described can be obtained under a Confidential Disclosure Agreement.

The CRADA aims include the rapid publication of research results and the timely exploitation of commercial opportunities. The CRADA partner will enjoy rights of first negotiation for licensing Government rights to any inventions arising within the scope of the agreement. The license option and commercialization of inventions shall not conflict with NIH Guidelines for the availability of transgenic/knockout animals (http://www1.od.nih.gov/wals/transgen.html).

The expected duration of the CRADA will be 2 years.

The role of the Laboratory of Metabolism in this CRADA will be as follows:

1. Isolate and characterize genomic clones of human CYP2D6 and CYP3A4.

2. Generate mice by standard injections of oocyte pronuclei and screen founders.

3. Characterize tissue specificity of expression.

4. Jointly publish research results.

The role of the Collaborator will be:

1. Characterize in vitro metabolism using hepatic microsomal fractions.

2. Evaluate in vivo pharmacokinetics with probe substrates and proprietary compounds.

3. Analyze the role of CYP2D6 and CYP3A4 on bioavailability and efficacy of test compounds.

4. Jointly publish research results.

Selection criteria for choosing the CRADA partner will include but not be limited to:

1. Ability to collaborate with NCI on further research and development of this technology. Demonstration of experience and expertise in this or related areas of technology and the ability to provide intellectual contribution to the ongoing research and development. Ability to accomplish objectives according to an appropriate timetable to be outlined in the Collaborator's proposal.

2. Willingness to comply with NIH IRP Guidelines for the Availability of Transgenic/Knockout Animals (http://www1.od.nih.gov/wals/transgen.html). The proposal should specifically address the methods by which the animals will be made available.

3. Demonstration of the resources (facilities, personnel and expertise) necessary to perform research, development and commercialization of this technology.

4. Commitment of reasonable effort and resources on research, development and commercialization of this technology.

5. Expertise in the commercial development, production, marketing and sales of products related to this area of technology.

6. The level of financial support the Collaborator will supply for CRADA-related Government activities.

7. A willingness to cooperate with the National Cancer Institute in the publication of research results.

8. An agreement to be bound by the DHHS rules involving human subjects, patent rights and ethical treatment of animals.

9. A willingness to accept the legal provisions and language of the NIH model CRADA with modifications to address selection criteria #2 and other minor modifications.

10. Provisions for distribution of patent rights to any inventions. Generally, the rights of ownership are retained by the organization which is the employer of the inventor, with (1) an irrevocable, nonexclusive, royalty-free license to the Government (when a company employee is the sole inventor) or (2) an option to negotiate an exclusive or nonexclusive license to the company on terms that are appropriate (when the Government employee is the sole inventor).

Dated: November 21, 1997.

Kathleen Sybert,

Acting Director, Technology Development and Commercialization Branch, National Cancer Institute, NIH.

[FR Doc. 97–31638 Filed 12–2–97; 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 the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Cancer Institute Special Emphasis Panel (SEP) meeting:

Name of SEP: Cancer Genetics Network—Informatics and Information Technology Group.

Date: December 9–10, 1997.

Time: December 9–7:30 p.m. to Recess. December 10—8:00 a.m. to Adjournment.

Place: Ramada Inn—Rockville, 1775 Rockville Pike, Rockville, MD 20852.

Contact Person: Gerald Lovinger, Ph.D., Scientific Review Administrator, National Cancer Institute, NIH, Executive Plaza North, Room 630C, 6130 Executive Boulevard, MSC 7405, Bethesda, MD 20892–7405, Telephone: 301/496–7987.

Purpose/Agenda: To review, discuss and evaluate grant applications.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

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 the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control)

Dated: November 25, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–31636 Filed 12–02–97; 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 the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting of the National Cancer Institute Special Emphasis Panel (SEP):

Name of SEP: Informatics Support for Breast and Colon Cancer Cooperative Family Registries.

Date: December 8, 1997.

Time: 9:00 a.m. to Adjournment.

Place: Executive Plaza North, Conference Room C, 6130 Executive Boulevard, Bethesda, MD 20892.

Contact Person: Courtney M. Kerwin, Ph.D., M.P.H., Scientific Review Administrator, National Cancer Institute, NIH, Executive Plaza North, Room 630I, 6130

Executive Boulevard, MSC 7405, Bethesda, MD 20892–7405, Telephone: 301/496–7421.

Purpose/Agenda: To review, discuss and evaluate grant applications.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

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 the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396; Cancer Biology Research; 93.397, Cancer Centers Support; 93:398, Cancer Research Manpower; 93.399, Cancer Control)

Dated: November 25, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–31637 Filed 12–2–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; 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 Child Health and Human Development Special Emphasis Panel (SEP) meeting:

Name of SEP: Molecular Basis of Male Infertility.

Date: December 1–2, 1997.

Time: December 1—6:00 p.m.—9:00 p.m. December 2—8:00 a.m.—adjournment.

Place: Marriott Hotel at Medical Center, 6580 Fannin Street, Houston, TX.

Contact Person: Ms. Anne Krey, Scientific Review Administrator, DSR, 6100 Executive Boulevard, Room 5E01, Bethesda, Maryland 20892, Telephone: 301–496–1485.

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.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

(Catalog of Federal Domestic Assistance Program Nos. [93.864, Population Research and No. 93.865, Research for Mothers and Children], National Institutes of Health, HHS)

Dated: November 25, 1997.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 97–31635 Filed 12–2–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration (SAMHSA)

Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the following meeting of the SAMHSA Special Emphasis Panel II in December 1997.

A summary of the meeting may be obtained from: Ms. Dee Herman, Committee Management Liaison, SAMHSA, Office of Policy and Program Coordination (OPPC), Division of Extramural Activities, Policy, and Review, 5600 Fishers Lane, Room 17–89, Rockville, Maryland 20857. *Telephone:* (301) 443–7390.

Substantive program information may be obtained from the individual named as Contact for the meeting listed below.

The meeting will include the review, discussion and evaluation of individual contract proposals. These discussions could reveal personal information concerning individuals associated with the proposals and confidential and financial information about an individual's proposal. The discussion may also reveal information about procurement activities exempt from disclosure by statute and trade secrets and commercial or financial information obtained from a person and privileged and confidential. Accordingly, the meeting is concerned with matters exempt from mandatory disclosure in Title 5 U.S.C. 552b(c)(3), (4), and (6) and 5 U.S.C. App. 2, § 10(d).

Committee name: SAMHSA Special Emphasis Panel II.

Meeting Date: December 15, 1997.

Place: Holiday Inn, Chase Room, 5520 Wisconsin Avenue, Bethesda, MD 20815–4495.

Closed: December 15, 1997 9:00 a.m.—Adjournment.

Contact: Michael Backenheimer, Ph.D., Room 17–89, Parklawn Building, Telephone: (301) 443–4783 and FAX: (301) 443–3437.

Dated: November 26, 1997.

Jeri Lipov,

Committee Management Officer, SAMHSA.

[FR Doc. 97–31673 Filed 12–2–97; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Applications for Permit

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*):

PRT–836807.

Applicant: Denise Freitag, Potomac, MD

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT–836777

Applicant: Kentucky Department of Fish and Wildlife, Frankfort, KY

The applicant requests a permit to import American peregrine falcons (*Falco peregrinus anatum*) from Canada for release as part of the Kentucky's peregrine falcon restoration program for the purpose of enhancement of the survival of the species. This notice covers activities conducted by the applicant over a five year period.

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203 and must be received by the Director within 30 days of the date of this publication.

Documents and other information submitted with these applications are available for review, *subject to the requirements of the Privacy Act and Freedom of Information Act,* by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S.

Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203. Phone: (703/358–2104); FAX: (703/358–2281).

Dated: November 28, 1997.

Karen Anderson,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 97–31720 Filed 12–2–97; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–924–1430–01; MTM 84895]

Opening of Lands; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Parcels of land which were segregated for Phase II of exchange MTM 84895 are no longer under consideration for exchange. This order terminates the exchange segregation and opens the following described lands to the public land laws and mining laws, subject to other segregations of record:

Principal Meridian, Montana

T. 3 N., R. 26 E.,
Sec. 32, S½SE¼.
T. 5 N., R. 28 E.,
Sec. 28, NE¼ and NE¼SE¼;
Sec. 34, NE¼NE¼.
T. 6 N., R. 28 E.,
Sec. 34, NE¼NE¼.
T. 4 N., R. 31 E.,
Sec. 24, NE¼NE¼.
T. 6 N., R. 31 E.,
Sec. 34, N½NE¼ and W½SE¼.
T. 4 N., R. 32 E.,
Sec. 18, lot 3 and NE¼SW¼.

Containing 635.46 acres in Yellowstone County.

EFFECTIVE DATE: December 3, 1997.

FOR FURTHER INFORMATION CONTACT: Sandra Ward, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, (406) 255–2949.

Dated: November 21, 1997.

James Binando,

Chief, Branch of Land Resources, Division of Resources.

[FR Doc. 97–31723 Filed 12–2–97; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ–950–5700–77; AZA 30355]

Notice of Proposed Withdrawal and Opportunity for Public Meeting; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Reclamation proposes to withdraw 9,880 acres of National Forest System lands to protect the Roosevelt Lake expansion lands and associated recreational developments. This notice closes the land for up to 2 years from location and entry under the United States mining laws. The lands will remain open to all other uses which may be made of National Forest System lands.

DATES: Comments should be received on or before March 3, 1998.

ADDRESSES: Comments should be sent to the Phoenix Area Manager, Bureau of Reclamation, P.O. Box 9980, Phoenix, Arizona 85068.

FOR FURTHER INFORMATION CONTACT: Larry Koontz, BOR Phoenix Area Office, 602–395–5672.

SUPPLEMENTARY INFORMATION: On November 14, 1997, a petition was approved allowing the Bureau of Reclamation to file an application to withdraw the following described National Forest System lands from location and entry under the United States mining laws, subject to valid existing rights.

Gila and Salt River Meridian

Tonto National Forest

T. 5 N., R. 10 E.,
Sec. 1, NE¼NE¼.
T. 4 N., R. 11 E.,
Sec. 2, W½NW½, NW¼SW¼, and SE¼SW¼;
Sec. 3, NE¼;
Sec. 11, NW¼NE¼ and SE¼NE¼;
Sec. 12, SE¼SW¼;
Sec. 13, N½NE¼.
T. 5 N., R. 11 E.,
Sec. 5, SW¼NE¼, NW¼NW¼, SE¼NW¼, NE¼SW¼, NW¼SE¼, and SE¼SE¼;
Sec. 6, S½NW¼NE¼, SW¼NE¼, NW¼, NE¼SW¼, and SE¼; Sec. 7, NE¼ and N½SE¼;
Sec. 8, E½E½, NW¼NE¼, and W½NW¼;
Sec. 14, S½SW¼ and SW¼SE¼;
Sec. 15, SW¼SW¼;
Sec. 16, SW¼NE¼, SW¼, and S½SE¼;
Sec. 17, E½NE¼ and NE¼SE¼;
Sec. 22, N½N½;
Sec. 23, W½NE¼, N½NW¼, NW¼SE¼, and SE¼SE¼;
Sec. 24, S½SW¼;
Sec. 25, W½NE¼, NE¼NW¼, and N½SE¼;
Sec. 28, SW¼NW¼ and SE¼SE¼;
Sec. 34, NW¼NW¼ and SE¼NW¼.
T. 6 N., R. 11 E.,
Sec. 31, S½NW¼SW¼, SW¼SW¼, W½SE¼SW¼, and E½SE¼SE¼;
Sec. 32, SW¼SW¼.
T. 4 N., R. 12 E.,
Sec. 2, S½ and S½N½;
Sec. 3;
Sec. 4, W½SW¼;
Sec. 5, E½NE¼;
Sec. 9, N½NE¼;
Sec. 10, N½N½;
Sec. 12, W½NE¼, N½NW¼, SE¼NW¼;
Sec. 36, E½NE¼.
T. 5 N., R. 12 E.,
Sec. 30, W½SW¼;
Sec. 31, W½NW¼, NE¼SW¼, N½SE¼, and SE¼SE¼;
Sec. 32, S½S½.
T. 3 N., R. 13 E.,
Sec. 1, SW¼NE¼;
Sec. 2, N½, SW¼, W½SE¼, excluding private lands within Roosevelt Lake Estates;
Sec. 3, E½E½;
Sec. 4, NW¼NE¼ and N½NW¼;
Sec. 11, W½NE¼, E½NW¼, and SW¼NW¼;
Sec. 12, NE¼NE¼.
T. 4 N., R. 13 E.,
Sec. 17, S½N½ and N½SE¼;
Sec. 21, N½N½ and S½NE¼;
Sec. 22, S½NE¼ and NW¼;
Sec. 23, NE¼SW¼ and N½SE¼;
Sec. 25, W½NE¼, SE¼NE¼, and NW¼;
Sec. 31, S½NE¼ and NW¼;
Sec. 32, SW¼NW¼, N½SW¼, SE¼SW¼, W½SE¼, and SE¼SE¼.
T. 3 N., R. 14 E.,
Sec. 3, SE¼SW¼ and SW¼SE¼;
Sec. 4, SW¼NW¼;
Sec. 5, N½NE¼ and NW¼NW¼;
Sec. 6, E½NE¼;
Sec. 9, NE¼;
Sec. 10, N½NW¼, SW¼NW¼, and NW¼NE¼.
T. 4 N., R. 14 E.,
Sec. 30, NW¼SW¼;
Sec. 31, NW¼NE¼, E½SE¼, and SE¼NE¼.

The areas described aggregate 9,880 acres in Gila County.

All persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing, by the date specified above, to the Phoenix Area Manager of the Bureau of Reclamation.

Notice is hereby given that a public meeting in connection with the proposed withdrawal will be held at a later date. A notice of time and place will be published in the **Federal Register** and a newspaper in the general vicinity of the lands to be withdrawn at least 30 days before the scheduled date of the meeting.

The application will be processed in accordance with the regulations set forth in 43 CFR 2300.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the land will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date.

Dated: November 20, 1997.

Michael A. Ferguson,

Deputy State Director, Resources Division.

[FR Doc. 97–31724 Filed 12–2–97; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains from Washington State in the Possession of the Yale Peabody Museum of Natural History, New Haven, CT

AGENCY: National Park Service

ACTION: Notice

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003 (d), of the completion of an inventory of human remains from Washington State in the possession of the Yale Peabody Museum of Natural History, New Haven, CT.

A detailed assessment of the human remains was made by Yale Peabody Museum professional staff in consultation with representatives of the Jamestown Band of S'Kallam Indians.

In 1873, human remains representing three individuals were donated to the Yale Peabody Museum of Natural History by Dr. T.T. Minor. These human remains were recovered near Port Townsend, WA. No known individuals were identified. No associated funerary objects are present.

Based on cranial deformation, these individuals have been determined to be Native American. No diagnostic artifacts that would indicate the antiquity of these remains exist in the Peabody Museum's collections. No information about the circumstances of recovery of these remains or the nature of their interment exists in the Peabody Museum's records. Consultation evidence provided by representatives of the Jamestown Band of S'Klallam Indians indicates that the Port Townsend, WA area is within the traditional territory of the Jamestown Band of S'Klallam Indians.

Based on the above mentioned information, officials of the Yale Peabody Museum of Natural History have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of three individuals of Native American ancestry. Lastly, officials of the Yale Peabody Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity which can be reasonably traced between these Native American human remains and the Jamestown Band of S'Klallam Indians.

This notice has been sent to officials of the Jamestown Band of S'Klallam Indians, the Port Gamble Indian Community of the Port Gamble Reservation, the Makah Indian Tribe of the Makah Reservation, the Swinomish Indians of the Swinomish Reservation, and the Tulalip Tribes of the Tulalip Reservation. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains should contact Dr. Richard Burger, Director, Yale Peabody Museum of Natural History, 170 Whitney Avenue, P.O. Box 208118, New Haven, CT 06520–8118; telephone: (203) 432–3752, before January 2, 1998. Repatriation of the human remains to the Jamestown Band of S'Klallam Indians may begin after that date if no additional claimants come forward.

The National Park Service is not responsible for the determinations within this notice.

Dated: November 19, 1997.

Francis P. McManamon,

Departmental Consulting Archeologist, Manager, Archeology and Ethnography Program.

[FR Doc. 97–31712 Filed 12–2–97; 8:45 am]

BILLING CODE 4310–70–F

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–368–371 (Final)]

Certain Steel Wire Rod From Canada, Germany, Trinidad and Tobago, and Venezuela

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission determines, pursuant to section 705(b) of the Tariff Act of 1930 (19 U.S.C. § 1671d(b)) (the Act), that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from Canada, Trinidad and Tobago, and Venezuela of certain steel wire rod, provided for in subheadings 7213.91.30, 7213.91.45, 7213.91.60, 7213.99.00, 7227.20.00, and 7227.90.60 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be subsidized by the respective governments of these countries.[2] The Commission also determines pursuant to the Act that subsidized imports from Germany are negligible, and its investigation of such imports is thereby terminated (19 U.S.C. § 1671d(b)(1)).

Background

The Commission instituted these investigations effective February 26, 1997, following receipt of a petition filed with the Commission and the Department of Commerce by Connecticut Steel Corp., Wallingford, CT; Co-Steel Raritan, Perth Amboy, NJ; GS Industries, Inc., Georgetown, SC; Keystone Steel & Wire Co., Peoria, IL; North Star Steel Texas, Inc., Beaumont, TX; and Northwestern Steel & Wire, Sterling, IL. The final phase of the investigations was scheduled by the Commission following notification of preliminary determinations by the Department of Commerce that imports of certain steel wzire rod from Canada, Germany, Trinidad and Tobago, and Venezuela were being subsidized within the meaning of section 703(b) of the Act (19 U.S.C. § 1671b(b)). Notice of the scheduling of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of August 20, 1997 (62 FR 44288). The hearing was held in Washington, DC, on October 16, 1997, and all persons who requested the opportunity were permitted to appear in person or by counsel.

On October 22, 1997, the Department of Commerce (''Commerce'') published notice in the **Federal Register** of the suspensions of its countervailing duty investigations on steel wire rod from Trinidad and Tobago (62 FR 54960) and Venezuela (62 FR 54966) based on agreements it concluded with these countries; however, at the same time Commerce indicated that it was continuing its investigations, pursuant to requests by petitioners. Accordingly, the Commission determined to continue its investigations.

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

[2] Commissioner Crawford dissenting with respect to Canada and Venezuela.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on November 26, 1997. The views of the Commission are contained in USITC Publication 3075 (November 1997), entitled ''Certain Steel Wire Rod from Canada, Germany, Trinidad and Tobago, and Venezuela: Investigations Nos. 701–TA–368–371 (Final).''

Issued: November 28, 1997.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 97–31717 Filed 12–2–97; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decrees Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act

In accordance with Departmental policy, 28 CFR 50.7, Section 122(d) (2) of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9622(d)(2), and Section 7003(d) of the Resource Conservation and Recovery Act (''RCRA''), 42 U.S.C. 6973(d), notice is hereby given that proposed consent decrees in *United States, et al.* v. *Alcan Aluminum, Inc., et al.,* Civil Action No. 88–4970, and in *United States* v. *Air Products and Chemicals, Inc., et al.,* Civil Action No. 97–7140, were lodged on November 21, 1997, with the United States District Court for the Eastern District of Pennsylvania. The proposed consent decrees, which together are intended to comprise a global settlement with respect to remaining issues involving the Kline Township location of the Site, would settle actions that the United States brought on behalf of the United States Environmental Protection Agency under Sections 106 and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9606, 9607(a), to compel environmental response actions to be taken and for recovery of response costs incurred by the United States in connection with the McAdoo Associates Superfund Site, located in Schuylkill County, Pennsylvania, in or near the Borough of McAdoo (''the Site''). The consent decrees would also resolve the claims of some of the settling defendants against other of the settling defendants arising out of this and an earlier settlement related to the Site in *United States and Commonwealth of Pennsylvania* v. *Air Products and Chemicals, Inc., et al.,* Civil Action No. 87–7352 (E.D. Pa.) (consent decree entered June 3, 1988) (''the 1988 decree''). Under the terms of the proposed consent decrees, (1) the United States will recover on behalf of the EPA Hazardous Substance Superfund, from those settling defendants that did not settle with the United States under the 1988 decree (''the Alcan parties''), the sum of $970,000, plus a designated share of interest that has accrued on funds that the Alcan parties paid into an escrow account pending finalization of a 1992 consent decree, whose entry was vacated by the United States Court of Appeals in *United States* v. *Alcan Aluminum, Inc.,* 25 F. 3d 1174 (3d Cir. 1994); (2) those settling defendants that settled under the 1988 decree (''the Air Products parties'') will receive $1.2 million from the Alcan parties and from the escrow account to resolve the Air Products parties' claims for contribution against the Alcan parties ($170,000), and to resolve the Air Products parties' reauthorized claim for reimbursement from the EPA Hazardous Substance Superfund under the 1988 decree ($1.03 million); (3) the Air Products parties will perform a groundwater monitoring remedy selected by EPA under a Record of Decision for the Site issued on September 30, 1991 for Operable Unit Two (OU2) at the Site; and (4) the settling defendants will pay the United States and the Commonwealth of Pennsylvania's past costs relating to OU2 at the Site (totaling $75,000 and $5,000, respectively).

The consent decrees include a covenant not to sue by the United States under Sections 106 and 107 of CERCLA, and under Section 7003 of RCRA.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decrees. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Alcan Aluminum, Inc., et al.,* DOJ Ref. Nos. 90–11–3–142A and 90–11–3–142E. Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).

The proposed consent decrees may be examined at the office of the United States Attorney for the Eastern District of Pennsylvania, 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106; the Region III Office of the Environmental Protection Agency, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; and at the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed consent decrees may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy, please refer to the referenced case and enclose a check in the amount of $33.50 (25 cents per page reproduction costs) payable to the Consent Decree Library (or $89.75 for a copy that includes all signature pages and exhibits).

Walker Smith,

Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 97–31722 Filed 12–2–97; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Petroleum Environmental Research Forum

Notice is hereby given that, on November 12, 1997, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301, *et seq.* (''the Act''), the Petroleum Environmental Research Forum (''PERF'') has filed written notifications simultaneously with the Attorney General and with the Federal Trade Commission disclosing a change in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, the notifications stated that Sun Company, Inc., has terminated its membership in PERF.

No other changes have been made in either the membership or planned activities of PERF. Membership in PERF remains open, and PERF intends to file additional written notification disclosing all changes in membership.

On February 10, 1986, PERF filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 14, 1986 (51 FR 8903).

The last notification was filed with the Department on February 15, 1996. A notice was published in the **Federal Register** pursuant to Section 6(b) of the

Act on March 27, 1996 (61 FR 13517–18).

Constance K. Robinson,

Director of Operations, Antitrust Division.

[FR Doc. 97–31721 Filed 12–2–97; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Labor Advisory Committee for Trade Negotiations and Trade Policy; Meeting Notice

Pursuant to the provisions of the Federal Advisory Committee Act (P.L. 92–463 as amended), notice is hereby given of a meeting of the Steering Subcommittee of the Labor Advisory Committee for Trade Negotiations and Trade Policy.

Date, time and place: December 11, 1997, 10:00 am, U.S. Department of Labor, Seminar Room 5, 200 Constitution Ave., N.W., Washington, D.C. 20210.

Purpose: The meeting will include a review and discussion of current issues which influence U.S. trade policy. Potential U.S. negotiating objectives and bargaining positions in current and anticipated trade negotiations will be discussed. Pursuant to section 9(B) of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(9)(B) it has been determined that the meeting will be concerned with matters the disclosure of which would seriously compromise the Government's negotiating objectives or bargaining positions. Accordingly, the meeting will be closed to the public.

For further information, contact: Jorge Perez-Lopez, Director, Office of International Economic Affairs, Phone: (202) 219–7597.

Signed at Washington, D.C., this 25th day of November 1997.

Andrew J. Samet,

Acting Deputy Under Secretary, International Affairs.

[FR Doc. 97–31672 Filed 12–2–97; 8:45 am]

BILLING CODE 4510–28–M

DEPARTMENT OF LABOR

Employment and Training Administration

Federal-State Unemployment Compensation Program: Unemployment Insurance Program Letters Interpreting Federal Unemployment Insurance Law

The Employment and Training Administration interprets Federal law requirements pertaining to unemployment compensation (UC) as part of its role in the administration of the Federal-State UC program. These interpretations are issued in Unemployment Insurance Program Letters (UIPLs) to the State Employment Security Agencies. The UIPL described below is published in the **Federal Register** in order to inform the public.

UIPL 39–97

UIPL 39–97, dated September 12, 1997, advises States of the Department of Labor's interpretation of the Reed Act provisions of Title IX of the Social Security Act and transmits updated instructions and requirements related to the use of ''Reed Act'' funds as transferred to State accounts in the Unemployment Trust Fund.

Dated: November 26, 1997.

Raymond J. Uhalde,

Acting Assistant Secretary of Labor.

Classification: UI
Correspondence Symbol: TEUFA
Date: September 12, 1997.
Directive: Unemployment Insurance Program Letter No. 39–97
To: All State Employment Security Agencies
From: Grace A. Kilbane, Director, Unemployment Insurance Service
Subject: The Reed Act Provisions of Title IX of the Social Security Act

1. *Purpose*. To transmit updated instructions and requirements related to the use of ''Reed Act'' funds as transferred to State accounts in the Unemployment Trust Fund (UTF).

2. *References*. Sections 303(a)(2), 303(a)(4), 303(a)(5), 303(a)(8), 901(c), 903, 904 and 1201 of the Social Security Act (SSA); the Balanced Budget Act of 1997 (BBA), P.L. 105–33; Sections 3304(a)(3), 3304(a)(4) and 3306(f) of the Federal Unemployment Tax Act (FUTA); 29 CFR Part 97; OMB Circular No. A–87; Part IV, Sections 3000–3040 of the *Employment Security Manual* (*ES Manual*); UIPL Nos. 5–90, 11–90 and 12–91; GAL Nos. 4–83, 5–94 and 2–96; and Section III, Chapter 2 of *ET Handbook No. 401*.

3. *Background*. The Unemployment Insurance Service (UIS) is issuing ''basic'' program letters for certain program areas to provide comprehensive instructions to States in a single document. This program letter provides guidance to States in accounting for their use of Reed Act funds in accordance with standards established by the Secretary of Labor. This directive is a consolidation of instructions from the *ES Manual* and previous UI program and administration letters related to Reed Act funds and now supersedes the *ES Manual* sections referenced above. These instructions may later be included as a part of a Handbook issuance.

4. *Action Required*. SESA administrators are requested to provide these instructions to the appropriate staff.

5. *Inquires*. Inquires should be directed to your Regional Office.

6. *Rescission*. Part IV, Sections 3000–3040 of the *Employment Security Manual*.

7. *Attachments*.

I. The Reed Act Provisions of Title IX of the Social Security Act;

II. Draft Language for State Laws.

Attachment I—The Reed Act Provisions of Title IX of the Social Security Act

A. Introduction

1. *Definition—Background*. The term ''Reed Act'' refers to a part of the Employment Security Financing Act of 1954, and is used in honor of Congressman Daniel A. Reed of New York, chairman of the House Ways and Means Committee at the time. This legislation amended Titles IX and XII of the Social Security Act (SSA) and established the basic structure of the Unemployment Trust Fund (UTF). The amendments to Title IX, among other things, provided, under certain conditions, for the transfer of excess funds in the Employment Security Administration Account (ESAA) in the UTF to the individual State accounts in the UTF (Section 903(a)(1), SSA). These transferred funds are commonly referred to as ''Reed Act'' funds. To date, only three Reed Act distributions—in 1956, 1957, and 1958—totalling $138 million, have been made to State accounts.

Under the SSA, the primary purpose of Reed Act funds is the payment of ''cash benefits to individuals with respect to their unemployment, exclusive of expenses of administration'' (Section 903(c)(1), SSA). However, subject to conditions specified in Section 903(c)(2), SSA, a State is permitted, at its discretion, to use Reed Act funds for ''the administration of its unemployment compensation law and public employment offices''. (See Part E. for exception for use of Reed Act amounts allocated for fiscal years 2000, 2001, and 2002.)

Title III, SSA, governs the use of Federal grant funds for the administration of the unemployment compensation (UC) programs by States. Section 302(a), SSA, addresses the uses of UC granted funds as follows:

The Secretary of Labor shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved by the Secretary of Labor under the Federal Unemployment Tax Act, such amounts as the Secretary of Labor determines to

be necessary for the proper and efficient administration of such law during the fiscal year for which such payment is to be made.

Section 303(a)(8), SSA, requires, as a condition of receiving UC administrative grants, that State laws include provision for: the expenditure of all moneys received pursuant to section 302 of this title solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of such State law.

Section 901(c)(1), SSA, authorizes to be made available for expenditure out of the employment security administration account, for each fiscal year—

(A) such amounts * * * as the Congress may deem appropriate for the purpose of—

(i) assisting the States in the administration of their unemployment compensation laws as provided in title III (including administration pursuant to agreements under any Federal unemployment compensation law).

(ii) the establishment and maintenance of systems of public employment offices in accordance with the Act of June 6, 1933, as amended (29 U.S.C., secs. 49–49n).

State employment security agencies (SESAs) include both UC and public employment (ES) offices and, to the extent that they operate State activities provided for only under title III, SSA, and the Wagner-Peyser Act, will hereafter be called the ''employment security program''. Reed Act funds may be used to pay the administrative expenses of the employment security program. (See Part E. for exception for use of Reed Act amounts allocated for fiscal years 2000, 2001, and 2002.)

Initially, Reed Act funds were available for administrative expenses up to 5 years from the date they were first credited to a State's account. Through amendments, the time period for administrative use was later extended to 10, 15, 25, and 35 years, and then eliminated effective October 1, 1991.

2. *Relationship to Trust Fund Operations.* Reed Act funds become a part of a State's unemployment fund, as defined in Section 3306(f) of the Federal Unemployment Tax Act (FUTA), on the date they are transferred to the State's account in the UTF. Such funds retain legal status as a part of the State's unemployment fund and must be accounted for as part of the fund until expended for unemployment compensation or administrative expenses of the State's employment security program. As such, Reed Act funds are subject to the ''immediate deposit'' and ''limited withdrawal'' standards (Sections 303(a)(4) and (5), SSA; Sections 3304(a)(3) and (4), FUTA) applicable to all State unemployment fund money.

B. Mechanics of a Reed Act Distribution

1. *Conditions Necessary for Making Transfers.* Whenever the Secretary of Labor has reason to believe that conditions which are necessary for a Reed Act transfer will occur in the next fiscal year, the Secretary, after consultation with the Secretary of the Treasury, shall report to Congress with a recommendation for appropriate action (Section 902(c), SSA). Section 903(a)(1) provides that a transfer of Reed Act funds will occur if the following conditions exist in the Federal accounts of the UTF at the end of a Federal fiscal year (that is, September 30):

a. The balance of funds in the extended unemployment compensation account (EUCA) and the Federal unemployment account (FUA) have reached their statutory ceilings, and all general revenue advances and related interest to these accounts have been repaid, and

b. There remains in the employment security administration account (ESAA) an amount in excess of the account's statutory ceiling.

The excess amount in the ESAA is then transferred to State accounts in the UTF at the beginning of the following Federal fiscal year, as explained below.

2. *Amounts Transferred to State Accounts.* Each State's share of the amount to be transferred is based on the proportion of wages subject to FUTA attributable to the State during the preceding calendar year to the aggregate amount of wages subject to FUTA during the same year for all States. The exact share for each State is derived by applying its computed ratio or percentage to the total amount to be transferred. (See Part B.3. for exception for calculating State shares with respect to amounts for Federal fiscal years ending in 1999, 2000, and 2001.) The Secretary of Labor determines the amount of each State's share and certifies it to the Secretary of the Treasury. (Section 903(a)(2), SSA.)

3. *Special Distribution with Respect to Federal Fiscal Years 1999, 2000, and 2001.* The Balanced Budget Act of 1997 (BBA) amended Section 903 of the SSA to cap the total amount of Reed Act transfers made with respect to Federal Fiscal years ending in 1999, 2000, and 2001 at $100,000,000 per year. Each State's share of the amount to be transferred will be based on the ratio of the amount of ''funds to be allocated to such State for such fiscal year pursuant to the base allocation formula under title III'', SSA, to ''the total amount of funds to be allocated to all States for such fiscal year pursuant to the base allocation formula under Title III.'' (Section 903(a)(3), SSA.)

4. *Limitations on Transfers.*

All States share in a Reed Act transfer. However, under Section 903(b), SSA, the total amount of a State's share may not be credited to its UTF account in the following two instances:

a. The Secretary of Labor finds that on October 1 of the year in question, a State is not eligible for certification under Section 303, SSA, *or* the law of the State is not approvable under Section 3304, FUTA.

In this instance, the State's share of Reed Act funds is credited to the FUA and held in reserve. If the Secretary of Labor certifies that the State is eligible for certification under Section 303, SSA, and/or that its law is approvable under Section 3304, FUTA, before the end of the fiscal year, the State's Reed Act share is then transferred to its account. However, such delayed credits, although designated for the State, earn interest for the State only from the date credited, because they are not a part of the State's individual account until credited. If certification and/or approval is not received before the end of the fiscal year, the amount that would have been transferred to the State's account remains in the FUA and becomes unrestricted as to its use as a part of that account.

b. On October 1, a State has an outstanding balance of advances under Title XII, SSA. (See Part C.2.)

The State's Reed Act share is reduced (but not below zero) by the balance of unpaid Title XII advances. The amount of the reduction is transferred to or retained in the FUA and serves to reduce the State's balance of outstanding advances. If the State's Reed Act share has not been reduced to zero, the remaining amount is credited to its UTF account.

C. Use of Reed Act Funds for UC Benefit Payments

1. *Use under Normal Circumstances.* Section 903(c)(1), SSA, imposes no requirements on a State's use of Reed Act funds for benefit payments. For this purpose, funds are withdrawn from the State's UTF account as are any other funds in the account. Logically, a State would first expend other available funds for benefits in order to preserve its Reed Act balance, which can be used for either benefits or, under specified conditions, administrative expenses. Therefore, the Department of Labor (DOL) assumes that as long as the balance of funds in a State's UTF

account exceeds its unexpended balance of Reed Act allocations, the total unused Reed Act balance remains within the account. (See Part E. for exceptions for use of amounts allocated for fiscal years 2000, 2001, and 2002.)

2. *Use upon Obtaining a Title XII Advance.* Section 1201, SSA, provides a system of ''Title XII'' advances to States with temporarily depleted unemployment compensation reserves. One of the requirements for a State to qualify for an advance is that the amount of the advance be determined by considering all other amounts available in the State's unemployment fund for benefit payment. (Section 1201(a)(3)(B), SSA.) This includes, as explained below, unobligated Reed Act funds. Therefore, upon obtaining a Title XII advance, a State's unexpended Reed Act funds become subject to expenditure for benefits without regard to whether they have been appropriated or, except as provided below, obligated for an administrative expense. (See Part E. for exceptions for use of amounts transferred with respect to Federal fiscal years 1999, 2000, and 2001.)

3. *Procedures to Set Aside Obligated Amounts* Amounts validly obligated, under appropriations made consistently with the Reed Act, are considered to be unavailable for any other purpose, including the payment of benefits upon obtaining a Title XII advance. To assure availability for expenditure when obligations mature, Reed Act funds, which are properly obligated for an administrative expense *prior* to obtaining an advance, may be made unavailable for benefit payment *if* the State elects to set aside such amounts in a UTF Reed Act ''sub-account''. This set aside provision does not apply to appropriated funds prior to actual obligation, because an appropriation specifies only the purpose for which funds may be expended and does not create transactions which require a payment of money. Funds residing in a Reed Act sub-account are not considered available for benefits and are not taken into account by DOL or Treasury for Title XII purposes, if properly set aside in such a sub-account. The procedures to set aside obligated amounts are as follows:

a. To establish an initial credit to a sub-account a State must:

1. Review each current Reed Act obligation under which there is an unexpended balance and validate the:

—Date of enactment of the enabling appropriation (see part D.1.),
—Date and amount of each obligation (see part D.2.), and
—Unexpended balance of each obligation amount;

2. Prepare a letter certifying the amount of unexpended Reed Act obligations as of the end of the month being used to establish the initial credit. This amount must agree with transactions reported on Form ETA 8403, *Summary of Financial Transactions—Title IX Funds (''Reed Act'' Money)* submitted for the same month. (The total of column III(b) less the total of column IV(a) must equal the amount of unexpended obligations.) As documentation, attach a summary sheet identifying each appropriation under which there is an unexpended obligation amount. For each appropriation, indicate the purpose, dollar amount, enactment date, legislative bill number, and the current total dollar amount obligated.

The letter and attachment should be addressed to: U.S. Department of Labor, Employment and Training Administration, Attention: TEUFA, 200 Constitution Avenue, N.W., Rm C–4512, Washington, D.C. 20210.

DOL will then certify the same to U.S. Treasury, subject to review of the State's documentation.

b. To provide for on-going maintenance of the sub-account, a State must:

1. Certify to DOL by letter on a monthly basis all new obligation amounts and all deobligated amounts. The letter must specify the effective date of each obligation or deobligation and identify the corresponding appropriation(s) and/or related obligation(s) by amount and effective date. The letter must be received by the tenth business day of the month following the month in which the transaction occurred and be accompanied by a Form ETA 8403 for the appropriate month:

2. When requisitioning funds from the State's UTF account, specifically identify withdrawal amounts requested from the Reed Act sub-account;

3. Include all Reed Act sub-account transactions on Form ETA 8403 for the month in which the transaction(s) occur; and

4. Include all Reed Act redeposits and withdrawals on each month's written confirmation letter to Treasury of UTF account activities.

As new obligations are made or as obligations are cancelled, the amounts obligated or deobligated will be certified in a similar manner and credited or deducted from the State's Reed Act sub-account. Withdrawals to pay Reed Act obligations, as specified by State requisitions, will be charged against the Reed Act sub-account.

4. *Restoration of Funds Used for Benefits.* Each expenditure of Reed Act funds, whether for benefits or administrative costs, reduces the amount available for appropriation in accordance with Section 903(c)(2), SSA. Under certain conditions described in Section 903(c)(3), SSA, funds used to pay benefits may be restored to availability for administrative purposes:

- The Governor of a State must submit a request for restoration of such funds to the Secretary of Labor,
- Funds to be restored must have been used for benefits,
- The amount to be restored does not exceed the balance in the State's UTF account, and
- The State's unemployment fund must be free of outstanding Title XII advances when the request is made.

a. Determining amount to be restored. States which used Title XII advances must determine the amount of Reed Act funds used for benefits. A ''pre-approved'' amount of a Title XII advance is designated for a State for a specific month. However, other than the amount set aside in a Reed Act sub-account, U.S. Treasury procedures take into account a State's entire UTF account balance (including Reed Act funds which have not been set aside in a Reed Act sub-account), which must be reduced to zero prior to calculating the actual amount of an advance and transferring it to the State.

- The balance of Reed Act funds (not set aside in a Reed Act sub-account) in the State's account on the date in the first month any portion of a Title XII advance was actually used is the amount of Reed Act funds used for benefits and eligible for restoration.
- If, after an initial advance and the resulting expenditure of Reed Act funds for benefits, funds are recovered through amortization (see Part F.) and deposited in a State unemployment fund in any subsequent month as Reed Act redeposits, then such redeposited amounts are also considered to have been used for benefits if the State uses any portion of a Title XII advance during that month. However, if the State does not use any portion of a subsequent advance in a month in which a redeposit is made, the redeposited amount remains in the State's account as Reed Act funds but must be used only to pay benefits while there is an outstanding balance of advances.

Example: On February 1, 1997, a State has a $500,000 balance of Reed Act money in its account in the UTF, none of which has been set aside in a Reed Act sub-account. A Title XII advance in the amount of $5,000,000 has been approved for use by the State during February. On February 9, the balance in the State's account is $700,000 and the State

requests a withdrawal of $2,000,000. To transfer the State's requisition of $2,000,000, the U.S. Treasury first deducts the remaining $700,000 from the State's account (which includes the $500,000 Reed Act balance), thereby reducing the State's account balance to zero; it then adds to the account $1,300,000 from the $5,000,000 Title XII advance for February, which it transfers to the State along with the original $700,000. At this time, the $500,000 in Reed Act money is deemed to have been used for benefits. During March and April, the State redeposits $100,000 to its UTF account received as amortization payments on a Reed Act financed building. This money is available for obligation for administrative expenses after the State repays all advances, because under Section 903(c)(2), SSA, Reed Act funds may not be obligated while there is a outstanding balance of Title XII advances. If the State does not borrow again and repays all outstanding Title XII advances, the Governor may request restoration of the $500,000 used for benefits in February 1997. If the State borrows again in April, the $100,000 would also be used for benefits. Therefore, after all advances are repaid, the Governor may request restoration of the $500,000 used for benefits in February 1997 and the $100,000 used for benefits in April 1997.

b. Procedures for restoration of funds.

States desiring restoration of Reed Act funds must prepare and submit:

- Form ETA 8403, indicating when funds were used for benefits by showing dates (month, year) in column I and the appropriate amounts as negative figures in column II of the report; and
- A letter from the Governor of the State to the Secretary of Labor (1) stating that the State's unemployment fund is free of Title XII obligations and contains funds at least equal to the amount to be restored, and (2) specifying amounts to be restored pursuant to Section 903(c)(3), SSA.

If the Secretary of Labor determines that:

- Amounts requested for restoration: (1) were used to pay benefits and (2) do not exceed the amount in the State's UTF account, and
- All Title XII advances were repaid as of the request date;

then the Secretary will notify the Governor that the restoration is approved. Restoration shall be effective on the first day of the month following the date of the Secretary's notice.

D. Use of Reed act funds for Administrative Purposes

1. *Legal Requirements.* Reed Act funds may be used for administrative expenses of the employment security program only if a State adheres to the requirements specified in Section 903(c)(2), SSA. (See Part E. for exception for use of amounts allocated for fiscal years 2000, 2001, and 2002.)

The State legislative body must authorize the use of Reed Act money by specific appropriation. The appropriation law: (1) Must specify the purpose and the amount of the appropriation, (2) may not authorize obligation of funds after the close of the two-year period which began on the date of enactment of the law, and (3) must limit the amounts which may be obligated to the balance of unobligated Reed Act funds in the State's unemployment fund. Funds must be withdrawn from the State's unemployment fund and expended after the date of enactment and must be accounted for in accordance with standards established by the Secretary of Labor. (See Attachment II, *Draft Language for State Laws* in appropriating Reed Act funds for administrative purposes.)

2. Guidelines for Use.

a. *Specificity and Limitation Requirements of an Appropriation Act.* A State appropriation act authorizing the use of Reed Act funds must (1) limit the use of funds appropriated exclusively to administrative expenses of the employment security program and (2) specify the purpose for which the funds are appropriated and the amount appropriated for each purpose. For example, the purpose of an appropriation law might be: ''To conduct a special, statewide, intensive audit of employer payrolls in the construction industry''.

When a State agency is administering other programs in addition to the employment security program (e.g., a disability insurance program), no part of the expenses of administering the other programs may be paid with Reed Act funds. When funds are appropriated for a purpose for which only a part is related to employment security, the appropriation law must specify the employment security share and the amount of Reed Act funds to be used.

Although an appropriation of Reed Act funds may exceed the balance of available Reed Act funds at the time of the appropriation (see part D.2.c.), the appropriation law must specify that the amount which may be obligated at any time may not exceed the balance of Reed Act funds available *at the time of obligation* in the State's unemployment fund.

b. *Two-Year Limit for Obligating Funds.* The two-year time limit imposed by Section 903(c)(2)(B), SSA, within which Reed Act funds appropriated by State law must be obligated begins on the date of enactment of the appropriation law, not the date as of which funds were transferred to the State's UTF account. The appropriation law must be worded so that it is clear that funds appropriated are not available for obligation after the two-year period. The term, ''date of enactment'', as used in Section 903(c)(2), SSA, means the date on which an act passed by the State legislature becomes law. The determination of the date when such an act becomes law is a question for the appropriate State authority. In some instances, State courts have held that the effective date of an act is the date of enactment. However, the substitution of ''effective date'' for the term ''date of enactment'' in Reed Act legislation should be avoided, since an interpretation of State law will be required to determine whether the appropriation law meets the requirements of Section 903(c)(2)(B), SSA, if ''effective date'' is used. The general rule is that the date of enactment is the date on which the act is approved by the Governor of the State. Money is ''obligated'' and an ''obligation'' is created when an order is placed, a contract is awarded, or other transactions are entered into which require a current or future payment of money. The use of the term ''obligate'' instead of ''expenditure'' in Reed Act appropriations is recommended for consistency with Section 903(c)(2)(B). The use of such terminology also allows greater flexibility in handling Reed Act funds; money obligated before the expiration of the two-year limit may be expended any time afterward.

c. *Appropriation in Anticipation of Future Reed Act Availability.* A State legislature is not prohibited from *appropriating* Reed Act funds in anticipation of a future availability of Reed Act funds. However, such funds may not be obligated prior to becoming available even though they have been properly appropriated by act, the enactment date of which precedes the date of funds becoming available.

d. *ETA Administrative Requirements Not Applicable.* Although Reed Act funds may be used for an administrative expense of the employment security program, Section 903(c)(2), SSA, does not, as do Sections 303(a) and 303(a)(8), SSA, require that the expenditure be for a purpose or in an amount found necessary for proper and efficient administration by the Secretary of Labor. Further, since Reed Act funds are not granted funds, the administrative requirements related to the use of grant funds at 29 Code of Federal Regulations (CFR) Part 97 and OMB Circular No. A–87 (60 *Federal Register* 26484 (May 17, 1995)) with respect to the expenditure of Wagner-Peyser Act and Title III funds (granted funds) are not applicable to the expenditure of Reed Act funds.

Nevertheless, Reed Act funds must be expended consistent with Sections 903(c) (1) and (2), SSA. Further, where Wagner-Peyser and granted funds are to be used to reimburse Reed Act expenditures for certain permissible purposes, DOL prior approval may be required for such use of granted funds. (See part F.)

e. *Restrictions on Withdrawal of Funds.* Reed Act funds may not be withdrawn from a State's unemployment fund for administrative expenses, and expenses may not be incurred until after the enactment date of the appropriation law. In addition, funds may not be withdrawn prior to obligation. The withdrawal of Reed Act funds must adhere to the U.S. Treasury-State Agreement under the Cash Management Improvement Act of 1990 (CMIA).

Funds may be withdrawn only in amounts necessary to pay mature obligations. (Section 303(a)(5), SSA; Section 3304(a)(4), FUTA.) An obligation is mature when payment is due either by reimbursement of expenses or contractual agreement for advance payments. Reed Act funds withdrawn may be mingled with other administrative funds (granted funds) if separate book accounts are maintained by the State agency to identify the balance of Reed Act funds at all times.

3. *Use of Reed Act Interest Credits.* Since Section 903(c)(2)(D), SSA, limits the amount which may be obligated for administration to amounts transferred to the State's account, interest credits attributable to the amount of Reed Act funds in the State's UTF account may not be appropriated, obligated, expended, or disbursed for administrative purposes.

4. *Investment of Reed Act Funds Not Permissible.* Except as provided under the CMIA, investment is not one of the purposes for which money withdrawn from a State unemployment fund may be used. Since Reed Act funds are a part of the State's unemployment fund, a State law which permits investment of such funds is inconsistent with Section 303(a)(5), SSA, and Section 3304(a)(4) of FUTA. It was the intent of Congress, as indicated by Section 904, SSA, that money in the UTF may be invested only by the Secretary of Treasury. This intent is effectuated only by assuring that Reed Act moneys remain in the UTF.

E. Use of Reed Act Funds Allocated for Fiscal Years 2000, 2001, and 2002

The BBA of 1997 amended paragraph (2) of Section 903(c) of the SSA, by adding the following sentence: ''Any amount allocated to a State under this section for fiscal year 2000, 2001, or 2002 may be used by such State only to pay expenses incurred by it for the administration of its unemployment compensation law, and may be so used by it without regard to any of the conditions prescribed in any of the preceding provisions of this paragraph.''

Unlike previous Reed Act transfers, States are prohibited from using Reed Act funds allocated for these three years for the payment of UC benefits or the administration of State public employment offices. However, States may, among other uses, use these Reed Act funds for purchasing real property for UC purposes and may amortize these purchases against UC grant funds. (See Parts G. and H.) Additionally, the restrictions applicable to Reed Act funds in section 903(c)(2), SSA, are not applicable to amounts allocated for fiscal years 2000, 2001, and 2002. This means that the amounts transferred to States for these three years may be used without obtaining an appropriation from the State's legislative body, as discussed in Parts D.1. and D.2., above. States must amend their UC laws to prohibit the use of Reed Act funds allocated for fiscal years 2000, 2001, and 2002 for the payment of UC benefits and may further amend their UC laws to authorize the use of such funds for UC administrative purposes without a specific appropriation from their State legislatures. (See Attachment II, *Draft Language for State Laws.*)

F. Use of Reed Act Funds for Voter Registration Activities

Under the National Voter Registration Act (NVRA) of 1993, States are permitted to designate State UC and ES offices as voter registration agencies. Reed Act funds may be used to pay for the administration of a State's UC law and public employment office. Since, under the SSA, voter registration activities are not necessary for the administration of the State's UC law, Reed Act funds may not be used for those activities. However, since Section 7(a)(3)(B) of the Wagner-Peyser Act authorizes SESAs to use ES grant monies for ''developing linkages between services funded under this Act and related Federal or State legislation'', if an ES office is designated as a voter registration agency under the NVRA, then voter registration activities of that ES office are legitimate ES administrative expenses chargeable to ES grants. Therefore, Reed Act funds may be used to pay for these voter registration activities.

Note: As illustrated in F., the use of Reed Act funds for SESA administrative expenses is permissible for purposes other than those specifically mentioned in this discussion.

G. Use of Reed Act Funds to Acquire Real Property

1. *Acquisition of Real Property Deemed an Expense of Administration.* Reed Act funds may be used to acquire land and to purchase or construct a building for use and occupancy by the State employment security agency consistent with Section 903(c)(2), SSA. This is an expense of employment security administration. The following are special conditions applicable to this use of Reed Act funds:

a. *Space.* Since Reed Act funds may be used only for employment security purposes, such funds may be used to pay only for that part of the land and building space costs which are directly related to employment security purposes, e.g., that part of the cost of a building as is represented by the proportion of the total space occupied and used by the employment security agency for employment security purposes, including the cost of agency functions and other agency programs and activities which jointly benefit Wagner-Peyser Act and unemployment compensation programs.

Reed Act funds may not be used to pay for more land or building space than is needed for employment security purposes. However, funds may be used to purchase or construct a building large enough to provide space for future expansion that reasonably can be anticipated at the time of purchase or construction.

b. *Rental of Space.* Extra space which is available through the purchase or construction of a building large enough for reasonable expansion purposes may be leased until the time it is required for agency use. Income from the lease may be deposited in the State's UTF account but may not be credited as Reed Act funds. Income from a lease may not be credited as Reed Act funds because only amounts transferred to the State's account under Section 903(a)(1), SSA, have ''Reed Act'' status. If the cost of the space is being amortized with grant funds, the income from the lease must be prorated between the State's UTF account and use to reduce the State's grant costs, in accordance with 29 CFR 97.25, and the annual grant agreement.

2. *Disposition of Real Property and Subsequent Use of Proceeds.* Real property acquired with Reed Act funds, which has not been amortized with grant funds (see part F.), may be sold or otherwise disposed of without obtaining DOL approval or disposition instructions. When unamortized real property is no longer needed for its originally authorized employment security purpose, States are expected to

use good business judgment in disposing of such property. Proceeds from such disposal must be returned to the State's UTF account. The proceeds will be credited as Reed Act funds up to the amount of the original expenditure, because only amounts transferred to the State's account under Section 903(a)(1), SSA, have Reed Act status.

When real property acquired with Reed Act funds and wholly or partially amortized with grant funds is no longer needed for its originally authorized employment security purposes, it must be sold, exchanged for replacement property, or otherwise disposed of as directed by DOL disposition instructions (29 CFR Part 97.31(c)). Example A illustrates the sale of real property which was purchased with both non-Federal funds and Reed Act funds, with a portion of the Reed Act funds have been amortized with DOL grant funds.

Example A: Thirty-five years ago, $1 million of Reed Act funds and $1 million of other non-Federal funds were used to acquire real property at the cost of $2 million for employment security purposes. Over the years, seventy percent (70%) of the Reed Act funds were amortized with DOL grant funds. Today, the real property is being sold for $6 million. The distribution of the respective equities is based on the following computations.

Share of Each Fund Source Based on Adjusted Contributions to Cost:			
Other Funds ($2,000,000 less $1,000,000)	$1,000,000	=	50%
DOL Grant Funds (70% x $1,000,000)	700,000	=	35%
Reed Act Funds ($1,000,000 less $700,000)	300,000	=	15%
Total Cost	2,000,000		100%
Equity in Property by Fund Source:			
Other Funds equity (50% x $6,000,000)			$3,000,000
DOL equity (35% x $6,000,000)			2,100,000
Reed Act equity (15% x $6,000,000)			900,000
Total Sale Proceeds			6,000,000

(29 CFR 97.31(c)(2).)

See Part F.1. for an explanation of how DOL (Federal) equity was created in the property.

a. *Replacement.* A State may use proceeds from the sale of real property as an offset to the purchase price of a replacement property. In a replacement transaction, it is not necessary to make another appropriation of Reed Act funds to obtain the replacement property if the use of such funds conforms in all respects to the original appropriation authorizing the acquisition of the disposed property and is permissible under State law. In the interpretation of State Reed Act appropriations, the State is the final arbiter of its State law. Such transactions may not result in a new obligation of Reed Act funds. If the property being replaced is worth more than the replacement, the excess cash proceeds received or equivalent cash shall be handled as in Part 2.b.

b. *Use of Cash Proceeds.* The Reed Act share of cash proceeds received from the sale or other disposition of real property must immediately be deposited in the State's account in the UTF (Section 303(a)(4), SSA, and Section 3304(a)(3), FUTA). Similarly, any portion of the Reed Act proceeds from a disposition that is not used for replacement property must be immediately deposited in the State's UTF account. However, only proceeds equivalent to the original cost of the property may be credited to the State's account as Reed Act funds. Earnings or profit resulting from real estate transactions may not be credited as Reed Act funds because only amounts transferred to a State as provided in Section 903(a)(1), SSA, have ''Reed Act'' status. The remainder of cash proceeds, if any, must be used for the payment of unemployment benefits or other expenditures consistent with the withdrawal standard. Failure to immediately deposit the applicable proceeds into the UTF may be cause for the Secretary of Labor to commence conformity/compliance proceedings and to assess interest on the amount outstanding. Example B illustrates the proper distribution of the Reed Act share of sales proceeds in Example A.

Example B:

Distribution of Reed Act Share of Sales Proceeds:	
Reed Act contribution to acquisition cost	$1,000,000
Less: Adjusted grant funds contribution to (amortization of) acquisition cost	700,000
Adjusted Reed Act Contribution	300,000
Reed Act equity in sales proceeds	900,000
Less: Adjusted Reed Act contribution (credited to UTF as Reed Act funds)	300,000
Balance of Reed Act equity (credited to UTF for payment of unemployment compensation and other expenditures consistent with the withdrawal standard)	600,000

H. Reimbursement of Reed Act Expenditures From Granted Funds

1. *Extent of Reimbursement.* UI and ES grant funds may be used to reimburse the State's Reed Act expenditures to the extent that the costs meet the requirements for use of funds authorized by the Wagner-Peyser Act and Title III. (29 CFR Part 97; OMB Circular No. A–87.) To date, reimbursement through amortization arrangements has been authorized for:

- the cost of obtaining land and constructing or purchasing a building for employment security purposes (real property),
- capital improvements to State-owned office buildings, to the extent such buildings are used for employment security purposes, and
- the acquisition of automatic data processing (ADP) installations.

Reed Act funds expended for the above purposes may be amortized with grant funds because these expenditures meet the administrative requirements related to the use of grant funds at 29 CFR Part 97 and OMB Circular No. A–87 with respect to the expenditure of Wagner-Peyser Act and Title III funds.

The amortization of Reed Act expenditures for the acquisition of real property and capital improvements with grant funds creates Federal equity. ''Federal equity'' means the Federal government owns a share of the fair market value of real property. Therefore, when the property ceases to be used for employment security purposes, DOL recaptures the Federal equity. The value of the Federal equity is based on the adjusted contribution of UI and ES grant funds to the acquisition cost of the property and any capital improvements that materially increase the value or useful life of real property.

2. *Deposit and ''Reappropriation'' of Reimbursed Reed Act Funds.* Grant funds used to reimburse a State for Reed Act expenditures must be deposited immediately to the State's UTF account (Section 303(a)(4), SSA; Section 3304(a)(3), FUTA), and credited to Reed Act funds used in the project. Where a reimbursement relates to a particular project within an appropriation involving two or more years of Reed Act allocations, the reimbursement is applied first to the earliest Reed Act allocation used in the project and thereafter to the next earliest in consecutive order. Reimbursed funds may be ''reappropriated'' by the State legislature for other Reed Act administrative purposes.

I. Unemployment Trust Fund (UTF) Transactions

1. *Withdrawal of Reed Act Funds.* U.S. Treasury requirements and procedures for withdrawal of Reed Act funds from a State's UTF account for payment of benefits and administrative expenses are the same as for regular benefit funds through Treasury's on-line requisition system. To withdraw Reed Act funds which have not been ''set aside'' in a Reed Act sub-account, the State must include the amount being withdrawn in the total requisition for regular benefits. There is a specific line on the electronic requisition screen for withdrawal of Reed Act funds which have been ''set aside'' in a Reed Act sub-account. The total amount of administrative Reed Act funds being withdrawn and the account and location of its deposit must be noted in the ''special instructions'' section of the screen.

2. *Deposit of Reed Act Fund Reimbursements.* As noted in part F.2., grant funds used to reimburse Reed Act expenditures must be returned immediately to the State's UTF account. The following are procedures for deposit of such reimbursements:

- The State agency must prepare a voucher against the administrative fund account in the amount of the reimbursement to be made.
- The ''payee designation'' must be the State employment security agency, or whatever designation is appropriate to permit deposit to the clearing account.
- After deposit to the clearing account, the reimbursement must be included in the next transfer of funds from the clearing account to the State's UTF account.

The same procedures for depositing reimbursement amounts will be used for returning any Reed Act funds which have been withdrawn for an administrative purpose but not used. (See part D.2.e.)

J. Accounting for Reed Act Funds

1. *Accounting Records.* Each State agency will maintain an accounting system with respect to Reed Act funds which will provide information for required DOL reports. The accounting records will contain:

a. Date and amount of each allocation or transfer of Reed Act funds to the State's UTF account, identified by fiscal year and totalled.

b. Date and amount of each expenditure of Reed Act funds for benefits and the fiscal year in which the funds charged with such expenditure were transferred to the State's account.

c. For each appropriation of Reed Act funds for costs of administration:

- Date of enactment of the appropriation law;
- Amount appropriated by the appropriation law;
- Date and amount of each obligation and expenditure of Reed Act funds with respect to each project authorized by the appropriation law and the Reed Act funds against which each obligation is charged;
- Date and amount of each withdrawal from the UTF account with respect to each project authorized by the appropriation law;
- Date and amount of each return (and credit) to the UTF account of withdrawals not expended;
- Date and amount of all receipts from the sale or other disposition of an employment security building financed with Reed Act funds or the lease of space therein;
- Date and amount of each reimbursement of Reed Act funds by way of amortization with grant funds with respect to each project authorized by the appropriation law; the crediting of each reimbursement to the UTF account, and the balance which remains to be reimbursed (or amortized); and
- Total of funds obligated pursuant to each appropriation, the total unobligated balance of each appropriation, and total charges against Reed Act funds.

d. Control totals for each transaction recorded for each appropriation in c. above.

e. Each entry in the records must be supported by appropriate documentation, and reference to such documentation must be made in the records.

2. *Approval of Vouchers.*

Each obligation and voucher for expenditure of Reed Act funds appropriated for expenses of employment security administration must be approved by the administrative head of the State agency or a duly authorized agent. All such documents or certified duplicates or copies thereof will be filed in the administrative office of the State agency.

K. Reed Act Funds Reporting Requirements

All transactions involving Read Act funds must be reported on Form ETA 8403, *Summary of Financial Transactions—Title IX Funds (''Reed Act'' Money)* in accordance with instructions in ET Handbook No. 401, Section III, Chapter 2. Redeposits to and withdrawals from the UTF account are also reported on lines 14 and 41, respectively, of Form ETA 2112, *UI Financial Transaction Summary.* Instructions for Form ETA 2112 are contained in ET Handbook No. 401, Section II, Chapter 1.

L. OMB Approvals

Reporting requirements for Form ETA 8403, *Summary of Financial Transactions—Title IX Funds (''Reed Act'' Money)* and Form ETA 2112, *UI Financial Transaction Summary* are approved by the Office of Management and Budget (OMB) under OMB Approval No. 1205–0154 (expiration date: February 28, 2000). OMB Approval is being sought for procedures to request restoration of Reed Act funds used for benefits (part C.5.b.) and procedures to establish and provide on-going maintenance to a Reed Act ''sub-account'' (part C.4.). When approval is received for these collections, notification will be issued.

Note: States are not required to respond to these collections of information unless a currently valid OMB approval number is in effect.

Attachment II—Draft Language for State Laws

I. Draft Statutory Language

The following language will allow States to use either of the Reed Act

appropriation alternatives provided after this draft statutory language.

(f) *Money credited under Section 903 of the Social Security Act.*

(1) Money credited to the account of this State in the Unemployment Trust Fund by the Secretary of the Treasury of the United States of America pursuant to Section 903 of the Social Security Act may not be requisitioned from this State's account or used except for the payment of benefits and for the payment of expenses incurred for the administration of this State's unemployment compensation law and public employment offices. Such money may be requisitioned pursuant to Section [insert section referring to withdrawals from the Unemployment Trust Fund] for the payment of benefits. Such money may also be requisitioned and used for the payment of expenses incurred for the administration of this State's unemployment compensation law and public employment offices but only pursuant to a specific appropriation by the legislature and only if the expenses are incurred and the money is requisitioned after the date of enactment of an appropriation law which specifies the purpose(s) for which such money is appropriated and the amount(s) appropriated therefor. Such appropriation is subject to the following conditions:

(A) The period within which such money may be obligated is limited to a period ending not more than two years after the date of the enactment of the appropriation law; and

(B) the amount which may be obligated is limited to an amount which does not exceed the amount by which (i) the aggregate of the amounts transferred to the account of this State pursuant to Section 903 of the Social Security Act exceeds, (ii) the aggregate of the amounts used by this State pursuant to this Act and charged against the amounts transferred to the account of this State.

(2) For purposes of subsection (1)(B), the amounts obligated under an appropriation for the above-described administrative purposes shall be charged against transferred amounts at the exact time the obligation is entered into.

(3) The appropriation, obligation, and expenditure or other disposition of money appropriated under this subsection shall be accounted for in accordance with standards established by the United States Secretary of Labor.

(4) Money appropriated as provided herein for the payment of expenses of administration shall be requisitioned as needed for the payment of obligations incurred under such appropriation and, upon requisition, shall be deposited in the employment security administration fund from which such payments shall be made. Money so deposited shall, until expended, remain a part of the unemployment fund and, if it will not be immediately expended, shall be returned promptly to the account of this State in the Unemployment Trust Fund.

(5) Notwithstanding paragraph (1), moneys credited with respect to Federal fiscal years 1999, 2000, and 2001, shall be used soley for the administration of the UC program and are not subject to appropriation by the legislature.

II. Draft Appropriation Language

Two suggested Reed Act appropriation bills are presented. Either bill may be used with the draft statutory language presented earlier. The first permits States with statutory Reed Act provisions to incorporate the requirements of Section 903(c)(2), SSA, by simply referencing these statutory provisions. This approach may be better for States where the Reed Act appropriation may be contained in a larger appropriation act or where State appropriation law limits the content of any single appropriation bill. The second details the requirements of Section 903(c)(2) and is similar to Reed Act appropriation bills recommended by this Department in the past. Since Reed Act moneys transferred with respect to Federal fiscal years 1999, 2000, and 2001, need not be appropriated by the State legislature, States need not follow this draft language for such moneys.

Alternative 1

AN ACT APPROPRIATING MONEY FOR ERECTING A BUILDING FOR USE BY [Name of State employment security agency]

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF [Name of State]

SEC. 1. There is hereby appropriated out of funds made available to this State under Section 903 of the Social Security Act, as amended, the sum of $_____, or so much thereof as may be necessary, to be used, under the direction of the [name of State employment security agency or the agency responsible for building construction] and subject to the requirements of Section [reference section of State code containing Reed Act provisions] of the State Code, for the purpose of acquiring land and erecting a building thereon for the use of [name of State employment security agency] and for such improvements, facilities, paving, landscaping, and fixed equipment[1] as may be required for its proper use and for operation by the [name of State employment security agency].

SEC. 2. Section 1 shall take effect and be in force from and after passage.

Alternative 2

AN ACT APPROPRIATING MONEY FOR ERECTING A BUILDING FOR USE BY [Name of State employment security agency]

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF [Name of State]

SEC. 1. There is hereby appropriated out of funds made available to this State under Section 903 of the Social Security Act, as amended, the sum of $_____, or so much thereof as may be necessary, to be used, under the direction of the [name of State employment security agency or the agency responsible for building construction], for the purpose of acquiring land and erecting a building thereon for the administration of this State's unemployment compensation law and public employment offices and for such improvement, facilities, paving, landscaping, and fixed equipment[2] as may be required for its proper use and operation.

SEC. 2. No part of the money hereby appropriated may be obligated after the expiration of the 2-year period beginning on the date of the enactment[3] of this act.

SEC. 3. The amount obligated[4] pursuant to this act shall not exceed at any time the amount by which (a) the aggregate of the amounts transferred to the account of this State pursuant to Section 903 of the Social Security Act exceeds (b) the aggregate of the amounts obligated for administration and paid out for benefits and required by law to be charged against the amounts transferred to the account of this State.

SEC. 4. This Act shall take effect and be in force from and after passage.

[FR Doc. 97–31669 Filed 12–2–97; 8:45 am]

BILLING CODE 4510–30–M

[1] ''Fixed equipment'' refers to such things as a central heating and/or air conditioning plant which becomes an integral part of the building and may be included in the cost of the building reimbursable out of granted funds.

[2] See footnote [1] above.

[3] The Department of Labor recommends that the phrase ''date of enactment'' be used here, since Section 903(c)(2)(B) of the Social Security Act requires that use of the appropriated money be limited to a 2-year period beginning with such date.

[4] Section 903(c)(2)(D) requires that this limitation be applied to money obligated, even though a State may choose to apply the 2-year limitation to expenditures.

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR–97–10]

Agency Information Collection Activities; Announcement of OMB Approval

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is announcing that a collection of information regarding the recording of occupational injuries and illnesses has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. This document announces the OMB approval number and expiration date.

FOR FURTHER INFORMATION CONTACT:

Stephen Newell, Office of Statistics, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3507, 200 Constitution Avenue, NW, Washington, D.C. 20210, telephone (202) 219–6463.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of April 22, 1997 (62 FR 19,621), the Agency announced its intent to request renewal of its current OMB approval for 29 CFR 1904, Recording and Reporting Occupational Injuries and Illnesses (less 1904.8, Reporting of Fatality or Multiple Hospitalization Incidents and 1904.17, Annual OSHA Injury and Illness Survey of Ten or More Employers). In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), OMB has renewed its approval for the information collection and assigned OMB control number 1218–0176. The approval expires 12/31/1998. Under 5 CFR 1320.5(b), an Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Dated: November 25, 1997.

Stephen A. Newell,

Director, OSHA Office of Statistics.

[FR Doc. 97–31604 Filed 12–2–97; 8:45 am]

BILLING CODE 4510–26–M

NUCLEAR REGULATORY COMMISSION

[Docket 70–7001]

Notice of Amendment to Certificate of Compliance GDP–1 for the U.S. Enrichment Corporation, Paducah Gaseous Diffusion Plant, Paducah, Kentucky

The Director, Office of Nuclear Material Safety and Safeguards, has made a determination that the following amendment request is not significant in accordance with 10 CFR 76.45. In making that determination the staff concluded that: (1) There is no change in the types or significant increase in the amounts of any effluents that may be released offsite; (2) there is no significant increase in individual or cumulative occupational radiation exposure; (3) there is no significant construction impact; (4) there is no significant increase in the potential for, or radiological or chemical consequences from, previously analyzed accidents; (5) the proposed changes do not result in the possibility of a new or different kind of accident; (6) there is no significant reduction in any margin of safety; and (7) the proposed changes will not result in an overall decrease in the effectiveness of the plant's safety, safeguards or security programs. The basis for this determination for the amendment request is shown below.

The NRC staff has reviewed the certificate amendment application and concluded that it provides reasonable assurance of adequate safety, safeguards, and security, and compliance with NRC requirements. Therefore, the Director, Office of Nuclear Material Safety and Safeguards, is prepared to issue an amendment to the Certificate of Compliance for the Paducah Gaseous Diffusion Plant. The staff has prepared a Compliance Evaluation Report which provides details of the staff's evaluation.

The NRC staff has determined that this amendment satisfies the criteria for a categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for this amendment.

USEC or any person whose interest may be affected may file a petition, not exceeding 30 pages, requesting review of the Director's Decision. The petition must be filed with the Commission not later than 15 days after publication of this **Federal Register** notice. A petition for review of the Director's Decision shall set forth with particularity the interest of the petitioner and how that interest may be affected by the results of the decision. The petition should specifically explain the reasons why review of the Decision should be permitted with particular reference to the following factors: (1) The interest of the petitioner; (2) how that interest may be affected by the Decision, including the reasons why the petitioner should be permitted a review of the Decision; and (3) the petitioner's areas of concern about the activity that is the subject matter of the Decision. Any person described in this paragraph (USEC or any person who filed a petition) may file a response to any petition for review, not to exceed 30 pages, within 10 days after filing of the petition. If no petition is received within the designated 15-day period, the Director will issue the final amendment to the Certificate of Compliance without further delay. If a petition for review is received, the decision on the amendment application will become final in 60 days, unless the Commission grants the petition for review or otherwise acts within 60 days after publication of this **Federal Register** notice.

A petition for review must be filed with the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC, by the above date.

For further details with respect to the action see (1) the application for amendment and (2) the Commission's Compliance Evaluation Report. These items 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.

Date of amendment request: October 6, 1997.

Brief description of amendment: The amendment proposes to revise Technical Safety Requirement (TSR) 2.3.4.7 and TSR 2.4.4.2, Criticality Accident Alarm System (CAAS) for Product and Tails Withdrawal and Cascade Facilities, to provide a cross reference for the Required Actions in order to assure all necessary Required Actions are performed when the C–310 CAAS is inoperable.

Basis for finding of no significance: 1. The proposed amendment will not result in a change in the types or significant increase in the amounts of any effluents that may be released offsite.

The proposed changes are related to human factors and do not change any requirements. There are no associated

effluent releases. Thus, they will not affect any effluents that may be released offsite.

2. The proposed amendment will not result in a significant increase in individual or cumulative occupational radiation exposure.

The proposed changes do not change or add any new requirements. The changes provide a cross reference between TSRs to ensure all required actions are performed when necessary. The changes do not relate to controls used to minimize occupational radiation exposures; therefore, the changes will not increase exposure.

3. The proposed amendment will not result in a significant construction impact.

The proposed changes will not result in any construction, therefore, there will be no construction impacts.

4. The proposed amendment will not result in a significant increase in the potential for, or radiological or chemical consequences from, previously analyzed accidents.

The proposed changes are administrative and serve only to relate the components of the CAAS in C–310. The changes do not change the current TSRs, only link separate sections more clearly. Therefore, the proposed changes do not represent an increase in the potential for, or radiological or chemical consequences from, previously evaluated accidents.

5. The proposed amendment will not result in the possibility of a new or different kind of accident.

The proposed changes to the TSRs do not add or change any TSR requirements. Therefore, the changes would not create new operating conditions or new plant configuration that could lead to a new or different type of accident.

6. The proposed amendment will not result in a significant reduction in any margin of safety.

The proposed changes attempt to rectify the situation in which an operator could overlook the linkage between the two TSRs that both contain required actions related to the CAAS. By including a cross reference, the changes try to ensure all required actions are performed. These changes do not decrease the margins of safety.

7. The proposed amendment will not result in an overall decrease in the effectiveness of the plant's safety, safeguards, or security programs.

Implementation of the proposed changes do not change the safety, safeguards, or security programs. Therefore, the effectiveness of the safety, safeguards, and security programs is not decreased.

Effective date: The amendment to Certificate of Compliance GDP–1 becomes effective 30 days after being signed by the Director, Office of Nuclear Material Safety and Safeguards.

Certificate of Compliance No. GDP–1: The Amendment will provide cross references for two Technical Safety Requirements for the Criticality Accident Alarm System in Building C–310.

Local Public Document Room location: Paducah Public Library, 555 Washington Street, Paducah, Kentucky 42003.

Dated at Rockville, Maryland, this 25th day of November 1997.

For the Nuclear Regulatory Commission.

Carl J. Paperiello,

Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 97–31731 Filed 12–2–97; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Nuclear Waste; Notice of Meeting

The Advisory Committee on Nuclear Waste (ACNW) will hold its 97th meeting on December 16–18, 1997, in Room T–2B3, at 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The schedule for this meeting is as follows:

Tuesday, December 16, 1997—8:30 A.M. until 6:00 P.M.

Wednesday, December 17, 1997—8:30 A.M. until 6:00 P.M.

Thursday, December 18, 1997—8:30 A.M. until 4:00 P.M.

A. *Meeting with NRC's Director, Division of Waste Management, Office of Nuclear Material Safety and Safeguards*—The Committee will meet with the Director to discuss developments at the Yucca Mountain project, resources, rules under development, a pilot program for regulating certain Department of Energy facilities, and other items of mutual interest.

B. *HLW Issue Resolution Status Reports and Acceptance Criteria*—The NRC staff will update the Committee on the progress of staff reviews related to the high-level waste key technical issues.

C. *Meet with the Commission*—The Committee will prepare for and meet with the Commission on items of mutual interest. These issues will include: ACNW priorities for FY 98, performance assessment capability in the NRC high-level radioactive waste program, application of probabilistic risk assessment methods to performance assessment in the NRC high-level waste program, and the implementation of the defense-in-depth concept in the revised 10 CFR Part 60. The meeting is currently scheduled for December 18, 1997 from 10:00 a.m. until 11:30 a.m.

D. *Low-Levels of Ionizing Radiation*—The Committee will review the latest developments in the biological effects of low-levels of ionizing radiation with members of the NRC staff and other interested individuals.

E. *Yucca Mountain Site Characterization*—The Committee will discuss site characterization activities at the Yucca Mountain site with a representative of the Department of Energy.

F. *10 CFR Part 61, Licensing Requirements For Land Disposal of Radioactive Waste*—The Committee's staff will present a short tutorial on the Commission's low-level waste regulations to the Committee.

G. *Preparation of ACNW Reports*—The Committee will discuss planned reports, including comments on ACNW priorities and strategic planning, and other topics discussed during the meeting as the need arises.

H. *Committee Activities/Future Agenda*—The Committee will consider topics proposed for future consideration by the full Committee and Working Groups. The Committee will discuss ACNW-related activities of individual members.

I. *Miscellaneous*—The Committee will discuss miscellaneous matters related to the conduct of Committee activities and organizational activities and complete discussion of matters and specific issues that were not completed during previous meetings, as time and availability of information permit.

Procedures for the conduct of and participation in ACNW meetings were published in the **Federal Register** on September 2, 1997 (62 FR 46382). In accordance with these procedures, oral or written statements may be presented by members of the public, electronic recordings will be permitted only during those portions of the meeting that are open to the public, and questions may be asked only by members of the Committee, its consultants, and staff. Persons desiring to make oral statements should notify the Chief, Nuclear Waste Branch, Mr. Richard K. Major, as far in advance as practicable so that appropriate arrangements can be made to schedule the necessary time during the meeting for such statements. Use of still, motion

picture, and television cameras during this meeting will be limited to selected portions of the meeting as determined by the ACNW Chairman. Information regarding the time to be set aside for this purpose may be obtained by contacting the Chief, Nuclear Waste Branch, prior to the meeting. In view of the possibility that the schedule for ACNW meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should notify Mr. Major as to their particular needs.

Further information regarding topics to be discussed, whether the meeting has been canceled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by contacting Mr. Richard K. Major, Chief, Nuclear Waste Branch (telephone 301/415–7366), between 8:00 A.M. and 5:00 P.M. EST.

ACNW meeting agenda, meeting transcripts, and letter reports are available for downloading or reviewing on the internet at http://www.nrc.gov/ACRSACNW.

The ACNW meeting dates for Calendar Year 1998 are provided below:

ACNW meeting No.	1998 ACNW meeting date
.....	No Meeting in January.
98	February 24–26, 1998.
99	March 24–26, 1998.
100	April 21–23, 1998.
.....	No Meeting in May
101	June 10–12, 1998.
102	July 21–23, 1998.
.....	No Meeting in August.
103	September 22–24, 1998 (Las Vegas, NV).
104	October 20–22, 1998.
.....	No Meeting in November.
105	December 15–17, 1998.

Dated: November 26, 1997.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 97–31730 Filed 12–2–97; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to Public Law 97–415, the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. Public Law 97–415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from November 7, 1997, through November 20, 1997. The last biweekly notice was published on November 19, 1997 (62 FR 61836).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

By January 2, 1998, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC and at the local public document room for the particular facility involved. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the

following factors: (1) the nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington DC, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for a hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room for the particular facility involved.

Carolina Power & Light Company, et al., Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of amendments request: November 6, 1997.

Description of amendments request: The proposed amendments change the Technical Specifications (TS) for the Brunswick Steam Electric Plant (BSEP) Units 1 and 2 to allow three 18-month diesel generator (DG) surveillance requirements (SR) to be performed during both plant operation (Operational Conditions 1 and 2) and shutdown (Operational Conditions 3, 4, and 5) rather than, as currently required, only during shutdown. The first SR is an inspection of the DG involving a partial disassembly. The second ensures that non-critical DG protective functions are bypassed on an Emergency Core Cooling system actuation signal. The third verifies that the DG operates for greater than or equal to 60 minutes while loaded to at least 3500 kw, which bounds the maximum expected post-accident diesel generator loading. The proposed amendments additionally remove an expired footnote from the BSEP Unit 2 DG TS.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

10 CFR 50.92 provides standards for determining whether a significant hazards consideration exists. A proposed amendment to an operating license for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated, (2) create the possibility of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety. Carolina Power & Light Company has reviewed these proposed license amendment requests and has concluded that their adoption would not involve a significant hazards consideration. The basis for this determination follows.

1. The proposed license amendments do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed license amendments add a footnote to SR 4.8.1.1.2.d to allow performance of SR 4.8.1.1.2.d.1, SR 4.8.1.1.2.d.4, and SR 4.8.1.1.2.d.5 in OPERATIONAL CONDITION 1, 2, 3, 4, or 5 rather than only during shutdown. The footnote requires the unit to be in OPERATIONAL CONDITION 3, 4, or 5 when performing SR 4.8.1.1.2.d.2, SR 4.8.1.1.2.d.3, SR 4.8.1.1.2.d.6, and SR 4.8.1.1.2.d.7 for its associated diesel generators. No such limitation is placed on SR 4.8.1.1.2.d.1, SR 4.8.1.1.2.d.4, or SR 4.8.1.1.2.d.5.

There is no relaxation of any limiting condition for operation (LCO) and no decrease in surveillance requirements as a result of the proposed amendments. As such, the proposed license amendments will not affect the ability of the diesel generators to perform their intended safety function. Performance of SR 4.8.1.1.2.d.1, SR 4.8.1.1.2.d.4, and

SR 4.8.1.1.2.d.5, during power operations, will not adversely affect overall nuclear safety. Diesel generator capacity is such that any three of the four diesel generators can supply the required loads for the safe shutdown of one unit and a design basis accident on the other unit without relying on offsite power. The diesel generator is not tied to the emergency bus (E bus) during performance of SR 4.8.1.1.2.d.1 or SR 4.8.1.1.2.d.4. Therefore, performance of SR 4.8.1.1.2.d.1 and SR 4.8.1.1.2.d.4, during power operation, will not affect the operability of any other safety-related systems nor will it create any perturbations of the electrical distribution system that could challenge plant operation.

Performance of SR 4.8.1.1.2.d.5, during power operation, will not adversely affect overall nuclear safety. SR 4.8.1.1.2.d.5 is performed in a similar manner to SR 4.8.1.1.2.a.5, which requires that, at least once per 31 days on a staggered test basis, a diesel generator be synchronized to the E bus and loaded to 1750 kw for 15 minutes. The critical portions of these surveillances are when the diesel generators are being synchronized to the E bus or disconnected from the E Bus. As such, performance of SR 4.8.1.1.2.d.5 during power operation does not create an additional opportunity of a perturbation of the electrical distribution system that could challenge plant operation than currently exists as a result of the performance of SR 4.8.1.1.2.a.5. The existing design of the electrical distribution system ensures that a grid problem will not result in failure of a diesel generator when it is synchronized to the E bus. The E buses are normally supplied by offsite power, via a 4160 V balance of plant (BOP) bus, through a master/slave breaker combination. When performing SR 4.8.1.1.2.d.5, the diesel generator is started in manual mode and synchronized to the E bus. With a diesel generator synchronized to the E bus, the diesel generator is protected from a potential overload condition. Class 1E protective relaying, at the E bus, is aligned to the trip circuit of the slave breaker to protect the diesel from an overload condition should the normal source of power be lost. These relays sense E bus voltage, E bus frequency, and directional power from the E bus to the BOP bus. Actuation of any of these relays, with the diesel in manual, will trip the slave and master breakers to separate the diesel generator from the BOP bus. This separates the diesel generator from the potential overload condition. In addition, either a loss of offsite power or loss of coolant accident results in the diesel generator output breaker opening, E bus loads stripping, and the diesel generator reverting to automatic mode. This allows the diesel generator to tie back to the E bus and carry the E bus loads.

The proposed license amendments reflect the clarification, previously made to Bases Section 3/4.8, ''Electrical Power Sources,'' in SR 4.8.1.1.2.d itself. Accordingly, SR 4.8.1.1.2.d.2, SR 4.8.1.1.2.d.3, SR 4.8.1.1.2.d.6, and SR 4.8.1.1.2.d.7 are performed for diesel generator 1 or 2 with BSEP, Unit No. 1 in OPERATIONAL CONDITION 3, 4, or 5 and for diesel generator 3 or 4 with BSEP, Unit No. 2 in OPERATIONAL CONDITION 3, 4, or 5. Defining the term ''during shutdown'' as ''OPERATIONAL CONDITION 3, 4, or 5'' is consistent with the current TS requirements of SR 4.8.1.1.2.d. TS Table 1.2, ''OPERATIONAL CONDITIONS,'' defines five OPERATIONAL CONDITIONS for the BSEP. There are two OPERATIONAL CONDITIONS applicable to power operation with the unit critical (i.e., POWER OPERATION and STARTUP) and three OPERATIONAL CONDITIONS applicable to a subcritical, shutdown unit (i.e., HOT SHUTDOWN, COLD SHUTDOWN, and REFUELING). Therefore, ''during shutdown'' and ''in OPERATIONAL CONDITION 3, 4, or 5'' have equivalent meaning.

Eliminating the expired BSEP, Unit No. 2 footnote to SR 4.8.1.1.2.d.1 is an administrative change and, therefore, cannot increase the probability or consequences of an accident previously evaluated.

Based on the above, the proposed license amendments do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed license amendments will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed license amendments to allow performance of SR 4.8.1.1.2.d.1, SR 4.8.1.1.2.d.4, and SR 4.8.1.1.2.d.5 in OPERATIONAL CONDITION 1, 2, 3, 4, or 5, rather than only during shutdown, do not affect the operation or response of any plant equipment, including the diesel generators, or introduce any new failure mechanism. Plant systems and equipment will continue to respond in accordance with design and as analyzed. There will not be a malfunction of a new or different type introduced by the proposed license amendments.

The proposed license amendments reflect the clarification, previously made to Bases Section 3/4.8, in SR 4.8.1.1.2.d itself. Accordingly, SR 4.8.1.1.2.d.2, SR 4.8.1.1.2.d.3, SR 4.8.1.1.2.d.6, and SR 4.8.1.1.2.d.7 are performed for diesel generator 1 or 2 with BSEP, Unit No. 1 in OPERATIONAL CONDITION 3, 4, or 5 and for diesel generator 3 or 4 with BSEP, Unit No. 2 in OPERATIONAL CONDITION 3, 4, or 5. Defining the term ''during shutdown'' as ''OPERATIONAL CONDITION 3, 4, or 5'' is consistent with the current TS requirements of SR 4.8.1.1.2.d. TS Table 1.2, ''OPERATIONAL CONDITIONS,'' defines five OPERATIONAL CONDITIONS for the BSEP. There are two OPERATIONAL CONDITIONS applicable to power operation with the unit critical (i.e., POWER OPERATION and STARTUP) and three OPERATIONAL CONDITIONS applicable to a subcritical, shutdown unit (i.e., HOT SHUTDOWN, COLD SHUTDOWN, and REFUELING). Therefore, ''during shutdown'' and ''in OPERATIONAL CONDITION 3, 4, or 5'' have equivalent meaning.

Eliminating the expired BSEP, Unit No. 2 footnote to SR 4.8.1.1.2.d.1 is an administrative change and, therefore, cannot create the possibility of a new or different kind of accident from any accident previously evaluated.

Based on the above, the proposed license amendments do not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed license amendments do not involve a significant reduction in a margin of safety.

Bases Section 3/4.8, ''Electrical Power Systems,'' states that the operability of the alternating current (ac) and direct current power sources and associated distribution systems during operation ensures that sufficient power will be available to supply the safety-related equipment required for the safe shutdown of the facility and the mitigation and control of accident conditions within the facility. Diesel generator capacity is such that any three of the four diesel generators can supply the required loads for the safe shutdown of one unit and a design basis accident on the other unit without relying on offsite power. Performance of SR 4.8.1.1.2.d.1, SR 4.8.1.1.2.d.4, and SR 4.8.1.1.2.d.5 during power operation will not affect the operability of any other safety-related systems, nor will it create any perturbations of the electrical distribution system that could challenge plant operation. Class 1E protective relaying, at the E bus, protects the diesel from an overload condition should the normal source of power be lost while performing SR 4.8.1.1.2.d.5. There is no relaxation of any LCO as a result of the

proposed license amendments. If an additional ac power source becomes inoperable during the performance of SR 4.8.1.1.2.d.1, SR 4.8.1.1.2.d.4, and SR 4.8.1.1.2.d.5, the units will be placed in the appropriate OPERATIONAL CONDITION in accordance with TS 3.8.1.1, ''A.C. Sources Operating.'' Therefore, the diesel generators' ability to perform their intended safety function, as described in Section 8.3.1.1.6.1 of the BSEP Updated Final Safety Analysis Report, is not adversely affected by the proposed license amendments.

The proposed license amendments are consistent with the guidance of Generic Letter 91–04, ''Changes In Technical Specification Surveillance Intervals To Accommodate A 24-Month Fuel Cycle,'' which concludes that TSs need not restrict surveillances to only being performed during shutdown provided that performance of the surveillance during power operations does not adversely affect safety.

The proposed license amendments reflect the clarification, previously made to Bases Section 3/4.8, in SR 4.8.1.1.2.d itself. Accordingly, SR 4.8.1.1.2.d.2, SR 4.8.1.1.2.d.3, SR 4.8.1.1.2.d.6, and SR 4.8.1.1.2.d.7 are performed for diesel generator 1 or 2 with BSEP, Unit No. 1 in OPERATIONAL CONDITION 3, 4, or 5 and for diesel generator 3 or 4 with BSEP, Unit No. 2 in OPERATIONAL CONDITION 3, 4, or 5. Defining the term ''during shutdown'' as ''OPERATIONAL CONDITION 3, 4, or 5'' is consistent with the current TS requirements of SR 4.8.1.1.2.d. TS Table 1.2, ''OPERATIONAL CONDITIONS,'' defines five OPERATIONAL CONDITIONS for the BSEP. There are two OPERATIONAL CONDITIONS applicable to power operation with the unit critical (i.e., POWER OPERATION and STARTUP) and three OPERATIONAL CONDITIONS applicable to a subcritical, shutdown unit (i.e., HOT SHUTDOWN, COLD SHUTDOWN, and REFUELING). Therefore, ''during shutdown'' and ''in OPERATIONAL CONDITION 3, 4, or 5'' have equivalent meaning.

Eliminating the expired BSEP, Unit No. 2 footnote to SR 4.8.1.1.2.d.1 is an administrative change and, therefore, cannot involve a significant reduction in a margin of safety.

Based on the above, the proposed license amendments do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: University of North Carolina at Wilmington, William Madison Randall Library, 601 S. College Road, Wilmington, North Carolina 28403–3297.

Attorney for licensee: William D. Johnson, Vice President and Senior Counsel, Carolina Power & Light Company, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Project Director: James E. Lyons.

Carolina Power & Light Company, et al., Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of amendments request: November 6, 1997.

Description of amendments request: The proposed amendments to Technical Specification (TS) Limiting Conditions for Operation (LCO) 3.3.5.5, Instrumentation for Control Room Emergency Ventilation System (CREVS) and 3.7.2, Control Room Emergency Ventilation System, and associated Bases for the Brunswick Steam Electric Plant (BSEP) Units 1 and 2 would be limited in duration (approximately 3 months) and would allow operation of both BSEP units to continue while upgrades to the control building ventilation system, including new air conditioning (AC) units, are being installed. Part of the planned work requires opening the ductwork at the evaporative (i.e. cooling) coils. Temporary barriers will be constructed to preserve the leakage integrity of the control room pressure boundary; however, the temporary barriers will not be seismically qualified. While the permanent AC units are out of service, temporary AC units will be utilized. During the upgrade installation, the AC for the control room will not be protected from certain external events (e.g., seismic events, environmental hazards such as tornadoes and hurricanes, radiological sabotage, and missile hazards), as required by the system design and licensing basis, and will not fully meet single failure criteria.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed amendments do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes do not affect any component of any of the barriers to radiation release, any of the systems which protect the core from overheating, nor any system used to shut down the reactor. The proposed changes do not affect any of the chlorination system piping or the tank car, which would be the initiating components of a chlorine release event. The proposed changes affect the CREVS and CREVS instrumentation, neither of which are accident or event causing systems. Therefore, the proposed changes do not increase the probability of an accident or toxic gas release previously analyzed in the Updated Final Safety Analysis Report (FSAR).

The proposed changes do not affect the ability of the CREVS to mitigate the consequences of a design basis accident or event involving a release of radioactive material. In addition, the proposed changes do not significantly affect the ability of the system to mitigate the consequences of a toxic gas release. The following measures will be taken to minimize the consequences of accidents and events:

Temporary isolation barriers will be constructed to provide integrity of the duct during design basis radiation release events. These temporary barriers will ensure that 10 CFR Part 50, General Design Criterion 19 for Control Room operator doses is met for all design basis radiation release accidents.

During the time that the temporary barrier is used, the chlorine tank car will be removed from the exclusion area. Analyses have shown that with the chlorine tank car outside of the exclusion area, there is no threat to Control Room habitability. Removal of the chlorine tank car from the exclusion area is the current Technical Specification requirement for inoperability of the Control Room chlorine isolation mode.

The temporary condensing units for the Control Room Air Conditioning system will be installed to high quality standards, and a spare condensing unit will be provided such that two units can be maintained functional. These units will each be powered from a separate division of Class 1E power. The operation of the units will be monitored to ensure that they are in good operating order.

If two or more of the condensing units should fail, instructions have been provided to the operators for increased monitoring of temperatures, and mitigating actions are available to the operators if temperatures rise above a predetermined limit.

Therefore, the consequences of an accident or an event involving a release

of radiation, toxic gas, or smoke will not be significantly increased. In addition, the change will not significantly affect the consequences of a seismic event or other severe natural phenomena, as previously analyzed in the Updated FSAR.

2. The proposed amendments would not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes involve adjustments to the LCO requirements for CREVS relative to protection from severe natural phenomena. The proposed changes do not introduce any new modes of plant operation. The proposed changes do not involve any new modes of system operation, except that temporary condensing units will be used in place of the permanent condensing units. The temporary condensing units will interface with the permanent Control Building Heating Ventilation and Air Conditioning system in a similar manner to the permanent system. The piping connections to the permanent system will be the same, and the controls interface will be the same. No new cross-ties will be created and no new piping will be run though the habitability boundary. Therefore, this change will not create the possibility of a new or different kind of accident from any accident previously analyzed.

3. The proposed license amendments do not involve a significant reduction in a margin of safety.

The proposed changes do not represent a significant change in the assumptions and inputs to the analyses for Control Room operator doses. No increase in the doses to the Control Room operators is expected after a seismic event or tornado, since the integrity of existing barriers to release of radioactive material are not affected. Therefore, this change does not result in a significant reduction in the margin of safety for a radiological event.

The proposed change does not represent a change to the leakage criteria for the Control Room, or the Control Room ventilation ductwork, following either a toxic gas or external smoke event. The bounding analysis remains valid, unless the failure is caused by a tornado or seismic event. Due to the low probability of such an event occurring during the short time frame involved in this modification, the occurrence of such an event is not of significant concern.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: University of North Carolina at Wilmington, William Madison Randall Library, 601 S. College Road, Wilmington, North Carolina 28403–3297.

Attorney for licensee: William D. Johnson, Vice President and Senior Counsel, Carolina Power & Light Company, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Project Director: James E. Lyons.

Consumers Energy Company, Docket No. 50–155, Big Rock Point Nuclear Plant, Charlevoix County, Michigan

Date of amendment request: September 19, 1997 (Accession No. 9709240373).

Description of amendment request: The amendment request propose changes to the Facility Operating License and technical specifications (TS) to reflect the permanent cessation of power operations and permanent transfer of nuclear reactor fuel to the spent fuel pool (SFP). In particular, Consumers Energy requests to change: safety limits; limiting safety system settings; limiting control system settings; limiting conditions for operation; surveillance requirements; design features; and administrative controls. On November 12, 1997, Consumers Energy provided supplemental information regarding their no significant hazards determination, as requested by NRC request for additional information letter dated October 12, 1997. By letters dated June 26 and September 23, 1997, the licensee certified permanent cessation of power operations and permanent removal of all fuel from the reactor, respectively.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The proposed change provides the applicable requirements to assure safe storage of spent nuclear fuel during decommissioning following the permanent cessation of power operations at the Big Rock Point Nuclear Plant (BRP) on August 30, 1997 [see Consumers Energy letter to NRC dated June 26, 1997] and permanent removal of all fuel from the reactor vessel on September 20, 1997 [see Consumer Energy letter to NRC dated September 23, 1997]. Decommissioning activities conducted using these controls do not present undue risk to the public, and do not impact common defense and security. As such, these changes will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

No accidents previously evaluated in the Updated Final Hazards Summary Report (UFHSR) will have their probability of occurrence increased because the proposed controls effectively preclude the occurrence of criticality, fuel temperature exceeding limits, or fuel handling accidents. The probability of plant accidents associated with power operations have been significantly reduced. Accidents associated with spent fuel handling, including cask and single bundle drop and spent fuel cooling capability loss events, are still pertinent and were reviewed using new data on pool inventory and revised 10 CFR 20 radiological limit determinations. The probability of occurrence of accidents associated with storing 441 spent fuel assemblies in the SFP (current license limit) have not been affected by the changes in the proposed TSs.

The consequences of a fuel handling and cask drop accidents were evaluated based on the removal of all fuel from the reactor and loading spent nuclear fuel in the SFP. The removal of all fuel from the reactor vessel to storage in the SFP and the subsequent decay of the fuel in the pool result in no increase in the probability of these accidents and continuously reduced consequences from these accidents.

Analyses using the techniques in Branch Technical Position APCSB 9–2 provide the heat rate from a freshly-removed full core off-load in the SFP whose racks are filled with a total of 441 fuel assemblies as the most limiting cooling condition. Existing cooling equipment under the current TSs provide sufficient cooling to preclude spent fuel pool temperatures reaching 150 degrees-Fahrenheit with a complete loss of spent fuel cooling for 72 hours. This precludes entry into an unanalyzed condition for the SFP and provides 3 days to recover cooling flow of ''approximately 30'' gallons per minute. Since this specification change is intended for implementation following 93 days after shutdown (approximately November 30, 1997), this analysis justifies the allowance of 24 hours to re-establish cooling flow provided in specification 3.1.2.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

The permanent cessation of power operation and removal of fuel from the

reactor eliminates the possibility of the following categories of accidents and transients to create a hazard to the health and safety of the public: increase in heat removal by the secondary system; increase in reactor coolant inventory; decrease in heat removal by the secondary system; decrease in reactor coolant inventory; reactivity and power distribution anomalies; anticipated transient without scram; and, single loop operation. These revised TSs, in combination with requirements in the UFHSR, provide assurance that fuel handling and spent fuel cask drop accident, which represent the remaining specific pertinent accidents analyzed in the ''radioactive release from a subsystem of component'' category, will not occur. Because the revised TSs related to fuel handling, spent nuclear fuel storage, and handling of the spent fuel cask satisfy current license and UFHSR requirements, no new accidents are created.

3. Involve a significant reduction in a margin of safety.

The safety margins for analyzed accidents are maintained because the containment structures and redundant control established by the plant remain in place until the decay of spent fuel has reduced the source term to levels that analysis confirms do not require the containment features. ninety three days after permanent cessation of operations, the spent nuclear fuel at BRP will have decayed to the point where the added margin from this decay more than compensates for the removal of the containment as a safety feature, and allows relaxed controls for the cooling of the SFP.

The Big Rock Point Plant Safety Committee has reviewed this Facility Operating License and TS change request and has determined this change does not involve an unreviewed safety question and, therefore, involves no significant hazards consideration. The proposed change has been reviewed by the BRP Nuclear Performance Assessment Department.

The NRC staff has reviewed the licensee's analysis, as provided by licensee letters dated September 19 and November 12, 1997, and, based on this review, it appears that the three standards or 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room: North Central Michigan College, 1515 Howard Street, Petosky, MI 49770.

Attorney for licensee: Judd L. Bacon, Esquire, Consumers Energy Company, 212 West Michigan Avenue, Jackson, Michigan 49201.

NRC Project Director: Seymour H. Weiss.

Duke Energy Corporation, Docket Nos. 50–269, 50–270, and 50–287, Oconee Nuclear Station, Units 1, 2, and 3, Oconee County, South Carolina

Date of amendment request: March 11, 1993; supplemented August 26, November 29, December 6, 1993, October 3, 1995, February 27, and September 3, 1997 (TSC 93–03).

Description of amendment request: The proposed changes would replace the present Electrical Power Systems section of the Technical Specifications, Sections 3.7 and 4.6, by consolidating and rearranging the present specifications, incorporating new specifications, and formating the section similar to the Babcock and Wilcox Standard Technical Specifications. The proposed changes would address such concerns as Keowee hydro station operability, Lee gas turbine operability, overhead and underground emergency power path operability, Keowee and Keowee main step-up transformer outage requirements, surveillance requirements of various components and systems, Oconee distribution system requirements, protective instrumentation system requirements, operability of 125 VDC Vital Instrument and Control power and limiting condition for operation, inverter requirements, Oconee shutdown requirements related to various components, Keowee unit extended outage, dc power operability requirements, battery cell parameter requirements, and various editorial and related Bases changes.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below.

Duke Power Company (Duke) [currently Duke Energy Corporation] has made the determination that this amendment request involves a No Significant Hazards Consideration by applying the standards established by NRC regulations in 10 CFR 50.92. This ensures that operation of the facility in accordance with the proposed amendment would not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated:

Each accident analysis addressed within the Oconee Final Safety Analysis Report (FSAR) has been examined with respect to the changes proposed within this amendment request. Changes included in this amendment request are provided to assure availability of electrical power systems for mitigation of Design Basis Accidents (DBAs). As described within the technical justification, the following types of changes are included:

(1) Editorial and administrative changes associated with reformatting the Technical Specification requirements;

(2) Additional restrictions not presently included in the Technical Specifications such as the addition of requirements for electrical power systems during cold shutdown and refueling, for the 230 kV switchyard degraded grid protection system and to delete the special inoperability period for the Keowee CX transformer;

(3) Technical changes to current requirements to provide clarity and operational flexibility. These changes maintain the ability of the electrical power systems to mitigate the consequences of DBAs without a significant reduction in availability. These changes include the definition of emergency power paths to include the associated DC sources and auxiliary transformers, the combination of special inoperability periods for ''planned'' and ''unplanned'' reasons, and the ability to use the Keowee special inoperability period more than once in a three year period; and

(4) Relocation of requirements which are unnecessary for the mitigation of DBAs to licensee controlled documents. Relocated requirements include surveillance requirements for the External Grid Trouble Protection system.

Based on the above and the technical justification * * *, there is no significant increase in the probability of DBA as a result of this change, nor is there a significant increase in the consequences of a DBA as a result of this change since the proposed amendment assures availability of electrical power systems.

(2) Create the possibility of a new or different kind of accident from any kind of accident previously evaluated:

The proposed changes make no physical changes to the plant configuration and do not adversely affect the performance of any equipment. Operation of ONS [Oconee Nuclear Station] in accordance with these Technical Specifications will not create any failure modes not bounded by previously evaluated accidents. Consequently, this change will not create the possibility of a new or different kind of accident from any kind of accident previously evaluated.

(3) Involve a significant reduction in a margin of safety:

Margins of safety associated with these Technical Specifications have been evaluated. These changes include editorial and administrative changes associated with reformatting the Technical Specification requirements, additional restrictions not presently included in the Technical Specifications, technical changes to current requirements which maintain the ability of the electrical power systems to mitigate the consequences of DBAs, and relocation of requirements which are unnecessary for the mitigation of DBAs to licensee controlled documents. The design basis of auxiliary electrical systems is to supply the required ES [emergency system] loads of one Unit and safe shutdown loads of the other two units. The proposed amendment does not affect any safety limits, setpoints, or design parameters and assures the continued availability of electrical power systems; thus preserving the existing margin of safety. Therefore, there will be no significant reduction in any margin of safety.

Duke has concluded based on the above, and the technical justification * * * that there are no significant hazards considerations involved in this amendment request.

The NRC has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Oconee County Library, 501 West South Broad Street, Walhalla, South Carolina.

Attorney for licensee: J. Michael McGarry, III, Winston and Strawn, 1200 17th Street, NW., Washington, DC.

NRC Project Director: Herbert N. Berkow.

Duquesne Light Company, et al., Docket No. 50–334, Beaver Valley Power Station, Unit No. 1, Shippingport, Pennsylvania

Date of amendment request: November 4, 1997.

Description of amendment request: The proposed amendment would change Item 6.a.2, ''4.16 Emergency Bus (Start Diesel),'' of Table 3.3–4 of Technical Specification 3.3.2.1. The proposed change would reduce the trip setpoint for starting the emergency diesel generators on emergency bus undervoltage from a trip setpoint of greater than or equal to 83 percent with a 12-cycle delay time to greater than or equal to 75 percent of nominal bus voltage with a time delay of less than 0.9 second including auxiliary relay times. The proposed change would also reduce the allowable value from greater than or equal to 81 percent of nominal bus voltage to greater than or equal to 74 percent of nominal bus voltage with a time delay of less than 0.9 second including auxiliary relay times.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change replaces the current Engineered Safety Feature setpoint, allowable value and delay time for the diesel generator start on loss of power function. An analysis has been performed to develop the new values to minimize the diesel generator starts when a Reactor Coolant Pump (RCP) is being started or a fast bus transfer occurs. The heat generated by an increase in motor current, in response to reduced voltage, will be less than the heat generated during motor starting. The analysis results show that bus voltages may dip below the allowable setpoint value and then recover to the pick-up setpoint within the proposed delay time without stalling motors.

The proposed change does not affect the design and reliability of any plant equipment; therefore, the probability of occurrence of a previously evaluated accident is not increased. The operation of the plant will not be changed as a result of this proposed amendment, except that fewer diesel generator starts will be initiated.

This function anticipates the loss of voltage to protect equipment connected to the 4.16 Kv emergency bus. The UFSAR [Updated Final Safety Analysis Report] accident analyses do not take credit for this function; therefore, the consequences of an accident previously evaluated is not increased.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change to the trip setpoint, allowable value and delay time will continue to ensure that the safety-related equipment connected to the emergency bus is adequately protected from a low voltage condition. These setting changes will minimize the diesel generator starts due to voltage drops when an RCP is started or a fast bus transfer occurs.

The new setpoint and time delay allow normal voltage drops to occur during expected plant operations without causing any thermal damage to safety-related equipment. The performance of the safety system will remain unchanged and will not alter any plant equipment, performance requirements or safety analysis. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the change involve a significant reduction in a margin of safety?

The proposed change does not involve a significant reduction in a margin of safety since an analysis has been performed to verify that safety-related equipment connected to the emergency bus is adequately protected from a low voltage condition with the proposed settings. The proposed changes do not affect the UFSAR design bases, accident assumptions, or technical specification bases. In addition, the proposed changes do not affect release limits, monitoring equipment or plant operating practices. Therefore, the proposed change will not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: B. F. Jones Memorial Library, 663 Franklin Avenue, Aliquippa, PA 15001.

Attorney for Licensee: Jay E. Silberg, Esquire, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Project Director: John F. Stolz.

Entergy Operations, Inc., et al., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of amendment request: October 28, 1997.

Description of amendment request: The amendment would (1) revise the frequency of conducting five Surveillance Requirements (SRs) and (2) add a 10 CFR Part 50, Appendix J Testing Program for Primary Containment Systems in the Technical Specifications (TSs) for Grand Gulf Nuclear Station, Unit 1 (GGNS). The five SRs are the following: SR 3.6.1.1.1 for primary containment, SR 3.6.1.2.1

for primary containment air locks, and SRs 3.6.1.3.5, 3.6.1.3.8, and 3.6.1.3.9 for primary containment isolation valves. The proposed revisions for each of the five SRs are to delete the references to SR 3.0.2 not being applicable and change the surveillance frequency from being ''in accordance with 10 CFR 50, Appendix J, as modified by approved exemptions'' to ''in accordance with 10 CFR Part 50, Appendix J, testing program.'' The testing program would be added to Section 5.0, Administrative Controls, of the TSs. Changes to the Bases of the TSs were also provided in the submittal.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

I. The proposed change does not significantly increase the probability or consequences of an accident previously evaluated.

[On April 26, 1995, the licensee was granted an exemption to Appendix J of 10 CFR Part 50 that allowed performance-based containment leak rate testing. This exemption will expire on the startup from Refueling Outage 9, currently scheduled for the spring of 1998. The licensee's proposed changes to the TSs are to adopt Option B, Performance-Based Requirements, that is now in Appendix J, but was not in Appendix J in 1995 when the exemption was granted. The technical findings that support the rulemaking for Option B are in NUREG–1493, ''Performance-Based Containment Leak Rate Test Program,'' dated September 1995. The licensee stated in its submittal that its current containment leak rate testing program meets the requirements of Option B.]

Two initiating events were identified which could be affected by the proposed changes [in the submittal of October 28, 1997]. An interfacing system LOCA [(loss-of-coolant accident)] could be caused by significant leakage of both normally closed isolation valves in systems with high pressure/low pressure interfaces. Interfacing systems LOCAs were considered for the LPCI, LPCS, HPCS, and RCIC systems [(i.e., low pressure coolant injection, low pressure core spray, high pressure core spray, and reactor core isolation cooling)]. Because the frequency for testing of these valves will not be changed under this proposal, there is no increase in the probability or consequences of an accident [previously evaluated].

The second event evaluated was a LOCA outside containment. In this case the probability for failure of the MSIVs [(main steam isolation valves)] and the feedwater isolation valves were calculated and combined with the frequency of a pipe break outside containment and the conditional probability of a core melt given a LOCA. The increase in core damage is extremely small and therefore does not significantly increase the probability of any previously evaluated accident. Further, because the testing frequency for MSIVs and feedwater isolation valves are not being changed, the LOCA outside containment events can be discounted.

Failure of, or leakage through[,] a containment barrier can[,] however, increase the consequences of those accidents previously evaluated. Because the leakage probability for two valves in series to fail is very small and because all lines isolated by a single containment isolation valve always have a water seal and cannot act as a release pathway unless the integrity of the connected system is compromised, there is no significant increase in the consequences of any previously evaluated accident.

Containment bypass can also increase the consequences of [previously] evaluated accidents. Accident sequences involving containment have been shown to be relatively insignificant by the GGNS IPE [(Individual Plant Examination]). The potential for [containment] bypass was analyzed. The analysis showed that the probabilities for bypass were dominated by failure to close scenarios. Many programs are in place at GGNS to monitor containment component performance[,] and to ensure that proper maintenance and repairs are made during the service life of the containment. Other routine surveillances are performed periodically to ensure that the valves will close on demand. In fact, all valves that are required to close for containment isolation and that are not maintained closed at all times during power operations are stroke tested quarterly or[,] at a minimum, during each refueling outage in accordance with ASME [(American Society of Mechanical Engineers) Boiler and Pressure Vessel Code,] Section XI, Subsection IWV.

[Based on the above, the proposed changes do not significantly increase the probability or consequences of an accident previously evaluated.]

II. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The request involves the reduction in the local leak rate and the integrated leak rate testing frequencies [in accordance with Option B of Appendix J to 10 CFR Part 50]. Extending the test frequencies has no influence on, nor does it contribute in any way to, the possibility of a new or different kind of accident or malfunction from those previously analyzed. The method of performing the test is not changed. No new accident modes are created by extending the testing intervals. No safety-related equipment or safety functions are altered as a result of this change.

[Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.]

III. The proposed change does not involve a significant reduction in a margin of safety.

The only margin of safety that has the potential of being impacted by the proposed changes involves the offsite dose consequences of postulated accidents which are directly related to containment leakage rate. The containment isolation system is designed to limit leakage to La which is defined by the GGNS TSs to be 0.437 percent by weight of the containment air [volume] per 24 hours at [the containment pressure of] 11.5 psig (Pa). The limitation on containment leakage rate is designed to ensure that total leakage volume will not exceed the value assumed in the accident analyses at the peak accident pressure (11.5 psig, Pa).

To provide additional conservatism, the measured overall integrated leakage rate is further limited to less than or equal to 0.75 La during performance of the periodic integrated leakage rate test and to less than or equal to 0.60 La for type B and C leakage rate tests [of Appendix J]. This is done to account for the possible degradation of the containment leakage barriers between [the Appendix J] tests. This acceptance criteria ensures that an acceptable margin of safety is being maintained and will not be altered by the proposed changes. The preservation of this margin will continue to provide for potential degradation of the leakage barriers between tests.

No change in the method of testing is being proposed. The tests will continue to be done at full pressure (Pa) or greater [pressure]. The test pressure for primary containment isolation valves will continue to be applied in the same direction as would be required for the valve to perform its safety function (unless a different direction can be shown to be equivalent or conservative). Primary containment penetrations

which require Type B leakage rate tests will be performed in the same manner as before. The Type A test [of Appendix J] will continue to be performed at full pressure (Pa). Other programs are in place to ensure that proper maintenance and repairs are performed during the service life of the primary containment[,] and systems and components penetrating the primary containment.

No change in the owners allowable leakage rate is being proposed. These conservative leakage rates ensure that[,] if every penetration were at its maximum allowable leakage rate, the total containment leakage would still be below 0.60 La. The effect of multiple penetration barriers is not considered which provides further conservatism.

The assessment of risk analysis for the proposed changes concluded that the overall risk impact of the changes are neutral and essentially negligible. Any containment isolation barrier allowed to be tested at less frequent intervals [through performance-based testing of proposed Option B of Appendix J] will have demonstrated enhanced performance which minimizes the potential for increased leakage. The assessment further shows that there is reasonable assurance that an acceptable level of performance for the containment isolation function can be maintained. The overall risk impact for the proposed changes are small enough to be almost indeterminate. No change to the leakage rate specified in the TSs is being proposed.

[The proposed changes to the TSs are in accordance with Option B of Appendix J of 10 CFR Part 50.]

[Therefore, the proposed changes do not involve a significant reduction in a margin of safety.]

Based on the above evaluation, operation in accordance with the proposed amendment involves no significant hazards consideration.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room Location: Judge George W. Armstrong Library, 220 S. Commerce Street, Natchez, MS 39120.

Attorney for licensee: Nicholas S. Reynolds, Esquire, Winston and Strawn, 1400 L Street, NW., 12th Floor, Washington, DC 20005–3502.

NRC Project Director: David A. Wigginton, Acting.

Maine Yankee Atomic Power Company, Docket No. 50–309, Maine Yankee, Atomic Power Station, Lincoln County, Maine

Date of amendment request: September 30, 1997.

Description of amendment request: The proposed amendment would eliminate certain license conditions of the Maine Yankee operating license that are no longer appropriate in the permanently defueled condition of the plant. These conditions include restrictions on the Fire Protection Program and implementation of leakage reduction, airborne iodine monitoring, secondary water chemistry, and cooling water discharge monitoring programs. By letter dated August 7, 1997, the licensee certified permanent cessation of power operations and permanent removal of fuel from the reactor vessel. Most of the provisions of the Maine Yankee operating license were established to ensure protection of the public health and safety during power operations. Maine Yankee has proposed to eliminate those license requirements that are not relevant to the permanently defueled plant condition to allow the Maine Yankee staff to focus on those provisions which are still appropriate during decommissioning.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The proposed change does not:

1. Involve a significant increase in the probability or consequence of an accident previously evaluated.

The purpose of the proposed change is to eliminate requirements which are not appropriate in the permanently defueled plant condition. Since the plant has permanently ceased operation and will be maintained in a defueled condition, many provisions of the license related to operation of the plant are no longer appropriate. Elimination of these unnecessary requirements allows the plant staff to focus on those requirements which continue to be appropriate to the existing plant condition. The proposed change does not affect those Chapter 14 accidents which are appropriate to the current plant conditions: fuel handling accident, spent fuel cask drop, and radioactive liquid waste system leaks and failures, and therefore, does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

The purpose of this proposed change is to eliminate requirements which are not appropriate in the permanently defueled plant condition. Since the plant has permanently ceased operation and will be maintained in a defueled condition, many provisions of the license related to operation of the plant are no longer appropriate. Elimination of these unnecessary requirements allows the plant staff to focus on those requirements which continue to be appropriate to the existing plant conditions. This proposed change does not affect storage of spent fuel and, therefore, does not create the possibility of a new or different accident from any accident previously evaluated.

3. Involve a significant reduction in a margin of safety.

The purpose of the proposed change is to eliminate requirements which are not appropriate in the permanently defueled plant condition. Since the plant has permanently ceased operation and will be maintained in a defueled condition, many provisions of the license related to operation of the plant are no longer appropriate. Elimination of these unnecessary requirements allows the plant staff to focus on those requirements which continue to be appropriate to the existing plant conditions. This proposed change does not affect storage of spent fuel and, therefore, does not involve a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Wiscasset Public Library, High Street, P.O. Box 367, Wiscasset, ME 04578.

Attorney for licensee: Mary Ann Lynch, Esquire, Maine Yankee Atomic Power Company, P.O. Box 408, Wiscasset, ME 04578.

NRC Project Director: Seymour H. Weiss.

Maine Yankee Atomic Power Company, Docket No. 50–309, Maine Yankee Atomic Power Station, Lincoln County, Maine

Date of amendment request: October 20, 1997.

Description of amendment request: The proposed amendment would replace in their entirety the existing Technical Specifications incorporated

in Facility Operating License No. DPR–36 as Appendix A. Maine Yankee developed the revised Technical Specifications, titled Permanently Defueled Technical Specifications, to reflect the permanently shutdown and defueled status of the plant. Changes are proposed to the definitions, limiting conditions for operation, surveillance, and administrative control sections.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC staff has reviewed the licensee's analysis against the standards of 10 CFR 50.92(c). A summary of the licensee's review is presented below:

The proposed change does not,

1. Involve a significant increase in the probability or consequence of an accident previously evaluated.

This proposed change is consistent with the improved Standard Technical Specifications. The relocation of requirements from the technical specifications to the licensee controlled documents is consistent with the criteria set forth in 10 CFR 50.36 for the content of technical specifications. The removal of definitions, generic LCO actions and generic surveillance requirements has no impact on facility structures or equipment or the methods of operation of such structures or equipment. The deletion of design features and safety limits not applicable to the permanently shutdown and defueled status of the Maine Yankee reactor has no impact on the remaining applicable design basis accidents. The removal of LCO and Surveillance specifications which are related only to the operation of the nuclear reactor or only to the prevention, diagnosis or mitigation of transients or accidents primarily involving the reactor, do not affect the remaining applicable accidents previously evaluated. The critical safety functions involving core reactivity control, reactor heat removal, reactor coolant system inventory control and containment integrity are no longer necessary at the Maine Yankee facility. The postulated accidents involving damage to the reactor coolant system, main steam lines, main feed lines, steam generators or the reactor core and the subsequent release of radioactive material are no longer applicable at the Maine Yankee facility. Spent fuel pool cooling and makeup related equipment and support equipment including electrical power systems are not required to be continuously available since there is time available to effect repairs or establish alternate sources of makeup flow in the event of a loss of cooling and makeup flow to the spent fuel pool. The effect of radioactive decay since the shutdown of the reactor has reduced the consequences of the fuel handling accident to levels below those previously analyzed. The relevant parameters associated with spent fuel pool (level and boron concentration) that make up the initial conditions assumed in applicable analysis are included in the technical specifications. The deletion and modification of provisions of administrative controls do not directly affect the design of structures or equipment necessary for the safe storage of irradiated fuel or the methods used for handling and storage of such fuel in the spent fuel pool. The changes to the administrative controls are, in fact, administrative in nature and do not affect any accident applicable to the safe storage of irradiated fuel or the permanently shutdown and defueled condition of the reactor. Therefore, the proposed changes to the Maine Yankee Technical Specifications do not involve any increase in the probability or consequences of any accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes have no impact on facility structures or equipment affecting the safe storage of irradiated fuel or the methods of operation of such structures or equipment or handling and storage of such fuel. These changes are consistent with the improved Standard Technical Specifications and add to the clarity and ease of use of the proposed PDTS. The removal of technical specifications which are related only to the operation of the nuclear reactor or only to the prevention, diagnosis or mitigation of transients or accidents primarily involving the reactor, can not result in different or more adverse failure modes or accidents than previously evaluated because the reactor is permanently shutdown and defueled. The proposed deletion of provisions of the Maine Yankee Technical Specifications do not affect systems credited in the existing accident analyses for the remaining applicable postulated accidents at the Maine Yankee facility. The proposed technical specifications continue to require proper control and monitoring of safety significant parameters and activities. The proposed restrictions on boron concentration and level in the spent fuel pool are fulfilled by normal operating conditions and preserve initial conditions assumed in the analyses of postulated DBA's. Therefore, the proposed changes to the MYTS does not create the possibility of a new or different accident from any accident previously evaluated.

3. Involve a significant reduction in a margin of safety.

The deletion of provisions in the technical specifications which are not related to the storage of irradiated fuel or which are inconsistent with the scope of the improved Standard Technical Specifications will not affect the analyses of the design basis accidents remaining applicable to the Maine Yankee facility. The postulated design basis accidents involving the reactor are no longer possible due to the permanently defueled status of the Maine Yankee reactor. The requirements for systems, structures and components which have been deleted from the Maine Yankee Technical Specifications are not credited in the existing accident analysis for the remaining applicable postulated accidents and therefore do not contribute to the margin of safety associated with the accident analysis. Therefore, the proposed changes to the Maine Yankee Technical Specifications would not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Wiscasset Public Library, High Street, P.O. Box 367, Wiscasset, ME 04578.

Attorney for licensee: Mary Ann Lynch, Esquire, Maine Yankee Atomic Power Company, P.O. Box 408, Wiscasset, ME 04578.

NRC Project Director: Seymour H. Weiss.

Northeast Nuclear Energy Company (NNECO), et al., Docket No. 50–423, Millstone Nuclear Power Station, Unit No. 3, New London County, Connecticut

Date of amendment request: October 15, 1997.

Description of amendment request: The proposed change to Technical Specification 3/4.4.3, Pressurizer, would replace the pressurizer maximum water inventory requirement with a pressurizer maximum indicated level requirement. The proposed amendment would also modify the associated Bases section and make editorial changes.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards

consideration, which is presented below:

NNECO has reviewed the proposed revision in accordance with 10 CFR 50.92 and has concluded that the revision does not involve a significant hazards consideration (SHC). The basis for this conclusion is that the three criteria of 10 CFR 50.92(c) are not satisfied. The proposed revision does not involve [an] SHC because the revision would not:

1. Involve a significant increase in the probability or consequence of an accident previously evaluated.

The Technical Specification maximum pressurizer inventory requirement in Technical Specification 3.4.3 is being changed to use the numerical value for the Reactor Trip setpoint on pressurizer high water level in Technical Specification Section 2.2. This changes the requirement from a volume to a level requirement, is consistent with the Improved Standard Technical Specifications for Westinghouse plants, and represents a more restrictive level requirement than the current technical specification. The bases change clarifies that the 89% level requirement only assures that there is a steam bubble in the pressurizer. Also, the bases change states that pressurizer level is maintained by automatic and procedural controls to provide assurance that the design basis analyses are valid. These changes do not modify plant operation. Lowering the maximum level requirement so that it is numerically consistent with the reactor trip setpoint, while clarifying the bases of the requirement, [cannot] involve a significant increase in the probability or consequences of an accident previously evaluated.

Therefore, the proposed revision does not involve a significant increase in the probability or consequence of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

There are no hardware modifications associated with the change. The change does not modify the way that the plant is operated. The change modifies neither accident mitigation nor system response post-accident.

Therefore, the proposed revision does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Involve a significant reduction in a margin of safety.

The change places a lower maximum pressurizer level requirement for the pressurizer. The change imposes the numerical setpoint value for the reactor trip on pressurizer high water level as the restriction on the pressurizer level. The change to the bases clarifies that the 89% level requirement only ensures the existence of a steam bubble and not the validity of the design basis analyses. The design basis non-LOCA [loss-of-coolant accident] analyses use the current programmed pressurizer level and the LOCA analysis uses 62% level for full power. Those events that are analyzed to address pressurizer filling concerns are initiated assuming a higher initial pressurizer water level that accounts for 6% level uncertainty. The bases change makes it clear that the pressurizer level required to assure the validity of the design basis analyses is maintained by the automatic and procedural controls and not the less than or equal to 89% level in the requirement.

Therefore, the proposed revision does not involve a significant reduction in a margin of safety.

In conclusion, bases on the information provided, it is determined that the proposed revision does not involve an SHC.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, Connecticut, and the Waterford Library, ATTN: Vince Juliano, 49 Rope Ferry Road, Waterford, Connecticut.

Attorney for licensee: Lillian M. Cuoco, Esq., Senior Nuclear Counsel, Northeast Utilities Service Company, P.O. Box 270, Hartford, Connecticut.

NRC Deputy Director: Phillip F. McKee.

Northeast Nuclear Energy Company (NNECO), et al., Docket No. 50–423, Millstone Nuclear Power Station, Unit No. 3, New London County, Connecticut

Date of amendment request: November 11, 1997.

Description of amendment request: The proposed amendment to Technical Specifications (TS) 3.9.1.2 and 3.9.13 and their Bases will allow crediting soluble boron for maintaining k-effective at less than or equal to 0.95 within the spent fuel pool (SFP) rack matrix following a seismic event of a magnitude greater than or equal to an operating basis earthquake (OBE).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

NNECO has reviewed the proposed revision in accordance with 10CFR50.92 and has concluded that the revision does not involve a significant hazards consideration (SHC). The basis for this conclusion is that the three criteria of 10 CFR 50.92(c) are not satisfied. The proposed revision does not involve [an] SHC because the revision would not:

1. Involve a significant increase in the probability or consequence of an accident previously evaluated.

There is one spent fuel pool accident condition discussed in Chapter 15 of the FSAR [final safety analysis report]. The FSAR discusses a fuel handling accident which drops a fuel assembly onto the fuel racks during fuel movement. Degradation of the Boraflex panels in a post-seismic condition will have no effect on the probability of a fuel assembly drop onto the stored fuel, or the fuel racks. Changing the way Boraflex responds to a seismic event will have no impact on the probability of a seismic event. A misplaced fuel assembly can be postulated in the MP3 [Millstone Unit 3] fuel pool as a result of either equipment malfunction or operator error. Degradation of the Boraflex panels will have no effect on the probability of a fuel misplacement event. Therefore, the degradation of Boraflex in a post-seismic condition does not involve an increase in the probability of an accident previously evaluated.

A fuel handling accident could cause a radioactive release of fission gases, resulting in dose consequences. This radioactive release of fission gases is due to the failure of a certain number of fuel pins which are postulated to fail during the fuel handling accident. The number of fuel pins which are postulated to fail in this event is not changed by the degradation of the Boraflex panels in a post-seismic condition. There are no criticality issues with this fuel handling accident for the reason described next. Although conservative, should a fuel handling accident occur during or after a seismic event, even with no Boraflex credit, the proposed 1750 ppm [parts per million] of soluble boron is sufficient to ensure that K-effective of the SFP is maintained at less than or equal to 0.95. The 1750 ppm boron requirement also bounds any criticality concerns for a fuel handling or dropped load event due to the no Boraflex assumption. Therefore, this proposed change does not involve an increase in the probability or

consequences of an accident previously evaluated.

Therefore, the proposed revision does not involve a significant increase in the probability or consequence of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

The change in the way Boraflex responds to a seismic event with the presence of 1750 ppm boron does not create a new accident. The use of soluble boron in the spent fuel pool is safe. There is no possibility of a dilution event during or following a seismic event up to the magnitude of an SSE [safe shutdown earthquake]. The normally filled piping systems in the vicinity of the spent fuel pool are fire protection, hot water heating, hot water preheating, domestic water, and component cooling. In addition, the roof drain system piping runs through the building. An engineering review of these systems has determined that the majority of the systems are leak tight and meet NU's [Northeast Utilities'] commitment to seismic II/I criteria for a seismic event up to and including an SSE. The analysis was performed consistent with the original design criteria for seismic II/I piping as documented in section 3.9.2 of the Millstone 3 Safety Evaluation Report (SER) Number 4.

Portions of fuel building piping systems that may not be leak tight following an SSE, and that would not leak into the spent fuel pool based on location of the potential leak, are not possible sources of dilution.

Two lines in the Hot Water Preheating system will be modified to meet the leak tight seismic II/I criteria and will not be possible sources of dilution.

A new pipe support will be added to the roof drain piping to meet the seismic II/I criteria. With the new support installed, one portion of the drain piping will still not meet leak tight requirements. The inlet opening on the roof feeding this portion of the piping will therefore be capped. Since the location of the potential cracking in the drain piping lies above the connection to the balance of the drain piping, and the system is not under pressure, water flowing from other portions of the drain system will not flow up to and out of the potentially cracked portion. This precludes a possible source of dilution.

Non borated water sources that are connected to the SFP will be isolated following a seismic event of greater than or equal to an OBE to prevent dilution. Therefore there is no possibility of a SFP boron dilution accident coincident with or following a seismic event up to an SSE, and credit for soluble boron is acceptable to meet the K-effective limit of 0.95 for the SFP. The crediting of soluble boron in the spent fuel pool to control K-effective following a seismic event does not create a new accident as boron dilution of the pool can be prevented by closing and administratively controlling the opening of dilution paths to the pool and initiating routine sampling requirements on SFP boron. At present the crediting of soluble boron following a fuel misplacement event is allowed for [in] the Millstone 3 [TS]. Analysis has shown that a seismic event of greater than an OBE level earthquake can cause Boraflex damage which can be more limiting than a fuel misplacement event. As such, the minimum boron requirement in the fuel pool will be increased from 800 ppm to 1750 ppm. As such, no new accident has been created because the crediting of boron following a malfunction/accident has always been allowed.

Therefore, the proposed revision does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Involve a significant reduction in a margin of safety.

The margin of safety, as defined by MP3 Technical Specifications, is to ensure that the K-effective of the MP3 SFP is maintained less than or equal to 0.95 at all times. The proposed change does not credit soluble boron during normal operations, but allows crediting soluble boron at a new higher concentration for control of K-effective during malfunction conditions. There is no reduction in the margin of safety as the result of the degradation of Boraflex following a greater than OBE seismic event, because soluble boron will compensate for the loss of Boraflex. A value of 1750 ppm of soluble boron in the SFP at all times ensures that K-effective of the MP3 SFP is maintained less than or equal to 0.95 at all times, including this new malfunction of degraded Boraflex following a greater than OBE seismic event.

Eliminating the credit for the reactivity [hold-down] effect of Boraflex panels in conjunction with 1750 ppm boron will have no effect on the probability of a seismic event. As the probability of a seismic event has not changed there is no increase in the probability of an accident or malfunction due to a seismic event. Following a seismic event, operators are presently required to make inspections of the plant to determine post seismic event plant conditions. As a result of this change, inspections will be required to review the status of the spent fuel pool and isolate potential dilution paths following a seismic event of greater than or equal to [an] OBE. These actions are consistent with present guidance in the seismic response procedure and do not create an undue burden on the operator. To compensate for the potential loss of Boraflex after a seismic event, the SFP is now required to be [] borated at all times to at least 1750 ppm to maintain the proper post seismic K-effective condition. As such, there is no mitigation equipment that has to operate in the spent fuel pool following a seismic event.

Although the Boraflex in the fuel racks is assumed to fail in a seismic event greater than an OBE, the presence of soluble boron in the fuel pool water will compensate for the loss of Boraflex. Surveillance requirements on SFP boron will ensure that there will be boron present in the SFP and ensure that the SFP is not diluted below the minimum required boron concentration during normal operation.

As the presence of SFP soluble boron during and after a seismic event maintains k-effective less than 0.95 there is no effect on the consequences of any accidents evaluated. As there are no new accidents created, there are no changes in the consequences of previously analyzed accidents, and there is no effect on the consequences of any accident. There is no reduction in the margin of safety as the result of the degradation of Boraflex following a greater than OBE seismic event, because during normal operations k-effective remains less than 0.95 without reliance on soluble boron, and during malfunction and accident conditions soluble boron can be used to compensate for the loss of Boraflex to maintain K-effective less than 0.95.

Therefore, the proposed revision does not involve a significant reduction in a margin of safety.

In conclusion, based on the information provided, it is determined that the proposed revision does not involve an SHC.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, Connecticut, and the Waterford Library, ATTN: Vince Juliano, 49 Rope Ferry Road, Waterford, Connecticut.

Attorney for licensee: Lillian M. Cuoco, Esq., Senior Nuclear Counsel, Northeast Utilities Service Company, P.O. Box 270, Hartford, Connecticut.

NRC Deputy Director: Phillip F. McKee.

Omaha Public Power District, Docket No. 50–285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska

Date of amendment request: October 3, 1997.

Description of amendment request: Omaha Public Power District (OPPD) proposes to change the Fort Calhoun Station Unit No. 1 Technical Specifications (TS) by revising TS Surveillance Requirement 3.9, ''Auxiliary Feedwater System,'' to clarify what flow paths are required to be tested. Additionally, OPPD proposes to revise the auxiliary feedwater pumps' surveillance requirements to delete the specific discharge pressure.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

A change to TS 3.9(2) is proposed to delete the specific discharge pressure specified for the Auxiliary Feedwater (AFW) pumps' surveillance. The developed head of the motor-driven and steam turbine-driven AFW pumps is verified quarterly. These tests are in addition to those required by TS 3.3, which implements ASME Section XI Inservice Testing (IST) to evaluate a pump's performance against its pump curve to determine operability. The IST program is controlled by TS 3.3, and requires that testing of ASME Code Class 1, Class 2, and Class 3 pumps shall be performed in accordance with Section XI of the ASME Boiler and Pressure Vessel Code, as required by 10 CFR 50.55a(g), except where specific written relief has been granted by the NRC. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes to TS 3.9(4) and the Basis Section only clarify the AFW flow paths that are required to be tested. The proposed change follows the recommendations of NUREG–0635, ''Generic Evaluation of Feedwater Transients and Small Break Loss-of-Coolant Accidents in Combustion Engineering Designed Operating Plants,'' Recommendation GS–6(2). No physical changes are proposed, information is being added to clarify the testing required to meet the recommendations of NUREG–0635, therefore these proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

There will be no physical alterations to the plant configuration or changes in operating modes. The proposed change to delete the specific discharge pressure of the AFW pumps from the TS is consistent with the ASME Code Section XI requirements that are controlled by TS 3.3. Testing requirements of TS 3.3 require testing of ASME Code Class 1, Class 2, and Class 3 pumps in accordance with Section XI of the ASME Boiler and Pressure Vessel Code, as required by 10 CFR 50.55a(g), except where specific written relief has been granted by the NRC. The clarifications being provided to describe the flow paths only provide additional information for testing required to meet the recommendation of NUREG–0635.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed changes will not result in any physical alterations to the plant configuration or changes to the application of setpoints or limits. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: W. Dale Clark Library, 215 South 15th Street, Omaha, Nebraska 68102.

Attorney for licensee: Perry D. Robinson, Winston & Strawn, 1400 L Street, N.W., Washington, DC 20005–3502.

NRC Project Director: William H. Bateman.

Public Service Electric & Gas Company, Docket Nos. 50–272 and 50–311, Salem Nuclear Generating Station, Unit Nos. 1 and 2, Salem County, New Jersey

Date of amendment request: November 4, 1997.

Description of amendment request: The amendments would change the Emergency Diesel Generator (EDG) Technical Specification (TS) 3/4.8.1 to (1) delete 18-month surveillance requirement 4.8.1.1.2.d.1, and (2) eliminate the accelerated testing requirement of Table 4.8–1. Both changes have been approved on other nuclear power facilities.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change deleting the requirement for an 18 month diesel inspection is consistent with the improved Standard Technical Specifications (NUREG–1433) and does not result in any changes to the existing plant design. The Salem preventive maintenance program utilizes diesel generator performance history, engineering analyses and manufacturer's recommendations as appropriate for determining diesel generator inspection requirements. The Technical Specifications will continue to contain surveillance requirements that demonstrate the functional capability of the diesel generators. The change does not impact the ability of the diesel generators or the AC electrical power sources to perform their function, nor result in a significant increase in the consequences of any accident previously evaluated. The diesel generators will continue as designed.

PSE&G has implemented the provisions of the maintenance rule for EDG's, including the appropriate regulatory guidance. This provides a program which assures EDG performance. The elements of this program include the performance of detailed root cause analysis of individual failures, effective corrective actions taken in response to individual failures, and implementation of preventive maintenance consistent with the Maintenance Rule. Additionally, the proposed changes (elimination of accelerated diesel generator testing requirements of TS 4.8.1.1.a in lieu of monthly testing and deletion of special

reporting requirements for diesel failures), do not delete the surveillance requirements but rather set their frequency at every 31 days. Monitoring the effectiveness of EDG maintenance and continuing surveillance testing will ensure that the diesel generators will perform their intended functions and will minimize failures. As is noted in the recommendations of GL [Generic Letter] 94–01, because PSE&G is monitoring and maintaining EDG performance in accordance with the provisions of 10 CFR 50.65, there is no longer a need for special reporting requirements.

Since the changes do not affect the assurance of diesel generator reliability or operability as discussed above, there is no significant increase in the probability or consequences of any accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously analyzed.

This request does not result in any change to the plant design or does it involve a significant change in current plant operation. The diesel generators are inspected utilizing diesel generator operating history, engineering analyses and manufacturer's recommendations as appropriate, and the remaining surveillance requirements continue to demonstrate the functional capability of the diesel generators.

Changing the surveillance of frequency of TS 4.8.1.2.a to 31 days the existing frequency as determined by Table 4.8–1, does not create a new or different kind of accident. Deleting of special reporting requirements, appropriate in light of the monitoring and maintenance in conformance with 10 CFR 50.65, and reliance on the reporting requirements of 10 CFR 50.72 and 10 CFR 50.73, does not create the possibility of a new or different kind of accident.

The proposed changes do not result in any change to the plant design nor do they involve a significant change in current plant design. No new failure modes will be introduced. Therefore, the proposed changes will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed request does not adversely impact the reliability of the diesel generators. As stated above, the diesel generator operating history, engineering analyses and the manufacturer's recommendations will be utilized as appropriate to perform diesel generator inspections. Additionally, other Technical Specification surveillance requirements will continue to demonstrate the functional capability of the diesel generators. The diesel generators will continue to perform their design functions.

Noting the monitoring and maintenance being performed in conformance with 10 CFR 50.65, revision of the frequency of surveillance testing of 4.8.1.1.2.a does not adversely impact the reliability of the diesel generators. Deletion of the special reporting requirements of 4.8.1.1.4 does not impact the operability or the reliability of the diesel generators.

This request does not involve an adverse impact on diesel generator operation or reliability. Since the diesel generator function is not affected by the proposed change, this request does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Salem Free Public library, 112 West Broadway, Salem, NJ 08079.

Attorney for licensee: Jeffrie J. Keenan, Esquire, Nuclear Business Unit—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Project Director: John F. Stolz.

Southern Nuclear Operating Company, Inc, Docket Nos. 50–348 and 50–364, Joseph M. Farley Nuclear Plant, Units 1 and 2, Houston County, Alabama

Date of amendments request: October 16, 1997.

Description of amendments request: The proposed amendments would revise the Farley Nuclear Plant (FNP) Units 1 and 2 Technical Specifications (TS) to increase the allowable number of charging pumps capable of injecting into the reactor coolant system (RCS) when the temperature of one or more of the RCS cold legs is 180°F or less. The amendments would also modify the FNP TS to allow a maximum of two charging pumps to be capable of injecting into the RCS during pump swap operations.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes to TS 3.1.2.3 allow two charging pumps to be capable of injecting into the reactor coolant system (RCS) for a period not to exceed 15 minutes while RCS cold leg temperature is at or below 180 degrees F. The intent is to allow the operator to start a second pump long enough to ensure that it operates properly and then to promptly secure the pump that was originally running. This order of pump operation will allow seal injection flow to be maintained to the RCS pumps number one seal continuously, thus preventing loss of pressure to the seals and maintaining filtered water flow through the seals. The proposed revised bases address the potential for [an] RCS mass addition transient. Guidance is given to prevent the charging pump swap from being conducted while the RCS is in a condition conducive to an overpressure transient. The RCS should be in a non water solid condition and the residual heat removal (RHR) relief valves must be operable or the RCS must be vented while the pump swap evolution is in progress. The proposed revision to TS 3.1.2.3 allows 15 minutes to have two pumps capable of injecting into the RCS, although two pumps will be running only momentarily, the remaining time is needed to perform the charging pump circuit breaker racking operations needed to render one of the two pumps incapable of injecting into the RCS. The proposed actions statement 3.1.2.3b directs that immediate action be taken to render all but one pump inoperable should the allotted 15 minutes be exceeded. This action is more appropriate than is currently specified. These proposed changes include sufficient controls to prevent an RCS overpressurization event.

Therefore, the proposed TS changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

This proposed change involves no change to the physical plant. It allows for a very limited and controlled operational change. The change increases the potential for a mass addition transient while the RCS is [at or] below 180 degrees F; however, sufficient controls are proposed to prevent a cold overpressure event.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed changes do not involve a significant reduction in a margin of safety.

The proposed change includes controls sufficient to prevent a significant reduction in the possibility or consequences of an accident. The proposed change specifies that the pump swap evolution be performed under conditions that will prevent an adverse plant transient. In addition, the proposed revision provides appropriate operator action that does not currently exist. This change is consistent with NUREG 1431, Standard Technical Specifications-Westinghouse Plants.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Houston-Love Memorial Library, 212 W. Burdeshaw Street, Post Office Box 1369, Dothan, Alabama.

Attorney for licensee: M. Stanford Blanton, Esq., Balch and Bingham, Post Office Box 306, 1710 Sixth Avenue North, Birmingham, Alabama.

NRC Project Director: Herbert N. Berkow.

Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit No. 3 Nuclear Generating Plant, Citrus County, Florida

Date of application for amendment: October 4, 1997.

Brief description of amendment: The proposed amendment revises the description of the electrical controls for Operating Reactor Building Recirculation System Fan/Cooler contained in the Final Safety Analysis Report and Improved Technical Specification Bases.

Date of publication of individual notice in the **Federal Register**: November 13, 1997 (62 FR 60921).

Expiration date of individual notice: December 15, 1997.

Local Public Document Room location: Coastal Region Library, 8619 W. Crystal River, Florida 34428.

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit No. 3 Nuclear Generating Plant, Citrus County, Florida

Date of application for amendment: October 31, 1997.

Brief description of amendment: The proposed amendment revises Operating License No. DPR–72, License Condition 2.C.(5) and deletes the requirement for installation and testing of flow indicators in the emergency core cooling system.

Date of publication of individual notice in the **Federal Register**: November 12, 1997 (62 FR 60733).

Expiration date of individual notice: December 12, 1997.

Local Public Document Room location: Coastal Region Library, 8619 W. Crystal River, Florida 34428.

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit No. 3 Nuclear Generating Plant, Citrus County, Florida

Date of application for amendment: October 31, 1997.

Brief description of amendment: The proposed amendment involves revisions to the Crystal River 3 Technical Specifications (TS) relating to decay heat removal requirements in Mode 4.

Date of publication of individual notice in the **Federal Register**: November 12, 1997 (62 FR 60735).

Expiration date of individual notice: December 12, 1997.

Local Public Document Room location: Coastal Region Library, 8619 W. Crystal River, Florida 34428.

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit No. 3 Nuclear Generating Plant, Citrus County, Florida

Date of application for amendment: October 31, 1997.

Brief description of amendment: The proposed amendment involves revisions to the Crystal River 3 Technical Specifications (TS) relating to the methodology for post-loss of coolant accident boron precipitation prevention.

Date of publication of individual notice in the **Federal Register**: November 12, 1997 (62 FR 60731).

Expiration date of individual notice: December 12, 1997.

Local Public Document Room location: Coastal Region Library, 8619 W., Crystal River, Florida 34428.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items 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 rooms for the particular facilities involved.

Duke Energy Corporation, et al., Docket No. 50–414, Catawba Nuclear Station, Unit 2, York County, South Carolina

Date of application for amendment: May 27, 1997.

Brief description of amendment: The amendment deletes references to steam generator tube sleeving and repair criteria that will not be used for the Westinghouse Model D5 steam generators in use at Catawba Unit 2. Also, unused paragraph numbers have been deleted and a typographical error has been corrected.

Date of issuance: November 13, 1997.

Effective date: As of the date of issuance to be implemented within 30 days.

Amendment No.: 154.

Facility Operating License No. NPF–52: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register**: June 18, 1997 (62 FR 33122).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 13, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: York County Library, 138 East Black Street, Rock Hill, South Carolina.

Entergy Operations, Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: October 7, 1997.

Brief description of amendment: The amendment changes the Appendix A Technical Specifications (TSs) by modifying TS 3.3.3.7.3, and Surveillance Requirements (SR) 4.3.3.7.3 for the broad range gas detection system. Also it makes some changes to the Bases in section 3/4.3.3.7 to incorporate information associated with the existing toxic gas monitors.

Date of issuance: November 14, 1997.

Effective date: November 14, 1997, to be implemented within 60 days.

Amendment No.: 135.

Facility Operating License No. NPF–38: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register**: October 15, 1997 (62 FR 53660).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 14, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, LA 70122.

Entergy Operations, Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: February 6, 1996.

Brief description of amendment: The proposed change will amend the Allowable Values of parameters in Table 3.3–4 of Waterford Steam Electric Station, Unit 3, (Waterford 3) Technical Specifications (TSs) to make it consistent with the identical parameters in Table 2.2–1 of TSs for Waterford 3. The proposed change will add Mode 4 to surveillance requirements of Table 4.3–2, Item 5.c (Safety Injection System Automatic Actuation Logic) that was inadvertently removed. Finally, the proposed change removes a reference to TS 3.3.3.2 in Surveillance Requirements TS 4.10.2.2 and 4.10.4.2 since Incore Detectors has been removed from the TSs.

Date of issuance: November 20, 1997.

Effective date: November 20, 1997, to be implemented within 60 days.

Amendment No.: 136.

Facility Operating License No. NPF–38: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register**: June 5, 1996 (61 FR 28615).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 20, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, LA 70122.

Houston Lighting & Power Company, City Public Service Board of San Antonio, Central Power and Light Company, City of Austin, Texas, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: August 23, 1996, as supplemented by letters dated October 1 and 15, 1996, and January 28, 1997.

Brief description of amendments: The amendments reflect the approval of the transfer of the authority to operate South Texas Project, Units 1 and 2, under the licenses to a new operating company, South Texas Project Nuclear Operating Company.

Date of issuance: November 17, 1997.

Effective date: November 17, 1997.

Amendment Nos.: Unit 1—Amendment No. 93; Unit 2—Amendment No. 80.

Facility Operating License Nos. NPF–76 and NPF–80. The amendments revised the Technical Specifications and the operating licenses.

Date of initial notice in **Federal Register**: November 7, 1996 (61 FR 57719).

The additional information contained in the supplemental letter dated January 28, 1997, was clarifying in nature and thus, it was within the scope of the initial notice and did not affect the staff's proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 17, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: Wharton County Junior College, J. M. Hodges Learning Center, 911 Boling Highway, Wharton, TX 77488.

Northeast Nuclear Energy Company, et al., Docket No. 50–423, Millstone Nuclear Power Station, Unit No. 3, New London County, Connecticut

Date of application for amendment: May 5, 1997.

Brief description of amendment: Technical Specification Surveillance 4.8.4.1 requires periodic testing of lower voltage circuit breakers for all containment penetration conductor overcurrent protective devices. The amendment modifies the requirements for determining the operability of lower voltage circuit breakers by using the manufacturer's curve of current versus time to test delay trip elements, clarifies the use of two pole in series testing, and expands the Bases description of the testing.

Date of issuance: November 14, 1997.

Effective date: As of the date of issuance, to be implemented within 60 days.

Amendment No.: 153.

Facility Operating License No. NPF–49: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register**: June 4, 1997 (62 FR 30637).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 14, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike,

Norwich, Connecticut 06360, and the Waterford Library, ATTN: Vince Juliano, 49 Rope Ferry Road, Waterford, Connecticut 06385.

Northern States Power Company, Docket Nos. 50–282 and 50–306, Prairie Island Nuclear Generating Plant, Unit Nos. 1 and 2, Goodhue County, Minnesota

Date of application for amendments: May 15, 1997, as supplemented August 29, October 20, October 24, and October 28, 1997.

Brief description of amendments: The amendments revise certain Technical Specification (TS) limitations on reactor coolant system leakage and steam generator tube surveillance, and implement a voltage-based repair criteria per requirements of NRC Generic Letter 95–05, ''Voltage-Based Repair Criteria for Westinghouse Steam Generator Tubes Affected by Outside Diameter Stress Corrosion Cracking.'' In addition, the amendments correct a typographical error in TS Section 4.12.c.

Date of issuance: November 18, 1997.

Effective date: November 18, 1997, with full implementation of the Technical Specifications within 30 days. License Condition 5 of Appendix B shall be implemented immediately upon issuance of the amendments.

Amendment Nos.: 133 and 125.

Facility Operating License Nos. DPR–42 and DPR–60: Amendments revised the licenses and the Technical Specifications.

Date of initial notice in **Federal Register**: August 13, 1997 (62 FR 43371).

The August 29, October 20, October 24, and October 28, 1997, supplements provided clarifying information that did not change the staff's initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 18, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: Minneapolis Public Library, Technology and Science Department, 300 Nicollet Mall, Minneapolis, Minnesota 55401.

Rochester Gas and Electric Corporation, Docket No. 50–244, R. E. Ginna Nuclear Power Plant, Wayne County, New York

Date of application for amendment: August 19, 1997, as supplemented September 17, 1997.

Brief description of amendment: The amendment revised the Ginna Station Improved Technical Specifications to correct an error in the required accumulator borated water volume specified in Surveillance Requirement 3.5.1.2.

Date of issuance: November 10, 1997.

Effective date: November 10, 1997.

Amendment No.: 69.

Facility Operating License No. DPR–18: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register**: October 8, 1997 (62 FR 52587).

The September 17, 1997, letter provided clarifying information that did not change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 10, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: Rochester Public Library, 115 South Avenue, Rochester, New York 14610.

The Cleveland Electric Illuminating Company, Centerior Service Company, Duquesne Light Company, Ohio Edison Company, OES Nuclear, Inc., Pennsylvania Power Company, Toledo Edison Company, Docket No. 50–440, Perry Nuclear Power Plant, Unit 1, Lake County, Ohio

Date of application for amendment: October 24, 1996, as supplemented June 16 and October 2, 1997.

Brief description of amendment: This amendment revised the minimum critical power ratio safety limit to reflect the 10 CFR Part 21 condition reported by General Electric in their letter to the NRC dated May 24, 1996.

Date of issuance: November 7, 1997.

Effective date: November 7, 1997.

Amendment No.: 91.

Facility Operating License No. NPF–58: This amendment revised the Technical Specifications.

Date of initial notice in **Federal Register**: February 12, 1997 (62 FR 6569). The June 16 and October 2, 1997, supplemental letters provided additional clarifying information and did not change the initial no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 7, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: Perry Public Library, 3753 Main Street, Perry, Ohio 44081.

Dated at Rockville, Maryland, this 25th day of November 1997.

For the Nuclear Regulatory Commission.

Elinor G. Adensam,

Acting Director, Division of Reactor Projects—III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 97–31522 Filed 12–2–97; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 13e–1, SEC File No. 270–255, OMB Control No. 3235–0305; Rule 12g3–2, SEC File No. 270–104, OMB Control No. 3235–0119; Trust Indenture: Act Rules, SEC File No. 270–115, OMB Control No. 3235–0132.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget requests for extension of the previously approved collections of information discussed below.

''Purchase of Securities by issuer thereof under the Securities Exchange Act of 1934''. Rule 13e–1 under the Exchange Act is designed to provide shareholders and the marketplace with relevant information concerning issuer repurchases during a tender offer for its securities by a third party. Public companies are the respondents. An estimated 20 respondents will file submissions annually at an estimated 13 hours per response for a total annual burden of 260 hours.

''Securities Exchange Act of 1934—Rule 12g3–2.'' Rule 12g3–2 provides an exemption for certain foreign securities. It affects approximately 1,800 foreign issuer respondents at an estimated one burden hour per response for a total annual burden of 1,800 hours.

''Requirements as to Form and Content of Applications, Statements and Reports under the Trust Indenture Act of 1939.'' Rules 7a–15 through 7a–37 under the Trust Indenture Act of 1939 (''TIA'') provides guidance for complying with requirements under the TIA. Persons and entities subject to TIA requirements are the respondents. No information collection burdens are imposed directly by these rules so they are assigned only one burden hour for administrative convenience.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information

unless it displays a currently valid control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, D.C. 20503; and (ii) Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: November 25, 1997.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–31616 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–22904/812–10608]

Acorn Investment Trust; Notice of Application

November 24, 1997.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for an order (i) under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 13(a)(2), 18(f)(1), 22(f), and 22(g) of the Act; (ii) under sections 6(c) and 17(b) of the Act for an exemption from section 17(a)(1); and (iii) under section 17(d) of the Act and rule 17d–1 to permit certain joint transactions.

SUMMARY OF APPLICATION: Applicant requests an order to permit Acorn Investment Trust (''Acorn'') to enter into deferred compensation arrangements with its trustees who are not interested persons of Acorn.

Filing Dates: The application was filed on April 7, 1997 and amended on August 22, 1997. Applicant has agreed to file an additional amendment, the substance of which is incorporated herein, 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 applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 22, 1997, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons 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. Acorn Investment Trust, 227 West Monroe Street, Suite 3000, Chicago, Illinois 60606.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Staff Attorney, at (202) 942–0574, or Mary Kay Frech, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. 202–942–8090).

Applicant's Representations

1. Acorn is a registered open-end management investment company organized as a Massachusetts business trust. Acorn currently offers three series: Acorn Fund, Acorn International, and Acorn USA (the ''Acorn Funds,'' together with any additional series offered by Acorn in the future, the ''Funds''). Wagner Asset Management, L.P. serves as investment adviser to the Funds. Acorn requests that the relief apply to the Funds and any successors in interest to Acorn or any existing or future series thereof.[1]

2. Acorn's board of trustees (''Trustees'') currently consists of nine persons, seven of whom are not ''interested persons'' of Acorn within the meaning of Section 2(a)(19) of the Act (''Eligible Trustees''). Each Eligible Trustee receives an annual retainer plus an additional fee for each board meeting and each pricing committee meeting attended. Acorn's Trustees have approved a deferred compensation plan for the Eligible Trustees (the ''Plan''). The purposes of the Plan is to permit the Eligible Trustees to defer any or all of their compensation from Acorn for federal income tax purposes. An Eligible Trustee's election to defer any or all of such compensation will continue in effect for each calendar year unless the Eligible Trustee delivers to the administrator of the Plan a written revocation or modification of the election.

3. If an Eligible Trustee elects to defer compensation pursuant to the Plan, compensation will be credited to a book reserve account established by Acorn (the ''Deferral Account''), as of the date the compensation otherwise would have been payable to the Eligible Trustee. Each Eligible Trustee may elect to have his or her compensation treated as if it had been invested and reinvested in shares of one or more of the Funds or of any unaffiliated money market fund with which the Funds enjoy exchange privileges (''Shares''), and may from time to time change his or her designation of Shares.[2]

4. The compensation credited to a Deferral Account for each Eligible Trustee will be treated as if it had been invested in the Shares at the current net asset value (''NAV'') of the Shares on the date the compensation is credited to the Deferral Account. Thereafter, the value of the Deferral Account will fluctuate as the NAV of the Shares fluctuates, and will also reflect the value of the assumed reinvested dividends or capital gains distributions in additional Shares. It is intended that each Fund may purchase Shares in amounts equal to the deemed investment of the Deferral Accounts of the Eligible Trustees.[3] If a Fund purchases Shares, the Shares will be held solely in the name of that Fund. When a Fund purchases Shares, liabilities created by the credits to the Deferral Accounts under the Plan are expected to be matched by an equal amount of assets (i.e., a direct investment in the Shares).

5. The Plan provides that each Fund's respective obligation to make payments of amounts accrued in each of the Deferral Accounts will be a general obligation of that Fund, and payments made pursuant to the Plan will be made from that Fund's general assets and property. No Fund will be liable for any other Fund's respective obligation to make payments under the Plan. Each Eligible Trustee will be a general unsecured creditor of a Fund. The Plan also provides that a Fund will not be under an obligation to purchase, hold, or dispose of any investments under the Plan. If a Fund chooses to purchase investments to cover its obligations under the Plan, such investments will

[1] For purposes of the application, ''successors in interest'' is limited to entities that result from a reorganization due to change of legal domicile or a change in form of business organization, e.g., partnership to corporation.

[2] The Plan may be amended in the future to permit an Eligible Trustee to have the return on the compensation measured by the return on shares of an investment company other than one of the Acorn Funds or an unaffiliated money market fund.

[3] Acorn's purchase of Shares will be made for the benefit of Acorn and not for the benefit of participating Eligible Trustees.

continue to be a part of the general assets and property of that Fund. Applicants state that the number of Shares purchased under the Plan will be *de minimis* in relation to the size of each Fund.

6. Under the Plan, amounts credited to an Eligible Trustee's Deferral Account generally will become payable in cash when an Eligible Trustee retires from the board. An Eligible Trustee may elect to receive payment in a lump sum or in equal annual installments over a period of five years. If an Eligible Trustee dies prior to the commencement of the distribution from the Deferral Account, the balance of the Deferral Account will be distributed to the Eligible Trustee's designated beneficiary in a lump sum as soon as practicable. If an Eligible Trustee dies after the commencement of such distribution, but prior to the complete distribution of the Deferral Account, the balance will be distributed to the beneficiary over the remaining distribution period. The Trustees, in their sole discretion, may accelerate the distribution of the Deferral Account. In all other events, the Eligible Trustee's right to receive distributions from the Deferral Account will be non-transferable.

7. The Plan also permits an Eligible Trustee to apply to the Plan administrator at any time for a full or partial withdrawal on the basis of ''hardship or unforeseen emergency'' as defined in the Plan. The Plan has reserved the right to accelerate or extend payment of amounts in the Deferral Account at any time after the termination of the Eligible Trustee's service as a trustee or in the event of a change in control of Acorn's investment adviser. In addition, in the event of liquidation, dissolution, or winding up of Acorn or the distribution of all or substantially all of Acorn's assets and property to its shareholders, or in the event of a merger or reorganization of Acorn (unless prior to such merger or reorganization, the Trustees determine that the Plan shall survive the merger or reorganization), all unpaid amounts in the Deferral Accounts will be paid in a lump sum to the Eligible Trustees on the effective date of such liquidation, dissolution, winding up, distribution, merger, or reorganization.

Applicant's Legal Analysis

1. Applicant requests an order under (i) section 6(c) of the Act to exempt Acorn from the provisions of sections 13(a)(2), 18(f)(1), 22(f), and 22(g) to the extent necessary to permit Acorn to implement the Plan; (ii) sections 6(c) and 17(b) of the Act to exempt Acorn from the provisions of section 17(a) to permit each Fund to sell securities of which it is the issuer to other Funds in connection with the Plan; and (iii) section 17(d) of the Act and rule 17d–1 to permit Acorn and the Eligible Trustees to effect certain transactions incident to the Plan.

2. Section 6(c) of the Act provides that the SEC may exempt any person, security, or transaction from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Section 18(f)(1) of the Act generally prohibits a registered open-end investment company from issuing senior securities. In addition, section 13(a)(2) of the Act requires that a registered investment company obtain shareholder authorization before issuing any senior security not contemplated by the recitals of policy in its registration statement. Section 18(g) of the Act defines ''senior security'' to include ''any bond, debenture, note or similar obligation or instrument constituting a security and evidencing indebtedness.'' Applicant states that the plan does not possess any of the characteristics of senior securities that led to the enactment of sections 13(a)(2) and 18(f)(1). Applicant states that Acorn will not be ''borrowing'' from its Eligible Trustees, and liabilities created by credits to the Deferral Accounts under the Plan are expected to be offset by equal amounts of assets of Acorn that would not otherwise exist if the compensation was paid on a current basis. Applicant asserts that the Plan will not induce speculative investments by Acorn or provide opportunity for manipulative allocation of the expenses and profits of Acorn. Applicant also asserts that the control of Acorn will not be affected, and the Plan will not confuse investors.

4. Section 22(f) prohibits restrictions on the transferability of negotiability of redeemable securities issued by an open-end investment company unless the restrictions are disclosed in its registration statement and do not contravene SEC rules and regulations. Applicant asserts that the restriction on the transferability of benefits under the Plan is clearly described in the Plan, is included in the Plan primarily to benefit the Eligible Trustees, and would not advserely affect the interests of Acorn's shareholders.

5. Section 22(g) generally prohibits registered open-end investment companies from issuing any of their securities for services or for property other than cash or securities. Applicant believes that section 22(g) is primarily concerned with the dilutive effect on the equity and voting power of the common stock of an investment company if securities are issued for consideration not readily valued. Applicant asserts that interests under the Plan will not entitle the Eligible Trustees to vote as shareholders or participate in the profit and gain of Acorn. In addition, applicant asserts that the Eligible Trustees' interests in the Plan are non-transferable, and an Eligible Trustee's right to receive payments under the Plan is not granted in return for services. Thus, applicant contends that the Plan merely provides for the deferral of compensation and any rights under the Plan should be viewed as being ''issued'' in return for Acorn not being required to pay the compensation on a current basis.

6. Section 17(a)(1) of the Act generally prohibits an affiliated person of a registered investment company, or any affiliated person of such person, from selling any security to such registered investment company. Applicant submits that the Funds and other investment companies that have the same investment adviser may be ''affiliated persons'' within the meaning of section 2(a)(3) of the Act. Applicant states that section 17(a)(1) was designed to prevent sponsors of investment companies from using investment company assets as capital for enterprises with which they are associated or to acquire controlling interests in such enterprises. Applicant believes that an exemption from this provision would facilitate the matching of its liability for deferred compensation with the value of the Shares chosen by the Eligible Trustees.

7. Section 17(b) authorizes the SEC to exempt a proposed transaction from section 17(a) if evidence establishes that: (a) the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching, (b) the transaction is consistent with the policy of each registered investment company concerned, and (c) the transaction is consistent with the general purposes of the Act. Applicant submits that the terms of the proposed transactions under the Plan that involve the acquisition of Shares by Funds are fair and reasonable to all parties, are consistent with the Act and the Funds' policies, and meet all the standards of section 17(b) of the Act. Applicant further submits that the requested relief from various provisions of the Act meets the standards for an exemption set forth in section 6(c) of the Act.

8. Section 17(d) and rule 17d–1 prohibit affiliated persons from participating in joint arrangements with a registered investment company unless authorized by the SEC. In passing on applications for such orders, rule 17–d provides that the SEC will consider whether the participation of such investment company 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. Applicant asserts that the Eligible Trustees will neither directly nor indirectly receive benefits that would otherwise inure to Acorn or its shareholders because (a) a Fund may choose to invest in Shares, (b) amounts credited to the Deferral Account will be adjusted to reflect income, gains, and losses relating to the investment of the assets of such Fund, and (c) such income, gains, or losses will be identical to what any shareholder in that Fund would receive whose shares were not subject to the Plan. Applicants contend that deferral of an Eligible Trustee's compensation in accordance with the Plan would essentially maintain the parties, viewed both separately and in their relationship to one another, in the same position as if the compensation were paid on a current basis and then invested in the Shares.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–31620 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 22912; 812–10348]

AFC (USA) I, Inc.; Notice of Application

November 26, 1997.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application for exemption under section 6(c) of the Investment Company Act of 1940 (the ''Act'') from all provisions of the Act.

SUMMARY OF THE APPLICATION: Applicant, AFC (USA) I, Inc., requests an order that would permit it to sell certain debt securities and use the proceeds to finance the business activities of its parent company, Airbus Finance Company Limited.

FILING DATES: The application was filed on November 13, 1996, and amended on July 17, 1997 and November 24, 1997.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 22, 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. Applicant, c/o Catharine Ennis, George's Dock House, 2nd Floor, International Financial Services Center, Dublin 1, Ireland.

FOR FURTHER INFORMATION CONTACT: Kathleen L. Knisely, Staff Attorney, at (202) 942–0517, or Mary Kay Frech, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, DC 20549, (tel. 202–942–8090).

Applicant's Representations

1. Applicant is a Delaware corporation formed in July, 1996. All of applicant's outstanding voting securities are owned by Airbus Finance Company Limited (''AFC''). AFC, a limited liability company incorporated under the laws of Ireland, provides sales financing support to the customers of Airbus Industrie G.I.E. (''Airbus Industrie'').[1] AFC and Airbus Industrie are each owned indirectly by Aerospatiale S.N.I., Daimler-Benz A.G. (''Daimler-Benz''), British Aerospace plc (''BAe''), and Construcciones Aeronauticas S.A. (''CASA'').

2. Applicant was organized to engage in financing activities to provide funds for use in the operations of AFC. Applicant proposes to obtain funds through the offer and sale of its debt securities in the United States and European or other overseas markets, and to lend the proceeds to AFC.

3. Due to the nature of capital markets, applicant may, from time to time, issue securities in amounts in excess of the amounts required by AFC at any given time. However, at least 85% of the cash or cash equivalents raised by applicant will be loaned to AFC as soon as practicable, but in no event later than six months after applicant's receipt of the cash or cash equivalents. Amounts that are not loaned to AFC will be invested in government securities, securities of AFC or a company controlled by AFC (or, in the case of a partnership or joint venture, the securities of the partners or participants in the joint venture), or debt securities which are exempted from the provisions of the Securities Act of 1933 by section 3(a)(3) of that Act.

4. Any issuance of debt securities by applicant to the public in the United States will be unconditionally guaranteed by AFC as to the timely payment of principal, interest, and premium, if any (a ''Guarantee''). Guarantee will provide each holder of debt securities issued by applicant a direct right of action against AFC to enforce AFC's obligations under the Guarantee without first proceeding against applicant.

5. Until AFC has achieved a specified long-term debt rating at or above investment grade (the ''AFC Rating''), any debt securities issued by applicant to the public in the United States also will be unconditionally guaranteed on a separate basis by each of Aerospatiale S.N.I., Daimler-Benz, BAe, and CASA, or any additional or substitute indirect owner of AFC as to the timely payment of principal of, interest, and premium, if any, on the debt securities.

6. In the future applicant may obtain funds through the offer and sale of non-voting preferred stock. Applicant will guarantee such stock with a guarantee complying with rule 3a–5(a)(2) under the Act.

Applicant's Legal Analysis

1. Rule 3a–5 under the Act provides an Exemption from the definition of investment company for certain companies organized primarily to finance the business operations of their parent companies or companies controlled by their parent companies. Rule 3a–5 is premised on the notion that it is appropriate to exempt a finance subsidiary from all provisions of the Act when the primary purpose of the finance subsidiary is to finance the business operations of its parent

[1] Applicant represents that AFC does not constitute a ''partnership'' or ''joint venture'' within the meaning of rule 3a–5(a)(4) under the Act and is substantially equivalent to a U.S. corporation for the purposes of rule 3a–5(b)(2) under the Act.

company or other subdiaries of its parent and when the purchaser of the finance subsidiary's securities ultimately looks to the parent and not to the finance subsidiary for repayment.[2] Rule 3a–5(b)(2)(i) defines ''parent company'' to be a corporation, partnership, or joint venture that is not considered an investment company under section 3(a) or that is exempted by order from the definition of investment company by section 3(b) or by the rules or regulations under section 3(a) of Act.

2. AFC is not a ''parent company'' within the definition in rule 3a–5(b)(2)(i) because AFC meets the definition of investment company in section 3(a) of the Act and is excepted from that definition by section 3(c)(6) of the Act. Applicant, therefore, is unable to rely on rule 3a–5 and seeks an exemption from all provisions of the Act.

3. In the release adopting rule 3a–5, the Commission stated that it may be appropriate to grant exemptive relief to the finance subsidiary of an issuer exempted from the definition of investment company under section 3(c) of the Act, but only on a case-by-case basis upon an examination of all relevant facts.[3] According to the adopting release, the concern was that a company could be considered not an investment company under section 3(c) of the Act and still be engaged primarily in investment company activities.[4]

4. Section 6(c) of the Act provides, in pertinent part, that the SEC may, conditionally or unconditionally, exempt any person or class of persons from any provision or provisions of the Act to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicant states that AFC is not engaged primarily in investment company activities, but that its principal activity is the provision of sales financing for Airbus Industrie customers. In addition, if AFC were itself to issue the securities that are to be issued by applicant and use the proceeds for its own purposes or advance them to its subsidiaries, AFC would not be subject to regulation under the Act. While AFC has chosen instead to use applicant as a financing vehicle, the Guarantee ensures that holders of applicant's securities will have direct recourse against AFC. Accordingly, applicant submits that the relief requested satisfies the section 6(c) standard.

Applicant's Condition

Applicant agrees that the order granting the requested relief shall be subject to the condition that:

Applicant will comply with all of the provisions of rule 3a–5 under the Act, except that AFC will not meet the portion of the definition of ''parent company'' in rule 3a–5(b)(2)(i) solely because it is excluded from the definition of investment company under section 3(c)(6) of the Act and is engaged primarily, directly or through majority owned subsidiaries, in one or more of the businesses described in section 3(c)(5)(A) and/or section 3(c)(5)(B) of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–31686 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

[2] *See* Investment Company Act Release No. 14275 (Dec. 14, 1984) (release adopting rule 3a–5 under the Act).

[3] *Id.* at 49443.

[4] *Id.*

SECURITIES AND EXCHANGE COMMISSION

Issuer Delisting; Notice of Application to Withdraw From Listing and Registration; (American Restaurant Partners, L.P., Class A Units of Limited Partnership Interests) File No. I–9606

November 26, 1997.

American Restaurant Partners, L.P. (''Company'') has filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'') and Rule 12d2–2(d) promulgated thereunder, to withdraw the above specified security (''Security'') from listing and registration on the American Stock Exchange, Inc. (''Amex'' or ''Exchange'').

The reasons cited in the application for withdrawing the Security from listing and registration include the following:

The Company has complied with Amex Rule 18 by filing with the Exchange a certified copy of the preambles and resolutions adopted by the general partners of the Company authorizing the withdrawal of the Security from listing and registration on the Amex, and by setting forth in detail to the Exchange the reasons for the proposed withdrawals, and the facts supporting the withdrawal.

In making the decision to withdraw its Security from listing and registration on the Amex, the Company considered the facts set forth below and determined that the withdrawal would be in the best interests of the holders of the Security.

The Company's decision to withdraw the Security from listing and registration on the Amex is based on a change in the federal income tax laws that will, effective January 1, 1998, subject the Company to taxation as a corporation if the Company's Security remains listed on the Exchange. Under a grandfather clause that expires December 31, 1997, the Company is sheltered from the Internal Revenue Code provisions which tax publicly traded limited partnerships as corporations. To avoid taxation as a corporation, the Company must immediately withdraw its Security from listing and registration on the Amex so that the Security is no longer traded on an established securities market by the end of 1997.

The Company has represented that it intends to establish a qualified matching service in accordance with Department of Treasury regulations so that holders of the Security may exchange their interests. The Company has further represented that it may put into effect a redemption and repurchase agreement to provide holders of the Security with another means for exchanging their interests.

The Company shall continue to send annual and quarterly reports containing financial statements to holders of the Security so long as it is obligated to do so under the Act.

By letter dated November 12, 1997, the Amex informed the Company that the Exchange has no objection to the withdrawal of the Company's Security from listing and registration on the Amex.

Any interested person may, on or before December 18, 1997, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, facts bearing upon whether the application has been made in accordance with the rules of the Exchange and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 97–31617 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–22910; 812–10638]

First American Funds, Inc., et al.

November 25, 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(d) of the Act exempting applicants from section 17(a) of the Act, and under section 17(d) of the Act and rule 17d–1 to permit certain joint transactions.

SUMMARY OF APPLICATION: The requested order would supersede a prior order to permit certain registered investment companies to invest excess cash in money market funds advised by the same adviser for cash management purposes. The order also would amend a prior order permitting a fund of funds to purchase shares of certain investment companies in the same group of investment companies in excess of the limits of section 12(d)(1).

Applicants: First American Funds, Inc. (''FAF''), First American Strategy Funds, Inc. (''FASF''), First American Investment Funds, Inc. (''FAIF''), including each current series and each subsequently created series of FAF, FASF and FAIF, U.S. Bank National Association or any other entity controlling, controlled by, or under common control with U.S. Bank National Association (''U.S. Bank''), and other registered investment companies or their series that are now or in the future advised by U.S. Bank.

Filing Dates: The application was filed on April 29, 1997 and amended on October 1, 1997. Applicants have agreed to file an additional amendment during the notice period, the substance of which is incorporated in this notice.

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 22, 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. FAF, FASF, and FAIF, Oaks, Pennsylvania 19456; U.S. Bank, 601 Second Avenue South, Minneapolis, Minnesota 55402.

FOR FURTHER INFORMATION CONTACT: J. Amanda Machen, Senior Counsel, at (202) 942–7120, or Mary Kay Frech, Branch Chief, at (202) 942–0564 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. 202–942–8090).

Applicants' Representations

1. FAIF is a registered open-end management investment company that currently offers twenty-three series, each of which is a variable net asset value fund. FAF is a registered open-end management investment company that currently offers three series, each of which is a money market fund subject to the requirements of rule 2a–7 under the Act. Each existing series of FAF and any future money market portfolio of FAF or FAIF or of other registered investment companies advised by U.S. Bank are referred to collectively as ''Money Market Funds.'' Each existing series of FAIF and any future variable net asset value portfolio of FAIF or FAF or of other registered investment companies advised by U.S. Bank are referred to collectively as ''Non-Money Market Funds.'' The Money Market Funds and the Non-Money Market Funds are referred to as the ''Funds.''

2. FASF is a registered open-end management investment company that currently offers four series, each of which is a variable net asset value fund. Under an existing order (''Fund of Funds Order''),[1] FASF operates as a ''fund of funds,'' the principal investments of which are shares of certain series of FAIF and FAF (''Underlying Portfolios'').

3. U.S. Bank, a wholly owned subsidiary of U.S. Bancorp (''USBC''), a bank holding company, serves as investment adviser for each series of FAIF, FAF and FASF. U.S. Bank has retained Marvin & Palmer Associates, Inc. (''Marvin & Palmer'') as a sub-adviser for FAIF's International Fund (U.S. Bank, Marvin & Palmer, and any future sub-adviser to any Fund are referred to collectively as the ''Investment Advisers''). First Trust National Association (the ''Custodian'') a wholly owned subsidiary of USBC, serves as custodian for the assets of each series of FAIF, FAF, and FASF.

4. Pursuant to an exemptive order, the Non-Money Market Funds can invest in the money market series of FAF in excess of the limits of section 12(d)(1) of the Act, so long as each Fund's aggregate investment in the money market fund does not exceed the greater of 5% of the Fund's total net assets or $2.5 million (''Cash Sweep Order'').[2]

5. Applicants request an order that would (a) supersede the Cash Sweep Order to permit (i) each of the Funds (''Investing Funds'') to use the cash reserves that have not been invested in portfolio securities (''Uninvested Cash'') to purchase shares of one or more of the Money Market Funds, provided that no Investing Fund will have more than an aggregate of 25% of its total assets invested in all Money Market Funds at any time, and (ii) the Money Market Funds to sell their shares to, and to redeem their shares from, the Investing Funds; and (b) amend the Fund of Funds Order to permit FASF to invest in shares of Underlying Portfolios that will in turn invest in shares of the Money Market Funds to the extent permitted by the order sought in this application (''Amended Cash Sweep Order'').[3] Because the Amended Cash Sweep Order will allow the Underlying Portfolios to invest greater amounts in the Money Market Funds than is allowed under the Cash Sweep Order, condition 2 to the Fund of Funds Order would be amended to allow FASF to continue to invest in the Underlying Portfolios.[4]

6. Each of the Funds has, or may have, Uninvested Cash held by its Custodian.

[1] *First American Investment Strategy Funds, Inc.*, Investment Company Act Release Nos. 22173 (Aug. 26, 1996) (notice) and 22241 (Sept. 23, 1996) (order).

[2] *First American Investment Funds, Inc.*, Investment Company Act Release Nos. 21722 (Jan. 30, 1996) (notice) and 21784 (Feb. 27, 1996) (order).

[3] The Amended Cash Sweep Order also would delete conditions 3 and 6 in the Fund of Funds Order.

[4] The fund of funds series of FASF are not ''Investing Funds'' as defined in the application, therefore any investment by them in the Money Market Funds would be under the Fund of Funds Order and subject to the conditions of that Order.

Uninvested Cash may result from a variety of sources, including dividends or interest received on portfolio securities, unsettled securities transactions, reserves held for investment strategy purposes, scheduled maturity of investments, liquidation of investment securities to meet anticipated redemptions, dividend payments, or new cash received from investors.[5] By investing Uninvested Cash in the Money Market Funds, applicants believe that the Investing Funds will be able to reduce their transaction costs, create more liquidity, enjoy greater returns on the Uninvested Cash and further diversify their holdings.

Applicants' Legal Analysis

1. Section 12(d)(1)(A) of the Act provides that no registered investment company may acquire securities of another investment company if the 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 the 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. The perceived abuses section 12(d)(1) sought to address include undue influence by an acquiring fund over the management of an acquired fund, layering of fees, and complex fund structures.

2. Applicants' request would permit the Investing Funds to use Uninvested Cash to acquire shares of Money Market Funds in excess of the percentage limitations set our in section 12(d)(1)(A). Applicants propose that each Investing Fund be permitted to invest in shares of the Money Market Funds so long as no Investing Fund will have more than an aggregate of 25% of its total assets invested in all Money Market Funds at any time. Applicants' request also would permit Money Market Funds to sell their securities to Investing Funds in excess of the percentage limitations set out in section 12(d)(1)(B). Applicants state that relief permitting an Investing Fund to invest up to 25% of its total net assets in shares of the Money Market Funds is appropriate because at any given time, 25% or more of an Investing Fund's total assets may be comprised of Uninvested Cash. Applicants also request amendment of condition 2 to the Fund of Funds Order to permit the FASF funds to continue to invest in shares of Underlying Portfolios, which in turn invest in shares of the Money Market Funds, in reliance on the Amended Cash Sweep Order.

3. Section 12(d)(1)(J) provides that the SEC can exempt any persons or transactions from section 12(d)(1) if 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.

4. Applicants believe that none of the concerns underlying section 12(d)(1) are presented by the proposed transactions. Applicants state that, because the Investment Advisers and their affiliates will not derive any investment advisory or other fees in connection with the Investing Funds' purchase or sale of shares of the Money Market Funds, the Investment Advisers are not susceptible to undue influence in their management of the Money Market Funds because of threatened redemptions from the Money Market Funds or loss of fees.

5. Applicants maintain that the proposed arrangement would not result in the inappropriate layering of either sales charges or investment advisory fees. Shares of the Money Market Funds sold to and redeemed by the Investing Funds will not be subject to a sales load, redemption fee, distribution fee under rule 12b–1 under the Act, or service fee. In addition, each Investment Adviser will credit to the respective Investing Fund, or waive, the investment advisory fees that it earns based on the Investing Fund's investments in the Money Market Funds to the extent the fees are based upon the Investing Fund's assets invested in shares of the Money Market Funds.

6. Regarding the complexity of the proposed structure, applicants note that the net asset value of each current Money Market Fund is, and has been since its inception, maintained at a constant $1.00 per share. Therefore, applicants submit that the value of the Investing Funds' investments in the Money Market Funds will be easily determinable. In addition, applicants maintain that the Fund of Funds Order already permits FASF to invest in Underlying Portfolios, which invest in Money Market Funds, provided that the Underlying Portfolios comply with certain conditions. As a result, applicants submit that no additional complexity will be created by amending the Fund of Funds Order to reflect the Amended Cash Sweep Order.

7. 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 investment adviser of the investment company and any person directly or indirectly controlling, or under common control with, the investment adviser. Under section 2(a)(3), each series within FAIF, FASF, and FAF may be deemed to be under common control with each of the others, and thus an affiliated person of each of the other series of FAIF, FASF, and FAF. As a result, section 17(a) would bar the sale of shares of the Money Market Funds to the Investing Funds, and the redemption of the shares by the Money Market Funds.

8. 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) of the Act permits the SEC to exempt persons or transactions from any provision of the Act, if the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants submit, for the reasons discussed below, that their request for relief satisfies these standards.

9. Applicants submit that the proposed transactions will not involve overreaching because the Investing Funds retain their ability to invest their Uninvested Cash directly in money market instruments, as authorized by their respective investment objectives and policies, if they believe they can obtain a higher return or for any other reason. Similarly, each of the Money Market Funds has the right to discontinue selling shares to any of the Investing Funds if its board of directors determines that the sales would adversely affect its portfolio management and operations. In addition, applicants note that shares of the Money Market Funds will be purchased and redeemed at their net asset value, the same consideration paid

[5] Uninvested Cash does not include cash collateral received in connection with the Investing Funds' securities lending activities.

and received for these shares by any other shareholder.

10. Section 17(d) 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. 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 state that each Investment Fund, by purchasing shares of the Money Market Funds, each Investment Adviser, by managing the assets of the Investing Funds, and each of the Money Market Funds, by selling shares to the Investing Funds, could be deemed to be participants in a joint enterprise. Applicants assert that investments by the Investing Funds in shares of the Money Market Funds will be on the same basis and will be indistinguishable from that of any other participant or shareholder and that the transactions will be consistent with the Act. In addition, applicants state that the proposed transactions may result in cost savings for the Investing Funds.

Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. Shares of the Money Market Funds sold to and redeemed from the Investing 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 National Association of Securities Dealer's Rules of Conduct).

2. No Money Market Fund will acquire securities of any other investment company in excess of the limits contained in section 12(d)(1) of the Act.

3. Each of the Investing Funds will be permitted to invest Uninvested Cash in, and hold shares of, a Money Market Fund only to the extent that the Investing Fund's aggregate investment in all Money Market Funds taken as a group does not exceed 25% of the Investing Fund's total assets.

4. Each Fund shall be advised by U.S. Bank or a person controlling, controlled by, or under common control with U.S. Bank.

5. Investment by an Investing Fund in shares of a Money Market Fund will be consistent with each Investing Fund's respective investment restrictions and policies as set forth in its prospectuses and statements of additional information.

6. The applicants will cause the Investment Advisers, in their capacities as advisers for the Money Market Funds, to remit to the respective Investing Fund, or waive, an amount equal to all investment advisory fees received by them under their respective advisory agreements with the Money Market Funds to the extent such fees are based upon the Investing Fund's assets invested in shares of the Money Market Funds. Any of these fees remitted or waived will not be subject to recoupment by the Funds' Investment Advisers at a later date.

7. FASF may continue to rely on the Funds of Funds Order, subject to compliance with the conditions it contains, except for conditions 3 and 6, which are deleted. Condition 2 to the Fund of Funds Order is amended to read as follows: ''No Underlying Portfolio will acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that the Underlying Portfolio other than a Money Market Fund acquires securities of another investment company under exemptive relief from the Commission permitting the Underlying Portfolio to purchase securities of an affiliated money market fund for short-term cash management purposes.''

For the SEC, by the Division of Investment Management, under delegated authority.

Margareet H. McFarland,

Deputy Secretary.

[FR Doc. 97–31619 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–22906; File No. 812–10752]

Fortis Benefits Insurance Company, et al.; Notice of Application

November 24, 1997.

AGENCY: Securities and Exchange Commission (the ''SEC'' or the ''Commission'').

ACTION: Notice of Application for an order pursuant to Section 26(b) of the Investment Company Act of 1940 (the ''1940 Act'').

SUMMARY OF APPLICATION: Applicants seek an order approving the substitution of shares of the Limited Maturity Bond Portfolio of the Neuberger & Berman Advisers Management Trust (''N & B Bond Portfolio'') for shares of the Strong Advantage Fund II series (''Strong Advantage Portfolio'') of the Strong Variable Insurance Funds, Inc. (''Strong Funds'') and the substitution of shares of the Federated Fund for U.S. Government Securities II portfolio of Federated Insurance Series (''Federated Government Portfolio'') for shares of the Strong Government Securities Fund II series of the Strong Funds (''Strong Government Portfolio'').

Applicants: Fortis Benefits Insurance Company (''Fortis Benefits'') and Variable Account D of Fortis Benefits Insurance Company (the ''Variable Account'').

Filing Date: The application was filed on August 11, 1997, and amended on October 31, 1997 .

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing on this application by writing to the Secretary of the SEC and serving Applicants with a copy of the request, in person or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on December 19, 1997, and accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester'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 Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, 500 Bielenberg Drive, Woodbury, Minnesota 55125.

FOR FURTHER INFORMATION CONTACT: Susan M. Olson, Attorney, or Kevin M. Kirchoff, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942–0670.

SUPPLEMENTARY INFORMATION: Following is a summary of the application. The complete application is available for a fee from the Public Reference Branch of the SEC, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. (202) 942–8090).

Applicants' Representations

1. Fortis Benefits, a stock life insurance company organized under the laws of Minnesota, is qualified to sell life insurance contracts in the District of Columbia and all states except New York. Fortis Benefits is an indirect wholly-owned subsidiary of Fortis, Inc., which is owned, indirectly, 50% by Fortis AMEV and 50% by Fortis AG. Fortis AMEV is a diversified financial

services company headquartered in Utrecht, the Netherlands. Fortis AG is a diversified financial services company headquartered in Brussels, Belgium. Fortis AMEV and Fortis AG have merged their operating companies under the trade name of Fortis. Fortis Benefits is the depositor and sponsor of the Variable Account.

2. The Variable Account is a segregated investment account of Fortis Benefits and was established under the insurance laws of Minnesota. The Variable Account is registered with the Commission as a unit investment trust under the 1940 Act. The Variable Account issues flexible premium deferred combination variable and fixed annuity contracts on either a group basis or as individual contracts (''Contracts'', and owners of which are referred to as ''Holders''). Interests in the Variable Account are offered through the sale of the Contracts and are registered under the Securities Act of 1933 (''1933 Act''). The Contracts are structured to allow Holders to elect an interest accumulation option through a fixed account (the ''Fixed Account'') or a variable return accumulation option through the Variable Account, or a combination of these two options.

3. The Variable Account is divided into subaccounts (''Subaccounts''). Assets held in each Subaccount pursuant to the Contracts are invested exclusively in one of the funds or portfolios available for investment. The portfolios are registered investment companies available for purchase only as a funding vehicle for variable life insurance and variable annuities issued by Fortis Benefits and other insurance companies (the ''Portfolios''). For Holders who were issued Contracts on or after December 1, 1996, there are 22 Subaccounts available for investment. The Strong Advantage Portfolio and the Strong Government Portfolio are not available for investment to Holders issued Contracts on or after December 1, 1996. For Holders issued Contracts before December 1, 1996, there are 30 Subaccounts available for investment, including the Strong Advantage Portfolio and the Strong Government Portfolio.

4. Strong Funds is registered under the 1940 Act as a diversified, open-end management investment company and currently issues seven series of shares, each of which is a separate open-end diversified investment management company. Each series of the Strong Funds is managed by Strong Capital Management.

5. Neuberger & Berman Advisers Management Trust is registered under the 1940 Act as a diversified, open-end management investment company and currently is comprised of seven portfolios, each of which is a separate open-end diversified management investment company. Each portfolio invests all of its net assets in its corresponding series of Advisers Managers Trust, an open end management investment company, in each case receiving a beneficial interest in that series. The corresponding series for the N & B Bond Portfolio is AMT Limited Maturity Bond Investment. AMT Limited Maturity Bond Investments invests in securities in accordance with an investment objective, policies and limitations identical to those of the N & B Bond Portfolio. The investment performance of the N & B Bond Portfolio will directly correspond with the investment performance of AMT Limited Maturity Bond Investments. This master/feeder fund structure is different from that of many investment companies which directly acquire and manage their own portfolio of securities. AMT Limited Maturity Bond Investment is managed by Neuberger & Berman Management Incorporated.

6. Federated Insurance Series is registered under the 1940 Act as a diversified management investment company. The Federated Government Portfolio is a diversified investment portfolio of the Federated Insurance Series.

7. Applicants are seeking to substitute shares of the N & B Bond Portfolio for shares of the Strong Advantage Portfolio and to substitute shares of the Federated Government Portfolio for shares of the Strong Government Portfolio.

8. Applicants represent that as of June 30, 1997, the assets attributable to Holders of the Subaccounts holding shares of the Strong Advantage Portfolio and the Strong Government Portfolio were relatively small, $152,580 and $96,408, respectively.

9. Applicants represent that as of June 30, 1997, the total net asset value of the Strong Advantage Portfolio and Strong Government Portfolio were relatively small, $192,723 and $96,453 , respectively.

10. Applicants represent that there has been a decrease in net asset value during 1997, as of June 30, 1997. From December 31, 1996 to June 30, 1997, the Strong Advantage Portfolio has decreased in size from $587,615 to $192,723 and the Strong Government Portfolio has decreased from $199,328 to $96,453.

11. The investment objective of the Strong Advantage Portfolio is to seek current income with a very low degree of share price fluctuation, which is pursued by investing in very short term, investment grade debt obligations. The investment objective of the Strong Government Portfolio is to seek total return by investing for a high level of current income with a moderate degree of share price fluctuation, which is pursued by normally investing at least 80% of total assets in U.S. government securities.

12. The investment objective of the N & B Bond Portfolio is to seek the highest current income consistent with low risk to principal and liquidity and secondarily, total return. The investment objective of the N & B Bond Portfolio is pursued by investing in a diversified portfolio of short to intermediate term U.S. government and agency securities and debt securities issued by financial institutions, corporations and others, primarily investment grade. The investment objective of the Federated Government Portfolio is to seek current income, which is pursued by normally investing at least 65% of total assets in securities issued or guaranteed as to payment of principal and interest by the U.S. government, its agencies or instrumentalities.

13. For several reasons, Applicants believe that it is not in the best interests of the Holders to continue to utilize the Strong Advantage Portfolio and Strong Government Portfolio (collectively, the ''Replaced Portfolios'') as investment options and further believe that the Applicants can better serve the interest of the Holders by utilizing investment alternative that may be better suited to their needs and interests.

14. Applicants represent that the proposed substitution of shares of the N & B Bond Portfolio for shares of the Strong Advantage Portfolio and the proposed substitution of shares of the Federated Government Portfolio for shares of the Strong Government Portfolio involve the substitution of Portfolios whose objectives, policies and restrictions are sufficiently similar to those of the Replaced Portfolios so as to continue fulfilling Holders' objectives and risk expectations.

15. Applicants represent that the performance of each Portfolio in which Holders will be invested following the proposed substituon is comparable or superior to the investment performance of the replaced Portfolios. The following chart sets forth the comparative average annual total returns for the periods listed below for the Replaced Portfolios and the N & B Bond Portfolio and the Federated Government Portfolio.

AVERAGE ANNUAL TOTAL RETURN FOR SPECIFIED PERIODS

[In percent]

Portfolios	For 6 months, ending 6/30/97	For year ending 12/30/96	For five years, ending 12/30/96	Since inception** through 12/30/96
Strong Advantage Portfolio	*2.30	4.92	N/A	5.24
N & B Bond Portfolio	*2.96	4.31	5.32	N/A
Strong Government Portfolio	*2.60	N/A	N/A	−0.41
Federated Government Portfolio	*3.01	4.20	N/A	5.62

*Not Annualized.
**Strong Advantage Portfolio, inception date 11/30/95. Strong Government Portfolio, inception date 1/31/96. Federated Government Portfolio, inception date 3/28/94.

16. Applicants represent that the ratio of expenses to net assets for the Subaccounts in which Holders will be invested after the substitution will be no greater than the ratio of expenses to net assets, after reimbursements and waivers, for the Subaccounts proposed to be eliminated. Therefore Holders will not be exposed to higher expenses following the substitution. The investment advisers to the Strong Advantage Portfolio, the Strong Government Portfolio and the Federated Government Portfolio have arrangements under which each may voluntarily waive a portion of their fees or reimburse the Portfolios for certain operating expenses. The investment adviser to the N & B Bond Portfolio has contractually agreed, subject to termination on 60 days prior written notice, to limit certain of the N & B Bond Portfolio's operating expenses by reimbursing certain expenses that exceed 1% of the average daily net asset value of the N & B Bond Portfolio. The following chart summarizes the ratio of expenses to net assets for the Portfolios for the year ended December 31, 1996 before and after reimbursements and waivers.

RATIO OF EXPENSES TO NET ASSETS FOR THE YEAR ENDED DECEMBER 31, 1996

[In percent]

Portfolio	Total expenses after reimbursements and waivers	Total expenses before reimbursements and waivers
Strong Advantage Portfolio	2.00	2.87
N & B Bond Portfolio	0.78	0.78
Strong Government Portfolio	*1.70	*3.90
Federated Government Portfolio	0.80	1.81

*Calculated on an annualized basis (commenced operations on January 31, 1996).

17. Applicant states that the small amount of assets attributable to Holders of the Subaccounts holding shares of the Replaced Portfolios, the relatively small total net asset values of the Replaced Portfolios, the relatively small overall size of the Replaced Portfolios with the decrease in net asset value during the first 6 months of 1997 and the fact that the Replaced Portfolios are not available as investment options to Holders of Contracts issued after December 1, 1996, will tend to strain the ability of the Replaced Portfolios to maintain an acceptable expense ratio compared to the larger N & B Bond Portfolio and the Federated Government Portfolio (collectively, the ''Substitute Portfolios''). Accordingly, the proposed substitution is expected to confer economic benefits to Holders by virtue of the enhanced asset size and the reduced expense ratios of the Substitute Portfolios.

18. The comparative total net assets as of June 30, 1997 were $252,284,067 for the N & B Bond Portfolio, compared to $192,723 for the Strong Advantage Portfolio, and $44,369,652 for the Federated Government Portfolio, compared to $96,453 for the Strong Government Portfolio.

19. Applicants state that since the N & B Bond Portfolio and the Federated Government Portfolio are available for investment under the Contracts, all of the affected Holders have received a current prospectus relating to the N & B Bond Portfolio and the Federated Government Portfolio.

20. Applicants state that notice will be sent to Holders 30 days prior to the proposed substitution which informs them that Fortis Benefits has filed an application for an order allowing Applicants to undertake the substitution described in their application and that they may elect at any time prior to the close of business on the closing date of the transactions to transfer their interest in either or both of the two current Subaccounts to any other Subaccount or to the Fixed Account, without charge. The notice will also inform Holders of the approximate date of the substitution. Once the substitution is completed, a confirmation will be mailed to the Holders reflecting the transfer of the Contract value from the Subaccount investing in the Strong Advantage Portfolio to the Subaccount investing in the N & B Bond Portfolio and/or the transfer of Contract value from the Subaccount investing in the Strong Government Portfolio to the Subaccount investing in the Federated Government Portfolio. The confirmation will be sent within 5 days of the substitution.

21. Applicants represent that the substitution will be effected by redeeming all shares held by the Variable Account in the Strong Advantage Portfolio and the Strong Government Portfolio and an equivalent purchase of shares in the N & B Bond Portfolio and the Federated Government Portfolio, respectively, at net asset value on the same date. The values under each Contract will be identical immediately before and after the transactions. All administrative and other costs of the transactions will be borne by Fortis Benefits. There will be no tax consequences to Holders and no adverse tax consequences to the Variable Account or Fortis Benefits relating to the transactions. The proposed substitution will not be counted as a transfer for the purpose of any restrictions on the number of transfers that may now or in the future apply to Holders. The proposed substitution will not alter the insurance benefits or other rights or benefits of Holders or the contractual obligations of Fortis Benefits.

Applicants' Legal Analysis

1. Section 26(b) provides, in pertinent part, that ''[i]t shall be unlawful for any depositor or trustee of a registered unit investment trust holding the security of a single issuer to substitute another security for such security unless the Commission shall have approved such substitution.'' Section 26(b) of the 1940

Act also provides that the Commission shall issue an order approving such substitution if the evidence establishes that the substitution is consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the 1940 Act.

2. Applicants request an order pursuant to Section 26(b) of the 1940 Act approving the substitution of the Replaced Portfolios with the Substitute Portfolios.

3. The Contracts provide that Fortis Benefits retains the right to make certain changes, if, in its judgment, they would best serve the interests of the Holders or would be appropriate in carrying out the purposes of the Contracts. Examples of the changes Fortis Benefits may make are to transfer assets in any Subaccount to another Subaccount, or to one or more separate accounts, or to add, combine or remove Subaccounts in the Variable Account or to substitute, for the Portfolio shares held in any Subaccount, the shares of another Portfolio or the shares of another investment company or any other investment permitted by law.

4. Applicants submit that the proposed substitution will meet the requirements of Section 26(b) for the following reasons:

(a) The investment objectives of the Replaced Portfolios are sufficiently similar to those of the Substitute Portfolios, respectively, to be appropriate for substitution.

(b) The investment performance of the Substitute Portfolios is comparable or superior to the investment performance of the Replaced Funds.

(c) The comparative ratio of expenses to net assets (following reimbursement) for the Substitute Portfolios will be no greater than that of the Replaced Portfolios.

(d) The proposed substitution will result in the investment of assets, currently in Portfolios which have not increased to a level which would make each investment alternative viable for Holders, into substantially larger and more stable underlying Portfolios.

Conclusion

For the reasons stated above, Applicants submit that the proposed substitution is consistent with the protection of investors and the purposes fairly intended by the policy and the provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–31622 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–26785]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

November 25, 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 18, 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 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.

Central and South West Corporation, et al.

[70–9113]

Central and South West Corporation (''CSW''), a registered holding company, 1616 Woodall Rodgers Freeway, Dallas, Texas 75202, and its wholly-owned service company subsidiary, Central and South West Services, Inc. (''CSW Services''), 212 East 6th Street, Tulsa, Oklahoma 74119, have filed an application-declaration under sections 6(a), 7, 9(a), 10, 12(c) and 13(b) of the Act and rules 42, 54 and 87–91 thereunder.

CSW owns all of the outstanding shares of common stock of four public utility subsidiaries (collectively, ''Operating Companies''): Central Power and Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and West Texas Utilities Company. Together, these Operating Companies provide electric service to approximately 1.7 million customers in a widely diversified area covering 152,000 square miles in portions of Arkansas, Louisiana, Oklahoma and Texas.[1]

CSW requests authorization to adopt and implement a stockholder rights plan (''Rights Plan'') under which CSW's Board of Directors (''Board'') would declare a dividend of one right (''Right'') for each outstanding share of CSW Common Stock, par value $3.50 per share (''Common Stock''), payable to stockholders of record on a date to be established (''Record Date'').[2] The Rights will be created by and issued under a rights agreement (''Rights Agreement'') to be entered into by CSW and CSW Services, as Rights Agent.[3] The Rights created under the proposed Rights Agreement would entitle the holders to purchase one-tenth of a share of Common Stock at a price of $50 per whole share of Common Stock, subject to adjustment (Purchase Price'').[4] This is equivalent to $5 per one-tenth of one share of Common Stock. CSW states that

[1] CSW also has numerous nonutility subsidiaries, including CSW Energy, Inc., which develops and operates independent power and cogeneration projects; CSW International, Inc., which pursues investments in energy ventures internationally, and which, indirectly, owns all the outstanding share capital of SEEBOARD p.l.c., one of 12 regional electricity companies in the United Kingdom; CSW Credit, Inc., which purchases the accounts receivable of the Operating Companies and certain non-affiliated electric utilities; CSW Communications, Inc., which provides communication services to the Operating Companies and certain non-affiliates; CSW Leasing, Inc., which invests in leveraged leases; EnerShop, Inc., which provides energy management services; and CSW Services, which performs, at cost, various accounting, engineering, tax, legal, financial electronic data processing, centralized economic dispatching of electric power and other services to CSW and its subsidiaries.

[2] As of June 30, 1997 there were 212,235,310 shares of Common Stock outstanding.

[3] The services of CSW Services, as Rights Agent, will be provided at cost. CSW expects that such charges, if any, will be *de minimis.* As Rights Agent, CSW Services practically has no active duties unless the Rights become, if ever, exercisable, at which time the Rights Agent performs or causes to be performed services similar to a stock transfer agent. CSW Services is the transfer agent for the Common Stock.

[4] The Purchase price payable, and the number of shares of Common Stock (or other securities or property, as the case may be) issuable upon exercise of the Rights are subject to adjustment from time to time to prevent dilution. Prior to the date on which the Rights become exercisable, the Board may make such equitable adjustments as it deems appropriate in the circumstances in lieu of any adjustment otherwise required by the foregoing. No adjustment in the Purchase Price will be required until the time at which cumulative adjustments require an adjustment of at least 1% in the Purchase Price. No fractional shares of Common Stock will be issued and, in lieu thereof, a cash payment will be made based on the market price of the Common Stock on the last trading day prior to the date of exercise.

the Purchase Price represents the Board's estimation of the long-term value of the Common Stock. The Board has adopted and approved the Rights Agreement subject to the receipt of an appropriate order from the Commission in this filing. Upon receipt of such an order, the Rights will be distributed as a dividend to the holders of CSW's outstanding shares of Common Stock.[5]

Initially, the Rights would not be exercisable and would trade as an integral part of the outstanding shares of Common Stock. Subject to certain rights of CSW to redeem [6] or exchange shares of Common Stock for [7] the Rights, the Rights would become exercisable (i.e., Common Stock could be purchased at the Purchase Price pursuant to the Rights) and Rights Certificates representing the Rights would be distributed and would trade independently of the outstanding shares of Common Stock upon the occurrence of the following triggering events (''Triggering Events''): the earlier to occur of (i) 10 days after the first public announcement that any person or group (''Acquiring Person'') has acquired beneficial ownership of 15% or more of CSW's outstanding Common Stock (''Acquisition Event'') and (ii) 10 business days (unless extended by the Board of Directors) after any person or group has commenced a tender or exchange offer which would, upon its consummation, result in such person or group becoming an Acquiring Person (''Offer Event'') (the earlier of (i) and (ii) is hereafter referred to as the ''Distribution Date'').

When the Triggering Event is an Acquisition Event, the holders of the Rights (other than an Acquiring Person and certain transferees thereof whose Rights will become void) would immediately have the right to receive, for each Right exercised, Common Stock having a market value equal to two times the Purchase Price then in effect (''Discount Purchase Right''). When the Triggering Event is an Offer Event, the holders of the Rights (other than an Acquiring Person and certain transferees thereof whose Rights will become void) would be entitled to the Discount Purchase Right once a person or group commencing the tender or exchange offer becomes an Acquiring Person.

In the event that, on or after the Distribution Date: (i) CSW is acquired by another person or entity not controlled by CSW (''Acquiror'') in a merger or other business combination transaction in which CSW Common Stock is exchanged for securities or other property; or (ii) 50% or more of CSW's consolidated assets or earnings power is sold or transferred to an Acquiror, each holder of a Right (except Rights which previously have been voided as discussed above) will thereafter be entitled to receive, for each Right exercised, common stock of the Acquiror having a market value equal to two times the Purchase Price then in effect.

CSW states that the proposed Rights Plan is intended to deter hostile takeover attempts and/or attempts to acquire CSW in a manner or on terms which the Board determines are not in the best interests of all stockholders by enabling the Board to provide CSW stockholders with adequate time to assess properly a takeover bid without undue pressure. The Rights Plan is also intended to confront a potential acquiror with the possibility that the exercise of Rights by stockholders will substantially increase the number of shares of Common Stock outstanding and therefore the cost of acquiring control of CSW. CSW states that the Rights Plan will operate to maximize and preserve the value of CSW for its stockholders, in the event of an attempted hostile or unwanted takeover, but is not designed to prevent a proxy contest to replace members of the Board or frustrate a fair offer for the entire company which is in the best interests of stockholders.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–31618 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

[5] Any of the provisions of the Rights Agreement may be amended by the Board without the consent of the holders of the Rights; provided, however, that on or after the Distribution Date (as defined below), the Rights Agreement may not be amended in any manner that would adversely affect the interests of the holders of the Rights.

[6] The Rights may be redeemed, as a whole, at a Redemption Price of $.01 per Right, subject to adjustment, at the direction of the Board, at any time prior to the earlier of: (i) 10 days after the first public announcement that any person has become an Acquiring Person (as defined below); and (ii) the date of final expiration of the Rights. The Rights will expire on the tenth anniversary of the Record Date, unless earlier redeemed or exchanged by CSW.

[7] At any time after any person or group shall have become an Acquiring Person and before any person (other than CSW and certain related entities), together with its affiliates and associates, shall have become the beneficial owner of 50% or more of the outstanding shares of Common Stock, the Board may direct the exchange of shares of Common Stock for all or any part of the Rights (other than Rights of an Acquiring Person which become void) at the exchange rate of one share of Common Stock per Right, subject to adjustment.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–26784]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

November 24, 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 18, 1997, to the Secretary, Securities and Exchange Commission, Washington, DC 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.

Central Power and Light Co.

[70–8597]

Central Power and Light company (''CPL''), 539 North Carancahua Street, Corpus Christi, Texas, 78401, a wholly owned electric utility subsidiary company of Central and South West Corporation, a registered public utility holding company, has filed a post-effective amendment, under sections 6(a), 7, 9(a) and 10 of the Act and rule 54 under the Act, to an application-declaration filed under sections 6(a), 7, 9(a), 10, 12(c) and 12(d) of the Act and rules 44 and 51 under the Act.

By orders dated June 15, 1995 (HCAR No. 26309), July 26, 1995 (HCAR No. 26339), and August 28, 1996 (HCAR No. 26565) (''Orders''), CPL was authorized to incur obligations, through December 31, 1997, in connection with the issuance by the Matagorda County

Navigation District No. One (''District'') of up to $325 million in Pollution Control Revenue Refunding Bonds (''Refund Bonds'') and of up to $150 million in Pollution Control Revenue Bonds and/or Solid Waste Revenue Bonds (''New Bonds'') (collectively, ''Bonds''). CPL to date has issued $160.635 million of Refund Bonds and no New Bonds, leaving $164.365 million of Refund Bonds and $150 million of New Bonds to be issued.

CPL now requests an extension of the authorization to issue the remaining Refund Bonds and New Bonds, pursuant to the terms and conditions set forth in the Orders, through December 31, 2002.

The Orders stated that the purpose of the Refund Bonds was to re-acquire all or a portion of five types of previously issued Pollution Control Revenue Bonds (''Old Bonds'') and that the purpose of the New Bonds was to reimburse CPL for expenditures qualified for tax-exempt financing or to provide for current solid waste expenditures.

The Old Bonds were issued to finance pollution control and solid waste disposal facilities for the South Texas Project Electric Generating Station (''Plant''). CPL owns a 25.2% undivided interest in the Plant. The Old Bonds were issued pursuant to Indentures of Trust with NationsBank of Texas, N.A., the Bank of New York, and Texas Commerce Bank, N.A.

CPL had entered into Installment Sale Agreements (''Sale Agreements'') to provide for the issuance of the Old Bonds. In connection with the issuance of the Bonds, the Orders authorized CPL to amend the Sale Agreements, enter into agreements with similar terms, and/or enter into new installment sale agreements.

The Orders provided that the Bonds were to bear a fixed or floating interest rate, were authorized to be secured with First Mortgage Bonds, and were to mature between one and forty years. The interest rate, redemption provisions and other terms and conditions applicable to the Bonds were to be determined through negotiation between CPL and one or more investment banking firms that were to purchase or underwrite the Bond (''Firms'').

The Orders authorized CPL to issue First Mortgage Bonds, to secure the Bonds, subject to applicable indenture restrictions, under a Supplemental Indenture to its Mortgage Indenture dated November 1, 1943 to the First National Bank of Chicago and A.H. Bohm. The optional redemption provisions, the sinking-fund provisions, and the limitation on dividends relative to the First Mortgage Bonds were authorized to deviate from the SEC Statement of Policy Regarding First Mortgage Bonds.

The Orders anticipated that the Bonds would be sold by the District pursuant to a Bond Purchase Agreement between the District and one or more Firms. The Orders authorized CPL to enter into negotiations with the Firms with respect to the interest rate, redemption provisions and other terms and conditions applicable to the Bonds.

Finally, the Orders authorized the use by CPL of interest rate swaps and other interest rate risk management devices.

Eastern Utilities Associates, et al.

[70–8609]

Eastern Utilities Associates, P.O. Box 2333, Boston, Massachusetts, 02107, a registered holding company; its public utility subsidiaries—Blackstone Valley Electric Company, Washington Highway, Lincoln, Rhode Island, 02865; Newport Electric Corporation, 12 Turner Road, Middletown, Rhode Island 02840; Eastern Edision Company, P.O. Box 2333, Boston, Massachusetts, 02107; and Montaup Electric Company, P.O. Box 2333, Boston, Massachusetts, 02107;—and its non-utility subsidiaries—EUA Service Corporation, P.O. Box 543, West Bridgewater, Massachusetts, 02379; EUA Cogenex Corporation, P.O. Box 2333, Boston, Massachusetts, 02107; and TransCapacity Limited Partnership, 83 Pine Street, Suite 101, West Peabody, Massachusetts, 01961 (''EUA Companies'')—have filed a post-effective amendment to an application filed under sections 6(a), 7, 9(a), 10 and 12(c) of the Act and rule 54 under the Act.

By order dated June 15, 1995 (HCAR No. 26308), the EUA Companies were authorized, through December 15, 1997, to contribute 150,000 common shares of EUA stock, or to contribute cash to purchase 150,000 common shares from EUA or on the open market, to an Employees' Savings Plan (''Plan''). The Plan, established in 1981, meets the requirements of the Employee Retirement Income Security Act of 1974 and is qualified and exempt under the Internal Revenue Code.

The EUA Companies now seek authorization to contribute to the Plan up to 200,000 common shares of EUA stock, or to contribute cash to purchase up to 200,000 common shares on the open market, through December 15, 1999.

Columbia Gas System, Inc.

[70–9127]

The Columbia Gas System, Inc. (''Columbia''), 12355 Sunrise Valley Drive, Suite 300, Reston, Virginia, 20191–3458, a registered holding company, has filed an application-declaration under sections 6(a), 7, 9(a), 10 and 13 of the Act and rule 54 under the Act.

Columbia seeks authorization to provide consulting services to associate and non-associate companies, and to engage in activities contemplated by the Gas Related Activities Act of 1990 (''GRAA''), on an international basis. In addition, Columbia seeks authorization to invest up to $5 million to acquire oil and natural gas leasehold interests in southern Ontario, Canada (''Canadian Interests'').

Columbia would both provide consulting services and engage in GRAA activities (''Activities'') through one or more, direct or indirect, to-be-formed non-utility subsidiaries (''Foreign Energy Subsidiaries''). The Foreign Energy Subsidiaries, in turn, might form one or more special-purpose subsidiaries to invest, directly or indirectly, in corporations, limited liability companies, partnerships or other entities that derive substantially all of their revenues from foreign consulting services or activities under the GRAA.

Columbia seeks authorization for the Foreign Energy Subsidiaries to engage in preliminary development activities in connection with foreign gas-related activities but asks the Commission to reserve jurisdiction over specific gas-related activities apart from the acquisition of the Canadian Interests.

Columbia seeks authorization to invest up to $5 million, through the Foreign Energy Subsidiaries, to acquire the Canadian Interests offered for sale by Paragon Petroleum Corporation (''Paragon''), a Canadian corporation. On October 17, 1997, Columbia Natural Resources, Inc. entered into a letter of intent with Paragon to acquire the Canadian Interests. This transaction is expected to close by December 31, 1997.

Columbia requests that the Commission authorize participation in the money pool by those direct and indirect subsidiaries that are formed in connection with the specific authorization sought in this application-declaration.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–31621 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–22913]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

November 26, 1997.

The following is a notice of applications for derigistration under section 8(f) of the Investment Company Act of 1940 for the month of November, 1997. A copy of each application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth St., N.W., Washington, D.C. 20549 (tel. 202–942–8090). An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 22, 1997, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. For Further Information Contact: Diane L. Titus, at (202) 942–0564, SEC, Division of Investment Management, Office of Investment Company Regulation, Mail Stop 10–4, 450 Fifth Street, N.W., Washington, D.C. 20549.

Crabbee Huson Real Estate Investment Fund, Inc. [File No. 811–8262]

Oregon Municipal Bond Fund, Inc. [File No. 811–4464]

Crabbee Huson Income Fund, Inc. [File No. 811–5836]

Crabbee Huson Equity Fund, Inc. [File No. 811–5837]

Crabbee Huson Asset Allocation Fund, Inc. [File No. 811–5838]

U.S. Government Money Market Fund, Inc. [File No. 811–5839]

U.S. Government Income Fund, Inc. [File No. 811–5840]

Summary: Each applicant requests an order declaring that it has ceased to be an investment company. On October 1, 1996, each applicant, an Oregon corporation, transferred its assets and liabilities to a new portfolio of Crabbe Huson Funds, a Delaware business trust, based on the relative net asset value. Each applicant thus merged into an identically named portfolio of Crabbe Huson Funds, except that the Oregon Municipal Bond Fund merged into the Crabbe Huson Tax-Exempt Fund. The approximate expenses related to each transaction, which were borne by the respective applicant, were as follows: Crabbe Huson Real Estate Fund, $14,393; Oregon Municipal Bond Fund, $13,007; Crabbe Huson Income Fund, $11,473; Crabbe Huson Equity Fund, $201,845; Crabbe Huson Asset Allocation Fund, $53,348; U.S. Government Money Market Fund, $31,382; U.S. Government Income Fund, $10,233.

Filing Dates: Each application was filed on February 24, 1997, and amended on June 23, 1997.

Applicants' Address: 121 S.W. Morrison, Suite 1400, Portland, Oregon 97204.

Leahi Investment Trust [File No. 811–5321]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On July 31, 1997, applicant transferred its assets to First Hawaii Municipal Bond Fund (''First Hawaii''), a series of First Pacific Mutual Fund, Inc., based on the relative net asset value per share of each fund. The approximate expenses incurred in connection with the merger were $40,000 and were borne by the investment advisers to applicant and First Hawaii.

Filing Dates: The application was filed on September 2, 1997, and amended on November 13, 1997.

Applicant's Address: Ward Plaza, Suite 129, 210 Ward Avenue, Honolulu, Hawaii 96814.

First Prairie Diversified Asset Fund [File No. 811–4210]

First Prairie Money Market Fund [File No. 811–4212]

First Prairie Municipal Money Market Fund [File No. 811–4213]

Prairie Municipal Bond Fund [File No. 811–5414]

First Prairie U.S. Treasury Securities Cash Management Fund [File No. 811–6405]

First Prairie Cash Management Fund [File No. 811–6406]

Prairie Intermediate Bond Fund [File No. 811–6595]

Prairie Funds [File No. 811–7231]

Prairie Institutional Funds [File No. 811–7235]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. Each applicant transferred its assets and liabilities to a series of Prairie Funds, The Woodward Funds, or Prairie Institutional Funds, based on the relative net asset value per share of each fund.

On March 4, 1995, First Prairie Diversified Asset Fund reorganized into Prairie Managed Assets Income Fund, a series of Prairie Funds. This applicant paid approximately $10,000 in expenses related to the reorganization.

On May 20, 1995, First Prairie Money Market Fund's Money Market Series reorganized into Prairie Money Market Fund, a series of Prairie Funds, and its Government Series reorganized into Prairie U.S. Government Money Market Fund, a series of Prairie Funds. This applicant paid approximately $35,000 in expenses related to the reorganization.

On May 20, 1995, First Prairie Municipal Money Market Fund reorganized into Prairie Municipal Money Market Fund, as series of Prairie Funds. This applicant paid approximately $20,000 in expenses related to the reorganization.

On September 14, 1996, Prairie Municipal Bond Fund, Inc. reorganized into Woodward Municipal Bond Fund, a series of The Woodward Funds. First Chicago NBD Corporation, the parent company of applicant's co-investment advisers, paid approximately $207,027 in expenses related to the reorganization.

On January 17, 1995, First Prairie U.S. Treasury Securities Cash Management Fund reorganized into U.S. Government Securities Cash Management Fund, a series of Prairie Institutional Funds. This applicant paid approximately $7,000 in expenses related to the reorganization.

On January 17, 1997, First Prairie Cash Management Fund reorganized into Cash Management Fund, a series of Prairie Institutional Funds. This applicant paid approximately $3,000 in expenses related to the reorganization.

On September 21, 1996, Prairie Intermediate Bond Fund reorganized into Woodward Income Fund, a series of The Woodward Funds. First Chicago NBD Corporation, the parent company of applicant's co-investment advisers, paid approximately $176,133 in expenses related to the reorganization.

On August 23, 1996, Prairie Managed Assets Fund, Prairie Growth Fund, Prairie Bond Fund, and Prairie International Equity Fund, each a series of Prairie Funds, reorganized into a corresponding series of The Woodward Funds. On September 14, 1996, Prairie U.S. Government Money Market Fund, Prairie Money Market Fund, and Prairie Municipal Money Market Fund, each a

series of Prairie Funds reorganized into a corresponding series of The Woodward Funds. On September 21, 1996, Prairie Managed Assets Income Fund, Prairie Equity Income Fund, Prairie Special Opportunity Fund, Prairie International Bond Fund and Prairie Intermediate Municipal Bond Fund, each a series of Prairie Funds, reorganized into a corresponding series of The Woodward Funds. First Chicago NBD Corporation, the parent company of applicant's co-investment advisers, paid approximately $1,888,347 in expenses related to the reorganization.

On July 15, 1996, Prairie Cash Management Fund, Prairie Treasury Prime Cash Management Fund, and Prairie U.S. Government Securities Cash Management Fund, each a series of Prairie Institutional Funds, reorganized into a corresponding series of The Woodward Funds. First Chicago NBD Corporation, the parent company of applicant's co-investment advisers, paid approximately $995,137 in expenses related to the reorganization.

Filing Dates: Each application was filed on June 27, 1997, and amended on October 20, 1997, and November 14, 1997.

Applicants' Address: Three First National Plaza, Chicago, Illinois 60670.

Target Income Fund, Inc. [File No. 811–6542]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On March 13, 1997, applicant completed a liquidation and sale of all of its investment assets to Concord Growth Corporation, a commercial finance services firm unaffiliated with applicant. On April 3, 1997, applicant completed a tender offer where each shareholder received its pro rata share of the aggregate net asset value of applicant. Applicant paid approximately $25,000 in expenses related to the liquidation.

Filing Dates: The application was filed on July 24, 1997, and amended on October 23, 1997.

Applicant's Address: 26691 Plaza Drive, Suite 222, Mission Viejo, CA 92691.

Neuberger & Berman Genesis Fund, Inc. [File No. 811–5562]
Neuberger & Berman Manhattan Fund, Inc. [File No. 811–1363]
Neuberger & Berman Partners Fund, Inc. [File No. 811–1601]
Neuberger & Berman Selected Sectors Fund, Inc. [File No. 811–691]

Summary: Each applicant requests an order declaring that it has ceased to be an investment company. On August 2, 1993, each applicant transferred its assets and liabilities to a new, identically named portfolio of the Neuberger & Berman Equity Funds, based on the relative net asset value per share of each fund. The approximate expenses of each merger, which were shared by the transferring and acquiring funds, were as follows: Neuberger & Berman Genesis Fund, $40,000; Neuberger & Berman Manhattan Fund, $141,000; Neuberger & Berman Partners Fund, $147,000; Neuberger & Berman Selected Sectors Fund, $84,000. In effect, the shareholders of each applicant paid the expenses related to the transaction because the relevant acquiring fund had no assets or shareholders prior to the transaction and its shareholders therefore were substantially the same as applicants' shareholders.

Filing Dates: The applications were filed on April 1, 1996, and amended on October 23, 1996.

Applicants' Address: 605 Third Avenue, New York, NY 10158–3698.

JP Investment Grade Bond Fund, Inc. [File No. 811–3544]
JP Capital Appreciation Fund, Inc. [File No. 811–3543]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. On December 20, 1996, each applicant sold substantially all of its assets to Oppenheimer Fund, Inc. All expenses of the sale were paid by Oppenheimer Fund, Inc. and the management of each applicant; shareholders paid no expenses in connection with the sale.

Filing Date: Both applications were filed on November 10, 1997.

Applicants' Address: 100 North Greene Street, Greensboro, North Carolina 27401.

Bankers National Variable Account C [File No. 811–4373]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant, a separate account organized as a unit investment trust, liquidated its holdings in Conseco Series Trust and made liquidating distributions to its security holders between December 10, 1991 and March 5, 1992. All expenses associated with Applicant's liquidation and dissolution were borne by Applicant's depositor.

Filing Dates: The application was filed on July 12, 1994, and amended and restated on October 15, 1997.

Applicant's Address: 11815 N. Pennsylvania Street, Carmel, IN 46032.

Jackson National Capital Management Funds [File No. 811–6611]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On December 20, 1996, applicant distributed its assets to its public shareholders of record at the net asset value per share. On December 23, 1996, applicant distributed all remaining assets to Jackson National Life Insurance Company, the sole remaining shareholder of record. Applicant's liquidation expenses totaled approximately $89,000 and were borne by Applicant's investment adviser.

Filing Dates: The application was filed on May 19, 1997, and amended on October 14, 1997.

Applicant's Address: 5901 Executive Drive, Lansing, Michigan 48911.

John Hancock Series, Inc. [File No. 811–5254]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On December 2, 1996, applicant on behalf of its series John Hancock Emerging Growth Fund transferred all of its assets to a new, identically named series of John Hancock Series Trust (''Series Trust''), based on the relevant net asset value per share of each fund. Reorganization expenses of approximately $225,106 were borne equally by applicant and the Series Trust.

Filing Date: The application was filed on July 7, 1997.

Applicant's Address: 101 Huntington Avenue, Boston, Massachusetts 02199–7603.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–31685 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39350; File No. SR–NASD–97–81]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Changes to the Rule 1010 Series, the Rule 8000 Series, and the Rule 9000 Series To Reflect Changes in the Corporate Organization of the National Association of Securities Dealers, Inc. and Its Subsidiaries

November 21, 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 31, 1997, the National Association of Securities Dealers, Inc. (''NASD''), through its regulatory subsidiary NASD Regulation,

Inc. (''NASD Regulation'' and collectively, the ''Association'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Regulation.[1] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Association is proposing to amend (a) Article V of the NASD Regulation By-Laws; (b) the Rule 1010 Series; (c) the Rule 8000 Series; (d) the Rule 9000 Series; and (e) certain other rules of the Association, generally to conform such rules to the corporate restructuring of the Association and to make clarifying and technical changes to such rules.

Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

BY-LAWS OF NASD REGULATION, INC.

Article V—National Adjudicatory Council

Sec. 5.1 Through 5.10

No change.

Sec. 5.11 The National Adjudicatory Council shall appoint a Review Subcommittee to determine whether disciplinary and membership proceeding decisions should be called for review by the National Adjudicatory Council under the Rules of the Association and to perform any other function authorized by the Rules of the Association. The Review Subcommittee shall be composed of no fewer than two and no more than four members of the National Adjudicatory Council. The number of Non-Industry members shall equal or exceed the number of Industry members. At all meetings of the Review Subcommittee, a quorum for the transaction of business shall consist of not less than 50 percent of the members of the Review Subcommittee, including not less than 50 percent of the Non-Industry members.

* * * * *

RULES OF THE ASSOCIATION

1000. MEMBERSHIP, REGISTRATION AND QUALIFICATION REQUIREMENTS

1010. Membership Proceedings

1011. Definitions

Unless otherwise provided, terms used in the Rule 1010 Series shall have the meaning as defined in Rule 0120.

(a) ''Applicant''

No change;

(b) ''Associated Person''

The term ''Associated Person'' means a *natural person registered under the Rules of the Association or a* sole proprietor, partner, officer, director, branch manager, or natural person occupying a similar status or performing similar functions who will be or is anticipated to be associated with the Applicant, or [any] *a* natural person engaged in the investment banking or securities business who will be or is anticipated to be directly or indirectly controlling or controlled by the Applicant, whether or not any such person is registered or exempt from registration under the NASD By-Laws or the Rules of the Association.

(c) ''Department''

No change.

(d) ''Director''

The term ''Director'' means a member of the NASD Regulation Board[, excluding the Chief Executive Officer of the NASD].

* * * * *

(I) ''Subcommittee''

The term ''Subcommittee'' means a subcommittee of the National [Business Conduct Committee] *Adjudicatory Council* that is constituted pursuant to Rule 1015 to conduct a review of a Department decision issued under the Rule 1010 Series.

1012. General Provisions

(a) Service of Notices and Decisions; Filing by Applicant

No change.

(b) Ex Parte Communications

(1) Unless on notice and opportunity for an Applicant and Interested Association Staff to participate, or to the extent required for the disposition of ex parte matters as authorized by the Rules of the Association:

(A) an Applicant, a counsel or representative of an Applicant, or an Interested Association Staff shall not make or knowingly cause to be made an ex parte communication relevant to the merits of a membership proceeding under the Rule 1010 Series to a Governor, [a Director,] a member of the National [Business Conduct Committee] *Adjudicatory Council* or a Subcommittee thereof, or an Association employee who is participating or advising in a decision of such a person with respect to that proceeding; and

(B) a Governor, [a Director,] a member of the National [Business Conduct Committee] *Adjudicatory Council* or a Subcommittee thereof, or an Association employee who is participating or advising in the decision of such a person with respect to a membership proceeding shall not make or knowingly cause to be made to an Applicant, a counsel or representative of the Applicant, or an Interested Association Staff an ex parte communication relevant to the merits of that proceeding.

(2) A Governor, [a Director,] a member of the National [Business Conduct Committee] *Adjudicatory Council* or a Subcommittee thereof, or an Association employee participating or advising in the decision of such a person, who receives, makes, or knowingly causes to be made a communication prohibited by this paragraph shall place in the record of the membership proceeding:

(A) all such written communications;

(B) memoranda stating the substance of all such oral communications; and

(C) all written responses and memoranda stating the substance of all oral responses to all such communications.

(3) The prohibitions against ex parte communications shall become effective when Association staff has knowledge that an Applicant intends to file a written request for review by the National [Business Conduct Committee] *Adjudicatory Council* under Rule 1015.

(c) Recusal or Disqualification

A Governor[, a Director,] or a member of the National [Business Conduct Committee] *Adjudicatory Council* or a Subcommittee thereof shall not participate in a matter governed by the Rule 1010 Series as to which that person has a conflict of interest or bias, or if circumstances otherwise exist where his

[1] Amendment Nos. 1 and 2 to this proposed rule filing were filed on November 12, 1997 and November 18, 1997, respectively. The changes contained in these amendments have been included in this Notice. *See* Letter Amendment No. 1 from T. Grant Callery, Senior Vice President and General Counsel, NASD to Katherine A. England, Assistant Director, Division of Market Regulation, Commission dated November 12, 1997; Letter Amendment No. 2 from Alden S. Adkins, Vice President and General Counsel, NASD Regulation to Katherine A. England, Assistant Director, Division of Market Regulation, Commission dated November 18, 1997. Several additional technical amendments are also included in this Notice. Telephone conversation between Sharon Zakula, Office of General Counsel, NASD Regulation and Mandy S. Cohen, Office of Market Supervision, Commission (November 20, 1997).

or her fairness might reasonably be questioned. In such a case, the person shall recuse himself or shall be disqualified as follows:

(1) The Chair of the NASD Board shall have authority to direct the disqualification of a Governor, and [the Vice Chair] *a majority* of the *Governors of the* NASD Board *excluding the Chair* shall have authority to direct the disqualification of the Chair of the NASD Board.

(2) The Chair of the [NASD Regulation Board] *National Adjudicatory Council* shall have authority to direct the disqualification of a [Director] *member of the Council or a member of a Subcommittee appointed pursuant to Rule 1015,* and the Vice Chair of the [NASD Regulation Board] *Council* shall have authority to direct the disqualification of the Chair of the [NASD Regulation Board] *National Adjudicatory Council.*

[(3) The Chair of the National Business Conduct Committee shall have authority to direct the disqualification of a member of the Committee or a member of a Subcommittee appointed pursuant to Rule 1015, and the Vice Chair of the Committee shall have authority to direct the disqualification of the Chair of the National Business Conduct Committee.]

[(d) Separation of Review Functions

A Director shall not participate or advise in the decision of a Governor with respect to the review of a membership proceeding under the Rule 1010 Series, and a Governor shall not participate or advise in the decision of a Director with respect to the review of a membership proceeding under the Rule 1010 Series.]

[(e)]*(d)* Computation of Time

No change.

1013. Application and Membership Interview

(a) Filing of Application

(1) No change.

(2) The second part of the application shall be filed with the Department of Member Regulation at the district office in the district in which the Applicant intends to have its principal place of business and shall include the following information and documents:

* * * * *

(C) [evidence of all registrations and licenses required by the Commission, state securities authorities, the Municipal Securities Rulemaking Board, the National Securities Clearing Corporation, and self-regulatory organizations, and] a copy of any decision by a federal or state authority or self-regulatory organization taking permanent or temporary adverse action with respect to a registration or licensing determination regarding the Applicant or an Associated Person;

* * * * *

1014. Department Decision

* * * * *

(e) Service and Effectiveness of Decision

The Department shall serve its decision and the membership agreement on the Applicant in accordance with Rule 1012. The decision shall become effective upon service and shall remain in effect during the pendency of any review until a decision constituting final action of the Association is issued under Rule 1015 or 1016, unless otherwise directed by the National [Business Conduct Committee, the NASD Regulation Board] *Adjudicatory Council,* the NASD Board, or the Commission.

(f) Effectiveness of Restriction

A restriction imposed under this Rule shall remain in effect and bind the Applicant and all successors to the ownership or control of the Applicant unless:

(1) removed or modified by the Department under Rule 1017;

(2) removed or modified by a decision constituting final action of the Association issued under Rule 1015 or 1016; or

(3) stayed by the National [Business Conduct Committee, the NASD Regulation Board] *Adjudicatory Council,* the NASD Board, or the Commission.

(g) Final Action

No change.

1015. Review by National [Business Conduct Committee] *Adjudicatory Council*

(a) [Request]*Initiation of Review*

(1) *Request by Applicant*

Within 25 days after service of a decision under Rule 1014, 1017, or 1018, an Applicant may file a written request for review with the National [Business Conduct Committee] *Adjudicatory Council.* A request for review shall state with specificity why the Applicant believes that the Department's decision is inconsistent with the membership standards set forth in Rule 1014, or otherwise should be set aside, and state whether a hearing is requested. The Applicant simultaneously shall send by first-class mail a copy of the request to the district office where the Applicant filed its membership application.

(2) *Notice of National Adjudicatory Council*

A decision issued under Rule 1014, 1017, or 1018 shall be subject to a call for review by any member of the National Adjudicatory Council or the Review Subcommittee defined in Rule 9120 within 30 days after service of the decision. If the National Adjudicatory Council calls a decision for review, a written notice of review shall be served promptly on the Applicant by first-class mail. The written notice of review shall state the specific grounds for the review and whether a hearing is directed. If a decision is called for review by any member of the National Adjudicatory Council or the Review Subcommittee the decision shall be reviewed by the National Adjudicatory Council. The National Adjudicatory Council simultaneously shall send by first-class mail a copy of the notice to the district office where the Applicant filed its membership application.

(b) Transmission of Documents

Within ten days after receipt of a request for *or notice of* review, the Department shall:

(1) transmit to the National [Business Conduct Committee] *Adjudicatory Council* copies of all documents that were considered in connection with the Department's decision and an index to the documents; and

(2) serve on the Applicant a copy of such documents (other than those documents originally submitted by Applicant) and a copy of the index.

(c) Membership Application Docket

The Department shall promptly record in the Association's membership application docket each request for *or notice of* review filed with the National [Business Conduct Committee] *Adjudicatory Council* under this Rule and each material subsequent event, filing, and change in the status of a membership proceeding.

(d) Appointment of Subcommittee

The National [Business Conduct Committee] *Adjudicatory Council or the Review Subcommittee defined in Rule 9120* shall appoint a Subcommittee to participate in the review. The Subcommittee shall be composed of at least two members. One member shall be a current member of the National [Business Conduct Committee] *Adjudicatory Council.* The remaining member or members shall be current or past Directors or past Governors.

(e) Powers of Subcommittee

If a hearing is requested *or directed*, the Subcommittee shall conduct the hearing. If a hearing is not requested, the Subcommittee may serve a notice directing that a hearing be held. If a hearing is not requested or directed, the Subcommittee shall conduct its review on the basis of the record developed before the Department and any written submissions made by the Applicant or the Department in connection with the request for review.

(f) Hearing

(1) Notice

If a hearing is requested or directed, the hearing shall be held within 45 days after the receipt of the request or service of the notice by the National [Business Conduct Committee] *Adjudicatory Council*. The National [Business Conduct Committee] *Adjudicatory Council* shall send written notice of the date and time of the hearing to the Applicant by facsimile or commercial courier not later than 14 days before the hearing.

(2) Counsel

No change.

(3) Evidence

Formal rules of evidence shall not apply to a hearing under this Rule. Not later than five days before the hearing, the Applicant and the Department shall exchange copies of their proposed hearing exhibits and witness lists and provide copies of the same to the National [Business Conduct Committee] *Adjudicatory Council*. If the Applicant or the Department fails to provide copies of its proposed hearing exhibits or witness list within such time, the Subcommittee shall exclude the evidence or witnesses from the proceeding, unless the Subcommittee determines that good cause is shown for failure to comply with the production date set forth in this subparagraph.

(4) Transcript

No change.

(5) Failure to Appear at Hearing

If an Applicant fails to appear at a hearing for which it has notice, the National [Business Conduct Committee] *Adjudicatory Council* may dismiss the request for review as abandoned, and the decision of the Department shall become the final action of the Association. Upon a showing of good cause, the National [Business Conduct Committee] *Adjudicatory Council* may withdraw a dismissal entered pursuant to this subparagraph.

(g) Additional Information, Briefs

At any time during its consideration, the Subcommittee of the National [Business Conduct Committee] *Adjudicatory Council* may direct the Applicant or the Department to submit additional information and to file briefs. Any additional information or brief submitted shall be provided to all parties before the National [Business Conduct Committee] *Adjudicatory Council* renders its decision.

(h) Subcommittee Recommendation

The Subcommittee shall present a recommended decision in writing to the National [Business Conduct Committee and all other Directors] *Adjudicatory Council* within 60 days after the date of the hearing held pursuant to paragraph (f), and not later than seven days before the meeting of the National [Business Conduct Committee] *Adjudicatory Council* at which the membership proceeding shall be considered.

(i) Decision

(1) Proposed Written Decision

After considering all matters presented in the review and the Subcommittee's recommended written decision, the National [Business Conduct Committee] *Adjudicatory Council* may affirm, modify, or reverse the Department's decision or remand the membership proceeding with instructions. The National [Business Conduct Committee] *Adjudicatory Council* shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents

No change.

(3) Issuance of Decision After Expiration of Call for Review Periods

The National [Business Conduct Committee] *Adjudicatory Council* shall provide its proposed written decision to the NASD [Regulation Board, and, if such decision is not called for review by the NASD Regulation Board, to the NASD Board. The NASD Regulation] *Board. The NASD* Board may call the membership proceeding for review pursuant to Rule 1016[(a). The]. *If the* NASD Board [may] *does not* call the membership proceeding for review [pursuant to Rule 1016(b). If neither the NASD Regulation Board nor the NASD Board calls the membership proceeding for review], the proposed written decision of the National [Business Conduct Committee] *Adjudicatory Council* shall become final. The National [Business Conduct Committee] *Adjudicatory Council* shall serve the Applicant with a written notice specifying the date on which the call for review period expired and stating that the final written decision will be served within 15 days after such date. The National [Business Conduct Committee] *Adjudicatory Council* shall serve its final written decision within 15 days after the date on which the call for review period expired. The decision shall constitute the final action of the Association for purposes of SEC Rule 19d–3, unless the National [Business Conduct Committee] *Adjudicatory Council* remands the membership proceeding.

(4) Failure To Issue Decision

If the National [Business Conduct Committee] *Adjudicatory Council* fails to serve its final written decision within the time prescribed in subparagraph (3), the Applicant may file a written request with the NASD Board requesting that the NASD Board direct the National [Business Conduct Committee] *Adjudicatory Council* to serve its decision immediately or to show good cause for an extension of time. Within seven days after receipt of such a request, the NASD Board shall direct the National [Business Conduct Committee] *Adjudicatory Council* to serve its written decision immediately or to show good cause for an extension of time. If the National [Business Conduct Committee] *Adjudicatory Council* shows good cause for an extension of time, the NASD Board may extend the 15 day time limit by not more than 15 days.

1016. Discretionary Review by [Boards] *NASD Board*

[(a) Discretionary Review by the NASD Regulation Board

(1) Call For Review By Director

A Director may call a membership proceeding for review by the NASD Regulation Board if the call for review is made within the period prescribed in paragraph (2).

(2) Seven Day Period; Waiver

After receiving the proposed written decision of the National Business Conduct Committee pursuant to Rule 1015, a Director shall have not less than seven days to determine if the membership proceeding should be called for review. A Director shall call a membership proceeding for review by notifying the General Counsel of NASD Regulation. By a unanimous vote of the NASD Regulation Board, The NASD Regulation Board may shorten the period to less than seven days. By an affirmative vote of the majority of the NASD Regulation Board then in office,

the NASD Regulation Board may, during the seven day period, vote to extend the period to more than seven days.

(3) Review at Next Meeting

If a Director calls a membership proceeding for review within the time prescribed in subparagraph (2), the NASD Regulation Board shall review the membership proceeding not later than the next meeting of the NASD Regulation Board. The NASD Regulation Board may direct the Applicant and the Department to file briefs in connection with review proceedings pursuant to this paragraph.

(4) Decision of NASD Regulation Board, Including Remand

After review, the NASD Regulation Board may affirm, modify, or reverse the proposed written decision of the National Business Conduct Committee. Alternatively, the NASD Regulation Board may remand the membership proceeding with instructions. The NASD Regulation Board shall prepare a proposed written decision that includes all of the elements described in Rule 1015(i)(2).

(5) Issuance of Decision After Expiration of Call for Review Period

The NASD Regulation Board shall provide its proposed written decision to the NASD Board. The NASD Board may call the membership proceeding for review pursuant to paragraph (b). If the NASD Board does not call the membership proceeding for review, the proposed written decision of the NASD Regulation Board shall become final. The NASD Regulation Board shall serve the Applicant with a written notice specifying the date on which the call for review period expired and stating that a final written decision will be served within 15 days after such date. The NASD Regulation Board shall serve its final written decision within 15 days after the date on which the call for review period expired. The decision shall constitute the final action of the Association for purposes of SEC Rule 19d–3, unless the NASD Regulation Board remands the membership proceeding.

(6) Failure To Issue Decision

If the NASD Regulation Board fails to serve its final written decision within the time prescribed in subparagraph (5), the Applicant may file a written request with the NASD Board requesting that the NASD Board direct the NASD Regulation Board to serve its decision immediately or to show good cause for an extension of time. Within seven days after receipt of such a request, the NASD Board shall direct the NASD Regulation Board to serve its written decision immediately or to show good cause for an extension of time. If the NASD Regulation Board shows good cause for an extension of time, the NASD Board may extend the 15 day time limit by not more than 15 days.]

[(b) Discretionary Review by the NASD Board]

[(1)]*(a)* Call for Review by Governor

A Governor may call a membership proceeding for review by the NASD Board if the call for review is made within the period prescribed in subparagraph (2).

[(2) Seven Day Period; Waiver]*(b) 15 Day Period; Waiver*

[(A) Membership Proceeding Called for Review by NASD Regulation Board

If the NASD Regulation Board reviewed the membership proceeding under paragraph (a), a] *A* Governor shall make his or her call for review at the next meeting of the NASD Board that is at least [seven] *15* days after the date on which the NASD Board receives the proposed written decision of the *National Adjudicatory Council* [NASD Regulation Board].

[(B) Membership Proceeding Not Called For by NASD Regulation Board

If no Director of the NASD Regulation Board called the membership proceeding for review under paragraph (a), a Governor shall make his or her call for review at the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the National Business Conduct Committee.]

[(C) Waiver]

By unanimous vote of the NASD Board, the NASD Board may shorten the period [in subparagraph (A) or (B)] to less than [seven] *15* days. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the [seven] *15* day period [in subparagraph (A) or (B)], vote to extend the period [in subparagraph (A) or (B)] to more than [seven] *15* days.

[(3)]*(c)* Review At Next Meeting

If a Governor calls a membership proceeding for review within the time prescribed in [subparagraph (2)] *paragraph (b),* the NASD Board shall review the membership proceeding not later than the next meeting of the NASD Board. The NASD Board may order the Applicant and the Department to file briefs in connection with review proceedings pursuant to this paragraph.

[(4)]*(d)* Decision of NASD Board, Including Remand

After review, the NASD Board may affirm, modify, or reverse [: (1)] the proposed written decision of the [NASD Regulation Board, or (2) if the NASD Regulation Board did not call the membership proceeding for review under paragraph (a), the proposed written decision of the National Business Conduct Committee] *National Adjudicatory Council.* Alternatively, the NASD Board may remand the membership proceeding with instructions. The NASD Board shall prepare a written decision that includes all of the elements described in Rule 1015(i)(2).

[(5)]*(e)* Issuance of Decision

The NASD Board shall serve its written decision on the Applicant within 15 days after the meeting at which it conducted its review. The decision shall constitute the final action of the Association for purposes of SEC Rule 19d–3, unless the NASD Board remands the membership proceeding.

1017. Removal or Modification of Business Restriction

* * * * *

(f) Service and Effectiveness of Decision

The Department shall serve its decision on the Applicant in accordance with Rule 1012. The decision shall become effective upon service and shall remain in effect during the pendency of any review until a decision constituting final action of the Association is issued under Rule 1015 or 1016, unless otherwise directed by the National [Business Conduct Committee, the NASD Regulation Board] *Adjudicatory Council,* the NASD Board, or the Commission.

(g) Request for Review; Final Action

An Applicant may file a written request for review of the Department's decision with the National [Business Conduct Committee] *Adjudicatory Council* pursuant to Rule 1015. The procedures set forth in Rule 1015 shall apply to such review, and the National [Business Conduct Committee's] *Adjudicatory Council's* decision shall be subject to discretionary review by [the NASD Regulation Board and] the NASD Board pursuant to Rule 1016. If the Applicant does not file a request for a review, the Department's decision shall constitute final action by the Association.

(h) Removal or Modification of Restriction on Department's Initiative

No change.

1018. Change in Ownership, Control, or Operations

* * * * *

(h) Service and Effectiveness of Decision

The Department shall serve its decision on the Applicant in accordance with Rule 1012. The decision shall become effective upon service and shall remain in effect during the pendency of any review until a decision constituting final action of the Association is issued under Rule 1015 or 1016, unless otherwise directed by the National [Business Conduct Committee, the NASD Regulation Board] *Adjudicatory Council*, the NASD Board, or the Commission.

(i) Request for Review; Final Action

An Applicant may file a written request for review of the Department's decision with the National [Business Conduct Committee] *Adjudicatory Council* pursuant to Rule 1015. The procedures set forth in Rule 1015 shall apply to such a review, and the National [Business Conduct Committee's] *Adjudicatory Council's* decision shall be subject to discretionary review by [the NASD Regulation Board and] the NASD Board pursuant to Rule 1016. If the Applicant does not file a request for review, the Department's action shall constitute the final action of the Association.

* * * * *

[4615. Automated Submission of Trading Data Requested by Association

(a) A member shall submit the trade data specified below in automated format as may be prescribed by the Association from time to time. This information shall be supplied with respect to any transaction or transactions that are the subject of a request for information made by the Association.

(1) If the transaction was a proprietary transaction effected or caused to be effected by the member for any account in which such member, or person associated with a member, is directly or indirectly interested, such member shall submit or cause to be submitted the following information:

(A) Clearing house number, or alpha symbol as used by the member submitting the data;

(B) Clearing house number(s) or alpha symbol(s) as may be used from time to time, of the member(s) on the opposite side of the transaction;

(C) Identifying symbol assigned to the security;

(D) Date transaction was executed;

(E) Number of shares, or quantity of bonds or options contracts for each specific transaction and whether each transaction was a purchase, sale, short sale, or if an options contract, whether open long or short or close long or short;

(F) Transaction price;

(G) Account number; and

(H) Market center where transaction was executed.

(2) If the transaction was effected or caused to be effected by the number for any customer account, such member shall submit or cause to be submitted the following information:

(A) The data described in subparagraphs (1)(A) through (H) above; and

(B) Customer name, address(es) branch office number, registered representative number, whether order was solicited or unsolicited, date account opened and employer name and the tax identification number(s).

(C) If transaction was effected for another member whether the other member was acting as principal or agent on the transaction or transactions that are the subject of the Association's request.

(3) In addition to the above trade data, a member shall submit such other information in such automated format as may from time to time be required by the Association.

(4) The Association may grant exceptions from the requirement that the data prescribed in subparagraphs (1) and (2) above be submitted to the Association in an automated format, in such cases and for such time periods as it deems appropriate.]

* * * * *

[5107. Automated Submission of Trading Data

Every Association member and approved affiliate that participates in Nasdaq International as a Service market maker or an order-entry firm shall submit to the Association the trade data specified below in automated format as may be prescribed by the Association from time to time. This information shall be supplied with respect to any transaction or transactions that are the subject of a request for information made by the Association. As used in paragraphs (a) through (d) hereof, the terms ''participating firm'' and ''firm'' include both Association members and approved affiliates that utilize the Service.

(a) If the transaction was a proprietary transaction effected or caused to be effected by the participating firm for any account in which such firm, or person associated with the firm, is directly or indirectly interested, the participating firm shall submit or cause to be submitted the following information:

(1) Clearing house number, or alpha symbol as used by the participating firm submitting the data;

(2) Clearing house number(s), or alpha symbol(s) as may be used from time to time, of the participating firm on the opposite side of the transaction;

(3) Identifying symbol assigned to the security;

(4) Date transaction was executed;

(5) Number of shares, ADRs, units, warrants or rights for each specific transaction and whether each transaction was a purchase, sale, or short sale;

(6) Transaction price;

(7) Account number; and

(8) Market center where transaction was executed.

(b) If the transaction was effected or caused to be effected by the participating firm for any customer account, such firm shall submit or cause to be submitted the following information:

(1) The data described in subparagraphs (1) through (8) of paragraph (a);

(2) Customer name, address(es), branch office number, registered representative number; whether order was solicited or unsolicited, date account opened and employer name, and the tax identification number(s); and

(3) If the transaction was effected for another Association member or participating firm, whether the other party was acting as principal or agent on the transaction or transactions that are the subject of the Association's request.

(c) In addition to the above trade data, a participating firm shall submit such other information in such automated format as may from time to time be required by the Association.

(d) The Association may grant exceptions from the requirement that the data prescribed in paragraphs (a) and (b) above be submitted to the Association in an automated format, in such cases and for such time periods as it deems appropriate.]

* * * * *

[6730. Automated Submission of Trade Data

Each member shall submit the trade data specified in Rule 4615 in automated format as may be prescribed by the Association from time to time with respect to any transaction or transactions involving non-Nasdaq

securities that are the subject of a request for information made by the Association.]

* * * * *

Investigations and Sanctions

Table of Contents [2]

* * * * *

8000. INVESTIGATIONS AND SANCTIONS

8100. GENERAL PROVISIONS

8110. Availability of Manual to Customers

[Every member of the Association shall keep in its main office and each of its branch offices] *Members shall keep and maintain* a current copy of the [Association's Manual and all amendments to it. Upon request, a member shall make the Manual and amendments available to any customer for examination.] *NASD Manual in a readily accessible place and shall make it available for examination by customers upon request.*

8120. Definitions

No change

[2] This table of contents is provided for convenience only, and is not a part of the amended Rules of the Association submitted for approval in this rule filing.

8200. INVESTIGATIONS

8210. Provision of Information and Testimony and Inspection and Copying of Books

* * * * *

(d) [Receipt of] Notice

A notice under this Rule shall be deemed [to have been] received by the member or person to whom it is directed by [the mailing thereof to the] *mailing or otherwise transmitting the notice to the last known* business address of [such] *the* member or *the last known residential address of the* person as reflected in the Central Registration Depository[, unless]. *If* the Adjudicator or Association staff responsible for [serving] *mailing or otherwise transmitting the notice to* the member or [associated] person has actual knowledge that the address *in the Central Registration Depository* is out of date[. In such case,] *or inaccurate, then* a copy of the notice shall be [served on the member at its last known address, or in the case of an associated person, at the associated person's] *mailed or otherwise transmitted to: (1) the last known business address of the member or the* last known residential address [and] *of* the [business address] *person as reflected* in the Central Registration Depository [of the member with which the person is employed or affiliated], *and (2) any other more current address of the member or the person known to the Adjudicator or Association staff who is responsible for mailing or otherwise transmitting the notice.*

* * * * *

8211. Automated Submission of Trading Data Requested by the Association

(a) A member shall submit the trade data specified below in automated format as may be prescribed by the Association from time to time. This information shall be supplied with respect to any transaction or transactions that are the subject of a request for information made by the Association.

(b) If the transaction was a proprietary transaction effected or caused to be effected by the member for any account in which such member, or person associated with a member, is directly or indirectly interested, such member shall submit or cuase to be submitted the following information:

(1) Clearing house number, or alpha symbol as used by the member submitting the data;

(2) Clearing house number(s), or alpha symbol(s) as may be used from time to time, of the member(s) on the opposite side of the transaction;

(3) Identifying symbol assigned to the security;

(4) Date transaction was executed;

(5) Number of shares, or quantity of bonds or options contracts for each specific transaction and whether each transaction was a purchase, sale, short sale, or, if an options contract, whether open long or short or close long or short;

(6) Transaction price;

(7) Account number; and

(8) Market center where transaction was executed.

(c) If the transaction was effected or caused to be effected by the member for any customer account, such member shall submit or cause to be submitted the following information:

(1) The data described in subparagraphs (b) (1) through (8) above;

(2) The customer name, address(es), branch office number, registered representative number, whether order was solicited or unsolicited, date account opened, employer name, and the tax identification number(s); and

(3) If thee transaction was effected for another member, whether the other member was acting as principal or agent.

(d) In addition to the above trade data, a member shall submit such other information in such automated format as may from time to time be required by the Association.

(e) Pursuant to the Rule 9600 Series, the Association may exempt a member from the requirement that the data prescribed in paragraphs (b) through (d) above be submitted to the Association in an automated format for good cause shown.

8212. Automated Submission of Trading Data for the Nasdaq International Service Requested by the Association

(a) Every Association member and approved affiliate that participates in the Nasdaq International Service as defined in the Rule 5100 Series (''Nasdaq International'') as a Service market maker or an order-entry firm shall submit to the Association the trade data specified below in automated format as may be prescribed by the Association from time to time. This information shall be supplied with respect to any transaction or transactions that are the subject of a request for information made by the Association. In this rule the terms ''participating firm'' and ''firm'' include both Association members and approved affiliates that utilize the Service.

(b) If the transaction was a proprietary transaction effected or caused to be effected by the participating firm for any account in whch such firm, or person

associated with the firm, is directly or indirectly interested, the participating firm shall submit or cause to be submitted the following information:

(1) Clearing house number, or alpha symbol as used by the participating firm submitting the data;

(2) Clearing house number(s), or alpha symbol(s) as may be used from time to time, of the participating firm on the opposite side of the transaction;

(3) Identifying symbol assigned to the security;

(4) Date transaction was executed;

(5) Number of shares, ADRs, units, warrants or rights for each specific transaction and whether each transaction was a purchase, sale or short sale;

(6) Transaction price;

(7) Account number; and

(8) Market center where transaction was executed.

(c) If the transaction was effected or caused to be effected by the participating firm for any customer account, such firm shall submit or cause to be submitted the following information:

(1) The data described in subparagraphs (b)(1) through (8);

(2) Customer name, address(es), branch office number, registered representative number, whether order was solicited or unsolicited, date account opened and employer name, and the tax identification number(s); and

(3) If the transaction was effected for another Association member or participating firm, whether the other party was acting as principal or agent on the transaction or transactions that are the subject of the Association's request.

(d) In addition to the above trade data, a participating firm shall submit such other information in such automated format as may from time to time be required by the Association.

(e) Pursuant to the Rule 9600 Series, the Association may exempt a person from the requirement that the data prescribed in paragraphs (b) through (d) above be submitted to the Association in an automated format for good cause shown.

8213. Automated Submission of Trading Data for Non-Nasdaq Securities Requested by the Association

Each member shall submit trade data specified in Rule 8211 in automated format as may be prescribed by the Association from time to time with respect to any transaction or transactions involving non-Nasdaq securities as defined in the rule 6700 Series that are the subject of a request for information made by the Association. Pursuant to the Rule 9600 Series, the Association may exempt a member from the requirement that the data prescribed in paragraphs (b) through (d) of Rule 8211 be submitted to the Association in an automated format for good cause shown.

8220. Suspension for Failure to Provide Requested Information

8221. Notice

(a) Notice to Member

If a member fails to provide any information, report, material, data, or testimony requested pursuant to the NASD By-Laws or the Rules of the Association, or fails to keep its membership application or supporting documents current, the National [Business Conduct Committee] *Adjudicatory Council* may provide written notice to such member specifying the nature of the failure and stating that the failure to take such action within 20 days after service of the notice constitutes grounds for suspension from membership.

(b) Notice to Person Associated with Member

If a person associated with a member fails to provide any information, report, material, data, or testimony requested pursuant to the NASD By-Laws or the Rules of the Association, the National [Business Conduct Committee] *Adjudicatory Council* may provide written notice to such person specifying the nature of the failure and stating that the failure to take such action within 20 days after service of the notice constitutes grounds for suspending the association of the person with the member.

(c) Service of Notice

The National [Business Conduct Committee] *Adjudicatory Council* shall serve the member of *person* associated [person] *with a member* with such notice via personal service or commercial courier.

8222. Hearing

(a) Request for Hearing

Within five days after the date of service of a notice issued under Rule 8221, a member or *person* associated [person] *with a member* served with a notice under Rule 8221(c) may file with the National [Business Conduct Committee] *Adjudicatory Council* a written request for an expedited hearing before a subcommittee of the National [Business Conduct Committee] *Adjudicatory Council.* The request shall state with specificity why the member or associated person believes that there are insufficient grounds for suspension or any other reason for setting aside the notice issued by the National [Business Conduct Committee] *Adjudicatory Council.*

(b) Hearing Procedures

(1) Appointment of Subcommittee

If a hearing is requested, the National [Business Conduct Committee] *Adjudicatory Council or the Review Subcommittee described in Rule 9120* shall appoint a subcommittee to conduct the hearing and decide whether the member or *person* associated [person] *with a member* should be suspended. The subcommittee shall be composed of a member of the National [Business Conduct Committee] *Adjudicatory Council* and one or more [current or past] *former* members of the NASD Regulation Board *and the NASD Board.*

(2) Time of Hearing

The hearing shall be held within 20 days after the date of service of the notice issued under Rule 8221. Not later than seven days before the hearing, the subcommittee shall serve the member or *person* associated [person] *with a member* with written notice of the date and time of the hearing via commercial courier or facsimile and notify the appropriate department or office of NASD Regulation of the date and time of the hearing. The appropriate department or office of NASD Regulation (hereinafter ''appropriate department or office'' in the Rule 8220 Series) shall be the department or office that issued the request for the information, report, material, data, or testimony that the member or associated person failed to provide, or in the case of a member that failed to keep its membership application or supporting documents current, the Department of Member Regulation.

(3) Transmission of Documents

Not later than seven days before the hearing, the subcommittee shall serve the member or *person* associated [person] *with a member* via commercial courier with all documents that were considered in connection with the National [Business Conduct Committee's] *Adjudicatory Council's* decision to issue a notice under Rule 8221.

(4) Counsel

The member or *person* associated [person] *with a member* and the appropriate department or office may be represented by counsel at a hearing conducted under this Rule.

(5) Evidence

Formal rules of evidence shall not apply to a hearing under this Rule. Not later than four days before the hearing, the member or *person* associated [person] *with a member* and the appropriate department or office shall exchange copies of proposed hearing exhibits and witness lists and provide copies of the same to the subcommittee.

(6) Witnesses

No change.

(7) Additional Information

At any time during its consideration, the subcommittee may direct the member or *person* associated [person] *with a member* or the appropriate department or office to submit additional information. Any additional information submitted shall be provided to all parties before the subcommittee renders its decision.

(8) Transcript

The hearing shall be recorded and a transcript prepared by a court reporter. The member or *person* associated [person] *with a member* may purchase a copy of the transcript from the court reporter at prescribed rates. A witness may purchase a copy of the transcript of his or her own testimony from the court reporter at prescribed rates. Proposed corrections to the transcript may be submitted by affidavit to the subcommittee within a reasonable time determined by the subcommittee. Upon notice to the participants in the hearing, the subcommittee may order corrections to the transcript as requested or sua sponte.

(9) Record

The record shall consist of all documents that were considered in connection with the National [Business Conduct Committee's] *Adjudicatory Council's* decision to issue a notice under Rule 8221, the notice issued under Rule 8221, the request for hearing filed under Rule 8222, the transcript of the hearing, and each document or other item of evidence presented to or considered by the Subcommittee. The Office of the General Counsel of NASD Regulation shall be the custodian of the record.

(10) Failure to Appear at Hearing

If a member or *person* associated [person] *with a member* fails to appear at a hearing for which it has notice, the subcommittee may dismiss the request for a hearing as abandoned, and the notice of the National [Business Conduct Committee] *Adjudicatory Council* issued under Rule 8221 shall become the final action of the Association. Upon a showing of good cause, the subcommittee may withdraw a dismissal entered pursuant to this subparagraph.

8223. Decision

(a) Subcommittee

No change.

(b) NASD Board of Governors

(1) Call for Review by Governor

No change.

(2) Review and Decision

If a Governor calls the suspension proceeding for review within the time prescribed in subparagraph (1), the NASD Board of Governors shall conduct a review not later than its next meeting. The NASD Board of Governors may affirm, modify, or reverse the decision of the subcommittee. Not later than seven days after the NASD Board of Governors meeting, the NASD Board of Governors shall serve a final written decision on the member or *person* associated [person] *with a member* via commercial courier or facsimile. The decision shall state the disposition of the suspension proceeding, and if a suspension is imposed, state the grounds for the suspension and the conditions for terminating the suspension.

* * * * *

8225. Termination of Suspension

A suspended member or *person* associated [person] *with a member* may file a written request for termination if the suspension on the ground of full compliance with the notice issued under Rule 8221 or, if applicable, the conditions of a decision under Rule 8223, with the head of the appropriate department or office. The head of the appropriate department or office shall respond to the request in writing within five days after receipt of the request. If the head of the appropriate department or office grants the request, he or she shall serve the member or *person* associated [person] *with a member* with written notice of the termination of the suspension via commercial courier or facsimile. If the head of the department or office denies the request, the suspended member or *person* associated [person] *with a member* may file a written request for relief with the National [Business Conduct Committee] *Adjudicatory Council*. The National [Business Conduct Committee] *Adjudicatory Council* shall respond to the request in writing within ten days after receipt of the request. The National [Business Conduct Committee] *Adjudicatory Council's* response shall be served on the member or *person* associated [person] *with a member* via commercial courier or facsimile.

8226. Copies of Notices and Decisions to Member

No change.

8227. Other Action Not Foreclosed

No change.

8300. SANCTIONS

8310. Sanctions for Violation of the Rules

(a) Imposition of Sanction

After compliance with the Rule 9000 Series, the Association may impose one or more of the following sanctions on a member or *person* associated [person] *with a member* for each violation of the federal securities laws, rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or Rules of the Association, or may impose one or more of the following sanctions on a member or *person* associated [person] *with a member* for any neglect or refusal to comply with an order, direction, or decision issued under the Rules of the Association:

(1) censure member or person associated with a member;

(2) impose a fine upon a member or person associated with a member;

(3) suspend the membership of a member or suspend the registration of a person associated with a member for a definite period or a period contingent on the performance of a particular act;

(4) expel a member, cancel the membership of a member, or revoke or cancel the registration of a person associated with a member;

(5) suspend or bar a member or person associated with a member from association with all members; or

(6) impose any other fitting sanction.

(b) Assent To Sanction

Each party to a proceeding resulting in a sanction shall be deemed to have assented to the imposition of the sanction unless such party files a written application for appeal, review, or relief pursuant to the Rule 9000 Series.

IM–8310–1. Effect of a Suspension, Revocation, Cancellation, or Bar

If the Association or the Commission issues an order that imposes a suspension, revocation, or cancellation of the registration of a person associated with a member or bars a person from further association with any member, a member shall not allow such person to remain associated with it in any

capacity, including a clerical or ministerial capacity. If the Association or the commission suspends a person associated with a member, the member also shall not pay or credit any salary, or any commission, profit, or other remuneration that results directly or indirectly from any securities transaction, that the *person* associated [person] *with a member* might have earned during the period of suspension.

* * * * * * *

Code of Procedure

Table of Contents [3]

[3] This table of contents is provided for convenience only, and is not a part of the amended Rules of the Association submitted for approval in this rule filing.

9525] *9524.* Discretionary Review by the NASD Board
[9526] *9525.* Application to Commission for Review

* * * * *

9000. CODE OF PROCEDURE

9100. Application and Purpose

9110. Application

No change.

9120. Definitions

(a) ''Adjudicator''

The term ''Adjudicator'' means: (1) a body, board, committee, group, or natural person that presides over a proceeding and renders a decision; (2) a body, board, committee, group, or natural person that presides over a proceeding and renders a recommended or proposed decision which is acted upon by an Adjudicator described in (1); or (3) a natural person who serves on a body, board, committee, or group described in (1) or (2). The term includes a *Review* Subcommittee as defined in paragraph (z), *a Subcommittee as defined in paragraph (bb),* an Extended Proceeding Committee as defined in paragraph [(k)]*(l),* and a Statutory Disqualification Committee as defined in paragraph [(y)]*(aa).*

* * * * *

(d) ''Counsel to the National [Business Conduct Committee] *Adjudicatory Council''*

The term ''Counsel to the National [Business Conduct Committee] *Adjudicatory Council''* means an attorney of the Office of the General Counsel of NASD Regulation *who is* responsible for advising the National [Business Conduct Committee] *Adjudicatory Council, the Review Subcommittee,* a Subcommittee, or an Extended Proceeding Committee regarding a disciplinary proceeding on appeal or review before the National [Business Conduct Committee.] *Adjudicatory Council.*

(e) ''Department of Enforcement''

The term ''Department of Enforcement'' means the Department of Enforcement or its delegatee, the Department of Market Regulation, except that the term excludes the Department of Market Regulation with respect to the actions of: (1) authorizing a complaint under Rule 9211; (2) determining the terms of a letter of acceptance, waiver, and consent or the terms of a minor rule violation plan letter under Rule 9216; (3) determining whether to contest an offer of settlement under Rule 9270; and (4) authorizing the filing of an appeal under Rule 9311.

(f) ''Director''

The term ''Director'' means a member of the Board of Directors of NASD Regulation[, excluding the Chief Executive Officer of the NASD.].

[(f)]*(g)* ''District Committee''

The term ''District Committee'' means a district committee elected pursuant to the NASD Regulation By-Laws or a resolution of the NASD Regulation Board.

[(g)]*(h)* ''Document''

The term ''Document'' means a writing, drawing, graph, chart, photograph, recording, or any other data compilation, including data stored by computer, from which information can be obtained.

[(h)]*(i) ''Extended Hearing''*

The term ''Extended Hearing'' means a disciplinary proceeding described in Rule 9231(c).

[(i)*(j)* ''Extended Hearing Panel''

The term ''Extended Hearing Panel'' means an Adjudicator that is constituted under Rule 9231(c) to conduct a disciplinary proceeding that is classified as an ''Extended Hearing'' and is governed by the Rule 9200 Series.

[(j)]*(k)* ''Extended Proceeding''

The term ''Extended Proceeding'' means a disciplinary proceeding described in Rule 9331(a)(2).

[(k)]*(l)* ''Extended Proceeding Committee''

The term ''Extended Proceeding Committee'' means an appellate Adjudicator that is [appointed by the National Business Conduct Committee and] constituted under Rule 9331[(a)(2)] to participate in the National [Business Conduct Committee's] *Adjudicatory Council's* considertation of a disciplinary proceeding that is classified as an ''Extended Proceeding'' and governed by the Rule 9300 Series.

[(l)]*(m)* ''General Counsel''

The term ''General Counsel'' means the General Counsel of NASD Regulation, or his or her delegatee, who shall be a person who reports to the General Counsel of NASD Regulation and is an Associate General Counsel, an Assistant General Counsel, or a person who has substantially the same or equivalent duties and responsibilities as an Associate General Counsel or an Assistant General Counsel.

[(m)]*(n)* ''Governor''

The term ''Governor'' means member of the Board of Governors of the NASD.

[(n)]*(o)* ''Head of Enforcement''

The term ''Head of Enforcement'' means the individual designated by the President of NASD Regulation to manage the Department of Enforcement, or his or her delegate *in the Department of Enforcement.*

(p)[(o)] ''Hearing Officer''

The term ''Hearing Officer'' means an employee of NASD Regulation who is an attorney and who is appointed by the Chief Hearing Officer to act in a adjudicative role and fulfill various adjudicative responsibilities and duties in the Rule 9200 Series regarding disciplinary proceedings brought against members and associated persons.

[(p)]*(q)* ''Hearing Panel''

The term ''Hearing Panel'' means an Adjudicator that is constituted under Rule 9231 to conduct a disciplinary proceeding governed by the Rule 9200 Series or that is constituted under the Rule 9500 Series to conduct a proceeding.

[(q)]*(r)* ''Interested Association Staff''

The term ''Interested Association Staff'' means, in the context of:

(1) a disciplinary proceeding under the Rule 9200 Series and the Rule 9300 Series:

(A) the Head of Enforcement;

(B) [a] *an employee of the* Department of Enforcement [employee] who reports, directly or indirectly, to the Head of Enforcement;

(C) an Association employee who directly participated in the authorization of the complaint; or

(D) an Association employee who directly participated in an examination, investigation, prosecution, or litigation related to a specific disciplinary proceeding, and a district director or department head to whom such employee reports;

(2) a proceeding under the Rule 9410 Series:

(A) the head of the Department of Member Regulation;

(B) a Department of Member Regulation employee who reports, directly or indirectly, to the head of the Department of Member Regulation;

(C) an Association employee who directly participated in the authorization of or the initial decision in the proceeding; or

(D) an Association employee who directly participated in an examination, investigation, prosecution, or litigation

related to a specific proceeding, and a district director or department head to whom such employee reports; or

(3) a proceeding under the Rule 9510 or 9520 Series:

(A) the head of the department or office that issues the notice or is designated as a Party;

(B) an Association employee who reports, directly or indirectly, to such person;

(C) an Association employee who directly participated in the initiation of the proceeding; or

(D) an Association employee who directly participated in an examination, investigation, prosecution, or litigation related to a specific proceeding, and a district director or department head to whom such employee reports; or[.]

[(r)]*(4) a proceeding under the Rule 9600 Series:*

(A) the head of the department or office that issues the decision granting or denying an exemption or is designated as a Party;

(B) an Association employee who reports, directly or indirectly, to such person;

(C) an Association employee who directly participated in the exemption proceeding; or

(D) an Association employee who directly participated in an examination, investigation, prosecution, or litigation related to a specific exemption proceeding, and a district director or department head to whom such employee reports.

(s) ''Market Regulation Committee''

The term ''Market Regulation Committee'' means the committee of NASD Regulation designated to consider the federal securities laws and rules and regulations adopted thereunder and various Rules of the Association and policies relating to:

(1) the quotations of securities;

(2) the execution of transactions;

(3) the reporting of transactions; and

(4) trading practices, including rules prohibiting manipulation and insider trading, and those Rules designated as Trading Rules (Rule 3300 Series), the Nasdaq Stock Market Rules (Rule 4000 Series), other Nasdaq and NASD Market Rules (Rule 5000 Series), NASD Systems and Programs Rules (Rule 6000 Series), and Charges for Services and Equipment Rules (Rule 7000 Series).

[(s)]*(t)* ''NASD Board''

The term ''NASD Board'' means the Board of Governors of the NASD.

[(t)]*(u)* ''NASD Regulation Board''

The term ''NASD Regulation Board'' means the Board of Directors of NASD Regulation.

[(u)]*(v)* ''Panelist''

The term ''Panelist'' as used in the Rule 9200 Series, means a member of a Hearing Panel or Extended Hearing Panel who is not a Hearing Officer. As used in the Rule 9300 Series, the term means a current or former Director or a former Governor who is appointed to serve on a Subcommittee or an Extended Proceeding Committee.

[(v)](*w*) ''Party''

With respect to a particular proceeding, the term ''Party'' means:

(1) in the Rule 9200 Series and the Rule 9300 Series, the Department of Enforcement or a Respondent;

(2) in the Rule 9410 Series and the Rule 9520 Series, the Department of Member Regulation or

(A) a member that is the subject of a notice under Rule 9412;

(B) a member that is the subject of a notice or files an application under Rule 9522;

[or]

(3) in the Rule 9510 Series, the department or office designated under Rule 9514(b) or a member or person that is the subject of a notice under Rule 9512 or Rule 9513*; or*[.]

[(w)]*(4) in the Rule 9600 Series, the department or office designated under Rule 9620 to issue the decision granting or denying an exemption or a member that seeks the exemption under Rule 9610.*

(x) ''Primary District Committee''

The term ''Primary District Committee'' means, in a disciplinary proceeding under the Rule 9200 Series, the District Committee designated by the Chief Hearing Officer pursuant to Rule 9232 to provide one or more of the Panelists to a Hearing Panel or, if applicable, to an Extended Hearing Panel, for such disciplinary proceeding.

[(x)]*(y)* ''Respondent''

The term ''Respondent'' means, in a disciplinary proceeding governed by the Rule 9200 Series and in an appeal or review governed by the Rule 9300 Series, an NASD member or associated person against whom a complaint is issued.

(z) ''Review Subcommittee''

The term ''Review Subcommittee'' means a body appointed by the National Adjudicatory Council pursuant to Article V of the NASD Regulation By-Laws.

(aa)[(y)] ''Statutory Disqualification Committee''

The term ''Statutory Disqualification Committee'' means a Subcommittee of the National [Business Conduct Committee] *Adjudicatory Council* [that is composed of current members of the NASD Regulation Board] that makes a recommended decision to grant or deny an application for relief from the eligibility requirements of the Association to the National [Business Conduct Committee] *Adjudicatory Council* pursuant to the Rule 9520 Series.

[(z)]*(bb)* ''Subcommittee''

The term ''Subcommittee'' means an Adjudicator that is [appointed by the National Business Conduct Committee]:

(1) constituted [by] *under* Rule 9331(a) to participate in the National [Business Conduct Committee's] *Adjudicatory Council's* consideration *of an appeal or a review* of a disciplinary proceeding pursuant to the Rule 9300 Series; [or]

(2) constituted under the Rule 9410 Series *or Rule 9630* to conduct a review proceeding.

* * * * *

9140. Proceedings

9141. Appearance and Practice; Notice of Appearance

(a) Representing Oneself

No change.

(b) Representing Others

A person shall not be represented before an Adjudicator, except as provided in this paragraph. Subject to the prohibitions of Rules 9150 and 9280, a person may be represented in any proceeding by an attorney at law admitted to practice before the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association. When a person first makes any filing or otherwise appears in a representative capacity before an Adjudicator in a proceeding, that person shall file with the Adjudicator, and keep current[,] *a Notice of Appearance. The Notice of Appearance is* a written notice stating the name of the proceeding; the representative's name, business address, and telephone number; and the name and address of the person or persons represented. Any individual appearing or practicing in a representative capacity before an Adjudicator may be required to file a power of attorney with the Adjudicator showing his or her authority to act in such capacity.

9142. Withdrawal by Attorney or Representative

No change.

9143. Ex Parte Communications

(a) Prohibited Communications

Unless on notice and opportunity for all Parties to participate, or to the extent required for the disposition of ex parte matters as authorized by the Rule 9000 Series:

(1) No Party, or counsel to or representative of a Party, or Interested Association Staff shall make or knowingly cause to be made an ex parte communication relevant to the merits of a proceeding to [a Governor, a Director, or] an Adjudicator who is participating in a decision with respect to that proceeding, or to an Association employee who is participating or advising in the decision of [a Governor, a Director, or] an Adjudicator with respect to that proceeding; and

(2) No [Governor, Director, or] Adjudicator who is participating in a decision with respect to a proceeding, or no Association employee who is participating or advising in the decision of [a Governor, a Director, or] an Adjudicator with respect to a proceeding shall make or knowingly cause to be made to a Party, a counsel or representative to a Party, or Interested Association Staff an ex parte communication relevant to the merits of that proceeding.

(b) Disclosure of Prohibited Communication

[A Governor, a Director, or an] *An* Adjudicator who is participating in a decision with respect to a proceeding, or an Association employee who is participating or advising in the decision of [a Governor, a Director, or] an Adjudicator, who receives, makes, or knowingly causes to be made a communication prohibited by this Rule shall place in the record of the proceeding:

(1) all such written communications;

(2) memoranda stating the substance of all such oral communications; and

(3) all written responses and memoranda stating the substance of all oral responses to all such communications.

(c) Remedies

No change.

(d) Timing

No change.

(e) Waiver of Ex Parte Prohibition

No change.

9144. Separation of Functions

(a) Interested Association Staff

Except as counsel or a witness in a proceeding or as provided in the Rule 9400 Series, Interested Association Staff is prohibited from advising an Adjudicator regarding a decision or otherwise participating in a decision of an Adjudicator. An Adjudicator is prohibited from advising Interested Association Staff regarding a decision or otherwise participating in a decision of Interested Association Staff, including the decision to issue a complaint and a decision whether to appeal or cross-appeal a disciplinary proceeding to the National [Business Conduct Committee] *Adjudicatory Council.*

(b) Separation of Adjudicators

A Hearing Officer, including the Chief Hearing Officer, or a Panelist of a Hearing Panel or an Extended Hearing Panel, is prohibited from participating in: a decision whether to issue a complaint pursuant to Rule 9211; a decision whether to appeal or cross-appeal a disciplinary proceeding to the National [Business Conduct Committee] *Adjudicatory Council* pursuant to Rule 9311; and a discussion or decision relating to a call for review, a review, or an appeal pursuant to the Rule 9300 Series. [A Director] *Except for the Chair of the National Adjudicatory Council, a Governor* is prohibited from participating in a discussion or *a* decision relating to the above referenced acts with the *Review Subcommittee or the* Adjudicators referenced above[, a Governor, or the NASD Board. A Governor is prohibited from participating in a discussion or a decision relating to the above referenced acts with the Adjudicators referenced above, a Director, or the NASD Regulation Board].

(c) Waiver of Prohibitions of Separation of Functions

No change.

9145. Rules of Evidence; Official Notice

No change.

9146. Motions

* * * * *

(j) Disposition of Procedural Motions; Disposition of Motions for Summary Disposition

(1) No change.

(2) In the Rule 9300 Series, a motion on a procedural matter may be decided by Counsel to the National [Business Conduct Committee, the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council, the Review Subcommittee,* a Subcommittee or, if applicable, an Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council.* A motion for disposition of a cause of action shall be decided by the National [Business Conduct Committee] *Adjudicatory Council,* except that a motion to dismiss a case for abandonment made under Rule 9344 may be decided by the [Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified) or the National Business Conduct Committee.] *Review Subcommittee.*

(3) No change.

(k) Motion for Protective Order

(1) A Party, a person who is the owner, subject, or creator of a Document subject to production under Rule 8210 or any other Rule which may be introduced as evidence in a disciplinary proceeding, or a witness who testifies at a hearing in a disciplinary proceeding may file a motion requesting a protective order to limit disclosure or prohibit from disclosure to other Parties, witnesses or other persons, except the Department of Enforcement and other Association staff, Documents or testimony that contain confidential information. The motion shall include a general summary or extract of the Documents or testimony without revealing confidential details. If the movant seeks a protective order against disclosure to other Parties, copies of the Documents shall not be served on the other Parties. Unless the Documents are unavailable, the movant shall file for *in camera* inspection a sealed copy of the Documents for which the order is sought. If the movant is not a Party, the motion shall be served on each Party by the movant using a method in Rule 9134(a) and filed with the Adjudicator. A motion for a protective order shall be granted only upon a finding that disclosure of the Document or testimony would have a demonstrated adverse business effect on the movant or would involve an unreasonable breach of the movant's personal privacy.

(2) If a protective order is granted, the order shall set forth the restrictions on use and disclosure of such Document or testimony. [A Hearing Officer) *An Adjudicator* does not have the authority to issue a protective order that would limit in any manner the use by the staff of the Association of such Documents or testimony in the Association staff's performance of their regulatory and self-regulatory responsibilities and

functions, including the transmittal, without restriction to the recipient, of such Documents or testimony to state, federal, or foreign regulatory authorities or other self-regulatory organizations. [A Hearing Officer] *An Adjudicator* does not have the authority to issue a protective order that purports to protect from production such Documents or testimony in the event that the Association is subject to a subpoena requiring that the Documents or testimony be produced.

(l) General

No change.

9147. Rulings on Procedural Matters

The NASD Board, the [NASD Regulation Board, the National Business Conduct Committee] *National Adjudicatory Council,* a Hearing Officer, or any other Adjudicator shall have full authority, except as otherwise provided by the Code, to rule on a procedural motion and any other procedural or administrative matter arising during the course of a proceeding conducted pursuant to the Code, subject to the rights of review or appeal provided by the Code.

9148. Interlocutory Review

No change.

9150. Exclusion From Rule 9000 Series Proceeding

(a) Exclusion

An Adjudicator may exclude an attorney for a Party or other person authorized to represent others by Rule 9141 from acting as counsel, acting in any representative capacity, or otherwise appearing in a particular Rule 9000 Series proceeding for contemptuous conduct under Rule 9280 or unethical or improper professional conduct in that proceeding. If an attorney for a Party, or other person authorized to represent others by Rule 9141, is excluded from a disciplinary hearing or conference, or any portion thereof, such attorney or person may seek review by the National [Business Conduct Committee] *Adjudicatory Council* of such exclusion under Rule 9280(c).

(b) Other Proceedings Not Precluded

No change.

9160. Recusal or Disqualification

No person shall participate as an Adjudicator in a matter governed by the Code as to which he or she has a conflict of interest or bias, or circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case the person shall recuse himself or herself, or shall be disqualified as follows:

(a) NASD Board

The Chair of the NASD Board shall have authority to order the disqualification of a Governor, and [the Vice] *a majority of the NASD Board excluding the* Chair of the NASD Board, shall have authority to order the disqualification of the Chair [of the NASD Board;)*:*

[(b) NASD Regulation Board]*(b) National Adjudicatory Council, Review Subcommittee, or Certain Subcommittees*

[The Chair of the NASD Regulation Board] *The Chair of the National Adjudicatory Council* shall have authority to order the disqualification of *a member of the National Adjudicatory Council or the Review Subcommittee, a member of* [Director and the Vice Chair of the NASD Regulation Board shall have authority to order the disqualification of the Chair of the NASD Regulation Board;

(c) National Business Conduct Committee or Certain Subcommittees

The Chair of the National Business Conduct Committee shall have authority to order the disqualification of a member of the National Business Conduct Committee,] a Subcommittee appointed pursuant to the Rule 9410 Series or *The Rule 9600 Series,* a Hearing Panel appointed pursuant to the Rule 9520 Series, and the Statutory Disqualification Committee; and the Vice Chair of the National [Business Conduct Committee] *Adjudicatory Council* shall have the authority to order the disqualification of the Chair of the National [Business Conduct Committee;] *Adjudicatory Council;*

[(d)]*(c)* Rule 9331 Subcommittee or Extended Proceeding Committee

Disqualification of a Panelist of a Subcommittee or Extended Proceeding Committee appointed under the Rule 9300 Series shall be governed by Rule 9332;

[(e)]*(d)* Rule 9514 Hearing Panel

The NASD Regulation Board or Nasdaq Board shall have authority to order the disqualification of a member of a Hearing Panel appointed by such Board under Rule 9514(b).

[(f)]*(e)* Panelist of Hearing Panel or Extended Hearing Panel

Disqualification of a Panelist of a Hearing Panel or Extended Hearing Panel appointed under the Rule 9200 Series shall be governed by Rule 9234;

[(g)]*(f)* Hearing Officer

Disqualification of a Hearing Officer of a Hearing Panel or an Extended Hearing Panel shall be governed by Rule 9233; and

[(h)]*(g)* NASD Regulation Staff As Adjudicator

The President of NASD Regulation shall have authority to order the disqualification of a member of the staff of the Department of Member Regulation participating in a Rule 9410 Series decision.

9200. DISCIPLINARY PROCEEDINGS

9210. Complaint and Answer

9211. [Issuance] *Authorization* of Complaint

(a) Complaint

(1) If the Department of Enforcement believes that any NASD member or associated person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which the Association has jurisdiction to enforce, the Department of Enforcement may authorize [and issue a complaint as set forth in Rule 9212] *a complaint.*

(2) The NASD Regulation Board and the NASD Board each shall have the authority to direct the Department of Enforcement to *authorize and* issue a complaint when, on the basis of information and belief, either of such boards is of the opinion that any NASD member or associated person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which the Association has jurisdiction to enforce.

[(3) At the time of authorization and issuance of a complaint, the Department of Enforcement may propose:

(A) an appropriate location for the hearing; and

(B) if the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(r), that the Chief Hearing Officer select a Market Regulation Committee Panelist for the Hearing Panel, or, if applicable, the Extended Hearing Panel as described in Rule 9231.]

(b) Commencement of Disciplinary Proceeding

No change.

9212. Complaint[-]*Issuance*—Requirements, Service, Amendment, Withdrawal, and Docketing

(a) Form, Content, Notice, Docketing, and Service

(1) If a complaint is authorized, the Department of Enforcement shall issue the complaint. Each complaint shall be in writing and signed by the Department of Enforcement. The complaint shall specify in reasonable detail the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision the Respondent is alleged to be violating or to have violated. If the complaint consists of several causes of action, each cause shall be stated separately. Complaints shall be served by the Department of Enforcement on each Party pursuant to Rules 9131 and 9134, and filed at the time of service with the Office of Hearing Officers pursuant to Rules 9135, 9136, and 9137.

(2) At the time of issuance of a complaint, the Department of Enforcement may propose:

(A) an appropriate location for the hearing; and

(B) if the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120 (s), that the Chief Hearing Officer select a Market Regulation Committee Panelist for the Hearing Panel, or, if applicable, the Extended Hearing Panel as described in Rule 9231.

* * * * *

9213. Assignment of Hearing Officer and Appointment of Panelists to Hearing Panel or Extended Hearing Panel

No change.

9214. Consolidation of Disciplinary Proceedings

(a) Initiated by Chief Hearing Officer

No change.

(b) Initiated by a Party

A Party may file a motion to consolidate two or more disciplinary proceedings if such consolidation would further the efficiency of the disciplinary process, if the subject complaints involve common questions of law or fact or one or more of the same Respondents, or if one or more of the factors favoring consolidation set forth in paragraph (a) appear to be present. If a Party moves to consolidate two or more disciplinary proceedings, the party shall file such motion, together with a copy of each relevant complaint and any answer thereto that has been filed, with the Office of Hearing Officers, and, *pursuant to Rule 9133,* shall serve the same upon the Parties [pursuant to Rule 9133] *in each of the cases proposed to be consolidated.* The Parties shall have 14 days after service to file a response, stating any arguments in favor of or opposition to consolidation, *and shall serve the response upon the Parties in each of the cases proposed to be consolidated. The Chief Hearing Officer shall issue an order approving or denying the request for consolidation.*

(c) Impact on Hearing Panel or Extended Hearing Panel

No change.

9215. Answer to Complaint

(a) Form, Service, Notice

[Each] *Pursuant to Rule 9133, each* Respondent named in a complaint shall [answer and] serve an answer to the complaint on all other Parties within 25 days after service of the complaint on such Respondent [pursuant to Rule 9133], and at the time of service *shall* file such answer with the Office of Hearing Officers pursuant to Rule 9135, 9136 and 9137. The Hearing Officer assigned to a disciplinary proceeding pursuant to Rule 9213 may extend such period for good cause. Upon the Receipt of a Respondent's answer, the Office of Hearing Officers shall promptly send written notice of the receipt of such answer to all Parties.

* * * * *

(e) Extension of Time to Answer Amended Complaint

If a complaint is amended pursuant to Rule 9212(b), the time for filing an answer or amended answer shall be extended to 14 days after service of the amended complaint. If any Respondent has already filed an answer, such Respondent shall have [15] *14* days after service of the amended complaint, unless otherwise ordered by the Hearing Officer, within which to file an amended answer.

(f) Failure to Answer, Default

If a Respondent does not file an answer *or make any other filing or request related to the complaint* with the Office of Hearing Officers within the time required, the [Hearing Officer shall order the] Department of Enforcement [to] *shall* send a second notice to such Respondent requiring an answer within 14 days after service of the second notice[, or within such longer period as the Hearing Officer in his or her discretion may order]. The second notice shall state that failure of the Respondent to reply within the period specified shall allow the Hearing Officer, in the exercise of his or her discretion, to: (1) treat as admitted by the Respondent the allegations in the complaint; and (2) enter a default decision against the Respondent pursuant to Rule 9269. If no answer is filed with the Office of Hearing Officers within the time required [by the second notice], the allegations of the complaint may be considered admitted by such Respondent and a default decision may be issued by the Hearing Officer. A Respondent may, for good cause shown, move the National [Business Conduct Committee] *Adjudicatory Council* to set aside a default.

9216. Acceptance, Waiver, and Consent; Plan Pursuant to SEC Rule 19d–1(c)(2)

(a) Acceptance, Waiver, and Consent Procedures

(1) Notwithstanding Rule 9211, if the Department of Enforcement has reason to believe a violation has occurred and the member or associated person does not dispute the violation, the Department of Enforcement may prepare and request that the member or associated person execute a letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such member's or associated person's right to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the National [Business Conduct Committee] *Adjudicatory Council,* the Commission, and the courts, or to otherwise challenge the validity of the letter, if the letter is accepted. The letter shall describe the act or practice engaged in or omitted, the rule, regulation, or statutory provision violated, and the sanction or sanctions to be imposed.

(2)(A) If a member or person associated with a member submits an executed letter of acceptance, waiver, and consent, by the submission such member or person associated with a member also waives:

(i) Any right of such member or person associated with a member to claim bias or prejudgment of the General Counsel, the National [Business Conduct Committee] *Adjudicatory Council,* or any member of the National [Business Conduct Committee] *Adjudicatory Council,* in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent; and

(ii) Any right of such member or person associated with a member to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent.

(B) If a letter of acceptance, waiver, and consent is rejected, the member or associated person shall be bound by the waivers made under subparagraphs (a)(1) and (a)(2)(A) for conduct by persons or bodies occurring during the period beginning on the date of the letter of acceptance, waiver, and consent was executed and submitted and ending upon the rejection of the letter of acceptance, waiver, and consent.

(3) If the member or associated person executes the letter of acceptance, waiver, and consent, it shall be submitted to the National [Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council. The Review Subcommittee* or the General Counsel may accept such letter or refer it to the National [Business Conduct Committee] *Adjudicatory Council* for acceptance or rejection by the National [Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council. The Review Subcommittee* may reject such letter or refer it to the National [Business Conduct Committee] *Adjudicatory Council* for acceptance or rejection by the National [Business Conduct Committee] *Adjudicatory Council.*

(4) If the letter is accepted by the National [Business Conduct Committee, the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council, the Review Subcommittee,* or the General Counsel, it shall be deemed final and shall constitute the complaint, answer, and decision in the matter. If the letter is rejected by the [Chair and Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified) or the National Business Conduct Committee] *Review Subcommittee or the National Adjudicatory Council,* NASD Regulation may take any other appropriate disciplinary action with respect to the alleged violation or violations. If the letter is rejected, the member or associated person shall not be prejudiced by the execution of the letter of acceptance, waiver, and consent under subparagraph (a)(1) and the letter may not be introduced into evidence in connection with the determination of the issues set forth in any complaint or in any other proceeding.

(b) Procedure for Violation Under Plan Pursuant to SEC Rule 19d–1(c)(2)

(1) Notwithstanding Rule 9211, NASD Regulation or the National [Business Conduct Committee] *Adjudicatory Council* may, subject to the requirements set forth in subparagraphs (b)(2) through (b)(4) and in SEC Rule 19d–1(c)(2), impose a fine (not to exceed $2,500) and/or a censure on any member or associated person with respect to any rule listed in IM–9216. If the Department of Enforcement has reason to believe a violation has occurred and if the member or associated person does not dispute the violation, the Department of Enforcement may prepare and request that the member or associated person execute a minor rule violation plan letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such member's or associated person's right to a hearing before the Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the National [Business Conduct Committee] *Adjudicatory Council,* the Commission, and the courts, or to otherwise challenge the validity of the letter, if the letter is accepted. The letter shall describe the act or practice engaged in or omitted, the rule, regulation, or statutory provision violated, and the sanction or sanctions to be imposed.

(2)(A) If a member or person associated with a member submits an executed minor rule violation plan letter, by the submission such member or person associated with a member also waives:

(i) any right of such member or person associated with a member to claim bias or prejudgment of the General Counsel, the National [Business Conduct Committee] *Adjudicatory Council,* or any member of the National [Business Conduct Committee] *Adjudicatory Council,* in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule violation plan letter; and

(ii) any right of such member or person associated with a member to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule violation plan letter.

(B) if a minor rule violation plan letter is rejected, the member or person associated with a member shall be bound by the waivers made under subparagraphs (b)(1) and (b)(2)(A) for conduct by persons or bodies occurring during the period beginning on the date the minor rule violation plan letter was executed and submitted and ending upon the rejection of the minor rule violation plan letter.

(3) If the member or associated person executes the minor rule violation plan letter, it shall be submitted to the National [Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council. The Review Subcommittee* or the General Counsel may accept such letter or refer it to the National [Business Conduct Committee] *Adjudicatory Council* for acceptance or rejection by the National [Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council. The Review Subcommittee* may reject such letter or refer it to the National [Business Conduct Committee] *Adjudicatory Council* for acceptance or rejection by the National [Business Conduct Committee] *Adjudicatory Council.*

(4) If the letter is accepted by the National [Business Conduct Committee, the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council, the Review Subcommittee,* or the General Counsel, it shall be deemed final and the Association shall report the violation to the Commission as required by the Commission pursuant to a plan approved under SEC Rule 19d–1(c)(2). If the letter is rejected by the [Chair and the Vice Chair of the National Business

Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), or by the National Business Conduct Committee] *Review Subcommittee or the National Adjudicatory Council,* NASD Regulation may take any other appropriate disciplinary action with respect to the alleged violation or violations. If the letter is rejected, the member or associated person shall not be prejudiced by the execution of the minor rule violation plan letter under subparagraph (b)(1) and the letter may not be introduced into evidence in connection with the determination of the issues set forth in any complaint or in any other proceeding.

IM–9216. Violations Appropriate for Disposition Under Plan Pursuant to SEC Rule 19d–1(c)(2)

- Rule 2210(b) and (c) and Rule 2220 (b) and (c)—Failure to have advertisements and sales literature approved by a principal prior to use; failure to maintain separate files of advertisements and sales literature containing required information; and failure to file advertisements with the Association within the required time limits.
- Rule 3360—Failure to timely file reports of short positions on Form NS–1.
- Rule 3110—Failure to keep and preserve books, accounts, records, memoranda, and correspondence in conformance with all applicable laws, rules, regulations and statements of policy promulgated thereunder, and with the Rules of the Association.
- *Rule 8211, Rule 8212, and Rule 8213—Failure to submit trading data as requested.*

9220. Request for Hearing; Extensions of Time, Postponements, Adjournments

9221. Request for Hearing

(a) Respondent Request for Hearing

With the filing of any Respondent's answer, such Respondent may: (1) request a hearing; (2) propose an appropriate location for the hearing; and (3) propose, if the complaint alleges at least one cause of action involving a violation of a statute or rule described in Rule 9120 [(r)*(s),* that the Chief Hearing Officer select a Market Regulation Committee Panelist for a Hearing Panel or, if applicable, an Extended Hearing Panel as described in Rule 9231. If a Respondent requests a hearing, a hearing shall be granted. A Respondent who fails to request a hearing with the filing of his or her answer waives the right to a hearing unless a Hearing Officer, Hearing Panel, or, if applicable, an Extended Hearing Panel, grants, for good cause shown, a later filed motion by such Respondent requesting a hearing.

* * * * *

9230. Appointment of Hearing Panel, Extended Hearing Panel

9231. Appointment by the Chief Hearing Officer of Hearing Panel or Extended Hearing Panel

(a) Appointment

No change.

(b) Hearing Panel

The Hearing Panel shall be composed of a Hearing Officer and two Panelists, except as provided in Rule 9234 (a), (c), (d), or (e). The Hearing Officer shall serve as the chair of the Hearing Panel. Each Panelist shall be associated with a member of the Association or retired therefrom.

(1) Except as provided in (2), the Chief Hearing Officer shall select as a Panelist a person who:

(A) currently serves or previously served on a District Committee;

(B) previously served on the National [Business Conduct Committee] *Adjudicatory Council*;

(C) previously served on a disciplinary subcommittee of the National *Adjudicatory Council or the National* Business Conduct Committee, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees; or,

(D) previously served as a Director, a director of the Nasdaq Board of Directors, or a Governor, but does not serve currently in any of these positions.

(2) If the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120 [r]*(s),* the Chief Hearing Officer may select as a Panelist a person who currently serves on the Market Regulation Committee or who previously served on the Market Regulation Committee not earlier than four years before the date the complaint was served upon the Respondent who was the first served Respondent in the disciplinary proceeding for which the Hearing Panel or the Extended Hearing Panel is being appointed.

(c) Extended Hearing Panel

Upon consideration of the complexity of the issues involved, the probable length of the hearing, or other factors that the Chief Hearing Officer deems material, the Chief Hearing Officer may determine that a matters shall be designated an Extended Hearing, and that such matter shall be considered by an Extended Hearing Panel. The Extended Hearing Panel shall be composed of a Hearing Officer and two Panelists, except as provided in Rule 9234(a), (c), (d), or (e). The Hearing Officer will serve as the chair of the Extended Hearing Panel. The Panelists shall be associated with a member of the Association, or retired therefrom. The Chief Hearing Officer shall have discretion to compensate any or all Panelists of an Extended Hearing Panel at the rate then in effect for arbitrators appointed under the Rule 10000 Series.

(1) Except as provided in (2), the Chief Hearing Officer shall select as a Panelist a person who meets the criteria set forth in paragraph (b)(1).

(2) If the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120 [r]*(s),* the Chief Hearing Officer may select as a Panelist a person who currently serves on the Market Regulation Committee or who previously served on the Market Regulation Committee not earlier than four years before the date the complaint was served upon the Respondent who was the first served Respondent in the disciplinary proceeding for which the Hearing Panel or the Extended Hearing Panel is being appointed.

(d) Observer

A person who is qualified to serve as a Panelist may be designated by the Chief Hearing Officer to serve as an observer to a Hearing Panel or an Extended Hearing Panel. If the Chief Hearing Officer designates more than two people to serve as observers to a Hearing Panel or an Extended Hearing Panel, the Chief Hearing Officer shall obtain the consent of the Parties. An observer may attend any hearing of a disciplinary proceeding and observe the proceeding, but may not vote or participate in any other manner in the hearing or the deliberations of the Hearing Panel or the Extended Hearing Panel, or participate in the administration of the disciplinary proceeding.

9232. Criteria for Selection of Panelists and Replacement Panelists

(a) Chief Hearing Officer Selection Alternatives

No change.

(b) Criteria for Selection of Panelist from Market Regulation Committee

The Chief Hearing Officer may select one but not more than one Panelist from the Market Regulation Committee, as provided in Rule 9231, to serve in a disciplinary proceeding if the complaint alleges at least one cause of action

involving a violation of a statute or a rule described in Rule 9120[(r)]*(s).*

* * * * *

9235. Hearing Officer Authority

(a) Hearing Officer Authority

No change.

(b) Authority in the Absence of Hearing Officer

If the Hearing Officer appointed to a case is temporarily unavailable or unable for any reason to discharge his or her duties in a particular proceeding under conditions not requiring the appointment of a replacement Hearing Officer, the Chief Hearing Officer or the Deputy Chief Hearing Officer in his or her discretion may exercise the necessary authority in the same manner as if he or she had been appointed Hearing Officer in the particular proceeding.

9240. Pre-hearing Conference and Submission

9241. Pre-hearing Conference

* * * * *

(d) Scheduling

An initial pre-hearing conference, unless determined by the Hearing Officer to be unnecessary or premature, shall be held within 21 days after [service] *filing* of an answer, or after the expiration of the second period provided for filing an answer as set forth in Rule 9215(f). When a complaint names multiple Respondents, the 21-day period shall commence from the later of (i) the date on which the last timely answer was filed, or (ii) if one or more Respondents have failed to answer, from the expiration of the second period provided for filing an answer under Rule 9215(f).

* * * * *

9250. Discovery

9251. Inspection and Copying of Documents in Possession of Staff

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(g) Failure to Make Documents Available—Harmless Error

In the event that a Document required to be made available to a Respondent pursuant to this Rule is not made available by the Department of Enforcement, no rehearing or amended decision of a proceeding already heard or decided shall be required unless the Respondent establishes that the failure to make the Document available was not harmless error. The Hearing Officer, or, upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council,* shall determine whether the failure to make the document available was not harmless error, applying applicable Association, Commission, and federal judicial precedent.

9252. Requests for Information

No change.

9253. Production of Witness Statements

(a) Availability

A Respondent in a disciplinary proceeding may file a motion requesting that the Department of Enforcement produce for inspection and copying [a] *any* statement of any person called or to be called as a witness by the Department of Enforcement that pertains, or is expected to pertain, to his or her direct testimony [, including statements] *and* that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500. The production shall be made at a time and place fixed by the Hearing Officer and shall be made available to all Parties. Such production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) Failure to Produce—Harmless Error

In the event that a statement required to be made available for inspection and copying by a Respondent is not provided by the Department of Enforcement, there shall be no rehearing of a proceeding already heard, or issuance of an amended decision in a proceeding already decided, unless the Respondent establishes that the failure to provide the statement was not harmless error. The Hearing Officer, or upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council,* shall determine whether the failure to provide any statement was not harmless error, applying applicable Association, Commission, and federal judicial precedent.

* * * * *

9270. Settlement Procedure

(a) When Offer Allowed; No Stay of Proceeding

A Respondent who is notified that a proceeding has been instituted against him or her may propose in writing an offer of settlement at any time. If a Respondent proposes an offer of settlement [30 or fewer days] before the hearing on the merits [is scheduled to begin, or] *has begun, the making of an offer of settlement shall not stay the proceeding, unless otherwise decided by the Hearing Officer. If a Respondent proposes an offer of settlement* after the hearing on the merits has begun, the making of an offer of settlement shall not stay the proceeding, unless otherwise decided by the Hearing Panel or, if applicable, the Extended Hearing Panel.

* * * * *

(d) Waiver

(1) If a Respondent submits an offer of settlement, by the submission such Respondent waives:

(A) any right of such Respondent to a hearing before a Hearing Panel or, if applicable, and Extended Hearing Panel, and any right of appeal to the National [Business Conduct Committee] *Adjudicatory Council,* the Commission, and the courts, or any right otherwise to challenge or contest the validity of the order issued, if the offer of settlement and order of acceptance are accepted;

(B) any right of such Respondent to claim bias or prejudgment of the Chief Hearing Officer, Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, a Panelist on a Hearing Panel, or, if applicable, an Extended Hearing Panel, the General Counsel, the National [Business Conduct Committee] *Adjudicatory Council,* or any member of the National [Business Conduct Committee] *Adjudicatory Council,* in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of acceptance, including acceptance, or rejection of such offer of settlement and order of acceptance; and

(C) any right of such Respondent to claim that a person or body violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussion regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of settlement, including acceptance or rejection of such offer of settlement and order of acceptance.

(2) If an offer of settlement and an order of acceptance are rejected, the Respondent shall be bound by the waivers made in this paragraph (d) for conduct by persons or bodies occurring during the period beginning from the date the offer of settlement was submitted and ending upon the rejection of the offer of settlement and order of acceptance.

(e) Uncontested Offers of Settlement

If a Respondent makes an offer of settlement and the Department of Enforcement does not oppose it, the offer of settlement is uncontested. If an offer of settlement is determined to be uncontested by the Department of Enforcement before a hearing on the merits has begun, the Department of Enforcement shall transmit the uncontested offer of settlement and a proposed order of acceptance to the National [Business Conduct Committee] *Adjudicatory Council* with its recommendation. If an offer of settlement is determined to be uncontested by the Department of Enforcement after a hearing on the merits has begun, the Department of Enforcement shall transmit the offer of settlement and a proposed order of acceptance to the Hearing Panel or, if applicable, the Extended Hearing Panel for acceptance or rejection. If accepted by the Hearing Panel or, if applicable, Extended Hearing Panel, the offer of settlement and the order of acceptance shall be forwarded to the National [Business Conduct Committee] *Adjudicatory Council* to accept or reject.

(1) A proposed order of acceptance shall make findings of fact, including a statement of the rule, regulation, or statutory provision violated, and impose sanctions consistent with the terms of the offer of settlement.

(2) Before an offer of settlement and an order of acceptance shall become effective, they shall be submitted to and accepted by the National [Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council. The Review Subcommittee* or the General Counsel may accept such offer of settlement and order of acceptance or refer them to the National [Business Conduct Committee] *Adjudicatory Council* for acceptance or rejection by the National [Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council. The Review Subcommittee* may reject such offer of settlement and order of acceptance or refer them to the National [Business Conduct Committee] *Adjudicatory Council* for acceptance or rejection by the National [Business Conduct Committee] *Adjudicatory Council.*

(3) If the offer of settlement and order of acceptance are accepted by the National [Business Conduct Committee, the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council, the Review Subcommittee,* or the General Counsel, they shall become final and the National [Business Conduct Committee, the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified),] *Adjudicatory Council. The Review Subcommittee* or the General Counsel shall communicate the acceptance to the Hearing Officer who shall thereafter issue the order.

(f) Contested Offers of Settlement

If a Respondent makes an offer of settlement and the Department of Enforcement opposes it, the offer of settlement is contested. When the Department of Enforcement opposes an offer of settlement, the Respondent's written offer and the Department of Enforcement's written opposition shall be submitted to a Hearing Panel or, if applicable, an Extended Hearing Panel. The Hearing Panel or, if applicable, the Extended Hearing Panel, may order the Department of Enforcement and the Respondent to attend a settlement conference.

(1) If a contested offer of settlement is approved by the Hearing Panel or, if applicable, Extended Hearing Panel, the Hearing Officer shall draft an order of acceptance of the offer of settlement. The order of acceptance shall make findings of fact, including a statement of the rule, regulation, or statutory provision violated, and impose sanctions consistent with the terms of the offer of settlement. The offer of settlement, any written opposition thereto, and the order of acceptance shall be forwarded to the National [Business Conduct Committee] *Adjudicatory Council* to accept or reject.

(2) Before an offer of settlement and order of acceptance shall become effective, they shall be submitted to, and accepted by, the National [Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council. The Review Subcommittee* may accept or reject such offer of settlement and order of acceptance or refer them to the National [Business Conduct Committee] *Adjudicatory Council* for acceptance or rejection by the National [Business Conduct Committee] *Adjudicatory Council.*

(3) If the offer of settlement and order of acceptance are accepted by the National [Business Conduct Committee or the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), the National Business Conduct Committee or the Chair or the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council or the Review Subcommittee, the National Adjudicatory Council or the Review Subcommittee* shall communicate the acceptance to the Hearing Officer who shall thereafter issue the order.

(g) Final Disciplinary Action of Association

No Change.

(h) Rejection of Offer of Settlement

If an uncontested offer of settlement or an order of acceptance is rejected by the Hearing Panel or, if applicable, the Extended Hearing Panel, the [Chair and Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), or the National Business Conduct Committee] *Review Subcommittee, or the National Adjudicatory Council,* the Respondent shall be notified in writing and the offer of settlement and proposed order of acceptance shall be deemed withdrawn. If a contested offer of settlement or an order of acceptance is rejected by the Hearing Panel or, if applicable, the Extended Hearing Panel, the [Chair and Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), or the National Business Conduct Committee] *Review Subcommittee, or the National Adjudicatory Council,* the Respondent shall be notified in writing and the offer of settlement and proposed order of acceptance shall be deemed withdrawn. The rejected offer and proposed order of acceptance shall not constitute a part of the record in any proceeding against the Respondent making the offer.

(i) Disciplinary Proceeding With Multiple Respondents

No change.

(j) No Prejudice From Rejected Offer of Settlement

If an offer of settlement is rejected by a Hearing Panel or, if applicable, an Extended Hearing Panel, the [Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), or the National Business Conduct Committee] *Review*

Subcommittee, or the National Adjudicatory Council, the Respondent shall not be prejudiced by the offer, which may not be introduced into evidence in connection with the determination of the issues involved in the pending complaint or in any other proceeding.

9280. Contemptuous Conduct

* * * * *

(c) National [Business Conduct Committee] *Adjudicatory Council* Review of Exclusions

If an attorney for a Party, or other person authorized to represent others by Rule 9141, is excluded from a disciplinary hearing or conference, or any portion thereof, such attorney or other person may seek review of the exclusion by filing a motion to vacate with the National [Business Conduct Committee] *Adjudicatory Council.* Such motion to vacate shall be filed and served on all Parties within five days after service of the exclusion order. Any response shall be filed with the National [Business Conduct Committee] *Adjudicatory Council* and served on all Parties within five days after the service to the motion to vacate. The National [Business Conduct Committee] *Adjudicatory Council or the Review Subcommittee* shall consider such motion on an expedited basis and promptly issue a written order. The filing of a motion to vacate shall stay all aspects of the disciplinary proceeding until at least seven days after service of the order of the National [Business Conduct Committee. The National Business Conduct Committee] *Adjudicatory Council or the Review Subcommittee. The* review proceedings shall be conducted on the basis of the written record without oral argument.

(d) Adjournment

The hearing, conferences, or other activities relating to the disciplinary proceeding shall be stayed pending the [National Business Conduct Committee's review] *review by the National Adjudicatory Council or the Review Subcommittee* of an exclusion order in paragraph (c). In the event that the National [Business Conduct Committee] *Adjudicatory Council or the Review Subcommittee* upholds an exclusion of an attorney or other person authorized to represent others by Rule 9141, the Hearing Officer may, upon motion by a Party represented by an attorney or other person subject to an order of exclusion, grant an adjournment to allow the retention of new counsel or selection of a new representative. In determining whether to grant an adjournment or the length of an adjournment, the Hearing Officer shall consider whether there are other counsel or representatives of record on behalf of the Party, the availability of other counsel or other members of an excluded attorney's firm, or the availability of other representatives for the Party, and any other relevant factors.

9300. REVIEW OF DISCIPLINARY PROCEEDING BY NATIONAL [BUSINESS CONDUCT COMMITTEE, NASD REGULATION AND NASD BOARDS] *ADJUDICATORY COUNCIL AND NASD BOARD*; APPLICATION FOR COMMISSION REVIEW

9310. Appeal to or Review by National [Business Conduct Committee] *Adjudicatory Council*

9311. Appeal by Any Party; Cross-Appeal

(a) Time to File Notice of Appeal

No change.

(B) Effect

An appeal to the National [Business Conduct Committee] *Adjudicatory Council* from a decision issued pursuant to Rule 9268 or Rule 9269 shall operate as a stay of that decision until the National [Business Conduct Committee] *Adjudicatory Council* issues a decision pursuant to Rule 9349 or, in cases called for discretionary review by the NASD Regulation or NASD Boards, until a decision is issued pursuant to Rule 9351 or Rule 9352.

(c) Notice of Appeal Content and Signature Requirements

A Party appealing pursuant to this Rule shall file a written notice of appeal with the Office of Hearing Officers and service the notice on the Parties. The notice of appeal shall be signed by the appealing Party, or his or her counsel or representative, and shall contain:

(1) The name of the disciplinary proceeding;

(2) The disciplinary proceeding docket number;

(3) The name of the Party on whose behalf the appeal is made;

(4) A statement on whether oral argument before the National [Business Conduct Committee] *Adjudicatory Council* is requested; and

(5) A brief statement of the findings, conclusions, or sanctions as to which exceptions are taken.

(d) Notice of Cross-Appeal

No change.

(e) Waiver of Issues Not Raised

The National [Business Conduct Committee] *Adjudicatory Council* may, in its discretion, deem waived any issued not raised in the notice of appeal or cross-appeal. The National [Business Conduct Committee] *Adjudicatory Council,* the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or, for a disciplinary proceeding decided under Rule 9269, the General Counsel, shall provide the Parties with notice of, and an opportunity to submit briefs on, any issue that shall be considered by the National [Business Conduct Committee] *Adjudicatory Council* if such issue was not previously set forth in the notice of appeal.

(f) Withdrawal of Notice of Appeal or Cross-Appeal

No change.

9312. Review Proceeding Initiated By National [Business Conduct Committee] *Adjudicatory Council*

(a) Call for Review

(1) Rule 9268 Decision

A decision issued pursuant to Rule 9268 may be subject to a call for review by any member of the National [Business Conduct Committee] *Adjudicatory Council* or, pursuant to authority delegated from the National [Business Conduct Committee] *Adjudicatory Council,* by any member of the Review Subcommittee [of the National Business Conduct Committee. The Review Subcommittee shall be composed of two to four persons who are current members of the National Business Conduct Committee. At least 50 percent of the persons making up the Review Subcommittee shall be Non-Industry Directors]. A decision issued pursuant to Rule 9268 shall be subject to a call for review within 45 days after the date of service of the decision. If called for review, such [decision shall be reviewed by the National [Business Conduct Committee] *Adjudicatory Council.*

(2) Rule 9269 Decision

A default decision issued pursuant to Rule 9269 shall be subject to a call for review by the General Counsel, on his or her own motion within 45 days after the date of service of the decision. If called for review, such decision shall be reviewed by the National [Business Conduct Committee] *Adjudicatory Council.*

(b) Effect

Institution of review by a member of the National [Business Conduct Committee] *Adjudicatory Council* on his or her own motion, a member of the Review Subcommittee on his or her own

motion, or the General Counsel, on his or her own motion, shall operate as a stay of a final decision issued pursuant to Rule 9268 or Rule 9269 as to all Parties subject to the notice of review, until the National [Business Conduct Committee] *Adjudicatory Council* issues a decision pursuant to Rule 9349, or, in cases called for discretionary review by the NASD [Regulation or NASD Boards] *Board*, until a decision is issued pursuant to Rule 9351 [or Rule 9352].

(c) Requirements

(1) If a member of the National [Business Conduct Committee] *Adjudicatory Council*, a member of the Review Subcommittee, or, for a disciplinary proceeding decided under Rule 9269, the General Counsel determines to call a case for review, a written notice of review shall be served promptly on each Party to the proceeding and filed with the Office of Hearing Officers. Such notice of review shall contain:

(A) the name of the disciplinary proceeding;

(B) the disciplinary proceeding docket number; and

(C) a brief statement of the findings, conclusions, or sanctions with respect to which the National [Business Conduct Committee] Adjudicatory Council, the Review Subcommittee, or the General Counsel determined that a call for review was necessary.

(2) The statement contained in the notice of review shall not limit the scope of the National [Business Conduct Committee's] *Adjudicatory Council's* authority under Rule 9346 to review any issues raised in the [decision rendered pursuant to Rule 9268 or Rule 9269.] *record*. The National [Business Conduct Committee] *Adjudicatory Council*, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or, for a disciplinary proceeding decided under Rule 9269, the General Counsel shall provide the Parties with notice of, and an opportunity to submit briefs on, any issue that shall be considered by the National [Business Conduct Committee] *Adjudicatory Council* if such issue was not previously set forth in the notice of review.

(d) Effect of Withdrawal of Notice of Appeal, Cross-Appeal

If the review of a disciplinary proceeding by the National [Business Conduct Committee] *Adjudicatory Council* is terminated before the National [Business Conduct Committee] *Adjudicatory Council* issues a decision on the merits because all appealing Parties file a notice of withdrawal of appeal and no Party previously filed a notice of cross-appeal, or all Parties who previously filed a notice of cross-appeal file a notice of withdrawal of cross-appeal:

(1) a member of the National [Business Conduct Committee or of] *Adjudicatory Council or* the Review Subcommittee shall have the right to call for review a decision issued pursuant to Rule 9268 in accordance with Rule 9312(a)(1), except that the 45 day period during which a call for review may be made shall begin on the day the Association receives the last filed notice of withdrawal of appeal or, if applicable, the last filed notice of withdrawal of cross-appeal; and,

(2) No change.

9313. Counsel to National [Business Conduct Committee] *Adjudicatory Council*

(a) Authority

A Counsel to the National [Business Conduct Committee] *Adjudicatory Council* shall be appointed by the General Counsel for each disciplinary case on appeal or review. A Counsel to the National [Business Conduct Committee] *Adjudicatory Council* shall have authority to take ministerial and administrative actions to further the efficient administration of a proceeding, including the authority to:

(1) direct the Office of Hearing Officers to complete and transmit a record of a disciplinary proceeding to the National [Business Conduct Committee] *Adjudicatory Council* in accordance with Rule 9267;

* * * * *

(b) Review

A Party seeking the review of a decision of a Counsel to the National [Business Conduct Committee] *Adjudicatory Council*, may make a motion to the National [Business Conduct Committee] *Adjudicatory Council, the Review Subcommittee*, a Subcommittee or, if applicable, an Extended Proceeding Committee.

9320. [Transmission] *Transmission* of Record; Extensions of Time, Postponements, Adjournments

9321. Transmission of Record

Within 21 days after the filing of a notice of appeal or notice of review, or at such later time as the National [Business Conduct Committee] *Adjudicatory Council* may designate, the Office of Hearing Officers shall assemble and prepare an index to the record, transmit the record and the index to the National [Business Conduct Committee] *Adjudicatory Council*, and serve copies of the index upon all Parties. The Hearing Officer who participated in the disciplinary proceeding, or the Chief Hearing Officer, shall certify that the record transmitted to the National [Business Conduct Committee] *Adjudicatory Council* is complete.

9322. Extensions of Time, Postponements, Adjournments

(a) Availability

At any time prior to the issuance of a decision pursuant to Rule 9349, the National [Business Conduct Committee] *Adjudicatory Council, the Review Subcommittee*, a Subcommittee or, if applicable, and Extended Proceeding Committee, or Counsel to the National [Business Conduct Committee] *Adjudicatory Council*, for good cause shown, may extend or shorten a period prescribed by the Code for the filing of any papers, except that Counsel to the National [Business Conduct Committee] *Adjudicatory Council* may shorten a period so prescribed only with the consent of the Parties. The National [Business Conduct Committee] *Adjudicatory Council, the Review Subcommittee*, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the National [Business Conduct Committee] *Adjudicatory Council*, for good cause shown, may postpone or adjourn a hearing consistent with paragraph (b), except that Counsel to the National [Business Conduct Committee] *Adjudicatory Council* may postpone or adjourn a hearing only with the consent of the Parties.

(b) Limitations on Postponements, Adjournments, and Changes in Location

Oral argument shall begin at the time and place ordered, unless the National [Business Conduct Committee] *Adjudicatory Council, the Review Subcommittee*, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the National [Business Conduct Committee] *Adjudicatory Council*, for good cause shown, postpones, adjourns, or changes the location of the oral argument, except that Counsel to the National [Business Conduct Committee] *Adjudicatory Council* may postpone or adjourn the oral argument only with the consent of the Parties. In considering a motion for the postponement or adjournment of an oral argument, the National [Business Conduct Committee] *Adjudicatory Council, the Review Subcommittee*, a Subcommittee or, if applicable, and Extended Proceeding Committee, or Counsel to the National [Business

Conduct Committee] *Adjudicatory Council* shall consider, in addition to any other relevant factors:

* * * * *

9330. Appointment of Subcommittee or Extended Proceeding Committee; Disqualification and Recusal

9331. Appointment of Subcommittee or Extended Proceeding Committee

(a) Appointment by National [Business Conduct Committee] *Adjudicatory Council*

Following the filing of a notice of appeal pursuant to Rule 9311 or a notice of review pursuant to Rule 9312, the National [Business Conduct Committee] *Adjudicatory Council* or the Review Subcommittee shall appoint a Subcommittee or an Extended Proceeding Committee to participate, subject to Rule 9345, in a disciplinary proceeding appealed or called for review.

(1) Subcommittee

Except as provided in subparagraph (2), for each disciplinary proceeding appealed or called for review, the National [Business Conduct Committee] *Adjudicatory Council* or the Review Subcommittee shall appoint a Subcommittee to participate, subject to Rule 9345, in the appeal or review. A Subcommittee shall be composed of two or more persons who shall be [current or] former Directors[,] or [former] Governors.

(2) Extended Proceeding Committee

Upon consideration of the volume and complexity of the certified record, or other factors the National [Business Conduct Committee] *Adjudicatory Council* or the Review Subcommittee deems material, the National [Business Conduct Committee] *Adjudicatory Council* or the Review Subcommittee may determine that a disciplinary proceeding appealed or called for review shall be designated an Extended Proceeding and shall appoint an Extended Proceeding Committee to participate, subject to Rule 9345, in the appeal or review. The Extended Proceeding Committee shall be composed of two or more persons who shall be [current or] former Directors[,] or [former] Governors. The [Chair of the National Business Conduct Committee] *Review Subcommittee* shall have discretion to compensate any or all Panelists of an Extended Proceeding Committee at the rate then in effect for arbitrators appointed under the Rule 1000 Series.

(b) Function

If a hearing is held, the Subcommittee or, if applicable, the Extended Proceeding Committee, shall hear oral arguments and consider, if allowed under Rule 9346(b), any new evidence. Based on the hearing and the record on appeal or review, the Subcommittee or, if applicable, the Extended Hearing Committee, shall make a recommendation to the National [Business Conduct Committee] *Adjudicatory Council* regarding the disposition of all matters on appeal, cross-appeal, or review. The recommendation shall be in the form of a written recommended decision.

9332. Disqualification and Recusal

(a) Recusal, Withdrawal of Member or Panelist

If at any time a member of the National [Business Conduct Committee] *Adjudicatory Council, including a member of the Review Subcommittee,* a Panelist of a Subcommittee or an Extended Proceeding Committee, or a Counsel to the National [Business Conduct Committee] *Adjudicatory Council* determines that the member, the Panelist, or the Counsel to the National [Business Conduct Committee] *Adjudicatory Council* has a conflict of interest or bias or circumstances otherwise exist where the fairness of the member, the Panelist, or the Counsel to the National [Business Conduct Committee] *Adjudicatory Council* might reasonably be questioned, the member, the Panelist, or the Counsel to National [Business Conduct Committee] *Adjudicatory Council* shall notify the Chair or the Vice [-] Chair of the National [Business Conduct Committee] *Adjudicatory Council,* and the Chair or the Vice [-] Chair of the National [Business Conduct Committee] *Adjudicatory Council* shall issue and serve on the Parties a notice stating that the member, the Panelist, or the Counsel to the National [Business Conduct Committee] *Adjudicatory Council* has withdrawn from the matter. In the event that a Panelist withdraws, is incapacitated, or is otherwise unable to continue service after a hearing has been convened, the Chair or Vice [-] Chair of the National [Business Conduct Committee] *Adjudicatory Council* shall appoint a replacement Panelist. In the event that a [Counsel to the National Business Conduct Committee] *member of the Review Subcommitte* withdraws, is incapacitated, or is otherwise unable to continue service after assignment, *the Chair or Vice Chair of the National Adjudicatory Council shall appoint another member of the National Adjudicatory Council to serve on the Review Subcommittee for the limited purpose of considering the issues raised in the disciplinary proceeding in which the withdrawal action was taken. The replacement member of the Review Subcommittee must have the same classification (Industry or Non-Industry) as the member who withdrew. In the event that a Counsel to the National Adjudicatory Council withdraws, is incapacitated, or is otherwise unable to continue service after assignment,* the General Counsel shall assign a replacement Counsel to the National [Business Conduct Committee] *Adjudicatory Council.*

(b) Motion for Disqualification

A Party may move for the disqualification of a member of the National [Business Conduct Committee] *Adjudicatory Council, the Review Subcommittee,* a Panelist of a Subcommittee or an Extended Proceeding Committee, or a Counsel to the National [Business Conduct Committee] *Adjudicatory Council.* All such motions shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the fairness of the member, the Panelist, or the Council to the National [Business Conduct Committee] *Adjudicatory Council* might reasonably be questioned, and shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the Party learned of those facts. Such motions shall be filed not later than 15 days after the later of:

(1) When the Party learned of the facts believed to constitute the disqualification; or

(2) When the Party was notified of the composition of the Subcommittee or, if applicable, the Extended Proceeding Committee or the assignment to the disciplinary proceeding of the Counsel to the National [Business Conduct Committee] *Adjudicatory Council.*

(c) Disposition of Disqualification Motions: Challenges to Single Member of National [Business Conduct Committee] *Adjudicatory Council or Review Subcommittee,* Single Panelist of Subcommittee or Extended Hearing Committee, *or* Counsel to the National [Business Conduct Committee] *Adjudicatory Council*

Motions for disqualification of a member of the National [Business Conduct Committee] *Adjudicatory Council, including a member of the Review Subcommittee,* a Panelist of a Subcommittee or an Extended

Proceeding Committee, or a Counsel to the National [Business Conduct Committee] *Adjudicatory Council* shall be decided by the Chair or Vice [-] Chair of the National [Business Conduct Committee] *Adjudicatory Council*, who shall promptly determine whether disqualification is required and issue a written ruling on the motion. *If a member of the Review Subcommittee is disqualified, the Chair or Vice Chair of the National Adjudicatory Council shall appoint another member of the National Adjudicatory Council to serve on the Review Subcommittee for the limited purpose of considering the issues raised in the disciplinary proceeding in which the motion was made. The replacement member of the Review Subcommittee must have the same classification (Industry or Non-Industry) as the member being replaced. If a Panelist is disqualified, the Chair or the Vice [-] Chair of the National [Business Conduct Committee] Adjudicatory Council* shall appoint a replacement Panelist. If a Counsel is disqualified, the General Counsel shall assign a replacement Counsel to the National [Business Conduct Committee] *Adjudicatory Council.*

(d) Disposition of Disqualification Motions: Challenges to Multiple *Members or* Panelists

(1) National [Business Conduct Committee] *Adjudicatory Council*

If a Party files a motion to disqualify more than one member of the National [Business Conduct Committee] *Adjudicatory Council*, the Chair or the Vice [-] Chair of the National [Business Conduct Committee] *Adjudicatory Council* shall promptly determine whether disqualification is required, and shall issue a written ruling on the matter. In the event of such disqualification, the remaining members of the National [Business Conduct Committee] *Adjudicatory Council* shall consider the review or appeal of the disciplinary matter.

(2) *Review Subcommittee*

If a Party files a motion to disqualify more than one member of the Review Subcommittee, the Chair or the Vice Chair of the National Adjudicatory Council shall promptly determine whether disqualification is required, and shall issue a written ruling on the matter. If members of the Review Subcommittee are disqualified, the Chair or Vice Chair of the National Adjudicatory Council shall appoint other members of the National Adjudicatory Council to serve on the Review Subcommittee for the limited purpose of considering the issues raised in the disciplinary proceeding in which the motion was made. The replacement members of the Review Subcommittee must have the same classification (Industry or Non-Industry) as the members being replaced.

(3) Subcommittee; Extended Proceeding Committee

If a Party files a motion to disqualify more than one Panelist of a Subcommittee or an Extended Proceeding Committee, the Chair or the Vice [-] Chair of the National [Business Conduct Committee] *Adjudicatory Council* shall promptly determine whether disqualification is required, and shall issue a written ruling on the motion. If multiple Panelists are disqualified, the Chair or the Vice [-] Chair of the National [Business Conduct Committee] *Adjudicatory Council* shall appoint replacement Panelists.

9340. Proceedings

9341. Oral Argument

(a) Request for Oral Argument

A Party may request oral argument before the Subcommittee or, if applicable, the Extended Proceeding Committee. Oral argument shall be requested in writing either in the Party's notice of appeal or cross-appeal or within 15 days after service of the National [Business Conduct Committee's] *Adjudicatory Council's* notice of review. Subject to the limitations of Rules 9342 and 9344, oral argument shall be granted if timely requested. The right to oral argument set forth in this Rule is unaffected by a Party's waiver of, or failure to request, a hearing pursuant to the Rule 9200 Series.

(b) Discretion to Proceed With or Without Oral Argument

No change.

(c) Notice Regarding Oral Argument

If oral argument is held, a notice stating the date, time, and location of the oral argument shall be served on the Parties at least 21 days before the hearing. The Parties may agree in writing to waive the notice period or, in extraordinary circumstances, the Subcommittee or, if applicable, the Extended Proceeding Committee, or Counsel to the National [Business Conduct Committee] *Adjudicatory Council* may provide for a shorter notice period, except that Counsel to the National [Business Conduct Committee] *Adjudicatory Council* may provide for a shorter notice period only with the consent of the Parties.

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9342. Failure to Appear at Oral Argument

No change.

9343. Disposition Without Oral Argument

If an oral argument is not held, the matter shall be considered by a Subcommittee or, if applicable, an Extended Proceeding Committee, on the basis of the record, as defined in Rule 9267, and supplemented by any written materials submitted to or issued by the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council* in connection with the appeal, cross-appeal, or call for review.

9344. Failure to Participate Below; Abandonment of Appeal

(a) Failure to Participate Below

When an appealing Party did not participate in the disciplinary proceeding before a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, but shows good cause for the failure to participate, the National [Business Conduct Committee] *Adjudicatory Council or the Review Subcommittee* may dismiss the appeal and remand the matter for further proceedings, or may [hear evidence and consider the matter] *order that the appeal proceed.* If the appealing Party did not participate in the disciplinary proceeding before a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, and fails to show good cause for the failure to participate, the matter shall be considered by the Subcommittee or, if applicable, the Extended Proceeding Committee, and the National [Business Conduct Committee] *Adjudicatory Council* on the basis of the record and other documents, as provided in Rules 9346 and 9347. For purposes of this paragraph, failure to participate shall include failure to file an answer or otherwise respond to a complaint, or failure to appear at a scheduled hearing, but shall not include failure to request a hearing pursuant to Rule 9221.

(b) Abandonment of Appeal

If an appealing Party fails to advise the National [Business Conduct Committee] *Adjudicatory Council or the Review Subcommittee* of the basis for seeking review or otherwise fails to provide information or submit a written brief in response to a request pursuant

to Rules 9346 and 9347, the National [Business Conduct Committee or the Chair and the Vice Chair of the National business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council or the Review Subcommittee* may dismiss the appeal as abandoned, and the decision of the Hearing Officer, the Hearing Panel or, if applicable, the Extended Hearing Panel, shall become the final disciplinary action of the Association. If a cross-appealing Party fails to advise the National [Business Conduct Committee] *Adjudicatory Council or the Review Subcommittee* of the basis for seeking review or otherwise fails to provide information or submit a written brief in response to a request pursuant to Rules 9346 and 9347, the National [Business Conduct Committee or the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified)] *Adjudicatory Council or the Review Subcommittee* may dismiss the cross-appeal as abandoned. Upon a showing of good cause, the National [Business Conduct Committee] *Adjudicatory Council* may withdraw any dismissal entered pursuant to this Rule.

9345. Subcommittee or Extended Proceeding Committee Recommended Decision to National [Business Conduct Committee] *Adjudicatory Council*

A Subcommittee or, if applicable, an Extended Proceeding Committee, shall present a recommended decision in writing to the National [Business Conduct Committee and all other Directors not later than seven days] *Adjudicatory Council* before the meeting of the National [Business Conduct Committee] *Adjudicatory Council* at which the disciplinary proceeding shall be considered.

9346. Evidence in National [Business Conduct Committee] *Adjudicatory Council* Proceedings

(a) Scope of Review

Except as otherwise set forth in this paragraph, the National [Business Conduct Committee's] *Adjudicatory Council's* review shall be limited to consideration of: (i) the record, as defined in Rule 9267, supplemented by briefs and other papers submitted to the Subcommittee or, if applicable, the Extended Proceeding Committee, and the National [Business Conduct Committee] *Adjudicatory Council;* and (ii) any oral argument permitted under this Code. A Party may introduce additional evidence only with prior approval of the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council,* upon a showing that extraordinary circumstances exist under paragraph (b). If an appealing Party shows good cause for failure to participate in the disciplinary proceeding below, the National [Business Conduct Committee] *Adjudicatory Council* may hear evidence and consider the disciplinary proceeding pursuant to Rule 9344(a).

(b) Leave to Introduce Additional Evidence

A Party may apply to the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council* for leave to introduce additional evidence by motion filed not later than 30 days after service of such Party's notice of appeal or cross-appeal or not later than 35 days after service upon the Party by the National [Business Conduct Committee] *Adjudicatory Council* of a notice of review. The motion shall describe each item of proposed new evidence, demonstrate that there was good cause for failing to introduce it below, demonstrate why the evidence is material to the proceeding, and be filed and served. The Party may attach the documentary evidence as an exhibit to the motion. By a motion filed in accordance with Rule 9146, a Party may request an extension of the period during which a Party may file a motion for leave to introduce additional evidence. A Party shall demonstrate that there was good cause for failing to file the motion for leave to introduce additional evidence during the period prescribed.

(c) Motion In Opposition; Motion to Introduce Rebuttal Evidence

No change.

(d) Discretion Regarding Review of Additional Evidence

Upon consideration of any motion to introduce additional evidence and any opposition thereto, the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council* may permit the evidence to be introduced into the record on review, or the National [Business Conduct Committee] *Adjudicatory Council* may remand the disciplinary proceeding for further proceedings consistent with its ruling or for further fact finding.

(e) Requirements for Submitting Additional Documentary Evidence

A Party that is permitted to introduce additional documentary evidence before the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council* pursuant to paragraph (d) shall make copies of the evidence available to the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council,* and to all Parties at such time as the Subcommittee or, if applicable, the Extended Proceeding Committee, the National [Business Conduct Committee] *Adjudicatory Council,* or Counsel to the National [Business Conduct Committee] *Adjudicatory Council* may specify.

(f) Subcommittee or Extended Proceeding Committee Order Requiring Additional Evidence

On its own motion, the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council* may order that the record be supplemented with such additional evidence as it may deem relevant. Among other things, the Subcommittee, or if applicable, the Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council* may order a Respondent who asserts his or her inability to pay a monetary sanction to file a sworn financial statement and to keep such statement current as ordered by the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National [Business Conduct Committee] *Adjudicatory Council.*

9347. Filing of Papers in National [Business Conduct Committee] *Adjudicatory Council* Proceedings

(a) Briefs; Reply Briefs; Requirements

Parties may file briefs in connection with proceedings governed by the Rule 9300 Series. Briefs shall be confined to the particular matters at issue. An exception to findings, conclusions, or sanctions shall be supported by citation to the relevant portions of the record, including references to specific pages relied upon, and by concise argument, including citation of such statutes, decisions, and other authorities as may be relevant. If an exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, an appendix thereto, or by citation to the record. Parties may file reply briefs. If a Party files a reply brief, such brief

shall be limited to matters in reply. All briefs shall conform to the requirements of the Rule 9130 Series, and, except with advance leave of the Subcommittee or, if applicable, the Extended Proceeding Committee, the National [Business Conduct Committee] *Adjudicatory Council, the Review Subcommittee,* or Counsel to the National [Business Conduct Committee] *Adjudicatory Council,* exclusive of pages containing tables of contents or tables of authorities, a brief other than a reply brief shall not exceed 25 double-spaced pages, and a reply brief shall not exceed 12 double-spaced pages.

(b) Timely Filing of Briefs

Briefs shall be due upon dates established by the Subcommittee or, if applicable, the Extended Proceeding Committee, the National [Business Conduct Committee] *Adjudicatory Council, the Review Subcommittee,* or Counsel to the National [Business Conduct Committee] *Adjudicatory Council* in a scheduling order. Unless the Subcommittee or, if applicable, the Extended Proceeding Committee, the National [Business Conduct Committee] *Adjudicatory Council, the Review Subcommittee,* or Counsel to the National [Business Conduct Committee] *Adjudicatory Council* specifies otherwise, opening briefs shall be submitted not less than 21 days from the date of the scheduling order, and answering briefs shall be submitted 21 days thereafter. When reply briefs are submitted, such briefs shall be filed not later than ten days after service of the answering brief. Counsel to the National [Business Conduct Committee] *Adjudicatory Council* may not shorten a period previously established for the filing of briefs except with the consent of the Parties.

9348. Powers of the National [Business Conduct Committee] *Adjudicatory Council* on Review

In any appeal or review proceeding pursuant to the Rule 9300 Series, the National [Business Conduct Committee] *Adjudicatory Council* may affirm, dismiss, modify, or reverse with respect to each finding, or remand the disciplinary proceeding with instructions. The National [Business Conduct Committee] Adjudicatory Council may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction.

9349. National [Business Conduct Committee] *Adjudicatory Council* Formal Consideration; Decision

(a) Decision of National [Business Conduct Committee] *Adjudicatory Council*, Including Remand

In an appeal or review of a disciplinary proceeding governed by the Rule 9300 Series that is not withdrawn or dismissed prior to a decision on the merits, the National [Business Conduct Committee] *Adjudicatory Council,* after considering all matters presented in the appeal or review, and the written recommended decision of the Subcommittee or, if applicable, the Extended Proceeding Committee, may affirm, dismiss, modify or reverse the decision of the Hearing Panel or, if applicable, Extended Hearing Panel, with respect to each Respondent who has appealed or cross-appealed or is subject to a call for review. The National [Business Conduct Committee] *Adjudicatory Council* may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the National [Business Conduct Committee] *Adjudicatory Council* may remand the disciplinary proceeding with instructions. The National [Business Conduct Committee] *Adjudicatory Council* shall prepare a proposed written decision pursuant to paragraph (b).

(b) Contents of Decision

No change.

(c) Issuance of Decision After Expiration of Call for Review Period

The National [Business Conduct Committee] *Adjudicatory Council* shall provide its proposed written decision to the NASD [Regulation Board, and, if the disciplinary proceeding is not called for review by the NASD Regulation Board, to the NASD Board. The NASD Regulation] *Board. The NASD* Board may call the disciplinary proceeding for review pursuant to Rule 9351. If the NASD Board does not call the disciplinary proceeding for review, the proposed written decision of the [NASD Regulation Board] *National Adjudicatory Council* shall become final, and the [NASD Regulation Board] *National Adjudicatory Council* shall serve its written decision on the Parties and provide a copy to each member of the Association with which a Respondent is associated. The decision shall constitute the final disciplinary action of the Association for purposes of SEC Rule 19d–1(c)(1), unless the [NASD Regulation Board] *National Adjudicatory Council* remands the proceeding.

[The NASD Board may call the disciplinary proceeding for review pursuant to Rule 9352. If neither the NASD Regulation Board nor the NASD Board calls the disciplinary proceeding for review, the proposed written decision of the National Business Conduct Committee shall become final, and the National Business Conduct Committee shall serve its written decision on the Parties and provide a copy to each member of the Association with which a Respondent is associated. The decision shall constitute the final disciplinary action of the Association for purposes of SEC Rule 19d–1(c)(1), unless the National Business Conduct Committee remands the proceeding.]

9350. Discretionary Review by NASD Board[s]

9351. [Discretionary Review by NASD Regulation Board]

(a) Call for Review by Director

A Director may call a disciplinary proceeding for review by the NASD Regulation Board, if the call for review is made within the period prescribed in paragraph (b).

(b) Seven Day Period; Waiver

After receiving the proposed written decision of the National Business Conduct Committee pursuant to Rule 9349, a Director shall have not less than seven days to determine if the disciplinary proceeding should be called for review. A Director shall call a disciplinary proceeding for review by notifying the General Counsel. By a unanimous vote of the NASD Regulation Board, the NASD Regulation Board may shorten the period to less than seven days. By an affirmative vote of the majority of the NASD Regulation Board then in office, the NASD Regulation Board may, during the seven day period, vote to extend the period to more than seven days.

(c) Review at Next Meeting

If a Director calls a disciplinary proceeding for review within the period prescribed in paragraph (b), the NASD Regulation Board shall review the disciplinary proceeding not later than the next meeting of the NASD Regulation Board. The NASD Regulation Board may order the Parties (excluding any Respondent who did not appeal or cross-appeal, or as to whom the issues appealed or called for review do not apply), to file briefs in connection with the NASD Regulation Board review proceedings pursuant to this Rule.

(d) Decision of NASD Regulation Board, Including Remand

After review, the NASD Regulation Board may affirm, modify, or reverse the proposed written decision of the National Business Conduct Committee. The NASD Regulation Board may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the NASD Regulation Board may remand the disciplinary proceeding with instructions. The NASD Regulation Board shall prepare a proposed written decision that includes all of the elements described in Rule 9349(b)(1) through (6).

(e) Issuance of Decision After Expiration of Call for Review Period

The NASD Regulation Board shall provide its proposed written decision to the NASD Board. The NASD Board may call the disciplinary proceeding for review pursuant to Rule 9352.

9352.] Discretionary Review by NASD Board

(a) Call for Review by Governor

No change.

(b) [Seven] *15* Day Period; Waiver

(1) *A* [Disciplinary Proceeding Called for Review by NASD Regulation Board

If the NASD Regulation Board reviewed the disciplinary proceeding under Rule 9351, a] Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least [seven] *15* days after the date on which the NASD Board receives the proposed written decision of the [NASD Regulation Board.] *National Adjudicatory Council.*

[(2) Disciplinary Proceeding Not Called for Review by NASD Regulation Board

If no Director of the NASD Regulation Board called the disciplinary proceeding for review under Rule 9351, a Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the National Business Conduct Committee.

(3)]*(2)* Waiver

By a unanimous vote for the NASD Board, the NASD Board may shorten the period in subparagraph (1) [or (2)] to less than [seven] *15* days. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the [seven] *15* day period in subparagraph (1) or (2), vote to extend the period in subparagraph (1) [or (2)] to more than [seven] *15* days.

(c) Review at Next Meeting

No change.

(d) Decision of NASD Board, Including Remand.

After review, the NASD Board may affirm, modify, or reverse [: (1)] the proposed written decision of the [NASD Regulation Board; or (2) if the NASD Regulation Board did not call a disciplinary proceeding for review under Rule 9351, the proposed written decision of the National Business Conduct Committee] *National Adjudicatory Council.* The NASD Board may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the NASD Board may remand the disciplinary proceeding with instructions. The NASD Board shall prepare a written decision that includes all of the elements described in Rule 9349 (b)(1) through (6).

* * * * *

9400. LIMITATION PROCEDURES UNDER RULES 3130 AND 3131

9410. Procedures for Regulating Activities of a Member Experiencing Financial or Operational Difficulties

* * * * *

9413. Department of Member Regulation Consideration

(a) Request for Hearing

No change.

(b) Stay

A request for hearing shall stay the notice of limitations served under Rule 9412 unless the National [Business Conduct Committee] *Adjudicatory Council* orders otherwise.

* * * * *

(j) Failure to Request Hearing

If a member does not request a hearing under paragraph (a), the limitations specified in the notice shall become effective on the date specified in the notice. Unless the National [Business Conduct Committee] *Adjudicatory Council* calls the notice for review under Rule 9414(a)(2), the limitations specified in the notice shall remain in effect until the Department of Member Regulation reduces or removes the limitations pursuant to Rule [9418(b)] *9417(b).*

9414. National [Business Conduct Committee] *Adjudicatory Council* Review

(a) Initiation of a Review

(1) Application by Member

A member aggrieved by a decision issued under Rule 9413 may file a written application for review by the National [Business Conduct Committee] *Adjudicatory Council.* The application shall state the specific grounds for the review and whether oral argument is requested. The application shall be filed pursuant to Rules 9135, 9136, and 9137 within seven days after service of the decision. The member may withdraw its application for review at any time by filing a written notice with the National [Business Conduct Committee] *Adjudicatory Council* pursuant to Rules 9135, 9136, and 9137.

(2) Motion of National [Business Conduct Committee] *Adjudicatory Council*

A decision issued under Rule 9413 shall be subject to a call for review by any member of the National [Business Conduct Committee] *Adjudicatory Council* or the Review Subcommittee [described in Rule 9312(a)(1)] within 30 days after service of the decision. If a member that receives a notice under Rule 9412 does not request a hearing under rule 9413, the notice shall be subject to a call for review by any member of the National [Business Conduct Committee] *Adjudicatory Council* or the Review Subcommittee within 30 days after the effective date of the notice. If the National [Business Conduct Committee] *Adjudicatory Council* or the Review Subcommittee calls a decision or notice for review, a written notice of review shall be served promptly on the member pursuant to Rules 9132 and 9134. The notice of review shall state the specific grounds for the review and whether an oral argument is ordered. If a decision is called for review by a member of the National [Business Conduct Committee] *Adjudicatory Council* or the Review Subcommittee, the National [Business Conduct Committee] *Adjudicatory Council* shall review the decision.

(3) Stay

Unless otherwise ordered by the National [Business Conduct Committee] *Adjudicatory Council*, the initiation of a review under this paragraph shall stay the decision of the Department of Member Regulation or an uncontested notice until a decision constituting final action of the Association is issued.

(4) Transmission of the Record

If a review is initiated under this paragraph, the Department of Member Regulation shall assemble and prepare an index of the record, transmit the record and index to the National [Business Conduct Committee] *Adjudicatory Council*, certify to the National [Business Conduct Committee] *Adjudicatory Council* that the record is complete, and serve a copy of the record and index on the member.

(5) Ex Parte Communications

The prohibitions against ex parte communications in Rule 9143 shall become effective under the Rule 9410 Series when Association staff has knowledge that a member intends to file a written application for review or that the National [Business Conduct Committee] *Adjudicatory Council* intends to review a decision on its own motion under this Rule.

(b) Subcommittee Consideration

(1) Appointment of Subcommittee

The National [Business Conduct Committee] *Adjudicatory Council or the Review Subcommittee* shall appoint a Subcommittee to participate in the review. The Subcommittee shall be composed of two or more members. One member shall be a member of the National [Business Conduct Committee] *Adjudicatory Council*, and the remaining member or members shall be current or former [Directors of the NASD Regulation Board or former Governors of the NASD Board.] *member of the National Adjudicatory Council or a former Director or Governor.*

* * * * *

(5) Recommendation

The Subcommittee shall present a recommended decision in writing to the National [Business Conduct Committee and all other Directors] *Adjudicatory Council* not later than seven days before the meeting of the National [Business Conduct Committee] *Adjudicatory Council* at which the proceeding shall be considered.

(c) Decision

(1) Decision of National [Business Conduct Committee] *Adjudicatory Council*, Including Remand

After considering all matters presented in the review and the written recommended decision of the Subcommittee, the National [Business Conduct Committee] *Adjudicatory Council* may affirm, modify, or reverse the Department of Member Regulation's decision or remand the proceeding with instructions. The National [Business Conduct Committee] *Adjudicatory Council* shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents of Decision

The decision shall include:

* * * * *

(E) if any limitations are imposed: (i) a description of the limitations and a statement describing a fitting sanction that will be imposed under Rule [9417] *9416* if the member fails to comply with any of the limitations; and (ii) the conditions for terminating the limitations.

(3) Issuance of Decision After Expiration of Call for Review Period

The National [Business Conduct Committee] *Adjudicatory Council* shall provide its proposed written decision to the NASD [Regulation Board, and, if the proceeding is not called for review by the NASD Regulation Board, to the NASD Board. The NASD Regulation] *Board. The NASD* Board may call the proceeding for review pursuant to Rule 9415. [The] *If the* NASD Board [may] *does not* call the proceeding for review [pursuant to Rule 9416. If neither the NASD Regulation Board nor the NASD Board calls the proceeding for review], the proposed written decision of the National [Business Conduct Committee] *Adjudicatory Council* shall become final, and the National [Business Conduct Committee] *Adjudicatory Council* shall serve its written decision on the member and the Department of Member Regulation pursuant to Rules 9132 and 9134. The decision shall be effective upon service. [The decision shall constitute the final action of the Association, unless the National Business Conduct Committee remands the proceeding.]

[9415. Discretionary Review by the NASD Regulation Board

(a) Call for Review by Director

A Director may call a proceeding for review by the NASD Regulation Board if the call for review is made within the period prescribed in paragraph (b).

(b) Seven Day Period; Waiver

After receiving the proposed written decision of the National Business Conduct Committee pursuant to Rule 9414, a Director shall have not less than seven days to determine if the proceeding should be called for review. A Director shall call a proceeding for review by notifying the General Counsel of NASD Regulation. By a unanimous vote of the NASD Regulation Board, the NASD Regulation Board may shorten the period to less than seven days. By an affirmative vote of the majority of the NASD Regulation Board then in office, the NASD Regulation Board may, during the seven day period, vote to extend the period to more than seven days.

(c) Review at Next Meeting

If a Director calls a proceeding for review within the period prescribed by paragraph (b), the NASD Regulation Board shall review the proceeding not later than the next meeting of the NASD Regulation Board. The NASD Regulation Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

(d) Decision of NASD Regulation Board, Including Remand

After review, the NASD Regulation Board may affirm, modify, or reverse the proposed written decision of the National Business Conduct Committee or remand the proceeding with instructions. The NASD Regulation Board shall prepare a proposed written decision that includes all of the elements described in Rule 9414(c)(2).

(e) Issuance of Decision After Expiration of Call for Review Period

The NASD Regulation Board shall provide its proposed written decision to the NASD Board. The NASD Board may call the proceeding for review pursuant to Rule 9416. If the NASD Board does not call the proceeding for review, the proposed written decision of the NASD Regulation Board shall become final, and the NASD Regulation Board shall serve its written decision on the member and the Department of Member Regulation pursuant to Rules 9132 and 9134. The decision shall be effective upon service.] The decision shall constitute the final action of the Association, unless the [NASD Regulation Board] *National Adjudicatory Council* remands the proceeding.

[9416]*9415.* Discretionary Review by the NASD Board

(a) Call for Review by Governor

No change.

(b) [Seven] *15* Day Period; Waiver

[(1) Proceeding Called for Review by NASD Regulation Board

If the NASD Regulation Board reviewed the proceeding under Rule 9415, a] *A* Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least [seven] *15* days after the date on which the NASD Board receives the proposed written decision of the

National Adjudicatory Council. [NASD Regulation Board.

(2) Proceeding Not Called for Review by NASD Regulation Board

If no Director of the NASD Regulation Board called the proceeding for review under Rule 9415, a Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the National Business Conduct Committee.

(3) Waiver

] By a unanimous vote of the NASD Board, the NASD Board may shorten the period [in subparagraph (1) or (2)] to less than [seven] *15* days. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the [seven] *15* day period [in subparagraph (1) or (2)], vote to extend the period [in subparagraph (1) or (2)] to more than [seven] *15* days.

(c) Review at Next Meeting

No change.

(d) Decision of NASD Board, Including Remand

After review, the NASD Board may affirm, modify, or reverse [: (1)] the proposed written decision of the [NASD Regulation Board, or (2) if the NASD Regulation Board did not call the proceeding for review under Rule 9415, the proposed written decision of the National Business Conduct Committee] *National Adjudicatory Council.* Alternatively, the NASD Board may remand the proceeding with instructions. The NASD Board shall prepare a written decision that includes all of the elements described in Rule 9414(c)(2).

(e) Issuance of Decision

No change.

[9417] *9416.* Enforcement of Sanctions

* * * * *

(c) No Stay of Sanctions

Unless otherwise ordered by the National [Business Conduct Committee] *Adjudicatory Council,* a request for a hearing pursuant to this Rule shall not stay the effectiveness of the order issued under paragraph (a).

(d) Decision

No change.

[9418] *9417.* Additional Limitations; Reduction or Removal of Limitations

(a) Additional Limitations

If a member continues to experience financial or operational difficulty specified in Rule 3130 or 3131, notwithstanding an effective notice or decision under the Rule 9410 Series, the Department of Member Regulation may impose additional limitations by issuing a notice under Rule 9412. The notice shall state that the member may apply for relief from the additional limitations by filing a written application for a hearing under Rule 9413 and that the procedures in Rules 9413 through [9417] *9416* shall be applicable. An application for a hearing also shall include a detailed statement of the member's objections to the additional limitations.

(b) Reduction or Removal of Limitations

No change.

[9419] *9418.* Application to Commission for Review[; Other Action Not Foreclosed

(a)] The right to have any action taken by the Association pursuant to this Rule Series reviewed by the Commission is governed by Section 19 of the Act. The filing of an application for review shall not stay the effectiveness of the action taken by the Association, unless the Commission otherwise orders.

9419. Other Action Not Foreclosed

[(b)] Action by the Association under the Rule 9410 Series shall not foreclose action by the Association under any other Rule.

[9420. Approval of Change in Business Operations That Will Result in a Change in Exemptive Status under SEC Rule 15c3–3

Deleted].

9500. SUSPENSION, CANCELLATION, BAR, DENIAL OF ACCESS, AND ELIGIBILITY PROCEDURES

9510. Procedures for Summary and Non-Summary Suspension, Cancellation, Bar, Limitation, or Prohibition

9511. Purpose and Computation of Time

(a) Purpose

(1) No change.

(2) The Association also may take the following actions, after notice and opportunity for hearing:

(A) cancel the membership of a member that becomes ineligible for continuance in membership, or that continues to be associated with an ineligible person, or suspend or bar a person from continuing to be associated with a member because such person is or becomes ineligible for association under Article [II] *III,* Section 3 of the NASD By-Laws;

(B) suspend or cancel the membership of a member or the registration of a person for failure to pay fees, dues, assessments, or other charges; failure to submit a required report or information related to such payment; or failure to comply with an arbitration award or a settlement agreement related to an arbitration or mediation under Article [V] *VI,* Section [2] *3* of the NASD By-Laws;

(C) cancel the membership of a member for failure to file or submit on request any report, document, or other information required to be filed with or requested by the Association under Article [VI] *VII,* Section 2 of the NASD By-Laws; and

(D) limit or prohibit any member, associated person, or other person with respect to access to services offered by the Association or a member thereof if the Association determines that such person does not meet the qualification requirements or other prerequisites for such access or such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the Association.

* * * * *

9513. Initiation of Proceeding for Non-Summary Suspension, Cancellation, Bar, Limitation, or Prohibition

(a) Notice

Association staff shall initiate a proceeding authorized under Section 3 of Article [II,] *III,* Section [2] *3* of Article [VI] *VII* of the NASD By-Laws, or Rule 9511(a)(2)(D), by issuing a written notice to the member, associated person, or other person. The notice shall specify the grounds for and effective date of the cancellation, suspension, bar, limitation, or prohibition and shall state that the member, associated person, or other person may file a written request for a hearing under Rule 9514. The notice shall be served by facsimile or overnight commercial courier.

(b) Effective Date

For any cancellation, suspension, or bar under Section 3 of Article [II] *III* of the NASD By-Laws, the effective date shall be at least seven days after service of the notice on the member or associated person. For any cancellation or suspension under Section [2] *3* of Article [V] *VI* or Section 2 of Article [VI] *VII* of the NASD By-Laws, the effective date shall be at least 15 days after service of the notice on the member or

associated person. For any limitation or prohibition on access to services offered by the Association or a member thereof pursuant to Rule 9511(a)(2)(D), the effective date shall be upon receipt of the notice with respect to services to which the member, associated person, or other person does not have access and shall be at least seven days after service of the notice with respect to services to which the member, associated person, or other person already has access.

9514. Hearing and Decision

(a) Request

No change.

(b) Designation of Party for the Association and Appointment of Hearing Panel

If a member, associated person, or other person subject to a notice under Rule 9512 or 9513 files a written request for a hearing, an appropriate department or office of the Association shall be designated as a Party in the proceeding, and a Hearing Panel shall be appointed.

(1) If the President of NASD Regulation or NASD Regulation staff issued the notice initiating the proceeding under Rule 9512(a) or 9513(a), the President of NASD Regulation shall designate an appropriate NASD Regulation department or office as a Party, and the NASD Regulation Board shall appoint a Hearing Panel. The Hearing Panel shall be composed of two or more members. One member shall be a Director of NASD Regulation, and the remaining member or members shall be [a] current or former [Director] *Directors* of NASD Regulation or [a former Governor of the NASD] *Governors.* The President of NASD Regulation may not serve on the Hearing Panel.

(2) If the President of Nasdaq or Nasdaq staff issued the notice under Rule 9512(a) or 9513(a), the President of Nasdaq shall designate an appropriate Nasdaq department or office as a Party, and the Nasdaq Board shall appoint a Hearing Panel. The Hearing Panel shall be composed of two or more members. One member shall be a [Director] *Director* of Nasdaq, and the remaining member or members shall be [a] current or former [Director] *Directors* of Nasdaq or [a former governor of the NASD] *Governors.* The President of Nasdaq may not serve on the Hearing Panel.

* * * * *

9515. Discretionary Review by the NASD Board

(a) Call for Review by Governor

No change.

(b) [Seven] *15* Day Period; Waiver

A Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least [seven] *15* days after the date on which the NASD Board receives the proposed written decision of the Hearing Panel. By a unanimous vote of the NASD Board, the NASD Board may shorten this period. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the period, vote to extend the period.

* * * * *

9522. Initiation of Eligibility Proceedings

(a) Notice of Disqualification or Ineligibility

(1) Issuance

No change.

(2) Notice to Member

A notice issued to a member that is subject to a statutory disqualification or is otherwise ineligible for membership shall state that the member may apply for relief by filing a written application for relief with the National [Business Conduct Committee] *Adjudicatory Council* within ten days after service of the notice.

(3) Notice to Associated Person

A notice issued to an associated person who is subject to a statutory disqualification or is otherwise ineligible for association shall state that a member may apply for relief on behalf of itself and such person by filing a written application for relief with the National [Business Conduct Committee] *Adjudicatory Council* within ten days after service of the notice.

(4) Service

No change.

(b) Application by Member

A member shall file a written application for relief from the eligibility requirements of the Association with the National [Business Conduct Committee] *Adjudicatory Council* if the member:

(1) determines that it is subject to a statutory disqualification or otherwise is no longer eligible for membership;

(2) determines that a person associated with it is subject to a statutory disqualification or otherwise is no longer eligible for association with the member; or

(3) wishes to sponsor the association of a person who is subject to a statutory disqualification or otherwise is ineligible for association with a member.

(c) Form of Application for Relief

No change.

(d) Withdrawal of Application

A member may withdraw its application for relief at any time by filing a written notice with the National [Business Conduct Committee] *Adjudicatory Council* pursuant to Rules 9135, 9136, and 9137.

(e) Ex Parte Communications

The prohibitions against ex parte communications set forth in Rule 9143 shall become effective under the Rule 9520 Series when Association staff has initiated the eligibility proceeding and Association staff has knowledge that a member intends to file a written application for relief with the National [Business Conduct Committee] *Adjudicatory Council.*

9523. National [Business Conduct Committee] *Adjudicatory Council* Consideration

(a) Hearing Panel Consideration

(1) Appointment of Hearing Panel

If a member files an application for relief, the National [Business Conduct Committee] *Adjudicatory Council or the Review Subcommittee* shall appoint a Hearing Panel composed of two or more members, who shall be current or former [Directors] *members* of the [NASD Regulation Board] *National Adjudicatory Council* or former *Directors or* Governors [of the NASD Board]. The Hearing Panel shall conduct a hearing and recommend a decision on the request for relief.

(2) Notice of Hearing

No change.

(3) Transmission of Documents

* * * * *

(ii) Not less than ten days before the hearing, the Department of Member Regulation, [who] *which* shall act as a Party in the eligibility proceeding, and the member and its current or prospective associated person shall exchange proposed exhibit and witness lists. The exhibit and witness lists shall be served by facsimile or commercial courier.

* * * * *

(9) Recommendation

On the basis of the record, the Hearing Panel shall present a recommended decision in writing on the request for relief to the Statutory Disqualification Committee. After considering the record

and recommendation of the Hearing Panel, the Statutory Disqualification Committee shall present its recommended decision in writing to the National [Business Conduct Committee and all other Directors] *Adjudicatory Council* not later than seven days before the meeting of the National [Business Conduct Committee] *Adjudicatory Council* at which the eligibility proceeding shall be considered.

(b) Decision

(1) Decision of the National [Business Conduct Committee] *Adjudicatory Council*

After considering all matters presented in the request for relief, the Statutory Disqualification Committee's recommended decision, the public interest, and the protection of investors, the National [Business Conduct Committee] *Adjudicatory Council* may grant or deny the request for relief, and, if relief is granted, impose conditions on the member and its current or prospective associated person. Alternatively, the National [Business Conduct Committee] *Adjudicatory Council* may remand the eligibility proceeding. The National [Business Conduct Committee] *Adjudicatory Council* shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents of Decision

No change.

(3) Issuance of Decision After Expiration of Call for Review Period

The National *Adjudicatory Council* [Business Conduct Committee shall provide its proposed written decision to the NASD Regulation Board, and, if the eligibility proceeding is not called for review by the NASD Regulation Board, the NASD Board. The NASD Regulation Board may call the eligibility proceeding for review pursuant to Rule 9524. The NASD Board may call the eligibility proceeding for review pursuant to Rule 9525. If neither the NASD Regulation Board nor the NASD Board calls the eligibility proceeding for review, the proposed written decision of the National Business Conduct Committee shall become final, and the National Business Conduct Committee shall serve its written decision on the member, the current or prospective associated person, and Department of Member Regulation pursuant to Rules 9132 and 9134. The decision shall be effective upon service. The decision shall constitute final action of the Association, unless the National Business Conduct Committee remands the eligibility proceeding.

9524. Discretionary Review by the NASD Regulation Board

(a) Call for Review by Director

A Director may call an eligibility proceeding for review by the NASD Regulation Board if the call for review is made within the period prescribed in paragraph (b).

(b) Seven Day Period; Waiver

After receiving the proposed written decision of the National Business Conduct Committee pursuant to Rule 9523, a Director shall have not less than seven days to determine if the eligibility proceeding should be called for review. A Director shall call an eligibility proceeding for review by notifying the General Counsel of NASD Regulation. By a unanimous vote of the NASD Regulation Board, the NASD Regulation Board may shorten the period to less than seven days. By an affirmative vote of the majority of the NASD Regulation Board then in office, the NASD Regulation Board may, during the seven day period, vote to extend the period to more than seven days.

(c) Review at Next Meeting

If a Director calls the eligibility proceeding for review within the period prescribed by paragraph (b), the NASD Regulation Board shall review the eligibility proceeding not later than the next meeting of the NASD Regulation Board. The NASD Regulation Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

(d) Decision of NASD Regulation Board, Including Remand

After review, the NASD Regulation Board may affirm, modify, or reverse the proposed written decision of the National Business Conduct Committee. Alternatively, the NASD Regulation Board may remand the eligibility proceeding with instructions. The NASD Regulation Board shall prepare a proposed written decision that includes all of the elements described in Rule 9523(b)(2).

(e) Issuance of Decision After Expiration of Call for Review Period

The NASD Regulation Board shall provide its proposed written decision to the NASD Board. The NASD Board may call the eligibility proceeding for review pursuant to Rule [9525] *9524*. If the NASD Board does not call the eligibility proceeding for review, the proposed written decision of the [NASD Regulation Board] *National Adjudicatory Council* shall become final, and the [NASD Regulation Board] *National Adjudicatory Council* shall serve its written decision on the member, the current or prospective associated person, and Department of Member Regulation pursuant to Rules 9132 and 9134. The decision shall be effective upon service. The decision shall constitute [the] final action of the Association, unless the [NASD Regulation Board] *National Adjudicatory Council* remands the eligibility proceeding.

[9525] *9524*. Discretionary Review by the NASD Board

(a) Call for Review by Governor

No change.

(b) [Seven Day Period; Waiver] *15 Day Period; Waiver*

[(1) Eligibility Proceeding Called for Review by NASD Regulation Board

If the NASD Regulation Board reviewed the eligibility proceeding under Rule 9524, as a] *A* Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least [seven] *15* days after the date on which the NASD Board receives the proposed written decision of the *National Adjudicatory Council* [NASD Regulation Board.

(2) Eligibility Proceeding Not Called for Review by NASD Regulation Board

If no Director of the NASD Regulation Board called the eligibility proceeding for review under Rule 9524, a Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the National Business Conduct Committee.

(3) Waiver

] By a unanimous vote of the NASD Board, the NASD Board may shorten the period [in subparagraph (1) or (2)] to less than [seven] *15* days. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the [seven] *15* day period [in subparagraph (1) or (2)], vote to extend the period [in subparagraph (1) or (2)] to more than [seven] *15* days.

(c) Review at Next Meeting

No change.

(d) Decision of NASD Board, Including Remand

After review, the NASD Board may affirm, modify, or reverse [: (1)] the proposed written decision of the [NASD Regulation Board, or (2) if the NASD Regulation Board did not call an eligibility proceeding for review under

Rule 9524, the proposed written decision of the National Business Conduct Committee] *National Adjudicatory Council.* Alternatively, the NASD Board may remand the eligibility proceeding with instructions. The NASD Board shall prepare a written decision that includes all of the elements described in Rule 9523(b)(2).

(e) Issuance of Decision

No change.

[9526] *9525.* Application to Commission for Review

The right to have any action taken pursuant to this Rule Series reviewed by the Commission is governed by Section 19 of the Act. The filing of an application for review shall not stay the effectiveness of final action by the Association, unless the Commission otherwise orders.

9600. PROCEDURES FOR EXEMPTIONS

9610. Application

(a) File with General Counsel

A member seeking an exemption from Rule 1021, 1022, 1070, 2210, 2340, 2520, 2710, 2720, 2810, 2850, 2851, 2860, Interpretive Material 2860–1, *3010*, 3210, 3350, *8211, 8212, 8213*, 11870, or 11900, Interpretive Material 2110–1, or Municipal Securities Rulemaking Board Rule G–37 shall file a written application with *the appropriate department or staff of the Association and provide a copy of the application to* the Office of General Counsel of NASD Regulation.

* * * * *

9630. Appeal

(a) Notice

An Applicant may file a written notice of appeal within 15 calendar days after service of a decision issued under Rule 9620. *The Notice of appeal shall be filed with the Office of General Counsel of NASD Regulation, with a copy of the notice also provided to the appropriate department or staff of the Association.* The notice of appeal shall contain a brief statement of the findings and conclusions as to which exception is taken. The National [Business Conduct] *Adjudicatory Council* [Committee] may order oral argument. If the Applicant does not want the National [Business Conduct Committee's] *Adjudicatory Council's* decision on the appeal to be publicly available in whole or in part, the Applicant also shall include in its notice of appeal a detailed statement, including supporting facts, showing good cause for treating the decision as confidential in whole or in part. The notice of appeal shall be signed by the Applicant.

(b) Expedited Review

Where the failure to promptly review a decision to deny a request for exemption would unduly or unfairly harm the applicant, the National [Business Conduct Committee] *Adjudicatory Council* shall provide expedited review.

(c) Withdrawal of Appeal

An Applicant may withdraw its notice of appeal at any time by filing a written notice of withdrawal of appeal with the National [Business Conduct Committee] *Adjudicatory Council.*

(d) Appointment of Subcommittee

Following the filing of a notice of appeal, the National [Business Conduct Committee shall] *Adjudicatory Council or Review Subcommittee may* designate a Subcommittee to hear an oral argument, if ordered, consider any new evidence that the Applicant can show good cause for not including in its application, and recommend to the National [Business Conduct Committee] *Adjudicatory Council* a disposition of all matters on appeal.

(e) Decision

After considering all matters on appeal and the Subcommittee's recommendation, the National [Business Conduct Committee] *Adjudicatory Council* shall affirm, modify, or reverse the decision issued under Rule 9620. The National [Business Conduct Committee] *Adjudicatory Council* shall issue a written decision setting forth its findings and conclusions and serve the decision on the Applicant. The decision shall be served pursuant to Rules 9132 and 9134. The decisions shall be effective upon service and shall constitute final action of the Association.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD Regulation included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD Regulation has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Association is proposing changes to the Rule 1010 Series, the Rule 8000 Series, the Rule 9000 Series, and various other rules to conform the rules to the changes adopted by the NASD Board to reorganize the NASD, NASD Regulation, and Nasdaq. The proposed rule amendments are intended to conform the Rule 1010 Series, the Rule 8000 Series, and the Rule 9000 Series to reflect the terms of the corporate reorganization that the NASD Board of Governors approved on June 26, 1997.[4]

Among other things, the corporate reorganization modifies the structure of the NASD Board. As a result, the structure of the NASD Regulation Board, and the Nasdaq Board and certain committees of NASD Regulation and Nasdaq will also change. Of all the structural changes approved by the NASD Board and the two subsidiary boards, two are most related to the operations described in the Rule 1010 Series, the Rule 8000 Series, and the Rule 9000 Series and are the impetus for a number of the rule changes described below.

First, the adjudicatory functions currently performed by the National Business Conduct Committee (''NBCC''), a committee of the NASD Regulation Board, will be performed instead by the National Adjudicatory Council (''NAC''). The proposed NAC members will be appointed by the NASD Regulation Board, but, except for the NAC Chair, will not be members of the NASD Regulation Board or the NASD Board.

Second, the process for reviewing a disciplinary proceeding has been streamlined. Under the proposal, if a disciplinary proceeding is subject to discretionary review at an executive level, such discretionary review will be performed solely by the NASD Board. In contrast, the Association's current practice requires that both the NASD Regulation Board and the NASD Board have an opportunity to review a disciplinary proceeding before the Association may issue a final decision. Although the regulatory responsibility of the NASD Regulation Board to engage in a review of a disciplinary proceeding

[4] The Commission recently approved a comprehensive amendment of the NASD By-Laws, the NASD Regulation By-Laws, the Nasdaq By-Laws, and the Delegation Plan containing the terms of the corporate reorganization. *See* Securities Exchange Act Release No. 39326 (November 14, 1997) (File No. SR–NASD–97–71).

has been eliminated, all directors of NASD Regulation will continue to play a vital role in the review of disciplinary proceedings, because, under the new board structure, all directors of the NASD Regulation Board also sit as Governors on the NASD Board.

As a result of these structural changes, the Association is proposing changes to Article V of the NASD Regulation By-Laws, the Rule 1010 Series, the Rule 8000 Series, and the Rule 9000 Series. First, the references to the adjudicatory functions currently performed by the NBCC have been redesignated as those performed by the proposed NAC. Second, the Association proposes amendments to the Rule 1010 Series, the Rule 8000 Series, and the Rule 9000 Series to delete the discretionary review function of the NASD Regulation Board in a Series of rules in which such function is currently set forth. Finally, other changes are proposed in this rule filing to clarify or simplify the rules that were approved on August 7, 1997, as part of SR–NASD–97–28.[5] Such changes are described later in detail.

(a) Changes to Article V of NASD Regulation By-Laws. The Association is proposing to add a new Section 5.11 to Article V of the NASD Regulation By-Laws. This section will set the quorum requirements and composition of the Review Subcommittee, a subcommittee of the new NAC. As described in greater detail below, the Review Subcommittee shall perform those functions in membership and disciplinary proceedings that are set forth in the membership and disciplinary procedure rules.

(b) Changes to the Rule 1010 Series. The Rule 1010 Series is entitled ''Membership, Registration and Qualification Requirement.'' The Association is proposing changes to the Rule 1010 Series in order to reflect the changes required pursuant to the corporate reorganization approved by the NASD Board while SR–NASD–97–28 was under consideration by the Commission.

First, in order to reflect the changes proposed as part of the corporate reorganization, the Association will amend the Rule 1010 Series generally by deleting each reference to the term, ''National Business Conduct Committee,'' and substituting the term, ''National Adjudicatory Council.''

Second, in current Rule 1016, the NASD Regulation Board has the authority to review an NBCC decision following an appeal or review proceeding regarding an applicant whose request for NASD membership has been denied, granted without restriction, or granted but is subject to one or more restrictions set forth in Rule 1014(b)(2). This change parallels the authority of the NBCC to call any disciplinary proceeding decision for review in the Rule 9000 Series. The Association is proposing to eliminate the discretionary review authority of the NASD Regulation Board in current Rule 1016 for the purpose of making the review process more efficient. Generally, this change means that an applicant will receive a final decision of the Association regarding membership status at least 30 days before the applicant would have received such notification under the current Rule 1010 Series. The NASD Board will continue to have the authority now set forth in Rule 1016.

(c) Changes to the Rule 8000 Series. The Rule 8000 Series is entitled ''Investigations and Sanctions.'' Several changes to the Rule 8000 Series were approved by the Commission on August 7, 1997, in SR–NASD–97–28. The Association is now proposing additional changes to the Rule 8000 Series in order to reflect the changes required pursuant to the corporate reorganization approved while SR–NASD–97–28 was under consideration by the Commission. In addition, the Association is proposing changes to Rule 8110 regarding the availability of the NASD Manual and Rule 8210(d) regarding notices sent under the Rule. Finally, the NASD is proposing to move three rules requiring that certain persons provide the Association with information to the Rule 8000 Series from other rule series.

First, in order to reflect the changes proposed as part of the corporate reorganization, the Association will amend the Rule 8000 Series generally by deleting each reference to the term, ''National Business Conduct Committee,'' and substituting the term, ''National Adjudicatory Council,'' and make other conforming changes discussed above to reflect the corporate reorganization.

Second, the Association proposes minor changes to Rule 8110 and Rule 8210(d). Rule 8110 requires a member to maintain an NASD Manual. If approved, the proposed change to Rule 8110 would allow a member to comply with the obligation of Rule 8110 to maintain a copy of the NASD Manual in its offices, including branch offices, by allowing the member to maintain an electronic version of the NASD Manual, among other options, in such offices.

Third, the proposed change to Rule 8210(d) is intended to clarify how the Association will determine if a member or a person subject to the Rule 8000 Series obligation to provide information to the Association upon request receives a notice sent by the Association. Additional addresses at which a person may be served have been added to the list to provide additional safeguards to potential recipients of such notices.

Fourth, the Association proposes to renumber three rules, Rule 4615, Rule 5107, and Rule 6730, as proposed Rule 8211, proposed Rule 8212, and proposed Rule 8213. Each of these rules requires certain persons to provide information to the Association. The Rule 8000 Series, by Rule 8210, contains the general requirement that a member or another person must provide information to the Association when requested to do so. The rules, in the current form and as renumbered proposed rules, set forth the same type of obligation as to specific types of information. The Association believes that members and other persons will be more aware of these information sharing obligations by placing the three current rules in the Rule 8000 Series. The Association also proposes minor, technical changes to such renumbered rules, as described below.

Rule 4615 requires a member to submit automated trading data upon request to the Association. The Association does not propose to amend the text of current Rule 4615, renumbered as Rule 8211, except as follows. The Association proposes to add an explicit reference to the Rule 9600 Series to identify the Rule 9600 Series as the avenue by which a member may seek a good cause exemption and to set forth clearly that ''good cause'' is the standard for seeking an exemption. The other amendments proposed are technical (*e.g.*, the paragraphs and subparagraphs of the rule are renumbered and a redundant clause is stricken).

Proposed Rule 8212, now Rule 5107, requires a member and an approved affiliate that participates in Nasdaq International as a Service market maker or an order-entry firm to submit certain trading data. The minor changes the Association proposes to the existing rule text include amending the title to clarify that the proposed Rule 8212 obligation is to provide information on trading data for the Nasdaq International Service transactions, adding a reference to the Rule 9600 Series as the appropriate rule series under which a member may seek a good cause exemption from the obligations of the rule, and stating explicitly that ''good cause'' is the standard for obtaining an exemption.

[5] *See* Securities Exchange Release No. 38908 (August 7, 1997), 62 FR 43385 (August 13, 1997).

Proposed Rule 8212, now Rule 6730, requires a member to submit certain types of trade data pursuant to proposed Rule 8211 (current Rule 4615) in automated format. Proposed Rule 8213 differs from current Rule 6730 in that the Association proposes to clarify the title of the rule, make an explicit reference to the Rule 6700 Series, and add a sentence at the end of the rule referring a member to the Rule 9600 Series in order to request exemptive relief.

The Association notes that its proposal to move Rule 4615, Rule 5107, and Rule 6730 to the Rule 8000 Series will not affect the Association's ability to seek information pursuant to any other Association rule under which the Association may do so from persons subject to the rule. For example, under proposed Rule 4623, Nasdaq is proposing to request information from electronic communications networks (''ECNs'') and the changes the Association is proposing with respect to the Rule 8000 Series are not intended to have any impact on the Association's proposal to gather information under proposed Rule 4623.

(d) Changes to the Rule 9000 Series. The Rule 9000 Series is entitled the ''Code of Procedure.'' The Rule 9000 Series was comprehensively changed pursuant to the Commission approval of SR–NASD–97–28 on August 7, 1997.[6] The Association is now proposing additional changes to the Rule 9000 Series in order to reflect the changes required pursuant to the corporate reorganization approved while SR–NASD–97–28 was under consideration by the Commission. In addition, the Association is amending Rule 9102(d), Rule 9844(b), and Rule 9347 (a–b), to clarify the role of the Review Subcommittee of the NAC. Finally, the Association is proposing minor changes to several other Rules, including Rule 9120, Rule 9141, Rule 9214, Rule 9215, Rule 9216, Rule 9231, Rule 9235, Rule 9241, Rule 9270, and 9312.

(1) Changes Related to the Corporate Reorganization. In order to reflect the changes proposed as part of the corporate reorganization, the Association will amend the Rule 9000 Series generally by deleting each reference to the term, ''National Business Conduct Committee,'' and substituting the term, ''National Adjudicatory Council.''

In addition, there are several proceedings described in the current Rule 9000 Series in which the NASD Regulation Board has the authority to review a disciplinary or other decision of the NBCC relating to the proceeding (*e.g.*, Rule 9351, relating to a Rule 9300 Series disciplinary proceeding that has been appealed to or reviewed by the proposed National Adjudicatory Council, and Rule 9415, relating to a Rule 9400 proceeding used to regulate the activities of a member experiencing financial or operational difficulties). The Association is proposing to eliminate such authority. Generally, if this proposed change is approved by the Commission, persons subject to disciplinary and other proceedings in which the discretionary review function of the NASD Regulation Board is eliminated will be notified of the final decision of the Association approximately 30 days earlier than such persons would be notified under the current Rule 9000 Series.

In order to reflect the increased role of the Review Subcommittee of the NAC in the administration of disciplinary proceedings during the appeal or review stages, the Association is proposing to amend several rules in the Rule 9300 Series, or other rules relating to a Rule 9300 Series appeal or review proceeding, by granting authority to the Review Subcommittee to make a number of decisions, and deleting from the same rules the authority of the Chair and Vice Chair of the proposed NAC (formerly, the NBCC) to make such decisions. In addition, in proposed amendments to Rule 9216 and Rule 9270, the Review Subcommittee is substituted for the Chair and the Vice Chair of the NAC (formerly, the NBCC) in: (a) Rule 9216(a), relating to the review and acceptance of letters of acceptance, waiver, and consent; (b) Rule 9216(b), relating to the review and acceptance of minor rule plan violation letters; and, (c) Rule 9270, relating to the review and acceptance of offers of settlement. As a result of the restructuring of the NBCC as the NAC and the proposed changes in procedural operations, the Association believes that it is more appropriate for either the full disciplinary committee, the proposed NAC, or by delegation, the smaller Review Subcommittee, balanced as to Industry and Non-Industry members, to make certain decision and rulings within the authority of the NBCC (the proposed NAC) that had been delegated previously to the Chair and the Vice Chair of the NBCC. Each of the above changes are reflected in amendments to a number of Rules in the Rule 9000 Series.

(2) Rule 9100 Series, Rule 9200 Series, and Rule 9300 Series—Other Changes. The Association proposes to add a new definition, ''Department of Enforcement,'' in Rule 9120, as new paragraph (e) and renumber all other paragraphs. The definition of ''Department of Enforcement'' is being added because a substantial number of Association disciplinary proceedings are conducted cooperatively by the Department of Enforcement and the Department of Market Regulation. In some cases, staff of the Department of Market Regulation will perform many of the functions of the complaining Party by delegated authority.

Proposed paragraph (e) provides that the Department of Enforcement means the Department of Enforcement itself, and for most purposes under the Code, its delegatee, the Department of Market Regulation as well. Although the Department of Market Regulation would have delegated authority to prosecute a disciplinary matter after authorization of the complaint by the Division of Enforcement, however, it would not have authority to authorize a disciplinary proceeding under Rule 9211, determine the terms of a letter of acceptance, waiver, and consent, or of a minor rule violation plan letter under Rule 9216 (a) and (b), or authorize the filing of a notice of appeal under Rule 9311.

The Association purposes many other minor changes to Rule 9120 which reflect renumbering or a change in the term, ''National Business Conduct Committee'' to the term, ''National Adjudicatory Council.'' In addition, certain definitions contain technical corrections to add references to proceedings in the Rule 9600 Series. Finally the Association is proposing to amend the definition of ''Review Subcommittee.'' The Association proposes to delete the definition from the Rule 9300 Series, locate it in Rule 9120, and amend it to clarify the composition of the Review Subcommittee and other terms of the Review Subcommittee by a cross reference to new Article V, Section 5.11 of the NASD Regulation By-Laws.

The Association proposes to amend Rule 9141(b) to clarify that the written notice one is required to file under that provision is a ''notice of appearance.'' Rule 9141(b) indicates that when a Respondent is represented by a third party, a written notice stating the name of the representative, among other things, shall be filed. The proposed change to paragraph (b) would make explicit that the written notice is a notice of appearance, and that the notice of appearance must be filed in each case. This procedure will avoid any misunderstanding as to who the representative is for a particular Respondent.

[6] *See* Release No. 34–38908, *supra* note 5.

The Association proposes to amend Rule 9214(b) to clarify that when the consolidation of two or more cases is being considered, all Parties to all such cases will be served with all papers filed and all orders issued. The proposed amendment also makes explicit that when a Party moves to consolidate two or more cases, the Chief Hearing Officer will decide which panel will hear the case and will issue an order accordingly.

The Association proposes to amend Rule 9215 in paragraph (a) to clarify that service of an answer occurs under Rule 9133, in paragraph (e) to change a 15 day period to a 14 day period, which is consistent with other periods in the Code, and in paragraph (f) to permit the Department of Enforcement to send a second notice to a Respondent who fails to file an answer. Paragraph (a) includes a reference to Rule 9133 which could be read as incorrectly stating that service of the complaint is made pursuant to Rule 9133. The amendment to paragraph (a) clarifies that service of an answer must be made pursuant to Rule 9133.

Currently, paragraph (e) of Rule 9215 provides for an extension of time for the Respondent to file an answer to an amended complaint. The time period is 14 days if the Respondent has not filed an answer to the original complaint and 15 days if the Respondent has filed an answer to the original complaint. The Association is proposing to make both periods 14 days, to eliminate confusion.

Rule 9215(f) provides that if a Respondent does not file an answer within the time period of the original complaint, the Hearing Officer will direct the Department of Enforcement to send a second notice of the complaint to the Respondent. Subsequently, the Hearing Officer may treat a failure to respond to the second notice as a default. In those cases in which the Respondent has filed an extension request or a letter or some other document with the Office of Hearing Officers, and subsequently fails to file an answer, it is unnecessary to have the Department of Enforcement send a second notice before a default is declared because the earlier filing by the Respondent is evidence that the Respondent received the original complaint. If there is evidence in the form of a communication to the Office of Hearing Officers that Respondent received the original complaint and failed to file an answer, the Association believes that there should be no requirement that a second notice of the complaint be sent before a default judgment can be entered. In addition, in the interests of efficiency, in those cases in which the Respondent does not file anything, the Department of Enforcement on its own initiative should send the second notice without an order from the Office of Hearing Officers. Therefore, the Association is proposing to amend Rule 9215 (f) to (i) delete the requirement that the Office of Hearing Officers order the Department of Enforcement to send the second notice when required, and (ii) delete the requirement to send a second notice before declaring a default if the Respondent has made a filing with the Office of Hearing Officers but has failed to answer the complaint in a timely manner.

The Association proposes to amend IM–9216, which follows Rule 9216(b), the provision allowing a person to resolve some rule violations by submitting a minor rule violation plan letter (''MRV'') to the Association. In IM–9216, the Association lists the rules that the Association may resolve violations of by using an MRV. The Association proposes to add Rule 4615, Rule 6730 and Rule 5107 to IM–9216 (as renumbered proposed Rules 8211 through proposed Rules 8213).

The Association inadvertently omitted Rule 4615 and Rule 6730 in IM–9216 in the submission of the proposed Rule 9000 Series in SR–NASD–97–28. Prior to August 7, 1997, when SR–NASD–97–28 was approved by the Commission, old Rule IM–9217, the former provision listing rule violations appropriate for resolution by an MRV included Rule 4615 and the Rule 6730 Series, which included Rule 6730. The Association also proposes to add Rule 5107 (proposed as Rule 8212) to IM–9216 because it is similar to Rule 4615 and Rule 6730. Rule 5107, like Rule 4615 and Rule 6730, is a ''blue sheeting'' rule, requiring the same type of information to be submitted as do the Rules 4615 and Rule 6730.

The Office of Hearing Officers has determined that without express authority in the Code of Procedure the Chief Hearing Officer would be unable to appoint persons to serve as observers to observe a disciplinary proceeding. Rule 9231 (b) and (c) currently provides that a Hearing Panel or an Extended Hearing Panel shall consist of a Hearing Officer and two Panelists, except in extraordinary circumstances relating to the prior disqualification or recusal of a Panelist as set forth in Rule 9234. The Association is proposing to add paragraph (d) to Rule 9231 to assure that, for training purposes only, the Chief Hearing Officer could appoint an observer to observe a disciplinary proceeding. Under paragraph (d), the Chief Hearing Officer could designate a person as an observer to a Hearing Panel or an Extended Hearing Panel if the person is eligible to be appointed as a Panelist. The Function is being established to provide future Panelists with the opportunity to observe a disciplinary proceeding hearing for training purposes.

The Association proposes to amend Rule 9235 to allow the Chief Hearing Officer or the Deputy Chief Hearing Officer to issue an order in a disciplinary proceeding in the event a Hearing Officer is unavailable. The Association is proposing to add new paragraph (b) to state explicitly that, in the event the appointed Hearing Officer is temporarily unavailable and exigent circumstances require action by the Hearing Officer, the Chief Hearing Officer or the Deputy Chief Hearing Officer may temporarily function as the appointed Hearing Officer in a proceeding until the appointed Hearing Officer is available.

The Association is proposing to amend Rule 9241 to trigger the 21 day period in the rule from the filing of an answer, rather than from the service of the answer. The Office of Hearing Officers knows when as answer has been filed; it may not know for a period of time whether the answer has been served.

The Association is proposing to amend Rule 9270(a) to allow a Hearing Officer to determine if an offer of settlement made before a hearing on the merits has begun should stay the hearing. Currently, a Hearing Panel must issue such decisions if the offer of settlement is filed within 30 days prior to the date the hearing is scheduled to begin. The specific change would provide that if a settlement motion is filed prior to the commencement of a hearing, the Hearing Officer has the authority to determine whether the hearing should be stayed. In contrast, if the settlement motion is filed after commencement of a hearing, the panel, rather than the Hearing Officer, has the authority to determine whether the hearing should be stayed.

In Rule 9312(e), the Association proposes to clarify that the National Adjudicatory Council's authority to review a case extends to any issue raised in the ''record'' of the disciplinary proceeding, rather than the ''decision'' as the Code now provides.

(3) Rule 9600 Series—Other Changes. The Association is proposing to amend the Rule 9600 Series under the Code of Procedure to require a member seeking an exemption from proposed Rule 8211, 8212, and 8213 (current Rule 4615, Rule 5107, and Rule 6730, discussed, *supra*, as changes to the Rule 8000 Series), to follow the procedures outlined in the

recently adopted Rule 9600 Series. Currently, the exemptive authority under Rule 4615, Rule 5107, and Rule 6730 is a generalized authority vested in the Association.

In addition, to eliminate delays in processing a request for an exemption, the Association proposes to modify Rule 9610. Proposed Rule 9610 requires a person seeking exemptive relief to file a written application with ''the appropriate department or staff of the Association, and provide a copy of the application to the Office of General Counsel of NASD Regulation,'' rather than filing the application only with the Office of the General Counsel of NASD Regulation. The same change is proposed in Rule 9630(a), which deals with filing a notice of an appeal of a decision regarding exemptive relief.

2. Statutory Basis

(a) The Association is requesting that the proposed rule change be effective within 45 days of SEC approval, but not later than January 1, 1998.

(b) The Association believes that the proposed rule change is consistent with Section 15A(b)(6), (7), and (8) of the Act.[7] The proposed rule change is consistent with Section 15A(b)(6) of the Act in that it will promote just and equitable principles of trade by providing fair procedures and standards for membership admission, and fair procedures and consistent treatment for requesting information from members or other persons who are obligated to provide the Association with information. The proposed rule change is consistent with Section 15A(b)(7) in that it furthers the statutory mandate that the Association establish rules providing that its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this title, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction. The rule change is consistent with Section 15A(b)(8) in that it furthers the statutory goals of providing a fair procedure for disciplining members and persons associated with members, fair procedures for admitting or denying membership to any person seeking membership to the Association, fair procedures for barring any person from becoming associated with a member of the Association, and fair procedures for prohibiting or limiting the association of any person with respect to access to services offered by the Association or a member thereof.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD Regulation does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the proposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice if the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR–NASD–97–81 and should be submitted by December 18, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–31523 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

[7] 15 U.S.C. § 780–3.

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39369; File No. SR–NASD–97–51]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving a Proposed Rule Change Regarding the Transfer of Securities of Issuers Listed on the Nasdaq Stock Market That Are Held Pursuant to a Direct Registration Program

November 26, 1997.

I. Introduction

On July 16, 1997, The Nasdaq Stock Market, Inc. (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change (File No. SR–NASD–97–51) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] The rule change will amend Rules 4200, 4310, 4320, and 4460 of the National Association of Securities Dealers, Inc. (''NASD'') to require Nasdaq issuers that elect to offer a direct registration program [2] to shareholders to participate, either directly or through the issuer's transfer agent, in an electronic link with a securities depository registered under Section 17A of the Act.[3] Notice of the proposal was published in the **Federal Register** on September 23, 1997.[4] No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposal

In 1994, the Commission requested comments on the establishment of a transfer agent operated direct registration system (''DRS'') for securities which would allow investors to have their securities registered in book-entry form directly on the books of

[1] 15 U.S.C. 78s(b)(1).

[2] New section (j) of NASD Rule 4200 defines a *direct registration program* as any program by an issuer, directly or through its transfer agent whereby a shareholder may have securities registered in the shareholder's name on the books of the issuer or its transfer agent without the need for a physical certificate to evidence ownership.

[3] 15 U.S.C. 78q–1.

[4] Securities Exchange Act Release No. 39082 (September 16, 1997), 62 FR 49719.

the issuer and to receive a statement of ownership instead of a certificate.[5] Since issuance of the Concept Release, a basic structure for DRS has been developed and implemented by a joint committee of representatives of the Securities Industry Association, the Securities Transfer Association, the Corporate Transfer Agents Association, and the registered securities depositories. Using DRS, investors have a new way, in addition to holding a certificate or holding in street name at a broker-dealer, to hold their securities positions.

A key component of DRS is the electronic linkage of issuers or their transfer agents with broker-dealers through registered securities depositories. Assuming an issuer and its transfer agent participate in DRS, this link allows a broker-dealer to deliver to a transfer agent on customer's request that his purchased securities be registered on the books of the issuer in book-entry form. The linkage also provides for the book-entry movement between broker-dealers and issuers of customers' existing positions.

The Depository Trust Company (''DTC'') has received Commission approval of its procedures implementing DRS.[6] Under DTC's procedures, to participate in DRS a transfer agent needs to become a DRS ''limited participant'' at DTC.[7]

Therefore, Nasdaq proposed to amend NASD's rules to establish a qualification requirement for all securities to be included in Nasdaq that if the issuer establishes a direct registration program it shall participate in an electronic link with a securities depository in order to facilitate the electronic transfer of securities held pursuant to the direct registration program. The electronic link may be direct or through the issuer's transfer agent.

III. Discussion

Section 15A(b)(6) of the Act[8] requires that the rules of a national securities association be designed to foster cooperation with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities. The Commission believes that the proposed rule change is consistent with Section 15A(b)(6) because it requires Nasdaq issuers participating in DRS to establish a link with a registered securities depository before operating DRS services. This requirement should increase cooperation among Nasdaq issuers, their transfer agents, broker-dealers, and DTC.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–NASD–97–51) be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–31684 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

[5] Securities Exchange Act Release No. 35038 (December 1, 1994), 59 FR 63652 (''Concept Release'').

[6] Securities Exchange Act Release No. 37931 (November 7, 1996), 61 FR 58600 [File No. SR–DTC–96–15].

[7] According to DTC, a party wishing to be a ''limited participant'' must: (1) be registered as a transfer agent with the SEC; (2) participate as a transfer agent in DTC's Fast Automated Securities Transfer (''FAST'') program; (3) provide ''direct mail service'' on transfers; and (4) communicate with DTC through a computer-to-computer interface using DTC's CCF platforms. *Id.* The Philadelphia Depository Trust Company has received Commission approval of similar DRS procedures. Securities Exchange Act Release No. 37933 (November 8, 1997), 61 FR 59269 [File No. SR–Philadep–96–14]

[8] 15 U.S.C. 78o–3(b)(6).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39358; File No. SR–PCX–97–43]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Relating to an Extension of the Exchange's Specialist Evaluation Pilot Program

November 25, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 17, 1997,[1] the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

PCX is proposing to extend its pilot program regarding the evaluation of its equity specialists until January 1, 1999. In addition, the Exchange is proposing to implement certain changes to the pilot program.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On June 3, 1997, the Commission approved a six-month extension of the pilot program for the evaluation of equity specialists.[2] The reason for the extension was to allow the PCX more time to evaluate the impact of the SEC's new order handling rules on the performance criteria and to determine an appropriate overall passing score and individual passing scores for each criterion. The Exchange now is proposing to extend the pilot program until January 1, 1999. The PCX has established an overall passing score and individual passing scores for each criterion and has determined when specialists that do not attain the minimum passing scores should meet with the Equity Allocation Committee (''EAC''). The Exchange is also proposing to replace the ''Bettering the Quote'' criterion with Price Improvement and to lower the weighting of the Specialist Evaluation Questionnaire from 15% to 10% so that Price Improvement can be given a weight of 10%. Since the Bettering the Quote criterion is now measured against the NBBO instead of the primary market, the PCX believes it is no longer

[1] *See* letter from Jeffrey S. Norris, Manager, Regulatory Development, PCX, to Heather Seidel, Attorney, Market Regulation, Commission, dated November 24, 1997 (''Amendment No. 1''). The substance of Amendment No. 1 is incorporated into the notice.

[2] *See* Securities Exchange Act Release No. 38712 (June 3, 1997), 62 FR 17941 (July 8, 1997).

a viable criterion. Previously, the ''Bettering the Quote'' criterion was measured against the primary market, which provided opportunities for the specialist to better the primary market quote. However, since the NBBO by definition is the best market, it does not provide the same opportunities for specialists to better the quote, especially when the PCX is the NBBO. The PCX believes that Price Improvement is a meaningful criterion that should be given a 10% weighting, which should be accomplished by lowering the Specialist Evaluation Questionnaire weighting to 10%. This will allow the Exchange to achieve its goal of providing its specialists with a more objective rating system. The description of the Price Improvement criterion as well as the overall passing score and individual passing scores are as follows:

a. Price improvement. ''Price Improvement'' measures the number of trades involving market and marketable limit orders that improve the NBBO if the NBBO quote spread at the time the original order is *received* is greater than or equal to two trading differentials, but less than or equal to eight trading differentials for that security. The execution price for stopped market or marketable limit orders will be compared with the guaranteed price (which is the NBBO at the time the order was received).

Orders completely or partially executed will be considered for price improvement. All *one-sided* market or marketable limit orders [3] with an NBBO quote spread greater than ⅛ point are eligible for price improvement. Only agency orders entered or received by an exchange are eligible for price improvement. Orders with time-in-force designations such as good until canceled (GTC), good through day of entry (DAY), immediate or cancel (IOC), and good until executed will be eligible for price improvement. In addition, stocks, rights, warrants, preferred stock, when issued, and when distributed equity securities will be eligible for price improvement.

The following types of orders will not be considered under the category of price improvement: all preopening market and limit orders, limit order executions out of the limit book (i.e., booked orders), electronically entered limit orders whose price falls in between the NBBO, non-regular-way trades (i.e., cash, next day and seller's option), negotiated trades or trades identified as crosses, bonds, orders designated as possible duplicates (POSS DUPE) or try to stop (TTS), canceled orders, odd-lot market and odd-lot limit orders, orders designated as all or none (AON), all tick sensitive executions (i.e., buy minus, sell plus, sell short, etc.), market quotations under 200 shares, and principal and program trade account types.[4]

Specialists will be measured on the percentage of trades that are price improved. The following table gives the parameters and corresponding point values:

Percent of eligible trades improved	Points
40 +	10
36–39.99	9
32–35.99	8
28–31.99	7
24–27.99	6
20–23.99	5
16–19.99	4
12–15.99	3
8–11.99	2
4–7.99	1
Below 4	0

Limit order executions out of the limit book (i.e., booked orders) were not included because they are filled as the market moves toward them, not when they are outside of the NBBO. Electronically entered limit orders whose price falls in between the NBBO were excluded because these are not executable at the time they are entered, unless the specialist chooses to fill them. Non-regular-way trades (i.e., cash, next day and seller's option) and negotiated trades are not included because they are negotiated and the price does not necessarily depend upon the NBBO. Trades identified as crosses were excluded because specialists do not participate in crosses, by definition. Bonds and orders designated as possible duplicates (POSS DUPE) were not included because they are entered manually. Canceled orders were excluded because orders cannot be improved upon if they are not allowed to be executed. Odd-lot market and odd-lot limit orders were not included because they are executed automatically in the background, and the specialist never has the opportunity to improve upon them. Orders designated as all or none (AON) and all tick sensitive executions (i.e., buy minus, sell plus, sell short, etc.) were excluded because they are conditional orders. Market quotations under 200 shares were not included because they are usually computer generated and the specialists generally have no opportunity to improve them. Principal orders were excluded because they cannot be sent via PCOAST. Program trades were not included because they involve a large portfolio of stocks and derivative index products, which are not generally routed to a regional exchange for execution.

b. Overall Passing Score. The PCX has established an overall passing score of 60 as the minimum standard that each specialist must attain each quarter. A specialist will have to obtain better than a passing score in each individual criterion (see minimum passing scores shown below) to obtain a minimum passing score of 60. Any specialist who falls below the minimum passing score will have to appear before the EAC and will be subject to the following restrictions: no new allocations and no trading in alternate specialist stocks for the quarter following the quarter that the specialist was evaluated. Such specialists will have the right to request the lifting of one or more of the restrictions based upon mitigating circumstances. Any specialist who does not attain a passing score in any three out of four quarters will also be subject to other restrictions imposed by the EAC, including reallocation of one or more stocks. The EAC will evaluate the effectiveness of the overall passing score and will adjust it accordingly.

c. Individual Criterion Passing Scores. The PCX has established individual passing scores for each individual criterion based upon third quarter 1997 evaluation results. The third quarter of 1997 was the first evaluation period that the Trading Between the Quote, Book Display Time, and Quote Performance calculations were based upon the NBBO instead of the primary market. In addition, the evaluation results in the third quarter were based upon one-sixteenth trading increments instead of one-eighth increments. As a result of the NBBO changes and the change to sixteenths, individual passing scores in the affected criteria were lower than in previous quarters. Previous quarter scores were not used to determine individual criterion passing scores because of the aforementioned changes. The EAC will evaluate the effectiveness of the individual passing scores and will adjust them accordingly. The individual passing scores for each criterion are as follows:

Evaulation criterion	Passing score
Turnaround Time	12.0
Holding Orders Without Action	7.5
Trading Between the Quote	5.0
Executions in Size Greater Than NBBO	2.0
Specialist Evaluation Questionnaire Survey	5.0

[3] The regional exchanges have agreed to the following definition for marketable limit orders: A marketable limit order to buy is priced at or above the NBBO offer, a marketable limit order to sell is priced at or below the NBBO bid.

[4] Preopening market and limit orders were excluded because all such orders are entered prior to there being a market that is trading, so there is no market to improve upon.

Evaulation criterion	Passing score
Book Display Time	10.5
Equal or Better Quote Performance	1.0
Post 1 P.M. Parameters	3.0
Price Improvement	4.0

Any specialist who does not attain a minimum passing score in a particular criterion for two or more consecutive quarters or more will be subject to the following:

1. If a specialist does not attain an overall passing score in any particular individual criterion for *2 consecutive quarters,* the specialist will have to appear before the EAC. The EAC will meet with the specialist with the intent of helping the specialist to improve the score.

2. If a specialist does not attain an overall passing score in any particular individual criterion for *3 out of 4 consecutive quarters,* the specialist will either not be permitted to trade any alternate specialist stocks or not be able to apply for any new stocks for one quarter. The Equity Allocation Committee will decide which restriction will apply.

3. If a specialist does not attain an overall passing score in any particular individual criterion for *4 out of 5 consecutive quarters, 5 out of 6 quarters, etc.*, the specialist will be subject to both the alternate specialist and no new stock restrictions for one quarter. The EAC may also, at its discretion, impose other restrictions, including reallocating one or more of the specialist stocks

The EAC will have the discretion not to impose any of these restrictions if there are mitigating circumstances.

The PCX intends to file a rule change to PCX 5.37 to reflect all of the aforementioned changes to its Specialist Evaluation Pilot Program.

The Commission has requested that the Exchange file a report regarding the Exchange's experience with the Pilot, for the period from April 1, 1997 to September 30, 1997, and this report has been filed under separate cover.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and Section 6(b)(5) in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public.

[5] 15 U.S.C. 78f(b).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–PCX–97–43 and should be submitted by December 24, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–31615 Filed 12–2–97; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

Senior Executive Service Performance Review Board Members

ACTION: Listing of personnel serving as members of this agency's Senior Executive Service Performance Review Boards.

SUMMARY: Section 4314(c)(4) of Title 5, U.S.C. requires that Federal agencies publish notification of the appointment of individuals who serve as members of that Agency's Performance Review Boards (PRB). The following is a listing of those individuals currently serving as members of this Agency's PRB;

1. Chris Sale, Chief Operating Officer;
2. John Whitmore, Deputy to the Associate Deputy Administrator for Government Contracting and Minority Enterprise Development;
3. Mary K. Swedin, Assistant Administrator for Congressional and Legislative Affairs;
4. John Gray, Associate Deputy Administrator for Economic Development;
5. Carolyn J. Smith, Assistant Administrator for Human Resources;
6. Herbert Mitchell, Deputy Associate Administrator for Disaster Assistance;
7. Mark Stephens, Deputy General Counsel;
8. John Smith, District Director (Chicago);
9. Erline Patrick, Assistant Administrator for Equal Employment Opportunity and Civil Rights Compliance;
10. Darryl Dennis, Counselor to the Administrator;
11. Charles Anderson, District Director (Miami);
12. Monika Harrison, Associate Administrator for Business Initiatives;
13. Judith Roussel, Associate Administrator for Government Contracting;
14. Mark Quinn, District Director (San Francisco);
15. Larry Wilson, Chief Financial Officer;
16. Jeanne Saddler, Counselor to the Administrator.

Dated: November 24, 1997.

Aida Alvarez,

Administrator.

[FR Doc. 97–31525 Filed 12–2–97; 8:45 am]

BILLING CODE 8025–01–M

SOCIAL SECURITY ADMINISTRATION

[Social Security Acquiescence Ruling 97-4(9)]

Chavez v. Bowen; Effect of a Prior Final Decision That a Claimant is Not Disabled, And of Findings Contained Therein, On Adjudication of a Subsequent Disability Claim Arising Under the Same Title of the Social Security Act—Titles II and XVI of the Social Security Act

AGENCY: Social Security Administration.

ACTION: Notice of Social Security Acquiescence Ruling.

SUMMARY: In accordance with 20 CFR 402.35(b)(2), the Acting Commissioner of Social Security gives notice of Social Security Acquiescence Ruling 97-4(9).

EFFECTIVE DATE: December 3, 1997.

FOR FURTHER INFORMATION CONTACT: Gary Sargent, Litigation Staff, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965-1695.

SUPPLEMENTARY INFORMATION: Although not required to do so pursuant to 5 U.S.C. 552(a)(1) and (a)(2), we are publishing this Social Security Acquiescence Ruling in accordance with 20 CFR 402.35(b)(2).

A Social Security Acquiescence Ruling explains how we will apply a holding in a decision of a United States Court of Appeals that we determine conflicts with our interpretation of a provision of the Social Security Act (the Act) or regulations when the Government has decided not to seek further review of that decision or is unsuccessful on further review.

We will apply the holding of the Court of Appeals decision as explained in this Social Security Acquiescence Ruling to claims at all levels of administrative adjudication within the Ninth Circuit. This Social Security Acquiescence Ruling will apply to all determinations and decisions made on or after December 3, 1997. If we made a determination or decision on your application for benefits between April 19, 1988, the date of the Court of Appeals decision, and December 3, 1997, the effective date of this Social Security Acquiescence Ruling, you may request application of the Ruling to your claim if you first demonstrate, pursuant to 20 CFR 404.985(b) or 416.1485(b), that application of the Ruling could change our prior determination or decision.

If this Social Security Acquiescence Ruling is later rescinded as obsolete, we will publish a notice in the **Federal Register** to that effect as provided for in 20 CFR 404.985(e) or 416.1485(e). If we decide to relitigate the issue covered by this Social Security Acquiescence Ruling as provided for by 20 CFR 404.985(c) or 416.1485(c), we will publish a notice in the **Federal Register** stating that we will apply our interpretation of the Act or regulations involved and explaining why we have decided to relitigate the issue.

(Catalog of Federal Domestic Assistance Program Nos. 96.001 Social Security - Disability Insurance; 96.002 Social Security - Retirement Insurance; 96.004 Social Security - Survivors Insurance; 96.005 Special Benefits for Disabled Coal Miners; 96.006 Supplemental Security Income.)

Dated: September 17, 1997.

John J. Callahan,

Acting Commissioner of Social Security.

Acquiescence Ruling 97-4(9)

Chavez v. *Bowen*, 844 F.2d 691 (9th Cir. 1988)—Effect of a Prior Final Decision That a Claimant is Not Disabled, And of Findings Contained Therein, On Adjudication of a Subsequent Disability Claim Arising Under the Same Title of the Social Security Act—Titles II and XVI of the Social Security Act.

Issue: Whether, in making a disability determination or decision on a subsequent disability claim with respect to an unadjudicated period, where the claim arises under the same title of the Social Security Act (the Act) as a prior claim on which there has been a final decision by an Administrative Law Judge (ALJ) or the Appeals Council that the claimant is not disabled, the Social Security Administration (SSA)[1] must: (1) apply a presumption of continuing nondisability and, if the presumption is not rebutted by the claimant, determine that the claimant is not disabled; and (2) if the presumption is rebutted, adopt certain findings required under the applicable sequential evaluation process for determining disability, made in the final decision by the ALJ or the Appeals Council on the prior disability claim.[2]

Statute/Regulation/Ruling Citation: Sections 205(a) and 702(a)(5) of the Social Security Act (42 U.S.C. 405(a) and 902(a)(5)), 20 CFR 404.900, 404.957(c)(1), 416.1400, 416.1457(c)(1).

Circuit: Ninth (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington)

Chavez v. *Bowen*, 844 F.2d 691 (9th Cir. 1988)

Applicability of Ruling: This Ruling applies to determinations or decisions at all administrative levels (i.e., initial, reconsideration, ALJ hearing and Appeals Council).

Description of Case: Mr. Chavez first applied for disability insurance benefits on June 1, 1982. On March 30, 1983, an ALJ awarded Mr. Chavez a closed period of disability from March 3, 1981, through May 1982. In determining that disability had ended, the ALJ found that, although Mr. Chavez could not perform his past relevant work, he was able to engage in a wide range of at least light substantial gainful activity. Mr. Chavez did not appeal this decision. Therefore, it became final and binding.

On July 18, 1983, Mr. Chavez filed another application for disability insurance benefits. In a decision dated May 10, 1984, an ALJ found that Mr. Chavez could perform work-related activities except for work involving constant standing, walking, and lifting, and carrying more than 20 pounds. The ALJ then found that Mr. Chavez's past work as a backhoe operator did not require excessive standing and lifting and that his impairments therefore did not prevent him from resuming his past work. The decision made no reference to the findings of the first ALJ. This decision became the final decision of the Secretary.

Upon appeal, the district court granted the Secretary's motion for summary judgment. The district court found that substantial evidence supported the finding that the claimant could perform light work and, therefore, was not disabled. Mr. Chavez appealed this decision to the United States Court of Appeals for the Ninth Circuit.

Holding: The Ninth Circuit stated that:

The principles of res judicata apply to administrative decisions, although the doctrine is applied less rigidly to administrative proceedings than to judicial proceedings. The claimant, in order to overcome the presumption of continuing nondisability arising from the first administrative law judges's findings of nondisability, must prove ''changed circumstances'' indicating a greater disability. (Citations omitted.)

The court then found that Mr. Chavez's ''attainment of 'advanced age' constitutes a changed circumstance precluding the application of res

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[1] Under the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, effective March 31, 1995, SSA became an independent Agency in the Executive Branch of the United States Government and was provided ultimate responsibility for administering the Social Security and Supplemental Security Income programs under titles II and XVI of the Act. Prior to March 31, 1995, the Secretary of Health and Human Services had such responsibility.

[2] Although *Chavez* was a title II case, similar principles also apply to title XVI. Therefore, this Ruling extends to both title II and title XVI disability claims.

judicata to the first administrative law judge's ultimate finding against disability.'' In addition, the court concluded that ''[t]he first administrative law judge's findings concerning the claimant's residual functional capacity, education, and work experience are entitled to some res judicata consideration in subsequent proceedings.''

Statement As To How Chavez Differs From Social Security Policy

Under SSA policy, if a determination or decision on a disability claim has become final, the Agency may apply administrative res judicata with respect to a subsequent disability claim under the same title of the Act if the same parties, facts and issues are involved in both the prior and subsequent claims. However, if the subsequent claim involves deciding whether the claimant is disabled during a period that was not adjudicated in the final determination or decision on the prior claim, SSA considers the issue of disability with respect to the unadjudicated period to be a new issue that prevents the application of administrative res judicata. Thus, when adjudicating a subsequent disability claim involving an unadjudicated period, SSA considers the facts and issues *de novo* in determining disability with respect to the unadjudicated period. SSA does not adopt findings from the final determination or decision on the prior disability claim in determining whether the claimant is disabled with respect to the unadjudicated period. Further, under SSA policy, a prior final determination or decision that a claimant is not disabled does not give rise to any presumption of a continuing condition of nondisability. When a subsequent claim involves an unadjudicated period, the determination or decision as to whether a claimant is disabled with respect to that period is made on a neutral basis, without any inference or presumption that a claimant remains ''not disabled.''

The United States Court of Appeals for the Ninth Circuit held that a final decision by an ALJ that a claimant is not disabled gives rise to a presumption that the claimant continues to be not disabled after the period adjudicated, and that this presumption of continuing nondisability applies when adjudicating a subsequent disability claim with an unadjudicated period arising under the same title of the Act as the prior claim. In order to rebut the presumption of continuing nondisability, a claimant must prove '''changed circumstances' indicating a greater disability.'' In addition, the court indicated that where the claimant rebuts the presumption by proving a ''changed circumstance,'' principles of res judicata require that certain findings contained in the final decision by the ALJ on the prior claim be given some res judicata consideration in determining whether the claimant is disabled with respect to the unadjudicated period involved in the subsequent claim. The court concluded that where the final decision by the ALJ on the prior claim, which found the claimant not disabled, contained findings of the claimant's residual functional capacity, education, and work experience, SSA may not make different findings in adjudicating the subsequent disability claim unless there is new and material evidence relating to the claimant's residual functional capacity, education or work experience.

Explanation of How SSA Will Apply The Chavez Decision Within The Circuit

This Ruling applies only to disability cases involving claimants who reside in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon or Washington at the time of the determination or decision on the subsequent claim at the initial, reconsideration, ALJ hearing or Appeals Council level. It applies only to cases involving a subsequent disability claim with an unadjudicated period arising under the same title of the Act as a prior claim on which there has been a final decision by an ALJ or the Appeals Council that the claimant is not disabled.

When adjudicating the subsequent claim involving an unadjudicated period, adjudicators will apply a presumption of continuing nondisability and determine that the claimant is not disabled with respect to that period, unless the claimant rebuts the presumption. A claimant may rebut the presumption by showing a ''changed circumstance'' affecting the issue of disability with respect to the unadjudicated period, e.g., a change in the claimant's age category under 20 CFR 404.1563 or 416.963, an increase in the severity of the claimant's impairment(s), the alleged existence of an impairment(s) not previously considered, or a change in the criteria for determining disability.

If the claimant rebuts the presumption, adjudicators then must give effect to certain findings, as explained below, contained in the final decision by an ALJ or the Appeals Council on the prior claim, when adjudicating the subsequent claim. For this purpose, this Ruling applies only to a finding of a claimant's residual functional capacity, education, or work experience, or other finding required at a step in the sequential evaluation process for determining disability provided under 20 CFR 404.1520, 416.920 or 416.924, or a finding required under the evaluation process for determining disability provided under 20 CFR 404.1578, as appropriate, which was made in the final decision on the prior disability claim. Adjudicators must adopt such a finding from the final decision on the prior claim in determining whether the claimant is disabled with respect to the unadjudicated period unless there is new and material evidence relating to such a finding or there has been a change in the law, regulations or rulings affecting the finding or the method for arriving at the finding.

[FR Doc. 97–31591 Filed 12–2–97; 8:45am]

BILLING CODE 4190–29–F

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301–116]

Cancellation of Public Hearing in Section 302 Investigation: Honduran Protection of Intellectual Property Rights

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: On October 31, 1997, the United States Trade Representative (USTR) initiated an investigation under section 302(b) of the Trade Act of 1974 with regard to acts, policies, and practices of the Government of Honduras with respect to the protection of intellectual property rights, and proposed to determine that these acts, policies and practices are actionable under section 301(b) and that the appropriate response is a partial suspension of tariff preference benefits accorded to Honduras under the Generalized System of Preferences (GSP) and Caribbean Basin Initiative (CBI) programs (62 FR 60299 of November 7, 1997). The annex to that notice set forth a list of articles of Honduras which could be subject to the suspension of tariff preference benefits. The USTR also invited interested persons to submit written comments and to participate in a public hearing on December 4, 1997, concerning the proposed determinations and action. Due to a lack of response, the December 4, 1997 hearing is hereby canceled. Written comments are still due by December 10, 1997.

ADDRESSES: Office of the United States Trade Representative, 600 17th Street, NW, Washington, DC 20508.

FOR FURTHER INFORMATION CONTACT: David Morrissy, Office of Trade and Development, Office of the United States Trade Representative, (202) 395–6971, or William Busis, Office of the General Counsel, Office of the United States Trade Representative, (202) 395–3150.

Irving A. Williamson,

Chairman, Section 301 Committee.

[FR Doc. 97–31603 Filed 12–2–97; 8:45 am]

BILLING CODE 3190–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application (97–03–C–00–BUF) To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Buffalo Niagara International Airport, Buffalo, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Buffalo Niagara International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before January 2, 1998.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Mr. Philip Brito, Manager, New York Airports District Office, 600 Old County Road, Suite 446, Garden City, New York 11530.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Ms. Carol J. Sampson, Senior Grants Specialist, for the Niagara Frontier Transportation Authority at the following address: Niagara Frontier Transportation Authority, 181 Ellicott Street, Buffalo, New York 14203.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Niagara Frontier Transportation Authority under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Philip Brito, Manager, New York Airports District Office, 600 Old County Road, Suite 446, Garden City, New York 11530 (Telephone 516–227–3800). The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Buffalo Niagara International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On November 20, 1997, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Niagara Frontier Transportation Authority was substantially complete within the requirements of section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than February 6, 1998.

The following is a brief overview of the application.

Application number: 97–03–C–00–BUF.

Level of the proposed PFC: $3.00.

Proposed charge effective date: May 1, 2006.

Proposed charge expiration date: March 31, 2011.

Total estimated PFC revenue: $6,509,194.

Brief description of proposed projects:

Use Only Projects

—Purchase One (1) Front End Loader
—Strengthen Pavement
—Taxiway C & Perimeter Road
—Overlay Taxiways D&F
—Conduct Pavement Study
—Rehabilitate and Overlay Runway 14/32

Impose & Use Projects

—Relocate Airport Beacon
—Construct Aircraft & Glycol Storage Facility
—Rehabilitate Aircraft Deicing Area
—Renovate Common-Use Gate Positions and Holdrooms
—Rehabilitate Storm Drain
—Purchase Snow Removal, Safety, Police and Aircraft Rescue and Fire Fighting (ARFF) Emergency Equipment

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Air Taxi/Commercial Operators (ATCO) filing FAA Form 1800–31.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA regional Airports office located at: Fitzgerald Federal Building, John F. Kennedy International Airport, Jamaica, New York, 11430.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the offices of the Niagara Frontier Transportation Authority.

Issued in Jamaica, New York, on November 25, 1997.

Thomas Felix,

Manager, Planning & Programming Branch, Eastern Region.

[FR Doc. 97–31699 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Announcing the Fifth Meeting of the Crashworthiness Subcommittee of the Motor Vehicle Safety Research Advisory Committee

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Meeting announcement.

SUMMARY: This notice announces the fifth meeting of the Crashworthiness Subcommittee of the Motor Vehicle Safety Research Advisory Committee (MVSRAC). MVSRAC established this Subcommittee at the April 1992 meeting to examine research questions regarding crashworthiness of vehicles under 10,000 pounds GVW.

DATES AND TIME: The meeting is scheduled for December 15, 1997, from 10:00 a.m. to 3:30 p.m.

ADDRESSES: The meeting will be held in room 9230 of the U.S. Department of Transportation building, which is located at 400 Seventh Street, SW., Washington, DC.

SUPPLEMENTARY INFORMATION: In May 1987, the Motor Vehicle Safety Research Advisory Committee was established. The purpose of the Committee is to provide an independent source of ideas for safety research. MVSRAC will provide information, advice, and recommendations to NHTSA on matters relating to motor vehicle safety research, and provide a forum for the development, consideration, and communication of motor vehicle safety research, as set forth in the MVSRAC Charter.

The topic of discussion for this meeting of the MVSRAC Crashworthiness Subcommittee is the agency's Advanced Air Bag Technology

Research Program. The agenda will include status reports on both the agency's research activities and on the activities of the Advanced Air Bag Technology Working Group. The Advanced Air Bag Technology Working Group was established by the MVSRAC Crashworthiness Subcommittee with the goal of presenting technical information and data to the Crashworthiness Subcommittee.

The meeting is open to the public, and participation by the public will be moderated by the Subcommittee Chairperson.

A public reference file (Number 88–01—Crashworthiness Subcommittee) has been established to contain the products of the Subcommittee and will be open to the public during the hours of 9:30 a.m. to 4:00 p.m. at the National Highway Traffic Safety Administration's Technical Information Services in Room 5108 at 400 Seventh Street, SW., Washington, DC 20590, telephone: (202) 366–2768.

FOR FURTHER INFORMATION CONTACT: Rita Gibbons, Office of Research and Development, 400 Seventh Street, SW., Room 6206, Washington, DC 20590, telephone: (202) 366–4862, telefax: (202) 366–5930.

Issued: November 28, 1997.

Joseph N. Kanianthra,

Acting Chairperson, Crashworthiness Subcommittee, Motor Vehicle Safety Research Advisory Committee.

[FR Doc. 97–31743 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Research and Development Programs Meeting

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This notice announces a public meeting at which NHTSA will describe and discuss specific research and development projects. Further, the notice requests suggestions for topics to be presented by the agency.

DATES AND TIMES: The National Highway Traffic Safety Administration will hold a public meeting devoted primarily to presentations of specific research and development projects on December 17, 1997, beginning at 1:30 p.m. and ending at approximately 5:00 p.m. The deadline for interested parties to suggest agenda topics is 4:15 p.m. on December 8, 1997. Questions may be submitted in advance regarding the agency's research and development projects. They must be submitted in writing by December 10, 1997, to the address given below. If sufficient time is available, questions received after the December 10 date will be answered at the meeting in the discussion period. The individual, group, or company asking a question does not have to be present for the question to be answered. A consolidated list of answers to questions submitted by December 10 will be available at the meeting and will be mailed to requesters after the meeting.

ADDRESSES: The meeting will be held at the Clarion Inn, Detroit Metro Airport, 9191 Wickham Road, Romulus, MI 48174. Suggestions for specific R&D topics as described below and questions for the December 17, 1997, meeting relating to the agency's research and development programs should be submitted to the Office of the Associate Administrator for Research and Development, NRD–01, National Highway Traffic Safety Administration, Room 6206, 400 Seventh St., S.W., Washington, DC 20590. The fax number is (202) 366–5930.

SUPPLEMENTARY INFORMATION: NHTSA intends to provide detailed presentations about its research and development programs in a series of public meetings. The series started in April 1993. The purpose is to make available more complete and timely information regarding the agency's research and development programs. This nineteenth meeting in the series will be held on December 17, 1997.

NHTSA requests suggestions from interested parties on the specific agenda topics to be presented. NHTSA will base its decisions about the agenda, in part, on the suggestions it receives by close of business at 4:15 p.m. on December 8, 1997. Before the meeting, it will publish a notice with an agenda listing the research and development topics to be discussed. The agenda can also be obtained by calling or faxing the information numbers listed elsewhere in this notice or from NHTSA's Web site under Announcements/Public Meetings at URL http://www.nhtsa.dot.gov/nhtsa/announce/meetings/. NHTSA asks that the suggestions be limited to six, in priority order, so that the presentations at the December 17 R&D meeting can be most useful to the audience. Specific R&D topics are listed below. Many of these topics have been discussed at previous meetings. Suggestions for agenda topics are not restricted to this listing, and interested parties are invited to suggest other R&D topics of specific interest to their organizations.

Additionally, if any interested parties would like to make a presentation regarding technical issues concerning any of NHTSA's research programs, information concerning the proposed topic and speaker should be submitted in writing by close of business December 8, 1997.

Specific R&D topics are:

Fiscal Year 1998 R&D Research Efforts,

International Harmonized Research Activities (IHRA),

On-line tracking system for NHTSA's research projects, and

Crash Injury Research and Engineering Network (CIREN).

Specific Crashworthiness R&D topics are:

Automatic lifesaving system—improved triage, transport, and treatment decisionmaking for automatic collision notification technologies,

Status of advanced air bag research,

Demonstration of CD ROM for child restraint/vehicle compatibility,

Preparation of new dummies for assessment of advanced air bag technology,

Status of research on restraint systems for rollover protection,

Improved frontal crash protection (program status, problem identification, offset testing),

Advanced glazing research,

Vehicle aggressivity and fleet compatibility,

Upgrade side crash protection,

Upgrade seat and occupant restraint systems,

Child safety research (ISOFIX),

Child restraint/air bag interaction (CRABI) dummy testing,

Truck crashworthiness/occupant protection,

National Transportation Biomechanics Research Center (NTBRC),

Head and neck injury research,

Lower extremity injury research,

Thorax injury research,

Human injury simulation and analysis,

Refinements to the Hybrid III dummy, and

Advanced frontal test dummy.

Specific Crash Avoidance R&D topics are:

National Advanced Driving Simulator (NADS),

Intelligent vehicle initiative,

Status and plans for anti-lock brake system (ABS) research,

Truck tire traction,

Human factors guidelines for crash avoidance warning devices,

Drowsy driver monitoring,

Driver workload assessment,

Rearend collision avoidance system guidelines,

Road departure collision avoidance system guidelines,

Intersection collision avoidance system guidelines, and

Lane change/merge collision avoidance system guidelines.

National Center for Statistics and Analysis (NCSA) topic is: Special crash investigation studies of air bag cases.

Separately, questions regarding research projects that have been submitted in writing not later than close of business on December 10, 1997, will be answered. A transcript of the meeting, copies of materials handed out at the meeting, and copies of the suggestions offered by commenters will be available for public inspection at NHTSA's Technical Information Services, Room 5108, 400 Seventh St., S.W., Washington, DC 20590. Copies of the transcript will then be available at 10 cents a page, upon request to NHTSA's Technical Information Services. The Technical Information Services section is open to the public from 9:30 a.m. to 4:00 p.m. The transcript will also be available on NHTSA's Web site under Announcements/Public Meetings at URL http://www.nhtsa.dot.gov/nhtsa/announce/meetings/.

NHTSA will provide technical aids to participants as necessary, during the Research and Development Programs Meeting. Thus, any person desiring the assistance of ''auxiliary aids'' (e.g., sign-language interpreter, telecommunication devices for deaf persons (TTDs), readers, taped texts, braille materials, or large print materials and/or a magnifying device), please contact Rita Gibbons on (202) 366–4862 or by telefax on (202) 366–5930 by close of business December 8, 1997.

FOR FURTHER INFORMATION CONTACT: Rita Gibbons, Staff Assistant, Office of Research and Development, 400 Seventh Street, S.W., Washington, DC 20590. Telephone: (202) 366–4862. Fax number: (202) 366–5930.

Issued: November 26, 1997.

Raymond P. Owings,

Associate Administrator for Research and Development.

[FR Doc. 97–31696 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Pipeline Safety User Fees

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice.

SUMMARY: This notice announces that the fiscal year 1998 user fee assessments for pipeline facilities will be mailed to pipeline operators on or about December 15, 1997. The fees to be assessed for natural gas transmission, hazardous liquid and liquefied natural gas (LNG) are indicated below:

Natural gas transmission pipelines: $67.98 per mile (based on 291,765 miles of pipeline).

Hazardous liquid pipelines: $59.59 per mile (based on 155,558 miles of pipeline).

LNG is based on the number of plants and total storage capacity:

Total storage capacity (bbl)	Assessment/plant
<10,000	=$1,250
10,000–100,000	=$2,500
100,000–250,000	=$3,750
250,000–500,000	=$5,000
>500,000	=$7,500

Section 60301 of Title 49, United States Code, authorizes the assessment and collection of pipeline user fees to fund the pipeline safety activities conducted under 49 U.S.C. 60101 *et seq.* The Research and Special Program Administration (RSPA) assesses each operator of regulated interstate and intrastate natural gas transmission pipelines (as defined in 49 CFR Part 192), and hazardous liquid pipelines carrying petroleum, petroleum products, anhydrous ammonia and carbon dioxide (as defined in 49 CFR Part 195) a share of the total Federal pipeline safety program costs in proportion to the number of miles of pipeline each operator has in service. Onshore pipelines excluded from regulation by 49 CFR Part 195 are not included in this mileage. Operators of LNG facilities are assessed based on total storage capacity (as defined in 49 CFR Part 193).

In accordance with the provisions of 49 U.S.C. 60301, Departmental resources were taken into consideration for determining total program costs. The apportionment ratio between gas and liquid pipeline programs (as shown below) is a result of the shift of program resources to the hazardous liquid program because of increased emphasis on environmental protection:

Year(s)	General program costs (gas)	General program costs (liquid)
1986–1990.	80%	20%.
1991–1992.	75%	25%.
1993	75% (¾ yr.) 60% (¼ yr.)	25% (¾ yr). 40% (¼ yr).
1994	60%	40%.
1995	75%	25%.
1996	65%	35%.
1997–1998.	55%	45%.

In accordance with the regulations of the Department of the Treasury, user fees will be due 30 days after the date of assessment. Interest, penalties, and administrative charges will be assessed on delinquent debts in accordance with 31 U.S.C. 3717.

Issued in Washington, D.C. November 28, 1997.

Richard B. Felder,

Associate Administrator for Pipeline Safety.

[FR Doc. 97–31742 Filed 12–2–97; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–32 (Sub-No. 65X)]

Boston and Maine Corporation—Abandonment Exemption—in Carroll County, NH

Boston and Maine Corporation (B&M) has filed a notice of exemption under 49 CFR part 1152 Subpart F—*Exempt Abandonments and Discontinuances* to abandon an approximately 10.80-mile line of railroad on the Conway Branch between milepost B–111.0 and milepost B–121.80 in Ossipee, Carroll County, NH. The line traverses United States Postal Service Zip Codes 03814, 03864 and 03468.

B&M has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) overhead traffic has been rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under

Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on January 2, 1998, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by December 15, 1997. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by December 23, 1997, with: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423.

A copy of any petition filed with the Board should be sent to applicant's representative: John R. Nadolny, Esq., Boston and Maine Corporation, Law Department, Iron Horse Park, North Billerica, MA 01862.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

B&M has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. The Section of Environmental Analysis (SEA) will issue an environmental assessment (EA) by December 8, 1997. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423) or by calling SEA, at (202) 565–1545. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), B&M shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by B&M's filing of a notice of consummation by December 3, 1998, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Decided: November 25, 1997.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 97–31768 Filed 12–2–97; 8:45 am]

BILLING CODE 4915–00–P

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C. 2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each offer of financial assistance must be accompanied by the filing fee, which is currently set at $900. See 49 CFR 1002.2(f)(25).

DEPARTMENT OF THE TREASURY

Customs Service

Extension of National Customs Automation Program Test Regarding Remote Location Filing

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces that Customs is permitting an extension to continue the second prototype of Remote Location Filing (RLF). This notice also invites public comments concerning any aspect of the current test, informs interested members of the public of the eligibility requirements for voluntary participation, describes the basis for selecting participants, and establishes the process for developing evaluation criteria. To participate in the prototype test, the necessary information, as outlined in this notice, must be filed with Customs and approval granted. It is important to note that resources expended by the trade and Customs on these prototypes may not carry forward to the final program. The **Federal Register** (61 FR 60749) notice, dated November 29, 1996, continues to apply except as specifically noted herein.

Based on our experience in second prototype of RLF, we have made modifications to the sections detailing the Eligibility Criteria and the Prototype Two Applications. The changes will effect parties who wish to apply for participation in the extension of the second prototype of RLF. Current participants may continue their participation without reapplying.

EFFECTIVE DATE: The extension of the second prototype will commence no earlier than January 1, 1998, will continue, and be concluded, no earlier than December 31, 1998, by a notice in the **Federal Register**. Comments concerning any aspect of the remote filing prototype test must be received on or before January 2, 1998.

ADDRESSES: Written comments regarding this notice, and information submitted to be considered for voluntary participation in the prototype should be addressed to the Remote Filing Team, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Room 5.2 A, Washington, D.C. 20229–0001.

FOR FURTHER INFORMATION CONTACT: For systems or automation issues: Joseph Palmer (202) 927–0173, Jackie Jegels (202) 927–0201, or Patricia Welter (305) 869–2780.

For operational or policy issues: Jennifer Engelbach (202) 927–2293, or Don Luther (202) 927–0915.

SUPPLEMENTARY INFORMATION:

Background

Title VI of the North American Free Trade Agreement Implementation Act (the Act), Public Law 103–182, 107 Stat. 2057 (December 8, 1993), contains provisions pertaining to Customs Modernization (107 Stat. 2170). Subtitle B of title VI establishes the National Customs Automation Program (NCAP), an automated and electronic system for the processing of commercial importations. Section 631 in Subtitle B of the Act creates sections 411 through 414 of the Tariff Act of 1930 (19 U.S.C. 1411–1414). These define and list the existing and planned components of the NCAP (section 411), promulgate program goals (section 412), provide for the implementation and evaluation of the program (section 413), and provide for remote location filing (section 414).

The Remote Location Filing (RLF) prototype will allow an approved participant to electronically file a formal or informal consumption entry with Customs from a location within the United States other than the port of arrival (POA), or from within the port of arrival with a requested designated exam site (DES) outside of the POA. Section 101.9(b) of the Customs Regulations (19 CFR 101.9(b)), implements the testing of NCAP components. See, T.D. 95–21 (60 FR 14211, March 16, 1995).

Since June 1994, the Customs Remote Team has shared the Customs RLF concept through many public meetings and concept papers, as well as posted information on the Customs Electronic Bulletin Board (CEBB), the Customs Administrative Message System, and the Customs web page at ''http://www.customs.treas.gov/imp-exp/comm-imp/remote/toc.htm.'' Pursuant to § 101.9, Customs Regulations, Customs has been testing the RLF concept. On

April 6, 1995, Customs announced in the **Federal Register** (60 FR 17605) its plan to conduct the first of at least two prototype tests regarding RLF. The first test, Prototype One, began on June 19, 1995. On February 27, 1996, Customs announced in the **Federal Register** (61 FR 7300) that it was permitting an extension and expansion of the RLF Prototype One until the implementation of Remote Prototype Two. On November 29, 1996, Customs announced in the **Federal Register** (61 FR 60749) its plan to conclude the first prototype test on December 31, 1996, and conduct a second prototype test of RLF commencing no earlier than January 1, 1997. In today's document, Customs is announcing that it will permit an extension of the RLF Prototype Two.

The first remote location prototype test was offered in the Automated Commercial System (ACS). Although the second remote prototype test was originally scheduled to be tested in the Automated Commercial Environment (ACE), the success of Prototype One precipitated the second test under ACS with a larger participant pool.

The first RLF prototype (Prototype One) concluded December 31, 1996. Prototype One was conducted with a very limited number of participants at limited locations. It was conducted with minimal system changes thereby requiring Customs to intervene manually in tracking and processing. All procedures and processes were closely coordinated with all selected and affected parties. The intent of Prototype One was to test such operational issues as communication, cargo movement and release, and service to and from remote locations. Prototype One tested features such as filing from a remote location, alternate exam location, and entry summary workload distribution.

The second RLF prototype (Prototype Two) commenced January 1, 1997, and will be extended to conclude no earlier than December 31, 1998. Prototype Two is an expanded version of Prototype One with more ports and trade participants. In order to expand the prototype Customs has trained additional ports and allowed Customhouse Brokers to apply as participants. Prototype Two will continue to operate with minimal system changes. The intent of this prototype is to test such operational issues as communication, cargo movement and release, and service to and from remote locations. This prototype will further test features such as filing from a remote location and alternate exam location.

Additional prototypes of RLF are being developed by Customs to determine the systemic and operational design of the final RLF program which will allow all filers to participate in this type of entry process at a national level. Prototype participants must recognize that these prototypes test the benefits and potential problems of RLF for Customs, the trade community, and other parties impacted by this program.

Description of RLF Program

The RLF program will be determined by the experiences of the planned remote prototypes and with other Customs initiatives such as the Reorganization, ACE, Trade Compliance Redesign, and Year 2000 programming. The Customs RLF team's objectives are:

(1) To work with the trade community, other agencies, and other parties impacted by this program in the design, conduct and evaluation of a second prototype test of RLF;

(2) To obtain experience through prototype tests of RLF for use in the design of operational procedures, automated systems, and regulations; and

(3) To implement RLF on a national level in conjunction with the Trade Compliance Redesign, and the Automated Commercial Environment.

Description of Proposed Test

Prototype Two commenced January 1, 1997, and will run until concluded, no earlier than December 31, 1998, by a notice in the **Federal Register**. Prototype Two will evaluate the operational impact and procedures for a larger participant base, testing filing from a remote location, and alternate location examinations.

Regulatory Provisions Suspended

Certain provisions in Part 111, and Part 141, of the Customs Regulations will be suspended during this prototype test. This will allow brokers to file remotely to service ports, designated as ''broker districts'' in accordance with a general notice published in the **Federal Register** (60 FR 49971, dated September 27, 1995), where they currently do not hold permits, and to allow for the movement of cargo from its port of arrival to a designated examination site in another port.

Eligibility Criteria

To qualify, a participant must have proven capability to provide electronically, on an entry-by-entry basis, the following: entry; entry summary; invoice information (when required by the Customs Service) using EIP; and payment of duties, fees, and taxes through the Automated Clearinghouse (ACH).

The following additional requirements and conditions apply:

1. Participants must be operational on ACH 30 days before applying for Prototype Two.

2. Participants must be operational on EIP before applying for Prototype Two.

3. The requested Customs locations must have operational experience with EIP, and have received RLF training.

RLF Trained Locations

The following are locations currently operational under the RLF Prototype Two test: (POA indicates a port trained as a port of arrival, and DES indicates a port trained as a designated examination site).

Port	POA	DES
Atlanta	✔	✔
Baltimore	✔	✔
Buffalo	✔	✔
Champlain-Rouses Point	✔	✔
Charleston	✔	✔
Chicago	✔	✔
Dallas/Ft. Worth	✔	✔
Detroit	✔	✔
Houlton, ME	✔	✔
Houston	✔	✔
Jacksonville	✔	✔
JFK	✔	✔
Laredo/Eagle Pass	✔	✔
Los Angeles	✔	✔
NY/Newark Area	✔	✔
New York Seaport	✔	✔
Norfolk/Richmond	✔	✔
Portland, ME	✔	✔
Port Huron	✔	✔
Rochester	(1)	✔
San Diego/Otay Mesa	✔	✔
San Francisco/Oakland	✔	✔
Savannah	✔	✔
Seattle	✔	✔
Utica/Syracuse	✔	✔

[1] Not available.

Future RLF Trained Locations

As the prototype continues and trade interest warrants, ports which are not currently trained in EIP and RLF processing will be trained. Announcements on newly trained ports will be placed on the CEBB and Administrative Message System. One criteria for selecting a port for training will be interest from the trade. Participants who would like to expand their participation to a non-trained port, should send the following information to the Remote Filing Team, at U.S. Customs Service, 1300 Pennsylvania Avenue, N.W. Room 5.2 A, Washington, D.C. 20229–0001:

a. Company name;

b. Contact name and phone number;

c. Importer name;

d. Port(s) of interest; and

e. The estimated number of entries a month.

4. Participants must maintain a continuous bond which meets or exceeds the national guidelines for bond sufficiency.

5. Only entry types 01 (consumption) and 11 (informal) will be accepted.

6. Cargo release must be certified from the entry summary (EI) transaction with the exception of immediate delivery explained in #7.

7. RLF participants will be allowed to file Immediate Delivery releases for direct arrival road and rail freight at the land border using paper invoices under Line Release, Border Cargo Selectivity (BCS), or Cargo Selectivity (CS). This must be done in accordance with 19 CFR 142.21(a). Submission of all line items at the time of release will be required of Northern Border filers if the release is effected using BCS or CS. If an examination is required for a line release transaction, the filer must submit all relevant line item information through BCS or CS. Under BCS and CS, the examination will be performed at the port of arrival using paper invoices. If the filer wishes the examination to be performed at an alternate site, full entry summary information (an EI transaction in ABI) with electronic invoice must be transmitted.

8. Participants will not be allowed to file a RLF entry involving cargo that has already been moved using in-bond procedures.

9. Participants will be required to use other government agency interfaces where available.

10. When necessary, cargo will be examined at the Customs port of arrival, or, at Customs discretion, a filer's requested DES, which must be the Customs port nearest the final destination. The scheduling (approval) of merchandise for examination at a DES that is not at the port of arrival will be considered a conditional release under permit that automatically obligates the importer's bond pursuant to 19 CFR 113.62 for an immediate redelivery to the DES. This **Federal Register** Notice advises the importer of record for such merchandise that this movement is a redelivery and he/she will not receive an individual notice of redelivery, Customs Form 4647, and that the redelivery clause of the importers bond is automatically triggered whenever Customs decides to examine the merchandise at a DES that is not at the port of arrival.

11. If a notice of redelivery is not complied with, or delivery to unauthorized locations, or delivery to the consignee without Customs permission occurs, the obligors agree to pay liquidated damages in the amount specified pursuant to the bond in 19 CFR 113.62 (f).

Customs will work with all participants to ensure that:

(1) Customs contacts and problem solving teams are established, and

(2) Procedures for remote entry and entry summary processing are prepared.

Prototype Two Applications

This notice solicits applications for participation in Remote Location Filing Prototype Two. There are two distinct application procedures, which depend upon the status of the applicant. The first is a one-step application process for importers applying on their own behalf as well as for brokers acting on behalf of specific clients. The second is a two-step process for brokers applying on their own behalf.

All applications must initially be submitted to the U.S. Customs Service, 1300 Pennsylvania Avenue, N.W. Room 5.2 A, Washington, D.C. 20229–0001. Applications will be accepted up to 30 days before the close of the Prototype Two extension.

Since this is an extension of Remote Prototype Two, current participants may continue their participation without reapplying. Note that participation in RLF Prototype Two is not confidential, and that lists of participants will be made available to the public.

Importers / Brokers on Behalf of Clients

These applications must be submitted to the U.S. Customs Headquarters (address cited above) with the following information:

1. Importer name and, if applicable, broker name, address, and filer code;

2. Supplier name, address, and manufacturer's number;

3. Types of commodities to be imported;

4. Other agency requirements;

5. Site(s) from which the applicant will be transmitting the electronic information;

6. Port name and port code for port(s) of arrival;

7. Port name and port code for designated examination site(s) located nearest the final destination(s);

8. Monthly volume anticipated;

9. Electronic Invoicing Program status and starting date;

10. Electronic Payment (ACH) status and starting date; and

11. Main contact person and telephone number.

Brokers as Applicants

This application process will be done in two steps. During the first step, the broker must submit the following information to U.S. Customs Headquarters (address cited above):

1. Broker name, address, filer code and IRS#;

2. Electronic Invoicing Program status and starting date;

3. Electronic Payment (ACH) status and starting date;

4. Site(s) from which the broker will be transmitting the electronic information;

5. Type of protocol: AII, EDIFACT or both; and

6. Point of contact.

Once a broker has received written approval from U.S. Customs Headquarters to proceed with the second step of the application process, the broker must submit the following information to the Port Director(s) overseeing each requested POA and DES location for each client (importer):

1. Participating client name, telephone number and Importer Number;

2. Supplier name, address, and manufacturer's number;

3. Types of commodities to be imported;

4. Other agency requirements;

5. Site(s) from which the applicant will be transmitting the electronic information;

6. Port name and port code for port(s) of arrival;

7. Port name and port code for designated examination site(s) located nearest the final destination(s);

8. Monthly entry volume anticipated;

9. Carriers used and their Automated Manifest System (AMS) status;

10. Main contact person and telephone number of filer; and

11. Certification that a copy of this application letter has been provided to the Client named in item 1.

Basis for Participant Selection

The basis for applications approved by Customs Headquarters will be EIP operational experience, electronic abilities, available electronic interfaces with other agency's import requirements, and operational limitations. For application scenarios requesting a DES outside of the POA, the compliance rate of the parties involved will be taken into consideration.

The basis for applications being approved or denied by the Port Director(s) will involve issues such as impact on available resources, commodity requirements and if the port has been trained in EIP/RLF.

The Port Director has 10 working days after the receipt of the information required in the second step of the application process to provide written approval or denial to the applicant. If the Port Director denies the application,

that denial is effective for 10 working days. After that, a new request may be submitted to the Port Director at the Port of Arrival and the Designated Examination Site. If the applicant does not receive a reply from the Port Director within 10 working days from the date of submission, the application should be considered denied. Those applicants not selected for participation by U.S. Customs Headquarters will be sent a letter of denial. They will, however, be invited to comment on the design, conduct, and evaluation of this prototype.

Also, it is emphasized that if a company is interested in filing remotely, it must first be operational with EIP. For information on EIP, please contact your ABI Client Representative.

Dismissal From Prototype Two

If a filer attempts to submit data relating to restricted merchandise or merchandise subject to quota, anti-dumping duties, countervailing duties, or other non-eligible data through the Electronic Invoice Program, the filer may be expelled from the program, prevented from participation in future RLF prototypes, and may be subject to liquidated damages and/or penalties under Section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592).

Test Evaluation Criteria

Once participants are selected, Customs and the participants will meet publicly or in an electronic forum to review comments received concerning the methodology of the test program or procedures, complete procedures in light of those comments, and establish baseline measures and evaluation methods and criteria. Evaluations of the prototype will be conducted and the final results will be published in the **Federal Register** as required by § 101.9(b), Customs Regulations.

The following evaluation methods and criteria have been identified.

1. Baseline measurements will be established through data queries and questionnaires.

2. Reports will be run through use of data query throughout the prototype.

3. Questionnaires will be distributed during and after the prototype period. Participants are required to complete the questionnaires in full and return them within 30 days of receipt.

Customs may evaluate any or all of the following items:

- Workload impact (workload shifts, volume, etc.);
- Policy and procedural accommodation;
- Trade compliance impact;
- Alternate exam site issues (workload shift, coordination/communication, etc.);
- Problem solving;
- System efficiency; and
- The collection of statistics.

The trade will be responsible for evaluating the following items:

- Service in cargo clearance;
- Problem resolution;
- Cost benefits;
- System efficiency;
- Operational efficiency; and
- Other items identified by the participant group.

Dated: November 26, 1997.

Audrey Adams,

Acting Assistant Commissioner, Office of Field Operations.

[FR Doc. 97–31683 Filed 12–2–97; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[EE–111–80]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, EE–111–80 (TD 8019), Public Inspection of Exempt Organization Returns (§ 301.6104(b)–1).

DATES: Written comments should be received on or before February 2, 1998 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Public Inspection of Exempt Organization Returns.

OMB Number: 1545–0742.

Regulation Project Number: EE–111–80.

Abstract: Internal Revenue Code section 6104(b) authorizes the IRS to make available to the public the returns required to be filed by exempt organizations. The information requested in section 301.6104(b)–1(b)(4) of this regulation is necessary in order for the IRS not to disclose confidential business information furnished by businesses which contribute to exempt black lung trusts.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 22.

Estimated Time Per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 22.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

REQUEST FOR COMMENTS: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 25, 1997.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 97–31593 Filed 12–2–97; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Minority Veterans, Notice of Meeting Cancellation

The Department of Veterans Affairs notice that a meeting of the Advisory Committee on Minority Veterans to be held on December 8, 1997, through December 10, 1997, in Washington, DC, is hereby canceled. The notice appeared in the **Federal Register** on November 13, 1997, on page 60938.

If you have any questions, please contact Mr. Anthony Hawkins, Department of Veterans Affairs, at (202) 273–6708.

Dated: November 25, 1997.

By direction of the Acting Secretary.

Heyward Bannister,

Committee Management Officer.

[FR Doc. 97–31626 Filed 12–2–97; 8:45 am]

BILLING CODE 8320–01–M

Corrections

Federal Register

Vol. 62, No. 232

Wednesday, December 3, 1997

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP85–221–097]

Frontier Gas Storage Company; Notice of Sale Pursuant to Settlement Agreement

Correction

In notice document 97–30998, appearing on page 63142, in the issue of Wednesday, November 26, 1997, the docket number should appear as set forth above.

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–155–008]

Mobile Bay Pipeline Company; Notice of Compliance Filing

Correction

In notice document 97–29812 beginning on page 60894 in the issue of Thursday, November 13, 1997 the docket number should read as set forth above.

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 180, 185 and 186

[OPP–300581; FRL–5755–5]

RIN 2070–AB78

Lambda-Cyhalothrin; Pesticide Tolerance

Correction

In rule document 97–30939, beginning on page 63002, in the issue of Wednesday, November 26, 1997, make the following corrections:

1. On page 63002, in the first column, in the **DATES** section, in the fourth line, ''January 28, 1998.'' should read ''January 26, 1998.''

2. On page 63010, in the third column, in the docket line, ''97–30959'' should read ''97–30939''.

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 200

[Docket No. 96N–0048]

Sterility Requirements for Inhalation Solution Products

Correction

In proposed rule document 97–25130, beginning on page 49638, in the issue of Tuesday, September 23, 1997, in the third column, in the **DATES** section, in the sixth and seventh lines, ''March 23, 1998.'' should read ''1 year after its date of publication in the **Federal Register**.''

BILLING CODE 1505-01-D

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 213a and 299

[INS No. 1807–96]

RIN 1115–AE58

Affidavits of Support on Behalf of Immigrants

Correction

In rule document 97–27605, beginning on page 54346, in the issue of Monday, October 20, 1997, make the following correction:

§ 213a.2 [Corrected]

On page 54353, in the first column, in § 213a.2(a)(2)(i), in the sixth line ''before'' should read ''after''.

BILLING CODE 1505-01-D

Federal Register

Wednesday
December 3, 1997

Part II

Office of Personnel Management

Science and Technology Reinvention Laboratory Personnel Demonstration Project at the Naval Sea Systems Command Warfare Centers; Notice

OFFICE OF PERSONNEL MANAGEMENT

Science and Technology Reinvention Laboratory Personnel Demonstration Project at the Naval Sea Systems Command Warfare Centers

AGENCY: Office of Personnel Management.

ACTION: Notice of approval of Demonstration Project final plan.

SUMMARY: The National Defense Authorization Act of fiscal year 1995 (P.L. 103–337) authorizes the Secretary of Defense, with Office of Personnel Management (OPM) approval, to conduct a Personnel Demonstration Project at Department of Defense (DoD) laboratories designated as Science and Technology Reinvention Laboratories. The legislation requires that most requirements of Section 4703 of Title 5 shall apply to the Demonstration Project. Section 4703 requires OPM to publish the project plan in the **Federal Register**.

DATES: This Demonstration Project may be implemented by the Warfare Centers beginning on March 3, 1998.

FOR FURTHER INFORMATION CONTACT:

Warfare Centers: Shirley Scott, Deputy Demonstration Project Manager, NSWCDD, HR Department, 17320 Dahlgren Road, Dahlgren, VA 22448, 540–653–4623.

OPM: Fidelma A. Donahue, U.S. Office of Personnel Management, 1900 E. Street, NW, Room 7460, Washington, DC 20415, 202–606–1138.

SUPPLEMENTARY INFORMATION:

1. Background

Since 1966, at least 19 studies of Department of Defense (DoD) laboratories have been conducted on laboratory quality and personnel. Almost all of these studies have recommended improvements in civilian personnel policy, organization, and management. The Warfare Centers' Personnel Demonstration Project involves a simplified classification system for GS employees, performance development and incentive pay systems, a streamlined reduction-in-force system, and a simplified examining and appointment process.

2. Overview

Twenty-three letters were received and one individual commented on the **Federal Register** notice at the Public Hearing. These comments brought several new perspectives to the attention of those responsible for implementing, overseeing, and evaluating the project. The comments highlighted instances of miscommunication and misunderstanding with the present system as well as the project interventions. Further, they underscored the importance of providing training to employees and supervisors on the Demonstration Project. The substance of all comments received has been conveyed to the Warfare Centers' Executive Group and the Commanding Officers and Executive Directors of the seven Warfare Center Divisions in the event that local policies, processes and training sessions may benefit from such perspectives. A summary of all comments received, along with accompanied responses, is provided below.

(A). General Management Issues

Comments: Several comments expressed concern over a Demonstration Project which provides additional flexibility to supervisors and suggested that these flexibilities will allow for or promote abuses and compromises of the merit system. With the feeling that many supervisors currently do not properly execute supervisory responsibilities or utilize the authority and tools provided under the current system, these employees fear a new system that gives supervisors additional flexibility over their career and pay. Several comments mentioned that no checks or oversight seem apparent and that management accountability is lacking under the Project.

Response: The Warfare Centers acknowledge that the Personnel Demonstration Project provides increased authority and responsibility to supervisors, particularly in those areas impacting employees' pay. The Office of Personnel Management's (OPM's) experience with other Personnel Demonstration Projects, including the ''China Lake'' Project, does not support the assumption that increased supervisory discretion and authority leads to merit system abuses. However, the Warfare Centers are sensitive to the concerns expressed by many of the comments and are committed to holding supervisors accountable for the proper use of increased authorities and flexibilities. To assist supervisors in carrying out their new responsibilities, the Demonstration Project currently requires that supervisors be trained on the new system and receive feedback from a number of sources, including employees, on their supervisory skills and leadership behaviors. Aggregate data from the feedback process will be made available to the top management of the Warfare Center Divisions and will be used to monitor and identify further supervisory development and training needs. Additionally, extensive independent evaluations of the Personnel Demonstration Project will be conducted by OPM's Personnel Resources and Development Center (PRDC) over the first five years of the project. The results of these evaluations will provide the Warfare Centers with information as to whether specific provisions of the project need to be modified, continued as is, or curtailed.

(B). Career Path and Broad Bands

Comments received on this aspect of the Personnel Demonstration Project were related to several subtopics.

(1) Assignment of Occupations to Career Paths

Comments: Several comments were submitted raising concern about the identification of occupations to career paths. These comments expressed a belief that such segmentation of the workforce is counterproductive to a teaming environment and may lead to a form of career path or series-based discriminatory actions. For the most part, these comments were specifically related to the assignment of GS–346, Logistician positions, to the Administrative/Technical (NT) Career Path.

Response: The Career Paths selected for the Warfare Centers' Personnel Demonstration Project are substantially similar to those used in the ''China Lake'' Personnel Demonstration Project with a few modifications made to further streamline the classification and compensation processes. The Warfare Centers' Personnel Demonstration Project groups positions by occupations under one of three Career Paths—Scientific/Engineering (ND); Administrative/Technical (NT); and General Support (NG). Each career path covers occupations similarly treated in regard to type of work, typical career progression, and qualification requirements. Using these criteria, positions designated as Logistician, GS–346 series, are assigned to the Administrative/Technical (NT) Career Path.

(2) Band Levels and Salary Ranges

Comments: Two individuals expressed concern that the proposed broad banding structure reduces the number of formal promotion events, removes the social distinctions between project leaders and workers, and results in a loss of status currently associated with the General Schedule grade level. Another individual offered an opinion that a system which includes seventeen

broad bands is contrary to the stated objective of making ''the distinctions between levels easier to discern and more meaningful.'' Others perceive that the proposed broad banding system serves to unfairly discriminate against women and minorities in that these groups of employees are predominately assigned to the Administrative and Technical (NT) and General Support (NG) Career Paths whose full performance levels are lower than that assigned to the Scientific and Engineering (ND) Career Path. Comments also questioned the use of a salary overlap between the broad bands and raised concern over the reallocation of pay upon conversion for special salary rate employees.

Response: The Warfare Centers recognize there may be a concern over the perceived loss of status and frequency of promotions that result from a broad banding system. Broad banding systems, by their very nature, serve to reduce the number of formal promotion events and to remove some of the distinctions among positions common to the General Schedule classification system. Results of the ''China Lake'' project did not indicate that this was a continuing concern of the workforce during the life of the project. The key objectives of the Warfare Centers' Broad Banded Classification System are to simplify the current classification system, reduce distinctions between levels of work, and provide managers greater flexibility to make assignments as work needs warrant.

The grouping of General Schedule grades into broad bands under each of the three career paths was based on the typical career progressions and full performance level of positions under the current General Schedule system. In addition, the salary progression of each career path is reflective of typical salary progression present in the non-Federal sector. It was not based on non-merit factors such as race, sex, gender, age, or national origin. Experience of the ''China Lake'' Project, used as a model for the Warfare Centers' Personnel Demonstration Project, did not support the concerns. To assist the Warfare Centers in monitoring this important issue, data on band level, salary, and workforce demographics, supplemented by perceptual data, are included in the planned evaluation strategy. Evaluation results will alert the Warfare Centers of any unintended outcomes of the broad banded classification system and will serve as the basis for decisions to modify, continue as currently stated, or to curtail the Demonstration Project.

The salary range of each broad band, with the exception of Band I of each career path and ND VI, has been extended to cover the salary range of the next lower General Schedule grade. The extended salary range serves to replicate the overlap found in the current General Schedule system and was included to facilitate assignment and pay setting flexibilities and to control costs that would otherwise occur upon promotions. The pay special salary rate employees receive under the current system is in many cases encompassed within the salary range of the broad banding system. The special provisions for reallocating the pay of special salary rate employees were included in the project to avoid payment of an unintended windfall.

(3) Lack of Salary Progression for GS–13 Scientists and Engineers

Comment: Several comments were received on the lack of salary progression for those individuals who will convert into the Personnel Demonstration Project at the top end of the recognized full performance level, in particular Scientists and Engineers at the GS–13 level. One individual suggested a modification to the Project to have a salary range extending beyond step 10 of the GS–13 grade level.

Response: This issue results from high grade controls that impact on all of the Science and Technology Reinvention Laboratory Personnel Demonstration Projects. Any negative impact under the Demonstration Project will be no greater than that under the current General Schedule system.

(C). Performance Appraisal and Performance Development System

Comment: Concern was expressed over the proposed change to a two level (pass/fail) rating system stating that such a system would de-motivate employees. Others expressed concern about the lack of specificity in the requirements for setting and communicating performance expectations, i.e., timing, format, documentation requirements. Additionally, comments were made that the non-adverse reduction to a lower band level would be perceived by employees as an adverse action.

Response: Since the initial development of the Personnel Demonstration Project, the Office of Personnel Management has modified its regulations governing Performance Appraisal Systems granting agencies the option of adopting a two level rating system. The planned evaluation of this Demonstration Project will assist in providing data on the merits of a pass/fail system.

The current performance appraisal system prescribes documentation of performance standards and elements, includes a requirement for periodic (mid-year) performance discussions, and establishes the format for specified documentation requirements. Yet, as acknowledged by the comments, many perceive the current system as not working despite these requirements. The Warfare Centers believe it is essential that employees fully understand performance expectations and will focus significant training for supervisors to that end. This training will cover setting and communicating performance expectations, providing feedback, and communicating the linkage between performance expectations and the incentive pay process. Furthermore, the Divisions will determine documentation requirements which meet their specific organizational needs, values, and cultures.

The reduction in band level may be taken only after an employee has been placed on and failed a Performance Plan. Safeguards have been provided in the Demonstration Project to ensure the decision to use the non-adverse assignment to a lower band is well documented, used appropriately, and allow employees avenues of redress.

(D). Incentive Pay System

Comment: A number of comments raised concern over the subjective nature of the incentive pay criteria leaving the employee's salary progression largely at the discretion of the supervisor. Additionally, several viewed the criteria as being outside the control of the employee and bearing little relationship to the employee's actual performance. Several raised concern on management's ability to adjust the size of the incentive pay fund in an attempt to maintain or lower labor rates or delay the need for a reduction-in-force. Also one comment expressed concern that the incentive payout would be limited to granting bonus pay in lieu of salary increases, thus negatively impacting the employee's retirement pay.

Response: The Warfare Centers recognize that employee perceptions of the success of the overall Personnel Demonstration Project will largely be governed by their perceptions of the how well the Warfare Centers manage the incentive pay system. A key flexibility to the Demonstration Project is to provide the Divisions the authority to manage an incentive pay system which best meets their needs in terms of culture, values, and financial situations. The specific criteria and process for incentive pay decisions as

well as the size of the incentive pay fund are some of the many aspects of the Project which have been delegated to the Warfare Centers Division and will not be defined at the Warfare Center level. The project provides for supervisory training which will stress the importance of establishing, interpreting, and communicating incentive pay criteria to help employees understand what is expected in order to receive incentive pay. Additionally, in exercising these authorities, each Warfare Center Division will be prepared to communicate the criteria, process, and decisions on the use of the incentive pay fund to its workforce.

(E). Reduction-in-Force

Comment: Two comments included a concern that the revised Reduction-In-Force system would provide management the ability to target individuals and stated a belief that this targeting would be in violation of veterans' preference rights or laws precluding discrimination based on age. Additional comments raised concern about the impact of the revised competitive area definition. This is seen as limiting placement considerations and as a major threat to job security.

Response: In developing the Personnel Demonstration Project, the Warfare Centers adopted as one of the guiding principles the preservation of veterans' preference laws. Extensive review of the project interventions was conducted to ensure that no aspect of veterans' preference entitlement has been adversely impacted. Additionally, simulated reduction-in-force scenarios were conducted to ensure that at a minimum the proposed changes did not adversely impact on veterans, women, minorities and other protected groups when compared with the current reduction-in-force system. The Personnel Demonstration Project, including the revised reduction-in-force changes, may be implemented within local bargaining units only through the collective bargaining process. In the event that full agreement is not reached prior to the need to conduct a reduction-in-force, the competitive area was redefined to ensure that Demonstration Project participants and non-Demonstration Project participants do not compete unfairly for placement considerations.

(F). Miscellaneous Comments

Additional comments received on the Project Proposal requested that the project remove the ceiling on overtime rates. One comment perceived an inconsistency in the assignment of ''non-professional technicians'' to the Administrative/Technical (NT) career path and the exemption from overtime provisions based on professional criteria. Another comment communicated refusal to waive any portion of rights conveyed to citizens by the U.S. Constitution.

Response: The Personnel Demonstration Project covers those interventions which the Warfare Centers believe to be fundamentally critical to successful mission execution and organizational excellence and was not intended to address all problems associated with the current General Schedule system. Together the interventions proposed provide the Warfare Centers with the ability to obtain, develop, incentivize, and retain high performers while being responsive to business considerations and overall workforce costs. The project does not modify the overtime provisions and the definitions of exemption criteria under the Fair Labor Standards Act covered by Title 5, CFR Part 551. This Demonstration Project has been developed under the authority granted to agencies in Section 4703 of Title 5. Individual permission is not needed to implement the Project. There is no authority nor intent to waive individual constitutional rights.

3. Demonstration Project Clarifications

To clarify how classification appeals are to be processed under the personnel demonstration project, additional language was incorporated into section III.B.1. In addition, minor editorial and technical clarifications were made to improve the final version of the personnel demonstration project.

Office of Personnel Management.

Janice R. Lachance,

Director.

Table of Contents

I. Executive Summary

The Naval Surface Warfare Center and the Naval Undersea Warfare Center, designated as Science and Technology Reinvention Laboratories, wish to conduct a Personnel Demonstration Project similar in nature to that of the 1980 Demonstration Project approved for the Naval Weapons Center, China Lake, and Naval Ocean Systems Center, San Diego. The Warfare Centers' project includes the following key project components: A Broad Banding Classification and Pay System for ''white collar'' employees; a Performance Development System; an Incentive Pay System; a new Reduction-in-Force (RIF) system; and a Competitive Examining and Appointment System. The Warfare Centers' project addresses an organization which is substantially larger (over 23,000 employees), has greater diversity of mission than previous projects, and has extensive union involvement at all major sites. In addition, the project plan has been developed with on-going involvement of the various unions represented in the Warfare Centers.

II. Introduction

A Purpose

The overall goal of the Demonstration Project is to implement a Human Resource Management System that facilitates mission execution and organization excellence and responds to today's dynamic environment of downsizing, restructuring and closures by obtaining, developing, utilizing, incentivizing and retaining high performing employees; and adjusting workforce levels to meet program and organizational needs. The system to be demonstrated has the flexibilities to accommodate and support wide-ranging activity missions, strategies and cultures. It is responsive to business considerations and permits a high degree of control over workforce costs. Clearly, it is more streamlined and understandable for those who will use it as well as those affected by it. Most importantly, it is focused not just on the needs of the organization, but also on the needs of the people who are the organization.

These objectives reflect the Federal and DoD goals of creating a government that works better and costs less, and a flexible system that can reduce, restructure or renew to meet diverse mission needs, expand or contract a workforce quickly, respond to workload exigencies, and contribute to quality

products, people and workplaces. The objectives also align with the Federal and DoD values and guiding principles of empowering employees to get results, maximum flexibility tempered with accountability, innovation and continuous improvement, caring for people during downsizing, and vital partnerships and teaming with all the stakeholders in the process.

B. Problems With Present System

The Warfare Centers find the current Federal Personnel System to be cumbersome, confusing, and unable to provide the flexibility necessary to respond to the current mandates of downsizing, restructuring, and possible closure while trying to maintain a high level of mission excellence. The present system—a patchwork of laws, regulations, and policies—often inhibits rather than supports the goals of developing, recognizing, and retaining the employees needed to realign the organization with its changing fiscal and production requirements.

The current Civil Service General Schedule (GS) system has 15 grades with 10 levels each and involves lengthy, narrative, individual position descriptions, which have to be classified by complex, OPM-mandated position classification standards. Because these standards have to meet the needs of the entire federal government, they are often not relevant to the needs of the Warfare Centers and are frequently obsolete. Distinctions between levels are often not meaningful. Currently, standards do not provide for a clear progression beyond the full performance level, especially for science/engineering occupations where career progression through technical as well as managerial career paths is important.

In addition, there are limited mechanisms for dealing with an employee who has been promoted out of his/her level of expertise or who, after a successful career, has been unable to gain the skills required of a new work environment. In most cases, the only possible action may be a reduction in grade. Under the current system a demotion to a lower grade is considered an adverse action even if there is no loss in pay. Under the proposal, a reduction in band level without a loss in pay will not be considered an adverse action.

Performance Management systems require additional emphasis on continuous, career-long development in a work environment characterized by an ever increasing rate of change. Since past performance and/or longevity are the factors on which pay raises are currently assessed, there is often no positive correlation between compensation and performance contributions nor value to the organization. These limited criteria do not take into account the future needs of the organization nor other culturally relevant criteria which an organization may wish to use as incentives.

The present Reduction in Force (RIF) process is highly complicated and relatively unresponsive to requirements for rapid work force restructuring and retention of employees with mission appropriate skills. RIF is confused by an augmented service credit for performance that is based in a performance appraisal system fraught with contention. Round I adds complexity, confusion, and uncertainty. Cost savings expected from RIF are drastically reduced by the inordinate administrative costs of the process and the likelihood that the employee ultimately separated will be at a lower grade than the originally targeted position. Additionally there is the expense of retained grade and retained pay. Current RIF procedures impact negatively on morale because of the high number of people affected and frequent misunderstandings of a complicated system that leaves affected employees wondering why they have been ''targeted.''

And finally, the complexity of the current examining system creates delays in hiring. Line managers find the complexity limiting as they attempt to accomplish timely recruitment of needed skills. To compete with the private sector for the best talent available, they need a process which is streamlined, easy to administer, and allows for timely job offers.

C. Changes Required/Expected Benefits

The proposed Demonstration Project responds to problems in the classification system with a Broad Banding Classification system for GS employees; to problems in the current performance management system with a Performance Development and Incentive Pay System; to the problems of the existing RIF procedures with a streamlined RIF system; and to problems of complicated hiring and examining procedures with a simplified examining and appointment process.

D. Participating Organizations/Mission

Both the Naval Surface Warfare Center and the Naval Undersea Warfare Center will participate in the project. The Warfare Centers are comprised of a total of seven Divisions with 14 major sites nationwide. The sites are diverse in employment profiles and size and have bargaining unit populations ranging from a small percentage to more than half of the workforce. These organizations operate throughout the full spectrum of research, development, test and evaluation, engineering and fleet support.

The Warfare Centers are Defense Business Operations Fund (DBOF) activities. Under DBOF, the cost of operating is paid by billing customers for work performed. The Warfare Centers seek to maximize management flexibility to control expenditures since the continued economic viability of a DBOF activity depends in large measure on remaining cost competitive with other organizations.

E. Participating Employees

This Demonstration Project will involve civilian personnel at all Warfare Center sites. There are 14 major sites (over 200 civilian personnel) and many smaller sites. Currently 23,697 civilians are employed as shown in Figure 1. The intent of the plan is to cover all civilian appropriated fund employees at all sites with the exception of the members of the Senior Executive Service. While the Demonstration Project, and its five components, cover all General Schedule (GS) employees, the Federal Wage System (FWS) employees are included only for purposes of changes in the Performance Development, Reduction-In-Force and Competitive Examining systems. Likewise, Senior Level (SL) and Scientific and Technical (ST) employees are covered only under the Incentive Pay, Performance Development and Reduction-In-Force systems. The Demonstration Project may be implemented incrementally throughout the Warfare Centers. The Demonstration Project will be implemented in bargaining units when those units so request and a negotiated agreement is reached. Approximately fifty percent of the workforce is represented by unions.

BILLING CODE 6325–01–M

Naval Surface Warfare Center (NSWC)

DIVISIONS	P	A	T	C	W	O	Total
Dahlgren	2,617	558	583	288	334	160	4,540
Indian Head	802	365	382	122	380	90	2,141
Crane	1207	768	1,395	167	1,146	136	4,819
Pt. Hueneme	925	753	399	192	21	32	2,322
Carderock	2,324	453	653	216	345	136	4,127
NSWC Total	**7,875**	**2,897**	**3,412**	**985**	**2,226**	**554**	**17,949**

Naval Undersea Warfare Center (NUWC)

Newport	2,308	416	404	259	125	11	3,523
Keyport	711	425	279	70	706	34	2,225
NUWC Total	**3,019**	**841**	**683**	**329**	**831**	**45**	**5,748**

Warfare Centers Total **23,697**

key: P = Professional A= Administrative T=Technical C=Clerical W=Wage O=Other

data a/o 4/8/96

FIGURE 1

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F. Employee/Labor Participation

One of the keys to developing a project plan sensitive to the multiplicity of management and employee needs has been the involvement of a Steering Committee composed of representatives from the Warfare Center Divisions and six national unions having bargaining units at the Warfare Center sites. The American Federation of Government Employees (AFGE), Metal Trades Council (MTC), International Association of Machinists (IAM), National Association of Government Employees (NAGE), the National Federation of Federal Employees (NFFE) and Fraternal Order of Police (FOP) represent more than half of the more than 25,000 employees in a variety of occupational groups at Warfare Center sites across the United States. Appendix A further describes the employee/union participation in this effort. The Steering Committee developed a project plan capable of meeting the seemingly differing, sometimes conflicting, goals of management and the unions. The Steering Committee substantially altered the original concept to address those needs in order to provide a viable implementation framework capable of meeting the wide variety of cultures and needs across the Warfare Center spectrum. The Steering Committee is also working to foster the establishment of partnerships within the Warfare Centers.

The Steering Committee agreed to the following language with respect to the implementation of the Demonstration Project in the Warfare Center bargaining units. ''Essential to the success of the Demonstration Project within a collective bargaining unit is the explicit choice of the parties to freely enter into the project with mutual agreement on all provisions associated with the project. To that end, either party will have the option NOT to enter the project up to the point where both parties sign a collective bargaining agreement covering the Demonstration Project and, if required, that agreement is ratified and approved. Further the parties may include in the contract provisions for evaluating, modifying and leaving the project during the life of the contract.'' Any disputes or impasses that arise in connection with the negotiation on the implementation of the Demonstration Project will be subject to mediation but not binding impasse procedures. For any bargaining subsequent to adoption of the Demonstration Project, the parties shall use impasse procedures defined in 5 U.S.C. 7119 unless alternative impasse procedures have been negotiated. In the event Executive Order 12871 is no longer in effect, the parties within the Demonstration Project will continue to negotiate issues covered by 5 U.S.C. 7106(b)(1) to the extent those issues impact on the provisions of the Demonstration Project. Within bargaining units, violations of provisions of the Demonstration Project may be covered by the negotiated grievance procedure.

This Demonstration Project was developed with management and union input through a collaborative process; however, it was agreed that union participation did not necessarily constitute full and complete endorsement of all details of the project. The Project will be implemented in bargaining units only after there is full agreement through the collective bargaining process.

While understanding that each bargaining unit will make its own choice about participating in the Demonstration Project, the Steering Committee has endeavored to create a project plan to fulfill the mutual interests of management and employees while supporting the long term objective of vital, competitive Warfare Centers capable of developing and delivering the best possible technology to their customers.

III. Methodology

A. Project Design

An overarching objective in the project design has been the development of a personnel system that provides a maximum opportunity for local ''tailoring'' to meet the variety of requirements of organizations engaged in missions ranging from theoretical research into submarine vulnerability and survivability to the storage of torpedoes. While the Divisions seek to recruit and retain world class engineers and scientists in order to remain viable as laboratories, they must also meet the development and motivational needs of an extraordinarily diverse workforce; i.e., employees ranging from small arms repairers in Crane, Indiana to program analysts in Newport, Rhode Island. In order to accomplish that end, the goal is to begin the process of delegating decision making to the people who know the most about what they need and how to get their work accomplished: the Divisions and sites.

While much of the Demonstration Project will be applied uniformly, there are decisions which will be delegated to

the Divisions and activities so that the needs and cultures of those organizations may be taken into account. Decisions at the local level will be made through the collective bargaining process.

B. Personnel System Changes

1. Classification/Pay

A fundamental element of the system is a simplified white collar classification and pay component. The proposed broad banding scheme reduces the fifteen GS grade levels and the Senior Level (SL) and Scientific & Technical (ST) pay levels, into five to six broad pay bands. (See Figure 2) GS occupations are further broken down into three separate career paths: Scientific and Engineering (ND), Administrative and Technical (NT), and General Support (NG).

The OPM-developed classification standards are replaced by a small number of one-page, generic benchmark standards developed within the Demonstration Project. These standards also serve as the core of the position description and replace lengthy individually tailored position descriptions. These generic level descriptions encompass multiple series and provide maximum flexibility for the organization to assign individuals consistent with the needs of the organization, established level or rank that the individual has achieved, and the individual's qualifications. Career progression between levels will occur by promotion, and pay progression within levels will occur through incentive pay.

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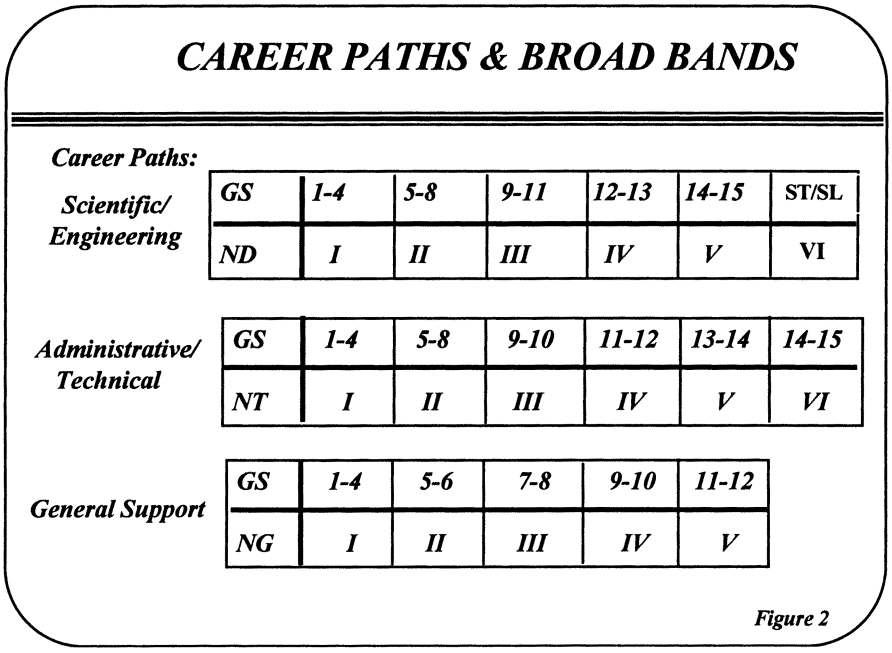

Figure 2

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The Warfare Centers' long experience with industrial funding will ensure their ability to control costs, an essential requirement in today's environment.

a. Career Paths. The Warfare Centers request exemption from the current GS classification system and substitute career paths and band levels. The designated career paths are: Scientific and Engineering (ND), Administrative and Technical (NT), and General support (NG). Like the China Lake system, the GS classification series would be retained. More detailed descriptions of the career paths and the classification series for each path are provided below. The breakdown of occupational series to career paths reflects only those occupations which currently exist within the two Warfare Centers. Additional series may be added as a result of changes in mission requirements or OPM recognized occupations. These additional series will be placed in the appropriate career path consistent with the established career path definitions.

SCIENTIFIC AND ENGINEERING: Professional engineering positions and scientific positions in the physical, biological, mathematical, and computer sciences; and student positions for training in these disciplines. Series and titles included in the path are: 0401, General Biological Science Series; 0403, Microbiology Series; 0408, Ecology Series; 0440, Genetics Series; 0460, Forestry Series; 0471, Agronomy Series; 0499, Biological Science Student Trainee Series; 0801, General Engineering Series; 0803, Safety Engineering Series; 0804, Fire Protection Engineering Series; 0806, Materials Engineering Series; 0807, Landscape Architecture Series; 0808, Architecture Series; 0810, Civil Engineering Series; 0819, Environmental Engineering Series; 0830, Mechanical Engineering Series; 0840, Nuclear Engineering Series; 0850, Electrical Engineering Series; 0854, Computer Engineering Series; 0855, Electronics Engineering Series; 0861, Aerospace Engineering Series; 0871, Naval Architecture Series; 0892, Ceramic Engineering Series; 0893, Chemical Engineering Series; 0894, Welding Engineering Series; 0896, Industrial Engineering Series; 0899, Engineering and Architecture Student Trainee Series; 1301, General Physical Science Series; 1306, Health Physics Series; 1310, Physics Series; 1313, Geophysics Series; 1320, Chemistry Series; 1321, Metallurgy Series; 1330, Astronomy and Space Science Series; 1350, Geology Series; 1360, Oceanography Series; 1372, Geodesy Series; 1386, Photographic Technology Series; 1399, Physical Science Student Trainee Series; 1515, Operations Research Series; 1520, Mathematics Series; 1529, Mathematical Statistician Series; 1530, Statistician Series; 1550,

Computer Science Series; 1599, Mathematics and Statistics Student Trainee Series.

ADMINISTRATIVE AND TECHNICAL: Professional or specialist positions in such administrative, technical and managerial fields as finance, procurement, human resources, computer, legal, librarianship, public information, safety, social sciences, and program management and analysis; nonprofessional technician positions that support scientific and engineering activities through the application of various skills and techniques in electrical, mechanical, physical science, biology, mathematics, and computer fields; and student positions for training in these disciplines. Series and titles included in this path are: 0018, Safety and Occupational Health Management Series; 0020, Community Planning Series; 0028, Environmental Protection Specialist Series; 0080, Security Administration Series; 0099, General Student Trainee Series; 0101, Social Science Series; 0110, Economist Series; 0132, Intelligence Series; 0170, History Series; 0180, Psychology Series; 0185, Social Work Series; 0187, Social Services Series; 0188, Recreation Specialist Series; 0201, Personnel Management Series; 0205, Military Personnel Management Series; 0212, Personnel Staffing Series; 0221, Position Classification Series; 0230, Employee Relations Series; 0233, Labor Relations Series; 0235, Employee Development Series; 0260, Equal Employment Opportunity Series; 0299, Personnel Management Student Trainee Series; 0301, Miscellaneous Administration and Program Series; 0334, Computer Specialist Series; 0340, Program Management Series; 0341, Administrative Officer Series; 0342, Support Services Administration Series; 0343, Management and Program Analysis Series; 0346, Logistics Management Series; 0391, Telecommunications Series; 0399, Administration and Office Support Student Trainee Series; 0501, Financial Administration and Program Series; 0505, Financial Management Series; 0510, Accounting Series; 0560, Budget Analysis Series; 0599, Financial Management Student Trainee Series; 0602, Medical Officer Series; 0610, Nurse Series; 0690, Industrial Hygiene Series; 0802, Engineering Technician Series; 0809, Construction Control Series; 0818, Engineering Drafting Series; 0856, Electronics Technician Series; 0895, Industrial Engineering Technician Series; 0899, Engineering and Architecture Student Trainee Series; 0905, General Attorney Series; 0950, Paralegal Specialist Series; 0962, Contact representative; 1001, General Arts and Information Series; 1010, Exhibits Specialist Series; 1015, Museum Curator Series; 1016, Museum Specialist and Technician Series; 1020, Illustrating Series; 1035, Public Affairs Series; 1060, Photography Series; 1071, Audiovisual Production Series; 1082, Writing and Editing Series; 1083, Technical Writing and Editing Series; 1084, Visual Information Series; 1101, General Business and Industry Series; 1102, Contracting Series; 1103, Industrial Property Management Series; 1104, Property Disposal Series; 1150, Industrial Specialist Series; 1152, Production Control Series; 1173, Housing Management Series; 1176, Building Management Series; 1199, Business and Industry Student Trainee Series; 1222, Patent Attorney Series; 1311, Physical Science Technician Series; 1410, Librarian Series; 1412, Technical Information Services Series; 1420, Archivist Series; 1521, Mathematics Technician Series; 1601, General Facilities and Equipment Series; 1640, Facility Management Series; 1654, Printing Management Series; 1670, Equipment Specialist Series; 1701, General Education and Training Series; 1710, Educational and Vocational Training Series; 1712, Training Instruction Series; 1810, General Investigating Series; 1811, Criminal Investigating Series; 1910, Quality Assurance Series; 2001, General Supply Series; 2003, Supply Program Management Series; 2010, Inventory Management Series; 2030, Distribution Facilities and Storage Management Series; 2032, Packaging Series; 2050, Supply Cataloging Series; 2101, Transportation Specialist Series; 2130, Traffic Management Series; 2150, Transportation Operations Series; 2181, Aircraft Operations Series.

GENERAL SUPPORT: Assistant and clerical positions providing support in such fields as budget, finance, supply, human resources; positions providing support through application of typing, clerical, or secretarial knowledge and skills; positions providing specialized facilities support such as guards, police officers and firefighters; and student positions for training in these disciplines. This path includes the following series and titles: 0019, Safety Technician Series; 0029, Environmental Protection Assistant Series; 0081, Fire Protection and Prevention Series; 0083, Police Series; 0085, Security guard Series; 0086, Security Clerical and Assistance Series; 0134, Intelligence Aid and Clerk Series; 0186, Social Services Aid and Assistant Series; 0189, Recreation Aid and Assistant Series; 0203, Personnel Clerical and Assistance Series; 0204, Military Personnel Clerical and Technician Series; 0303, Miscellaneous Clerk and Assistant Series; 0304, Information Receptionist Series; 0305, Mail and File Series; 0318, Secretary Series; 0322, Clerk-Typist Series; 0326, Office Automation Clerical and Assistance Series; 0332, Computer Operation Series; 0335, Computer Clerk and Assistant Series; 0344, Management Clerical and Assistance Series; 0350, Equipment Operator Series; 0351, Printing Clerical Series; 0356, Data Transcriber Series; 0361, Equal Opportunity Assistance Series; 0382, Telephone Operating Series; 0390, Telecommunications Processing Series; 0392, General Communications Series; 0394, Communications Clerical Series; 0399, Administration and Office Support Student Trainee Series; 0462, Forestry Technician Series; 0503, Financial Clerical and Assistance Series; 0525, Accounting Technician Series; 0530, Cash Processing Series; 0540, Voucher Examining Series; 0544, Civilian Pay Series; 0561, Budget Clerical and Assistance Series; 0640, Health Technician; 0647, Diagnostic Radiologic Technologist Series; 0675 Medical Records Technician Series; 0679, Medical Clerk Series; 0698, Environmental Health Technician Series; 0945, Clerk of Court Series; 0986, Legal Clerical and Assistance Series; 1087, Editorial Assistance Series; 1105, Purchasing Series; 1106, Procurement Clerical and Technician Series; 1107, Property Disposal Clerical and Technician Series; 1411, Library Technician Series; 1531, Statistical Assistant; 1702, Education and Training Technician Series; 2005, Supply Clerical and Technician Series; 2091 Sales Store Clerical Series; 2102, Transportation Clerk and Assistant Series; 2131, Freight Rate Series; 2135, Transportation Loss and Damage Claims Examining Series; 2151, Dispatching Series.

b. Broad Bands and Levels of Responsibility. A fundamental purpose of broad banding is to make the distinctions between levels easier to discern and more meaningful. In that regard, the 15 GS grade levels are reduced to no more than six band levels, each representing a defined level of work. Within each career path, bands typically include the following categories of positions: student trainee and/or entry level, developmental, full performance level, and expert and/or supervisor/manager.

With fewer band levels than GS grades, the level of responsibility reflected in each band typically

encompasses the responsibilities of two or more GS grade levels. For example, the responsibilities of a band level covering work at the full performance level may represent a synthesis of GS–11 and GS–12 responsibilities. For the NT career path, the responsibilities associated with the top two bands do not precisely align with equivalent GS levels. Some GS–14 level responsibilities band best with GS–13 while others band best with GS–15.

Although Band VI of the ND career path covers SL and ST positions, this does not represent a requested change in the basis for classification or allocation of billets for these positions. The authority to allocate new billets, classify positions and set initial pay for assignment to SL and ST positions within the Warfare Centers will be retained at the Assistant Secretary of the Navy (Manpower and Reserve Affairs) level. (Accordingly, classification appeal procedures for such positions are not affected by the provisions of this demonstration project.) The intent of including these positions in the ND career path was two fold: (1) to emphasize the dual career progression for scientists and engineers in nonsupervisory and nonmanagerial career paths; and (2) to include SL and ST employees in all other aspects of the Demonstration Project, i.e., performance development, incentive pay and reduction-in-force systems. Consistent with our goal of developing, recognizing, and retaining employees needed to meet our changing organizational needs, the Demonstration Project seeks the authority to manage its SL and ST workforce under the same performance development and incentive system as other employees. This includes the authority at the Division level to adjust the pay of SL and ST employees up to Level IV of the Executive Schedule. Incentive pay decisions will be made against criteria relevant to the needs of the organization including the criticality and difficulty of the position, critical skills, and current salary level of the employees.

c. Simplified Classification Process. A limited number of Warfare Center one-page generic, level descriptors that also serve as the core of preclassified position descriptions will be created within the Demonstration Project. Those descriptions may be further tailored with an addendum to provide information on Fair Labor Standards Act (FLSA) coverage, selective placement factors, specialized knowledge/skills/abilities, etc. Within the Demonstration Project, the term ''classification of a position'' for positions covered by broad banding is defined as the placement of a position in its appropriate career path, occupational series, and band level based on the application of standards (referred to as level descriptions or benchmark standards) established at the Warfare Center level. Line managers will be meaningfully involved in the classification process to make it more relevant to their organization's needs.

d. Classification Appeals. (Classification appeal procedures for SL and ST employees placed in Band VI of the ND career path remain as currently provided for and are not affected by the appeal procedures described in this demonstration project.) An employee may appeal the career path, series, or broad band level of his or her position at any time. When doing so, the employee must formally raise the areas of concern to the supervisor in the immediate chain of command. If an employee is not satisfied with the supervisor response, he or she may then appeal to the DOD appellate level via the employee's chain of command and the Warfare Centers' Demonstration Project Office. Only after DOD has rendered a decision under the provisions of this demonstration project, may an employee file an appeal with the Office of Personnel Management. Appellate decisions from OPM are final and binding on all administrative, certifying, payroll, disbursing, and accounting officials of the Government. Time periods for case processing under Title 5 apply.

An employee may not appeal the demonstration project classification criteria, the accuracy of the level descriptor, or the pay setting criteria; the assignment of occupational series to a career path; the title of a position; the propriety of a salary schedule; or matters grievable under an administrative or negotiated grievance procedure or an alternative dispute resolution procedure. The evaluation of a classification appeal under this demonstration project is based upon the demonstration project classification criteria. Case files will be forwarded for adjudication through the servicing human resources organization and will include copies of the employee's level descriptor, the addendum, and a copy of the Warfare Centers' classification criteria along with other documents or information required by the Office of Personnel Management.

e. Simplified Assignment Process. Today's environment of downsizing and workforce transition mandates that the organization has maximum flexibility to assign individuals. Broad banding can be used to address these needs. As a result of the assignment to a particular level descriptor, the organization will have maximum flexibility to assign an employee within broad descriptors consistent with the needs of the organization, and the individual's qualifications and rank or level. Subsequent assignments to projects, tasks, or functions anywhere within the organization requiring the same level and area of expertise, and qualifications would not constitute an assignment outside the scope or coverage of the currently level descriptor. Such assignments within the coverage of the generic descriptors are accomplished as realignments and do not constitute a position change. For instance, a technical expert can be assigned to any project, task, or function requiring similar technical expertise. Likewise, a manager could be assigned to manage any similar function or organization consistent with that individual's qualifications. This flexibility allows a broader latitude in assignments and further streamlines the administrative process and system.

f. Broad Bands and Salary Ranges. The basis for the Demonstration Project pay system is each band level having a basic salary range that exactly corresponds to salaries of three or more GS grade levels. This continued linkage with the GS system will result in adjustments to the salary ranges through future general and locality pay increases under the General Schedule System. To more closely replicate the salary overlap found in the current GS system, there is a one grade extended salary overlap with each lower band for bands II and above. (See Figure 3) The one exception is the band for ST and SL positions (ND VI). The pay range for these positions will be 120% of the minimum rate of basic pay for GS–15 up to Level IV of the Executive Schedule. The purpose of the salary overlap is twofold. First, it is to provide pay setting flexibilities and cost containment opportunities in promotions. This reduces the instances of nondiscretionary promotion pay increases of greater than 6% that may otherwise be required to advance pay to the lower end of the next higher band level. The second purpose is to facilitate an assignment back to the next lower level without loss in pay when appropriate.

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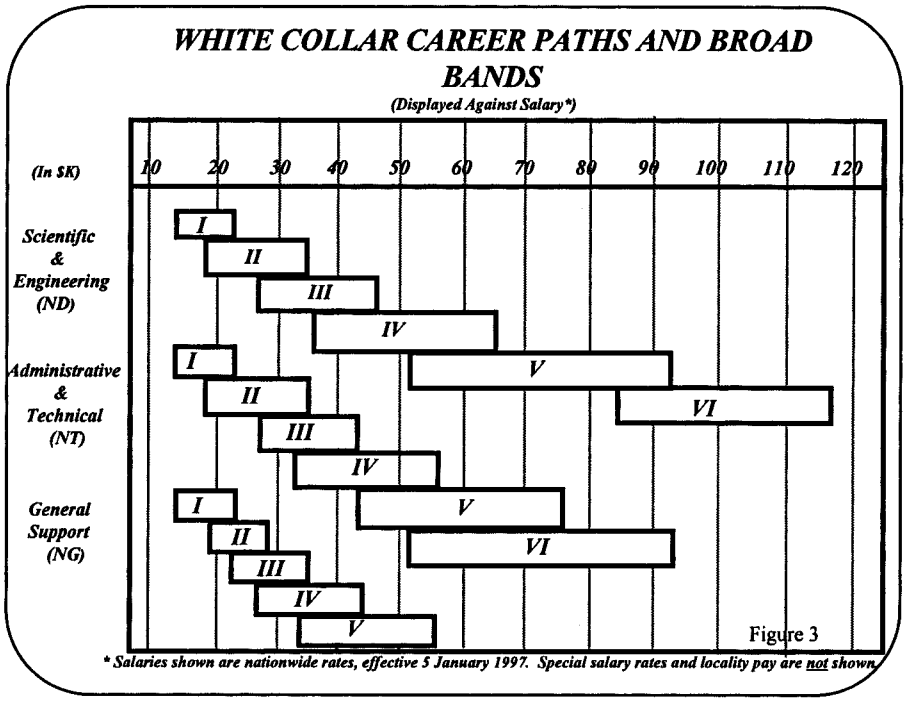

Figure 3

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g. Locality Pay and Special Salary Rates. For each band level., the basic annual rate of pay will be adjusted to reflect the appropriate locality pay percentage. The maximum locality rate for each band level will be referred to as a ''locality pay point.'' When the special salary rates authorized under the GS system exceed the locality pay point, the top of the applicable band will be extended to the maximum special salary rate authorized for that series and geographic location. Placement within this special rate extension will be restricted to employees in an occupation and location covered by that special rate. An employee will be considered a special rate employee only if his/her basic pay falls within the extension, i.e., the basic pay exceeds the locality pay point. Consistent with the intent of locality pay, special salary rate employees, as defined above, will not be eligible for locality pay adjustments. When the locality pay point overtakes the employee's rate of basic pay through general or locality pay increases, the employee will no longer be considered a special salary rate employee. In this instance, the employee's total adjusted basic pay will be increased to the new locality pay point. The employee's new adjusted salary will then be reallocated into a new basic pay and a locality pay adjustment rate. Pay retention provisions and adverse action procedures will not apply to the reallocation of the employee's salary as the employee's total adjusted salary will remain the same.

h. Pay Administration. The following definitions and policies will apply to the movement of employees within the Demonstration Project from one career path or band level to another, or placement in a Demonstration Project Career Path from the GS, FWS, or other personnel systems:

ADVANCED IN-HIRE RATE: Upon initial appointment, the individual's pay may be set anywhere within the band level consistent with the special qualifications of the individual and the unique requirements of the position. These special qualifications may be in the form of education, training, experience, or any combination thereof that is pertinent to the position in which the employee is being placed.

Geographic Movement Within the Demonstration Project: An employee covered by broad banding who moves to a new duty station in a different geographic area and continues to be an employee covered by the Warfare Center Demonstration Project will have his/her pay in the new area computed as explained below. In all cases, the geographic movement is processed before any other simultaneous pay action (e.g., promotion, reassignment, downgrade, change in series, etc.) effective on the same day.

1. Regular Range Employees. An employee paid at a rate below the locality pay point for his or her band level will receive no change in his or her rate of basic pay upon geographic movement. The employee's locality pay adjustment will be recomputed using the newly applicable locality pay percentage, which may result in a higher or lower locality pay adjustment and, thus, a higher or lower adjusted rate (locality rate or special rate, as applicable). Exception: For employees who would be eligible for a special rate under the GS system and who are in the regular range of a band with a special rate extension, the new adjusted salary following a geographic move may not be less than the old adjusted salary multiplied by the factor derived by dividing the new adjusted band maximum by the old adjusted band maximum.

2. Special Rate Extension Employees. For an employee being paid at a rate in a special rate extension, the new adjusted salary following a geographic move is equal to the old adjusted salary multiplied by the factor derived by dividing the new adjusted band maximum by the old adjusted band maximum; however the new adjusted rate may not be less than the applicable locality pay point in the new area.

3. Pay Protection Provision. A special pay protection provision applies to employees who (a) were entitled to a special rate immediately before conversion into the Demonstration project, (b) continue to meet the GS special rate eligibility conditions, and (c) are paid at a rate that equals or exceeds the dollar amount of the pre-conversion special rate. For these employees, the new adjusted rate

following a geographic move may not be less than the dollar amount of the employee's pre-conversion special rate. Adverse action and pay retention provisions of Title 5, United States Code, will not apply to any reduction in basic pay due solely to the operation of the above rules.

PROMOTION: Within the Demonstration Project Broad Banding system a promotion will be defined as the movement of an employee from a lower to a higher band level in the same career path, or from one career path to another wherein the band in the new career path has a higher maximum salary than the band from which the employee is moving.

After the implementation of the Demonstration Project, for an employee moving from the GS, a promotion will be defined as placement in a band level which incorporates a GS grade level which is higher than the employee's current grade.

For an employee moving from the FWS, a promotion will be defined as placement in the Demonstration Project in a band level where the representative rate of the highest GS grade covered (i.e., step 04 adjusted rate of the highest GS grade) is higher than the representative rate of the employee's current FWS grade (i.e., step 02).

Promotions will follow basic federal merit promotion policy that provides for competitive and non-competitive promotions. Except for promotions from the FWS to positions covered by the Demonstration Project broad banding system, an employee will normally receive an increase of six percent upon promotion unless a higher increase is necessary to raise the employee's salary to the minimum salary of the new band. The employee's total adjusted pay (basic pay and locality pay; if any) will be used in determining the amount of the promotion increase and in setting the employee's adjusted pay in the higher band. Decisions not to increase pay or for increases of other than six percent or to the minimum level of the band must be approved at the Division level, unless otherwise delegated to lower levels. In no situation may an employee's salary upon promotion be established lower than the minimum salary range of the new band.

Factors to be used to help determine the amount of the increase may include, but are not limited to, the employee's directly related experience which may be of immediate use in the new position; the employee's current pay; and the relationship to salaries of other similarly qualified employees.

REASSIGNMENT: For movement within the Demonstration Project Broad Banding system, a reassignment will be movement to a position covered by the same band level, or from one career path to another when the salary range of the new band level and the employee's current band level remains the same.

For an employee moving from the GS, a reassignment will be defined as placement in the Demonstration Project in a band level where the highest GS grade covered is the same as the employee's current GS grade.

For an employee moving from the FWS, a reassignment will be defined as placement in the Demonstration Project in a band level where the representative rate of the highest GS grade covered (i.e., step 04 adjusted rate of the highest GS grade included in that broad band) is the same as the representative rate of the employee's current FWS grade.

DEMOTION OR CHANGE TO LOWER BAND LEVEL: For movement within the Demonstration Project Broad Banding system, a demotion will be defined as the movement of an employee from a higher band to a lower band within the same career path, or from one career path to another where the band in the new career path has a lower maximum salary than the band from which the employee is moving.

For an employee moving from the GS, a demotion will be defined as placement in the Demonstration Project in a band level where the highest GS grade covered is lower than the employee's current GS grade.

For employees moving from the FWS, a demotion will be defined as placement in the Demonstration Project in a band level where the representative rate of the highest GS grade covered (i.e., step 04 adjusted rate of the highest grade included in that pay band) is lower than the representative rate of the employee's current FWS grade.

SALARY ADJUSTMENT: A salary adjustment is defined as an increase in an employee's base pay (by other than the incentive pay process) within the employee's current band level to an amount which does not exceed the top of the band. The salary adjustment may be used to adjust the pay of individuals who have acquired a level of education that would otherwise make the employee qualified for an appointment at a higher level and would be used in lieu of a new appointment. For example, this authority may be used to adjust the pay of graduate level Cooperative Education (COOP) students or employees who have obtained an advanced degree, e.g., Ph.D.

OTHER: Current provisions for Highest Previous Rate, Pay Retention (except as otherwise noted), Special Recruitment and Relocation Bonuses, Retention Allowances and Accelerated Promotions will continue. The use of OPM's Operating Manual for ''Qualification Standards For General Schedule Positions'' will continue with minor modifications; ''Band'' will be substituted for ''Grade'' where appropriate and the time in grade requirement will be eliminated.

2. Performance Development System

The philosophical base of this Demonstration Project is that employees are valued and trusted and are the organization's most critical assets. Accordingly, the primary objectives of the Demonstration Project are to: develop employees to meet the changing needs of the organization; to help employees achieve their career goals; to improve performance in current positions; to retain high performers, and to improve communication with customers, colleagues, managers and employees. The system focuses on continuous performance improvement and minimizes administrative requirements. On-going dialogue between the employee and supervisor is fundamental to this development focus, and Performance Development Resources are provided as part of the system to facilitate this dialogue and assist with diagnosis of performance issues. The emphasis on continued improvement is carried over into the process for addressing performance problems. The proposed system substitutes an early intervention which focuses immediately on a formal performance plan designed to support the employee's success. A determination of unacceptable performance is made only if the employee does not meet the requirements for acceptable performance detailed in that plan. The following paragraphs describe the key components of the Performance Development System. Figure 4 depicts the relationship of these components and their linkage with the Incentive Pay System.

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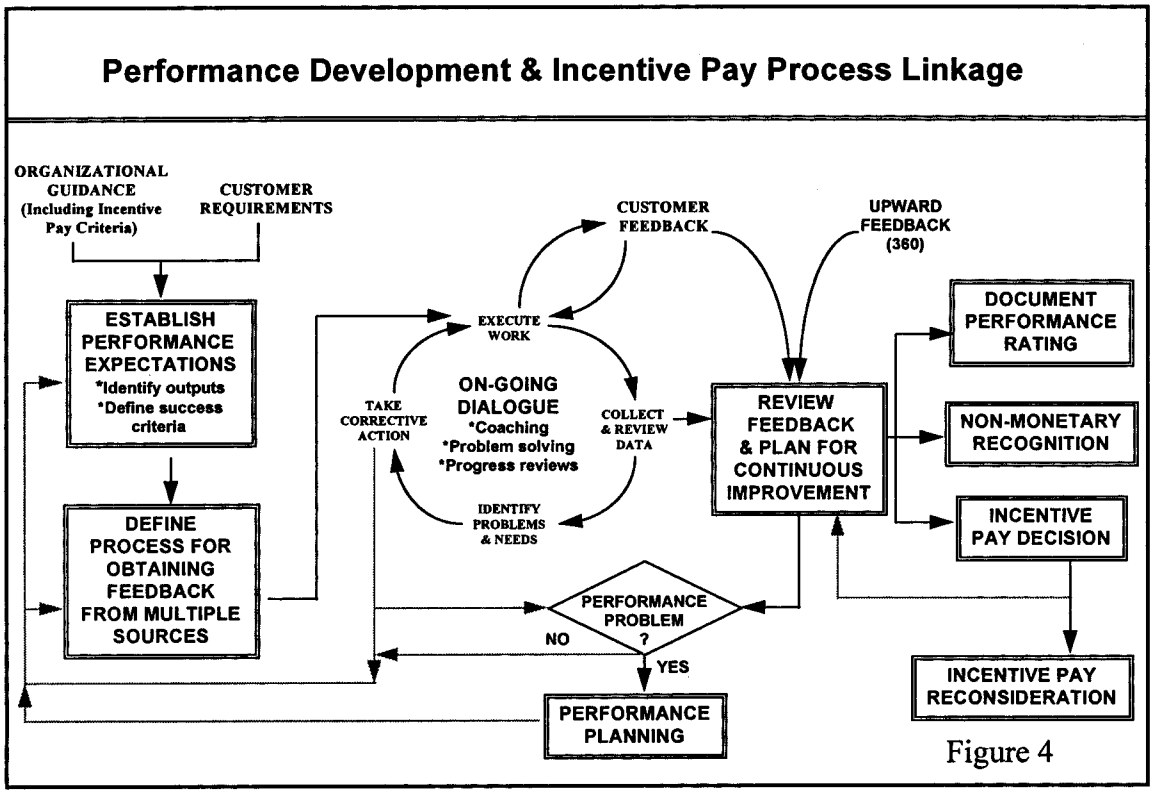

Figure 4

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a. Performance Development Resources (PDR). At the heart of the performance development system is the concept of providing organizational resources to support the development process. While the design of these resources will be delegated to each Division, they will typically consist of a pool of people, including union representatives, who act as a support system to identify or help provide for the needs of employees and managers in the development process. Current limitations regarding union involvement in discussions concerning assigning and directing employees will not prevent the parties within the Demonstration Project from developing appropriate procedures for the Performance Development Resources.

The PDR will be available to facilitate communications around expectations and needs, and help supervisors and employees seek agreement throughout all aspects of the performance development process. Should performance problems arise, the PDR will be particularly useful in diagnosing issues impacting performance (e.g., employee skills, attitudes and motivation, clarity of job expectations, systemic issues, access to information and resources, relationships with co-workers and supervisor, etc.) and identifying options for addressing these issues (e.g., development opportunities, tools or equipment to support improved performance, reassignment of the employee to a position that better matches his/her capabilities and interests, etc.) They will also make referrals to others who may be helpful, and identify systemic or organization wide issues which may be affecting performance.

Supervisors are expected to utilize the PDR for assistance in preventing and alleviating performance problems. Employees may also use the PDR to assist them in correcting self-identified performance problems, in development planning to enhance their career opportunities consistent with the needs of the organization, and to facilitate communication and feedback with their supervisors, etc.

b. Two Level Rating System. The system employs a two level rating system: ''acceptable'' and ''unacceptable'' performance. ''Acceptable'' performance is defined as ''performance that fulfills the requirements for which the position exists.'' An employee's performance may not be determined ''unacceptable'' unless the employee has been placed on and failed a performance plan. Employee performance ratings will be documented annually.

c. Establishing Performance Expectations. Clear, mutually understood performance expectations that are linked to organizational goals, strategies and values are fundamental to successful individual and organizational performance. The outcome of this component of the Performance Development System is clear communication of the products and/or services to be delivered by the employee(s), and the success criteria against which those outputs will be assessed. Documentation of outputs and success criteria is expected when necessary to facilitate mutual understanding of performance expectations.

The most effective means of creating a common understanding is through a process in which the supervisor and employee(s) discuss requirements and establish performance goals and expectations. Employees and supervisors are expected to actively participate in these discussions to seek clarity regarding expectations and identify potential obstacles to meeting goals. In addition, employees should explain (to the extent possible) what they need from their supervisor to support goal accomplishment. The timing of these goal setting discussions will vary based on the nature of work performed, but will occur at least annually. More frequent, task specific, discussions of expectations may be more appropriate in some organizations. In cases where work is accomplished by a team, team discussions regarding goals and expectations may be appropriate,

however expectations for individual contributions to the team goals should always be clearly specified. Either the supervisor, the employee, or the union may enlist the assistance of the Performance Development Resources to facilitate effective dialogue with regard to these issues.

Documentation of performance expectations is a helpful mechanism for ensuring clarity of understanding and providing a focus for later discussions on progress and developmental needs. As a minimum, formal documentation of expectations is required when an employee begins a new or substantially different job. Documentation in other situations is based on the needs and desires of the employee and supervisor, and may rely on other existing documentation (e.g., project plans, process documentation, customer requirements, etc.) No prescribed format is required for such documentation; the employee and supervisor are encouraged to seek agreement on what form of documentation will meet their needs and who will be responsible for producing it. The assistance of the Performance Development Resources may be enlisted by either party to support their efforts to reach agreement. In bargaining units, documentation procedures will be subject to bargaining. Current limitations regarding union involvement in decisions concerning assigning and directing employees will not prevent the parties within the Demonstration Project from developing appropriate procedures for documenting performance discussions.

d. On-going Performance Dialogue. To facilitate performance development, employees and supervisors will engage in on-going dialogue. Ideally this dialogue will occur as part of normal day-to-day interactions for the purpose of ensuring a common understanding of expectations, reviewing whether expectations are being met, providing support in identifying resources or solving problems, providing coaching on complex or sensitive issues, providing information to increase the understanding of the project context, and keeping the supervisor informed of progress. In addition to this on-going interaction, however, it is expected that periodically a more formal dialogue will occur focused on reviewing progress, discussing customer feedback, exploring process improvements that could remove obstacles to effective performance, and identifying developmental needs to support continual improvement and career growth. The employee and supervisor should seek agreement on the frequency and form for both the formal and informal dialogues to ensure they will meet their needs. Either the supervisor, the employee or the union may call upon the Performance Development Resources to facilitate communications or conflict resolution around these issues. In cases where work is accomplished by a team, team meetings may be an appropriate forum for some of this interaction, however team discussions do not eliminate the need for the supervisor to have some form of individual dialogue with each employee.

The expected outcomes from this on-going dialogue component are plans to support the continuous improvement of individual and organizational performance. Documentation of these discussions and resulting plans is encouraged to the extent that it contributes to clarity of understanding and facilitates later review of progress on continuous improvement efforts. The nature and content of such documentation is based on the needs and desires of the employee and supervisor. No prescribed format is required for such documentation; the employee and supervisor are encouraged to seek agreement on what form of documentation will meet their needs and who will be responsible for producing it. The assistance of the Performance Development Resources may be enlisted by either party to support their efforts to reach agreement.

In bargaining units, these procedures are subject to bargaining. Current limitations regarding union involvement in decisions concerning assigning and directing employees will not prevent the parties within the Demonstration Project from developing appropriate procedures for ongoing performance dialogues and for documenting performance discussions.

e. Feedback from Multiple Sources. The primary purpose of feedback in the Performance Development System is to provide employees with information regarding how well their performance is meeting customer requirements in order to help the employees continually improve their performance. The outputs expected from this component are data and customer feedback which enable review of performance against success criteria. These data provide input to the review and continuous performance improvement planning discussed as part of the on-going dialogue component.

The responsibility for employee development and continuous improvement is jointly held between the supervisor and employee. They are expected to work together to identify internal and external customers and to define and implement a process by which the employee can regularly receive feedback. A variety of mechanisms may be appropriate, such as customer surveys, process measures which track customer requirements, an discussions with customers. Supervisors are expected to facilitate this process and work with employees to interpret the feedback and establish improvement goals. Performance Development Resources may be helpful during this process. Their assistance may be requested by the supervisor, the employee or the union. Current limitations regarding union involvement in decisions concerning assigning and directing employees will not prevent the parties within the Demonstration Project from developing appropriate mechanisms and procedures for obtaining feedback from multiple sources.

Managers and supervisors are also expected to obtain feedback from their customers, including their employees, and to use that feedback as a basis for establishing both personal and organizational performance development goals. The use of an anonymous instrument is appropriate for providing feedback to supervisors and managers on the impact of their behavior. The use of these instruments will help focus attention on desired leadership behaviors, structure the feedback in a constructive manner, and offset the power imbalance that often prevents supervisors from getting useful feedback from their employees. When necessary, supervisors and managers may choose to use the Performance Development Resources to help support their own developmental needs.

f. *Performance Plan.* When an employee has continued performance difficulties, the organization will provide a formal Performance Plan to support the supervisor and employee in resolving Performance Plan to support the supervisor and employee in resolving the performance problems. Use of the Performance Development Resources will be an integral part of this effort. Supervisors are expected to call on the Resources for assistance in preventing or alleviating performance problems before the need for formal action arises. When there is an indication that performance is not consistently meeting customer requirements, supervisors are expected to call on the Resources to analyze the causes of the difficulty and develop an approach for resolving it. Development of a formal Performance Plan is indicated if and when it is determined that the employee's performance (vs. system performance) is a contributor to the problem informal intervention has

not been successful in correcting the problem. Use of the Performance Development Resources is expected throughout the period of the Performance Plan in an attempt to facilitate a solution to the problem. The Performance Plan must be written, and will clearly document organizational expectations for successful job performance, specify accountability, identify developmental resources to correct any skill deficiencies, define the time frame of the performance plan, specify organizational support that will be provided and how performance results will be monitored. In addition, the Plan will clearly specify the potential consequences if performance is not acceptable. Periodic discussions between the supervisor and employee must occur during the time frame of the Performance Plan to review progress; these discussions must be documented. Current limitations regarding union involvement in decisions concerning assigning, directing, removing or reducing in grade employees will not prevent the parties within the Demonstration Project from developing appropriate procedures and documentation in connection with Performance Plans. (NOTE: Nothing in this subsection will preclude action under Title 5, United States Code, Chapter 75, when appropriate.)

g. *Accountability for Performance.* An employee will be given a rating of ''unacceptable'' only if and when the employee is unable to successfully complete the Performance Plan. When an employee's performance is rated as ''unacceptable,'' one of four actions will be taken: (1) removal from the Federal Service, (2) placement in a lower band level with a corresponding reduction in pay (demotion), (3) reduction in pay while remaining in the same band level, or (4) placement in a lower band level with no reduction in pay (demotion).

For the third category of action, the amount of reduction in pay will be up to, but may not exceed, the maximum amount of incentive pay (see below) that the employee could be eligible to receive during the current payout period, i.e., up to the equivalent of 4 continuing pay points as of the most recent payout cycle. Following the pay reduction, the objection is to restore performance and may commensurate with it. A formal Development Plan will be established to maximize the opportunity for success in the assignment by clearly identifying performance expectations and defining a plan to achieve them within an appropriate time frame, not to exceed 12 months. The activity's Performance Development Resources will be utilized throughout this process. If and when performance improves during the period in which the employee is otherwise ineligible for incentive pay, some or all of the reduced pay may be restored. Such restoration is not retroactive and is separate and apart from incentive pay.

For the fourth category of action, the employee may be moved to the next lower band level provided no loss in pay results and the employee's pay does not exceed the top of the lower bank level. Within the Demonstration Project, this would not be considered an adverse action and would not be appealable through a statutory appeals process except for preference eligible employees. Employees will be provided with a written notice of the decision and preference eligibles will be notified of their right to appeal the action to the Merit Systems Protection Board. Current limitations regarding union involvement in decisions concerning reducing employees in grade will not prevent the parties within the Demonstration Project from developing procedures for the non-adverse reduction in band level. The decision to reduce an employee to a lower band level with no reduction in pay will be subject to review under existing grievance or alternative dispute resolution procedures.

3. Incentive Pay System

The Incentive Pay System provides a mechanism for encouraging and rewarding performance contributions and other outcomes resulting from the continuous improvement focus of the performance development system.

INCENTIVE PAY FOR EMPLOYEES COVERED BY BROAD BANDING: Supervisors will conduct an annual review of each employee's salary and decide how total compensation should be adjusted to reflect the employee's performance contribution to the organization. The adjustment may be made as a continuing increase to base pay and/or as a one-time cash bonus to adjust total compensation. The philosophical foundation for incentive pay is described below:

Principles of Incentive Pay

Background: One of the outcomes of pay banding is an expanded range of pay progression opportunities for employees. This is accomplished through ''incentive pay.'' Incentive pay is awarded to people based on the value of their performance contributions to the organization. With this comes the necessity to insure that pay decisions are consistent with the needs and values of the organization. At the same time, they must be seen as fair and equitable. While the Demonstration Project provides discretion for Warfare Center Divisions to substantially define the criteria and process for managing incentive pay, it is appropriate that there be general Project-wide principles that provide a policy framework for division decisions. The following are those principles.

PRINCIPLE: ''The organization succeeds through the collective contributions of people in all occupations.''

The Warfare Centers perform critical missions for the Navy in support of national defense. These missions require the collective efforts of all their people. While certain positions and occupations are highly visible, it is the whole organization as a team pulling in the same direction and towards the same goals that enables the Centers to excel. In that regard, no occupational groups are to be effectively excluded from opportunities for incentive pay and other forms of recognition. Rather, there is an expectation that incentive pay generally will be distributed proportionally to the various career paths. Further, all people who are making positive performance contributions as demonstrated by acceptable performance will share in incentive pay. Amounts and time intervals will be set by Divisions/sites.

PRINCIPLE: ''Pay should be commensurate with value of performance to the organization.''

In general, an individual's total pay (base pay, plus any incentive pay) should be commensurate with the value of the performance contributions to the organization. Contributions may be based on past and/or potential performance consistent with criteria defined by the Warfare Center Divisions. In that regard, there should be relative pay equity between people whose contributions to the organization are of equal value. Consistent with this principle, as the value of a person's contribution increases, compensation should likewise increase. It follows that as an individual's compensation increases, there is a corresponding increase in expected performance contributions.

Typically, when a person is hired, or promoted to a higher band level, and pay is at or near the lower end of that band, there are expected successive increases in pay toward the mid range of that band. This pay growth is reflective of a learning curve upon entering a new position, and the corresponding increasing value to the organization. Pay progression through the mid range occurs with progressively higher levels of performance contributions. Beyond that, extraordinary contributions are expected for pay to increase through the upper levels of the band.

a. Eligibility. All employees who are making positive performance contributions as demonstrated by acceptable performance will share in incentive pay with the amounts and time intervals set by the Divisions and sites. Employees receiving an unacceptable rating since the last incentive payout are ineligible for the next incentive pay consideration.

b. Incentive Pay Pool. Payments under the Incentive Pay System are made from the incentive pay pool. Within the incentive pay pool, there are separate

funds for continuing pay increases and bonus payments. The incentive pay pool is not used to fund promotions between pay bands. It is also not used to fund general pay increases, special rate increases, or locality pay increases; rather, employees will continue to receive any such increases (as applicable under the Plan) consistent with other employees outside the demonstration project.

The incentive pay pool will be operated within the parameters of the overall finance system governing the Warfare Centers. As a Defense Business Operating Fund (DBOF) activity, the Warfare Centers are 100 percent industrially funded and operate as ''not-for-profit'' competitors within the Department of Defense. Under DBOF, the Centers are reimbursed for their work by their customers through billings based on stabilized rates. The assistant Secretary of the Navy for Financial Management and Comptroller oversees the establishment of these stabilized rates through reviews of Biannual Financial Management Budget submissions, which are highly visible at all Command levels. This funding process imposes a discipline in controlling costs (including salary expenditures for the Warfare Centers that is not present under appropriated funded organizations.

The size of the continuing pay fund is based on appropriate factors, including the following:

a. Historical spending for within-grade increases, quality step increases, and in-level career promotions (with dynamic adjustments to account for changes in law or in staffing factors e.g., average starting salaries and the distribution of employees among job categories and band levels);

b. Labor market conditions and the need to recruit and retain a skilled workforce to meet the business needs of the organization; and

c. The fiscal condition of the organization.

Given the implications of base pay increases on long-term pay and benefit costs, the amount of the continuing pay fund will be derived after a cost analysis with documentation of the mission-driven rationale for the amount. Any decision to substantially reduce the amount of funds devoted to continuing pay increases would typically occur only in lieu of more drastic cost cutting measures (e.g., RIF or furlough). As part of the evaluation of the project, average salary (base pay) will be tracked over time using two comparison groups: (1) The original two Navy Demonstration labs in China Lake and San Diego, and (2) a comparison group constructed using OPM's Central Personnel Data File.

The size of the bonus pay fund will be based on appropriate factors, including the following:

a. Historical spending for performance awards, special act awards, and awards for beneficial suggestions;

b. The organization's fiscal condition and financial strategies; and

c. Employee retention rates.

The decision process for defining the size of the incentive pay pool and the two funds within that pool will be established at the Division/site level. The design of the decision process, insofar as it affects bargaining unit employees, will be subject to collective bargaining.

d. Delegated Criteria Setting. The criteria and process for incentive pay will be substantially defined at the Division/site level. The incentive pay decision may be based on some combination of past, present and future performance. Examples of criteria may include criticality of skills, difficulty of position, criticality of position, individual or team contributions, suggestions for improving system or organization processes, length and/or quality of experience, current total compensation, etc. The criteria and process for incentive pay distribution for bargaining unit employees are subject to collective bargaining. Current limitations regarding union involvement in decisions concerning assigning and directing employees will not prevent the parties from developing the criteria and process for incentive pay decisions. (Note: The movement of an employee within a band based on the execution of an incentive pay decision is not a ''classification'' action.)

e. Pay Points. The payout process will utilize a point system to distribute incentive pay increases. A maximum of four (4) points will be available, thus each employee performing in an acceptable manner will be eligible to receive 0, 1, 2, 3 or 4 pay points in the form of continuing pay, bonus pay or some combination.

FOR FWS EMPLOYEES, cash awards continue to be available under the existing Incentive Awards system based on performance and special acts.

f. Communication and Documentation. It is important that employees understand what is expected in order to receive a pay increase. Supervisors will interpret organizational criteria for their employees to clarify how it applies to their work and have periodic assessment discussions with employees to prevent surprise decisions at the time of payout. These assessment discussions should normally be held separately from performance development dialogues. Supervisors and employees are encouraged to seek agreement on their documentation needs. In addition, supervisors are expected to document their payout recommendation decisions and to discuss their decision rationale with employees. In bargaining units, documentation procedures will be subject to bargaining. Current limitations regarding union involvement in decisions concerning assigning and directing employees will not prevent the parties from developing documentation procedures for the communication and documentation of incentive pay discussions and decisions.

g. Reconsideration of Incentive Pay Decisions. Employees will have the opportunity for a reconsideration of incentive pay decisions. While the specific purpose of the reconsideration is to address employee concerns about such decisions, the process is also intended to facilitate communication and understanding between employees and supervisors/managers concerning performance contributions and their impact on pay decisions. In addition, the process seeks to identify possible systemic problems that need to be addressed. In that regard, reconsideration is considered a positive and integral component of an effective incentive pay system by providing a mechanism to support continuous improvement. Accordingly, employees will not be discouraged from requesting reconsideration. Neither will they be subjected to reprisal or stigma. The specific process for reconsideration will be defined at the Division/site level. Current limitations regarding union involvement in decisions concerning assigning and directing employees will not prevent the parties from developing procedures for the reconsideration of incentive pay decisions. That process will include, but will not necessarily be limited to, the following characteristics: It should be administratively streamlined; provide expedited resolution; maintain appropriate confidentiality; be fair and impartial; address assertions of harmful error involving issues of process and procedure; and ensure that management payout decisions reflect reasonableness in judgment in evaluating applicable criteria.

h. Guidance on Managing Incentive Pay. Each Division is expected to develop policies and criteria to guide the implementation of the incentive pay system which are consistent with their mission, strategies and organizational values, and supportive of the Naval Sea

Systems Command and Warfare Center strategic plans. Some Divisions may rely on individual management judgment based on general guidance, while other Divisions may define a more mechanical process based on highly objective criteria. Additional guidance may be provided by major organizational components (e.g., departments or directorates) to tailor or interpret the command-level criteria for their specific mission and strategies. Each major organizational component will have authority to manage the incentive pay allocation derived from the salaries of employees in that component. Departments/Directorates may further delegate authority to mange a prorated portion of the fund to the next lower echelon. Supervisors and managers within the unit will be assessing the nature of each employee's contribution, consistent with the organization's policy and criteria as reflected in the written guidance. They will then make recommendations to a second level reviewer regarding the number of pay points to be awarded to each employee (i.e., 0 to 4 points) and the nature of incentive pay (i.e., continuing pay and/or bonus pay). Decisions regarding approval/disapproval of recommendations will be made at the organizational level to which authority has been delegated to manage the pay pool; typically this will be the second or third level reviewer. In cases where work is accomplished by a team, the team members may be involved in formulating the recommendation for distribution of incentive pay.

4. Reduction-In-Force (RIF)

Flexible and responsive alternatives are needed to restructure an organization in a short period of time. The current RIF system is complicated, costly, and relatively unresponsive to the needs of the organization.

The proposed RIF system will have a single round of competition to replace the current ''two round'' process. Once the position to be abolished has been identified, the incumbent of that position may ''displace'' another employee when the incumbent has a higher retention standing and is fully qualified for the position occupied by the employee with a lower standing. Retention standing is based on tenure, veterans' preference, length of service, and performance. However, there will be no augmented service credit based on performance ratings. An employee rated as unacceptable during the 12 month period preceding the effective date of a RIF may only displace an employee rated unacceptable during that same period. The same ''undue disruption'' standard currently utilized will serve as the criteria to determine if an employee is fully qualified. The displaced individual may similarly displace other employees. If/when there is no position in which an employee can be placed by this process or assigned to a vacant position, that employee will be separated.

Displacement is limited to one broad band level below the employee's present level. A preference eligible employee with a compensable service connected disability of 30 percent or mre may displace up to two broad band levels (or the equivalent of five General Schedule grades) below the employee's present level. Employees not covered by broad banding (FWS), may ''displace'' up to three grades/intervals (five grades/intervals for preference eligibles with a service connected disability of 30 percent or more).

The new system will eliminate retained grade but will preserve retained pay.

All positions included in the Demonstration Project within an activity at a specific geographic location will be considered a separate competitive area.

5. Competitive Examining and Distinguished Scholastic Appointments

The Warfare Center needs a process which will allow for the rapid filling of vacancies, is less labor intensive, and is responsive to our needs. Restructuring the examining process and providing an authority to appoint candidates meeting distinguished scholastic achievements will help achieve these goals. When a Division implements the Demonstration Project for some portion of their workforce, this component may be available for all occupations. This will eliminate the imposition of multiple examining and appointment systems on the public and will strengthen efficiencies gained under the Demonstration Project. To further minimize resource requirements and the complexities inherent in administering two different sets of examining and hiring processes, this component may also be applied to GS and FWS positions in activities for which the Warfare Center Divisions provide human resource services.

a. Delegated Examining Authority. The Warfare Centers propose to demonstrate a streamlined examining process for both permanent and non-permanent positions. This authority will be further delegated to the Division level. This authority will apply to all positions with exception of positions in the Senior Executive Service, to Senior Level (ST/SL) positions, to the Executive Assignment System or positions of Administrative Law Judge. This authority will include the coordination of recruitment and public notices, the administration of the examining process, the administration of veterans' preference, the certification of candidates, and selection and appointment consistent with merit principles.

b. Description of Examining Process: The primary change in the examining process to be demonstrated is the grouping of eligible candidates into three Quality Groups using numerical scores and the elimination of consideration according to the ''rule of three''.

For each candidate, minimum qualifications will be determined using OPM's Operating Manual for ''Qualification Standards For General Schedule Positions''/''Job Qualification Systems For Trades and Labor Occupations (Handbook X–118C)'' including any selective placement factors identified for the position. Candidates who meet basic (minimum) qualifications will be further evaluated based on knowledge, skills and abilities which are directly linked to the position(s) to be filled. Based on this assessment, candidates will receive a numerical score of 70, 80, or 90. No intermediate scores will be granted except for those eligibles who are entitled to veterans' preference. Preference eligibles meeting basic (minimum) qualifications will receive an additional 5 or 10 points (depending on their preference eligibility) which is added to the minimum scores identified above. Candidates will be placed in one of three quality groups based on their numerical score, including any veterans' preference points: Basically Qualified (score of 70 and above), Highly Qualified (score of 80 and above), or Superior (score of 90 and above). The names of preference eligibles shall be entered ahead of others having the same numerical rating.

For scientific/engineering and professional positions at the equivalent of GS–9 and above, candidates will be referred by quality groups in the order of the numerical ratings, including any veterans' preference points. For all other positions, i.e., other than scientific/engineering and professional positions at the equivalent of GS–9 and above, preference eligibles with a compensable service-connected disability of 10 percent or more who meet basic (minimum) eligibility will be listed at the top of the highest group certified.

In selecting the top candidate, selecting officials should be provided with a reasonable number of qualified candidates from which to choose. All

candidates in the highest group will be certified. If there is an insufficient number of candidates in the highest group, candidates in the next lower group may be certified in rank order. When two or more groups are certified, candidates will be identified by quality group (i.e., Superior, Highly Qualified, Basically Qualified) in the order of their numerical scores. In making selections, to pass over any preference eligible(s) to select a nonpreference eligible requires approval under current pass over or objection procedures.

c. Distinguished Scholastic Achievement Appointment: The Warfare Centers further propose to establish a Distinguished Scholastic Achievement Appointment using an alternative examining process which provides the authority to appoint undergraduates and graduates through the doctoral level to professional positions at the equivalent of GS–7 through GS–11, and GS–12 positions involved in research.

At the undergraduate level, candidates may be appointed to positions at a pay level no greater than the equivalent of GS–7 step 10 provided they meet the minimum standards for the position as published in OPM's operating manual, Qualification Standards for General Schedule Positions, plus any selective factors stated in the vacancy announcement; the occupation has a positive education requirement; and, the candidate has a cumulative grade point average of 3.5 or better (on a 4.0 scale) in those courses in those fields of study that are specified in the Qualifications Standards for the occupational series. Appointments may also be made at the equivalent of GS–9 through GS–12 on the basis of graduate education and/or experience for those candidates with a grade point average of 3.5 or better (on a 4.0 scale) for graduate level courses in the field of study required for the occupation.

Veterans' preference procedures will apply when selecting candidates under this authority. Preference eligibles who meet the above criteria will be considered ahead of nonpreference eligibles. In making selections, to pass over any preference eligible(s) to select a nonpreference eligible requires approval under current objection procedures. Priority must also be given to displaced employees as may be specified in OPM and Department of Defense regulations.

Distinguished Scholastic Achievement Appointments will enable the Warfare Centers to respond quickly to hiring needs with eminently qualified candidates possessing distinguished scholastic achievements.

C. Project Implementation

While many of the basic elements of each component of the project will be implemented uniformly at all sites through policies established at the Warfare Center level, a number of policies, procedures, or processes will be delegated to the Division and/or site levels. This permits the system to be operationally defined, within a Warfare Center directed framework, to fit the culture and needs of the local organizations. In bargaining units, the project will be implemented only after there is full agreement through the collective bargaining process.

D. Entry Into/Exit From the Project

1. Initial Conversion of Current Workforce

For the most part, current GS/GM employees will be converted automatically from their current grades to the appropriate career paths and band levels. However, the Warfare Centers consider it essential to the success of the project that employees, upon entering the project, feel that they are not losing a pay entitlement accrued under the GS system. Accordingly, the current employees of the Warfare Centers will be ''made whole'' through a one year ''buy-in'' period. On the day of conversion, employees typically will receive base pay increases for prorated step increase equivalents. Employees at the 10th step or receiving a retained rate are not eligible for the increase. Further, during the first 12 months following conversion, employees will receive pay increases for non-competitive promotion equivalents when the grade level of the promotion is encompassed within the same band, the employee's performance warrants the promotion and promotions would have otherwise occurred during that period. Employees who receive an in-level promotion at the time of conversion will not receive a prorated step increase equivalent.

Additionally, in many cases, employees who are today covered by a local or national special salary rate will no longer be considered a special rate employee under the Demonstration Project and will thus gain eligibility for full locality pay. To control conversion costs and to avoid a salary increase windfall for these employees, the adjusted salaries of these employees will not change. Rather, the employees will receive a new basic pay rate computed by dividing their adjusted basic pay by the locality pay factor for their area. A full locality adjustment will then be added to the new basic pay rate. Adverse action and pay retention provisions will not apply to the conversion process as there will be no change in total salary.

2. New and Transfer Employees

New hires, including employees transferring from other Federal activities, will be converted into the Demonstration Project in the career path and at the level and pay consistent with the duties and responsibilities of the position and individual qualifications.

3. Exit From the Demonstration Project

Employees who leave the Demonstration Project broad banding system to accept federal employment in the traditional Civil Service system will have their pay set by the gaining activity. To assist activities in setting pay and in determining whether such placement constitutes a promotion, reassignment, or change to lower grade, the employee's band and salary level will be converted to a General Schedule equivalent grade prior to leaving the Demonstration Project in the following manner:

Employees who exit the Demonstration Project will be tentatively converted to a GS grade most comparable to the employee's current Demonstration Project level and salary. In instances where the current salary is in the area between two overlapping GS grades within the same level, the converted grade is either (1) the higher of the two overlapping GS grades if the current salary meets or exceeds Step 4 of the higher GS grade, or (2) the lower of the overlapping grades if the current salary is less than Step 4 of the higher GS grade. In those instances where the current salary falls below the established GS salary range for the lowest GS grade covered by the Demonstration Project band level, the converted grade is the lowest GS grade level in that band. In those situations where an employee has not been promoted or placed in a lower pay band while covered by the Demonstration Project, the employee will be converted at a level which is no lower than the GS grade held immediately prior to entering the Demo project. This converted GS grade is the GS equivalent grade and is not necessarily the grade the employee will have upon transfer or reassignment outside the Demonstration Project. If the employee is receiving a retained rate under the Demonstration Project, the employee's GS-equivalent grade is the highest grade encompassed in his or her bank level. The Warfare Center will coordinate with OPM to describe a procedure for determining the GS-equivalency pay rate for an employee retaining a rate under the Demonstration Project.

An employee's pay within the converted GS grade is set by converting the Demonstration project adjusted rate of pay to a rate on the highest applicable adjusted rate range for the converted GS grade (including locality rates and special rates, as applicable). For example, if the highest applicable adjusted rate range under the GS pay system for a particular employee is a special rate range, the adjusted project rate (locality rate or special rate) is converted to the lowest special rate in that range that equals or exceeds the project rate; from this converted special rate, the employee's unadjusted GS rate and locality rate would be derived. This pay conversion is done before processing any geographic movement or other pay-related action coinciding with the employee's conversion out of the Demonstration project.

When an employee transfers to another activity, the employee's rating of record will be transferred. When the gaining activity uses other than a two level performance system, the employee may be provided a supplementary performance assessment using the gaining organizations appraisal criteria. If the employee requests such an appraisal, the employee will be responsible for providing the criteria to the supervisor for completion. Gaining organizations are not bound to use this supplementary performance appraisal in any formal actions.

Service under the Demonstration Project is creditable for within-grade increase purposes upon conversion back to the GS system. Incentive Pay increases (including a zero increase) under the Demonstration Project are equivalent increases for the purpose of determining the commencement of a within-grade increase waiting period under 5 CFR 531.405(b).

E. Project Duration

The initial implementation period for the Project will be five years. At that time, the entire Demonstration project will be reexamined to determine whether to continue, modify or terminate the Project.

IV. Evaluation Plan

Chapter 47 (Title 5 U.S.C.) requires that an evaluation system be implemented to measure the effectiveness of the proposed personnel management interventions. An evaluation plan for the entire laboratory Demonstration program covering 24 DOD labs was developed by a joint OPM/DOD Evaluation Committee. A Comprehensive evaluation plan was submitted to the Office of Defense Research & Engineering in 1995 and subsequently approved. (Proposed Plan for Evaluation of the Department of Defense S&T Laboratory Demonstration Program, Office of Merit Systems Oversight & Effectiveness, June 1995). The overall evaluation effort will be coordinated and conducted by OPM's Personnel Resources and Development Center (PRDC). The primary focus of the evaluation is to determine whether the waivers granted result in a more effective personnel system than the current as well as an assessment of the costs associated with the new system.

The present personnel system with its many rigid rules and regulations is generally perceived as an impediment to mission accomplishment. The Demonstration Project is intended to remove some of those barriers and therefore, is expected to contribute to improved organizational performance. While it is not possible to prove a direct causal link between intermediate and ultimate outcomes (improved personnel system performance and improved organizational effectiveness), such a linkage is hypothesized and data will be collected and tracked for both types of outcome variables.

An intervention impact model (Appendix B) will be used to measure the effectiveness of the various personnel system changes or interventions. Additional measures will be developed as new interventions are introduced or existing interventions modified consistent with expected effects. Measures may also be deleted when appropriate. Activity specific measures may also be developed to accommodate specific needs or interests which are locally unique.

The evaluation model for the Demonstration Project identifies elements critical to an evaluation of the effectiveness of the interventions. The overall evaluation approach will also include consideration of contact variables that are likely to have an impact on project outcomes: e.g., HRM regionalization, downsizing, cross-service integration, and the general state of the economy. However, the main focus of the evaluation will be on intermediate outcomes, i.e., the results of specific personnel system changes which are expected to improve human resources management. The ultimate outcomes are defined as improved organizational effectiveness, mission accomplishment and customer satisfaction.

Data from a variety of different sources will be used in the evaluation. Information from existing management information systems supplemented with perceptual data will be used to assess variables related to effectiveness. Multiple methods provide more than one perspective on how the Demonstration project is working. Information gathered through one method will be used to validate information gathered through another. Confidence in the findings will increase as they are substantiated by the different collection methods. The following types of data will be collected as part of the evaluation: (1) workforce data; (2) personnel office data; (3) employee attitudes and feedback using surveys, structured interviews and focus groups; (4) local activity histories; and, (5) core measures of laboratory effectiveness.

V. Waivers of Law and Regulation

A. Waivers to Title 5, United States Code

Chapter 33, Section 3317(a): Competitive service, certification from register (in so far as ''rule of three'' is eliminated under the Demonstration project).

Chapter 33, Section 3318(a): In so far as ''rule of three'' is eliminated under the Demonstration Project. Veterans preference provisions remain unchanged.

Chapter 43, Section 4301: Definitions.

Chapter 43, Section 4302: Establishment of performance appraisal systems.

Chapter 43, Section 4303: Modified to the extent that an employee may be removed, reduced in band level with a reduction in pay, reduced in pay without a reduction in band level or reduced in band level without a reduction in pay based on unacceptable performance. For employees who are reduced in band level without a reduction in pay, Sections 4303(b) and 4303(e) (2) and (3) do not apply.

Chapter 43, Section 4303(b)(1)(A)(ii): Requirement for critical elements.

Chapter 51, Section 5101–5111: Purpose, definitions, basis, classification of positions, review, authority—To the extent that white collar employees will be covered by broad banding. Pay category determination criteria for Federal Wage System positions remain unchanged.

Chapter 53, Section 5303; 5302 (1), (8), and (9); Section 5303; and Section 5304: Pay Comparability System. (To the extent necessary to allow Demonstration project employees covered by broad banding to be treated as General Schedule employees and to allow basic rates of pay under the Demonstration project to be treated as scheduled rates of basic pay.) (This waiver does not apply to Federal Wage System (FWS) employees. This waiver does not apply to SL/ST employees who

continue to be covered by these provisions, as appropriate.)

Section 404 of the Federal Employees Pay Comparability Act of 1990 (P.L. 101–509): Special Pay Adjustments for Law Enforcement Officers in Selected Cities. (To the extent necessary to allow law enforcement officers under the Demonstration project to be treated as law enforcement officers under the General Schedule.)

Chapter 53, Section 5305: Special Pay Authority.

Chapter 53, Section 5331–5336: General Schedule Pay Rates.

Chapter 53, Section 5362: Grade Retention.

Chapter 53, Section 5363: Pay Retention. (Only to the extent necessary to (1) replace ''grade'' with ''band level''; (2) allow Demonstration Project employees to be treated as General Schedule employees; (3) provide that pay retention does not apply to conversions from General Schedule special rates to Demonstration project pay and reallocations of Demonstration project pay rates within special rate extensions to locality adjusted pay rates due to promotions or general or locality pay increases, as long as the employee's total rate of pay is not reduced; and (4) provide that pay retention does not apply to reductions in basic pay due solely to the operation of the pay setting rules for geographic movement within the Demonstration Project.) (This waiver does not apply to FWS employees who continue to be covered by these provisions, as appropriate. This waiver does not apply to SL/ST employees unless they move to a GS equivalent position under conditions that trigger entitlement to pay retention.)

Chapter 53, Section 5371: Health Care Positions. (Only to the extent necessary to allow Demonstration project employees to hold positions subject to chapter 51 of title 5. (This waiver does not apply to FWS employees.)

Chapter 55, Section 5545(d): Hazardous Duty Differential. (Only to the extent necessary to allow Demonstration project employees covered by broad banding to be treated as General Schedule employees.) (This waiver does not apply to FWS and SL/ST employees.)

Cgapter 57, Sections 5753, 5754, and 5755: Recruitment; Relocation Bonuses; Retention Allowances; Supervisory Differentials: (Only to the extent necessary to allow employees and positions under the Demonstration project covered by broad banding to be treated as employees and positions under the General Schedule.) (This waiver does not apply to FWS employees. This waiver does not apply to SL/ST employees who continue to be covered by these provisions, as appropriate.)

Chapter 59, Section 5941: Allowances based on living costs and conditions of environment; employees stationed outside continental United States or Alaska (Only to the extent necessary to provide that COLA's paid to employees under the Demonstration project are paid in accordance with regulations prescribed by the President (as delegated to OPM).

Chapter 71, Section 7106(a)(2): In so far as provision on assigning and directing, documenting performance discussions, Performance Development Resources, Performance Plans, criteria and process for incentive pay, and communication and documentation requirements for incentive pay and reconsideration of incentive pay decisions; and, in so far as provision on reducing employees in grade may prevent the parties from negotiating procedures for non-adverse assignment of employees to a lower pay band.

Chapter 71, Section 7119(b)(1): In so far as provision for either party to request impasse proceedings would be contrary to provisions of the Demonstration project.

Chapter 75, Section 7512(3); To the extent necessary to (1) replace ''grade'' with ''band level''; and, (2) exclude reductions in band level not accompanied by a reduction in pay taken under Chapter 43.

Chapter 75, Section 7512(4): Adverse Action. (Only to the extent necessary to provide that adverse action provisions do not apply to—(1) conversions from General Schedule special rates to Demonstration project pay and reallocations of Demonstration project pay rates within special rate extensions to locality adjusted pay rates due to promotions of general or locality pay increases, as long as the employee's total rate of pay is not reduced; and (2) reductions in basic pay due solely to the operations of the pay setting rules for geographic movement within the Demonstration project.)

B. Waivers to Title 5, Code of Federal Regulations

Part 300, Sections 300.601 through .605: Time in grade restrictions are eliminated in the Demonstration project.

Part 332, Section 332.401(b): Only to the extent that for non-professional or non-scientific positions equivalent to GS–9 and above, preference eligibles with a compensable service-connected disability of 10 percent or more who meet basic (minimum) qualification requirements will be entered at the top of the highest group certified without the need for further assessment.

Part 332, Section 332.402: ''Rule of three'' will not be used in the Demonstration project.

Part 332, Section 332.404: Order of selection is not limited to highest three eligibles.

Part 351, Section 351.402(b): Competitive area to the extent that the Demonstration project will be a separate competitive area within the activity.

Part 351, Sections 351.403 (a) and (b): Competitive levels to the extent that there is no requirement for the establishment of competitive levels in the Demonstration project.

Part 351, Section 351.404 (a) and (b): Retention register to the extent that the requirement to establish separate retention registers by competitive level is eliminated.

Part 351, Section 351.501(a)(3): For order of retention, delete ''as augmented by credit for performance'' under Section 351.504.

Part 351, Section 351.504: Credit for performance to the extent that the Demonstration project eliminates service credit for performance.

Part 351, Section 351.601 through .608: References to competitive levels are eliminated.

Part 351, Section 351.701 (b) and (c) Assignment rights (bump and retreat): To the extent that the distinction between bump and retreat is eliminated and the placement of ''white collar'' Demonstration Project employees is restricted to no more than one broad band level below the employee's current level, except that for a preference eligible with a compensable service connected disability of 30 percent or more, the limit is two broad band levels (or the equivalent of five General Schedule grades) below the employee's present level.

Part 430, Subpart B: Performance appraisal for General Schedule, Prevailing Rate and certain other employees: Employees under the Demonstration project will not be subject to the requirements of this subpart.

Part 432: Modified to the extent that an employee may be removed, reduced in band level with a reduction in pay, reduced in pay without a reduction in band level and reduced in band level without a reduction in pay based on unacceptable performance. Also modified to delete referenced to critical element. For employees who are reduced in band level without a reduction in pay, Sections 432.105 and 432.106(a) do not apply, except that such sections continue to apply to preference eligible employees.

Part 432, Section 432.104 and .105: Proposing and Taking Action Based on Unacceptable Performance: In so far as references to ''critical elements'' are deleted and adding that the employee may be ''reduced in grade or pay or removed'' if performance does not improve to acceptable levels after a reasonable opportunity. In addition, requirements waived to the extent that a reduction in band level is taken based on skill utilization criteria when there is no reduction in pay.

Part 511, Section 511.201: Coverage of and exclusions from the General Schedule (To the extent that White Collar positions are covered by broad banding. Pay category determination criteria for Federal Wage System positions remain unchanged)

Part 511, Section 511.601: Classification appeals—modified to the extent that white collar positions established under this demonstration project, although specifically excluded from Title 5, are covered by the classification appeal process outlined in this section, as amended below.

Part 511, Section 511.603(a): Right to appeal—substitute ''band'' for grade.

Part 511, Section 511.607(b): Non Appealable Issues—add to the list of issues which are neither appealable nor reviewable, ''the assignment of series under this demonstration project to appropriate career paths.''

Part 530, Subpart C: Special Salary Rates.

Part 531, Subparts B, D, and E: Determining The Rate of Basic Pay, Within-Grade Increases, and Quality Step Increases. (Except that the provisions relating to highest previous rate under Parts 531.202 and 531.203 are waived only to the extent necessary to work in a broad banding system.)

Part 531, Subpart C and F: Special Pay Adjustments for Law Enforcement Officers and Locality-Based Comparability Payments. (Only to the extent necessary to allow Demonstration Project employees covered by broad banding to be treated as General Schedule employees and to allow basic rates of pay under the Demonstration project to be treated as scheduled annual rates of pay.) (This waiver does not apply to FWS employees. This waiver does not apply to SL/ST employees who continue to be covered by these provisions, as appropriate.)

Part 536: All provisions pertaining to grade retention.

Part 536, Section 536.104: Pay Retention. (Only to the extent necessary to (1) Replace ''grade'' with ''band level''; (2) allow Demonstration Project employees to be treated as General Schedule employees; (3) provide that pay retention does not apply to—conversions from General Schedule special rates to Demonstration project pay and reallocations of Demonstration project pay rates within special rate extensions to locality adjusted pay rates due to promotions or general or locality pay increases, as long as the employee's total rate of pay is not reduced; and (4) provide that pay retention does not apply to reductions in basic pay due solely to the operation of the pay setting rules for geographic movement within the Demonstration Project.) (This waiver does not apply to FWS employees who continue to be covered by these provisions, as appropriate. This waiver does not apply to SL/ST employees unless they move to a GS equivalent position under conditions that trigger entitlement to pay retention.)

Part 550, Section 550.703: Severance Pay. (Modify the definition of ''reasonable offer'' by replacing ''two grade or pay levels'' with ''one band level'' and ''grade or pay level'' with ''band level.''). (This waiver does not apply to FWS employees.)

Part 550, Section 550.902, definition of ''employee'': Hazardous Duty Pay. (Only to the extent necessary to treat Demonstration project employees covered by broad banding as General Schedule employees.) (This waiver does not apply to FWS and SL/ST employees.)

Part 575, Subparts A, B, C, and D: Recruitment Bonuses, Relocation Bonuses, Retention Allowances, and Supervisory Differentials. (Only to the extent necessary to allow employees and positions under the Demonstration project covered by broad banding to be treated as employees and positions under the General Schedule.) (This waiver does not apply to FWS employees. This waiver does not apply to SL/ST employees who continue to be covered by these provisions, as appropriate.)

Part 591, Subpart B: Cost-of-Living Allowances and Post Differential-Nonforeign Areas. (To the extent necessary to allow Demonstration project employees covered by broad banding to be treated as employees under the General Schedule.) (This waiver does not apply to FWS employees. This waiver does not apply to SL/ST employees who continue to be covered by these provisions, as appropriate.)

Part 752: Section 752.401(a)(3): To the extent necessary to (1) Replace ''grade'' with ''band level''; and (2) exclude reductions in band level not accompanied by a reduction in pay taken under Chapter 43.

Part 752: Section 752.401(a)(4): Adverse Action. (Only to the extent necessary to provide that adverse action provisions do not apply to—(1) conversions from General Schedule special rates to Demonstration project pay and reallocations of Demonstration project pay rates within special rate extensions to locality adjusted pay rates due to promotions or general or locality pay increases, as long as the employee's total rate of pay is not reduced; and (2) reductions in basic pay due solely to the operation of the pay setting rules for geographic movement within the Demonstration Project.

VI. Cost

The goal of this Demonstration Project is the implementation of a system in which payroll costs and resource utilization can be controlled consistent with the organization's larger fiscal strategies. This is especially critical in our industrially funded (DBOF) environment. The continued economic viability of the DBOF activities depends in large measure on controlling expenditures and remaining cost competitive with other organizations. This Demonstration Project proposes a system of pay incentives and processes that are flexible and can operate in harmony with the organization's operational needs and the financial needs of the larger organization. The costs of project implementation will be borne by the Divisions/sites.

Costs associated with the development of the Demonstration Project include software automation, training and project evaluation. All funding will be provided through the Warfare Centers budget. Training costs will be approximately $192K per thousand employees. The timing of the expenditure will be site specific and dependent upon the implementation schedules. Because automation requirements will be minimized as a result of system similarities to existing Navy Demonstration Projects, costs are estimated at $100K for the first two years of project implementation. Evaluation costs are estimated at approximately $60K per year.

VII. Project Oversight and Management

Project oversight and management will be carried out by the Warfare Centers' Executive Group, composed of the Commanders and Technical Directors of the two Warfare Centers. They will be assisted by the Demonstration Project Management Office and the Steering Committee. (See Figure 5)

The Steering Committee, chaired by a senior executive or senior Navy officer

appointed by the Executive Group, is comprised of a senior member of each Division of the Warfare Centers, and a member from the American Federation of Government Employees, Metal Trades Council, International Association of Machinists, National Association of Government Employees, National Federation of Federal Employees, and Fraternal Order of Police. This group serves as an advisory body to the Executive Group which makes final decisions on the Demonstration Project proposal and implementation. The role of the Steering Committee is to aggregate and analyze incoming data from formal and informal evaluations and make recommendations. It may also include facilitating information sharing, mediating impasses, and promotion of partnership roles.

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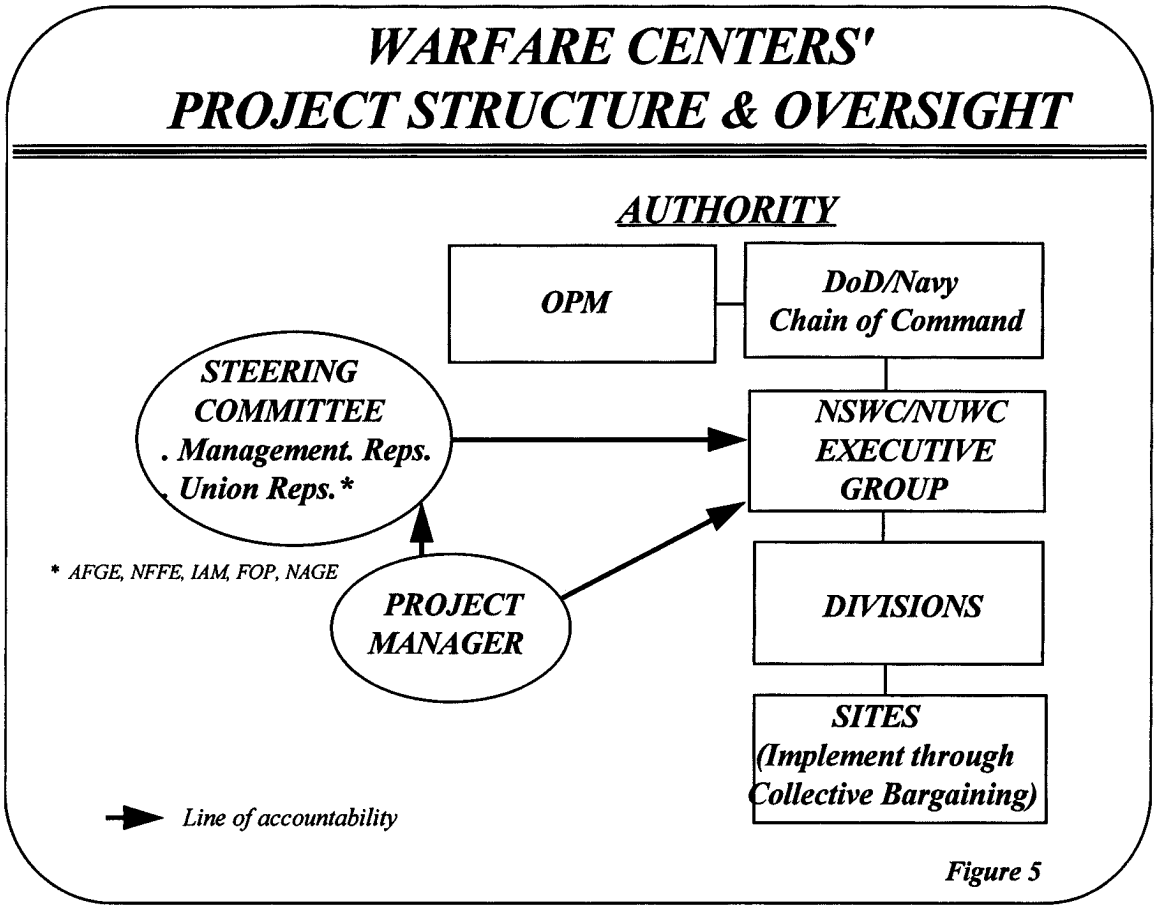

Figure 5

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Appendix A—Employee/Union Involvement Methodology

From the inception of the Naval Sea Systems Command Warfare Centers' Personnel Demonstration Project, employee involvement in crafting the Project Proposal was viewed as essential to producing a plan that considered the needs of all parties. National union representatives participated as members of the steering Committee which developed the Personnel Demonstration Project Proposal and will be overseeing its implementation. While the process that produced the Project Proposal was a collaborative one, union participation did not necessarily constitute full and complete endorsement of all details of the Proposal.

At the Warfare Centers' various Divisions and sites, employees and unions are involved through a variety of communications strategies. Within the Divisions, communications teams composed of a cross section of the workforce have been formed for the purpose of disseminating information about the project as well as a focal point for employee questions. Further, Divisions are establishing groups or committees to help guide the implementation of the Project throughout the organization. This model of broad participation is envisioned to continue throughout the life of the Demonstration Project.

Unions Represented

Dahlgren, VA: American Federation of Government Employees

White Oak, MD: American Federation of Government Employees; Metal Trades Council

Panama City, FL: National Federation of Federal Employees

Crane, IN: American Federation of Government Employees; Fraternal Order of Police

Louisville, KY: International Association of Machinists & Aerospace Workers

Carderock, MD: Metal Trades Council; Federal Firefighters Association Pattern Maker Association

Annapolis, MD: National Federation of Federal Employees

Philadelphia, PA: Metal Trades Council; Fraternal Order of Police, International Association of Firefighters

Ft. Lauderdale, FL: American Federation of Government Employees

Port Hueneme, CA: National Association of Government Employees; Federal Union of Scientists and Engineers
Indian Head, MD: American Federation of Government Employees; International Association of Firefighters; International Association of Machinists and Aerospace Workers
McAlester, OK: American Federation of Government Employees
Keyport, WA: Metal Trades Council
Newport, RI: National Association of Government Employees; Federal Union of Scientists and Engineers
New London, CT: National Association of Government Employees

Appendix B—Project Evaluation and Oversight

Intervention Impact Model—DOD Lab Demonstration Program

Intervention and expected effects	Measures	Data sources
1. COMPENSATION		
a. Broad banding:		
Increased organizational flexibility	Perceived flexibility	Attitude survey.
Reduced administrative workload, paperwork reduction.	Actual perceived time savings	Personnel office data, PME results, attitude survey.
Advanced in-hire rates	Starting salaries of banded v. non-banded employees	Workforce data.
Slower pay progression at entry levels—increased pay potential.	Progression of new hires over time by band, career path—mean salaries by band, career path, demographics.	Workforce data.
Increased satisfaction with advancement	Employee perceptions of advancement	Attitude survey.
Increased pay satisfaction	Pay satisfaction, internal/external equity	Attitude survey.
Improved recruitment	Offer/acceptance ratios	Personnel office data.
	Percent declinations	
No change in high grade (GS–14) distribution	Number/percentage of high grade salaries pre/post banding.	Workforce data.
b. Conversion buy-in: Employee acceptance	Employee perceptions of equity, fairness	Attitude survey.
	Cost as a percent of payroll	Workforce data.
2. PERFORMANCE MANAGEMENT		
a. Cash awards/bonuses:		
Reward/motivate performance	Perceived motivational power	Attitude survey.
To support fair and appropriate distribution of awards.	Amount and number of awards by career path, demographics.	Workforce data.
	Perceived fairness of awards	Attitude survey.
	Satisfaction with monetary awards	Attitude survey.
b. Performance/contribution based pay progresson:		
Increased pay-performance link	Perceived pay-performance link	Attitude survey.
	Perceived fairness of ratings	Attitude survey.
Improved performance feedback	Satisfaction with ratings	Attitude survey.
	Employee trust in supervisors	Attitude survey
	Adequacy of performance feedback	Attitude survey.
Decreased turnover of high performers	Turnover by performance rating category	Workforce data.
Increased turnover of low performers:		
Differential pay progression of high/low performers.	Pay progression by performance rating category, career path.	Workforce data.
Alignment of organizational and individual performance expectations and results.	Linkage of performance expectations to strategic plans/goals.	Performance expectations, strategic plans.
	Performance expectations	Attitude survey/focus groups.
	Perceived involvement	
Increased employee involvement in performance planning and assessment.	Performance management procedures	Attitude survey/focus groups.
		Personnel regulations.
c. New appraisal process:		
Reduced administrative burden	Employee and supervisor perception of revised procedures.	Attitude survey.
Improved communication	Perceived fairness of process	Focus group.
d. Performance development:		
Better communication of performance expectations	Feedback and coaching procedures used	Focus groups.
	Time, funds spent on training by demographics	Personnel office data.
Improved satisfaction and quality of workforce	Organizational commitment	Training records.
	Perceived workforce quality	Attitude surveys.
		Attitude survey.
3. ''WHITE COLLAR'' CLASSIFICATION		
a. Improved classification systems with generic standards:		
Reduction in amount of time and paperwork spent on classification.	Time savings	Personnel office data.
	Reduction of paperwork/number of personnel actions (classification/promotion)	
Ease of use	Managers' perceptions of time savings, ease of use, improved ability to recruit.	Attitude survey.
Improved recruitment of employee with appropriate skills.	Perceived quality of recruits	Focus groups/interviews.
	GPA's of new hires, education levels	Personnel office date.

Intervention and expected effects	Measures	Data sources
b. Classification authority delegated to managers:		
Increased supervisory authority/accountability	Perceived authority	Attitude survey.
Decreased conflict between management and personnel staff.	Number of classification disputes/appeals pre/post	Personnel records.
	Management satisfaction with service provided by personnel office.	Attitude survey.
No negative impact on internal pay equity	Internal pay equity	Attitude survey.
c. Dual career ladder:		
Increased flexibility to assign employees	Assignment flexibility	Focus groups, surveys.
	Sup/non-sup ratios	Workforce data.
Improved internal mobility	Perceived internal mobility	Attitude survey.
Increased pay equity	Perceived pay equity	Attitude survey.
Flatter organization	Supervisory/non-supervisory ratios	Workforce data.
Improved quality of supervisory staff	Employee perceptions of quality of supervisors	Attitude survey.
4. STAFFING/RECRUITMENT		
Competitive examining and categorical grouping:		
Improved hiring process	Management satisfaction with hiring process, time to hire, perceived quality of new hires.	Attitude survey.
Increased quality of hires	GPA's of new hires, education levels	Personnel office data (from issue of Form 52 to referral of candidates).
Increased timeliness	Time to fill positions	Attitude survey.
No negative impact on fairness of process, openness to competition.	Candidate/employee satisfaction.	
5. RIF		
Modified RIF:		
Prevent loss of high performing employees with needed skills.	Separated employees by demographics, performance	Workforce data. Attitude survey/focus groups.
Contain cost and disruption	Satisfaction with RIF process	Attitude survey/focus groups.
	Cost comparisons of traditional v. modified RIF	Rightsizing and documenting systems/personnel office/budget data.
	Time to conduct RIF	
	Number of appeals/reinstatements	
6. COMBINATION OF ALL INTERVENTIONS		
All:		
Improved organizational effectiveness	Combination of personnel measures	All data sources.
Improved management of R&D workforce	Employee/Management satisfaction	Attitude survey.
Improved planning	Planning procedures	Strategic planning documents.
Improved cross functional coordination	Perceived effectiveness of planning procedures	Attitude survey. Organizational charts.
	Actual/perceived coordination	Attitude survey.
Increased product success	Customer satisfaction	Customer satisfaction surveys.
Cost of innovation	Project training/development costs (staff salaries, contract cost).	Demo project office records.
	Training hours per employee)	Contract documents.
7. CONTEXT		
a. Regionalization:		
Reduced servicing ratios/cost	HR servicing ratios average cost per employee served	Attitude survey.
No negative impact on service quality	Service quality, timeliness	Workforce data. Attitude survey/focus groups.
b. GPRA: Improved organizational performance	Other measures to be developed	As established.

[FR Doc. 97–31625 Filed 12–2–97; 8:45 am]

BILLING CODE 6325–01–M

Federal Register

Wednesday
December 3, 1997

Part III

Department of Health and Human Services

Food and Drug Administration

Final Guidance on Industry-Supported Scientific and Educational Activities; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 92N–0434]

Final Guidance on Industry-Supported Scientific and Educational Activities

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a final guidance entitled ''Final Guidance on Industry-Supported Scientific and Educational Activities'' (hereinafter referred to as the final guidance). The agency sought public comment on a draft version of this final guidance entitled ''Draft Policy Statement on Industry-Supported Scientific and Educational Activities'' (hereinafter referred to as the draft policy statement), which was published in the **Federal Register** on November 27, 1992; and on November 18, 1994, on a related citizen petition. The agency considered the comments received and, where appropriate, revised the draft policy statement to create the final guidance. The final guidance describes how industry may support scientific and educational activities without being subject to regulation under the Federal Food, Drug, and Cosmetic Act (the act). The full text of the guidance is published in this document.

DATES: Written comments on the guidance may be submitted at any time.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1-23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT:

For general questions about the guidance: Ilisa B. G. Bernstein, Office of Policy (HF–23), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–3380, or via e-mail at IBernste@oc.fda.gov;

Regarding biological products: Toni M. Stifano, Center for Biologics Evaluation and Research (HFM–200), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–3028, or via e-mail at stifano@cber.fda.gov;

Regarding medical device products: Byron L. Tart, Center for Device Evaluation and Radiologic Health (HFZ–302), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 301–594–4639, or via e-mail at bxt@cdrh.fda.gov;

Regarding human prescription drugs: Norman A. Drezin, Center for Drug Evaluation and Research (HFD–40), Food and Drug Administration, 5600 Fishers Lane, rm. 17B–17, Rockville, MD 20857, 301–827–2831, or via e-mail at drezinn@cder.fda.gov;

Regarding prescription animal drugs: Edward L. Spenser, Center for Veterinary Medicine (HFV–216), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1722, or via e-mail at espenser@cvm.fda.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 27, 1992 (57 FR 56412), FDA published the draft policy statement. As the agency noted in the introduction to the draft policy statement, these activities may be subject to regulation under the labeling and advertising provisions of the act when they provide information on FDA-regulated products marketed by the supporting companies.

As the introduction also noted, FDA traditionally has not sought to regulate industry-supported scientific and educational activities that are otherwise independent and nonpromotional. Industry-supported scientific and educational activities that are not independent and nonpromotional are not per se illegal, but they are subject to regulation.

FDA published the draft policy statement in response to requests from industry for guidance in this area. Prior to publishing the draft policy statement, the agency engaged in an extensive outreach effort with scientific and health care professionals, industry, consumer groups, and other Government agencies in an attempt to strike a proper balance between the need for industry-supported dissemination of current scientific information and the need to ensure that promotional activities by industry meet the requirements of the law.

Recognizing the importance and delicacy of this balance, the agency invited comments with regard to all issues raised in the draft policy statement.

The agency received 152 comments, which included comments from academic and organized medicine, health care professionals, industry and trade associations, public relations and advertising firms, and commercial continuing education providers. FDA thoroughly considered these comments and revised the draft policy statement where appropriate. In the **Federal Register** of November 18, 1994 (59 FR 59820), the agency sought comment on a citizen petition (Docket No. 92N–0434/CP1) requesting that the agency withdraw the draft policy statement. The agency received about 60 comments in response to this notice.

I. Highlights of the Final Guidance

In response to comments, the agency has made several revisions to the draft policy statement. First, the draft policy statement has been modified to clarify that it is providing guidance on what the agency would look at in determining independence. In doing so, rather than enumerating the elements of a written agreement, the final guidance presents the ideas contained in the elements as factors the agency will consider in evaluating activities and determining independence. Additionally, the text of ''Other Factors in Determining Independence'' indicia that were listed in section II.B. of the draft policy statement (57 FR 56412 at 56414) are now included in the factors the agency will consider in evaluating activities and determining independence. Second, although the final guidance has been modified to place less emphasis on a written agreement between the supporting company and the provider, the agency continues to believe that a written agreement is one way to document what measures were taken by the parties to maintain the independence of the program.

In the final guidance, only 1 of the 10 elements of the written agreement presented in the draft policy statement remains unchanged. The ''Statement of Purpose'' (section II.A.1. of the draft policy statement) has been deleted because the final guidance lists the factors the agency will consider, rather than a suggested written agreement. The text of the ''Control of Content and Selection of Presenters and Moderators'' (section II.A.2. of the draft policy statement) has been modified slightly, but remains substantially unchanged. In the ''Disclosure of Financial Relationships'' (section II.A.3. of the draft policy statement) a factor has been added indicating that when an activity includes discussion of unapproved uses, there should be general disclosure of that fact. Additionally this discussion has been renamed ''Disclosures,'' and all factors that describe a disclosure are listed under this heading. The discussion concerning ''Supporting Company Involvement in Content'' (section II.A.4. of the draft policy statement) has been incorporated into the factor concerning ''Control of Content and Selection of Presenters and Moderators'' of the final guidance. The

discussion of ''Ancillary Promotional Activities'' (section II.A.5. of the draft policy statement) has been narrowed so as to limit promotional activities only in the room in which an activity takes place. The discussions concerning ''Objectivity and Balance'' (section II.A.6.), ''Limitations on Data'' (section II.A.7. of the draft policy statement), and ''Discussion of Unapproved Uses'' (section II.A.8. of the draft policy statement) have been deleted from the final guidance. The ''Opportunities for Debate'' (section II.A.9. of the draft policy statement) has been renamed ''Opportunities for Discussion'' to clarify its intent. The ''Schedule of Activities'' discussion (section II.A.10. of the draft policy statement) has also been deleted from the final guidance.

Much of the draft policy statement's section entitled ''Other Factors in Determining Independence'' appears in the final guidance, with a few modifications. First, the discussions concerning the ''Provider'' (section II.B.1. of the draft policy statement) has been modified slightly, deleting the statement that discussed whether persons who are involved in promotion of a company's products may function in the role as an independent provider. The discussion concerning industry representatives help in logistical assistance (section II.B.2.a. of the draft policy statement) has been deleted from final guidance. The ''Suggestion of Presenters'' discussion (section II.B.2.b. of the draft policy statement) has been incorporated, in part, into the factor concerning ''Control and Content and Selection of Presenters and Moderators'' in the final guidance. The discussion concerning ''Focus on a Single Product'' (section II.B.3.a. of the draft policy statement) has been incorporated into the factor entitled ''Focus of the Program'' in the final guidance. The discussions concerning ''Multiple Performances'' (section II.B.3.b. of the draft policy statement), ''Audience Selection'' (section II.B.4.c.), ''Dissemination'' (section II.B.5.), and ''Complaints'' (section II.B.6.) remain substantially unchanged. The ''Gifts'' (section II.B.4.a.) and ''Emphasis on Noneducational Activities'' (section II.B.4.b.) discussions have been deleted from the final guidance. Finally, the discussion concerning ''Misleading Title'' (section II.B.4.d. of the draft policy statement) has been incorporated into the factor concerning ''Focus of the Program'' in the final guidance.

In general, these revisions are intended to better focus the final guidance on the agency's core concerns—that the provider develop the subject program independent from the influence of the supporting company, and that there is disclosure of relationships between and among the supporting company, provider, presenters, and products discussed that may be relevant to an assessment of the information presented. Thus, while the number of changes may be significant, they do not change the fundamental intent of the final guidance to distinguish industry-supported scientific and educational activities that are free from supporting company influence from those that are not.

II. Summary and Responses to Comments Received

A. General Comments

1. Several comments disputed the agency's assertion that industry-supported scientific and educational activities traditionally have been viewed by the agency as subject to regulation under the act. They maintained that regulation of these activities is an unwarranted expansion of agency authority and that the agency should specifically articulate the basis for its regulatory authority.

FDA has long regulated drugs and devices (including biological products and animal drugs) based on the ''intended uses'' for such products. Under section 201 of the act (21 U.S.C. 321), which defines the terms ''drug'' and ''device,'' the intended use of an article determines whether the article is a drug or device. In general, under the act and the Public Health Service Act, a sponsor who wishes to market any new drug or biological product must demonstrate to FDA that the product is safe and effective for each of its intended uses. (See sections 505(a) and 512(a) of the act (21 U.S.C. 355(a) and 360b(a)) and section 351 of the Public Health Service Act.) A sponsor who wishes to market a new medical device must either demonstrate to FDA that there is a reasonable assurance that the device is safe and effective for each of its intended uses or that it is substantially equivalent to (meaning, in part, that it has the same intended use as) another device for which such a showing is not required. (See sections 510(k), 513(f) and (i), and 515(a) of the act (21 U.S.C. 360(k), 360c(f) and (i), and 360e(a)).) The package insert or product manual (approved professional labeling) which, for approved and/or licensed products, physically accompanies the product, sets forth the uses for which the product has been demonstrated to be safe and effective.

The ''intended use'' of a drug or device refers to the objective intent of the persons legally responsible for the labeling of the product. This intent is determined by such persons' expressions or by the circumstances surrounding the distribution of the article including, for example, labeling claims, advertising matter, or oral or written statements by such persons or their representatives. (See 21 CFR 201.128 and 801.4.) The agency, thus, regulates products based not only on information provided ''with'' the product (approved professional labeling), but also based on information disseminated by or on behalf of manufacturers in other contexts, such as scientific and educational meetings and symposia, books, reprints of articles from scientific journals, in part because all of these activities/materials can create new intended uses for the products, which must be reflected in the approved labeling of the products.

The agency's focus on the manufacturer's characterization of its product in the marketplace is best reflected in the statutory requirement that a drug or device shall be deemed to be misbranded unless its labeling bears adequate directions for use. (See section 502(f)(1) of the act (21 U.S.C. 352(f)(1)).) The courts have agreed with the agency that section 502(f)(1) of the act requires information not only on how a product is to be used (e.g., dosage and administration), but also on all the intended uses of the product. (See *Alberty Food Products Co.* v. *United States*, 185 F.2d 321 (9th Cir. 1950) (drug product was misbranded because its labeling failed to state the intended use of the drug (arthritis and rheumatism) as suggested by the company in newspaper advertisements); 21 CFR 201.5)) As previously described, oral statements and materials presented at industry-supported scientific and educational activities may provide evidence of a product's intended use. If these statements or materials promote a use that is inconsistent with the product's approved labeling, the product is misbranded under section 502(f)(1) of the act for failure to bear labeling with adequate directions for all intended uses. If it is a device, it is also adulterated because the listing of unapproved uses in the labeling or advertising of an approved device results in an adulterated medical device under section 501(f) of the act, and misbranded under section 502(o) of the act because premarket notification was not provided as required under section 510(k) of the act.

FDA also finds support for its policy of examining a broad array of information disseminated by companies in the general grant of authority over labeling and advertisements. Section

201(m) of the act defines the term ''labeling'' to include all ''written, printed, or graphic'' materials ''accompanying'' a regulated product. The Supreme Court has agreed with the agency that this definition is not limited to materials that physically accompany a product. If the material supplements, explains, or is otherwise textually related to a product, it is deemed to accompany the product for purposes of section 201(m) of the act. (See *Kordel* v. *United States,* 335 U.S. 345 (1948).)

The agency has adopted a similar interpretation of the term ''advertisement,'' which appears in section 502(n) of the act (prescription drug advertisements) and 502(r) of the act (restricted device advertisements). Although the act does not define the term ''advertisement,'' section 502(n) and (r) of the act indicates that advertisements do not include materials regulated as labeling. In addition, the legislative histories of the 1938 act and the 1962 amendments to the act support a broad construction of what constitutes ''advertising.'' Thus, the agency interprets the term ''advertisement'' to include information (other than labeling) that originates from the same source as the product and that is intended to supplement or explain the product. Prescription drug and restricted device advertisements that do not comply with section 502(n), (q), or (r) of the act, or regulations issued thereunder, cause a prescription drug or restricted device to be misbranded.

2. Some comments contended that the policy will adversely affect the availability and quality of continuing education for health care professionals. They maintained that the perception of regulatory risk on the part of supporting companies, as well as administrative and financial burdens resulting from compliance with the policy, will cause companies that have supported educational programs to redirect funds to lower risk, more efficient activities.

The agency recognizes the importance of continuing education for health care professionals and recognizes, as well, the traditional role of industry in supporting such activities. With this final guidance, the agency has attempted to address concerns raised by supporting companies, to describe factors the agency will consider in determining whether an industry-supported activity is independent and not generally subject to regulation, and to accommodate industry's need for predictability in these activities. The agency believes that the flexibility accorded companies in the final guidance and in the agency's responses to these comments should provide a reasonable basis for continued support for these activities. Decisions by companies involving allocation of resources for promotion and education are, of course, affected by a variety of factors. The agency cannot ensure that companies will provide a given level of support for professional education within the health care community.

B. The First Amendment

3. Several comments contended that the Draft Policy Statement on Industry-Supported Scientific and Educational Activities (Draft Policy Statement) infringes upon the First Amendment to the Constitution. Some comments claimed that the Draft Policy Statement infringed protections afforded to commercial speech.

The agency has considered the First Amendment in developing its policies on industry-supported scientific and educational activities, and believes that the Draft Policy Statement and the Final Guidance are consistent with the First Amendment's protection of freedom of expression. In producing these policy statements (guidance), FDA has sought to accommodate the need for industry-supported scientific and educational activities and the statutory mandate to regulate promotional activities (labeling and advertising) for drugs and devices in accordance with the act and the Public Health Service Act.

1. The Regulation of Drugs and Devices

FDA's guidance on industry-supported scientific and educational activities describes the agency's regulation of drugs and medical devices; it is not intended to regulate speech. It provides insight into the factors FDA will consider when evaluating an industry-supported activity to determine whether it should be subject to regulation as labeling or advertising, and, if so, to ensure that the activity does not misbrand or adulterate the subject drug or device. There are three bases for this conclusion.

First, the guidance applies only to those company-supported activities that relate to the supporting company's product(s) or to competing product(s). A company-supported activity that does not relate to the company's product, a competing product, or suggest a use for the company's product would not be subject to regulation as a promotional activity.

Second, the guidance distinguishes between company-supported activities that are independent of the promotional influence of the supporting company and those that are not. As explained in the guidance, the agency does not seek to regulate industry-supported activities that are independent and nonpromotional.

Third, the regulation of drugs and devices has an unavoidable effect on speech. As explained more fully in response to Comment A.1, the act mandates that FDA regulate products as drugs or devices (including biological products and animal drugs) based on the ''intended uses'' for such products.

Under section 201 of the act which defines, among other things, the terms ''drug'' and ''device,'' the intended use of an article determines whether the article is a drug or device. In general, under the act and the Public Health Service Act, a sponsor who wishes to market any new drug or biological product must demonstrate to FDA that the product is safe and effective for each of its intended uses (sections 505(a) and 512(a) of the act and section 351 of the Public Health Service Act). A sponsor who wishes to market a new medical device must either demonstrate to FDA that there is a reasonable assurance that the device is safe and effective for each of its intended uses or that it is substantially equivalent to (meaning, in part, that it has the same intended use as) another device for which such a showing is not required (sections 510(k), 513(f) and (i), and 515(a) of the act). In addition, all drugs and devices must bear labeling with adequate directions for each intended use. If labeling for a drug or device fails to contain adequate directions for each intended use, the drug or device is deemed to be misbranded (section 502(f)(1) of the act) and subject to seizure or other enforcement actions. For approved or licensed products, the requirement that products bear labeling with adequate directions for use is met by inclusion of the products' FDA-approved professional labeling (package insert or product manual) that sets forth the uses for which the product has been approved/cleared as safe and effective.

The intended use of a drug or device refers to the objective intent of the persons legally responsible for the labeling of the product.

> The intent is determined by such persons' expressions or may be shown by the circumstances surrounding the distribution of the article. This objective intent may, for example, be shown by labeling claims, advertising matter, or *oral or written statements by such persons or their representatives.*

(21 CFR 201.128 and 801.4) (emphasis added); see e.g., *Coyne Beahm, Inc., et al.* v. *United States Food and Drug Administration, et al.,* 958 F. Supp. 1060 (M.D.N.C. 1997).

Accordingly, oral statements and materials presented at industry-

supported scientific and educational activities may provide evidence of a product's intended use. If these statements or materials promote a use that has not been approved by the agency (and therefore does not appear in the product's approved labeling), the product is misbranded under section 502(f)(1) of the Act for failure to bear labeling with adequate directions for all intended uses (21 CFR 201.5; *Alberty Food Products Co.* v. *United States*, 185 F.2d 321 (9th Cir. 1950)). The product may also be misbranded if its labeling[1] or advertising is false or misleading (section 502(a), (n), and (q) of the act). If it is a device, it is also adulterated because the listing of unapproved uses in the labeling or advertising of an approved device results in an adulterated medical device under section 501(f) of the act, and misbranded under section 502(o) of the act because premarket notification was not provided as required under section 510(k) of the act.[2] Thus, FDA's regulation of intended uses for drugs and devices is essential to the regulation of such products. The safety and effectiveness of drugs and devices cannot be evaluated in isolation from consideration of their intended uses.

The Supreme Court ''has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech * * *'' (*NAACP* v. *Claiborne Hardware Co.*, 102 S.Ct. 3409, 3425 (1982)). (See also *Ohralik* v. *Ohio State Bar Association*, 98 S.Ct. 1912, 1919 (1978) (the government ''does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity'').) Similarly, several lower courts have recognized that in certain areas of extensive Federal regulation (securities, antitrust, transportation, trade, and labor), the Government may regulate communications of the regulated parties without offending the First Amendment. In particular, *SEC* v. *Wall Street Publishing Institute, Inc.*, 851 F.2d 365 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 1342 (1989), is most analogous to FDA's regulation of industry-supported scientific and educational activities.

The defendant in *Wall Street Publishing* published a stock market magazine that included feature articles profiling individual companies and portraying the subject firms as appealing investment prospects. Some of the articles were written by the featured company itself, others were written by public relations firms paid by the featured companies, and still others were written by the editors of the magazine, who were paid by the featured companies. Because these arrangements were not disclosed in the magazine, the Securities Exchange Commission (SEC) sought to enjoin the publisher for violations of section 17(b) of the Securities Act of 1993, 15 U.S.C. 77q(b), which makes it unlawful to describe a security for consideration without disclosing the existence of the consideration. The publisher challenged the injunction on, among others, First Amendment grounds.

The court rejected the SEC's characterization of the feature articles as commercial speech and upheld the government's efforts to regulate the magazine based on ''the federal government's broad powers to regulate the security industry'' (*Id.* at 372 (footnote omitted)). According to the court, ''[w]here the federal government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the government, and regulation of such communications has been upheld'' (*Id.* (citations omitted)). This holding stems from the fact that ''[i]f speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible* * *.'' (*Id.* at 373; see also *Id.* at 374 n.9 (''Requiring disclosure of a material fact in order to prevent investor misunderstanding is the very essence of federal securities regulation.'')).

The court noted that:

> [R]egulation of the exchange of information regarding securities is subject only to limited First Amendment scrutiny. Speech relating to the purchase and sale of securities, in our view, forms a distinct category of communications in which the government's power to regulate is at least as broad as with respect to the general rubric of commercial speech * * * In areas of extensive federal regulation * * * we do not believe the Constitution requires the judiciary to weigh the relative merits of particular regulatory objectives that impinge upon communications occurring within the umbrella of an overall regulatory scheme.

Id. at 373. See also *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 46 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) (''[R]ules restricting speech do not necessarily abridge freedom of speech.''); *SEC* v. *Suter*, 732 F.2d 1294 (7th Cir. 1984).

As with securities regulation, the Federal Government exerts extensive authority over the sale and promotion of drugs and devices. Moreover, as previously explained, the Government's ability to regulate speech about these products, like its need to regulate speech concerning the sale of securities, is essential to the regulation of drugs and devices. Yet the regulation of drugs and devices, unlike the regulation of securities, clearly encompasses more than economic activity; it protects consumer health and safety in an area where harm to the public can be direct and immediate.

Accordingly, First Amendment defenses have been raised and rejected in a number of FDA enforcement actions. ''Freedom of speech does not include the freedom to violate the labeling provisions of the Federal Food, Drug, and Cosmetic Act'' (*United States* v. *Articles of Food * * * Clover Club Potato Chips*, 67 F.R.D. 419, 424 (D. Idaho 1975)). The First Amendment does not prohibit the seizure and condemnation of a book that is used to misbrand a product (*United States* v. *8 Cartons, Containing ''Plantation 'The Original' etc. Molasses''*, 103 F. Supp. 626, 628 (W.D.N.Y. 1951); *United States* v. *Articles of Drug*, 32 F.R.D. 32, 35 (S.D. Ill. 1963); but cf. *United States* v. *24 Bottles * * *''Sterling Vinegar and Honey''*, 338 F.2d 157 (2d Cir. 1964) (book not used in immediate connection with sale of product is not labeling and does not misbrand product)).

In conclusion, the act requires that FDA regulate drugs and devices based on their ''intended use.'' The term ''intended use'' is broadly defined to capture the manner in which a company characterizes its product in the marketplace. The agency thus must examine the various means by which manufacturers and their representatives provide information about their products to health care professionals and consumers, including statements and materials presented at industry-supported scientific and educational activities, to determine whether the products are being improperly promoted, and therefore misbranded or adulterated. Accordingly, FDA's ability to regulate the communications at such activities is essential to the regulation of drugs and devices. In view of the fact that the regulation of drugs and devices is an area of extensive federal regulation, the agency may regulate the communications at industry-supported

[1] Section 201(m) of the act defines the term ''labeling'' to include all ''written, printed, or graphic'' materials ''accompanying'' a regulated product. (See *Kordel* v. *United States*, 335 U.S. 345, 349–350 (1948).)

[2] It is a violation of the act to, among other things, introduce or deliver for introduction into interstate commerce a misbranded or adulterated drug or device, or to cause the misbranding or adulteration of a drug or device while it is held for sale after shipment in interstate commerce. (See e.g., sections 301(a) and (k) of the act.)

scientific and educational activities without violating the First Amendment.

2. Commercial Speech

Assuming, contrary to the analysis just presented, that industry-supported scientific and educational activities constitute protected speech, they are commercial speech and FDA's regulation of such activities does not violate the First Amendment. Although the Supreme Court has furnished little explicit guidance as to how to determine whether speech is commercial, it has provided some suggestion as to what factors are relevant when making a commercial speech determination. (See *Bolger* v. *Youngs Drug Products*), 103 S.Ct. 2875 (1983) (concluding that informational pamphlets are commercial speech based on a combination of three characteristics (conceded to be advertisements, reference to a specific product, and economic motivation), but not suggesting that each of these characteristics is a necessary element of commercial speech); *S.U.N.Y.* v. *Fox*, 109 S.Ct. 3028 (1989) (speech which proposes a commercial transaction); *Cincinnati* v. *Discovery Network*, 113 S.Ct. 1505 (1993) (speech which proposes a commercial transaction).) Furthermore, the Court has made clear that speech which does more than propose a commercial transaction (linking a product to a current public debate or containing discussions of important public issues) is not necessarily transformed into noncommercial speech (*Central Hudson Gas & Electric Corp.* v. *Public Serv. Comm'n*, 100 S.Ct. 2343 (1980); *Bolger*, 103 S.Ct. at 2880–2881).

Applying the characteristics suggested in *Bolger* (advertisement, reference to a specific product, economic motivation) or the test used in *Fox* and *Discovery Network* (speech which proposes a commercial transaction), industry-supported scientific and educational activities are commercial speech. The guidance at issue only applies to activities that make reference to a specific product, and as explained below, the activities are economically motivated and propose a commercial transaction. Drug and device companies sponsor such programs not only to encourage scientific exchange, education, and corporate goodwill, but more importantly, to convince the audience to prescribe, purchase, or otherwise use the products mentioned. A company-sponsored program that discusses use of a company product carries with it, at the least, an implicit solicitation, and in many cases an explicit one (cf. *Central Hudson*, 100 S.Ct. at 2352 (suggesting that most businesses are unlikely to underwrite promotions that are of no interest to consumers); *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157 (7th Cir. 1977) (advertisement by egg industry trade association claiming no relationship between eggs, cholesterol, and heart disease constitutes commercial speech)).

Indeed, a review of the medical literature on industry-supported scientific and educational activities demonstrates that such activities are economically motivated and propose a commercial transaction. It is significant to note that the number and cost of drug company-supported symposia have increased significantly over the years. In 1974, 16 drug companies sponsored 7,519 symposia, at a cost of 6.5 million dollars. Roughly comparable figures showed that in 1988 the same companies sponsored 34,688 symposia at a cost exceeding 85.9 million dollars.[3] It is reasonable to conclude that drug companies would not spend such large sums of money if they did not view these programs as an effective means to promote their products. Numerous reports in the medical literature support this conclusion.

In an article entitled ''Physicians and the Pharmaceutical Industry: An Alliance with Unhealthy Aspects,'' *36 Perspectives in Biology and Medicine* 376–394, 385 (Spring 1993), author Robert C. Noble describes industry-sponsored symposia as, ''*an effective method for marketing new drugs*,'' and explains that, ''*[t]he symposium, like the promotional dinner, is frequently given a neutral title that disguises any promotional purpose* * * *'' (emphasis added). (See also Lisa Bero, Alison Galbraith, and Drummond Rennie, ''The Publication of Sponsored Symposiums in Medical Journals,'' *New England Journal of Medicine*, 327:1135–1140, 1992 (demonstrating that published symposia were promotional and not peer-reviewed, and those that were sponsored by a single company focused on single products, had misleading titles, and featured unapproved drugs).)

It has also been suggested that drug companies will not provide financial support for scientific and educational activities unless those activities in some way promote the supporting company's products. An editorial by Stephen E. Goldfinger, in the *New England Journal of Medicine*, addressed the growing support and influence of the drug industry in the education of physicians. According to Dr. Goldfinger:

> The most acceptable kind of educational backing is the least available: donations to providers of continuing medical education that are unrestricted with respect to program topics, speakers, or the backgrounds of the invited registrants. When I have suggested this model to pharmaceutical directors who proclaim a genuine interest in supporting continuing medical education, the usual response is a quizzical smile followed by a gentle reminder of the value of confining our discussion to the realm of the possible. At a minimum, that realm usually requires the topic to be an area ''of interest'' to the sponsor, meaning an area related to a product line in need of promotion.

Stephen E. Goldfinger, ''A Matter of Influence'' (Editorial), *New England Journal of Medicine*, pp. 1408–1409, 1409 (May 28, 1987).

Similarly, 2 years later, Eugene M. Bricker, wrote in the same journal that:

> Most of the medical-service industry's marketing exercises are intended to be both educational and promotional, and some are indeed broadly educational and of excellent quality. This does not alter the fact that promotion is their basic objective; companies would not subsidize marketing methods unless they were rewarding.

Eugene M. Bricker, ''Industrial Marketing and Medical Ethics'' (Editorial), *New England Journal of Medicine*, pp. 1690–1692, 1691 (June 22, 1989). (See also Kenneth Miller, William A. Gouveia, Michael Barza, et al., ''Undesirable Marketing Practices in the Pharmaceutical Industry'' (Letter to the Editor), *New England Journal of Medicine*, p. 54 (July 4, 1985) (Physician and pharmacist members of a hospital pharmacy committee expressing concern that drug company grants to support educational functions, such as talks by visiting speakers, are sometimes clearly linked to a request for the admission of a drug to the hospital's formulary or increased use of the product).)

Moreover, the results of a study by Marjorie A. Bowman and David L. Pearle, ''Changes in Drug Prescribing Patterns Related to Commercial Company Funding of Continuing Medical Education,'' *Journal of Continuing Education in the Health Professions*, 8:13–20, 1988, confirm that industry-supported scientific and educational activities propose a commercial transaction. Doctors Bowman and Pearle analyzed the drug prescribing patterns of physicians attending three different continuing medical education (CME) courses, each of which was subsidized heavily by a single, but different drug company. The course topics were directly related to a set of similar drugs from the same class. Immediately prior to and 6 months after

[3] Senate Labor and Human Resources Committee, Congressional Research Service, Survey of selected pharmaceutical firms, Washington, DC, Government Printing Office, 1991.

each course, the physician attendees were asked to identify the frequency of prescriptions written for the set of drugs. Despite the presumed independence of CME course content, in all three courses the rate of prescribing for the drug of the sponsoring company increased the greatest in absolute terms, while prescribing rates for the other drugs discussed in the program either decreased or did not increase as much. Thus, company funding of such programs does appear to influence physicians' drug prescribing behavior in favor of the sponsoring company's product. (See also Jerry Avorn, Milton Chen, and Robert Hartley, ''Scientific and Commercial Sources of Influence on the Prescribing Behavior of Physicians,'' *American Journal of Medicine*, 73:4–8, 1982 (demonstrating that commercial sources have greater influence over prescribing behavior than scientific sources of information); Robert S. Stern, ''Drug Promotion for an Unlabeled Indication—The Case of Topical Tretinoin,'' *New England Journal of Medicine*,'' 331:1348–1349, 1994 (demonstrating that reports of company-sponsored studies and promotional efforts, including symposia, were associated with a large increase in prescribing for an unapproved indication).)

Thus, if industry-supported scientific and educational activities constitute protected speech, that speech is ''commercial speech'' for purposes of constitutional analysis.

3. The Central Hudson Analysis

Over the past few decades, the Supreme Court has afforded commercial speech limited constitutional protection (*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 96 S.Ct. 1817 (1976); *Central Hudson*, 100 S.Ct. at 2343; 44 *Liquormart, Inc.* v. *Rhode Island*, 116 S.Ct. 1496 (1996)). In *Central Hudson*, the Supreme Court established a four-prong test to determine whether limitations on commercial speech are constitutional. The test inquires: (1) Whether the speech concerns lawful activity and is not misleading; (2) whether the asserted government interest is substantial; (3) whether the limitation directly advances the governmental interest asserted; and (4) whether the limitation is not more extensive than is necessary to serve that interest (*Central Hudson*, 100 S.Ct. at 2351). Subsequently, in *S.U.N.Y.* v. *Fox*, 109 S.Ct. 3028 (1989), the Court clarified that the fourth prong of the *Central Hudson* test is not a ''least restrictive means'' requirement; rather it requires that the restriction be ''narrowly tailored'' to serve the asserted government interest. Narrow tailoring means ''a fit that is not necessarily perfect, but reasonable'' between means and ends (*Id*. at 3035).

FDA's guidance on industry-supported scientific and educational activities satisfies all four prongs of the *Central Hudson* test.

a. The first prong. Commercial speech that is false or misleading, or that concerns illegal activity, is not protected by the First Amendment and may be banned (*Zauderer* v. *Office of Disciplinary Counsel*, 105 S.Ct. 2265, 2275 (1985); *Ibanez* v. *Board of Accountancy*, 114 S.Ct. 2084, 2088 (1994)). Commercial speech is misleading when it is either inherently likely to deceive or when experience has shown that the speech has in fact been deceptive (In *Re R.M.J.*, 102 S.Ct. 929, 937 (1982)). Regulation of commercial speech that is not misleading, or that is only potentially misleading, must satisfy the remaining prongs of the *Central Hudson* test.

As previously discussed, industry-supported scientific and educational activities that promote an unapproved product, or promote an approved product for an unapproved use, create an unlawful product—a misbranded or adulterated drug or device. Accordingly, industry-supported activities that promote unlawful products ''concern illegal activity'' and may be prohibited.

Although FDA believes that most industry-supported scientific and educational activities are not inherently misleading, they are clearly potentially misleading. The potential to mislead the listener (a health care professional) at such an activity is heightened because the listener must not only determine whether the information presented is scientifically sound, but also whether, or to what extent, the supporting company has influenced the presentation.

Evidence of bias in the content of industry-supported CME programs was demonstrated in a study conducted by Marjorie A. Bowman. Dr. Bowman analyzed the content of two CME programs on calcium channel blocker drugs (approved for treating high blood pressure) that were funded by different drug companies. In each case, the program speakers mentioned positive effects more often in connection with the sponsoring company's drug and negative effects more often with competitors' drugs.[4] A second study that analyzed the publication of industry-sponsored symposia in medical journals concluded that the symposia were promotional in nature and not peer-reviewed, and those that were sponsored by single pharmaceutical companies focused on single drug products, had misleading titles, and featured unapproved drugs.[5] Additionally, there are numerous reports in the medical literature describing deceptive practices in the design and delivery of industry-supported symposia. See e.g., Robert C. Noble, ''Physicians and the Pharmaceutical Industry: An Alliance with Unhealthy Aspects,'' *36 Perspectives in Biology and Medicine* 376–394 (Spring 1993); ''Pushing Drugs to Doctors,'' *Consumer Reports*, 57:87, Feb. 1992 (reporting on drug industry marketing practices that mislead doctors).

The potential to present misleading information at industry-supported activities is a particular concern when unapproved uses are addressed. Usually, unapproved uses have not been vigorously evaluated, or if they have been studied, the results are inconclusive. Thus, unapproved uses tend to lack the same degree of certainty and confidence as FDA approved uses. In fact, the data that can identify risks associated with the unapproved use often do not exist, and therefore complete information about the risks of the new use cannot be provided. This lack of data, of course, does not make all discussions about unapproved uses misleading. However, it is important that the audience understand the limitations on data supporting unapproved uses. The disclosure of such limitations, as recommended in the Final Guidance, will help ensure that the audience understands the uncertainty associated with unapproved uses and not be misled into thinking that such uses are safe and effective.

b. The second prong. FDA's guidance on industry-supported scientific and educational activities serves the substantial Government interest of protecting the health and safety of its citizens by helping to ensure the dissemination of truthful and nonmisleading information about drugs and medical devices. The Supreme Court has repeatedly held that the Government's ''interest in the health, safety, and welfare of its citizens constitutes a substantial interest'' (*Posadas de Puerto Rico Associates* v. *Tourism Co.*, 106 S.Ct. 2968, 2977

[4] Marjorie A. Bowman, ''The Impact of Drug Company Funding on the Content of Continuing Medical Education,''*Mobius*, 6:66–69, January 1986.

[5] Lisa Bero, Alison Galbraith, and Drummond Rennie, ''The Publication of Sponsored Symposiums in Medical Journals,''*New England Journal of Medicine*, 327:1135–1140, 1992.

(1986); *Rubin* v. *Coors*, 115 S.Ct. 1585, 1591 (1995)).

In order to protect and promote the public health, Congress granted FDA broad statutory authority to ensure that promotional activities (labeling and advertising) for drugs and devices are truthful and not misleading. Section 502(a) of the act provides that a drug or device is deemed to be misbranded if its labeling is false or misleading in any particular, and under section 502(q) of the act a restricted medical device is misbranded if its advertising is false or misleading in any particular. A prescription drug is misbranded under section 502(n) of the act unless the manufacturer, packer, or distributor includes in all advertisements with respect to that drug, ''a true statement of * * * information in brief summary relating to side effects, contraindications, and effectiveness * * *.''[6] Similarly, a restricted device is misbranded under section 502(r) of the act unless the manufacturer, packer, or distributor includes in all advertisements with respect to that device, ''a true statement of * * * the intended uses of the device and relevant warnings, precautions, side effects, and contraindications * * *.'' Moreover, section 201(n) of the act specifically explains that if an article is alleged to be misbranded because the labeling or advertising is misleading, there shall be taken into account not only representations or suggestions made in the labeling or advertising, but also the extent to which the labeling or advertising fails to reveal material facts. The dissemination of false or misleading information about drugs and devices can induce physicians to choose therapies that deprive patients of reliable treatment and cause severe morbidity, life-threatening adverse effects, or death.

FDA's guidance also serves to protect the public health by preserving the integrity of the premarket approval process, a second substantial government interest. As explained earlier, by enacting the act, Congress established a premarket approval and clearance process whereby manufacturers must establish that their drugs and devices are safe and effective for each of their intended uses before they can be marketed and promoted for those uses. Manufacturers of drugs and devices are not permitted to promote unapproved products or unapproved uses of approved products, either directly or indirectly, such as through industry-supported scientific and educational activities. This regulatory requirement is an important incentive for manufacturers to conduct studies to determine whether their products are safe and effective. If premarket approval were not required for each intended use and manufacturers were free to promote products for any use, manufacturers would have little reason to do scientific research and to present their data to FDA. Additionally, it is important to note that the approval of a drug or device for one use does not provide assurance that the product is safe or effective for a different use or use in a different patient population. Consequently, the promotion of unapproved uses raises significant safety concerns, which are more fully discussed below.

c. The third prong. FDA's guidance on industry-supported scientific and educational activities directly advances the government's substantial interests. ''[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree'' (*Edenfield* v. *Fane*, 113 S.Ct. 1792, 1800 (1993)).

FDA's guidance directly advances the Government's interest of protecting the health and safety of its citizens by helping to ensure the dissemination of truthful and nonmisleading information about drugs and devices. The guidance includes a number of suggestions on the design and conduct of industry-supported scientific and educational activities so that they will be free from the promotional influence of the supporting company and not misleading. Such suggestions include, for example, meaningful disclosure of the company's funding of the program and any significant relationship between the provider (an entity, other than a regulated company, that produces the activity or program), presenter, and supporting company; giving the provider full control over the content of the program and selection of speakers; avoiding involvement of the sales or marketing departments of the supporting company in audience selection decisions; and not having promotional activities in the meeting room. Industry-supported activities that are designed and carried out in this manner are less likely to result in the dissemination of false, misleading, or biased information that can adversely affect public health.

On a number of occasions, FDA has become aware of and taken action against industry-supported scientific and educational activities that were false or misleading, and that could have caused harm to patients. For example, a few years ago, agency staff viewed two videotaped presentations on treating gallstone disease that were broadcast nationwide on a cable television network intended for physicians. The videos were produced and paid for by a major drug company and prominently featured a drug marketed by the company for the chemical dissolution of certain gallstones. The programs encouraged doctors to prescribe this drug *instead* of surgery to treat gallstone disease. These representations and suggestions were false or misleading because: (1) The drug is approved only for dissolving certain types and sizes of gallstones in patients for whom surgery is not medically appropriate, or for patients who refuse surgery, and (2) surgery is more effective and is the preferred treatment for almost all patients with gallstone disease.

These industry-sponsored presentations could have caused many physicians to make inappropriate and potentially harmful treatment decisions. After FDA notified the sponsoring company that the programs were false or misleading, the company agreed to take appropriate corrective action.

In a more recent example, a major drug company sponsored a misleading symposium on cyclosporine drug products (approved to prevent organ rejection in kidney, liver, and heart transplant patients), held in conjunction with the annual meeting of the American Society of Transplant Physicians. The sponsoring company's ''pioneer'' (nongeneric) cyclosporine drug product was about to lose patent protection and face competition from lower-priced generic cyclosporine products at the time of the symposium.

An investigation by FDA revealed that the sponsoring company and its agent specifically requested that one invited speaker revise his abstract to remove any references to the impending availability of generic cyclosporine products, to delete or revise sections of text that did not support switching stable patients to the sponsoring company's product, and to make other revisions to his presentation. Despite the speaker's insistence on including his abstract as originally written, the sponsoring company again asked the speaker to revise his abstract and presentation. When the speaker again refused to revise his abstract, it was not

[6] The prescription drug advertising regulations, issued under section 502(n) of the act, provide that an advertisement does not satisfy the requirement that it present a ''true statement'' of information in brief summary if it is false or misleading with respect to side effects, contraindications, or effectiveness (see 21 CFR 202.1(e)(5)(i)). In addition, the regulations list 33 ways in which prescription drug advertisements may be false or misleading (see 21 CFR 202.1(e)(6) and (e)(7)).

included in the program materials disseminated during the symposium.

The sponsoring company's actions to control the content of the symposium resulted in a misleading presentation in that: (1) The sponsoring company implied that the speakers were speaking without editorial input or influence from the sponsoring company, and (2) the sponsoring company foreclosed a full discussion of all cyclosporine drug products. The sponsoring company's efforts undermined the unbiased exchange of scientific information, may have caused physicians to unnecessarily switch stable patients to the company's product, and likely resulted in greater than necessary expenditures by patients. This might not have been the case had the sponsoring company, consistent with the agency's longstanding policy as articulated in the Draft Policy Statement, not influenced the content of the program.

FDA's guidance also directly advances the Government's interest of protecting the public health by preserving the integrity of the premarket approval process. The act requires sponsors to establish that their drugs and devices are safe and effective for their intended uses before they can be marketed and promoted. Consistent with this statutory scheme, FDA has consistently prohibited the promotion of unapproved products and unapproved uses of approved products. As explained earlier, this preserves the incentive for sponsors to conduct the adequate and well-controlled clinical investigations that are necessary to demonstrate whether products are safe and effective for each of their intended uses, and prevents patients from being exposed to unnecessary harms. There are, unfortunately, several examples of harms associated with the promotion of unapproved uses.

For example, several manufacturers of calcium channel blockers (drugs approved to treat a type of chest pain known as angina) attempted to promote these products for use in patients who had recently suffered heart attacks, called acute myocardial infarctions (post-AMI patients). The use of calcium channel blockers in post-AMI patients is not an approved use, and the agency successfully thwarted these promotional efforts. Many studies of post-AMI calcium channel blocker use have failed to show benefits, and some studies suggest that they may cause harm, particularly in patients with poor heart function. Given the many patients who suffer an AMI each year, the loss of life could have been in the thousands if the manufacturers had promoted this use.

In another example, certain approved anti-arrhythmic drugs were illegally promoted for unapproved uses in post-AMI patients. Included in these promotional activities were industry-sponsored lectures, presentations, and other publicity events. Use of anti-arrhythmic drugs for this unapproved use was substantial and growing until a clinical study (the CAST study) was conducted to evaluate definitively the safety and effectiveness of this use. The study produced a highly unexpected result in that the treatment with anti-arrhythmic drugs produced a 2.5-fold increase in mortality. It is estimated that tens of thousands of deaths were associated with this unapproved use.[7]

More detailed information on the preceding examples and additional examples involving drugs, biologics, and devices are contained in an FDA **Federal Register** notice requesting comments on a citizen petition submitted by the Washington Legal Foundation (see 59 FR 59820, November 18, 1994).

FDA's guidance on industry-supported scientific and educational activities protects the integrity of the premarket approval process because it dissuades manufacturers from using such activities as a means to promote unapproved products and unapproved uses; thereby encouraging scientific research and eliminating unnecessary harms to patients. At the same time, however, the agency acknowledges that drug and device manufacturers have an important role in legitimate scientific and educational discussions, including discussions of unapproved products and unapproved uses. Accordingly, the guidance recognizes that discussions of unapproved uses at industry-sponsored activities may be appropriate, and suggests that the provider include a general disclosure to the audience as to whether any unapproved uses will be discussed. This disclosure accommodates the need for industry-supported discussion on unapproved uses, yet helps ensure that the information presented is not misleading so as to be misconstrued as discussion of an approved use.

d. The fourth prong. The agency believes that the guidance is ''narrowly tailored'' and a reasonable approach to protect the health and safety of consumers by discouraging the dissemination of misleading or biased information, and by maintaining the integrity of the premarket approval process. The ''Factors Considered in Evaluating Activities and Determining Independence,'' in section II.A. of the Final Guidance, are ''reasonable means'' of distinguishing industry-supported activities that are intended to be promotional from those that are intended to be nonpromotional and free from the supporting company's influence and bias.

The Supreme Court has expressed a willingness to defer the fourth-prong determination to the regulating body. (See *Fox*, 109 S.Ct. at 3035; *United States* v. *Edge Broadcasting Co.*, 113 S.Ct. 2696, 2707 (1993).) Since *Fox*, the Court has applied the ''reasonable fit'' standard to uphold the regulation of commercial speech. (See *Edge*, 113 S.Ct. at 2705; *Florida Bar* v. *Went For It, Inc.*, 115 S.Ct. 2371, 2380 (1995).) Moreover, the courts have granted greater leeway and upheld reasonable regulation of commercial speech with regard to potentially harmful activities. (See *Edge*, 113 S.Ct. 2696 (upholding Federal prohibition of lottery advertising on radio in nonlottery State); *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *cert. denied*, 65 U.S.L.W. 3723 (April 28, 1997) (No. 96–1428) (upholding restrictions on outdoor advertising of alcoholic beverages); *Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *cert. denied*, 65 U.S.L.W. 3723 (April 28, 1997) (No. 96–1428) (upholding restrictions on outdoor advertising of cigarettes).) Certainly, with regard to the regulation of potentially dangerous drugs and medical devices, FDA is entitled to the same, if not greater, deference.

FDA's guidance on industry-supported scientific and educational activities is narrowly tailored. The guidance applies only to those industry-supported activities that relate to the supporting-company's product(s) or to competing product(s). It is directed to the regulated sponsors of such activities (drug and device manufacturers) rather than the participating professionals. It does not apply at all to independent scientists and organizations (e.g., universities, medical societies, professional groups), which may freely participate in or sponsor scientific or educational activities. Additionally, the agency has made clear that it does not seek to regulate all industry-supported scientific and educational activities under the labeling and advertising provisions of the Act. As explained in the guidance, FDA has not regulated and does not intend to regulate industry-supported activities that are

[7] *More Information for Better Patient Care: Hearing on S. 1477 Before the Senate Comm. on Labor and Human Resources*, 104th Cong. 51, 78–79 (1996) (statement of Thomas J. Moore, Senior Fellow, Center for Health Policy Research, George Washington University).

independent of the promotional influence of the supporting company.

The Final Guidance suggests that the provider ensure:

[M]eaningful disclosure, at the time of the program, to the audience of: (1) the company's funding of the program; (2) any significant relationship between the provider, presenters or moderators, and the supporting company (e.g., employee, grant recipient, owner of significant interest or stock); and (3) whether any unapproved uses of products will be discussed.

These disclosures are fully consistent with the First Amendment. (See *Virginia Board of Pharmacy*, 96 S.Ct. at 1830 n. 24 (''They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.''); In *Re R.M.J.*, 102 S.Ct. at 926 (''a warning or disclaimer might be appropriately required * * * in order to dissipate the possibility of consumer confusion or deception.''); Zauderer, 105 S.Ct at 2282 and n.14 (holding that disclosure requirements do not violate the First Amendment as long as they are reasonably related to the state's interest in preventing deception, and indicating that disclosure requirements are one of the acceptable less restrictive alternatives to actual suppression of speech).)

The agency's suggested disclosures are reasonably related to ensuring that the audience is in a position to fully evaluate the information presented, in order to avoid being misled, confused, or deceived. The guidance suggests that the disclosures be ''meaningful'' and ''to the audience.'' It does not specify how or when during the activity the disclosures should be delivered, or what should be said. Furthermore, as explained previously, the guidance suggests that the provider disclose whether any unapproved uses of products will be discussed. It recognizes that discussions of unapproved uses may be appropriate.

Finally, in response to comments, the agency made revisions to the Draft Policy Statement (reflected in the Final Guidance) that are additional evidence of ''narrow-tailoring.'' The most significant change was to place less emphasis on the elements of a written agreement between the supporting company and the provider, and instead provide guidance on what the agency will consider in evaluating activities and determining independence (Factors Considered in Evaluating Activities and Determining Independence). The Final Guidance makes clear that the list of factors is not exhaustive and that other factors may be appropriate for consideration in a particular case. The supporting company and the provider are free to adopt alternative approaches to help ensure that activities are independent and nonpromotional.

4. Conclusion

FDA strongly believes that the Draft Policy Statement and the Final Guidance on Industry-Supported Scientific and Educational Activities do not abridge the First Amendment because the agency's ability to regulate such activities is essential to the regulation of drugs and devices, and the regulation of drugs and devices is an area of extensive Federal regulation. If however, such activities are considered protected speech, they are commercial speech. The guidance satisfies all prongs of the *Central-Hudson* test, and thus, does not violate the First Amendment.

C. Scope

4. Several comments from the medical device industry argued that medical devices should be exempt from the policy. Some comments recommended, in the alternative, that there be a separate policy specific to medical devices. They argued that the policy initiative resulted from an effort to address abuses in the pharmaceutical industry, and that such abuses are not characteristic of the educational programs supported by medical device companies. Moreover, they maintained that educational programs for devices are more in the nature of hands-on training programs and thus present unique issues that would make compliance with a number of provisions of the draft policy statement (e.g., multiple presentations, audience selection) impractical or impossible.

The agency declines to exempt medical devices from the final guidance. The statutory concepts of labeling, advertising, and intended use do not differ for drugs and medical devices. ''Hands-on'' training sessions sponsored by device manufacturers are inherently product-specific and generally do not fall within the description of independent and nonpromotional educational programs that are contemplated by the final guidance. Training provided or supported by device manufacturers related to labeled uses would present no difficulty for the sponsor. Industry-supported training for off-label uses, however, will ordinarily be viewed by the agency as violative of the act.

5. Several comments from the animal drug industry and the veterinary community contended that animal drugs should be exempt from the policy. They argued that the animal drug industry is not prone to the same abuses as the human drug industry, that the process by which continuing education programs are provided to veterinarians is not comparable to the process by which continuing education is provided to other health care professionals, and that the administrative burdens and resulting expense imposed by the policy would restrict the availability of educational programs for veterinarians.

The agency acknowledges that the processes by which continuing education is provided for veterinary health care professionals differs in many ways from continuing education for other health care professionals. Nevertheless, the basic principles embodied in the final guidance, the importance of independence, disclosure, and educational design and intent apply to veterinary continuing medical education just as they apply to other industry-sponsored professional education.

6. Several comments addressed the scope of activities that are affected by the policy. Some comments contended that the scope of the policy has been appropriately narrowed to scientific and educational activities directed to health care professionals. They supported the exclusion of activities directed at business, policy, or other nonhealth care professional groups. Other comments argued that the scope should be narrowed further to encompass only those industry-supported educational activities directed to health care professionals who are involved in prescribing or administering regulated products. Several comments expressed concern that the scope of activities to which the policy applies, beyond live presentations, is unclear. They expressed concern about the extent to which the policy applies to presentations in electronic and other media. They contended that the policy should set forth the limitations of its application and, moreover, should expressly exempt written materials from the scope of its application.

Although this final guidance is intended to address industry-supported scientific and educational activities directed to health care professionals, the agency anticipates that presentations to other audiences may lend themselves to the principles described in this final guidance. It is understood that a large majority of health care professionals participate in the diagnostic and therapeutic management of patients and are, therefore, in a position to either prescribe, influence prescribing, or monitor the effectiveness of regulated medical products. Information

presented at continuing education programs may have a significant impact on these health care professionals.

There is no basis for applying a substantially different policy to industry-supported educational or scientific activities that are broadcast, electronically recorded, or disseminated via other emerging media.

7. One comment requested that the agency clarify that the policy applies generally to continuing medical education and also to industry-supported educational activities directed to health care professionals. The comment was concerned that the reference to continuing medical education, in the first sentence of the first paragraph of the background section of the draft policy statement, suggests that the scope of the policy may be limited to continuing medical education.

The agency agrees with the comment and has revised the language to refer to ''continuing education for health care professionals.''

8. One comment was concerned that the language in the background section of the draft policy statement implies that only independent activities, as described in the draft policy statement, can be considered educational activities. The comment stated that accredited educational activities that are not free from company influence, yet *not* inconsistent with approved labeling for any company product discussed, will no longer be regarded as legitimate educational activities.

The final guidance is not intended to distinguish between education and promotion and does not suggest that company influenced activities are illegitimate or noneducational. To clarify this intent, FDA has added a sentence to the background section, which states that the agency recognizes that industry-supported activities can be both nonpromotional and educational. The final guidance is intended to distinguish between industry-supported activities that the agency does not intend to regulate because they are otherwise independent of company influence and those that are subject to regulation because of the substantive influence of the supporting company. Company-influenced activities that provide information to health care professionals on regulated products may be educational in nature. They are, nevertheless, subject to regulation and, thus, must be consistent with approved labeling.

9. Some comments were concerned that the policy narrows or eliminates the ability of companies to engage in scientific exchange as provided for in § 312.7(a) (21 CFR 312.7(a)) (human drugs) and § 511.1(b)(8)(iv) (21 CFR 511.1(b)(8)(iv)) (animal drugs). The comments contended that the draft policy statement seems to subject company-controlled scientific exchange to regulation because it is not an independent activity. They contended that appropriate company-controlled scientific exchange should be expressly exempted from regulation in the policy.

This final guidance seeks to clarify the distinction between the concepts of promotion/commercialization and industry-supported scientific exchange set forth in §§ 312.7(a) (human drugs) and 511.1(b)(8)(iv) (animal drugs). Programs supported by companies that are not otherwise independent scientific or educational activities are subject to regulation as product promotion/commercialization.

10. Several comments contended that the policy is fundamentally flawed in that it institutionalizes industry support for continuing education activities for health care professionals. One comment argued that part of the definition of continuing medical education should be that it is nonsubsidized. Other comments recommended that the agency encourage multiple-source funding for educational activities to minimize the potential for bias as the policy may not be adequate to prevent the subtle bias inherent in a single sponsor situation.

The ''institutionalization'' of industry support for continuing education predates the agency's draft policy statement. The agency has sought to avoid, through its policy, undue interference with the availability of continuing education. Although FDA shares the concerns of some health care professionals that substantial reliance on industry funding may result in bias in continuing education, such should be addressed by the profession rather than by the agency. Although enlisting multiple sponsors would likely reduce the potential for bias toward any one product, the agency believes that this approach may not be practical, in all instances, for all FDA-regulated products.

D. Background: Promotion, Education, and Independence

11. Some comments objected to language in the background section of the draft policy statement indicating that, in assessing whether an industry-supported activity is independent, the agency will examine whether and to what extent the company ''is in a position to influence'' the presentation. They contended that the correct inquiry is whether a company has actually influenced a presentation, not whether a company was in a position to influence the presentation.

The agency cannot, in all cases, presume a provider to be independent merely because there is no documented attempt by the supporting company to influence the program. Business relationships or other relationships may influence a provider. A provider whose continued existence depends on the funding and goodwill of a supporting company may, for practical purposes, be in the same position as a company employee, who depends on his or her salary. Whether or not a company is in a position to influence the presentation is important in determining whether the activity is independent.

12. One comment objected to the first sentence of the fifth paragraph to the background section of the draft policy statement; this sentence indicated that, in assessing whether an activity is independent, the agency will examine whether and to what extent the company is in a position to ''otherwise use the presentation as an advertising vehicle.'' The comment contended that this language is ambiguous as to what might cause the agency to conclude that a supporting company has otherwise used a presentation as an advertising vehicle.

The agency agrees that clarification may be helpful. Accordingly, FDA has revised the text to state that the agency will examine whether and to what extent the company is in a position to ''otherwise transform an ostensibly independent program into a promotional vehicle.''

13. One comment suggested that the example provided in the parenthetical statement in the fifth paragraph to the background section of the draft policy statement (57 FR 56412 at 56413) be changed from ''if the provider believes that future financial support from the company depends upon producing programs that promote the company's product'' to ''if the provider *has reason to believe* * * *.''

The agency agrees with the suggested change and has revised that section of the final guidance accordingly.

E. Policy: Scientific and Educational Activities Supported by Industry

The draft policy statement, in discussing FDA policy generally, stated that the agency ''has not regulated and does not intend to regulate under the labeling and advertising provisions of the act industry-supported scientific and educational activities that are independent of the influence of the supporting company'' (57 FR 56412 at 56413). The agency further stated that

''companies and providers who wish to ensure that their activities will not be subject to regulation should design and carry out their activities based on a written agreement * * * that the provider will be solely responsible for designing and conducting the activity * * *.''

14. Some comments contended that to make the provider solely responsible for design and conduct of an educational activity excessively restricts supporting company involvement. They suggested revising the text to make the provider ''ultimately'' responsible for design and conduct of an educational activity.

In order to maintain the concept of independence described in this final guidance, it is important to retain the concept of provider ''sole responsibility'' for the design and conduct of the activity. This guidance is not designed to restrict companies from continuing to provide programs for health care professionals, but to distinguish between activities that are otherwise independent from the promotional influence of the supporting company and those that are not. A provider who merely adopts a company-designed presentation has not functioned as a truly independent educational provider.

1. Written Agreement—Generally

Although the draft policy statement did not require a written agreement, it did state that a written agreement can ''play an important role in helping to ensure that an industry-sponsored activity comes within the safe harbor traditionally recognized by the agency for independent scientific and educational activities'' (57 FR 56412 at 56413). The draft policy statement also described 10 elements the agency would anticipate in such written agreement.

As discussed in comment 15 of section II.E.1. of this document, the final guidance was modified to place less emphasis on a written agreement, but states that a written agreement is one way to document what measures were taken by the parties to maintain the independence of an activity.

15. Several comments suggested that a written agreement between the provider and supporting company was required and overly burdensome, both substantively and administratively. These comments identified a number of possible consequences including, foremost, that the written agreement would function as a disincentive for industry to support continuing education, resulting in fewer and lower quality educational activities. Several comments objected to the written agreement in general as overly restrictive and intrusive, containing too many elements, unwieldy, and/or impractical. The comments suggested, among other things, that there should be no requirement at all, that the agreement should provide only that the provider exercises final control and that the agreement should provide only that the program be objective, balanced, and scientifically rigorous, and that there be disclosure with all other details left to the parties. Other comments recommended that the agency develop a ''generic'' written agreement, or alternatively, provide guidance to national accrediting organizations as to the content of acceptable standardized written agreements. Still other comments were supportive of the concept of a written agreement, did not anticipate that written agreements would be unduly burdensome, and moreover, maintained that the written agreement would improve the process of developing meaningful educational activities. Some comments suggested that, for their purposes, the fact that clear guidance, which distinguishes regulated from nonregulated activities exists, may be more important than what the guidance actually contains. The comments complained that the lack of guidance, and resulting uncertainty as to the regulatory consequences of industry support for scientific and educational activities, have made industry reluctant to provide support for these activities.

As noted earlier, the agency has clarified its intention that a written agreement between the supporting company and the provider is recommended, and *not* required. The final guidance recognizes that a written agreement is one way of documenting the measures taken by the provider and the supporting company to ensure independence of an activity. The agency does not anticipate that a written agreement would be an undue burden for any of the parties involved in continuing education for health care professionals. Moreover, the agency anticipates that such agreements will enhance, rather than detract from, the quality of industry-supported educational activities.

16. One comment contended that failure to abide by the terms of a written agreement should subject the parties to additional penalties beyond those currently provided for in the act.

The agency believes that its existing statutory authority is sufficient to address industry-supported activities that are subject to regulation and may be violative.

2. Statement of Purpose

The draft policy statement's ''Statement of Purpose'' section (section II.A.1.) advised that the company and the provider should agree that the program ''is for scientific or educational purposes and not for the purpose of promoting any product and that any discussion of the company's products will be objective, balanced and scientifically rigorous'' (57 FR 56412 at 56413).

FDA has deleted the ''Statement of Purpose'' section because the elements of a written agreement are no longer described in the final guidance.

3. Control of Content/Selection of Presenters

The draft policy statement stated that the provider would be responsible for exercising full control over the planning of the program's content, including the selection of presenters and moderators. The draft policy statement indicated that companies should ''play no role in the selection of presenters or moderators other than responding to provider requests'' for such persons, but that companies could make unsolicited suggestions of speakers to ''nationally recognized accrediting organizations that compile lists of speakers * * *'' (57 FR 56412 at 56413). The draft policy statement specified further details regarding requests for speakers, such as having companies agree to provide, where reasonably possible, the names of more than one suggested presenter and to ''disclose all known significant financial and other relationships between the company and suggested presenter.'' The draft policy statement stated that providers should agree to seek suggestions for presenters from sources other than the company, to make independent judgments on appropriate presenters, and to select presenters ''representing an appropriate diversity of legitimate medical opinion on the topic under discussion when the format permits * * *'' (57 FR 56412 at 56413). Additionally, the draft policy statement stated that providers should agree to disclose whether a presenter was suggested by the company. The final guidance includes a factor concerning ''Control of Content and Selection of Presenters and Moderators'' (section II.A.), which contains most of the concepts described in the draft policy statement.

17. Several comments objected to the provision in the draft policy statement concerning presenters suggested by the supporting company. The comments objected in particular to the statement that the provider agrees to disclose

when it has selected a presenter suggested by the supporting company. These comments contended that such disclosure is unnecessary because it unfairly raises the specter of bias as to that presenter and, moreover, the ''Disclosure of Financial Relationships'' element of the draft policy statement (section II.A.3.) provides for adequate disclosure of any significant relationship between the presenter and the supporting company. Other comments contended that the supporting company should under no circumstances be permitted to suggest presenters.

As stated in the draft policy statement, there is a perceived need on the part of some providers for assistance from supporting companies in identifying appropriate speakers. The agency is unwilling, at this time, to infer undue influence by the supporting company if it responds to a request from such a provider. Health care professionals are entitled to know the nature of any involvement by supporting companies in educational efforts. However, the agency agrees with the comment that disclosure of any significant relationship between the provider, supporting company, and presenters or moderators would be sufficient. The possibility of unwarranted bias against presenters suggested by industry should be dealt with in the open environment of scientific exchange. Accordingly, the final guidance does not address specific disclosure of the supporting company's suggestions for speakers or moderators.

18. Some comments objected to the statement that a supporting company, when responding to a provider request for suggestions of presenters, agree to disclose all known significant financial and other relationships between the suggested presenter and the supporting company. They argued that this provision is burdensome and redundant in light of the disclosure obligation in the ''Disclosure of Financial Relationships'' section of the draft policy statement (section II.A.3.).

The agency believes that a presenter's significant relationships with a supporting company are, like a presenter's qualifications, essential to a provider's informed decision as to the appropriateness of a suggested presenter. Although the final guidance does not specifically state that the agency will consider whether the supporting company disclosed such relationships, it is suggested that this type of disclosure be made.

The agency does not agree that this disclosure is redundant with the ''Disclosures'' section of the final guidance (section II.A.) because the two provisions serve different purposes. The disclosure made by the supporting company when suggesting a speaker is to assist the provider in evaluating the appropriateness of the suggestion. The ''Disclosures'' section of the final guidance is to inform the audience, at the time of the program, of the presenter's relationship with the supporting company in order to provide the audience a perspective from which to evaluate the information conveyed by the presenter. The agency does not view the supporting company's disclosure when suggesting a presenter as more comprehensive than the disclosure to the audience in the ''Disclosures'' section.

4. Disclosure of Financial Relationships

The draft policy statement suggested that, as part of the written agreement, the provider agrees to ''ensure meaningful disclosure'' of the company's funding of the activity and ''any significant relationship between the provider and the company and between individual presenters or moderators and the company * * *'' (57 FR 56412 at 56413). In the final guidance, this provision is incorporated in the general ''Disclosures'' section.

19. Several comments sought clarification as to what is meant by ''meaningful'' disclosure and ''significant'' relationships. Several comments also contended that this provision is an administrative burden, and that it places a disproportionate burden on the provider, as opposed to the supporting company and presenters.

Significant relationships are relationships that may give rise to actual or perceived conflicts of interest. The concept of disclosure of relationships that may give rise to conflicts of interest has specific and well-understood application to medical and scientific discourse (e.g., in publication and in the peer-review process). The agency envisions that this provision can be satisfied by disclosing the existence of and characterizing significant relationships, and need not include further detail such as the amount of compensation or funding received. Thus, this disclosure should impose only a minimal burden on providers, presenters, and supporting companies. Where there is a question as to whether a relationship is significant, providers, presenters, and supporting companies should disclose the existence of the relationship.

Meaningful disclosure is disclosure that is reasonably calculated to reach the relevant audience in a manner that will alert them to potential biases. The provider should determine how to ensure that disclosure is meaningful.

20. One comment contended that significant relationships between the supporting company and providers and presenters should preclude any characterization of the activity as an independent educational activity inasmuch as disclosure is not adequate to cure the taint of influence.

It is neither practical nor justified to make a potential conflict of interest an absolute bar to participation in an independent educational activity. Disclosure of such potential conflicts is a workable means to address the potential for bias in medical and scientific contexts, and there is no reason to believe that it will be any less workable in addressing the potential for bias in the context of industry-supported scientific and educational activities.

21. Another comment argued that disclosure is the only element of the written agreement that should be retained, that company involvement should be permitted, and that it should be left to the judgment of the audience as to how to evaluate the content of the program.

While disclosure may be deemed by some in the health care profession a proper solution to concerns about bias, the agency's concerns are not wholly satisfied by disclosure. Under the act, the regulated industry cannot promote its products for unapproved uses, or otherwise promote drugs, biologics, or medical devices in ways not consistent with approved labeling, even in the context of unbiased presentations in which the company's role is fully disclosed. Discussions of unapproved uses, or other matters not consistent with approved labeling, should occur in a context of independent scientific or educational activity produced by organizations and individuals who are not involved in marketing the products. Thus, disclosure alone is not adequate to ensure independence in industry-supported scientific and educational activities as it does not insulate such activities from the substantive influence of supporting companies.

5. Supporting Company Involvement in Content

The draft policy statement suggested, as part of the written agreement, that a company agree not to engage in scripting, targeting of points for emphasis, or other activities that are designed to influence a program's content. The draft policy statement indicated, however, that companies could provide ''limited technical assistance * * * in preparing slides or

audiovisual materials * * *'' (57 FR 56412 at 56413). In the final guidance, this discussion is included in the ''Control of Content and Selection of Presenters and Moderators'' factor. Although discussion regarding ''limited technical assistance'' is not included in the final guidance, as discussed in the response to comment 22 of section II.E.5. of this document, technical assistance is a concern.

22. Several comments recommended that the agency more clearly define the limits of permissible technical assistance. Some comments argued that the policy should preclude all technical assistance, as to permit such assistance opens the door to influence. Other comments raised concerns that the policy is overly restrictive as to technical assistance in which supporting companies may engage. Several comments argued that supporting companies should be allowed to script, target points for emphasis, and provide unlimited technical assistance so long as such influence does not unfairly bias the program.

The agency continues to believe that the supporting company should not engage in activities that could influence the presentation's content. Activities such as scripting and targeting points for emphasis can have a direct effect on the presentation's direction, balance, and overall message. A company-designed and financed presentation, even if approved by an independent provider, remains, in the agency's view, an activity that is not independent.

In addition, because the agency shares the concern that technical assistance may open the door to influence, the agency suggests that the supporting company should provide limited technical support only in response to an unsolicited request for assistance from either the provider or a presenter.

6. Ancillary Promotional Activities

The draft policy statement indicated that the written agreement should include an agreement by supporting companies to not have any promotional activities or promotional exhibits ''in the same room or in an obligate path to the educational activity, unless the exhibit is within an area that is designated for general exhibits and includes exhibits from different companies marketing alternative or competing therapies.'' Additionally, providers would agree that no advertisements for the supporting company's products would appear in any materials disseminated in the program room (57 FR 56412 at 56413). The final guidance states that one factor the agency will consider is whether there are promotional activities in the meeting room.

23. Many comments were concerned about the scope of this element on ancillary promotional activities by supporting companies, specifically the language on promotional activities occurring in an obligate path to the educational activity. These comments asserted that this aspect of the policy was, in general, unduly restrictive; contrary to the normal practice of placing exhibits in advantageous locations; it would have a disproportionate effect on smaller, sole-sponsored, local meetings to the extent that it may make supporting companies reluctant to fund local continuing education activities; and it placed FDA, inappropriately, in the position of influencing meeting facility layout, including routes of ingress and egress into meeting facilities. As a consequence, the comments argued that certain facilities would become more or less attractive venues for educational activities on the basis of physical layout alone. One comment contended that the discussion regarding ancillary promotional activities is overly permissive and blurs the distinction between independence and promotion, which the comment viewed as contrary to the stated purpose of the policy. Another comment argued that the close juxtaposition of an independent educational activity and a promotional activity may sharpen rather than blur the desired distinction.

The agency is persuaded that the language in the draft policy statement regarding promotional activities in an obligate path to the educational activity should be deleted from the final guidance. This provision is problematic in that its application may turn on the physical layout of a building, and thus may favor certain facilities and providers. Moreover, the agency is not convinced that this is necessary to preserve the distinction between an independent educational activity and a promotional activity. The agency gives some credence to one comment's observation that the close juxtaposition of an independent educational activity and a promotional activity may be as likely to sharpen as to blur the desired distinction between independent and promotional activities. Because its contribution to preserving the distinction between an independent activity and a promotional activity is uncertain, there is not adequate justification for this provision in light of its differential impact on affected parties. Consequently, the final guidance has been revised to suggest that ancillary promotional activities should not take place in the actual meeting room.

24. Several comments interpreted the draft policy statement as precluding a sole exhibitor from having a promotional exhibit at either a sole or multi-sponsored educational activity. The comments objected that this would cause the issue to turn on whether other exhibitors chose to exhibit.

These comments misinterpret the draft policy statement. The provision on ancillary promotion would not preclude sole exhibitors from exhibiting at either sole-sponsored or multi-sponsored programs. The final guidance, as revised, merely suggests that promotional activities (sole exhibitors or otherwise) not take place in the meeting room. Companies are otherwise free to exhibit at sole or multi-sponsored programs without threatening the independent status of the activity.

7. Objectivity and Balance and Limitations on Data

The draft policy statement contained two sections, entitled ''Objectivity and Balance'' and ''Limitations on Data'' as part of the suggested written agreement. Under ''Objectivity and Balance'' a provider would agree to take steps to ensure that data are objectively selected and presented, that both favorable and unfavorable information about a product are fairly represented, and that there is a ''balanced discussion of the prevailing body of scientific information'' about a product and reasonable, alternative treatment options. In ''Limitations on Data'' the provider would agree to have ''meaningful disclosure'' of any limitations or uncertainty on data. Neither of these elements are included as factors in the final guidance.

25. Several comments maintained that these two sections would place excessive regulatory burdens on providers because providers would be obliged to screen presentations in advance and would appear to be responsible for the behavior of presenters who are, to an extent, beyond the provider's control. Other comments argued that these sections are inconsistent with the concept of independence because they effectively regulate content in an ostensibly independent program in a manner similar to the fair balance requirement in FDA's advertising regulations. Some comments argued that these elements are necessarily subjective in practice and that, among other things, time limitations, venue, and educational objectives may influence the extent to which a program is considered balanced or discusses data limitations. Other

comments maintained that these elements state only that which should reasonably be expected in legitimate, independent scientific discourse and thus are not appropriately the subject of a regulatory policy. They maintained that having these elements as part of the written agreement is paternalistic because it does not credit the audience with the intelligence and means to require objectivity and balance and to put presented data in its appropriate context. Still other comments supported these elements.

The agency is persuaded that these elements are not necessary to help ensure that sponsored programs are nonpromotional and independent of the supporting company's influence, and that there is adequate disclosure of relationships and information that is relevant to the audience's assessment of information presented. The agency is also persuaded that objectivity, balance, and disclosure of data limitations are commonly understood to be elements of typical, independent scientific discourse. The agency is convinced that these issues should be left to providers, presenters, and accreditors of educational activities and, therefore, these elements are not included as factors the agency will consider in determining independence.

8. Discussion of Unapproved Uses

The draft policy statement suggested that if unapproved uses are discussed, the written agreement include an agreement by the provider that presenters disclose that the product is not approved in the United States for the use under discussion. The final guidance states that the agency will consider whether there is meaningful disclosure, at the time of the program, to the audience of whether any unapproved uses of products will be discussed.

26. Several comments contended that this element is inconsistent with the concept of an independent program, burdensome, and would limit scientific exchange. Several comments added that the ultimate content of presentations is beyond the control of providers and that it would be cumbersome to flag discussion of unapproved products or uses throughout a program or presentation. Comments from the oncology community argued that this aspect of the written agreement would be especially burdensome for oncology educational programs because it would likely apply to the bulk of product uses discussed. One comment suggested using a general disclaimer in the program materials that not all products or product uses to be discussed are approved uses in the United States, rather than requiring presenters to specifically identify those unapproved uses.

The agency is persuaded that this disclosure, as presented in the draft policy statement, has the potential to be burdensome and unwieldy in practice, particularly in specialty areas where a high percentage of product use is for unapproved uses. Therefore, the final guidance does not include as a separate factor that providers have presenters disclose that a particular product or use is unapproved.

The agency, however, believes that the fact that a program may include discussion of products or product uses that are not approved is a matter that warrants disclosure. This fact, along with acknowledgment of the supporting company's funding of a program, is important to an audience's assessment of the information presented. The agency believes that a less burdensome disclosure than that proposed in the draft policy statement would suffice. The agency agrees with the comment that a single, general disclosure as to whether a program, or individual presentations in a program, will include discussion of products or product uses that are not approved would be adequate to address the agency's concern. Therefore, FDA has deleted the ''Discussion of Unapproved Uses'' element from the final guidance, and the factor discussing ''Disclosures'' has been revised to suggest that the provider ensure meaningful disclosure, at the time of the program, to the audience of whether any unapproved uses of products will be discussed. Ideally, such disclosure should occur in conjunction with disclosure of the supporting company's financial support for the program. This disclosure could take the form of a statement in the program materials or be delivered verbally at the start of the program.

27. Several comments contended that presenters should be permitted to report on foreign regulatory status, and pending U.S. applications and supplements for products discussed.

Nothing in this final guidance should be construed as barring presenters from discussing the foreign regulatory status of a product, or indicating that a product being discussed is the subject of a pending new drug application or supplement in the United States.

9. Opportunities for Debate

The draft policy statement included an element that the provider agree, in the case of live presentations, to provide ''meaningful opportunities for scientific debate or questioning'' during the program (57 FR 56412 at 56414). The final guidance includes a similar factor entitled ''Opportunities for Discussion.''

28. Several comments contended that it is not always practical to provide meaningful opportunities for debate because such opportunities may be contingent on the size of the program, time constraints, willingness of an audience to participate, and other factors unrelated to a program's independence. These comments maintained that an opportunity for debate should be a goal of an independent program, but not included in all activities. Other comments asked the agency to clarify what is meant by ''meaningful opportunities'' for debate.

The agency agrees that opportunities for debate should be a goal of an independent program, but it is not practical or appropriate in all activities. Factors unrelated to a program's independence could intercede to preclude an opportunity for meaningful debate. The agency's inquiry concerning this factor likely would be whether a program format reasonably afforded an opportunity for discussion, and such opportunity was nonetheless not provided. This finding may suggest an intent to insulate from peer scrutiny the data and ideas presented. As with the other factors in this final guidance, a finding that a meaningful opportunity for discussion was denied may suggest that a program was not independent despite representations to the contrary.

Certain comments seeking clarification of what is meant by a ''meaningful opportunity for scientific debate or questioning'' seem to have inferred a more stringent concept than was intended. The goal contemplated is no more than a reasonable opportunity for the type of question and answer session typical of continuing education activities. The agency has changed the word ''debate'' to ''discussion'' to reflect this less structured intent.

10. Schedule of Activities

The draft policy statement suggested that the company and provider agree to, and record in the written agreement, the dates, times, and locations of all presentations (57 FR 56412 at 56414).

29. Several comments contended that it is overly burdensome to have a supporting company and provider identify all presentations to be held. They maintained that this is problematic in that not all future programs may be anticipated at the time a provider and supporting company enter into an arrangement. Several comments maintained that the fact of multiple presentations of the same program should not be viewed as

suggesting possible promotional intent so as to warrant higher scrutiny. Some comments argued that it is desirable to repeat certain programs for public health reasons, that demand for additional programs suggests that a program is valuable, and that repeat presentations are desirable as they are the most efficient way to disseminate valuable information. Some comments contended that there should be a distinction between multiple programs that were agreed to in advance of any presentation and those that were agreed to after the fact, and only the later should be subject to higher scrutiny.

The agency is convinced that it may be difficult for a supporting company and provider to document the dates, times, and locations of all presentations in advance and, therefore, has removed this element from the final guidance. The agency, however, remains convinced that, in some circumstances, the fact of multiple presentations may be an indicator of supporting company influence. The agency agrees that multiple presentations of the same program are more troublesome when a supporting company agrees to fund additional programs after having viewed the initial program. This opportunity to view a program in advance of a decision to fund additional programs provides an obvious degree of control over content of multiple presentations. Thus, these programs would be viewed with greater scrutiny.

F. Other Factors in Determining Independence

The draft policy statement stated that if, notwithstanding the presence of a written agreement, a question is raised regarding product promotion, FDA would consider several ''possible indicia of company influence.'' These factors included, among others, an examination of the relationship between the provider and supporting company, the provider's involvement in the company's sales or marketing, logistical assistance provided by the company, the program's focus (whether the program concentrated on a single product), and gifts to encourage attendance (57 FR 56412 at 56414). The draft policy statement also indicated that ''no individual factor is likely by itself to stimulate an action based on lack of independence.'' Many of the factors that were discussed in the ''Other Factors in Determining Independence'' section of the draft policy statement (section II.B.) have been retained in the final guidance.

30. Several comments advised deleting this entire section from the policy. Another comment contended that the articulated factors undercut the protection afforded by the policy by permitting post hoc review of a provider's decisions for indications of possible influence.

The agency believes that it is important to consider the actual conduct of the parties in determining whether a supporting company has acted to transform an educational activity into a promotional presentation for its products. By including this discussion in the ''Factors Considered in Evaluating Activities and Determining Independence'' (section A. of the final guidance), the agency believes that there will be less concern regarding post hoc review.

1. Relationship Between Provider and Supporting Company

The draft policy statement noted that legal, business, or other relationships between the company and the provider might place the company in a position whereby it could influence the content of the activity. This discussion is contained in the final guidance as a factor the agency will consider.

31. Some comments contended that there should be clarification of the types of relationships that predispose a supporting company to influence content. Some comments argued that ''influence'' is too expansive or vague a term, and that, a more appropriate inquiry would be supporting company ''control.''

As discussed in response to comment 14 of section II.E. of this document, a company-designed presentation does not become independent merely because it is approved by a provider who has final editorial control. The agency believes that ''influence'' is the most appropriate term to describe the basic concept of independence. The final guidance does, however, identify several types of relationships that may predispose a supporting company to influence content (e.g., legal relationships, business relationships, a provider that is owned by, or is not viable without the support of the supporting company).

32. One comment contended that legal, business, or other relationships should not be at issue where ''a provider has documented independence through accreditation from a major accrediting organization.''

There is no basis for assuming that accreditation of the provider by a major accrediting organization will, in and of itself, ensure that the provider will not be subject to influence as a result of a relationship with the supporting company.

2. Provider Involvement in Sales or Marketing

The draft policy statement listed, as another factor in determining independence, the provider's involvement in advising or assisting in the sales or marketing of a company's product. The discussion in the draft policy statement stating that ''individuals who are involved in promotion of a company's products may not function in the role of independent provider, but could be selected by an independent provider to function as a speaker or moderator'' (57 FR 56412 at 56414) has been deleted. The remaining discussion is listed in the final guidance as a factor the agency will consider.

33. Some comments identified situations where this provision may be interpreted so as to preclude institutional providers and/or companies from interacting due to minor or unrelated involvement with the supporting company.

The primary concern of the agency, as reflected in the draft policy statement, is with relationships that may affect the provider's independence. A relationship between a provider member or employee and a supporting company will not, in and of itself, imply influence by the company. If, however, company employees or individuals acting on behalf of the company are actively involved in provider decisions on the content of provider activities sponsored by the company, there may be a reason to question the provider's independence.

34. Some comments contended that this provision does not adequately distinguish between advertising agencies involved in sales and advertising, and communications companies involved in education, which also may be viewed as a marketing function, nor does it allow for the existence of advertising and communications (or education) divisions within the same company.

FDA acknowledges that certain providers are often involved in both promotional activities and independent educational activities. The involvement of a provider in both types of activities does, however, raise questions about whether an educational activity is, in fact, being utilized as part of a promotional campaign.

While the final guidance does not preclude the use of the same provider in a promotional effort and an independent educational activity, such an arrangement poses obvious difficulties. Companies choosing to engage a provider in both activities should be especially concerned about the

assignment of provider personnel to the different activities. The agency will not ordinarily regard provider personnel who serve as company agents for company promotional activities to be independent for other company-sponsored scientific or educational activities.

3. Provider's Demonstrated Failure to Meet Standards

The draft policy statement identified, as a factor in determining independence, the provider's record of failure to meet standards of independence, balance, objectivity, or scientific rigor when putting on ostensibly independent educational programs (57 FR 56412 at 56414). This discussion is listed in the final guidance as a factor the agency will consider.

35. Some comments sought clarification as to what is meant by, or what criteria support a conclusion of, ''demonstrated failure to meet standards'' on the part of a provider. Some comments contended that this is an unworkable requirement as supporting companies are not in a position to know of a provider's past failures to meet standards in its educational programs.

It is not unreasonable to expect due diligence on the part of companies when contracting with providers. In exercising due diligence, supporting companies should conduct a reasonable evaluation of all information readily available about a provider.

4. Logistical Assistance

Another factor in determining independence contained in the draft policy statement was the extent of logistical assistance provided by the supporting company. The draft policy statement specifically mentioned that ''significant contact'' between industry representatives and presenters might indicate an attempt to influence a presentation (57 FR 56412 at 56414). As discussed in comment 36 of section II.F.4. of this document, this discussion has been deleted from the final guidance.

36. Several comments argued that the logistical assistance element was too ambiguous a standard as it is not clear what is meant by ''significant contact.'' Some comments argued that, notwithstanding any ambiguity, significant contact between a presenter and a supporting company representative should not be an indicator of influence as the agency's inquiry should focus on actual attempts to influence or control the content of a presentation. They maintained that supporting company representatives have ongoing relationships with presenters that would make compliance with a generalized ''significant contact'' standard problematic.

While the agency believes that the ''significant contact'' standard is amenable to clarification, it need not be, as the agency is persuaded that its inquiry concerning contacts between a presenter and a supporting company in conjunction with a sponsored program should focus on attempts to influence, rather than on volume or nature of contacts. A supporting company, among other factors for determining independence, should not script, target points for emphasis, or engage in other activities that are designed to influence the content of a program. The agency believes that factor alone is adequate to address the agency's concern as to contact between a supporting company representative and a presenter in conjunction with a sponsored program. Therefore, discussion of the logistical assistance provision has been deleted from the final guidance.

5. Suggestion of Presenters

The draft policy statement acknowledged that some providers perceive a need to ask the supporting company to suggest presenters. The draft policy statement stated that if a company suggests presenters who ''are or were actively involved in promoting the company's products or who have been the subject of complaints or objections with regard to presentations that were viewed as misleading or biased in favor of the company's products,'' FDA might infer promotional intent on the company's part (57 FR 56412 at 56414). This discussion has been incorporated, in part, into the factor concerning ''Control of Content and Selection of Presenters and Moderators'' in the final guidance.

37. Some comments contended that a supporting company may not be in a position to know if a presenter it suggests has been the subject of complaints with regard to presentations viewed as biased in favor of the company's products. They maintained that this provision should expressly indicate that supporting companies are only accountable for knowingly suggesting presenters that have been the subject of such complaints.

The agency believes that the company should be familiar with the presenter's background and should be willing to make a reasonable inquiry before recommending the name of a presenter to the provider. In the final guidance, this discussion has been incorporated in the factor concerning ''Control of Content and Selection of Presenters and Moderators.''

38. Some comments contended that there should be no inference of promotional intent arising from a supporting company's suggestion of a presenter who has been involved in promoting a company's products. They argued that actual influence of, rather than intent to influence, an activity is the relevant inquiry, that the scope of activities that may be viewed as involvement in product promotion is unclear, and that any relationship between the presenter and the supporting company can be adequately addressed through disclosure.

The agency is concerned about the ability of a supporting company to hire an individual to engage in promotional activities for the company and to actively support the appearance of the same individual as a presenter in an independent educational activity sponsored by the company. The agency does not agree that a retrospective finding of actual influence, which may be extremely difficult to document, is the relevant inquiry. The issue is whether the company is in a position to influence program content by suggesting a presenter who is a paid product promoter. The suggestion by supporting companies of presenters selected from their company maintained list and/or their marketing consultants may be viewed as an attempt to influence the content of the program. The agency will not ordinarily infer such intent when a provider independently selects a presenter who has been involved in product promotion for a supporting company. Disclosure cannot overcome the lack of independence that will ordinarily result from companies suggesting promoters as presenters in such programs.

6. Focus on a Single Product

The draft policy statement indicated that one factor in determining independence might be whether the program content was focused on a single product marketed by the supporting company or a competing product except when existing treatment options were so limited as to preclude any meaningful discussion of alternative therapies. The draft policy statement noted that each treatment option did not have to be discussed with equal emphasis, but that emphasis on newer or more beneficial treatments should be provided ''in the context of a discussion of all reasonable and relevant options'' (57 FR 56412 at 56414). This discussion has been incorporated in the factor concerning the ''Focus of the Program'' in the final guidance.

39. Some comments contended that focus on a single product should not be regarded as a factor that may suggest lack of independence, as single product programs are useful, especially during a product's launch phase, and choice of topic should be at the provider's discretion and should confer no negative inference.

FDA agrees that single product programs may be useful, especially during a product's launch phase. However, the agency also recognizes that single-product programs raise unique concerns about the independence of a program, because such programs inherently lack the presentation of competing therapeutic modalities.

40. Several comments contended that to suggest that a program emphasizing a single product do so in the context of a discussion of all reasonable and relevant options is unreasonable or impossible given the time constraints of a typical educational activity.

The final guidance does not suggest that a program emphasizing a single product do so in the context of a discussion of all reasonable and relevant options. However, the agency will consider, as one of several factors, a program's focus on a particular therapy when other reasonable and relevant options are either not discussed or are de-emphasized.

7. Multiple Presentations

The draft policy statement indicated that multiple performances of the same program might result in a higher level of agency scrutiny than single-performance programs (57 FR 56412 at 56414). The final guidance states that the agency will consider whether multiple presentations of the same program are held.

41. Several comments contended that multiple presentations should not be viewed as suggesting promotional intent so as to warrant higher scrutiny. They argued that it is desirable to repeat certain programs for public health reasons, that the demand for multiple programs suggests that a program is a valuable one, and that repeat presentations are desirable as they are the most efficient way to disseminate valuable information. Some comments contended that there should be a distinction between multiple programs that were agreed to before the fact and those that were scheduled after the fact. They contended that only the latter should be subject to a higher level of scrutiny.

Multiple presentations are just one of a number of factors the agency considers in determining the level of scrutiny to be applied. Footnote 4 of the draft policy statement explicitly recognized that repeat presentations can serve public health interests and that Public Health Service components sometimes actively encourage multiple presentations on selected urgent topics. FDA agrees that an agreement to conduct multiple presentations arrived at prior to commencement of the initial presentation raises fewer questions than an agreement arrived at after commencement. The opportunity of a sponsor to view the initial presentation before agreeing to fund additional presentations provides an obvious degree of control over content of multiple presentations.

42. Some comments sought clarification of the scope of activities that may be deemed multiple presentations. The comments described examples such as a single broadcast to multiple sites via electronic media, and a multiple presentation at a single location for the purpose of accommodating several nursing shifts.

A single broadcast to multiple sites would be regarded as a single presentation because the sponsoring company could not apply added control to the additional sites. Thus, the presentation at each site enjoys an equal degree of independence. This is only slightly less true for multiple presentations to accommodate several shifts on the same day, especially when the multiple presentations have been contracted for in advance. Of course, the delay might be 1 or 2 weeks to accommodate those who might have been on a different rotation or 1 or 2 months to accommodate newly hired employees. FDA believes that any increased opportunity for a sponsoring company to deny funding for subsequent presentations or to edit them will raise a question with regard to independence.

8. Gifts

The draft policy statement indicated that one factor in determining independence might be gifts or inducements (other than token gifts) provided to encourage attendance (57 FR 56412 at 56414). The final guidance does not contain this factor.

43. One comment argued that this provision should be deleted because it merely duplicates the Accreditation Council for Continuing Medical Education (ACCME) guidelines.

ACCME-accredited programs do not represent the full range of activities to which this final guidance applies, and moreover, providers of ACCME-accredited programs may not, in all instances, comply with ACCME-guidelines. Nonetheless, this factor has been deleted from the final guidance because, upon reconsideration, the agency is not convinced that the use of gifts or inducements to encourage attendance is a reliable factor in determining independence.

9. Emphasis on Noneducational Activities

The draft policy statement indicated that an emphasis on noneducational activities (such as leisure or recreational activities) would be another factor in determining independence (57 FR 56412 at 56414). The final guidance does not contain this factor.

44. Some comments contended that the agency's concern over whether the announcement and promotion of an educational activity focuses more on the educational content than on leisure or recreational activities ancillary to the activity is vague and that the agency should provide objective criteria for assessing this issue. One comment contended that this provision appears to create a weaker standard than that of the AMA guidelines on gifts to physicians as it seems to indicate that a program announcement or promotion that focuses equally on education and leisure would be appropriate. They urged that the language be changed to require that the program announcement and promotion focus ''predominantly'' or ''almost exclusively'' on the educational aspects of the program.

The agency continues to view the AMA guidelines as an appropriate standard for health care professionals. Although the agency agrees that program promotion, including program announcements, should focus predominantly on the educational content of the program, it does not consider greater focus on leisure or recreational activities as reason to believe that the program may be lacking independence.

10. Audience Selection

Under the draft policy statement, another factor in determining independence was whether the supporting company's sales or marketing departments generated the invitation or mailing lists for supported activities, or whether such lists were intended to reflect sales or marketing goals (such as rewards for high prescribers of the company's products or to influence ''opinion leaders'') (57 FR 56412 at 56414). This discussion is listed in the final guidance as a factor the agency will consider.

45. Several comments objected to limitations on supporting company involvement in selecting or otherwise

generating audiences for educational activities. Some maintained that supporting company-generated mailing lists should be permitted. Some maintained that providers should be permitted to enlist the aid of the supporting company's sales representatives to generate audiences by distributing program invitations, or by other means, and that this involvement should not suggest a lack of independence unless a supporting company is solely responsible for generating an audience.

The agency continues to view company involvement in audience selection and/or solicitation for attendance as undermining program independence. The involvement of company sales representatives in the invitation process creates an opportunity for a sales presentation on the product that is likely to be discussed at the program. This may invite a discussion of unapproved uses in a promotional context, thus making the educational program a part of the company's promotional campaign. In addition, supporting company involvement in the audience selection process invites the development of lists that target health care professionals who are deemed important to attend by the supporting company. It also invites the selection of a large number of ''peer influence'' professionals who are likely to be strong supporters of the company's products. This provides an opportunity for bias and indirect influence on the content of the program, and it allows the program to be used as a promotional vehicle for targeted health care professionals.

46. Some comments contended that the selection of ''opinion leaders'' as a target audience should not raise an issue inasmuch as such physicians are deemed important by genuinely independent providers as well as companies. They argued that opinion leaders are likely the most efficient purveyors of information derived from educational activities that, by their very nature, are accessible to only a limited number of physicians.

The focus on opinion leaders is a standard promotional tactic to speed acceptance of a new product so as to more rapidly increase market share. The agency's understanding of educational needs assessments by providers is that educational programs generally are not directed to specific opinion leaders. It is the agency's understanding that there is no such policy on the part of major accrediting organizations such as ACCME. It is reasonable to question whether a program that targets ''opinion leaders'' may do so for promotional purposes. This inference of possible promotion, however, is only one of many factors to be considered should a question be raised concerning an educational activity purported to be independent.

47. One comment contended that supporting companies should be permitted to furnish providers with complete specialty and subspecialty mailing lists.

The agency would not object to a supporting company furnishing a provider with complete specialty or subspecialty mailing lists.

11. Misleading Title

The draft policy statement indicated that a program's title might demonstrate a lack of independence if the title failed to fairly represent the scope of the presentation (57 FR 56412 at 56414). This discussion has been incorporated in the factor concerning the ''Focus of the Program'' in the final guidance.

48. One comment argued that, where the title is under the direction and control of the provider, it is not the proper subject of a promotional inference as to the supporting company.

Although the title of a program may ostensibly be under the direction and control of the provider, the agency has observed that a misleading title may reflect a lack of independence and a desire on the part of the provider to promote the supporting company's products under the guise of education. For example, a program entitled ''New Approaches to Hypertension'' that focuses on a single product manufactured by the sponsoring company may suggest to the agency that the program is designed to promote the company's product. A misleading title is not, in and of itself, dispositive with regard to the issue of promotional intent. It is only one of a number of factors to be considered by the agency.

12. Dissemination

Under the draft policy statement, if information about the supporting company's product presented in the scientific or educational activity is further disseminated after the initial program or publication, by or at the company's behest, other than in response to an unsolicited request or through an independent provider, this would be another indication of possible company influence (57 FR 56412 at 56414). This discussion has been incorporated into the final guidance as a factor the agency will consider.

49. Some comments maintained that the independence of an educational activity is enduring and that the public health is better served by making written, printed, or graphic program materials readily available to health care professionals.

Written, printed, or graphic materials containing product information and disseminated by, or on behalf of, a product manufacturer are generally viewed as promotional labeling. If, on the other hand, the materials are prepared and disseminated by the provider for educational purposes, or the materials are disseminated by the company in response to an unsolicited request, this would not generally be considered as a possible indication of company influence.

50. One comment contended that footnote 6 of the draft policy statement (which noted that repeat performances are permitted when the decision is made by the provider, possibly with review by a nationally recognized professional organization) should be deleted, as it appears to be more restrictive for repeat presentations than other provisions in the draft policy statement.

The agency believes that footnote 6 of the draft policy statement is consistent with other provisions of the draft policy statement. As suggested in the text of the draft policy statement, multiple performances may cause the agency to exercise greater scrutiny. However, a decision made by the provider that multiple presentations are warranted provides some assurance that there is a genuine professional need for repetition of the program. Nevertheless, FDA no longer believes that this footnote is necessary and has deleted it from the final guidance.

51. One comment suggested that the reference to ''publication'' in section II.B.5 of the draft policy statement be struck as this appears not relevant to the range of activities contemplated by the policy.

FDA agrees with the comment and has removed the reference to ''publication'' from the final guidance.

13. Complaints

Another factor for determining independence under the draft policy statement concerned complaints from the provider, presenters, or attendees regarding attempts by the company to influence content (57 FR 56412 at 56414). This discussion has been incorporated into the final guidance as a factor the agency will consider.

52. Some comments contended that complaints should be independently substantiated before becoming a basis for the agency inferring promotional intent and that the agency should clarify the mechanism for reporting complaints.

In general, the agency will not infer promotional intent by a supporting company without an investigation that substantiates, to the agency's satisfaction, a complaint or allegation.

The agency declines to establish a formal mechanism for reporting complaints. FDA receives information through various means, both formal (as in requests for meetings) and informal (such as letters and telephone calls). The agency will exercise its judgment and discretion in deciding whether to take action on a complaint.

G. FDA Reliance on Major Accrediting Organizations

The draft policy statement acknowledged that accrediting organizations can play an important role in ensuring that industry-sponsored activities are independent and nonpromotional. The draft policy statement indicated that FDA would seek to rely to the extent possible on major accrediting organizations to monitor company-supported educational activities conducted by their accredited providers (57 FR 56412 at 56414). In the final guidance, this section has been renamed ''FDA's Cooperation With Major Accrediting Organizations'' and it states that the agency will continue to work with major accrediting organizations to monitor company-supported educational activities conducted by their accredited providers.

53. Some comments questioned the extent of FDA's intent to rely on, and to defer to, major accrediting organizations.

Although FDA recognizes the valuable role that accrediting organizations can play in ensuring that industry-supported educational activities are independent and nonpromotional, FDA cannot rely exclusively on such organizations. The ultimate responsibility for monitoring inappropriate promotion in these programs lies with FDA. Accordingly, the final guidance has been revised to clarify that FDA intends to work with major accrediting organizations to monitor company-supported educational activities conducted by their accredited providers.

III. Comments

Interested persons may, at any time, submit written comments to the Dockets Management Branch (address above). Requests and comments are to be identified with the docket number found in brackets in the heading of this document. Comments may be submitted at any time and will be used to determine whether to revise the guidance further.

Dated: November 24, 1997.

William B. Schultz,

Deputy Commissioner for Policy.

The text of the final guidance follows:

BILLING CODE 4160–01–F

Guidance for Industry

Industry-Supported Scientific and Educational Activities

U.S. Department of Health and Human Services
Food and Drug Administration
Office of Policy
November 1997

Guidance for Industry[1]

Industry-Supported Scientific and Educational Acivities

I. Background: Promotion, Education, and Independence

Two important sources of information on therapeutic products (human and animal drugs, biological products, and medical devices regulated by the Food and Drug Administration (FDA)) for health care professionals are: (1) Activities (programs and materials) performed by, or on behalf of, the companies that market the products; and (2) activities, supported by companies, that are otherwise independent from the promotional influence of the supporting company. Although both provide valuable and sometimes vital information to health care professionals, the programs and materials performed and disseminated by companies are subject to the labeling and advertising provisions of the Federal Food, Drug, and Cosmetic Act (the act), whereas the truly independent and nonpromotional industry-supported activities have not been subject to FDA regulation.[2]

This jurisdictional line is important because the constraints on advertising and labeling,[3] when applied to scientific and educational activities, can restrict the freedom of participants to discuss their data or express their views. In particular, discussions of unapproved uses, which can be an important component of scientific and educational activities, are not permissible in programs that are or can be (because the provider is not functionally independent) subject to substantive influence by companies that market products related to the discussion. Thus, the agency, has traditionally sought to avoid regulating activities that are produced

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[1] This guidance has been prepared by FDA's Intra-Agency Working Group on Advertising and Promotion. This guidance represents the Agency's current thinking on industry-supported scientific and educational activities. It does not create or confer any rights for or on any person and does not operate to bind FDA or the industry. An alternative approach may be used if such approach satisfies the requirements of the applicable statute, regulations, or both.

[2] In this context, the terms ''independent'' and ''nonpromotional'' are not mutually exclusive. The agency views independence as an indication of whether an activity is nonpromotional.

[3] These provisions require the company to ensure that the content does not promote unapproved uses, and that discussions of the company's products are not false or misleading and do not lack fair balance.

independently from the influence of companies marketing the products. The agency recognizes that industry-supported activities can be both nonpromotional and educational.

Demarcating the line between activities that are performed by or on behalf of the company, and thus, subject to regulation, and activities that are essentially independent of their influence has become more difficult due to the increasing role industry has played in supporting postgraduate and continuing education for health care professionals.

The agency traditionally has recognized the important public policy reasons not to regulate all industry-supported activities as advertising or labeling. To permit industry support for the full exchange of views in scientific and educational discussions, including discussions of unapproved uses, FDA has distinguished between those activities supported by companies that are nonpromotional and otherwise independent from the substantive influence of the supporting company and those that are not. Those activities that have been deemed by the agency to be independent from influence by the supporting company and nonpromotional have not been treated as advertising or labeling, and have not been subjected to the agency's regulatory scrutiny.

In determining whether an activity is independent of the substantive influence of a company, the agency examines whether and to what extent the company is in a position to influence the presentation of information related to its products or otherwise transform an ostensibly independent program into a promotional vehicle. FDA is concerned that companies may influence the content of educational programs both directly and indirectly. Directly, by being involved in the selection of speakers or in the treatment of topics. Indirectly, through the nature of the relationship between the company and the provider (e.g., if the provider has reason to believe that future financial support from the company depends upon producing programs that promote the company's products.)

FDA is responsible for seeing that scientific and educational activities that are not intended to be promotional are designed to be truly independent from substantive influence by the marketers of regulated products. The agency recognizes, however, that the primary responsibility for overseeing the process of postgraduate and continuing professional education and scientific exchange lies with the scientific and health

care communities and accrediting organizations. Accordingly, FDA will work closely with scientific and professional health care communities and accrediting organizations to help ensure that provider activities are independent.

The agency is providing this guidance to describe the agency's enforcement policy with regard to scientific and educational activities supported by industry. The guidance seeks to clarify the distinction drawn by the agency between scientific and educational activities that FDA considers nonpromotional and those that the agency considers promotional, and to provide guidance on how industry may support such activities without subjection to regulation under the labeling and advertising provisions of the act.

This guidance applies only to those company-supported activities that relate to the supporting company's products or to competing products. A company-supported educational activity or part thereof that does not relate to the company's products or a competing product, or suggest a use for the company's products, would not be considered a promotional activity under this guidance.

II. Guidance: Industry-Supported Scientific and Educational Activities

FDA has not regulated and does not intend to regulate, under the labeling and advertising provisions of the act, industry-supported scientific and educational activities that are independent of the influence of the supporting company. Companies and providers who wish to ensure that their activities will not be subject to regulation should design and carry out their activities free from the supporting company's influence and bias, based on the factors considered in evaluating activities and determining independence, as described below. These factors are provided to furnish guidance on the design and conduct of such activities, so that they will be educational and nonpromotional in nature. These factors will be considered as part of an overall evaluation of an activity; no individual factor is likely by itself to stimulate an action based on lack of independence.

A. Factors Considered in Evaluating Activities and Determining Independence

FDA will consider the following factors in evaluating programs and activities and determining independence:

(1) Control of Content and Selection of Presenters and Moderators

The agency will consider whether the provider has maintained full control over the content of the program, planning of the program's content, and over the selection of speakers and moderators. In so doing, the agency will look at whether the supporting company has engaged in scripting, targeting points for emphasis, or other actions designed to influence the program's content. In addition, the agency will consider if the company has suggested speakers who are or were actively involved in promoting the company's products or who have been the subject of complaints or objections with regard to presentations that were viewed as misleading or biased in favor of the company's products.

(2) Disclosures

The agency will consider whether there was meaningful disclosure, at the time of the program, to the audience of: (1) The company's funding of the program; (2) any significant relationship between the provider, presenters or moderators, and the supporting company (e.g., employee, grant recipient, owner of significant interest or stock); and (3) whether any unapproved uses of products will be discussed;

(3) The Focus of the Program

The agency will consider whether the intent of the company and the provider is to produce an independent and nonpromotional activity that is focussed on educational content and free from commercial influence or bias. The agency will also consider whether the title of the activity fairly and accurately represents the scope of the presentation.

The agency also will look at the focus of the activity to determine if the central theme is based on a single product marketed by the company or a competing product, except when existing treatment options are so limited as to preclude any meaningful discussion of alternative therapies. This is not to suggest that each treatment option must be discussed with precisely equal emphasis. However, emphasis on a newer or, in the view of the presenter, more beneficial treatment modality should be provided in the context of a discussion of all reasonable and relevant options.

(4) Relationship Between Provider and Supporting Company

The agency will consider whether there are legal, business, or other relationships between the company and the provider that could place the company in a position whereby it may exert influence over the content of the activity (e.g., a provider that is owned by, or is not viable without the support of, the company supporting the activity).

(5) Provider Involvement in Sales or Marketing

The agency will consider whether individuals employed by the provider and involved in designing or conducting scientific or educational activities are also involved in advising or otherwise assisting the company with respect to sales or marketing of the company's product.

(6) Provider's Demonstrated Failure to Meet Standards

The agency will consider whether the provider has a history of conducting programs that fail to meet standards of independence, balance, objectivity, or scientific rigor when putting on ostensibly independent educational programs.

(7) Multiple Presentations

The agency will consider whether multiple presentations of the same program are held.[5]

(8) Audience Selection

The agency will consider whether invitations or mailing lists for supported activities are generated by the sales or marketing departments of the supporting company, or are intended to reflect sales or marketing goals (e.g., to reward high prescribers of the company's products, or to influence ''opinion leaders'').

(9) Opportunities for Discussion

In the case of a live presentation, the agency will consider whether there was an opportunity for meaningful discussion or questioning provided during the program.

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[5] FDA recognizes that some repeat programs can serve public health interests. The Department of Health and Human Services sometimes actively encourages multiple presentations on selected urgent topics.

(10) Dissemination

The agency will consider whether information about the supporting company's product presented in the scientific or educational activity is further disseminated after the initial program, by or at the behest of the company, other than in response to an unsolicited request or through an independent provider as discussed herein.

(11) Ancillary Promotional Activities

The agency will consider whether there are promotional activities, such as presentations by sales representatives or promotional exhibits, taking place in the meeting room.

(12) Complaints

The agency will consider whether any complaints have been raised by the provider, presenters, or attendees regarding attempts by the supporting company to influence content.

B. Additional Considerations

The foregoing list of factors is not intended to be exhaustive and other factors may be appropriate for consideration in a particular case.

One means of documenting the measures taken to ensure independence of an activity is to have a written agreement between the provider and the supporting company. This document should reflect that the provider will be solely responsible for designing and conducting the activity, and that the activity will be educational, nonpromotional, and free from commercial bias. While not required, a written agreement, coupled with the factors described above, can provide valuable evidence as to whether an activity is independent and nonpromotional.

III. FDA'S Cooperation With Major Accrediting Organizations

FDA recognizes the important role accrediting organizations can play in ensuring that industry-sponsored educational activities are independent and nonpromotional. The agency also recognizes the importance of avoiding undue Government interference in postgraduate and continuing education for health

care professionals, as the agency seeks to ensure that company promotional activities meet applicable legal requirements. Thus, the agency will continue to work with major accrediting organizations to monitor company-supported educational activities conducted by their accredited providers.

[FR Doc. 97–31741 Filed 12–2–97; 8:45 am]
BILLING CODE 4160–01–C

Federal Register

Wednesday
December 3, 1997

Part IV

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 179

Irradiation in the Production, Processing, and Handling of Food; Final Rules

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 179

[Docket Nos. 86F–0507 and 86F–0509]

Irradiation in the Production, Processing and Handling of Food

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; denial of request for stay of effective date and for a hearing; confirmation of effective date.

SUMMARY: The Food and Drug Administration (FDA) is denying the requests for a hearing that it has received on the final rule that amended the food additive regulations to authorize the use of sources of ionizing radiation for the control of food-borne pathogens in poultry. After reviewing the objections to the final rule and the requests for a hearing, the agency has concluded that the objections do not raise issues of material fact that justify a hearing or otherwise provide a basis for revoking the amendment to the regulation. FDA is also denying the request for a stay of the effective date of the amendment to the food additive regulations.

DATES: Effective date confirmed: May 2, 1990.

FOR FURTHER INFORMATION CONTACT: Patricia A. Hansen, Center for Food Safety and Applied Nutrition (HFS–206), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3093.

SUPPLEMENTARY INFORMATION:

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I. Introduction

In the **Federal Register** of May 2, 1990 (55 FR 18538), FDA issued a final rule permitting the use of ionizing radiation for the control of food-borne pathogens in poultry (the ''poultry final rule''). This regulation, codified under 21 CFR 179.26, was issued in response to petitions filed by Radiation Technology, Inc. (RTI) (Docket No. 86F–0507), and the U.S. Department of Agriculture (USDA), Food Safety and Inspection Service (FSIS) (Docket No. 86F–0509). In the **Federal Register** of March 3, 1987 (52 FR 6391), FDA published a notice announcing the filing of the petition submitted by RTI (FAP 8M3422), and in the **Federal Register** of February 20, 1987 (52 FR5343), FDA published a notice announcing the filing of the petition submitted by USDA, FSIS, (FAP 7M3974). FDA based its decision on data contained in both petitions and in its files.

II. Objections, Requests for a Hearing, and Request for a Stay

Section 409(f) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348(f)), provides that, within 30 days after publication of an order relating to a food additive regulation, any person adversely affected by such order may file objections, specifying with particularity the provisions of the order ''deemed objectionable, stating reasonable grounds therefor,'' and may request a public hearing based upon such objections. FDA may deny a hearing request if the objections to the regulation do not raise genuine and substantial issues of fact that can be resolved at a hearing.

Under 21 CFR 171.110 of the food additive regulations, objections and requests for a hearing are governed by part 12 (21 CFR part 12) of FDA's regulations. Under § 12.22(a) each objection: (1) Must be submitted on or before the 30th day after the date of publication of the final rule; (2) must be separately numbered; (3) must specify with particularity the provision of the regulation or proposed order objected to; (4) on which a hearing is requested must specifically so state; failure to request a hearing on an objection constitutes a waiver of the right to a hearing on that objection; and (5) requesting a hearing must include a detailed description and analysis of the factual information to be presented in support of the objection. Failure to include a description and analysis for an objection constitutes a waiver of the right to a hearing on that objection.

Following publication of the poultry final rule, FDA received several identical letters with multiple signatures and two submissions from Food and Water, Inc. (FWI), within the 30-day objection period. The submissions sought revocation of the final rule and requested a hearing. One of FWI's objections also requested that the regulation be stayed pending a public hearing of the scientific issues. The other FWI submission also requested an extension of the ''comment'' [sic] period.

III. Standards for Granting a Hearing

Specific criteria for deciding whether to grant or deny a request for a hearing are set out in § 12.24(b). Under the regulation, a hearing will be granted if the material submitted by the requester shows, among other things, that: (1) There is a genuine and substantial factual issue for resolution at a hearing; a hearing will not be granted on issues of policy or law; (2) the factual issue can be resolved by available and specifically identified reliable evidence; a hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions; (3) the data and information submitted, if established at a hearing, would be adequate to justify resolution of the factual issue in the way sought by the requestor; a hearing will be denied if the data and information submitted are insufficient to justify the factual determination urged, even if accurate; and (4) resolution of the factual issue in the way sought by the person is adequate to justify the action requested; a hearing will not be granted on factual issues that are not determinative with respect to the action requested (e.g., if the action would be the same even if the factual issue were resolved in the way sought).

A party seeking a hearing is required to meet a ''threshold burden of tendering evidence suggesting the need for a hearing'' (*Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 214–215 (1980) *reh. den*., 445 U.S. 947 (1980), citing *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620–621 (1973)). An allegation that a hearing is necessary to ''sharpen the issues'' or to ''fully develop the facts'' does not meet this test (*Georgia Pacific Corp*. v. *U.S. E.P.A.*, 671 F.2d 1235, 1241 (9th Cir.

1982)). If a hearing request fails to identify any factual evidence that would be the subject of a hearing, there is no point in holding one. In judicial proceedings, a court is authorized to issue summary judgment without an evidentiary hearing whenever it finds that there are no genuine issues of material fact in dispute and a party is entitled to judgment as a matter of law (see Rule 56, Federal Rules of Civil Procedure). The same principle applies in administrative proceedings (see § 12.28).

A hearing request must not only contain evidence, but that evidence should raise a material issue of fact concerning which a meaningful hearing might be held (*Pineapple Growers Association* v. *FDA*, 673 F.2d 1083, 1085 (9th Cir. 1982)). Where the issues raised in the objection are, even if true, legally insufficient to alter the decision, the agency need not grant a hearing (*Dyestuffs and Chemicals, Inc.* v. *Flemming*, 271 F.2d 281 (8th Cir. 1959), *cert. denied*, 362 U.S. 911 (1960)). FDA need not grant a hearing in each case where an objector submits additional information or posits a novel interpretation of existing information (see *United States* v. *Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971)). In other words, a hearing is justified only if the objections are made in good faith and if they ''draw in question in a material way the underpinnings of the regulation at issue'' (*Pactra Industries* v. *CPSC*, 555 F.2d 677 (9th Cir. 1977)). Finally, courts have uniformly recognized that a hearing need not be held to resolve questions of law or policy (see *Citizens for Allegan County, Inc.* v. *FPC*, 414 F.2d 1125 (D.C. Cir. 1969); *Sun Oil Co.* v. *FPC*, 256 F.2d 233, 240 (5th Cir.), *cert. denied*, 358 U.S. 872 (1958)).

Even if the objections raise material issues of fact, FDA need not grant a hearing if those same issues were adequately raised and considered in an earlier proceeding. Once an issue has been so raised and considered, a party is estopped from raising that same issue in a later proceeding without new evidence. The various judicial doctrines dealing with finality can be validly applied to the administrative process. In explaining why these principles ''self-evidently'' ought to apply to an agency proceeding, the D.C. Circuit wrote:

> The underlying concept is as simple as this: Justice requires that a party have a fair chance to present his position. But overall interests of administration do not require or generally contemplate that he will be given more than a fair opportunity.

Retail Clerks Union, Local 1401, R.C.I.A. v. *NLRB*, 463 F.2d 316, 322 (D.C. Cir. 1972). (See *Costle* v. *Pacific Legal Foundation, supra* at 1106. See also *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1966).)

In sum, a hearing request must present sufficient credible evidence to raise a material issue of fact and the evidence must be adequate to resolve the issue as requested and to justify the action requested.

IV. Analysis of Objections and Response to Hearing Requests

The objections to the poultry final rule can be categorized into two broad areas—those objecting to FDA's safety determination, and those objecting to FDA's finding of no significant environmental impact (FONSI). FDA addresses each of the objections below, as well as the data and information filed in support of each, comparing each objection and the information submitted in support of it to the standards for granting a hearing in § 12.24.

A. Safety of Irradiation to Control Microorganisms in Poultry

1. FDA's Determination of Safety

Under 21 CFR 170.3(i), safety of a food additive means that there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under the intended conditions of use. FDA's regulations reflect the Congressional judgment that the additive must be properly tested and such tests carefully evaluated, but that the additive need not, indeed cannot, be shown to be safe to an absolute certainty. The House Report on the Food Additives Amendment of 1958 stated: ''Safety requires proof of a reasonable certainty that no harm will result from the proposed use of the additive. It does not—and cannot—require proof beyond any possible doubt that no harm will result under any conceivable circumstance'' (H. Rept. 2284, 85th Cong., 2d sess., 1958).

The poultry final rule discussed in detail FDA's evaluation of the safety of ionizing radiation for use to control food-borne pathogens in poultry (55 FR 18538). In concluding that irradiation doses up to 3 kiloGray (kGy) used on poultry had been shown to be safe, FDA reviewed three major animal feeding studies—a multigenerational feeding study in rats, a chronic feeding study in rats, and a 1-year feeding study in dogs. These studies provided the basis for FDA's conclusion regarding toxicological safety of the use of ionizing radiation in poultry. All three studies were conducted at Centraal Instituut Voor Voedingsonderzoek (CIVO); in each study, irradiated chicken constituted 35 percent (by dry weight) of the test diet. FDA concluded that the CIVO studies were of high quality, and that they provided no evidence of any adverse effects attributable to consumption of diets containing chicken irradiated at 3 or 6 kGy.[1]

FDA also reviewed all other data in its files relevant to the safety of irradiated chicken, including several in vitro and in vivo mutagenesis and genetic toxicity studies conducted using irradiated chicken. Such tests are often used to screen for possible association of carcinogenicity with a test substance by looking for positive mutagenic responses (genotoxicity). The agency concluded that several of these tests were well conducted and demonstrated the lack of mutagenic effects from the irradiated chicken. The agency noted deficiencies in other genetic toxicity tests that prevented reliance on such tests as a basis for a safety assessment but none of the tests provided evidence of a mutagenic effect.

In sum, the agency concluded on the basis of all the evidence, including the toxicological information before it, that poultry irradiated at up to 3 kGy was safe (55 FR 18538 at 18543).

2. Objections

a. *Letters*. FDA received several letters with multiple signatures that were substantially identical in content. This group of letters asserted that FDA's safety decision regarding the use of ionizing radiation on poultry was based solely on tests in mice, rats, and dogs, and raised a concern that studies in FDA's files, other than those described previously, used chicken that was irradiated under conditions that are different from those in the regulation issued by FDA. This group of letters states that human epidemiology studies should be conducted to establish the safety of the use of radiation, and that public hearings should be held. None of the letters included any information to support this objection.

Because these submissions provided no information to support their assertion regarding FDA's safety review, they provide no basis for FDA to reconsider its decision to issue the poultry final rule. Moreover, these submissions provide no basis for

[1] FDA also reviewed a carcinogenicity study in mice, conducted by Bio-Research Laboratories Ltd., in which the test diet contained 50 percent irradiated chicken. The agency noted that the mouse study results raised no concern that irradiated chicken is carcinogenic. However, FDA did not rely on this study because there were deficiencies in the data and report.

granting a hearing because a hearing request must include specifically identified reliable evidence that can lead to resolution of a factual issue in dispute. A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions (§ 12.24(b)(2)). Therefore, FDA is denying the hearing requested by these letters.

b. *Objections by FWI.* In one of its submissions, FWI contends that ''FDA has failed to demonstrate that there is a 'reasonable certainty' that irradiation of poultry at 300 krad [3 kGy] is not harmful, and that therefore the Agency's approval is arbitrary and capricious.'' FWI gives four reasons for its contention.

i. *Power of the CIVO chronic rat feeding study.* First, FWI raises an issue about the statistical power of the chronic feeding study in rats conducted by CIVO. Specifically, FWI asserts that this feeding study was inadequate for determining safety because the study did not have sufficient statistical power to demonstrate that the cancer risk from consumption of irradiated chicken would be less than one in a million. FWI stated: ''In accordance with procedures applied to food additives generally, testing must be of such sensitivity that even a small incremental risk of cancer cannot escape detection, namely one per million, extrapolated to a typical human consumer.'' FWI provided the results of statistical analyses regarding the power of the test. In a background statement in its submission, FWI also stated that ''(g)iven the evidence that the formation of genotoxic radiolytic products can and does occur, a petitioner seeking approval of irradiation of poultry * * * should bear the burden of establishing the magnitude of expected cancer risk, or that it is below a stated level.'' In support of its objection, FWI submitted only a table entitled ''Identification of Genotoxic Radiolytic Products in Irradiated Organic Media or Food,'' but this table contained no information on genotoxicity data from irradiated poultry. FWI's objection did not dispute FDA's conclusion that the evidence demonstrated that irradiated poultry was not mutagenic (55 FR 18538 at 18540).

Neither FDA's guidelines nor generally accepted scientific procedures suggested for food additive testing recommend that carcinogenicity testing be sufficiently sensitive to detect an increased cancer risk of one in one million.[2] FWI provided no information to support its contention, either by reference to FDA's regulations or to any other requirement. Thus, FDA concludes that this objection raises no issue of fact that can be resolved at a hearing. Instead, the objection simply states FWI's preference for a policy regarding carcinogenicity testing. A hearing will not be granted on issues of policy or law (§ 12.24(b)(1)).

In addition, FDA does not dispute FWI's contention that the statistical power of this test is such that it cannot detect an increased cancer risk of one in one million. However, FWI did not demonstrate why prevailing on this factual issue would be adequate to justify the action requested (§ 12.24(b)(4)).

Additionally, FWI suggested that to increase sensitivity of the testing the radiation dose should have been increased tenfold or that concentrated extracts of all radiolytic products formed by irradiating chicken should have been fed.[3] Once again, FWI submitted no information to establish that the testing it recommended is required to demonstrate safety, or even that such testing would be valid to assess safety. Nor did FWI provide any information concerning how one can conduct such a study or how one can interpret the findings in the context of poultry irradiated at a dose not to exceed 3 kGy. Because FWI provided no evidence to consider in support of its assertion, FDA is denying the request for a hearing on this point because a hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions (§ 12.24(b)(2)).

ii. *Addition of ethoxyquin to irradiated chicken in the CIVO studies.* In the CIVO studies, the researchers removed water from the chicken by drying over hot air, in order to preserve the chicken for the time needed to complete the testing. Prolonged contact with hot air causes lipids (fats) to be oxidized to lipid peroxides, thereby rendering the food rancid and unpalatable. Prolonged storage can also lead to rancidity. Thus, the researchers added ethoxyquin, an antioxidant, to the chicken to prevent rancidity. Preventing rancidity by this means is of importance for a product dried and stored, as in the test.

In its second contention, FWI states that the CIVO studies were seriously compromised because the addition of the antioxidant ethoxyquin to the chicken decreased the levels of lipid peroxides in the irradiated chicken to levels comparable to those in unirradiated chicken. FWI contends that these decreased levels would interfere with the observation of toxicity from the lipid peroxides that were formed in higher amounts during the hot air drying of irradiated chicken than in the unirradiated chicken.

In the poultry final rule, FDA noted that ethoxyquin had been incorporated into both the control diets and the test diets in the CIVO studies. The agency acknowledged (55 FR 18538 at 15839 and 15840) that FDA reviews of the CIVO studies had raised the question of

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[2] In fact, it would not be feasible to conduct such testing in laboratory animals for substances ordinarily consumed at anything other than trivially low levels in the diet. Generally, to increase the power of a test one must increase the amount of test substance fed or increase the number of animals in each group. For example, the standard approach to assess low levels of carcinogenic risk is to feed a substance in large amounts, determine the risk at such a high dose, and extrapolate to lower doses using a linear extrapolation model. Using such a model to detect an increased risk of one in one million from a substance and assuming that the study design could detect a 10 percent cancer incidence at a high dose, one would have to feed an animal 100,000 times the amount it would consume under realistic conditions. This clearly cannot be done with a diet of chicken. Alternatively, testing thousands of animals per group would overwhelm normal laboratory capabilities.

Under FDA guidelines, testing of a food additive is generally conducted at levels no higher than 5 percent of the diet for nonnutritive substances. This level can be higher for a nutritive substance, however, provided it does not cause a significant nutritional deficit (Ref. 1). As noted previously and discussed in detail in the poultry final rule, the CIVO studies fed chicken irradiated at the maximum dose allowed by the regulation, as well as at twice that dose, in amounts equivalent to 35 percent of the diet (by dry weight). Moreover, based on its review of the mutagenicity data, FDA concluded that there was no basis to suspect that irradiated chicken would be carcinogenic.

[3] Irradiation doses typically can be raised only marginally higher than would be used in practice before they produce effects that would change food significantly, often producing an unpalatable product that animals will not eat. Special processing conditions can be used to minimize such effects, however, such as irradiating food in the frozen state in the absence of air. In the poultry final rule, FDA cited tests conducted at a dose approximately 10 times higher than the CIVO studies, which studies showed no adverse effects related to irradiation (55 FR 18539 at 18540). FDA relied primarily on the CIVO studies, however, because FDA would not expect irradiation of poultry at a dose below 3 kGy to be conducted using the processing conditions required for the higher dose.

Extracts of irradiated foods have not been relied on primarily for testing because radiolytic products of food do not differ in any particular chemical or physical properties from other components of food that would allow them to be specifically extracted from food. Additionally, radiolytic products are typically identical to substances that occur naturally in foods. Therefore, FDA is not aware of how one could prepare an extract that would ensure the presence of all radiolytic products while excluding the presence of other similar components of food that did not result from irradiation. The only way to ensure that all radiolytic products are present is to feed the irradiated food itself.

whether the addition of ethoxyquin could compromise the study and that this issue needed to be resolved before FDA could reach a safety decision. After careful consideration, FDA concluded that the addition of ethoxyquin to prevent rancidity of the chicken fat did not confound the results of the study.

The effect of ethoxyquin is to retard, during storage, the normal oxidation to peroxides of the fatty content of the diet. Importantly, ethoxyquin cannot reverse oxidation that has already taken place. In the CIVO studies, ethoxyquin was added after irradiation of the meat. Therefore, its presence would not alter the effects of radiation on the food (including any potential effects on the formation of lipid peroxides), as might occur if ethoxyquin had been added beforehand and were present during irradiation.[4]

FWI did not dispute FDA's explanation in the final rule as to why addition of ethoxyquin did not compromise the CIVO studies, and provided no information to contradict the agency's conclusion. Further, FWI did not show that FDA failed to consider important information that would have altered the agency's conclusion on this issue. Therefore, FDA is denying this objection and request for a hearing because a hearing will not be held if there is no factual issue that can be resolved by available and specifically identified reliable evidence (§ 12.24(b)(2)).

iii. *Adequacy of all CIVO studies—other issues.* In its objection, FWI also refers to ''* * * additional concerns regarding all the CIVO studies (storage of the irradiated chicken for periods far in excess of those anticipated for human consumers; possibly excessive supplementation of diets with vitamins A and E) and for the chronic feeding study in particular as noted in memoranda provided by the FDA * * *.'' FWI submitted no information to substantiate these concerns. FWI stated, however, that the short amount of time available to file objections following issuance of the poultry final rule precluded a detailed examination of the issues raised by these studies.[5]

FDA is denying FWI's request for a hearing to the extent that it is based on these particular contentions because FWI's request identified no particular factual issue in dispute and also because FWI provided no specific evidence that could be considered at such a hearing. As noted, a hearing will not be granted on the basis of mere allegations or descriptions of positions or contentions (see § 12.24(b)(1) and (b)(2)).

iv. *Compliance with the Bureau of Foods Irradiated Food Committee (BFIFC) report of 1980.* Finally, FWI asserts that the irradiated poultry final rule did not comply with all the recommendations of the BFIFC report issued in 1980. FWI also expressed disagreement with recommendations in that report.

The BFIFC report is an internal document prepared by FDA scientists that provides recommendations for evaluating the safety of irradiated foods based on the known effects of radiation on foods and on the capabilities of toxicological testing. The report was made available to the public for comment in the **Federal Register** of March 27, 1981 (46 FR 18992). While the report and the comments received on it have aided FDA's thinking regarding the safety testing of irradiated foods, the report established no requirements. FDA cited the BFIFC report in a footnote in the poultry final rule (55 FR 18538 at 18541) to illustrate how the toxicological data the agency considered (much of which was submitted before issuance of the BFIFC report) compared to the recommendations in the report.

Consistent with section 409 of the act, FDA's decision on the safety of irradiation of poultry was based on the entire record of that proceeding. Further, as discussed in the poultry final rule, in reaching its conclusion that irradiation of poultry under conditions specified in the regulation does not present a toxicological hazard (55 FR 18538 at 18541), FDA evaluated both studies submitted in the petitions as well as other studies of irradiated chicken available in agency files. Although FWI alleged that some of the studies that FDA evaluated did not comply with recommendations in the BFIFC report, FWI did not present any evidence that these alleged inconsistencies, even if true, would have led to a different conclusion concerning the safety of irradiation of poultry. Therefore, FDA is denying this objection and request for a hearing because it raises no factual issue that, even if resolved in the way sought by the objection, would justify the action requested (§ 12.24(b)(4)).

B. Environmental Issues

1. FDA's Finding of No Significant Impact

In reaching its decision to permit the irradiation of poultry at up to 3 kGy, the agency carefully considered the environmental effects of this action, as required under the National Environmental Policy Act (NEPA). After carefully reviewing the environmental assessment (EA) submitted by FSIS for FAP 7M3974 and environmental information submitted by RTI for FAP 8M3422, FDA concluded that this particular action would not have a significant impact on the human environment, and that an environmental impact statement was not required. The agency's FONSI and the evidence supporting it, including material from both the FSIS' EA and the submissions from RTI, were placed on display at FDA's Dockets Management Branch.

A key element in the EA and in FDA's FONSI is the regulatory controls exerted by various regulatory bodies, such as the Nuclear Regulatory Commission (NRC), the Occupational Safety and Health Administration, the Department of Transportation, the Environmental Protection Agency, FDA itself, and various State and local authorities. These controls are designed to ensure that any substances that may be lawfully emitted into the environment will not pose a significant environmental impact. These controls and regulations were cited in the materials considered by FDA, which material formed the basis of its FONSI.

2. Objections by FWI

In its second objection, FWI contends that FDA's FONSI is ''inadequate.'' FWI requested the preparation of an Environmental Impact Statement (EIS) and an open public hearing on the existing and potential dangers of the irradiation industry. Specifically, FWI maintained that the agency's FONSI is inadequate because it:

* * * relies strictly on information submitted by those who stand to gain from the approval of poultry irradiation; * * * extensively cites materials submitted by Martin Welt, a convicted felon with a criminal record of deceiving federal regulatory agencies; * * * completely disregards the fact that there have already been numerous irradiation accidents and, thus, must be deemed inadequate.

The objection also states that:

In documents released by FSIS within the past year, initially there is no mention of

[4] Moreover, ethoxyquin would not be needed for poultry irradiated and stored under typical commercial conditions. Commercial needs would require processing and storage practices that would prevent development of rancidity in order to provide a marketable product. Thus, the agency does not expect that high levels of lipid peroxides will be present in foods that are sold for human consumption.

[5] With respect to the limited time available for objections, FDA notes that the notice of filing for FAP 8M3422, which petition contained these studies, was published more than 3 years prior to FDA's decision. Thus, all safety information in the petition, including the CIVO studies, was available to FWI under the Freedom of Information Act for a significant period of time (21 CFR 171.1(h)(1)).

irradiation as a potential research area; and then, later, the FSIS declares that alternatives to the irradiation solution need not be discussed when considering the environmental impact of the technology. This contradiction alone warrants a hearing and should prove the need for a full Environmental Impact Statement.

Finally, the objection also requested an extension of the comment period, asserting that:

FDA; * * * received the original petition (FAP 7M3974) seeking approval for poultry irradiation in February, 1977 [sic] and, thus, it has taken your agency more than 13 years to come to your final decision. You are now granting the public a mere 30 days to comment on a ruling that took your agency more than 13 years to decide upon.

FDA notes that FWI misinterprets the statutory 30-day objection period, which is specified in section 409(f) of the act, as an opportunity for comment. The poultry final rule issued in the **Federal Register** of May 2, 1990, was a final rule and the opportunity for comment ended at that time. As noted in section I of this document, the agency had announced in the **Federal Register** of February 20, 1987, the filing of FAP 7M3974 and the filing of FAP 8M3422 in the **Federal Register** of March 3, 1987. Thus, FWI had notice of the filing of the petitions and had ample time to comment. The time to submit objections is established by statute (section 409(f) of the act), and thus, is not a deadline established by FDA. However, because the submission from FWI was submitted within the objection period, FDA is considering it as an objection.

In the following discussion, FDA addresses each of FWI's points outlined previously, as well as the data and information filed in support of each, comparing each to the standards for a hearing in § 12.24.

a. *Information submitted by interested parties.* The mere fact that information has been submitted by a party with an interest in an issue under agency consideration is not sufficient reason to reject that information.[6] In fact, each petitioner is required by FDA regulations to submit an EA as part of its food additive petition unless the action sought by the petitioner qualifies for a categorical exclusion. In assessing the potential environmental impact that could result from the approval of use of a food additive, including the use of sources of radiation in food processing, FDA critically evaluates the information submitted in the petitioner's EA, consistent with the applicable agency regulations (part 25 (21 CFR part 25)).

FWI has failed to submit any evidence that would call into question the validity of any of the specific information submitted by the petitioners and relied upon by FDA. FWI is merely asserting its opinion that an EA submitted by a petitioner is inherently inadequate. Accordingly, the agency is denying FWI's request for a hearing because a hearing will not be granted on issues of policy or law (§ 12.24(b)(4)), nor will one be granted on the basis of mere allegations or denials or general descriptions of positions or contentions (§ 12.24(b)(1)).

b. *Petitioner convicted of crimes.* In its objection, FWI also contends that the agency's FONSI is inadequate because ''* * * it extensively cites materials submitted by Martin Welt, a convicted felon with a criminal record of deceiving federal regulatory agencies.'' FWI did not provide any specific information to question the reliability or accuracy of the environmental information contained in FAP 8M3422[7] or FAP 7M3974. To support its objection, FWI submitted a copy of the government's sentencing memorandum in *United States* v. *Welt*, Criminal #88–87, U.S. District Court, District of New Jersey, 1988, (dated August 30, 1988, from Samuel A. Alito, Jr., United States Attorney, to the Honorable Maryanne Trump Barry, United States District Court, District of New Jersey, with attachments).

A food additive regulation is a conclusion that use of the additive in compliance with the conditions of use specified in such regulation is safe; a food additive regulation is not a license for an individual petitioner. Similarly, the FONSI is a conclusion that use of the additive under the proposed conditions of use, which includes compliance with applicable Federal, State, and local regulations, will not result in a significant impact on the human environment. The fact that Martin Welt (once the president of one of the petitioners) is a convicted felon is not in dispute. However, Dr. Welt's status is wholly irrelevant to the agency's evaluation of the potential environmental impact of the poultry final rule. FDA evaluated the environmental information supplied by RTI and the EA submitted by FSIS in an independent, scientific and critical fashion. It is the quality of the data and conclusions drawn from the information provided that are important. FWI raised no allegation as to the accuracy or credibility of the submitted information, nor did it identify any information FDA ignored or misinterpreted in issuing its FONSI. Accordingly, FDA is denying FWI's request for a hearing on this issue because a hearing will not be granted on factual issues that are not determinative to the action requested (see § 12.24(b)(4)).

c. *Accidents at irradiation facilities.* FWI also objected to the agency's FONSI on the grounds that the EA prepared by USDA ''fails to mention the numerous irradiation accidents which have already occurred in the U.S.—many of which have resulted in environmental, worker and product contamination.'' FWI contends that should the poultry industry widely adopt the use of irradiation, the need for irradiation facilities will be greatly expanded and that there are additional risks inherent in such an expanded irradiation industry. In support of its objection, FWI submitted the following:

1. A document entitled ''Fact Sheet—Radiation Sterilizers, Inc. (RSI) Incident, prepared by James L. Setser.''

2. A document entitled ''Summary—First Interim Report of the RSI Incident Evaluation Task Force,'' June 1989.

3. A document entitled ''Statement Before the Incident Evaluation Task Force for the Governor of Georgia,'' prepared by Judith H. Johnsrud, Research Director, Food and Water, Inc., October 17, 1988.

4. A list of ''Irradiation incidents at large scale gamma irradiation facilities, 1974 to 1988,'' compiled by Brion Sprinsock, National Coalition to Stop Food Irradiation.

5. A transcript of the morning session of the U.S. Nuclear Regulatory Commission Irradiator Workshop held on May 24, 1988.

FDA's action in issuing a food additive regulation permitting the irradiation of poultry at up to 3 kGy allows licensed irradiation processors to include poultry among the products treated at their facilities. Such irradiation of poultry is subject, however, to all applicable regulations, including local, State, and Federal safety regulations. FDA's FONSI is a statement that irradiation of poultry, in compliance with all applicable regulations, will not have a significant impact on the environment. It is entirely reasonable for FDA to evaluate the environmental effects of this food additive approval on the basis that facilities will operate in compliance with applicable safety rules. To assume that facilities will not operate in such

[6] Moreover, the agency notes that, the USDA, one of the petitioners, does not stand to gain from the approval of poultry irradiation, contrary to FWI's contention that the environmental information was submitted by those who do.

[7] Dr. Martin Welt was the president of RTI when it submitted FAP 8M3422. As the responsible company official, he signed the environmental information submitted in that petition. At the time FDA issued its final rule, Dr. Welt was no longer part of RTI management.

compliance would be highly speculative and essentially be a requirement that FDA perform a worst-case analysis when evaluating the potential environmental impact of an agency action. This is simply not what NEPA requires (see *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989)).

Importantly, the poultry final rule, in and of itself, does not permit any additional building or operation of irradiation facilities, and thus, does not directly result in any increased risk of accidents at such facilities. Before an irradiation facility is built, other regulatory agencies with oversight regarding its site design, location, licensing, and radiation control procedures (such as the NRC) must issue permits. The evaluation of the environmental impact of the construction and operation of these facilities is, under NEPA, the responsibility of the licensing agency or agencies. FDA's environmental evaluation in this case, and thereby FDA's FONSI, was not intended to reassess the environmental impact issues that are the responsibility of other regulatory agencies. In fact, under NEPA, an agency is not required to assess the environmental impact of a portion of a project where a second agency has jurisdiction over such portion (see *State of N.C.* v. *City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991)).

Accordingly, even if there have been accidents at irradiation facilities, or even if there would be an increased risk of such accidents as a result of the poultry final rule, these facts have no bearing on FDA's EA of its action. Thus, FDA is denying a hearing on this issue because a hearing will not be granted on factual issues that are not determinative with respect to the action requested (§ 12.24(b)(4)).

d. *Alleged contradiction*. FWI also objects to FDA's FONSI on the grounds of an alleged contradiction between information in FSIS's EA and other FSIS documents and cites an article from *The Food and Drug Letter* (April 28, 1989) in support of its objection. According to FWI, FSIS declared in its EA that alternatives to irradiation need not be discussed when considering the environmental impact of the technology and yet, in the article in *The Food and Drug Letter*, did not mention irradiation as one of the research areas for potentially solving the bacterial problem.

The material cited by FWI does not support its contention. In preparing an EA, petitioners are required, under § 25.31a(a)(11), to consider alternatives to the proposed action if potential adverse environmental impacts have been identified for the proposed action (§ 25.31a(a)(11)). After evaluating the FSIS' EA, the agency found that irradiation of poultry in compliance with existing laws and regulations will not lead to a significant impact on the environment. Because no adverse impacts are expected, the agency did not require, and FSIS did not address, alternatives to the proposed action under format item 11 of the EA. It should also be noted that, contrary to FWI's contention, FSIS did not claim in its EA that irradiation is the only solution to food-borne pathogens.

The article referred to by FWI from *The Food and Drug Letter* discusses areas identified by FSIS for future research for potential solutions to the problem of microbial contamination in poultry; at that time, irradiation had already been a subject of research as a potential solution to this problem. Thus, there is no contradiction between the statements made by FSIS in its EA and in the article in *The Food and Drug Letter*.

In order to justify a hearing on this issue, FWI would need to provide credible evidence that challenges FDA's conclusion that the irradiation of poultry in compliance with existing regulations will not lead to a significant impact on the environment (see § 12.24(b)(2)). FWI has not done so and, thus, has failed to meet a threshold burden of tendering evidence that suggests a need for a hearing (*Costle* v. *Pacific Legal Foundation*, *supra*, 445 U.S. at 214).

V. Summary and Conclusions

The safety of poultry irradiated at up to 3 kGy has been thoroughly tested and the data have been reviewed by the agency. As discussed previously, FDA concluded that the available studies establish the safety of poultry irradiated at doses up to 3 kGy for human consumption.

The petitioner has the burden to demonstrate safety before FDA can approve the use of a food additive. Nevertheless, once the agency makes a finding of safety in an approval document, the burden shifts to an objector, who must come forward with evidence that calls into question FDA's conclusion (*American Cyanamid Co.* v. *FDA*, 606 F2d. 1307, 1314–1315 (D.C. Cir. 1979)).

None of those objecting to the final rule has identified any information in the record that was misconstrued by FDA to support the objector's claim that the agency incorrectly concluded that consumption of poultry irradiated at up to 3 kGy is safe. Nor has any objector established that the agency overlooked significant information in reaching its conclusion. Indeed, none of the objections presented any relevant evidence that has not already been carefully reviewed and weighed by the agency. The agency has determined that the objections do not raise any genuine and substantial issue of fact that would justify an evidentiary hearing on any of the objections raised (§ 12.24(b)). Accordingly, FDA is overruling the objections and is denying the requests for a hearing. In addition, FWI's request for a stay of the effectiveness of the May 2, 1990, regulation until a hearing is held is moot because FDA is denying all hearing requests.

FDA is confirming May 2, 1990, as the effective date of the regulation.

VI. Reference

The following reference has been placed on display in the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. FDA, Bureau of Foods, ''Toxicological Principles for the Safety Assessment of Direct Food Additives and Color Additives Used in Food,'' Appendix III, p. 18, 1982.

Dated: November 26, 1997.

Michael A. Friedman

Lead Deputy Commissiner for the Food and Drug Administration.

[FR Doc. 97–31739 Filed 12–2–97; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 179

[Docket No. 94F–0289]

Irradiation in the Production, Processing and Handling of Food

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of a source of radiation to treat refrigerated or frozen uncooked meat, meat byproducts, and certain meat food products to control foodborne pathogens and extend product shelf-life. This action is in response to a petition filed by Isomedix, Inc.

DATES: Effective December 3, 1997; written objections and requests for a hearing by January 2, 1998.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Patricia A. Hansen, Center for Food Safety and Applied Nutrition (HFS–206), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3093.

SUPPLEMENTARY INFORMATION:

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I. Introduction

In a notice published in the **Federal Register** of August 25, 1994 (59 FR 43848), FDA announced that a food additive petition (FAP 4M4428) had been filed by Isomedix, Inc., 11 Apollo Dr., Whippany, NJ 07891, proposing that part 179 *Irradiation in the Production, Processing and Handling of Food* (21 CFR part 179) be amended to provide for the safe use of a source of radiation to treat the fresh or frozen raw edible tissue of domesticated mammalian human food sources for purposes of reduction of parasites and microbial pathogens, and extension of product shelf-life.

Several letters, from members of academia and from a trade group, were received in response to the filing of the petition. The letters urged FDA to approve irradiation of beef and other meats, and expressed the belief that the use of irradiation could benefit public health and improve the safety of meat by controlling foodborne pathogens. Because the letters expressed general support for the agency's action, but provided no substantive information, these comments will not be addressed further.

The comments illustrate, however, a heightened public awareness of the health threat posed by pathogens in or on meat. Among these, *Escherichia coli* O157:H7, *Salmonella* sp., and *Clostridium perfringens* are of primary concern from a public health standpoint; *E. coli* O157:H7 because of the severity of the illness associated with the organism, and *Salmonella* and *C. perfringens* because of the high number of outbreaks and individual cases of foodborne illness associated with these pathogens (Refs. 1 and 2).[1]

Although proper handling practices and cooking to recommended internal temperatures are effective interventions in preventing foodborne illness associated with meat products, much effort has gone into the development of other interventions aimed at reducing microbial pathogens. Irradiation has been proposed as one such additional tool.

The subject petition requests that FDA amend the food additive regulations to authorize the use of ionizing radiation to ''control microbial pathogens in raw, fresh-chilled, and frozen intact and comminuted edible tissue of the skeletal muscle and organ meat of domesticated mammalian food sources; with concomitant control of infectious parasites, and, extension of acceptable edible/marketable life of chilled/refrigerated and defrosted meat through the reduction in levels of spoilage microorganisms.'' The petition also specifies that the proposed foods are to be ''primarily from bovine, ovine, porcine, and equine sources.'' The petition requests that a maximum dose of 4.5 kiloGray (kGy) be established for the irradiation of fresh (chilled, not frozen) meat, and that a maximum dose of 7.0 kGy be established for the irradiation of frozen meat.

In this final rule, FDA is adding refrigerated and frozen uncooked meat, meat byproducts (e.g., edible organs such as the liver and the kidneys) and certain meat food products (e.g., ground beef and hamburger) to the list of foods that are authorized (under § 179.26(b)) for treatment with ionizing radiation. In addition, FDA is establishing 4.5 kGy as the maximum permitted dose for irradiation of refrigerated meat, meat byproducts, and certain meat food products; and 7.0 kGy as the maximum permitted dose for irradiation of frozen meat, meat byproducts and certain meat food products.

The foods that are set forth in the regulation below are all subject to the Federal Meat Inspection Act (21 U.S.C. 601, *et seq.*), and are defined by the U.S. Department of Agriculture/Food Safety and Inspection Service (USDA/FSIS) in title 9 of the Code of Federal Regulations. These foods include meat, as defined by USDA/FSIS in 9 CFR 301.2(rr),[2] meat byproducts, as defined by USDA/FSIS in 9 CFR 301.2(tt),[3] and certain meat food products[4] from among those defined by USDA/FSIS in 9 CFR 301.2(uu).

In the text of this document, the term ''meat'' will be used to refer collectively to meat, meat byproducts, and applicable meat food products. When, in the text of this document, the discussion is also applicable to foods that might, in common usage, be referred to as a meat or as a type of meat (e.g., chicken, turkey, or fish), but that

[1] *E. coli* O157:H7 causes hemorrhagic colitis, a severe illness, the symptoms of which include high fever, vomiting, and bloody diarrhea, with consequent dehydration. In patients with weakened or immature immune systems, the infection can progress to hemolytic uremic syndrome (HUS), a life-threatening kidney disease with a mortality rate of 6 percent (Ref. 3). The number of outbreaks in the United States reported to be associated with *E. coli* O157:H7 has increased from 4 in 1992 to 30 in 1994; *E. coli* O157:H7 has been estimated to cause more than 20,000 infections and 250 deaths each year (Ref. 4).

Salmonella sp. are a leading reported cause of foodborne bacterial diseases (Ref. 5) and have been reported to be associated with 48 percent of beef-related outbreaks (Ref. 2). *C. perfringens* is also an important agent of foodborne microbial disease, with a projected incidence of 652,000 cases and 7.6 deaths per year. During 1973 to 1987, beef accounted for 30 percent of all *C. perfringens* type A food poisoning outbreaks (Ref. 6).

[2] *Meat.* (1) The part of the muscle of any cattle, sheep, swine, or goats, which is skeletal or which is found in the tongue, or in the diaphragm, or in the heart, or in the esophagus, with or without the accompanying and overlying fat, and the portions of bone, skin, sinew, nerve, and blood vessels which normally accompany the muscle tissue and which are not separated from it in the process of dressing. It does not include the muscle found in the lips, snout, or ears. This term, as applied to products of equines, shall have a meaning comparable to that provided in this paragraph with respect to cattle, sheep, swine, and goats.

(2) The product derived from the mechanical separation of the skeletal muscle tissue from the bones of livestock using the advances in mechanical meat/bone separation machinery and meat recovery systems that do not crush, grind, or pulverize bones, and from which the bones emerge comparable to those resulting from hand-deboning (i.e., essentially intact and in natural physical conformation such that they are recognizable, such as loin and rib bones, when they emerge from the machinery) which meets the criteria of no more than 0.15 percent or 150 mg/100 gm of product for calcium (as a measure of bone solids content) within a tolerance of 0.03 percent or 30 mg.

[3] *Meat byproduct.* Any part capable of use as human food, other than meat, which has been derived from one or more cattle, sheep, swine, or goats. This term, as applied to products of equines, shall have a meaning comparable to that provided in this paragraph with respect to cattle, sheep, swine, and goats.

[4] Specifically, those meat food products within the meaning of 9 CFR 301.2(uu), with or without nonfluid seasoning, that are otherwise composed solely of intact or ground meat and/or meat byproducts (e.g., ground beef as in 9 CFR 319.15(a); hamburger as in 9 CFR 319.15(b); certain defatted beef or pork products as in 9 CFR 319.15(e) and 9 CFR 319.29(a), respectively; mechanically separated (species) as in 9 CFR 319.5).

do not conform to the definitions of meat, meat byproducts, or meat food products in title 9 of the Code of Regulations, the term ''flesh food(s)'' will be used instead.

II. Evaluation of Safety

Under section 201(s) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 321(s)), a source of radiation used to treat food is defined as a food additive:

> * * * The term ''food additive'' means any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food (including any substance intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding food; and including any source of radiation intended for any such use) * * *.

Under section 409(c)(3)(A) of the act (21 U.S.C. 348(c)(3)(A)), a food additive cannot be approved for a particular use unless a fair evaluation of the evidence establishes that the additive is safe for that use. The concept of safety embodied in the Food Additives Amendment of 1958 (the Amendment) is explained in the legislative history of the provision: ''Safety requires proof of a reasonable certainty that no harm will result from the proposed use of the additive. It does not—and cannot—require proof beyond any possible doubt that no harm will result under any conceivable circumstance'' (H. Rept. 2284, 85th Cong., 2d sess. 4 (1958)). This concept of safety has been incorporated into FDA's food additive regulations (21 CFR 170.3(i)).

The legislative history of the Amendment clearly reflects that Congress recognized that it is impossible to establish with complete certainty the absolute harmlessness of any chemical substance. The concept of safety contained in the Amendment has, as its focus, the reduction of uncertainty about the safety of an additive to the point where the agency can reasonably conclude that no harm will result from its proposed use.

The statute does not prescribe the safety tests to be performed but leaves that determination to the discretion and scientific expertise of FDA. Not all food additives require the same amount or type of testing. The amount and type of testing required to establish the safety of an additive will vary depending on the particular additive and its intended use.

In this particular case, the additive is not, literally, added to food. Instead, a source of radiation is used to process or treat food such that, analogous to other food processes, its use can affect the characteristics of the food. In the subject petition, the intended technical effect is a change in the microbial load of the food, specifically, a reduction in the numbers of microorganisms, both pathogenic and nonpathogenic, in or on meat. It is important to realize, however, that the petitioner is not required to show, nor is FDA permitted to consider, that irradiation of meat has benefits, health or otherwise, for consumers of irradiated meat. The legislative history of the Amendment is clear on this point:

> The question of whether an additive produces such [a technical] effect (or how much of an additive is required for such an effect) is a factual one, and does not involve any judgement on the part of the Secretary whether such effect results in any added 'value' to the consumer of such food or enhances the marketability from a merchandising point of view.

S. Rept. 2422, 85th Cong., 2d sess. 7 (1958). Accord: H. Rept. 2284, 85th Cong., 2d sess. 6 (1958)

Thus, in evaluating the safety of a source of radiation to treat meat intended for human consumption, FDA cannot consider the possible benefits to consumers or to food processors. Instead, the agency must identify the various effects that can result from irradiating this food and assess whether any of these effects may pose a human health risk. In this regard, three areas of concern need to be addressed: potential toxicity, nutritional adequacy, and potential microbiological risk. Each of these areas is discussed in detail in section III of this document.

III. Evaluation of Safety of the Petitioned Use of a Source of Radiation

The petitioner submitted a large number of published articles and other study reports containing data and information in the areas of radiation chemistry,[5] dietary consumption patterns, toxicology, nutrition, and microbiology. FDA has reviewed the data and studies submitted in the petition, as well as other information in its files relevant to the safety and nutritional adequacy of meat treated with ionizing radiation. Specifically, the agency evaluated information concerning:

1. Studies of the radiation chemistry of food components and whole foods, including chemical analyses of irradiated flesh foods.

2. Toxicity studies of flesh foods, including studies of irradiated beef, pork, horse meat, chicken, and fish.

3. Studies of nutrient levels in, and information regarding dietary consumption patterns of, irradiated flesh foods.

4. Studies of the effects of irradiation on both pathogenic and nonpathogenic microorganisms.

A. General Framework

To determine whether the use of a food additive is safe, FDA typically considers the chemical identity and amount of the additive that will be ingested in light of what is known regarding its toxicity. In the case of substances added directly to food, the agency estimates the amount of the additive that will be ingested from the proposed use levels of the additive in particular foods or food types along with consideration of consumption patterns of those foods. Information about the chemical structure of an additive and an assessment of the likely consumption levels of the additive, together with information obtained from toxicological testing, forms the basis for evaluating safety.

In the case of food irradiation, the effects of this form of processing on the characteristics of the treated foods are a direct result of the chemical reactions induced by the absorbed radiation. Research has established that the types and amounts of products generated by radiation-induced chemical reactions (hereinafter referred to as ''radiolytic products'') depend on the chemical constituents of the food and on the conditions of irradiation. Information regarding the chemical structures and the amounts of radiolytic products in particular food types, together with the information obtained from toxicological testing, forms a sound basis for evaluating the toxicological safety of an irradiated food.

In the case of food irradiation, the nutritional adequacy and the microbiological safety of the treated foods must also be evaluated. Research has shown that the principles of radiation chemistry govern the extent of changes both in the nutrient levels and in the microbial load of irradiated foods. Key factors include the specific nutrient or microorganism of interest, the food, and the conditions of irradiation.

[5] The term ''radiation chemistry'' refers to the chemical reactions that occur as a result of the absorption of ionizing radiation. Like all chemical reactions, these radiation-induced reactions depend on the nature of the reactants and on the energy supplied to the system. In the context of food irradiation, the radiation-induced reactions depend on the chemical constituents of the food and such factors as the ambient atmosphere (which also contains potential reactants), the physical state of the food, the ambient temperature, and the radiation dose. Radiation-induced chemical reactions can affect the detailed chemical composition of the food and the cellular components of the microorganisms in or on the food.

B. Radiation Chemistry

Scientists have compiled an enormous body of data regarding the effects of ionizing radiation on different foods under various conditions of irradiation. Because of the complexity in the composition of any food and the large numbers of specific radiation-induced reactions that can occur, the agency will limit its discussion here to the broad principles that are applicable to this decision.[6] These broad principles provide the basis for extrapolation and generalization from data obtained in specific foods irradiated under specific conditions to draw conclusions regarding foods of a similar type irradiated under different, yet related, conditions.

1. Factors Affecting the Radiation Chemistry of Foods

Apart from the chemical composition of the food itself, the factors, or irradiation conditions, that are most important in considering the radiation chemistry of a given food include the radiation dose, the physical state of the food (e.g., the solid or frozen versus the liquid or nonfrozen state), and the ambient atmosphere (air, reduced oxygen, vacuum, etc.).

With respect to dose, the amounts of radiolytic products generated in a particular food have been shown to be directly proportional to the radiation dose (Refs. 7, 8, and 9). Thus, it is entirely sound to extrapolate from data obtained at high radiation doses to draw conclusions regarding the amounts of radiolytic products expected to be generated at lower doses.

The radiation chemistry of food is also strongly influenced by the physical state of the food. If all other conditions, including dose and ambient atmosphere, are the same, the extent of chemical change that occurs in a particular food in the frozen state is less than the change that occurs in the same food in the nonfrozen state. This is a result of the reduced mobility, in the frozen state, of the initial products of irradiation (free radicals, which are highly energetic, unstable molecules). Because of their reduced mobility, these free radicals tend to recombine to form the original substance rather than to diffuse through the food to react with other components of the food matrix and thereby form different substances (Refs. 9 and 10). Thus, both the types and the amounts of radiolytic products are affected by the physical state of the food, and, for a given food, higher radiation doses are needed to effect the same degree of chemical change in frozen versus nonfrozen food. Higher radiation doses are also needed to accomplish the same antimicrobial technical effect in a frozen food versus a nonfrozen food of the same type.

The formation of radiolytic products in a given food is also affected by the ambient atmosphere. Irradiation in an atmosphere of high oxygen content generally produces both a greater variety, and greater amounts, of radiolytic products in the food than would be produced in an atmosphere of lower oxygen content. This is because irradiation initiates certain oxidation reactions, reactions that occur with greater frequency in foods with high fat content (Refs. 11 and 12). The final products of radiation-induced oxidation reactions in foods are similar to those produced by oxidation reactions induced by other processes (e.g., storage or heating in air).

In general, the types of products generated by irradiation are similar to those produced by other food processing methods. Radiation-induced chemical changes, if sufficiently large, however, may cause changes in the organoleptic properties of the food. Because food processors wish to avoid undesirable effects on taste, odor, color, or texture, there is an incentive to minimize the extent of these chemical changes in the food. Thus, irradiation is often conducted under reduced oxygen levels or on food in the frozen state.

2. Radiation Chemistry of the Major Components of Flesh Foods

The major components of all foods are water, carbohydrates, proteins, and lipids. Flesh foods, as a group, have very little carbohydrate content, and are comprised primarily of water, proteins, and lipids. The radiation chemistry of these components is well established.

In foods of relatively high water content, such as flesh foods, free radicals produced by radiolysis of water form the majority of the initial products of the radiation-induced chemical reactions. These free radicals, in turn, react with the other components of the food to form the final, stable, radiolytic products.

With respect to proteins, several types of reactions can occur as a result of irradiation. One type of reaction is the breaking of a small number of peptide bonds to form polypeptides of shorter length than the original protein (Refs. 13 and 14).[7] Radiation-induced aggregation or cross-linking of individual polypeptide chains can also occur; these processes result in protein denaturation (Refs. 13 through 16). In irradiated flesh foods, most of the radiolytic products derived from proteins have the same chemical composition but are altered in their secondary and tertiary structures. These changes are similar to those that occur as a result of heating, but in the case of irradiation, such changes are far less pronounced and the amounts of reaction products generated are far lower.

A third type of reaction that can occur when proteins are irradiated involves the reaction of amino acids in the polypeptide chain with the free radicals produced from water, without the breaking of peptide bonds (Refs. 17 and 18). The compounds produced by such reactions, like the other radiolytic products derived from proteins, are similar or identical to those found in foods that have not been irradiated. The radiolytic products resulting from this third type of reaction occur in very small amounts; various studies have established that there is little change in the amino acid composition of flesh foods irradiated at doses below 50 kGy (Refs. 19 and 20), a dose approximately seven times greater than the highest dose set forth in the regulation below.

The radiation chemistry of lipids (fats) is also well established.[8] Numerous studies have been performed with various oils and fats and also on the lipid fraction of irradiated foods (see, e.g., Refs. 21 through 25). A variety of radiolytic products derived from lipids have been identified, including fatty acids, esters, aldehydes, ketones, alkanes, alkenes, and other hydrocarbons (Refs. 7, 22, 23, 25, and 26a through 26c).[9] All of these types of

[6] Several books provide more detailed discussions of radiation chemistry with references to the large number of original research studies, particularly in the area of food irradiation. Sources that can be consulted for further information include, but are not limited to: *Radiation Chemistry of Major Food Components*, edited by P. S. Elias and A. J. Cohen, Elsevier, Amsterdam, 1977; *Recent Advances in Food Irradiation*, edited by P. S. Elias and A. J. Cohen, Elsevier, Amsterdam, 1983; and Diehl, J. F., ''Chemical Effects of Ionizing Radiation,'' Ch. 3 in *Safety of Irradiated Foods*, Marcel Dekker, New York, 1995.

[7] Proteins are composed of amino acids joined by peptide bonds. The characteristic sequence of amino acids in a particular protein is known as the primary structure. The extent and nature of the coiling or pleating of different segments of the protein is known as the secondary structure. The three dimensional shape of the coiled or pleated protein is known as the tertiary structure. Denaturation refers to structural changes that result in a loss of biological properties; these are usually changes in the secondary or tertiary structures.

[8] The fat in meat is composed primarily of triglycerides, each molecule of which contains three fatty acids. The predominant fatty acids in the triglycerides of flesh foods are oleic, palmitic, linoleic, and stearic acid.

[9] One major effort to determine whether radiolytic products in a flesh food presented any risk to human health is described in a report entitled ''Evaluation of the Health Aspects of Certain Compounds Found in Irradiated Beef,'' prepared by the Life Sciences Research Office of the Federation

compounds are also found in foods that have not been irradiated. These types of compounds are also produced by heating foods, and, in the case of heating, are produced in amounts far higher than the trace amounts that result from irradiating foods (Refs. 23 and 27).

In summary, the results obtained from chemical analyses of irradiated flesh foods establish that there would be very small amounts of individual radiolytic products generated by radiation doses comparable to those proposed in the petition. In addition, most of these radiolytic products are either the same as, or structurally very similar to, compounds found in foods that have not been irradiated. Because of their structural similarities to compounds found in foods that have not been irradiated, these radiolytic products would be expected to be toxicologically similar to such compounds as well. Thus, the available information regarding the radiation chemistry of the major components of flesh foods supports the proposition that there is no reason to suspect a toxicological hazard due to consumption of an irradiated flesh food.

3. Flesh Foods as a Generic Class

As noted above, flesh foods are comprised primarily of water, proteins, and lipids.[10] While the proportions of the individual amino acids in the proteins and the individual fatty acids in the lipid fraction vary somewhat among the different flesh foods, the same chemical components provide the basis for any chemical reactions in flesh foods caused by the absorption of ionizing radiation. Because of this, the same compounds (in slightly varying proportions) will constitute the majority of radiolytic products in all irradiated flesh foods.

The large number of studies on the radiation chemistry of food and food components, taken together, support this conclusion regarding commonality in the chemistry and predictability of the types and amounts of radiolytic products (see, e.g., Refs. 14, 18, and 30). Accordingly, it is scientifically sound to generalize from the data obtained in studies of a variety of specific irradiated flesh foods to draw conclusions regarding the irradiation of flesh foods as a class (Ref. 30). Because of the foregoing, FDA has determined that, to evaluate the safety of foods that are the subject of this petition (i.e., meat and meat byproducts as defined in 9 CFR 301.2(rr) and (tt), and certain meat food products from among those defined in 9 CFR 301.2(uu)), it is entirely appropriate to consider the available data from all flesh foods, irradiated under a variety of conditions. Details of the agency's analysis are presented below.

C. Toxicological Considerations

As discussed previously, all of the available information from the results of chemical analyses suggests that there is no reason to suspect a toxicological hazard due to consumption of an irradiated food. However, while chemical analyses have not identified the presence of any particular radiolytic products in amounts that would raise a toxicological concern, the agency notes that the large body of data from studies where irradiated flesh foods were fed to laboratory animals provides an independent way to assess toxicological safety. Thus, the agency has also examined all the available data from toxicological studies that are relevant to the safety of irradiated meat, namely, all of those with flesh foods.

This includes the data relied on by the agency in its previous evaluation of the safety of poultry irradiated at doses up to 3 kGy (discussed in the **Federal Register** of May 2, 1990 (55 FR 18538)), as well as additional data in FDA files from studies of irradiated meat, poultry, and fish. The agency's analysis incorporates the principle that toxicological data collected from studies on foods irradiated at high doses can be applied to the toxicological evaluation of foods of the same generic class receiving lower doses (Refs. 14 and 30). The agency's analysis also takes into account the known effects of other conditions of irradiation, such as the physical state of the food and the ambient atmosphere, to compare the results of different studies. A summary of that analysis is presented below.

1. Toxicity Studies of Flesh Foods Relied Upon by FDA in Previous Safety Evaluations

In the early 1980's, as part of a regulatory initiative on irradiation of minor dry ingredients (e.g., spices and seasonings) and foods irradiated at low doses, the agency conducted a review of all toxicological studies of irradiated foods that were available at that time. In order to come to timely closure on that rulemaking, the agency limited its analysis to whether individual studies could stand alone to support a safety decision and to whether the studies showed any evidence of toxicity attributable to irradiation. The agency found no evidence of toxicity that could be attributed to irradiation of food and amended its regulations to authorize the use of irradiation on foods at low doses (no greater than 1 kGy) and on minor dry ingredients at doses no greater than 30 kGy (51 FR 13376 at 13378, April 18, 1986).

However, FDA concluded that it could not, at that time, expand approval to higher doses for foods other than minor dry ingredients because most of the individual studies had limitations in design or conduct. The agency did not attempt to determine whether the available toxicological studies, taken as a whole, could complement each other and thus compensate for weaknesses in any individual study or whether additional information could be obtained to supplement the available reports. In addition, FDA had not, at that time, assessed the nutritional and microbiological ramifications of irradiating major dietary components at doses above 1 kGy.

Although, as noted, many of the animal feeding studies were not fully adequate by modern toxicology standards, the agency found that several studies were fully adequate in design and conduct and could stand alone in support of safety. One of these studies examined the effects of feeding an irradiated flesh food to animals; specifically, rats were fed beef stew or evaporated milk, each food irradiated at 27.9 and 55.8 kGy (51 FR 13376 at

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of American Societies for Experimental Biology under contract with the U.S. Army (''the FASEB/LSRO report'' and supplements, Refs. 26a through 26c).

This report presented the results of chemical analyses performed on frozen beef irradiated under vacuum at a dose of 56 kGy. Sixty-five volatile radiolytic products were identified, most of which originated from the lipid fraction. This study established that these 65 radiolytic products were either identical or structurally similar to substances found in foods that have not been irradiated, and that these individual radiolytic products were produced in very small amounts (generally 1 to 700 parts per billion of irradiated beef), even at a radiation dose eight times higher than the highest dose requested in the petition.

[10] The proximate composition of flesh foods does not vary widely. Beef and lamb, for example, are composed of approximately 17 to 20 percent protein, 15 to 25 percent fat, and 56 to 65 percent water, depending on the cut. Chicken, depending on the cut and whether the skin is included, is approximately 18 to 25 percent protein, 5 to 19 percent fat, and 57 to 75 percent water. Fish, depending on the species, is approximately 16 to 27 percent protein, 1 to 20 percent fat, and 60 to 75 percent water.

The predominant fatty acids in the triglycerides of flesh foods are oleic, palmitic, linoleic, and stearic acid. The saturated fatty acids (palmitic and stearic acid) contribute approximately 8 to 12 percent of the fat content in both beef and lamb. The fat in chicken (skin on) and pork is composed of approximately 2 to 9 percent saturated fatty acids. The amino acid content of flesh foods also does not vary widely. In beef, pork, lamb, and chicken, tryptophan contributes the smallest weight percentage and lysine the greatest weight percentage to the amino acid content (see Refs. 28 and 29).

13384).[11] The data showed that no treatment-related adverse effects were observed with either irradiated food.

Subsequent to the agency's review of all animal feeding studies, discussed above, FDA further evaluated a series of feeding studies of irradiated poultry, obtaining additional information on some of the studies and analyzing the results in greater detail.[12] The agency has previously discussed the findings of, and its conclusions regarding, these studies in its decision authorizing the irradiation of poultry at doses no greater than 3 kGy (55 FR 18538, May 2, 1990).[13] Briefly, the agency concluded that three animal feeding studies of high quality (a multigeneration study in rats, a chronic study in rats, and a 1-year study in beagle dogs), in which chicken was irradiated at 3 or 6 kGy and administered at a level of 35 percent of the diet, showed no evidence of adverse toxicological effects attributable to irradiation (55 FR 18538 at 18539 and 18540). At that time, the agency also reviewed all other toxicity data on irradiated poultry and found the results to be consistent with a conclusion that irradiated poultry does not present a toxicological hazard.[14]

[11] Although the agency cited this as one study, it would be more accurately described as one report where the results of two chronic feeding studies of irradiated beef stew, one in rats and one in dogs, and two chronic studies of irradiated evaporated milk, also one in rats and one in dogs, were described. The two studies in rats were fully accepted by the agency. The two studies in dogs were not fully accepted in the agency's early review solely because of the small number of animals used.

[12] The earlier review had not fully accepted some of these studies because the reports did not contain a complete discussion of all relevant details. In addition, FDA had not fully addressed the possible significance of the use of an antioxidant to prevent rancidity from developing during drying of the meat for storage. The agency subsequently concluded that the studies were acceptable after receiving additional information from the laboratory, and after determining that the antioxidant could not have changed the effects due to irradiation because it was added after the chicken was irradiated (see 55 FR 18538 at 18539 and 18540).

[13] Following publication of the final rule, FDA received several letters and two submissions within the 30-day objection period. The submissions sought revocation of the final rule and requested a hearing. Elsewhere in this issue of the **Federal Register**, FDA is denying the objections and requests for a hearing because they do not raise issues of material fact that justify a hearing or otherwise provide a basis for revoking the final rule.

[14] The agency evaluated several other studies in which animals were fed radiation-sterilized chicken and one in which mice were fed chicken irradiated at 7 kGy. No treatment-related adverse effects were seen in any of these studies (55 FR 18538 at 18540). However, because, in the studies of radiation-sterilized chicken, the conditions of irradiation were different from what would be used in commerce under the regulation sought by the petitioner, and because of deficiencies in the data from the study of chicken irradiated at 7 kGy, FDA did not rely explicitly on these studies.

In summary, the agency has previously found that the following toxicological studies of irradiated flesh foods, tested in fully adequate animal feeding studies, demonstrated no adverse health effects that could be attributed to irradiation: beef (as a component of stew) irradiated at doses of 27.9 and 55.8 kGy and tested in a chronic study in rats; chicken irradiated at doses of 3 kGy and 6 kGy and tested in a three generation reproduction study in rats, a chronic study in rats, and a 1-year study in dogs.

2. Additional Analyses of Toxicity Data

In 1980, a Joint FAO/IAEA/WHO Expert Committee[15] concluded that irradiation of any food commodity at an average dose of up to 10 kGy presents no toxicological hazard (Ref. 31). Based in part on the Expert Committee's conclusion regarding the absence of toxicological hazard (as well as conclusions on the nutritional adequacy and microbiological safety of irradiated foods), the Codex Alimentarius Commission (Codex), in 1984, recommended that member nations adopt the Codex finding that the ''wholesomeness of foods irradiated so as to have absorbed an overall average dose of up to 10 kGy, is not impaired'' (Ref. 32). FDA did not adopt the Codex recommendation in its 1986 rulemaking because, as noted, it had not yet analyzed the issues of nutritional adequacy and microbiological safety in a sufficiently comprehensive way and had not pursued the analysis of toxicity data beyond the examination of individual studies.

Subsequently, WHO, at the request of one of its member States, conducted a new review and analysis of the safety data on irradiated food (Ref. 33). WHO considered the extent to which data on one food type can be extrapolated to other foods and the extent to which individual studies of irradiated foods can be integrated into one large database to be evaluated as a whole, as opposed to separate evaluations of a series of individual studies.

This review included all the studies in FDA's files that the agency considered as reasonably complete, as well as those studies that appeared to be acceptable but had deficiencies interfering with interpretation of the data (see 51 FR 13376 at 13378). The WHO review also included data from USDA and from the Federal Research Centre for Nutrition at Karlsruhe, Germany. WHO explicitly documented, in detail, the data relied on for its conclusion that the integrated toxicological database is sufficiently sensitive to evaluate safety and that no adverse toxicological effects due to irradiation were observed in the dose ranges tested (Ref. 33).

[15] FAO is the Food and Agriculture Organization of the United Nations, IAEA is the International Atomic Energy Agency, and WHO is the World Health Organization.

FDA has previously reviewed the individual studies that are cited in the WHO report and found no evidence of toxicity attributable to irradiation. FDA has now also reexamined these studies to determine whether the integrated toxicological database derived from this body of work, together with the information regarding radiation-induced chemical changes, establishes the toxicological safety of meat irradiated under the conditions set forth in the regulation below.

FDA finds that, while many of these studies cannot individually establish safety,[16] they still provide important information that, evaluated collectively, supports a conclusion that there is no reason to believe that irradiation of flesh foods presents a toxicological hazard (Refs. 34a and 34b). The overwhelming majority of studies reported no adverse toxicological effects due to consumption of irradiated flesh foods; equally important, the few effects observed were not reproduced in other studies.[17] In addition, FDA notes that many of the feeding studies were conducted using flesh foods irradiated at doses far higher than those proposed in the petition, providing some exaggeration in terms of the amounts of radiolytic products consumed.

Details regarding the important features of both WHO's and FDA's recent analyses are presented below. FDA has evaluated all relevant data to ensure that any potential evidence of toxicity would not be overlooked. However, because of the large number of studies in the total database, this document focuses on the types of

[16] For example, the number of animals used in many of the early studies is smaller than that commonly used today. Complete histopathology was not always done or reported. For some studies, the data are available only in brief summary form.

[17] If the radiolytic products in flesh foods irradiated under test conditions were of any toxicological significance, consistent effects, particularly in those tests where the foods were irradiated at comparable doses and under comparable conditions, should have been observed. It is also important to note that at the time many of these studies were conducted, scientists did not fully understand the nutritional ramifications of modifying an animal's diet by feeding it large amounts of foods not normally consumed by laboratory animals. The few adverse effects observed in certain of the studies are consistent with what one could expect based on the nutritional composition of the test diet (Refs. 33 and 35).

studies of irradiated flesh foods that provide the greatest opportunity for detecting a treatment-related effect rather than attempting an exhaustive discussion of all the available studies.[18] In addition, this document concentrates on those studies that were conducted at radiation doses greater than, or comparable to, the doses requested in the subject petition.

3. Chronic Feeding Studies

Both FDA and WHO evaluated chronic studies in which various flesh foods, irradiated at doses ranging from 6 to 74 kGy, were fed to animals (Ref. 36). These include those studies, discussed previously, on which FDA has relied in previous safety evaluations of irradiated foods. The studies in which no adverse effects were reported include the following: (1) Studies in which rats were fed beef irradiated at 56 kGy; pork at 56 kGy; chicken at 6 kGy; fish at 6 kGy; horse meat at 6.5 kGy; fish at 56 kGy; beef stew at 56 kGy; a mixture of beef, pork, fish, and other foods at 28 kGy; pork brain and egg at 93 kGy; and pork at 74 kGy; (2) studies in which mice were fed chicken irradiated at 59 kGy; bacon and bacon fat at 56 kGy; chicken at 7 kGy; fish and beef at 56 kGy; pork brain and egg at 93 kGy; and pork and chicken at 56 kGy; and (3) studies in which dogs were fed chicken irradiated at 59 kGy; chicken, beef, and jam at 56 kGy; bacon and cabbage at 56 kGy, beef at 56 kGy; and chicken at 6 kGy.

In addition to the studies listed above, four chronic studies reported observations that merit further discussion. FDA has concluded that the effects reported in these four studies were either not attributable to irradiation or were otherwise not of toxicological significance.

In one study (Ref. 37), weanling rats fed a mixture of radiation-sterilized (56 kGy) chicken stew and irradiated (6 kGy) cabbage for 19 days were reported to have reduced levels of alkaline phosphatase in duodenal tissue. However, this effect was not seen in weanling rats fed either (but not both) radiation-sterilized chicken stew or irradiated cabbage for 19 days and was not seen in other rats that were fed the irradiated chicken stew/cabbage mixture for 150 days. Additionally, no adverse histopathological findings that would indicate a toxic effect were reported. FDA concludes that the observed decrease in alkaline phosphatase levels in weanlings is not of toxicological significance for three reasons: (1) The effect observed in weanling rats was not observed in rats maintained on the same diet into adulthood, (2) the effect was not reproduced when either of the two irradiated foods was fed individually, and (3) no other reported observations indicate a toxic effect (Ref. 38).

In a second study (Ref. 39), a diet composed of a mixture of nine foods, including bacon, beef, ham, and fish was radiation-sterilized (56 kGy) and fed to rats. This study reported a decreased weight gain for third generation females, but not for males. FDA has concluded that this effect cannot be attributed to irradiation because it was accompanied by breeding problems that significantly reduced the sizes of the groups of rats fed the control diet as well as the groups of rats fed the irradiated diet, an observation that is indicative of overall dietary deficiencies unrelated to radiation treatment (Ref. 35).

A third study (Ref. 40) reported a significant increase in heart lesions (auricular dilatations) in mice fed radiation-sterilized (56 kGy) pork and chicken. FDA has determined that this effect cannot be attributed to the irradiated flesh foods because a replicate study with nearly 5,000 mice of the same strains showed no such lesions. (Refs. 34a and 38).

Finally, a chronic study in dogs fed irradiated (8 kGy) soft shell clams reported a decrease in blood urea nitrogen (BUN) in the males but not in the females (Ref. 41). FDA has concluded that the decreased BUN levels in this study were not of toxicological significance for the following reasons. FDA notes that, while an elevated BUN level could be a sign of kidney malfunction (urea is a metabolite of protein excreted by the kidney), a decrease in BUN level may simply indicate less protein consumed. No significant findings were reported, however, with respect to clinical chemistry parameters other than BUN levels, or in the histopathological examinations. Moreover, given that the normal range of BUN levels in dogs is quite wide, the observed decrease in BUN level is likely to represent an artifact of the low statistical power of the study and is not of toxicological significance (Ref. 38).

In summary, a large number of chronic feeding studies have been conducted in rats, mice, and dogs with flesh foods irradiated at doses between 6 and 74 kGy. In these studies, no toxic effects that can be attributed to radiation treatment were consistently observed.

4. Reproduction and Teratology Studies

FDA has also reviewed the following reproduction/teratology studies (Ref. 42) in which flesh foods, irradiated at doses of 6 kGy or higher, were fed to laboratory animals: (1) Studies in which rats were fed pork irradiated at 56 kGy; chicken and green beans irradiated at 59 kGy; and fish irradiated at 6 kGy (two separate studies with fish); (2) a multigeneration reproduction study and a teratology study in which mice were fed chicken irradiated at 59 kGy and 45 kGy, respectively; (3) two studies in which dogs were fed beef irradiated at 56 kGy; (4) a study in which hamsters were fed chicken irradiated at 45 kGy; and (5) a study in which rabbits were fed chicken irradiated at 45 kGy.

All of these studies, except one, showed no adverse effects. In one of the two studies in which fish irradiated at 6 kGy was fed to rats (''the Shillinger study,'' Ref. 43), rats in the treated group were reported to have an increased incidence of testicular atrophy and prolonged estrous cycles, among other findings. The authors reported no significant difference between experimental and control groups with regard to such standard indices of reproductive function as time of first births, fertility index, number of offspring in the litter, or weight of offspring at birth or at 1 month of age. In addition, no toxic effects on the growth or development of three generations were reported. The authors stated that some of the findings point to a protein deficiency.[19] However, the second reproduction study with fish irradiated at the same dose (''the Hickman study,'' Ref. 44) reported no adverse effects. FDA has concluded that the effects reported in the Shillinger study are not attributable to irradiation for three reasons: (1) The irradiated fish was stored under inappropriate conditions, (2) the results of measurements of blood protein levels

[18] Chronic toxicity studies and reproductive toxicity studies are generally considered to be the most sensitive tools for detecting treatment-related toxicological effects when there is no basis, *a priori*, to expect a particular adverse effect. This is because treatment over the lifetime of the animal in a chronic study allows the longest time for a subtle effect to be manifested, and because the developing organism in reproduction and teratology studies can be particularly sensitive to toxic effects.

[19] Although the irradiated fish was not irradiated at a sterilizing dose or treated to inactivate enzymes that could lead to decomposition, it was stored under refrigeration for up to 2 months. Fish fed to the control group, however, was stored frozen until incorporated into the diet. Irradiated fish, stored under refrigeration, had greater opportunity to undergo decomposition or other spoilage before consumption. The authors did not report addition of vitamins or minerals to the diets and did not report actual nutrient levels in the diet. The authors also reported a higher incidence of pneumonia and parasitic infections in the treated group, varying blood and liver enzyme activities in the different generations, and a lower albumin/globulin ratio (a sign of protein deficiency) in the treated group.

are consistent with a nutritionally inadequate diet, and (3) similar effects were not seen in the Hickman study.

In summary, the agency concludes that the available studies of irradiated flesh foods show no adverse effects on reproductive or developmental endpoints that can be attributed to radiation treatment.

5. Genetic Toxicity Studies

Although chronic feeding studies are the primary basis for assessing potential carcinogenicity of a substance, genetic toxicity tests are often used to screen for possible carcinogenic effects. A large variety of genetic toxicity studies with irradiated chicken, ham, beef, or fish have been conducted (Ref. 45). All of these studies report that no genotoxic effects were observed. FDA agrees that these studies demonstrate that irradiated flesh foods are not genotoxic.

6. Summary of the Toxicological Assessment

As noted previously, chemical analyses and toxicity studies provide independent means for assessing whether there is a reasonable certainty that irradiation of meat will not present a toxicological hazard. Chemical analyses are used to identify substances produced by irradiation that might present a risk. Animal feeding studies and genetic toxicity studies are used to determine whether toxicants may be present in irradiated foods, even if not identified, at levels that would be harmful.

The agency has carefully reviewed the data and information submitted in the petition. The agency has also considered all the available data and studies in its files regarding the radiation-induced chemical changes in flesh foods and the toxicological effects of irradiated meat and other irradiated flesh foods (e.g., chicken and fish) when consumed in the diet.

All the available results of chemical analyses of irradiated flesh foods support the conclusion that a toxicological hazard due to consumption of irradiated flesh foods is highly unlikely, because no substance resulting from irradiation has been found at levels that would suggest any reason for toxicological concern. The results of the available toxicological studies of irradiated flesh foods also demonstrate that a toxicological hazard is highly unlikely because no toxicologically significant adverse effects attributable to consumption of irradiated flesh foods were observed in any of these studies. Thus, the results of the chemical analyses and the toxicological studies are entirely consistent. The agency therefore concludes, based on all the evidence before it, that irradiation of meat under the conditions set forth in the regulation does not present a toxicological hazard.

D. Nutritional Considerations

The nutritional adequacy of an irradiated food may be affected by radiation-induced reductions in the amounts of essential nutrients in the food. FDA has carefully reviewed the data and information submitted in the petition, as well as other information in its files, to determine whether irradiation would have an adverse effect on the nutritional value of meat.

1. Nutrients in Meat

Flesh foods are consumed primarily as sources of protein. The so-called ''red meats,'' beef in particular, are also rich sources of iron and phosphorus. Flesh foods, including red meats, also contribute significantly to the dietary intake of B vitamins, except for thiamine.

Most individual flesh foods, including meats, provide only a minor portion of the dietary intake of thiamine (Ref. 46). The exception to this rule is pork, which contributes approximately 9 percent of the thiamine in the American diet (Refs. 46 and 47). The largest contributors to thiamine intake in the human diet, however, are grains in various foods (e.g., cereals; flour in bread, other baked goods, and pasta) and legumes.

2. Effects of Irradiation on the Nutrients in Meat

It is well known that the nutrient value of the macronutrients in the diet (proteins, fats, and carbohydrates) is not significantly altered by irradiation at the petitioned doses (Refs. 19, 48, and 49). Minerals (e.g., iron, phosphorus, and calcium) are also unaffected by irradiation (Refs. 48 and 49).

Levels of certain vitamins may be reduced, however, as a result of irradiation. The extent to which this occurs depends on the specific vitamin, the food type, and the conditions of irradiation. Not all vitamin loss is significant, however. The extent to which a reduction in a specific vitamin level is significant depends on the relative contribution from the food in question to the dietary intake of the vitamin.

Most of the nutrition-related studies submitted in the petition presented analyses of vitamin levels in irradiated flesh foods. These studies covered a wide range of foods, vitamins, and irradiation conditions. Most of these studies focused on the levels of B vitamins because, as noted, meats and certain edible organs (e.g., the liver and the heart) are better sources of B vitamins than of other vitamins, such as vitamins C or D, for example. For the same reason, FDA's evaluation of the nutritional adequacy of irradiated meat and meat byproducts, which considered all relevant vitamins, focused on the effects of irradiation on the levels of B vitamins. In FDA's evaluation, thiamine levels received particular attention because thiamine is one of the vitamins most susceptible to radiation (Refs. 46 and 50).

In general, the available studies have reported insignificant effects on the levels of B vitamins other than thiamine when flesh foods were irradiated at dose levels comparable to those proposed in the subject petition (Refs. 50, 51, and 52). For example, pork irradiated at a dose of 6.7 kGy showed no detectable loss in cobalamin level and, when irradiated at 5 kGy, showed no detectable loss in niacin level (''the first Fox study,'' Ref. 47). Similar results have been obtained in studies of the effects of irradiation on other B vitamins such as pyridoxine and pantothenic acid (Ref. 52).

Another recently conducted study by Fox et al., (''the second Fox study,'' Ref. 53) compared radiation-induced reductions in B vitamin levels in beef, lamb, pork, and turkey, all of which were irradiated at 5 °C in the presence of oxygen, conditions which would tend to maximize vitamin loss. The authors reported that, even under such conditions, losses of riboflavin resulting from irradiation were virtually undetectable at radiation doses up to 3 kGy and that the losses did not differ significantly among the various flesh foods. The average incremental loss of riboflavin at radiation doses above 3 kGy was reported to be 2.5 percent per kGy, which was judged by the authors as insignificant. FDA agrees that this reduction in riboflavin is insignificant in the context of the total diet (Refs. 46 and 51).

Losses in thiamine levels resulting from irradiation were also measured in the second Fox study. Thiamine losses were detectable at all irradiation doses tested and differed among the flesh foods tested, but the range was fairly narrow: from a low of 8 percent loss per kGy in lamb to a high of 16 percent loss per kGy in beef. The incremental thiamine loss in pork was approximately 11 percent per kGy above 3 kGy when irradiated at 5 °C in the presence of oxygen. These results were consistent with the results of the first Fox study in which pork irradiated at 4.5 kGy at 0 °C (frozen) sustained losses

in thiamine levels of circa (ca.) 40 percent (Ref. 47).

Other studies of the effect of irradiation on thiamine levels in flesh foods, conducted under a variety of irradiation conditions, show losses ranging from approximately 10 to 50 percent over a dose range of 0.6 to 7.3 kGy (Refs. 46, 52, 54, and 55), which is comparable to the dose range that could, in actual practice, be used under the limitations set forth in the regulation. It is important to note that the highest thiamine losses (ca. 50 percent for some, but not all, flesh foods) have occurred when foods were irradiated at the higher doses in this range (ca. 7 kGy), in the nonfrozen state, and/or in the presence of oxygen.

Irradiation of meat is likely to be carried out on products that are in prepackaged form. Meat is commonly packaged under vacuum or reduced oxygen levels at the wholesale level and stored and shipped either refrigerated or frozen (Ref. 2). As discussed previously, irradiation of food in the frozen state (or at reduced temperatures) and under reduced oxygen levels tends to minimize vitamin losses (Ref. 48). Thus, irradiation of most meat, which is likely to be carried out in an atmosphere of reduced oxygen content and at low temperature or in the frozen state, will tend to result in thiamine losses that are far less than 50 percent.

Nevertheless, the agency has conducted an ''extreme case'' assessment of the potential effect on the dietary intake of thiamine that would result if all flesh foods (i.e., meat, poultry, and fish) were irradiated under conditions that would tend to maximize thiamine loss (i.e., such that thiamine levels in all these foods would be reduced by 50 percent). The agency has determined that even in such extreme and unlikely circumstances, the average thiamine intake would still be above the recommended daily allowance (RDA) and, thus, there would be no deleterious effect on the total dietary intake of thiamine as a result of irradiating flesh foods, including meat (Ref. 46).

3. Summary of the Nutritional Assessment

As discussed, FDA has concluded that the effects of irradiation on thiamine, under the conditions set forth in the regulation below, will not result in an adverse effect on the dietary intake of thiamine. Because the effects of irradiation on B vitamins other than thiamine are far less than the effects on thiamine, FDA also concludes that there will be no deleterious effect on the total dietary intake of these other B vitamins (e.g., riboflavin, niacin, cobalamin). In addition, as noted, irradiation does not affect mineral levels, nor, at the doses set forth in the regulation, the nutritional quality of the protein in meat.

FDA therefore concludes, based on all the evidence before it, that irradiation of meat under the conditions set forth in the regulation below will not have an adverse impact on the nutritional adequacy of a person's diet.

E. Microbiological Considerations

Irradiation at the doses requested in the petition will reduce, but not entirely eliminate, the microorganisms in or on meat. Further, because different microorganisms are affected by irradiation to different degrees, irradiation of meat will change the relative amounts of different microorganisms present (the microbiological profile). The microbiological profile and the storage conditions of meat influence the growth patterns of the various microorganisms found in or on this food. Because microorganisms remaining in food after irradiation processing can multiply, FDA has assessed whether irradiation of meat under the conditions set forth in the regulation is likely to alter the growth patterns of any surviving microorganisms in such a way as to result in an increased microbiological hazard (from increased growth of pathogens) compared to meat that has not been irradiated.

1. Microbiological Profile of Raw Meat

Meat is a nutrient-rich substrate that can support the growth of a variety of microorganisms. During the initial processing steps (e.g., slaughter, skinning, cutting of primals) these microorganisms are diverse. They include a wide variety of nonpathogenic spoilage bacteria, including organisms from the *Pseudomonas-Moraxella-Acinetobacter* group, *Lactobacillus* sp., and others. Pathogenic (illness-causing) microorganisms, including *Salmonella* sp., *E. coli* O157:H7, *Listeria monocytogenes*, *Staphylococcus aureus*, and others, have also been isolated from raw meat, generally at relatively low levels (see Refs. 2, 56, and 57).

Spores[20] of certain other pathogenic microorganisms have been isolated from raw meat as well. The most commonly occurring spores in meat are those of *C. perfringens* (Refs. 2 and 6). Spores of *Clostridium botulinum* have also been isolated from raw meat; the available data indicate that both the incidence and the numbers of *C. botulinum* spores are extremely low (Refs. 58, 59, and 60).

Fungal species (i.e., yeasts and molds) have also been isolated from the surfaces of raw meat, presumably as a result of airborne contamination. Various parasites, including *Toxoplasma gondii* and *Trichinella spiralis*, both of which can cause serious foodborne illness, may also be found in meat.

2. Effects of Irradiation on Microorganisms in or on Meat

The petitioner provided reports and published articles describing the effects of irradiation on the microorganisms in or on flesh foods. These reports and published articles provide data on several microorganisms of relevance, including various species of *Salmonella*; *E. coli* O157:H7; *C. perfringens*; *S. aureus*; *L. monocytogenes*; *Bacillus cereus*; *Campylobacter jejuni*; and the protozoan parasite *T. gondii*. Taken together, the available reports and published articles establish that the radiation dose necessary to reduce the initial population of any of the bacterial pathogens by 90 percent (i.e., the ''D value'') ranges from 0.1 kGy to just under 1 kGy. For any individual pathogen, the D value varies depending on such factors as the specific food, physical state (frozen versus nonfrozen) of the food, temperature, and ambient oxygen level.

The D value for *Salmonella*, for example, ranges from approximately 0.4 kGy to 0.8 kGy, depending on the microbial strain and the other factors mentioned above (Refs. 61, 62, 63, and 64). *E. coli* O157:H7 is more radiation sensitive than *Salmonella*, with a D value range of approximately 0.2 to 0.4 kGy, depending on the type of flesh food and the conditions of irradiation (Refs. 62, 63, and 65). Other studies of a variety of different pathogens in different flesh foods yield comparable results.[21]

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[20] Spores are the so-called ''resting stage'' of certain bacteria in which the bacterial cell becomes enclosed in a tough, resistant coat as a response to adverse environmental conditions. On return to less adverse conditions, the spore can germinate and revert to the normal vegetative form of the organism. Under favorable conditions, the vegetative cells can multiply and, in the case of certain spore-forming bacteria, produce toxin. Growth rates of the vegetative cells are influenced by several factors including temperature, ambient oxygen level, pH, and the size of the spore inoculum (numbers of spores present).

[21] For example, the D values of both *L. monocytogenes* and *S. aureus* fall in the range of 0.40 to 0.48 kGy when irradiated in beef, pork, or lamb at 5 °C (see, e.g., Refs. 62 and 66). *C. jejuni* is more radiation sensitive, with D values in the range of 0.16 to 0.24 kGy depending on the particular meat and the conditions of irradiation (see, e.g., Refs. 63 and 67).

T. gondii tissue cysts are inactivated at a radiation dose of approximately 0.4 kGy (Ref. 68).

D values for the principal nonpathogenic microorganisms (spoilage bacteria) commonly found in or on meat cover a wide range, from approximately 0.3 to 2.0 kGy (Refs. 69, 70, and 71). *Lactobacillus* sp. are among the more radiation-resistant nonpathogenic spoilage bacteria; the D values for these bacteria range from approximately 1 to 2 kGy, depending on the microbial strain and the conditions of irradiation (Ref. 71).

In the case of spore-forming bacteria, the spores and vegetative cells are affected by irradiation to different degrees. Spores are generally more resistant to the effects of radiation than vegetative cells. For example, the D values for vegetative cells of various strains of *C. perfringens* range from 0.6 to 0.8 kGy (Refs. 72 and 73), comparable to the D values for most of the pathogens discussed above, while the D values for the spores of *C. perfringens* range from 1.2 to 1.8 kGy (Ref. 74). The spores of *C. botulinum* are more radiation-resistant; the D values for the spores of various strains of *C. botulinum* range from approximately 2 to 4 kGy (Refs. 60 and 74).

The agency has reviewed the data and information described previously as well as other information in its files and has determined that irradiation at doses of up to 4.5 kGy for refrigerated product and doses of up to 7.0 kGy for frozen product will significantly reduce the number of pathogenic microorganisms in or on meat (Ref. 75). Under the conditions set forth in the regulation below, reductions in *Salmonella* levels, for example, could be approximately 100,000-fold in refrigerated beef irradiated at 4.5 kGy. Because *E. coli* is more sensitive to the effects of irradiation, reductions in the levels of that microorganism would be even greater in beef irradiated under these same conditions. The levels of most spoilage microorganisms on meat will also be significantly reduced at the petitioned doses, resulting in an extension of the shelf-life of the product.

However, while irradiation at the petitioned doses significantly reduces the numbers of many pathogenic and spoilage bacteria, its effect in reducing the numbers of relatively radiation-resistant spores of other pathogenic bacteria (e.g., *C. botulinum*, with D values of approximately 2 to 4 kGy), is less. Therefore, FDA has carefully examined the effects of radiation-induced changes in the microbiological profile of meat on the growth patterns of surviving microorganisms to determine whether the microbiological safety of meat irradiated under the conditions set forth in the regulation would be adversely affected. In FDA's evaluation, *C. botulinum* received particular attention both because *C. botulinum* spores are the most radiation-resistant of the pathogens found in meat and because the illness induced by botulinal toxin is so severe.

3. Growth Patterns of Microorganisms in or on Raw Meat

As noted previously, meat is a substrate that can, in principle, support the growth of a variety of microorganisms. The conditions under which meat is stored (e.g., temperature, ambient atmosphere, pH) influence the growth patterns of different microorganisms, however, affecting both the types and numbers of different microorganisms that are likely to be found in or on meat at any given time.

Meat is chilled and subsequently stored under refrigeration (generally 37 to 45 °F) immediately following the initial processing steps. During cold storage, the predominant microorganisms are the spoilage bacteria, primarily *Pseudomonas* sp., that are capable of growth at these temperatures. If the chilled meat is packaged in an environment of reduced oxygen content, other spoilage bacteria, such as *Lactobacillus* sp., *Brochothrix thermosphacta*, and other lactic acid-producing microorganisms, predominate (Refs. 2 and 56).

The growth of *C. perfringens*, *Salmonella*, and *E. coli* is well controlled by cooling meat quickly after slaughter and maintaining the product at refrigerated temperatures during subsequent transport and storage. None of these pathogens is normally capable of growth in meat stored under refrigeration. In addition, competition with the more numerous and faster-growing spoilage bacteria that predominate at refrigeration temperatures further inhibits the growth of these pathogens. Both *Salmonella* and *E. coli* O157:H7 are capable of significant growth, however, in meat stored above refrigeration temperatures (''temperature abuse'' conditions; above 50 °F). Temperature control is thus a primary tool in reducing the growth of, and consequently, the risk from, these pathogens.

Growth of *C. botulinum* is influenced by several factors in addition to temperature, including the availability of oxygen, pH of the food, and the numbers of *C. botulinum* spores in relation to the types and numbers of competing microorganisms. Temperature control is, however, the single most important factor in controlling the growth of the strains of *C. botulinum* that have been most frequently (albeit still rarely and in low numbers) isolated from meat in the United States (Refs. 59, 60, and 76) In this regard, the same temperature control regimen used to control the growth of other pathogens such as *Salmonella*, *E. coli* O157:H7, and *C. perfringens* also works well to inhibit growth of, and toxin production by, *C. botulinum* in meat. Temperature abuse can lead to growth and toxin production by *C. botulinum*; however, this typically takes several weeks to occur, even at temperatures of approximately 60 °F. By this time, signs of spoilage (e.g., putrid odor, slimy texture), produced primarily by the faster-growing and more numerous nonpathogenic spoilage bacteria, are evident. The objectionable odor and texture of spoiled meat is a signal that typically inhibits consumers from eating the product. Reports of botulism resulting from consumption of such meat are rare and, generally, have been limited to ethnic groups that favor these foods (see Refs. 59, 76, and 77).

In summary, maintaining meat at low storage temperatures is the primary method for controlling the growth of pathogenic microorganisms and, thus, for reducing the risk of disease from pathogenic microorganisms in or on meat.

4. Effects of Irradiation on Growth Patterns of Microorganisms in or on Meat

As noted above, radiation-induced changes in the microbiological profile of meat have the potential to affect the growth patterns of the various microorganisms in or on meat. FDA has evaluated whether irradiation would result in significantly altered microbial growth patterns in meat (e.g., significantly increased growth of pathogens) such that irradiated meat would present an increased microbiological hazard compared to meat that had not been irradiated. The agency has reviewed data and information submitted in the petition, as well as other information in its files, regarding the effects of irradiation, temperature abuse conditions, and ambient oxygen levels on the microbiological profile of meat.

Because *C. botulinum* spores are the most resistant to the effects of irradiation and would thus be more likely to survive irradiation than other pathogens and most spoilage bacteria, and because the illness associated with botulinal toxin is so severe, FDA, in its evaluation, focused particularly on the effects of irradiation on the probability of significantly increased growth of, and subsequent toxin production by, *C. botulinum*.

With respect to most of the significant pathogens found in or on meat, other than *C. botulinum* (e.g., *Salmonella* and *E. coli* O157:H7), FDA concludes that the probability of significant growth of these pathogens in irradiated meat stored under adequate temperature control is extremely remote for two reasons. First, these pathogens typically require temperatures of 50 °F or higher for significant growth. Second, as noted above, most of the pathogens in or on meat are more sensitive to the effects of irradiation than many of the common spoilage microorganisms (e.g., *Lactobacillus*, with D values of 1 to 2 kGy). Because these pathogens are sensitive to the effects of irradiation, FDA expects that irradiation under the conditions set forth in the regulation below will reduce the numbers of these pathogens to a far greater extent than it will reduce the numbers of the faster-growing spoilage microorganisms that compete with, and inhibit the growth of, pathogens at refrigeration temperatures.

Nevertheless, FDA has also considered the effects of temperature abuse on growth of these pathogens (e.g., *Salmonella*, *E. coli* O157:H7, *C. perfringens*) in irradiated meat. In one of the studies submitted in the petition (Ref. 72), pork was packaged and irradiated at 1.75 kGy under a modified atmosphere containing no oxygen following inoculation with high levels of any one of several pathogens. In this study, the authors reported that growth of these pathogens (*Salmonella*, *E. coli*, and *C. perfringens*, among others), was, in fact, decreased by irradiation even when temperature conditions were favorable for growth (approximately 60 °F).

With respect to *C. botulinum*, FDA concludes that the probability for significant growth of, and toxin production by, *C. botulinum* in irradiated meat stored under adequate temperature control (properly refrigerated or frozen) is extremely remote for several reasons. First, as noted, *C. botulinum* spores occur with extremely low frequency and in extremely low numbers in meat; these numbers will be further reduced by irradiation at the petitioned doses. Research has established that the size of the spore inoculum (numbers of spores present in the food) is an important factor in the growth of, and toxin production by, *C. botulinum*; reduced numbers of spores generally result in a decreased probability that growth sufficient for toxin production will occur (Ref. 59).

Second, most strains of *C. botulinum* that have been found in meat do not grow and produce toxin under refrigeration conditions appropriate for transport and storage of flesh foods. The available data show that growth and subsequent toxin production by *C. botulinum* in meat requires significantly elevated temperatures (50 to 55 °F, or higher) (Refs. 59, 60, and 77). Even under reduced ambient oxygen levels (conditions that favor the growth of *C. botulinum*), elevated temperatures are still required for significant growth and toxin production. Irradiation does not enable *C. botulinum* to grow at refrigeration temperatures; elevated temperatures on the order of 50 to 55 °F are required, whether meat is irradiated or not. Nevertheless, the agency has also considered whether, in the absence of temperature control, irradiation could increase the likelihood that *C. botulinum* could grow and produce toxin without the signs of spoilage familiar to the consumer that discourage consumption of spoiled meat.

One study submitted in the petition (Ref. 78) investigated the effect of irradiation, at a dose of 3 kGy, on the patterns of microbial growth and spoilage in vacuum-packaged pork loins stored under conditions of proper refrigeration (2 to 4 °C to simulate wholesale storage, and 5 to 7 °C to simulate retail storage) and under conditions of severe temperature abuse (24 to 25 °C). Shelf-life of pork stored under refrigeration conditions was extended by irradiation. The authors found that both irradiated pork and pork that had not been irradiated spoiled rapidly under conditions of severe temperature abuse and that the same types of microorganisms were responsible for spoilage in both irradiated pork and pork that had not been irradiated. The authors concluded that the concurrent and similar increases that they observed in the numbers of *lactobacilli* and other bacteria in the temperature-abused, vacuum-packaged irradiated pork indicated that sufficient spoilage organisms survived irradiation to bring about spoilage after severe temperature mishandling. FDA concurs in these conclusions (Ref. 77).

In several other studies submitted in the petition (''the Lambert studies,'' Refs. 79a through 79c), pork was packaged and irradiated at a dose of 1 kGy under reduced ambient oxygen levels following inoculation with high levels of *C. botulinum* spores. In these studies, storage at elevated temperatures, equivalent to approximately 60 °F, was required for *C. botulinum* to grow and produce toxin; no toxin was detected in pork stored at approximately 41 °F . The authors concluded that irradiation at 1 kGy significantly delayed toxin production by *C. botulinum* (Refs. 79a and 79b). The authors of these studies also reported that signs of spoilage in the irradiated pork appeared at least 1 week before, and under certain conditions, up to 5 weeks before, toxin was detected (Ref. 79a).

The data and information in the Lambert studies show that even when the levels of *C. botulinum* spore inoculum are high and the ambient oxygen level low (conditions that, as noted, would tend to increase growth and toxin production), toxin production was preceded by signs of spoilage in the irradiated meat. These data also demonstrate that storage at sustained elevated temperatures, for several weeks, are required for growth of, and toxin production by, *C. botulinum* in irradiated pork.

Third, other data and information also show that various species of other microorganisms commonly found on meat, particularly spoilage bacteria (e.g., *Lactobacillus* sp.[22] and others), survive irradiation in sufficient numbers to grow and inhibit growth of, and toxin production by, *C. botulinum* in both refrigerated and temperature-abused irradiated meats (Refs. 71, 80, and 81).

5. Summary of the Microbiological Assessment

FDA has reviewed the data and information submitted in the petition and has considered all the available data and information in its files relevant to an assessment of the microbiological safety of the irradiation of meat. In particular, FDA has carefully examined the effects of radiation-induced changes in the microbiological profile of meat on the growth patterns of any surviving microorganisms, including *C. botulinum*, to determine whether the microbiological safety of meat would be adversely affected by irradiation under the conditions set forth in the regulation below.

As discussed previously in this document, the agency has determined that irradiation of meat and meat byproducts under the conditions set forth in the regulation below will not result in any additional health hazard from *C. botulinum* (Ref. 75). Likewise, as discussed previously, FDA has also determined that irradiation will not result in any additional hazard from common pathogens other than *C. botulinum*. Therefore, the agency concludes, based on all the evidence before it, that irradiation of meat under

[22] In the case of *Lactobacillus*, production of lactic acid, which lowers the pH of the meat, is a contributing factor in inhibiting the growth of various pathogens, including *C. botulinum* (see, e.g., Refs. 59 and 71).

the conditions set forth in the regulation below will not result in a microbiological hazard.

IV. Current Good Manufacturing Practice Considerations

As noted, the proper processing, handling, and storage of meat and meat byproducts, irradiated or not, are necessary to ensure their safety. With respect to the processing and handling of both meat and poultry, USDA/FSIS has recently established specific requirements applicable to meat and poultry establishments designed to reduce the occurrence and numbers of pathogenic microorganisms on meat and poultry products and thus, to reduce the incidence of foodborne illness associated with these products (61 FR 38806, July 25, 1996). Among other things, these new regulations require that each meat and poultry establishment develop and implement written standard operating procedures for sanitation (Sanitation SOP's, SSOP's) and that each establishment also develop and implement a system of preventive controls, known as HACCP (Hazard Analysis and Critical Control Points), which is designed to improve the safety of their products.

FSIS has stated that it intends to use HACCP systems as a framework for the modernization of the meat and poultry inspection system (61 FR 33806). HACCP systems are not intended to replace good manufacturing practices (GMP's), but rather to be used as the basis of an approach to food safety that focuses on hazard prevention and control. HACCP, GMP's, SSOP's, and other tools and interventions all have a place in ensuring the safety of meat. FSIS has stated that it anticipates that the adoption of HACCP systems by the meat industry as a whole will significantly increase the safety of meat products and reduce the risk of foodborne illness (61 FR 33806).

A. Temperature control

As noted previously, proper temperature control is critical in ensuring the safety of meat, meat byproducts, and meat food products, whether or not they are irradiated. FDA's regulations regarding CGMP's (part 110 (21 CFR part 110)) stipulate that the temperature of refrigerated foods not exceed 45 °F (§ 110.80(b)(3)(i)). With respect to meat products specifically, FDA's Model Food Code, which is offered for adoption by States and other government entities that exercise primary regulatory authority over food service, retail food stores, and food vending machine operations, recommends that meat products be stored at 41°F or less. There are no data or other information that suggest that, in order to ensure their safety, irradiated meat products require different temperature controls than meat products that have not been irradiated.

Moreover, FSIS, under its regulatory authority over meat processing plants, can establish specific requirements with respect to temperature control of irradiated meat, meat byproducts, and meat food products.[23] FDA concludes that its regulation should allow for flexibility in this regard. Therefore, the regulation does not establish specific requirements with respect to temperature control of irradiated meat, meat byproducts, and meat food products.

B. Consideration of the Need for Establishment of a Minimum Dose

FDA has established, in § 179.25, general provisions defining CGMP for the use of irradiation in the treatment of food. This regulation discusses requirements such as recordkeeping and the need for a scheduled process for food irradiation. Among other things, § 179.25 also requires that ''Food treated with ionizing radiation shall receive the minimum radiation dose reasonably required to accomplish its intended effect * * *.'' (Section 179.25(b).)

FDA notes that the minimum dose necessary to control pathogenic organisms on food can vary with the particular microorganism, the specific food, and with the microbial load on the food. In its decision to permit the irradiation of poultry at doses up to 3 kGy, FDA explicitly considered these facts and noted that FSIS, based on its regulatory authority over poultry processing plants, could establish a minimum dose, consistent with CGMP, for controlling pathogenic organisms in or on the products processed in such plants. The agency also concluded that FSIS should be free to do so without having to submit a new petition for an amendment to the regulation, as long as any requirements complied with the applicable sections of part 179.

Similarly, with respect to the processing of meat, meat byproducts, and meat food products, FDA is not establishing a minimum required dose. The agency concludes that different doses could be appropriate, in different circumstances, for achieving the desired technical effect and that FDA's regulation should allow for flexibility in this regard. Moreover, FSIS, under its regulatory authority over meat processing plants, can establish a minimum dose, consistent with GMP, for controlling pathogenic organisms in or on the products processed in these plants. FSIS should be free to do so without having to submit a petition for an amendment to FDA's regulation, as long as any FSIS requirements comply with the applicable sections of part 179.

V. Labeling

Meat, meat byproducts, and meat food products are subject to the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*). Therefore, the labeling of these products irradiated under the conditions set forth in the regulation must comply with any requirements imposed by USDA/FSIS under its authority to approve the labeling of such products.

VI. Conclusion of Safety

FDA has evaluated the data in the petition and other material in its files relevant to the proposed use of a source of radiation to treat meat, meat byproducts, and certain meat food products. Based on all the evidence before it, FDA concludes that irradiation of these products under the conditions set forth in the regulation below will not present a toxicological hazard, will not present a microbiological hazard, and will not adversely affect the nutritional adequacy of such products. Therefore, the agency concludes that irradiation of meat, meat byproducts, and meat food products under the conditions set forth in the regulation below is safe. Accordingly, FDA has determined that part 179 should be amended.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the listed contact person. As provided in § 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

[23] In the preamble to the rule that established the new requirement for the development and implementation of HACCP systems in meat and poultry plants, FSIS addressed the need for cooling and chilling requirements for raw meat and poultry. In the final rule, FSIS stated that, with respect to regulation of time and temperature control, it would be best to have, as a performance standard, a maximum temperature for products being shipped into commerce, and at which raw products in commerce must be maintained. This standard would be applicable to all persons who handle such product before the product reaches the consumer. FSIS concluded, however, that development of such a performance standard required the acquisition of additional information, and indicated that it would engage in further rulemaking in this area.

VII. Environmental Impact

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

VIII. Objections

Any person who will be adversely affected by this regulation may at any time on or before January 2, 1998 file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

IX. References

The following sources are referred to in this document. References marked with an asterisk (*) have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. References without an asterisk are not on display; they are available as published articles and books.

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List of Subjects in 21 CFR Part 179

Food additives, Food labeling, Food packaging, Radiation protection, Reporting and record keeping requirements, Signs and symbols.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 179 is amended as follows:

PART 179—IRRADIATION IN THE PRODUCTION, PROCESSING AND HANDLING OF FOOD

1. The authority citation for 21 CFR part 179 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 343, 348, 373, 374.

2. Section 179.26 is amended in the table in paragraph (b) by adding a new entry ''8.'' under the headings ''Use'' and ''Limitations'' to read as follows:

§ 179.26 Ionizing radiation for the treatment of food.

* * * * *

(b) * * *

Use	Limitations
* * *	* * * *
8. For control of foodborne pathogens in, and extension of the shelf-life of, refrigerated or frozen, uncooked products that are meat within the meaning of 9 CFR 301.2(rr), meat byproducts within the meaning of 9 CFR 301.2(tt), or meat food products within the meaning of 9 CFR 301.2(uu), with or without nonfluid seasoning, that are otherwise composed solely of intact or ground meat, meat byproducts, or both meat and meat byproducts..	Not to exceed 4.5 kGy maximum for refrigerated products; not to exceed 7.0 kGy maximum for frozen products.

* * * * *

Dated: November 26, 1997.

Michael A. Friedman,

Lead Deputy Commissioner for the Food and Drug Administration.

[FR Doc. 97–31740 Filed 12–2–97; 8:45 am]

BILLING CODE 4160–01–F

Federal Register

Wednesday
December 3, 1997

Part V

Department of Education

Strengthening Institutions, Hispanic-Serving Institutions, and Endowment Challenge Grant Programs Eligibility, Fiscal Year 1997; Notice

DEPARTMENT OF EDUCATION

[CFDA NO: 84.031]

Reopening of Closing Date for Receipt of Applications for Designation as an Eligible Institution for Fiscal Year 1997; Eligibility for the Strengthening Institutions, Hispanic-Serving Institutions, and Endowment Challenge Grant Programs

SUMMARY: On November 27, 1996 (61 FR 60254), January 13, 1997 (62 FR 1739), and May 16, 1997 (62 FR 27130), the Department of Education (ED) published in the **Federal Register** closing dates for the receipt of applications from institutions that wished to be designated as eligible institutions under the Strengthening Institutions, Hispanic-Serving Institutions and Endowment Challenge Grant Programs for Fiscal Year 1997. An eligible institution under these programs may not apply for a grant at this time but they may receive a waiver. The FSEOG and FWS Programs are student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended.

Some institutions, that were only interested in receiving a waiver of the non-Federal share requirement under the FSEOG and FWS Programs, did not submit an institutional eligibility application before those deadline dates. As a result, ED is reopening the closing date for that limited purpose. Thus, an institution that seeks designation as an eligible institution for Fiscal Year 1997 under the Strengthening Institutions, Hispanic-Serving Institutions and Endowment Challenge Grant Programs, solely for the purpose of obtaining a waiver of the non-Federal share requirement under the FSEOG and FWS Programs for the 1997–98 award year, may submit an application to ED for that purpose through December 31, 1997. An institution may apply under this reopened closing whether or not it submitted a previous application.

Applicants should base any waiver request of the needy student criterion on the corrected Base Year Low-Income Levels table included as an errata sheet with the eligibility application package and published in the **Federal Register** on May 16, 1997 (62 FR 27130).

DEADLINE FOR TRANSMITTAL OF APPLICATIONS: December 31, 1997.

APPLICATIONS AVAILABLE: November 26, 1997.

FOR APPLICATIONS OR INFORMATION CONTACT: Blanca Westgate or Jane Wrenn, Strengthening Institutions Program, Institutional Development and Undergraduate Education Service, U.S. Department of Education, 600 Independence Avenue, S.W., (Suite CY–80, Portals Building), Washington, DC 20202–5335. Telephones: (202) 708–8816, 708–8839 or 708–8866. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

Information about the Department's funding opportunities, including copies of application notices for discretionary grant competitions, can be viewed on the Department's electronic bulletin board (ED Board), telephone (202) 260–9950; on the Internet Gopher Server (at gopher://gcs.ed.gov/); or on the World Wide Web (at http://gcs.ed.gov). However, the official application notice for a discretionary grant competition is the notice published in the **Federal Register**.

Authority: 20 U.S.C.1057, 1059c and 1065a.

Dated: November 24, 1997.

David A. Longanecker,

Assistant Secretary for Postsecondary Education.

[FR Doc. 97–31494 Filed 12–2–97; 8:45 am]

BILLING CODE 4000–01–P

Federal Register

Wednesday
December 3, 1997

Part VI

The President

Proclamation 7056—World AIDS Day, 1997

Federal Register
Vol. 62, No. 232
Wednesday, December 3, 1997

Presidential Documents

Title 3—

The President

Proclamation 7056 of December 1, 1997

World AIDS Day, 1997

By the President of the United States of America

A Proclamation

For more than 15 years, America and the world have faced the challenges posed by HIV and AIDS. This devastating disease respects no borders and does not discriminate. In every city, town, and community, we have lost sons and daughters, brothers and sisters, mothers and fathers, life partners and friends. HIV and AIDS have affected us all, regardless of income, region, gender, race, religion, sexual orientation, or age. Sadly, both the number of people living with AIDS and the number of new HIV infections is rising worldwide. This year, as we observe the tenth World AIDS Day, we recognize with particular concern the toll HIV and AIDS continue to take on our children and youth.

The statistics are heartbreaking. In America alone, more than 7,500 children under the age of 13 have been diagnosed with AIDS. Every hour of every day, two more Americans under the age of 21 become infected with HIV. Around the world, more than 1 million children are living with HIV and AIDS. Twelve hundred children die of AIDS each day, even as 1,600 more become infected with the HIV virus. Compounding this tragedy is the terrible reality that many of the world's young people who are living with HIV and AIDS do not have access to the life-extending drugs and medical protocols that our scientists and doctors have developed. There is also a critical shortage of prescription drugs suitable for children suffering from pediatric HIV and AIDS. Of the 14 approved drugs for adults and adolescents, only five are approved for children.

From the earliest days of my Administration, we have sought to meet the challenges posed by AIDS with increased resources and action. I am proud of our success, with the cooperation of the Congress, in dramatically increasing funding for AIDS prevention measures and research. Such programs and research have helped to slow the spread of HIV and AIDS and have made possible the production of new drugs that are extending the lives of people with HIV and AIDS here at home and around the world.

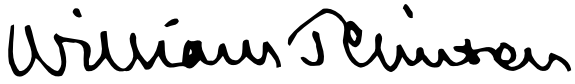
But our progress against the scourge of AIDS has not been the result of government action alone. We have been able to make these great strides in understanding and treating HIV and AIDS thanks in large part to the hard work and commitment of thousands of researchers, health care providers, and clinical trial participants. I am proud as well of the resounding response of courage, compassion, responsibility, and love that the AIDS crisis has brought forth from our people. The lesbian and gay community, particularly in the early years of this epidemic, energized existing organizations and created new institutions to respond to the unmet needs of those living with HIV and AIDS. Educators and activists, members of religious and civic groups, business and labor organizations, and tens of thousands of other men and women of goodwill have joined together to comfort the afflicted and bring an end to this disease.

We can rejoice in our progress, but we cannot rest. In May, I announced a new HIV vaccine initiative, and I am pleased that the global community has joined together in making the development of this vaccine a top international priority. Within 10 years, we hope to have the means to stop

this deadly virus. But until we reach that day, I call on every American to remain with us on our crusade to eradicate this terrible epidemic and care for those living with AIDS along the way. As we mark World AIDS Day this year, we must continue to provide care for the sick and ensure that all have access to the treatment they need. And one of our most important tasks now is to strengthen our efforts to educate young people about HIV and AIDS and to make available to them and others at high risk effective prevention programs. By giving our children real hope for a future free from the shadows of HIV and AIDS, we can best commemorate the many loved ones we have already lost to the disease during its long and tragic course. May their enduring memory light our journey toward a vaccine for HIV and a final cure for AIDS.

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 December 1, 1997, as World AIDS Day. I invite the Governors of the States, the Commonwealth of Puerto Rico, officials of the other territories subject to the jurisdiction of the United States, and the American people to join me in reaffirming our commitment to defeating HIV and AIDS and to helping those who live with the disease. I encourage every American to participate in appropriate commemorative programs and ceremonies in workplaces, houses of worship, and other community centers and to reach out to protect our children and to help all people who are living with AIDS.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of December, 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. 97–31893
Filed 12–2–97; 11:02 am]
Billing code 3195–01–P

Federal Register

Wednesday
December 3, 1997

Part VII

Office of Management and Budget

Cancellation Pursuant to Line Item Veto Act; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998; Notice

OFFICE OF MANAGEMENT AND BUDGET

Cancellation Pursuant to Line Item Veto Act; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998

December 2, 1997.

One Special Message from the President under the Line Item Veto Act is published below. The President signed the message on December 2, 1997. Under the Act, the message is required to be printed in the **Federal Register** (2 U.S.C. 691a(c)(2)).

Clarence C. Crawford,

Associate Director for Administration.

THE WHITE HOUSE,
Washington,
December 2, 1997.

Dear Mr. Speaker:

In accordance with the Line Item Veto Act, I hereby cancel the dollar amount of discretionary budget authority, as specified in the attached report, contained in the ''Departments of Commerce, Justice, and State, and Related Agencies Appropriations Act, 1998'' (H.R. 2267). I have determined that the cancellation of this amount will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest. This letter, together with its attachment, constitutes a special message under section 1022 of the Congressional Budget and Impoundment Control Act of 1974, as amended.

Sincerely,

William J. Clinton.

The Honorable Newt Gingrich,
Speaker of the House of Representatives,
Washington, D.C. 20515.

THE WHITE HOUSE,
Washington,
December 2, 1997.

Dear Mr. President:

In accordance with the Line Item Veto Act, I hereby cancel the dollar amount of discretionary budget authority, as specified in the attached report, contained in the ''Departments of Commerce, Justice, and State, and Related Agencies Appropriations Act, 1998'' (H.R. 2267). I have determined that the cancellation of this amount will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest. This letter, together with its attachment, constitutes a special message under section 1022 of the Congressional Budget and Impoundment Control Act of 1974, as amended.

Sincerely,

William J. Clinton.

The Honorable Albert Gore, Jr.,
President of the Senate,
Washington, D.C. 20510.

Cancellation No. 97–82.

CANCELLATION OF DOLLAR AMOUNT OF DISCRETIONARY BUDGET AUTHORITY

Report Pursuant to the Line Item Veto Act, P.L. 104–130

Bill Citation: ''Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998'' (H.R. 2267).

1(A). Dollar Amount of Discretionary Budget Authority: $5,000 thousand for a cooperative agreement with Montana State University for a research program on green buildings on page 37 of the enrolled bill (H.R. 2267) and on page 142 of House Report 105–405 (Joint Explanatory Statement of the Committee of Conference), dated November 13, 1997.

1(B). Determinations: This cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest.

1(C), (E). Reasons for Cancellation; Facts, Circumstances, and Considerations Relating to or Bearing Upon the Cancellation; and Estimated Effect of Cancellation on Objects, Purposes, and Programs: H.R. 2267 provides $5 million for a cooperative agreement with Montana State University (MSU) for research on green buildings. This project circumvents the National Institute of Standards and Technology's (NIST) research selection process and meets no clear agency need. NIST labs do not provide large, open-ended research grants to external facilities. With the proposed research conducted entirely at MSU, NIST has no leverage to oversee its quality or relevance. Similar grants in FY 1994 and FY 1997 were not requested by the Administration, and have shown no demonstrated benefits to NIST's mission. By diverting scarce resources to a non-federal facility, this project damages NIST's ability to chose projects for their national benefit and technical merit. As the proposed demonstration lab does not meet NIST's research needs and is far from existing facilities, this project's benefits would accrue primarily to Montana State University.

1(D). Estimated Fiscal, Economic, and Budgetary Effect of Cancellation: As a result of the cancellation, Federal outlays will not increase, as specified below. This will have a commensurate effect on the Federal budget deficit and, to that extent, will have a beneficial effect on the economy.

Outlay changes

[In thousands of dollars]

Fiscal year:	
1998	.....
1999	−3,850
2000	−1,050
2001	−100
2002	.....
2003–07	.....
Total	−5,000

1(F). Adjustments to Non-Defense Discretionary Spending Limits

Budget authority: −$5,000 thousand in FY 1998.

Outlays: The estimated outlay effect for each year is shown above.

Evaluation of Effects of These Adjustments upon Sequestration Procedures: If a sequestration were required, such sequestration would occur at levels that are reduced by the amounts above.

2(A). Agency: Department of Commerce.

2(A). Bureau: National Institute of Standards and Technology.

2(A). Governmental Function/Project (Account): Research and Development (Scientific and Technical Research and Services).

2(B). States and Congressional Districts Affected: Montana, At Large.

2(C). Total Number of Cancellations (inclusive) in Current Session in each State and District identified above: Montana: five.

[FR Doc. 97–31971 Filed 12–2–97; 4:36 pm]

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Federal Register

Vol. 62, No. 232

Wednesday, December 3, 1997

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FEDERAL REGISTER PAGES AND DATES, DECEMBER

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

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 DECEMBER 3, 1997

AGRICULTURE DEPARTMENT
Animal and Plant Health Inspection Service
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HEALTH AND HUMAN SERVICES DEPARTMENT
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Quarterly wage and unemployment compensations claims reporting to National Directory of New Hires; comments due by 12-8-97; published 10-7-97

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LABOR DEPARTMENT
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