

Code of Federal Regulations

Now Available Online
Code of Federal Regulations
via
GPO Access
(Selected Volumes)

Free, easy, online access to selected *Code of Federal Regulations (CFR)* volumes is now available via *GPO Access*, a service of the United States Government Printing Office (GPO). *CFR* titles will be added to *GPO Access* incrementally throughout calendar years 1996 and 1997 until a complete set is available. GPO is taking steps so that the online and printed versions of the *CFR* will be released concurrently.

The *CFR* and *Federal Register* on *GPO Access*, are the official online editions authorized by the Administrative Committee of the Federal Register.

New titles and/or volumes will be added to this online service as they become available.

<http://www.access.gpo.gov/nara/cfr>

For additional information on *GPO Access* products, services and access methods, see page II or contact the *GPO Access* User Support Team via:

- ★ Phone: toll-free: 1-888-293-6498
- ★ Email: gpoaccess@gpo.gov



FEDERAL REGISTER Published daily, Monday through Friday, (not published on Saturdays, Sundays, or on official holidays), by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (49 Stat. 500, as amended; 44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). Distribution is made only by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

The **Federal Register** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders and Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress and other Federal agency documents of public interest. Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless earlier filing is requested by the issuing agency.

The seal of the National Archives and Records Administration authenticates this issue of the **Federal Register** as the official serial publication established under the Federal Register Act. 44 U.S.C. 1507 provides that the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper, 24x microfiche and as an online database through *GPO Access*, a service of the U.S. Government Printing Office. The online edition of the **Federal Register** on *GPO Access* is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions. The online database is updated by 6 a.m. each day the **Federal Register** is published. The database includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward. Free public access is available on a Wide Area Information Server (WAIS) through the Internet and via asynchronous dial-in. Internet users can access the database by using the World Wide Web; the Superintendent of Documents home page address is http://www.access.gpo.gov/su_docs/, by using local WAIS client software, or by telnet to swais.access.gpo.gov, then login as guest. (no password required). Dial-in users should use communications software and modem to call (202) 512-1661; type *swais*, then login as guest (no password required). For general information about *GPO Access*, contact the *GPO Access* User Support Team by sending Internet e-mail to gpoaccess@gpo.gov; by faxing to (202) 512-1262; or by calling toll free 1-888-293-6498 or (202) 512-1530 between 7 a.m. and 5 p.m. Eastern time, Monday-Friday, except for Federal holidays.

The annual subscription price for the **Federal Register** paper edition is \$555, or \$607 for a combined **Federal Register**, Federal Register Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the Federal Register Index and LSA is \$220. Six month subscriptions are available for one-half the annual rate. The charge for individual copies in paper form is \$8.00 for each issue, or \$8.00 for each group of pages as actually bound; or \$1.50 for each issue in microfiche form. All prices include regular domestic postage and handling. International customers please add 25% for foreign handling. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA or MasterCard. Mail to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954.

There are no restrictions on the republication of material appearing in the **Federal Register**.

How To Cite This Publication: Use the volume number and the page number. Example: 60 FR 12345.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche 202-512-1800
Assistance with public subscriptions 512-1806

General online information 202-512-1530; 1-888-293-6498

Single copies/back copies:

Paper or fiche 512-1800
Assistance with public single copies 512-1803

FEDERAL AGENCIES

Subscriptions:

Paper or fiche 523-5243
Assistance with Federal agency subscriptions 523-5243



Contents

Federal Register

Vol. 62, No. 250

Wednesday, December 31, 1997

Agency for Toxic Substances and Disease Registry

NOTICES

Meetings:

- Hanford Health Projects Inter-tribal Council et al., 68294
- Public Health Service Activities and Research at DOE Sites Citizens Advisory Committee, 68295

Agricultural Marketing Service

RULES

- Grapes grown in California, 68150–68152
- Oranges, grapefruit, tangerines, and tangelos grown in Florida, 68142–68150

PROPOSED RULES

- Meats, prepared meats and meat products:
 - Grading and certification services fees, 68232–68233

Agricultural Research Service

NOTICES

- Patent licenses; non-exclusive, exclusive, or partially exclusive:
 - Integrated BioControl Systems, Inc., 68248

Agriculture Department

- See Agricultural Marketing Service
- See Agricultural Research Service
- See Farm Service Agency
- See Food and Consumer Service
- See Forest Service
- See Natural Resources Conservation Service

Centers for Disease Control and Prevention

NOTICES

- Mine Safety and Health Act:
 - Mine shift atmospheric conditions; respirable dust sample, 68372–68395

Coast Guard

PROPOSED RULES

- Drawbridge operations:
 - California, 68245–68246

NOTICES

- Reports; availability, etc.:
 - Cargo securing manual requirements, 68349–68350

Commerce Department

- See Economic Analysis Bureau
- See International Trade Administration
- See National Institute of Standards and Technology
- See National Oceanic and Atmospheric Administration
- See National Telecommunications and Information Administration

NOTICES

- Agency information collection activities:
 - Submission for OMB review; comment request, 68254–68255

Committee for the Implementation of Textile Agreements

NOTICES

- Cotton, wool, and man-made textiles:
 - Honduras, 68261–68262
 - Macau; correction, 68262
 - Philippines; correction, 68262

Singapore, 68262–68264

Export visa requirements; certification, waivers, etc.:
Hong Kong, 68264

Consumer Product Safety Commission

NOTICES

Settlement agreements:

Century Products Company, 68264–68266

Customs Service

RULES

Duty free entry of metal articles; technical change, 68164–68165

Defense Department

See Defense Logistics Agency

See Navy Department

NOTICES

Agency information collection activities:

- Proposed collection; comment request, 68267
- Submission for OMB review; comment request, 68267–68268

Defense Logistics Agency

NOTICES

Privacy Act:

Systems of records, 68268–68269

Economic Analysis Bureau

RULES

International services surveys:

- Foreign direct investments in U.S.—
 - BE-22 annual survey of selected services transactions with unaffiliated foreign persons, 68163–68164
 - BE-93 annual survey of royalties, license fees, and other receipts and payments for intangible rights between U.S. and unaffiliated foreign persons, 68161–68163

Education Department

NOTICES

Grants and cooperative agreements; availability, etc.:

Minority students to become teachers program; closing date withdrawn, 68490

Meetings:

National Assessment Governing Board, 68270–68272

Energy Department

See Federal Energy Regulatory Commission

RULES

Information classification:

Restricted data and formerly restricted data identification; Federal procedures, 68502–68517

NOTICES

Price-Anderson Act; report to Congress, request for comments, 68272–68278

Environmental Protection Agency

RULES

Air programs:

Fuels and fuel additives—
Reformulated and conventional gasoline; standards and requirements modification, 68196–68208

Air quality implementation plans; approval and promulgation; various States; air quality planning purposes; designation of areas:

Colorado, 68188-68196

Air quality implementation plans; approval and promulgation; various States:

Washington

Correction, 68187-68188

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:

Hexythiazox, 68208-68216

Superfund program:

National oil and hazardous substances contingency plan—

National priorities list update, 68216

PROPOSED RULES

Air quality implementation plans; approval and promulgation; various States; air quality planning purposes; designation of areas:

Colorado, 68246

NOTICES

Meetings:

National Advisory Council for Environmental Policy and Technology, 68287-68288

Urban Wet Weather Flows Advisory Committee, et al., 68288-68289

Pesticides; experimental use permits, etc.:

BASF Corp., 68289

Executive Office of the President

See Management and Budget Office

See Presidential Documents

See Trade Representative, Office of United States

Farm Service Agency

RULES

Dairy indemnity payment program, 68142

Federal Aviation Administration

RULES

Airworthiness directives:

British Aerospace, 68158-68159

Fokker, 68154-68158, 68159-68161,

PROPOSED RULES

Airworthiness directives:

British Aerospace, 68236-68237

Construcciones Aeronauticas, S.A., 68237-68239

EXTRA Flugzeugbau, 68239-68241

NOTICES

Advisory circulars; availability, etc.:

Aircraft—

Airworthiness designee function codes, 68350

Antidrug and alcohol misuse prevention programs for personnel engaged in specified aviation activities:

Random drug testing; minimum percentage rate, 68350-68351

Federal Communications Commission

NOTICES

Mass Media Bureau:

Lottery advertisement restrictions enforcement; Players International, Inc., et al. v. United States and FCC, 68289

Rulemaking proceedings; petitions filed, granted, denied, etc., 68290

Federal Energy Regulatory Commission

NOTICES

Agency information collection activities:

Submission for OMB review; comment request, 68278

Environmental statements; availability, etc.:

Alliance Pipeline L.P., 68286

Whitewater Engineering Corp., 68286-68287

Hydroelectric applications, 68287

Applications, hearings, determinations, etc.:

ANR Pipeline Co., 68278-68279

Bangor Energy Resale, Inc., 68279

Chandeleur Pipe Line Co., 68279

Cinergy Services, Inc., et al., 68280

Citizens Utilities Co., 68280

Columbia Gas Transmission Corp., 68280

COM/Energy Marketing, Inc., 68280-68281

Consolidated Edison Co. of New York, Inc., 68281

Equitrans, L.P., 68281

Idaho Power Co., 68281

Metropolitan Edison Co. et al., 68282

National Fuel Gas Supply Corp., 68282

NorAm Gas Transmission Co., 68282

Northern/AES Energy LLC, 68283

Northern Natural Gas Co., 68282-68283

Northwest Pipeline Corp., 68283

Pacific Gas & Electric Co. et al., 68284

Southern Natural Gas Co., 68284

Texas Eastern Transmission Corp., 68284-68285

Texas Gas Transmission Corp., 68285

Wyoming Interstate Co. Ltd. et al., 68285-68286

Federal Highway Administration

NOTICES

Environmental statements; availability, etc.:

Pitkin, Eagle, and Garfield Counties, CO; transportation improvements, 68351-68352

Federal Housing Enterprise Oversight Office

RULES

Practice and procedure:

Civil money penalties, 68152-68154

Federal Register Office

NOTICES

Public Laws; cumulative list

105th Congress—

First Session, 68366-68369

Federal Reserve System

PROPOSED RULES

International banking operations (Regulation K) and delegation of authority rules:

Regulatory improvement and streamlining of provisions, 68424-68464

NOTICES

Banks and bank holding companies:

Change in bank control, 68290

Formations, acquisitions, and mergers, 68290-68291

Permissible nonbanking activities, 68291

Federal Open Market Committee:

Domestic policy directives, 68291-68292

Federal Retirement Thrift Investment Board

NOTICES

Meetings; Sunshine Act, 68292

Federal Transit Administration**NOTICES**

Environmental statements; availability, etc.:
Pitkin, Eagle, and Garfield Counties, CO; transportation improvements, 68351-68352

Financial Management Service

See Fiscal Service

Fiscal Service**NOTICES**

Interest rates:
Renegotiation Board and prompt payment rates, 68356

Food and Consumer Service**PROPOSED RULES**

Child nutrition programs:
Women, infants, and children; special supplemental food program—
Cereal sugar limit; withdrawn, 68233-68236

NOTICES

Child nutrition programs:
Child and adult care food program—
Summer food service programs; reimbursement rates, 68248-68249

Food and Drug Administration**NOTICES**

Meetings:
Medical Devices Advisory Committee, 68295

Forest Service**NOTICES**

Environmental statements; availability, etc.:
Idaho Panhandle National Forests, ID, 68249

Meetings:
Southwest Oregon Provincial Interagency Executive Committee Advisory Committee, 68249
Southwest Washington Provincial Advisory Committee, 68249

National Forest System lands:
Timber sales contracts—
Stumpage rate adjustment procedure change, 68249-68254

General Services Administration**RULES**

Federal property management:
Excess personal property; reporting criteria, 68216-68217
Utilization and disposal—
Excess and exchange/sale information technology (IT) equipment disposal; FIRMR provisions; relocation, 68217

Federal travel:
Per diem localities; maximum lodging and meal allowances
Correction, 68217-68219

Health and Human Services Department

See Agency for Toxic Substances and Disease Registry
See Centers for Disease Control and Prevention
See Food and Drug Administration
See National Institutes of Health

NOTICES

Agency information collection activities:
Submission for OMB review; comment request; correction, 68292

Grant and cooperative agreement awards:
Association of Hispanic Colleges and Universities, 68292-68293
Inter-University Program for Latino Research, 68293
National Hispanic Medical Association, 68293-68294

Housing and Urban Development Department

See Federal Housing Enterprise Oversight Office

NOTICES

Agency information collection activities:
Proposed collection; comment request, 68296-68298
Submission for OMB review; comment request, 68298-68299

Interior Department

See Land Management Bureau

See Minerals Management Service

See Reclamation Bureau

Internal Revenue Service**RULES**

Estate and gift taxes:
Property interests and powers disclaimer, 68183-68187

Income taxes:
Adoption or change of accounting method requirements; elections time extended, 68167-68173
Amortizable bond premium, 68173-68183
Qualified small business stock, 68165-68167

PROPOSED RULES

Procedure and administration:
Agreements for tax liability installment payments, 68241-68242
Unauthorized collection actions, civil cause of action, 68242-68244

International Trade Administration**NOTICES**

Antidumping:
Color television receivers from—
Korea, 68255-68257
Pasta from—
Italy, 68257-68258
Small diameter circular seamless carbon and alloy steel standard, line, and pressure pipe from—
Germany, 68258

Cheese quota; foreign government subsidies:
Annual list, 68258-68259

International Trade Commission**NOTICES**

Import investigations:
Multiple implement, multi-function pocket knives and related packaging and promotional material, 68300
Titanium sponge from—
Japan et al., 68300-68301

Justice Department**PROPOSED RULES**

Federal Claims Collection Standards; implementation, 68476-68487

NOTICES

Meetings:
President's Advisory Board on Race, 68301-68302

Labor Department

See Mine Safety and Health Administration

NOTICES

Agency information collection activities:
Submission for OMB review; comment request, 68302

Land Management Bureau**NOTICES**

Coal leases, exploration licenses, etc.:
 New Mexico, 68299
 Environmental statements; availability, etc.:
 Northeast National Petroleum Reserve-Alaska Draft
 Integrated Activity Plan, 68299

Legal Services Corporation**RULES**

Cost standards and procedures, 68219–68228

Management and Budget Office**NOTICES**

Managerial Cost Accounting Standards; availability, 68324

Minerals Management Service**PROPOSED RULES**

Royalty management:
 Administrative appeals process and alternative dispute
 resolution; release of third-party proprietary
 information, 68244–68245

Mine Safety and Health Administration**PROPOSED RULES**

Coal and metal and nonmetal mine safety and health:
 Occupational noise exposure
 Miners and miners' representatives; right to observe
 required operator monitoring, etc., 68468–68473

NOTICES

Agency information collection activities:
 Proposed collection; comment request, 68420–68421
 Mine Safety and Health Act:
 Mine shift atmospheric conditions; respirable dust
 sample, 68372–68395
 Respirable coal mine dust; standard noncompliance
 determinations, 68395–68420

National Archives and Records Administration

See Federal Register Office

National Institute of Standards and Technology**NOTICES**

Patent licenses; non-exclusive, exclusive, or partially
 exclusive:
 Thorlabs, Inc., 68259

National Institutes of Health**NOTICES**

Meetings:
 National Eye Institute, 68296
 National Institute on Alcohol Abuse and Alcoholism,
 68296

National Oceanic and Atmospheric Administration**RULES**

Fishery conservation and management:
 Alaska; fisheries of Exclusive Economic Zone—
 Groundfish, 68229
 Scallop, 68230–68231
 Alaska; fisheries of the Exclusive Economic Zone—
 Atka mackerel, 68228–68229

PROPOSED RULES

Fishery conservation and management:
 Caribbean, Gulf, and South Atlantic fisheries—
 Gulf of Mexico reef fish, 68246–68247

NOTICES

Fishery conservation and management:
 Alaska; fisheries of the Exclusive Economic Zone—
 Recordkeeping and reporting requirements; public
 workshop, 68259–68260
 Permits:
 Endangered and threatened species, 68260

National Science Foundation**NOTICES**

Antarctic Conservation Act of 1978; permit applications,
 etc., 68302–68303

National Telecommunications and Information Administration**NOTICES**

Meetings:
 Public Interest Obligations of Digital Television
 Broadcasters Advisory Committee, 68260–68261

Natural Resources Conservation Service**NOTICES**

Environmental statements; availability, etc.:
 Waimea-Paauilo Watershed, HI, 68254

Navy Department**NOTICES**

Base realignment and closure:
 Surplus Federal property—
 Marine Corps Air Station, Tustin, CA, 68269–68270

Nuclear Regulatory Commission**NOTICES**

Operating licenses, amendments; no significant hazards
 considerations; biweekly notices, 68303–68323
 Senior Executive Service:
 Executive Resources Board; membership, 68323

Office of Federal Housing Enterprise Oversight

See Federal Housing Enterprise Oversight Office

Office of Management and Budget

See Management and Budget Office

Office of United States Trade Representative

See Trade Representative, Office of United States

Personnel Management Office**RULES**

Practice and procedure:
 Claims settlement procedures, 68139–68142

NOTICES

Agency information collection activities:
 Proposed collection; comment request, 68324–68325
 Submission for OMB review; comment request, 68325–
 68326

Postal Service**RULES**

Practice and procedure:
 Second-class mail privileges; denial, suspension, or
 revocation
 Correction, 68364

Presidential Documents**EXECUTIVE ORDERS**

Government agencies and employees:
 Pay and allowance rates (EO 13071), 68521–68530

Public Debt Bureau

See Fiscal Service

Public Health Service

See Agency for Toxic Substances and Disease Registry

See Centers for Disease Control and Prevention

See Food and Drug Administration

See National Institutes of Health

Reclamation Bureau**PROPOSED RULES**

Colorado River Water Quality Improvement Program:

Colorado River water offstream storage, and interstate redemption of storage credits in lower division States, 68492-68500

NOTICES

Environmental statements; availability, etc.:

Central Valley Project Improvement Act, CA, 68299-68300

Colorado River Water Quality Improvement Program—Offstream storage and interstate redemption of storage credits in the lower division States, 68466

Securities and Exchange Commission**NOTICES**

Self-regulatory organizations; proposed rule changes:

Chicago Board Options Exchange, Inc., 68326-68330

National Association of Securities Dealers, Inc., 68330-68334

Pacific Exchange, Inc., 68334-68338

Philadelphia Stock Exchange, Inc., 68338-68347

Surface Transportation Board**NOTICES**

Railroad operation, acquisition, construction, etc.:

Buffalo & Pittsburgh Railroad, Inc., 68352

Railroad services abandonment:

South Carolina Central Railroad Co., Inc., 68352-68353

Textile Agreements Implementation Committee

See Committee for the Implementation of Textile Agreements

Toxic Substances and Disease Registry Agency

See Agency for Toxic Substances and Disease Registry

Trade Representative, Office of United States**NOTICES**

Trade Agreement Act:

Threshold adjustment, 68347

Transportation Department

See Coast Guard

See Federal Aviation Administration

See Federal Highway Administration

See Federal Transit Administration

See Surface Transportation Board

NOTICES

Agency information collection activities:

Submission for OMB review; comment request, 68347-68348

Meetings:

Puget Sound area waters; pollution and public safety; solicitation of public views and comments, 68348-68349

Treasury Department

See Customs Service

See Fiscal Service

See Internal Revenue Service

PROPOSED RULES

Federal Claims Collection Standards; implementation, 68476-68487

NOTICES

Agency information collection activities:

Proposed collection; comment request, 68353-68354

Submission for OMB review; comment request, 68354-68355

Organization, functions, and authority delegations:

Internal Revenue Service, Commissioner, 68355-68356

United States Information Agency**NOTICES**

Grants and cooperative agreements; availability, etc.:

College and university affiliations program, 68356

Veterans Affairs Department**NOTICES**

Agency information collection activities:

Proposed collection; comment request, 68356-68360

Submission for OMB review; comment request, 68360-68361

Meetings:

Environmental Hazards Advisory Committee, 68361

Rehabilitation Advisory Committee, 68361-68362

Scientific Review and Evaluation Board for Health

Services Research and Development Service, 68362

Poverty threshold (1996); weighted average, 68362

Privacy Act:

Systems of records, 68362-68363

Separate Parts In This Issue**Part II**

Office of the Federal Register, National Archives and Records Administration, 68366-68369

Part III

Department of Health and Human Services, Centers for Disease Control; Department of Labor, Mine Safety and Health Administration, 68372-68421

Part IV

Federal Reserve System, 68424-68464

Part V

Department of Interior, Bureau of Reclamation, 68466

Part VI

Department of Labor, Mine Safety and Health Administration, 68468-68473

Part VII

Department of Justice and the Department of the Treasury, 68476-68487

Part VIII

Department of Education, 68490

Part IX

Department of Interior, Bureau of Reclamation, 68492–
68500

Part X

Department of Energy, 68502–68517

Part XI

The President, 68521–68530

Reader Aids

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

Electronic Bulletin Board

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

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR	68188
Executive Orders:	80.....68196
13071.....	81.....68188
13033 (Superseded by	180.....68208
EO 13071).....	300.....68216
5 CFR	Proposed Rules:
178.....68139	52.....68246
7 CFR	81.....68246
760.....68142	41 CFR
905.....68142	101-42.....68216
925.....68150	101-43 (2 docs.).....68216,
Proposed Rules:	68217
54.....68232	101-46.....68217
246.....68233	Ch. 301.....68217
10 CFR	43 CFR
1045.....68502	Proposed Rules:
12 CFR	4.....68244
1780.....68152	414.....68492
Proposed Rules:	45 CFR
211.....68424	1630.....68219
265.....68424	50 CFR
14 CFR	679 (3 documents).....68228,
39 (4 documents).....68154,	68229, 68230
68156, 68158, 68159	Proposed Rules:
Proposed Rules:	622.....68246
39 (3 documents).....68236,	
68237, 68239	
15 CFR	
801 (2 documents).....68161,	
68163	
19 CFR	
54.....68164	
26 CFR	
1 (3 documents).....68165,	
68167, 68173	
20.....68183	
25.....68183	
301.....68167	
601.....68167	
602 (2 documents).....68167,	
68173	
Proposed Rules:	
301 (2 documents).....68241,	
68242	
30 CFR	
Proposed Rules:	
56.....68468	
57.....68468	
62.....68468	
70.....68468	
71.....68468	
243.....68244	
250.....68244	
290.....68244	
31 CFR	
Proposed Rules:	
Ch. IX.....68476	
900.....68476	
901.....68476	
902.....68476	
903.....68476	
904.....68476	
33 CFR	
Proposed Rules:	
117.....68245	
39 CFR	
954.....68364	
40 CFR	
52 (2 documents).....68187,	

Rules and Regulations

Federal Register

Vol. 62, No. 250

Wednesday, December 31, 1997

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

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 178

RIN 3206-AH89

Procedures for Settling Claims

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final rules of procedure for the settlement of claims submitted to OPM for Federal civilian employees' compensation and leave, for proceeds of canceled checks for veterans' benefits payable to deceased beneficiaries, and for the settlement of deceased employees' compensation. Before June 30, 1996, these claims were settled by the United States General Accounting Office (GAO). However, on that date, pursuant to the Legislative Branch Appropriations Act of 1996, the authority to settle these claims transferred to the Director, Office of Management and Budget, who delegated this function to the Office of Personnel Management.

EFFECTIVE DATE: January 30, 1998.

FOR FURTHER INFORMATION CONTACT: Paul Britner, Senior Attorney, (202) 606-2233, Claims Adjudication Unit, Office of the General Counsel, Room 7537, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the Legislative Branch Appropriations Act of 1996, most of the claims settlement functions performed by the General Accounting Office were transferred to the Director, Office of Management and Budget. See Sec. 211, Pub. L. 104-53, 109 Stat. 535. Subsequently, the Acting Director

delegated these functions to various components within the Executive branch in a determination order dated June 28, 1996. In summary, this order delegated to the Office of Personnel Management the authority to settle claims against the United States involving Federal employees' compensation and leave, deceased employees' compensation, and proceeds of canceled checks for veterans' benefits payable to deceased beneficiaries. Subsequently, Congress codified these changes through additional legislation. See Pub.L. 104-316, 110 Stat. 3826. The proposed rules were published in the **Federal Register** on August 25, 1997. The deadline for receiving comments has passed and no comments regarding the proposed rules have been received. The final procedures contain no changes from the proposed procedures and are substantially similar to the procedures formerly used by GAO, which are found at 4 CFR parts 31, 32 and 33.

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would only apply to Federal agencies and employees.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (42 U.S.C. 3501-3530), and assigned OMB control number 3206-0232. *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.*

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 178

Administrative practice and procedure, Claims, Compensation, Government employees.

U.S. Office of Personnel Management.

Janice R. Lachance,
Director.

Accordingly, OPM is amending 5 CFR by adding part 178 as follows:

PART 178—PROCEDURES FOR SETTLING CLAIMS

Subpart A—Administrative Claims— Compensation and Leave, Deceased Employees' Accounts and Proceeds of Canceled Checks for Veterans' Benefits Payable to Deceased Beneficiaries

Sec.

- 178.101 Scope of subpart.
- 178.102 Procedures for submitting claims.
- 678.103 Claim filed by a claimant's representative.
- 178.104 Statutory limitations on claims.
- 178.105 Basis of claim settlements.
- 178.106 Form of claim settlements.
- 178.107 Finality of claim settlements.

Subpart B—Settlement of Accounts for Deceased Civilian Officers and Employees

- 178.201 Scope of subpart.
- 178.202 Definitions.
- 178.203 Designation of beneficiary.
- 178.204 Order of payment precedence.
- 178.205 Procedures upon death of employee.
- 178.206 Return of unnegotiated Government checks.
- 178.207 Claims settlement jurisdiction.
- 178.208 Applicability of general procedures.

Subpart A—Administrative Claims— Compensation and Leave, Deceased Employees' Accounts and Proceeds of Canceled Checks for Veterans' Benefits Payable to Deceased Beneficiaries

Authority: 31 U.S.C. 3702; 5 U.S.C. 5583; 38 U.S.C. 5122; Pub. L. No. 104-53, 211, Nov. 19, 1995; E.O. 12107.

§ 178.101 Scope of subpart.

(a) *Claims covered.* This subpart prescribes general procedures applicable to claims against the United States that may be settled by the Director of the Office of Personnel Management pursuant to 31 U.S.C. 3702, 5 U.S.C. 5583 and 38 U.S.C. 5122. In general, these claims involve Federal employees' compensation and leave and claims for proceeds of canceled checks for veterans' benefits payable to deceased beneficiaries.

(b) *Claims not covered.* This subpart does not apply to claims that are under the exclusive jurisdiction of administrative agencies pursuant to specific statutory authority or claims concerning matters that are subject to negotiated grievance procedures under collective bargaining agreements entered into pursuant to 5 U.S.C. 7121(a). Also, these procedures do not

apply to claims under the Fair Labor Standards Act (FLSA). Procedures for FLSA claims are set out in part 551 of this chapter.

§ 178.102 Procedures for submitting claims.

(a) *Content of claims.* Except as provided in paragraph (b) of this section, a claim shall be submitted by the claimant in writing and must be signed by the claimant or by the claimant's representative. While no specific form is required, the request should describe the basis for the claim and state the amount sought. The claim should also include:

(1) The name, address, telephone number and facsimile machine number, if available, of the claimant;

(2) The name, address, telephone number and facsimile machine number, if available, of the agency employee who denied the claim;

(3) A copy of the denial of the claim; and,

(4) Any other information which the claimant believes OPM should consider.

(b) *Agency submissions of claims.* At the discretion of the agency, the agency may forward the claim to OPM on the claimant's behalf. The claimant is responsible for ensuring that OPM receives all the information requested in paragraph (a) of this section.

(c) *Administrative report.* At OPM's discretion, OPM may request the agency to provide an administrative report. This report should include:

(1) The agency's factual findings;

(2) The agency's conclusions of law with relevant citations;

(3) The agency's recommendation for disposition of the claim;

(4) A complete copy of any regulation, instruction, memorandum, or policy relied upon by the agency in making its determination;

(5) A statement that the claimant is or is not a member of a collective bargaining unit, and if so, a statement that the claim is or is not covered by a negotiated grievance procedure that specifically excludes the claim from coverage; and

(6) Any other information that the agency believes OPM should consider.

(d) *Canceled checks for veterans' benefits.* Claims for the proceeds of canceled checks for veterans' benefits payable to deceased beneficiaries must be accompanied by evidence that the claimant is the duly appointed representative of the decedent's estate and that the estate will not escheat.

(e) *Where to submit claims.* (1) All claims under this section should be sent to the Claims Adjudication Unit, Room 7535, Office of the General Counsel,

Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

Telephone inquiries regarding these claims may be made to (202) 606-2233.

(2) FLSA claims should be sent to the appropriate OPM Oversight Division as provided in part 551 of this chapter.

§ 178.103 Claim filed by a claimant's representative.

A claim filed by a claimant's representative must be supported by a duly executed power of attorney or other documentary evidence of the representative's right to act for the claimant.

§ 178.104 Statutory limitations on claims.

(a) *Statutory limitations relating to claims generally.* Except as provided in paragraphs (b) and (c) of this section or as otherwise provided by law, all claims against the United States Government are subject to the 6-year statute of limitations contained in 31 U.S.C. 3702(b). To satisfy the statutory limitation, a claim must be received by the Office of Personnel Management, or by the department or agency out of whose activities the claim arose, within 6 years from the date the claim accrued.

The claimant is responsible for proving that the claim was filed within the applicable statute of limitations.

(b) *Claims under the Fair Labor Standards Act.* Claims arising under the FLSA, 29 U.S.C. 207, *et seq.*, must be received by the Office of Personnel Management, or by the department or agency out of whose activity the claim arose, within the time limitations specified in the FLSA.

(c) *Other statutory limitations.* Statutes of limitation other than that identified in paragraph (a) of this section may apply to certain claims. Claimants are responsible for informing themselves regarding other possible statutory limitations.

§ 178.105 Basis of claim settlements.

The burden is upon the claimant to establish the timeliness of the claim, the liability of the United States, and the claimant's right to payment. The settlement of claims is based upon the written record only, which will include the submissions by the claimant and the agency. OPM will accept the facts asserted by the agency, absent clear and convincing evidence to the contrary.

§ 178.106 Form of claim settlements.

OPM will send a settlement to the claimant advising whether the claim may be allowed in whole or in part. If OPM requested an agency report or if the agency forwarded the claim on behalf of the claimant, OPM also will

send the agency a copy of the settlement.

§ 178.107 Finality of claim settlements.

(a) The OPM settlement is final; no further administrative review is available within OPM.

(b) Nothing in this subpart limits the right of a claimant to bring an action in an appropriate United States court.

Subpart B—Settlement of Accounts for Deceased Civilian Officers and Employees

Authority: 5 U.S.C. 5581, 5582, 5583.

§ 178.201 Scope of subpart.

(a) *Accounts covered.* This subpart prescribes forms and procedures for the prompt settlement of accounts of deceased civilian officers and employees of the Federal Government and of the government of the District of Columbia (including wholly owned and mixed-ownership Government corporations), as stated in 5 U.S.C. 5581, 5582, 5583.

(b) *Accounts not covered.* This subpart does not apply to accounts of deceased officers and employees of the Federal land banks, Federal intermediate credit banks, or regional banks for cooperatives (see 5 U.S.C. 5581(1)). Also, these procedures do not apply to payment of unpaid balance of salary or other sums due deceased Senators or Members of the House of Representatives or their officers or employees (see 2 U.S.C. 36a, 38a).

§ 178.202 Definitions.

(a) The term *deceased employees* as used in this part includes former civilian officers and employees who die subsequent to separation from the employing agency.

(b) The term *money due* means the pay, salary, or allowances due on account of the services of the decedent for the Federal Government or the government of the District of Columbia. It includes, but is not limited to:

(1) All per diem instead of subsistence, mileage, and amounts due in reimbursement of travel expenses, including incidental and miscellaneous expenses which are incurred in connection with the travel and for which reimbursement is due;

(2) All allowances upon change of official station;

(3) All quarters and cost-of-living allowances and overtime or premium pay;

(4) Amounts due for payment of cash awards for employees' suggestions;

(5) Amounts due as refund of salary deductions for United States Savings bonds;

(6) Payment for all accumulated and current accrued annual or vacation leave equal to the pay the decedent would have received had he or she lived and remained in the service until the expiration of the period of such annual or vacation leave;

(7) The amounts of all checks drawn in payment of such compensation which were not delivered by the Government to the officer or employee during his or her lifetime or of any unnegotiated checks returned to the Government because of the death of the officer or employee; and

(8) Retroactive pay under 5 U.S.C. 5344(b)(2).

§ 178.203 Designation of beneficiary.

(a) *Agency notification.* The employing agency shall notify each employee of his or her right to designate a beneficiary or beneficiaries to receive money due, and of the disposition of money due if a beneficiary is not designated. An employee may change or revoke a designation at any time under regulations promulgated by the Director of the Office of Personnel Management or his or her designee.

(b) *Designation Form.* Standard Form 1152, Designation of Beneficiary, Unpaid Compensation of Deceased Civilian Employee, is prescribed for use by employees in designating a beneficiary and in changing or revoking a previous designation; each agency will furnish the employee a Standard Form 1152 upon request. In the absence of the prescribed form, however, any designation, change, or cancellation of beneficiary witnessed and filed in accordance with the general requirements of this part will be acceptable.

(c) *Who may be designated.* An employee may designate any person or persons as beneficiary. The term *person* or *persons* as used in this part includes a legal entity or the estate of the deceased employee.

(d) *Executing and filing a designation of beneficiary form.* The Standard Form 1152 must be executed in duplicate by the employee and filed with the employing agency where the proper officer will sign it and insert the date of receipt in the space provided on each part, file the original, and return the duplicate to the employee. When a designation of beneficiary is changed or revoked, the employing agency should return the earlier designation to the employee, keeping a copy of only the current designation on file.

(e) *Effective period of a designation.* A properly executed and filed designation of beneficiary will be effective as long as employment by the same agency

continues. If an employee resigns and is reemployed, or is transferred to another agency, the employee must execute another designation of beneficiary form in accordance with paragraph (d) of this section. A new designation of beneficiary is not required, however, when an employee's agency or site, function, records, equipment, and personnel are absorbed by another agency.

§ 178.204 Order of payment precedence.

To facilitate the settlement of the accounts of the deceased employees, money due an employee at the time of the employee's death shall be paid to the person or persons surviving at the date of death, in the following order of precedence, and the payment bars recovery by another person of amounts so paid:

(a) First, to the beneficiary or beneficiaries designated by the employee in a writing received in the employing agency prior to the employee's death;

(b) Second, if there is no designated beneficiary, to the surviving spouse of the employee;

(c) Third, if none of the above, to the child or children of the employee and descendants of deceased children by representation;

(d) Fourth, if none of the above, to the parents of the deceased employee or the survivor of them;

(e) Fifth, if none of the above, to the duly appointed legal representative of the estate of the deceased employee; and

(f) Sixth, if none of the above, to the person or persons entitled under the laws of the domicile of the employee at the time of his or her death.

§ 178.205 Procedures upon death of employee.

(a) *Claim form.* As soon as practicable after the death of an employee, the agency in which the employee was last employed will request, in the order of precedence outlined in § 178.204, the appropriate person or persons to execute Standard Form 1153, Claim for Unpaid Compensation of Deceased Civilian Employee.

(b) *Claims involving minors or incompetents.* If a guardian or committee has been appointed for a minor or incompetent appearing entitled to unpaid compensation, the claim should be supported by a certificate of the court showing the appointment and qualification of the claimant in such capacity. If no guardian or committee has been or will be appointed, the initial claim should be supported by a statement showing:

(1) Claimant's relationship to the minor or incompetent, if any;

(2) The name and address of the person having care and custody of the minor or incompetent;

(3) That any moneys received will be applied to the use and benefit of the minor or incompetent; and

(4) That the appointment of a guardian or committee is not contemplated.

§ 178.206 Return of unnegotiated Government checks.

All unnegotiated United States Government checks drawn to the order of a decedent representing money due as defined in § 178.202, and in the possession of the claimant, should be returned to the employing agency concerned. Claimants should be instructed to return any other United States Government checks drawn to the order of a decedent, such as veterans benefits, social security benefits, or Federal tax refunds, to the agency from which the checks were received, with a request for further instructions from that agency.

§ 178.207 Claims settlement jurisdiction.

(a) *District of Columbia and Government corporations.* Claims for unpaid compensation due deceased employees of the government of the District of Columbia shall be paid by the District of Columbia, and those of Government corporations or mixed ownership Government corporations may be paid by the corporations.

(b) *Office of Personnel Management.* Each agency shall pay undisputed claims for the compensation due a deceased employee. Except as provided in paragraph (a) of this section, disputed claims for money due deceased employees of the Federal Government will be submitted to the Claims Adjudication Unit, Office of General Counsel, in accordance with § 178.102 of subpart A. For example:

(1) When doubt exists as to the amount or validity of the claim;

(2) When doubt exists as to the person(s) properly entitled to payment; or

(3) When the claim involves uncurrent checks. *Uncurrent checks* are unnegotiated and/or undelivered checks for money due the decedent which have not been paid by the end of the fiscal year after the fiscal year in which the checks were issued. The checks, if available, should accompany the claims.

(c) *Payment of claim.* Claims for money due will be paid by the appropriate agency only after settlement by the Claims Adjudication Unit occurs.

§ 178.208 Applicability of general procedures.

When not in conflict with this subpart, the provisions of subpart A of this part relating to procedures applicable to claims generally are also applicable to the settlement of account of deceased civilian officers and employees.

[FR Doc. 97-33928 Filed 12-30-97; 8:45 am]
BILLING CODE 6325-01-P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 760

RIN 0560-AF-30

Dairy Indemnity Payment Program

AGENCY: Farm Service Agency, USDA.
ACTION: Final rule.

SUMMARY: This final rule amends the authority citation for the Dairy Indemnity Payment Program (DIPP) regulations to cover the expenditure of additional funds that were recently appropriated. The DIPP indemnifies dairy farmers and manufacturers for losses suffered with respect to milk and milk products, through no fault of their own.

EFFECTIVE DATE: December 31, 1997.

FOR FURTHER INFORMATION CONTACT: Raellen Erickson, Agricultural Program Specialist, Price Support Division, FSA, USDA, STOP 0512, 1400 Independence Avenue, SW, Washington, DC 20250-0512; telephone (202) 720-7320; e-mail address is RErickso@wdc.fsa.usda.gov.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be not significant for purposes of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

Federal Assistance Program

The title and number of the Federal Assistance Program, as found in the Catalog of Federal Domestic Assistance, to which this rule applies are Dairy Indemnity Payments, Number 10.053.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this final rule because the Farm Service Agency is not required by 5 U.S.C. 533 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of these determinations.

Environmental Evaluation

It has been determined by an environmental evaluation that this action will have no significant impact on the quality of the human environment. Therefore, neither an environmental assessment nor an Environmental Impact Statement is needed.

Executive Order 12372

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

Executive Order 12988

This rule has been reviewed pursuant to Executive Order 12988. To the extent State and local laws are in conflict with these regulatory provisions, it is the intent of CCC that the terms of the regulations prevail. The provisions of this rule are not retroactive. Prior to any judicial action in a court of competent jurisdiction, administrative review under 7 CFR part 780 must be exhausted.

Paperwork Reduction Act

The information collections in 7 CFR part 760 will be published in a separate **Federal Register** Notice with request for comments. A regular submission of this information collection package will be forwarded to OMB at the end of the 60-day comment period.

Background

The DIPP was originally authorized by section 331 of the Economic Opportunity Act of 1964. The statutory authority for the program was extended several times. Most recently, funds were appropriated for this program by the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Act, 1998 ("the Act"), Pub. L. 105-86, 111 Stat. 2079, which authorizes the program to be carried out until the funds appropriated under the Act are expended. The objective of DIPP is to indemnify dairy farmers and manufacturers of dairy products who, through no fault of their own, suffer income losses with respect to milk or milk products removed from commercial markets because such milk or milk products contain certain harmful residues. In addition, dairy farmers can also be indemnified for income losses with respect to milk required to be removed from commercial markets due to residues of chemicals or toxic substances or

contamination by nuclear radiation or fallout.

The regulations governing the program are set forth at 7 CFR §§ 760.1-760.34. This final rule makes no changes in the provisions of the regulations. Since the only purpose of this final rule is to revise the authority citation pursuant to the Act, it has been determined that no further public rulemaking is required. Therefore, this final rule shall become effective upon the date of publication in the **Federal Register**.

List of Subjects in 7 CFR Part 760

Dairy products, Indemnity payments, Pesticides and pests.

Accordingly, 7 CFR Part 760 is amended as follows:

PART 760—INDEMNITY PAYMENT PROGRAMS

Subpart—Dairy Indemnity Payment Program

The authority citation for Subpart—Dairy Indemnity Payment Program is revised to read as follows:

Authority: Dairy Indemnity Program, Pub. L. 105-86, 111 Stat. 2079.

Signed in Washington, DC, on December 22, 1997.

Keith Kelly,

Administrator, Farm Service Agency.

[FR Doc. 97-34032 Filed 12-30-97; 8:45 am]
BILLING CODE 3410-05-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 905

[Docket No. FV97-905-1 FIR]

Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida; Limiting the Volume of Small Florida Red Seedless Grapefruit

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is finalizing without change the provisions of an amended interim final rule limiting the volume of small red seedless grapefruit entering the fresh market under the Florida citrus marketing order. The marketing order regulates the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida and is administered locally by the Citrus Administrative Committee (committee). The amended interim final rule limited

the volume of size 48 and/or size 56 red seedless grapefruit handlers could ship during the first 11 weeks of the 1997–1998 season that began in September. That rule provided a sufficient supply of small sized red seedless grapefruit to meet market demand, without saturating all markets with these small sizes. The committee believed this action was necessary to help stabilize the market and improve grower returns.

EFFECTIVE DATE: January 30, 1998.

FOR FURTHER INFORMATION CONTACT:

Christian D. Nissen, Southeast Marketing Field Office, Marketing Order Administration Branch, F&V, AMS, USDA, P.O. Box 2276, Winter Haven, Florida 33883; telephone: (941) 299–4770, Fax: (941) 299–5169; or Anne M. Dec, Marketing Order Administration Branch, F&V, AMS, USDA, room 2522–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 720–2491, Fax: (202) 205–6632. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, F&V, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456; telephone (202) 720–2491, Fax: (202) 205–6632.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 84 and Marketing Order No. 905, both as amended (7 CFR part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida, hereinafter referred to as the “order.” The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.”

The Department is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the

hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary’s ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

The order provides for the establishment of grade and size requirements for Florida citrus, with the concurrence of the Secretary. These grade and size requirements are designed to provide fresh markets with citrus fruit of acceptable quality and size. This helps create buyer confidence and contributes to stable marketing conditions. This is in the interest of growers, handlers, and consumers, and is designed to increase returns to Florida citrus growers. The current minimum grade standard for red seedless grapefruit is U.S. No. 1, and the minimum size requirement is size 56 (at least 3⁵/₁₆ inches in diameter).

Section 905.52 of the citrus marketing order provides authority to limit shipments of any grade or size, or both, of any variety of Florida citrus. Such limitations may restrict the shipment of a portion of a specified grade or size of a variety. Under such a limitation, the quantity of such grade or size that may be shipped by a handler during a particular week is established as a percentage of the total shipments of such variety by such handler in a prior period, established by the committee and approved by the Secretary, in which the handler shipped such variety.

Section 905.153 of the order provides procedures for limiting the volume of small red seedless grapefruit entering the fresh market. The procedures specify that the committee may recommend that only a certain percentage of size 48 and/or 56 red seedless grapefruit be made available for shipment into fresh market channels for any week or weeks during the regulatory period. The 11 week period begins the third Monday in September. Under such a limitation, the quantity of sizes 48 and/or 56 red seedless grapefruit that may be shipped by a handler during a regulated week is calculated using the recommended percentage. By taking the recommended weekly percentage times the average weekly volume of red grapefruit handled by such handler in the previous five seasons, handlers can calculate the volume of sizes 48 and/or 56 they may ship in a regulated week.

This rule finalizes the provisions of an interim final rule as amended limiting the volume of small red seedless grapefruit entering the fresh

market during the 11 week regulatory period from September 15, 1997, to November 30, 1997. A proposed rule was published on July 29, 1997, in the **Federal Register** (62 FR 40482). Subsequently, an interim final rule was published September 12, 1997, in the **Federal Register** (62 FR 47913). That rule limited the volume of small red seedless grapefruit entering the fresh market for each week of an 11 week period beginning the week of September 15. That rule limited the volume of sizes 48 and/or 56 red seedless grapefruit by establishing a weekly percentage for each of the 11 weeks. On October 30, 1997, an amendment to the interim final rule was published in the **Federal Register** (62 FR 58633) that changed the weekly percentage of sizes 48 and/or 56 red seedless grapefruit entering the fresh market for the last five weeks of the regulatory period from 30 percent to 35 percent. This rule finalizes the interim final rule as amended, without change.

The committee originally voted at its May 28, 1997, meeting to establish a weekly percentage of 25 percent for each of the 11 weeks in a vote of 10 in favor to 7 opposed. The committee recommended adjusting the percentages at its meeting August 26, 1997, in a vote of 14 in favor to 3 opposed, recommending weekly percentages of 50 percent for the first three weeks (September 15 through October 5), 35 percent for the next three weeks (October 6 through October 26), and at 30 percent for the remainder of the 11 weeks. The committee met again, October 14, 1997, and in a unanimous vote recommended changing the weekly percentage for the last five weeks from 30 percent to 35 percent.

For the past few seasons, returns on red seedless grapefruit have been at all time lows, often not returning the cost of production. On tree prices for red seedless grapefruit have declined steadily from \$9.60 per box (1–3/5 bushel) during the 1989–90 season, to \$3.11 per box during the 1992–93 season, to \$1.82 per box during the 1994–95 season, to \$1.55 per box during the 1996–97 season. The committee believes that to stabilize the market and improve returns to growers, demand for fresh red seedless grapefruit must be stabilized and increased.

One problem contributing to the current state of the market is the excessive number of small sized grapefruit shipped early in the marketing season. During the past three seasons, sizes 48 and 56 accounted for 34 percent of total shipments during the 11 week regulatory period, with the average weekly percentage exceeding 40 percent of shipments. This contrasts

with sizes 48 and 56 representing only 26 percent of total shipments for the remainder of the season. While there is a market for early grapefruit, the shipment of large quantities of small red seedless grapefruit in a short period oversupplies the fresh market for these sizes and negatively impacts the market for all sizes.

For the majority of the season, larger sizes return better prices than smaller sizes. However, there is a push early in the season to get fruit into the market to take advantage of the higher prices available at the beginning of the season. The early season crop tends to have a greater percentage of small sizes. This creates a glut of smaller, lower priced fruit on the market that drives down the price for all sizes. Early in the season, larger sized fruit commands a premium price. In some cases, the f.o.b. is \$4 to \$6 a carton (4/5 bushel) more than for the smaller sizes. In early October, the f.o.b. for a size 27 averages around \$10.00 per carton. This compares to an average f.o.b. of \$5.50 per carton for size 56. By the end of the 11 week period outlined in this rule, the f.o.b. for large sizes has dropped to within two dollars of the f.o.b. for small sizes.

In the past three seasons, during the period covered by this rule, prices of red seedless grapefruit have fallen from a weighted average f.o.b. of \$7.80 per carton to an average f.o.b. of \$5.50 per carton. Even though later in the season the crop has sized to naturally limit the amount of smaller sizes available for shipment, the price structure in the market has already been negatively affected. In the past three years, the market has not recovered, and the f.o.b. for all sizes fell to around \$5.00 to \$6.00 per carton for most of the rest of the season.

The committee discussed this issue at length at several meetings. The committee believes that the over shipment of smaller sized red seedless grapefruit early in the season has contributed to below production cost returns for growers and lower on tree values. An economic study done by the University of Florida—Institute of Food and Agricultural Sciences (UF-IFAS) in May 1997, found that on tree prices have fallen from a high near \$7.00 in 1991-92 to around \$1.50 for this past season. The study projects that if the industry elects to make no changes, the on tree price will remain around \$1.50. The study also indicates that increasing minimum size restrictions could help to raise returns.

The committee examined shipment data covering the 11 week regulatory period for the last four seasons. The information contained the amounts and

percentages of sizes 48 and 56 shipped during each week. They compared this information with tables outlining weekly f.o.b. figures for each size. Based on this statistical information from past seasons, the committee members believe there is an indication that once shipments of sizes 48 and 56 reach levels above 250,000 cartons a week, prices decline on those and most other sizes of red seedless grapefruit. Without volume regulation, the industry has been unable to limit the shipments of small sizes. The committee believes that if shipments of small sizes can be maintained at around 250,000 cartons a week, prices should stabilize and demand for larger, more profitable sizes should increase.

The committee has had considerable discussion regarding at what level to establish the weekly percentages. They wanted to recommend weekly percentages that would provide a sufficient volume of small sizes without adversely impacting the markets for larger sizes. At its May 28, 1997, meeting, the committee recommended that the percentage for each of the 11 weeks be established at the 25 percent level. Their reasoning was that this percentage, when combined with the average weekly shipments for the total industry, provided a total industry allotment of 244,195 cartons of sizes 48 and/or 56 red seedless grapefruit per regulated week. This percentage would have allowed total shipments of small red seedless grapefruit to approach the 250,000 carton mark during regulated weeks without exceeding it.

During committee deliberations at the May 28, 1997, meeting, several concerns were raised regarding the regulation. One area of concern was the possible impact the regulation may have on exports. Several members stated that there was a strong demand in some export markets for small sizes. Other members responded that the percentages set allow handlers enough volume of small sizes to meet the demand in these markets. It was also stated that any shortfall an individual handler might have can be filled by loan or transfer. There was also some discussion that markets that normally demand small sizes have shown a willingness to purchase larger sizes. In addition, committee data indicate that the majority of export shipments occur after the 11 week period when there are no restrictions on small sizes.

Another concern raised was the effect the action would have on packouts. It was stated that the rule could reduce the volume packed, resulting in higher packinghouse costs. The purpose of the recommended rule was to limit the

volume of small sizes marketed early in the season. Larger sizes can be substituted for smaller sizes with a minimum effect on overall shipments. The rule might require more selective picking of only the sizes desired, something that many growers are doing already. The UF-IFAS study presented indicated that it would increase returns if growers would harvest selectively and return to repick groves as the grapefruit sized. This also would allow growers to maximize returns on fresh grapefruit by not picking unprofitable grades and sizes of red grapefruit that will be sent to the less profitable processing market. The study also indicated that selective harvesting can reduce the f.o.b. cost per carton, and therefore, have a positive impact on grower returns.

Several members were concerned about what would happen if market conditions were to change. Other committee members responded that if industry conditions were to change (for example, if there was a freeze, or if the grapefruit was not sizing), the committee could meet and recommend that the percentage be raised to allow for more small sizes, or that the limits be removed all together.

Another concern raised at the May 28, 1997, meeting was that market share could be lost to Texas. According to the Economic Analysis Branch (EAB), of the Fruit and Vegetable Division, of the Agricultural Marketing Service (AMS), limiting shipments of small Florida grapefruit will probably not result in a major shift to Texas grapefruit because the Texas industry is much smaller and has higher freight costs to some markets supplied by Florida. The UF-IFAS study made similar findings. Texas production is much smaller and has been susceptible to freezes that take it out of the market. This has lessened its impact on the overall grapefruit market.

At the May 28, 1997, meeting, one handler expressed that they ship early in the season and this action could be very restrictive. Members responded that the availability of loans and transfers address these concerns. There was also discussion of how restrictive this rule actually is. Based on shipments from the past four seasons, available allotment would have exceeded actual shipments for each of the first three weeks that are regulated under this rule even if the weekly percentage was set at 25 percent. In the three seasons prior to last season, if a 25 percent restriction on small sizes had been applied during the 11 week period, only an average of 4.2 percent of overall shipments during that period would have been affected. The rule published on September 12, 1997, affected even fewer shipments by

establishing less restrictive weekly percentages. In addition, a large percentage of this volume most likely could have been replaced by larger sizes. A sufficient volume of small sized red grapefruit was still allowed into all channels of trade, and allowances were in place to help handlers address any market shortfall.

The committee met again August 26, 1997, and revisited the weekly percentage issue. At the meeting, the committee recommended that the weekly percentages be changed from 25 percent for each of the 11 regulated weeks to 50 percent for the first three weeks (September 15 through October 5), 35 percent for the next three weeks (October 6 through October 26), and 30 percent for the remainder of the 11 weeks.

In its discussion of this change, the committee reviewed the initial percentages recommended and the current state of the crop. The committee also reexamined shipping information from past seasons, looking particularly at volume across the 11 weeks. Based on shipments from the past four seasons, available allotment under a 25 percent restriction would have exceeded actual shipments for each of the first three weeks that are regulated under this rule.

The committee recognized that in terms of available allotment, establishing a weekly percentage of 25 percent for the first three regulated weeks would not be restrictive. However, they said that this was based on total available allotment, not on data for each individual handler. The committee determined that if available allotment would exceed shipments for the first three weeks even when establishing a percentage of 25 percent, it would give individual handlers greater flexibility during these three weeks to establish the percentage at 50 percent. They argued that this would provide each handler with additional allotment during these three weeks, reducing the number of loans and transfers needed to utilize the available allotment, yet having little or no effect on the volume of small sizes. The committee also agreed that setting the percentage at 50 percent rather than 100 percent would still provide some restriction should shipments for September 15 through October 5 for this season exceed past quantities.

For the remainder of the 11 weeks, the committee believed that the weekly percentage needed to be less than 50 percent (which would have resulted in virtually no limitation on shipments of small sizes) but greater than 25 percent. The committee held that it is important to control small sizes, but it is also

important to be able to service the markets that demand small sizes. The issue was raised regarding the possible market impact when small sizes exceed 250,000 cartons in a week. The committee recognized that ideally, 244,195 cartons of red seedless grapefruit would be available to the industry for each of the 11 weeks if the percentage was set at 25 percent. However, the committee was concerned that the true amount available would be lower.

Several members stated that setting a weekly percentage at 25 percent to approximate the 250,000 cartons was based on total utilization of allotment, and that assumption was unreasonable. The committee agreed that loans and transfers are beneficial, but that even with their availability a percentage of allotment would most likely not be used.

Several other members raised concerns about focusing too much on total allotment available, rather than on allotment available to individual handlers. The committee stated that the way a handler's base is calculated using an average week is probably the most equitable way to do so. However, they acknowledged that it did present some problems. Members concurred that the season for red seedless grapefruit is approximately 33 weeks. However, the members agreed that this did not mean that every handler was shipping during all 33 weeks. They discussed how a handler's average weekly shipments are calculated by averaging their shipments from the past five seasons, and then dividing this number by the 33 weeks to establish an average week. Members stated that the calculated average week was often lower than their actual weekly shipments during the periods they were shipping because they were not shipping during all 33 weeks. They also stated that applying a weekly percentage of 25 percent to their average week would have resulted in limiting their shipments to a level closer to 15 percent of their actual shipments during this period.

Based on this discussion, the committee thought a weekly percentage of 25 percent would be overly restrictive. The committee believed that since total available allotment most probably will not be fully utilized, and how individual handlers are affected, establishing a weekly percentage of 35 percent for the regulation weeks October 6 through October 26 would be more appropriate. They believed this level would provide a sufficient supply of small sizes without exceeding amounts that would negatively affect other markets.

The committee further recommended that the weekly percentage for the remainder of the 11 weeks be established at 30 percent. The committee resolved that a lower percentage was desirable moving into the last five weeks of regulation. The committee believed that as the industry moves into the season and shipments increase, a weekly percentage of 30 percent would provide the best balance between supply and demand for small sized red seedless grapefruit.

At the August 26, 1997, meeting, the concern was raised that the weekly percentages recommended were not restrictive enough. Committee members responded that not all available allotment would be utilized, and that the recommended percentages would still restrict shipments of small sizes, while providing handlers with flexibility to supply those markets that demand small sizes.

However, the committee met again October 14, 1997, and revisited the weekly percentage issue. The committee recommended another revision in the weekly percentages. The committee recommended that the weekly percentage for the final five weeks of the regulated period (October 27 through November 30, 1997) be changed from 30 percent to 35 percent.

In its discussion of this change, the committee reviewed the percentages previously recommended and the current state of the crop. In addition, the committee had some new information regarding this season that was not available during its earlier meetings. On October 10, 1997, the Department released its crop estimate for Florida grapefruit. The estimate for total Florida grapefruit was 54 million boxes, a 3.2 percent reduction from last season. In addition, the committee was provided information regarding size distribution developed from a September size survey. The size survey was conducted by the Department as part of the crop estimate and showed that more small sizes were available than anticipated. The committee also had the benefit of having operated several weeks under a weekly percentage regulation.

During the committee's discussion, there were many comments that the use of the weekly percentage rule was being effective. They believed that this rule was having a positive effect on the market and on returns. The weekly percentages, combined with a very limited processing market, has forced the industry to do more spot picking for the available markets.

Several persons attending the committee meeting encouraged the committee to stay the course, and leave

the weekly percentages as they were established. However, others thought that the 30 percent weekly percentage rate for the last five weeks of the regulation period might be too restrictive. Concerns were again voiced that the method for calculating allotment base was not always a good approximation of a handler's historical shipments during this 11-week period. Based on the shipment data available for the current season, and shipments from past seasons, total weekly shipments of red seedless grapefruit during the rest of the regulatory period are expected to exceed the average week calculated for the industry of 976,782 cartons. There is also some indication that shipments during the remainder of the regulation period may be greater than in past seasons. With shipments running higher, the committee concluded that establishing a 30 percent weekly percentage rate in combination with the calculated average week would result in available allotment of less than 30 percent of overall shipments.

The committee discussed the merits of changing the established weekly percentage rate for the last five weeks from 30 percent to 35 percent. Such a change represents an additional industry allotment of less than 50,000 cartons. The effect on an individual handler's allotment would be minimal. However, there was discussion that such a change would provide some additional flexibility for handlers.

In addition, having been operating under a weekly percentage for several weeks, members stated that the regulation was being effective and moving to a more restrictive level was unnecessary. Members agreed that one of the most important goals of this regulation was to create some discipline in the way fruit was picked and marketed. Several individuals stated that there are indications from the current and past regulatory weeks that maintaining the weekly percentage at 35 percent for the remainder of the 11 weeks would continue to accomplish this goal.

The committee examined the information on past shipments and on the size distribution information available for the current season. Based on the size survey, 37.6 percent of the crop is size 48 or 56. This amount was somewhat larger than originally expected, indicating that there was a greater volume of smaller sizes than the committee had anticipated. Considering this, and the other information discussed, the committee agreed that establishing a weekly percentage of 35 percent for the remainder of the regulated period would address the

goals of this regulation, while providing handlers with some additional flexibility.

The committee again included in its deliberations that if crop and market conditions should change, the committee could recommend that the percentages be increased or eliminated to provide for the shipment of more small sizes. The committee considered the official crop estimate and the information in the UF-IFAS study. Committee members also discussed how the crop was sizing. Using this information on the 1997-98 crop, the committee members believed that establishing the weekly percentages as recommended provided enough small sizes to supply those markets without disrupting the markets for larger sizes.

After considering the concerns expressed, and the available information, the committee determined that the interim final rule as amended was needed to regulate shipments of small sized red seedless grapefruit.

Under the procedures in section 905.153, the quantity of sizes 48 and/or 56 red seedless grapefruit that may be shipped by a handler during a regulated week is calculated using the recommended percentage for that week. By taking the established weekly percentage times the average weekly volume of red grapefruit handled by such handler in the previous five seasons, handlers can calculate the volume of sizes 48 and/or 56 they may ship in a regulated week.

An average week was calculated by the committee for each handler using the following formula. The total red seedless grapefruit shipments by a handler during the 33 week period beginning the third Monday in September and ending the first Sunday in May during the previous five seasons were added and divided by five to establish an average season. This average season was then divided by the 33 weeks in a season to derive the average week. This average week is the base for each handler for each of the 11 weeks contained in the regulation period. The applicable weekly percentage is then multiplied by a handler's average week. The total is that handler's allotment of sizes 48 and/or 56 red seedless grapefruit for the given week.

The calculated allotment is the amount of small sized red seedless grapefruit a handler can ship. If the minimum size established under section 905.52 remains at size 56, handlers can fill their allotment with size 56, size 48, or a combination of the two sizes such that the total of these shipments are within the established limits. If the

minimum size under the order is 48, handlers can fill their allotment with size 48 fruit such that the total of these shipments are within the established limits. The committee staff will perform the specified calculations and provide them to each handler.

To illustrate, suppose Handler A shipped a total of 50,000 cartons, 64,600 cartons, 45,000 cartons, 79,500 cartons, and 24,900 cartons of red seedless grapefruit in the last five seasons, respectively. Adding these season totals and dividing by five yields an average season of 52,800 cartons. The average season is then divided by 33 weeks to yield an average week, in this case, 1,600 cartons. This is handler A's base. Assuming the weekly percentage is 50 percent, this percentage is then applied to the handler's base. This provides this handler with a weekly allotment of 800 cartons ($1,600 \times .50$) of size 48 and/or 56.

The average week for handlers with less than five previous seasons of shipments is calculated by the committee by averaging the total shipments for the seasons they did ship red seedless grapefruit during the immediately preceding five years and dividing that average by 33. New handlers with no record of shipments have no prior period on which to base their average week. Therefore, a new handler can ship small sizes up to the established weekly percentage as a percentage of their total volume of shipments during their first shipping week. Once a new handler has established shipments, their average week is calculated as an average of the weeks they have shipped during the current season.

This rule finalizes, without change, the weekly percentages for each of the eleven weeks of the regulatory period (September 5 through November 30) that appeared in the amended interim final rule.

The rules and regulations contain a variety of provisions designed to provide handlers with some marketing flexibility. When regulation is established by the Secretary for a given week, the committee calculates the quantity of small red seedless grapefruit which may be handled by each handler. Section 905.153(d) provides allowances for overshipments, loans, and transfers of allotment. These allowances should allow handlers the opportunity to supply their markets while limiting the impact of small sizes on a weekly basis.

During any week for which the Secretary has fixed the percentage of sizes 48 and/or 56 red seedless grapefruit, any handler can handle an amount of sizes 48 and/or 56 red

seedless grapefruit not to exceed 110 percent of their allotment for that week. The quantity of overshipments (the amount shipped in excess of a handler's weekly allotment) will be deducted from the handler's allotment for the following week. Overshipments are not allowed during week 11 because there are no allotments the following week from which to deduct the overshipments.

If handlers fail to use their entire allotments in a given week, the amounts undershipped will not be carried forward to the following week. However, a handler to whom an allotment has been issued can lend or transfer all or part of such allotment (excluding the overshipment allowance) to another handler. In the event of a loan, each party will, prior to the completion of the loan agreement, notify the committee of the proposed loan and date of repayment. If a transfer of allotment is desired, each party will promptly notify the committee so that proper adjustments of the records can be made. In each case, the committee will confirm in writing all such transactions prior to the following week. The committee can also act on behalf of handlers wanting to arrange allotment loans or participate in the transfer of allotment. Repayment of an allotment loan is at the discretion of the handlers party to the loan.

The committee computes each handler's allotment by multiplying the handler's average week by the percentage established by regulation for that week. The committee will notify each handler prior to that particular week of the quantity of sizes 48 and 56 red seedless grapefruit such handler can handle during a particular week, making the necessary adjustments for overshipments and loan repayments.

This rule does not affect the provision that handlers may ship up to 15 standard packed cartons (12 bushels) of fruit per day exempt from regulatory requirements. Fruit shipped in gift packages that are individually addressed and not for resale, and fruit shipped for animal feed are also exempt from handling requirements under specific conditions. Also, fruit shipped to commercial processors for conversion into canned or frozen products or into a beverage base are not subject to the handling requirements under the order.

Section 8(e) of the Act requires that whenever grade, size, quality or maturity requirements are in effect for certain commodities under a domestic marketing order, including grapefruit, imports of that commodity must meet the same or comparable requirements. This rule does not change the minimum

grade and size requirements under the order, only the percentages of sizes 48 and/or 56 red grapefruit that may be handled. Therefore, no change is necessary in the grapefruit import regulations as a result of this action.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 80 handlers subject to regulation under the order and approximately 11,000 growers of citrus in the regulated area. Small agricultural service firms, which includes handlers, have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those having annual receipts of less than \$500,000.

Based on the Florida Agricultural Statistics Service and committee data for the 1995-96 season, the average annual f.o.b. price for fresh Florida red grapefruit during the 1995-96 season was \$5.00 per 4/5 bushel cartons for all grapefruit shipments, and the total shipments for the 1995-96 season were 23 million cartons of grapefruit. Approximately 20 percent of all handlers handled 60 percent of Florida grapefruit shipments. In addition, many of these handlers ship other citrus fruit and products which are not included in committee data but would contribute further to handler receipts. Using the average f.o.b. price, about 80 percent of grapefruit handlers could be considered small businesses under SBA's definition and about 20 percent of the handlers could be considered large businesses. The majority of Florida grapefruit handlers, and growers may be classified as small entities.

The committee believes that the over shipment of smaller sized red seedless grapefruit early in the season has contributed to below production cost returns for growers and lower on tree values. For the past few seasons, returns on red seedless grapefruit have been at all time lows, often not returning the

cost of production. On tree prices for red seedless grapefruit have declined steadily from \$9.60 per box during the 1989-90 season, to \$3.11 per box during the 1992-93 season, to \$1.82 per box during the 1994-95 season, to \$1.55 per box during the 1996-97 season. The committee believes that to stabilize the market and improve returns to growers, demand for fresh red seedless grapefruit must be stabilized and increased.

Under the authority of section 905.52 of the order, this rule limits the volume of small red seedless grapefruit entering the fresh market for each week of the 11 week period beginning the week of September 15, 1997. Under such a limitation, the quantity of sizes 48 and/or 56 red seedless grapefruit that may be shipped by a handler during a particular week is calculated using the recommended percentage. By taking the recommended percentage times the average weekly volume of red grapefruit handled by such handler in the previous five seasons, the committee calculates a handler's weekly allotment of small sizes. This rule provides a supply of small sized red seedless grapefruit sufficient to meet market demand, without saturating all markets with these small sizes. This rule is necessary to help stabilize the market and improve grower returns.

At the May 28, 1997, meeting, the committee recommended that the percentage for each of the 11 weeks be established at the 25 percent level. They reasoned that this percentage, when combined with the average weekly shipments for the total industry, would provide a total industry allotment of 244,195 cartons of sizes 48 and/or 56 red seedless grapefruit per regulated week. This percentage would have allowed total shipments of small red seedless grapefruit to approach the 250,000 carton mark during regulated weeks without exceeding it.

At the May 28, 1997, meeting, there was discussion regarding the expected impact of this change on handlers and growers in terms of cost. Discussion focused on the possibility that market share could be lost to Texas and that this rule could increase packinghouse costs. According to Economic Analysis Branch, limiting shipments of small Florida grapefruit probably will not result in a major shift to Texas grapefruit because the Texas industry is much smaller and has higher freight costs to some markets supplied by Florida. The UF-IFAS study made similar findings. Texas production is much smaller and has been susceptible to freezes that take it out of the market. This has lessened its impact on the overall grapefruit market.

The concern about packinghouse costs was that volume regulation could mean lower packouts which may increase cost. However, the availability of loans and transfers provides some flexibility. Also, this rule only affects small sizes and only during the 11 week period. By substituting larger sizes and using loans and transfers, packouts should approach the weekly volume of seasons prior to this rule.

A weekly percentage of 25 percent, when combined with the average weekly shipments for the total industry, would provide a total industry allotment of 244,195 cartons of sizes 48 and/or 56 red seedless grapefruit. Based on shipments from the past four seasons, a total available allotment of 244,195 cartons would exceed actual shipments for each of the first three weeks regulated under this rule.

In addition, if a 25 percent restriction on small sizes had been applied during the 11 week period in the three seasons prior to last season, an average of 4.2 percent of overall shipments during that period would have been affected. The September 12, 1997, interim final rule as subsequently amended on October 30, 1997, affected even fewer shipments by establishing less restrictive weekly percentages. In addition, a large percentage of this volume most likely could have been replaced by larger sizes. Under that action a sufficient volume of small sized red grapefruit was still allowed into all channels of trade, and allowances were in place to help handlers address any market shortfall. Therefore, the overall impact on total seasonal shipments and on industry cost should be minimal.

The committee also discussed the state of the market and the cost of doing nothing. During the past three seasons, sizes 48 and 56 accounted for 34 percent of total shipments during the 11 week regulatory period, with the average weekly percentage exceeding 40 percent of shipments. For the remainder of the season, sizes 48 and 56 represent only 26 percent of total shipments. While there is a market for early grapefruit, the shipment of large quantities of small red seedless grapefruit in a short period oversupplies the fresh market for these sizes and negatively impacts the market for all sizes.

The early season crop tends to have a greater percentage of small sizes. The large volume of smaller, lower priced fruit drives down the price for all sizes. Early in the season, larger sized fruit commands a premium price. In some cases, the f.o.b. is \$4 to \$6 a carton more than for the smaller sizes. In early October, the f.o.b. for a size 27 averages around \$10.00 per carton. This

compares to an average f.o.b. of \$5.50 per carton for size 56. By the end of the 11 week period outlined in this rule, the f.o.b. for large sizes has dropped to within two dollars of the price for small sizes.

In the past three seasons, during the period covered by this rule, prices of red seedless grapefruit have fallen from a weighted average f.o.b. of \$7.80 per carton to an average f.o.b. of \$5.50 per carton. Even though later in the season the crop has sized to naturally limit the amount of smaller sizes available for shipment, the price structure in the market has already been negatively affected. This leaves the f.o.b. for all sizes around \$5.00 to \$6.00 per carton for the rest of the season.

As previously stated, the on tree price of red seedless grapefruit has also been falling. On tree prices for fresh red seedless grapefruit have declined steadily from \$9.60 per box during the 1989-90 season, to \$3.11 per box during the 1992-93 season, to \$1.82 per box during the 1994-95 season, to \$1.55 per box during the 1996-97 season. In many cases, prices during the past two seasons have provided returns less than production costs. This price reduction could force many small growers out of business. If no action is taken, the UF-IFAS study indicates that on tree returns will remain at levels around \$1.50.

The September 12, 1997, interim final rule and the subsequent amendment on October 30, 1997, provided a supply of small sized red seedless grapefruit to meet market demand, without saturating all markets with these small sizes. The committee believes that if the supply of small sizes is limited early in the season, prices can be stabilized at a higher level. This provides increased returns for growers. In addition, if more small grapefruit is allowed to remain on the tree to increase in size and maturity, it could provide greater returns to growers.

The committee surveyed shipment data covering the 11 week regulatory period for the last four seasons and examined tables outlining weekly f.o.b. figures for each size. The committee believed that if shipments of small sizes can be maintained at around 250,000 cartons a week, prices should stabilize and demand for larger, more profitable sizes should increase. The established weekly percentages, when combined with the average weekly shipments for the total industry, should help maintain industry shipments of sizes 48 and/or 56 red seedless grapefruit at quantities close to the 250,000 carton level per regulated week. A stabilized price that returns a fair market value benefits both small and large growers and handlers.

The 11-week volume regulation may require more selective picking of only the sizes desired, something that many growers are doing already. The UF-IFAS study indicated that returns could increase if growers harvest selectively and return to repick groves as the grapefruit sized. This also allows growers to maximize returns on fresh grapefruit by not picking unprofitable grades and sizes of red grapefruit that are sent to the less profitable processing market. The study indicated that selective harvesting can reduce the f.o.b. cost per carton. The study also indicates that increasing minimum size restrictions could help to raise returns.

Fifty-nine percent of red seedless grapefruit is shipped to fresh market channels. There is a processing outlet for grapefruit not sold into the fresh market. However, the vast majority of processing is squeezing the grapefruit for juice. Because of the properties of the juice of red seedless grapefruit, including problems with color, the processing outlet is limited, and not currently profitable. Therefore, it is essential that the market for fresh red grapefruit be fostered and maintained. Any costs associated with this action are only for the 11 week regulatory period. However, benefits from this action could stretch throughout the entire 33 week season. Even if this action was successful only in raising returns a few pennies a carton, when applied to 34 million cartons of red seedless grapefruit shipped to the fresh market, the benefits should more than outweigh the costs.

The limits established in the weekly volume regulation are based on percentages applied to a handler's average week. This process was established by the committee because it was the most equitable. All handlers have access to loans and transfers. Handlers and growers both will benefit from increased returns. The costs or benefits of this rule are not expected to be disproportionately more or less for small handlers or growers than for larger entities.

The committee discussed alternatives to the recommended volume regulation. The committee discussed eliminating shipments of size 56 grapefruit all together. Several members expressed that there is a market for size 56 grapefruit. Members favored the percentage rule recommended because it supplies a sufficient quantity of small sizes should there be a demand for size 56. Therefore, the motion to eliminate size 56 was rejected. Another alternative discussed was to do nothing. However, the committee rejected this option, taking in account that returns would

remain stagnant without action. Thus, the majority of committee members agreed that weekly percentages should be established as recommended for the shipment of small sized red seedless grapefruit for the 11 week period beginning September 15, 1997.

The committee met again August 26, 1997, and revisited the weekly percentage issue. The committee recommended that the weekly percentages be set to 50 percent for the first three weeks (September 15 through October 5), 35 percent for the next three weeks (October 6 through October 26), and 30 percent for the remainder of the 11 weeks.

In the discussion of that change, the committee reviewed the initial and the revised percentages recommended, the current state of the crop, and shipping information from past seasons. The committee recognized that in terms of available allotment, even establishing a weekly percentage of 25 percent for the first three regulated weeks would not be restrictive. Shipment data from the past four seasons indicate that available allotment under a 25 percent restriction would have exceeded actual shipments for each of the first three weeks that were regulated under the September 12, 1997, rule.

The committee determined that if available allotment would have exceeded shipments for the first three weeks even when establishing a percentage of 25 percent, it would give individual handlers greater flexibility during these three weeks to establish the percentage at 50 percent. They argued that this would provide each handler with additional allotment during these three weeks, reducing the number of loans and transfers needed to utilize the available allotment, yet having little or no effect on the volume of small sizes. The committee also agreed that setting the percentage at 50 percent would still provide some restriction should shipments for this period this season exceed past quantities.

For the remainder of the 11 weeks, the committee believed that the weekly percentage needed to be tighter than 50 percent which would impose nearly no restriction but greater than 25 percent. The issue was raised regarding the possible market impact when small sizes exceed 250,000 cartons in a week. The committee recognized that ideally, 244,195 cartons of red seedless grapefruit would be available to the industry for each of the 11 weeks if the percentage was set at 25 percent. However, the committee was concerned that the true amount available would be lower. Several members stated that setting a weekly percentage at 25

percent to approximate the 250,000 cartons was based on total utilization of allotment, and that assumption was unreasonable. The committee agreed that loans and transfers are beneficial, but that even with their availability a percentage of allotment would most likely not be used.

At the August 27, 1997, meeting, several other members raised concerns about focusing too much on total allotment available, rather than on allotment per handler. Members concurred that the season for red seedless grapefruit is approximately 33 weeks. However, this did not mean that every handler was shipping during all 33 weeks. Using 33 weeks to divide an average season to calculate an average week often resulted in amounts lower than their actual weekly shipments because they were not shipping during all 33 weeks. They stated that applying a 25 percent restriction regulated them at a level closer to 15 percent of their actual shipments during the regulation period.

Based on this discussion, the committee thought a weekly percentage of 35 percent for the regulation weeks October 6 through October 26 would be a more appropriate level. They believe that because total allotment will not be fully utilized and the way individual handlers are affected, this level would provide a sufficient supply of small sizes without overly exceeding amounts that would negatively affect other markets.

The committee further recommended at the August 27, 1997, meeting, that the weekly percentage for the remainder of the 11 weeks be established at 30 percent. The committee resolved that moving into the last five weeks of regulation, a tighter percentage was desirable. The committee believed that as the industry moves into the season and shipments increase, a weekly percentage of 30 percent would provide the best balance between supply and demand for small sized red seedless grapefruit.

However, on October 14, 1997, the committee met again and recommended a further revision to the weekly percentages. The committee recommended that the weekly percentages for the last five weeks of the regulatory period be changed from 30 percent to 35 percent. In its discussion of this change, the committee reviewed the initial percentages recommended and the current state of the crop.

The committee also reviewed some new information regarding this season that was not available during its earlier meetings. On October 10, 1997, the Department released its crop estimate

for Florida grapefruit. The estimate for total Florida grapefruit was 54 million boxes, a 3.2 percent reduction from last season. In addition, the committee was provided information regarding size distribution developed from a September size survey. This survey was conducted by the Department and showed a larger percentage of small sizes than anticipated. The committee also had the benefit of having operated several weeks under a weekly percentage regulation.

There were many comments by those attending the meeting that the use of the weekly percentage rule was being effective. Members stated that the rule was having a positive effect on the market and on returns. Overall committee support for the regulation had increased.

The committee considered that the 30 percent weekly percentage rate for the last five weeks of the regulation period may be too restrictive. Reviewing shipment data for the beginning weeks of this season and shipments from past seasons, the committee determined that total weekly shipments during the rest of the regulatory period would exceed the average week calculated for the industry of 976,782 cartons. There was also some discussion that shipments during the remainder of the regulation period may be greater than in past seasons. The committee considered that with shipments running higher, establishing a 30 percent weekly percentage rate in combination with the calculated average week would actually be establishing a rate more restrictive than 30 percent of overall shipments.

The committee discussed the merits of changing the established weekly percentage rate for the last five weeks from 30 percent to 35 percent. Such a change represents an additional industry allotment of less than 50,000 cartons, and should have a minimal impact when distributed to individual handlers. However, members thought that an increase would provide some additional flexibility for handlers.

In addition, having been operating under a weekly percentage for several weeks, members stated that the regulation was being effective and moving to a more restrictive level was unnecessary. Members agreed that one of the most important goals of this regulation was to create some discipline in the way fruit was picked and marketed. Committee members believed that maintaining the weekly percentage at 35 percent for the remainder of the 11 weeks would continue to accomplish this goal.

The committee examined the information on past shipments and on

the size distribution information available for the current season. Based on the size survey, 37.6 percent of the crop is size 48 or 56. This amount was somewhat larger than anticipated, indicating that there were more smaller sized red grapefruit than the committee had originally thought. Considering this, and the other information discussed, the committee agreed that establishing a weekly percentage of 35 percent for the remainder of the regulated period would address the goals of this regulation, while providing handlers with some additional flexibility.

This rule changes the requirements under the Florida citrus marketing order. Handlers utilizing the flexibility of the loan and transfer aspects of this action are required to submit a form to the committee. The rule increases the reporting burden on approximately 80 handlers of red seedless grapefruit who will be taking about 0.03 hour to complete each report regarding allotment loans or transfers. The information collection requirements contained in this section have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) and assigned OMB number 0581-0094. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

The Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule. However, red seedless grapefruit must meet the requirements as specified in the U.S. Standards for Grades of Florida Grapefruit (7 CFR 51.760 through 51.784) issued under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 through 1627). Further, the public comments received concerning the proposed rule and previous interim final rule relative to this action did not address the initial regulatory flexibility analysis.

In addition, the committee meetings were widely publicized throughout the citrus industry and all interested persons were invited to attend the meeting and participate in committee deliberations on all issues. Like all committee meetings, the May 28, 1997, meeting, the August 26, 1997, meeting, and the October 14, 1997, meeting were public meetings and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on Tuesday, July 29, 1997 (62 FR 40482). A 15-day comment period

was provided to allow interested persons to respond to the proposal. Thirty-five comments were received. An interim final rule concerning this action was published in the **Federal Register** on Friday, September 12, 1997 (62 FR 47913). Copies of both rules were mailed or sent via facsimile to all committee members and to grapefruit growers and handlers. The rules were also made available through the Internet by the Office of the Federal Register.

The 35 comments received in response to the proposed rule were addressed in the interim final rule published in the **Federal Register** on Friday, September 12, 1997 (62 FR 47913).

In the September 12, 1997, interim final rule, a 10-day comment period was provided to allow interested persons to respond to the rule. One comment was received, that comment was addressed in an amendment to the interim final rule published on October 30, 1997 (62 FR 58633). The amendment provided another 10-day comment period. No additional comments were received.

After consideration of all relevant matter presented, including the information and recommendations submitted by the committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 905

Grapefruit, Marketing agreements, Oranges, Reporting and recordkeeping requirements, Tangelos, Tangerines.

For the reasons set forth in the preamble, 7 CFR part 905 is amended as follows:

PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND TANGELOS GROWN IN FLORIDA

Accordingly, the interim final rule amending 7 CFR Part 905 which was published at 62 FR 47913 (September 12, 1997) and amended at 62 FR 58633 (October 30, 1997), is adopted as a final rule without change.

Dated: December 24, 1997.

Sharon Bomer Lauritsen,

Acting Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 97-34135 Filed 12-30-97; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 925

[Docket No. FV98-925-1 IFR]

Grapes Grown in a Designated Area of Southeastern California; Temporary Suspension of Continuing Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule suspends the continuing assessment rate for the California Desert Grape Administrative Committee (Committee) under Marketing Order No. 925 for the 1998 fiscal period. The fiscal period begins January 1 and ends December 31. The Committee is responsible for local administration of the marketing order, and recommended that no handler assessments be collected in 1998. It made this recommendation because it has enough reserve funds to cover 1998 fiscal year expenses and expenses expected during the first several months of fiscal year 1999, and to keep its operating reserve within the maximum permitted under the marketing order. The assessment rate will apply again during fiscal year 1999 to cover expenses and to replenish the Committee's reserve funds. That rate will continue in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective January 2, 1998. Comments received by March 2, 1998 will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; Fax: (202) 205-6632. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Diane Purvis, Marketing Assistant, or Rose Aguayo, Marketing Specialist, California Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California 93721; telephone: (209) 487-5901, Fax: (209) 487-5906; or George Kelhart, Marketing Order

Administrative Branch, Fruit and Vegetable Programs, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 205-6632. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 205-6632.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 925 (7 CFR part 925) regulating the handling of grapes grown in a designated area of southeastern California, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California grape handlers are subject to assessments. Funds to administer the order are derived from such assessments. In 1997, an assessment rate of \$.01 per lug of grapes was fixed by the Secretary to continue in effect indefinitely unless modified, suspended, or terminated. This action suspends that assessment rate for the 1998 fiscal year. The assessment rate again will apply in fiscal year 1999, and it will be applicable to all assessable grapes beginning January 1, 1999, and continue in effect until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal

place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule temporarily suspends §925.215 of the order's rules and regulations. Section 925.215 established an assessment rate of \$0.01 per lug for fiscal period 1997 and subsequent fiscal periods. Continuous assessment rates remain in effect from fiscal period to fiscal period indefinitely unless modified, suspended, or terminated by the Secretary. This rule suspends the \$0.01 assessment rate for the 1998 fiscal period.

Section 925.41 of the grape marketing order provides authority for the Committee, with the approval of the Department, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. In addition, §925.42 authorizes the use of reserve funds to cover program expenses. The members of the Committee are producers and handlers of California grapes. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. Recommendations concerning the assessment rate are formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

The Committee met on November 12, 1997, and unanimously recommended to carry over the 1997 reserve fund of almost \$190,000, to adopt a budget of \$160,619, and to suspend the assessment rate of \$0.01 per lug of grapes for the 1998 fiscal period. The Committee determined that sufficient funds would be available to meet the expected 1998 fiscal period expenses, and to cover anticipated expenses during the first few months of fiscal year 1999, before handler assessments are collected. The Committee discussed alternatives to this rule, including not suspending the assessment rate, but concluded that an assessment rate will not be necessary as there will be sufficient reserve funds and interest income to meet the 1998 fiscal period expenses, and early season expenses in 1999. Also, the Committee recommended that the major expenditures for the 1998 fiscal period should include \$100,000 for research, \$25,000 for the sheriff's patrol, and \$9,109 for the manager's salary. Budgeted expenses for these items in 1997 were \$100,000 for research, \$25,000 for compliance purposes, and

\$8,675 for the manager's salary. Funds in the reserve will be kept within the maximum permitted by the order (approximately one fiscal period's expenses).

Although this assessment rate suspension only is effective for the 1998 fiscal period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the continuing assessment rate. The dates and times of Committee meetings are available from the Committee or the Department. Committee meetings are open to the public and interested persons may express their views at these meetings. The Department will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 1998 budget has been approved; and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by the Department.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 27 handlers of California grapes subject to regulation under the marketing order and approximately 80 producers in the production area. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.601) as those whose annual receipts are less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$5,000,000. Ten of the 27 handlers subject to regulation have annual grape sales of at least \$5,000,000, excluding receipts from any other sources. The remaining 17 handlers have annual receipts less than \$5,000,000, excluding receipts from other sources. In addition, 70 of the 80 producers subject to regulation have annual sales of at least \$500,000. The remaining 10 producers

have annual sales less than \$500,000, excluding receipts from any other sources. Therefore, a majority of handlers and a minority of producers are classified as small entities.

This rule suspends § 925.215 of the order's rules and regulations, which established an assessment rate of \$0.01 per lug for fiscal period 1997 and subsequent fiscal periods. This suspension will be in effect for the 1998 fiscal period.

The Committee discussed alternatives to this rule, including not suspending the assessment rate, but concluded that no assessment rate will be necessary as there will be sufficient funds in the reserve and interest income to meet the 1998 fiscal period's expenses, and expenses for the first several months of fiscal year 1999. Also, the Committee recommended that the major expenditures for the 1998 fiscal period should include \$100,000 for research, \$25,000 for the sheriff's patrol, and \$9,109 for the manager's salary. Budgeted expenses for these items in 1997 were \$100,000 for research, \$25,000 for compliance purposes, and \$8,675 for the manager's salary. Funds in the reserve will be kept within the maximum permitted by the order (approximately one fiscal period's expenses).

Handler costs will be reduced during the 1998 fiscal year, as assessments will not be collected. The Committee's meeting was widely publicized throughout the grape industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the November 12, 1997, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This action will not impose any additional reporting or recordkeeping requirements on either small or large grape handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

The Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found

that the continuing assessment rate on handlers during the 1998 fiscal period no longer tends to effectuate the declared policy of the Act. The suspension shall continue only through December 31, 1998, at which time it shall terminate and the suspended assessment rate specified in section 925.215 will apply again beginning January 1, 1999.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This action relieves restrictions on handlers by suspending the assessment rate on handlers during the 1998 fiscal period; (2) the 1998 fiscal period begins on January 1, 1998, and this action should be effective as soon as possible to inform handlers that the Secretary concurs with the Committee's recommendation; (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting; and (4) this interim final rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 925

Grapes, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 925 is amended as follows:

PART 925—GRAPES GROWN IN A DESIGNATED AREA OF SOUTHEASTERN CALIFORNIA

1. The authority citation for 7 CFR part 925 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 925.215 [Suspended]

2. In Part 925, § 925.215 is suspended in its entirety effective January 1, 1998, through December 31, 1998.

Dated: December 23, 1997.

Sharon Bomer Lauritsen,

Acting Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 97-34094 Filed 12-30-97; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Part 1780

RIN 2550-AA06

Civil Money Penalties

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Final rule.

SUMMARY: OFHEO is issuing this final rule to adjust each civil money penalty within its jurisdiction to account for inflation. This action is necessary to implement the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996.

DATES: This final rule is effective December 31, 1997.

FOR FURTHER INFORMATION CONTACT: Danielle Arigoni, Research Assistant, Office of Policy Analysis, or Marvin L. Shaw, Senior Counsel, Office of General Counsel, 1700 G Street, NW, 4th Floor, Washington, DC 20552, telephone (202) 414-3800 (not a toll-free number). The telephone number for the Telecommunications Device for the Deaf is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Federal Housing Enterprise Oversight (OFHEO) was established by Title XIII of the Housing and Community Development Act of 1992, Pub. L. 102-550, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (1992 Act). OFHEO is an independent office within the U.S. Department of Housing and Urban Development (HUD) with responsibility for ensuring that the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) are adequately capitalized and operating in a safe and sound manner. The 1992 Act authorizes OFHEO's Director (Director) to impose a civil money penalty for violations by an Enterprise or its executive officers or directors of any statute or regulation under OFHEO's jurisdiction.¹

Fannie Mae and Freddie Mac are Government-sponsored enterprises that provide liquidity to and stability in the secondary market for residential

¹ See 1992 Act, section 1376 (12 U.S.C. 4636).

mortgages.² The Enterprises also increase the availability of mortgage credit benefiting low- and moderate-income families and areas that are underserved by lending institutions. The Enterprises engage in two principal businesses: investing in residential mortgages and guaranteeing residential mortgage securities.

II. Debt Collection Improvement Act of 1996

In order to preserve the remedial impact of civil money penalties and foster compliance with the law, the Federal Civil Penalties Inflation Adjustment Act of 1990,³ as amended by the Debt Collection Improvement Act of 1996⁴ (the Debt Collection Improvement Act), requires Federal agencies to make an initial inflationary adjustment for all applicable civil money penalties and to make further adjustments of these penalty amounts at least once every 4 years. The Debt Collection Improvement Act further stipulates that any resulting increases in a civil money penalty due to the calculated inflation adjustments (i) should apply only to violations that occur after October 23, 1996—the Act's effective date—and (ii) should not exceed 10 percent of the penalty indicated.

Under the Debt Collection Improvement Act, the inflation adjustment for each applicable civil money penalty is determined by increasing the maximum civil money penalty amount per violation by the cost-of-living adjustment. The "cost-of-living" adjustment is defined by the statute as the amount by which the Consumer Price Index (CPI) for the month of June of the calendar year preceding the adjustment exceeds the CPI for the month of June of the year in which the amount of such civil penalty was last set or adjusted pursuant to law, divided by the earlier CPI value. Any calculated increase under this adjustment is subject to a specific rounding formula⁵ set forth in the Debt Collection Improvement Act.

² See 1992 Act, sections 1331–38 (12 U.S.C. 4561–67, 4562 note).

³ Pub. L. 101–410, 28 U.S.C. 2461 note.

⁴ Pub. L. 104–134, section 31001(s), 110 Stat. 1321–358 (codified as amended at 28 U.S.C. 2461 note).

⁵ The statute's rounding rules require that an increase be rounded to the nearest multiple as follows: \$10 in the case of penalties less than or equal to \$100; \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000; \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000; \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000; \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000;

III. OFHEO'S Civil Money Penalties Affected by the Inflation Adjustment

The following example illustrates how the methodology outlined in the Debt Collection Improvement Act applies to civil money penalties assessed by OFHEO. Under section 1376 of the 1992 Act, OFHEO may impose a daily penalty not to exceed \$1,000,000 on either Enterprise or any executive officer or director of an Enterprise for certain violations. The first step in determining the inflation adjustment is to calculate and apply the percentage by which the CPI for all Urban Consumers (CPI-U) has changed over the period beginning in the year in which the existing civil money penalty amounts were last statutorily defined (section 1376 was adopted in 1992, and no adjustments have been made since) and ending in the calendar year preceding the adjustment. Given that the current year is 1997, the end of the period is the preceding year, 1996. The corresponding CPI-U values for the months of June in 1992 and 1996 are 419.9 and 469.5, respectively. Dividing the difference between the two values by the base year (1992) value yields a percentage increase of 11.8, which is multiplied by the existing civil money penalty amount of \$1,000,000 to yield an increase of \$118,000.

The second step is to apply the rounding rules in the Debt Collection Improvement Act which state that, where the increase is greater than \$100,000 but less than or equal to \$200,000, the increase shall be rounded to the nearest multiple of \$10,000. As a result, the increase is rounded up to \$120,000. When added to the original civil money penalty, the adjustment yields a new maximum civil money penalty of \$1,120,000.

Finally, the Debt Collection Improvement Act provides that any adjustment for inflation of a civil money penalty shall not exceed 10 percent of the existing amount. In this case, the maximum penalty amount is \$100,000. As such, the final increase is adjusted to meet the 10 percent increase limit, since the \$120,000 increase resulting from the calculations exceeds the amount allowed by the Debt Collection Improvement Act. A final civil money penalty amount is reached by adding the equivalent of 10 percent of the statutorily defined penalty (\$100,000) to the existing civil money penalty amount (\$1,000,000), yielding a figure of \$1,100,000. This is the figure which is associated with the violations previously penalized by a maximum

and \$25,000 in the case of penalties greater than \$200,000.

\$1,000,000 fine. This adjustment process has been applied to all of OFHEO's statutory civil money penalty limits to determine the maximum amounts as listed in the 1992 Act.

Based on these considerations, OFHEO has decided to amend chapter XVII of Title 12 of the Code of Federal Regulations by adding subpart E, titled "Civil Money Penalties," to Part 1780 to reflect the inflation adjustments mandated by the Debt Collection Improvement Act.

IV. Effective Date

OFHEO finds good cause to make this rule effective upon publication of this document in the **Federal Register** under the Administrative Procedure Act (APA), 5 U.S.C. 553(d). This final rule does not impose any additional responsibilities on any entity. Instead, it simply adjusts the civil penalties as directed by the Debt Collection Improvement Act.

OFHEO also finds for good cause that notice and an opportunity to comment on this document are unnecessary under the APA, 5 U.S.C. 553. This rulemaking conforms with and is consistent with the statutory authority set forth in the Debt Collection Improvement Act, with no issues of policy discretion. Consequently, because the opportunity for notice and comment is unnecessary, OFHEO is issuing these requirements as a final rule.

V. Regulatory Impact Statements

Executive Order 12612, Federalism

Executive Order 12612 requires that Executive departments and agencies identify regulatory actions that have significant federalism implications. A regulation has federalism implications if it has substantial direct effects on the States, on the relationship or distribution of power between the Federal Government and the States, or on the distribution of power and responsibilities among various levels of government. OFHEO has determined that this regulation has no federalism implications that warrant the preparation of a Federalism Assessment in accordance with Executive Order 12612.

Executive Order 12866, Regulatory Planning and Review

OFHEO's Acting Director has determined that this final rule does not constitute a "significant regulatory action" for the purposes of Executive Order 12866.

Executive Order 12988, Civil Justice Reform

Executive Order 12988 sets forth guidelines to promote the just and efficient resolution of civil claims and to reduce the risk of litigation to the Federal Government.

The regulation meets the applicable standards of sections 3(a) and 3(b) of Executive Order 12988.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, requires that regulations involving the collection of information receive clearance from OMB. The regulation contains no such collection of information requiring OMB approval under the Paperwork Reduction Act. Consequently, no information has been submitted to OMB for review under the Paperwork Reduction Act.

Regulatory Flexibility Act

The Regulatory Flexibility Act applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b) (see 5 U.S.C. 601(2)). Because this action is limited to the adoption of statutory language, without interpretation, notice and comment on this final rule is unnecessary pursuant to 5 U.S.C.

553(b)(B). Therefore, the Regulatory Flexibility Act does not apply to this final rule.

Unfunded Mandates Act of 1995

OFHEO has determined that this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector of \$100 million or more in any one year. Accordingly, this rulemaking is not subject to the Unfunded Mandates Act of 1995.

List of Subjects in 12 CFR Part 1780

Administrative practice and procedure, Penalties.

Accordingly, for the reasons set forth in the preamble, OFHEO amends chapter XVII of Title 12 of the Code of Federal Regulations by adding Part 1780 to read as follows:

PART 1780—UNIFORM RULES OF PRACTICE AND PROCEDURE

Subpart A—[Reserved]

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—[Reserved]

Subpart E—Civil Money Penalty Inflation Adjustments

Sec.
1780.70 Inflation adjustments.
1780.71 Applicability.

Authority: 12 U.S.C. 4513, 4636; 28 U.S.C. 2461 *note*.

Subpart A—[Reserved]

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—[Reserved]

Subpart E—Civil Money Penalty Inflation Adjustments

§ 1780.70 Inflation adjustments.

The maximum amount of each civil money penalty within OFHEO's jurisdiction is adjusted in accordance with the Debt Collection Improvement Act of 1996 (28 U.S.C. 2461 *note*) as follows:

U.S. Code citation	Description	Previous maximum penalty	New adjusted maximum penalty
12 U.S.C. 4636(b)(1)	First Tier	\$5,000	\$5,500
12 U.S.C. 4636(b)(2)	Second Tier (Executive Officer or Director)	10,000	11,000
12 U.S.C. 4636(b)(2)	Second Tier (Enterprise)	25,000	27,500
12 U.S.C. 4636(b)(3)	Third Tier (Executive Officer or Director)	100,000	110,000
12 U.S.C. 4636(b)(3)	Third Tier (Enterprise)	1,000,000	1,100,000

§ 1780.71 Applicability.

The inflation adjustments in § 1780.70 apply to civil money penalties assessed in accordance with the provisions of 12 U.S.C. 4636 for violations occurring after October 23, 1996.

Dated: December 22, 1997.

Mark A. Kinsey,

Acting Director, Office of Federal Housing Enterprise Oversight.

[FR Doc. 97-33945 Filed 12-30-97; 8:45 am]

BILLING CODE 4220-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 96-NM-174-AD; Amendment 39-10266; AD 98-01-02]

RIN 2120-AA64

Airworthiness Directives; Fokker F28 Mark 1000, 2000, 3000, and 4000 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Fokker Model F28 Mark 1000, 2000, 3000, and 4000 series airplanes, that requires a one-time visual inspection of the rear cargo door

and luggage auxiliary structure for corrosion, repetitive borescope inspections of the rear cargo door, and removal and repair of any corrosion found during the inspections. This amendment also requires the drilling of drain holes and application of a corrosion preventive and sealing compound inside the rear cargo door, and modification of the rear cargo door to aid in future routine borescope inspections. This amendment is prompted by reports of corrosion being found in the affected areas on several of the affected airplanes. The actions specified by this AD are intended to prevent such corrosion, which could result in structural failure of the cargo door and loss of the door during flight, and consequent rapid decompression, aerodynamic instability, and/or damage to other fuselage structures.

DATES: Effective February 4, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 4, 1998.

ADDRESSES: The service information referenced in this AD may be obtained from Fokker Services B.V., Technical Support Department, P.O. Box 75047, 1117 ZN Schiphol Airport, the Netherlands. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

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

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Fokker Model F28 Mark 1000, 2000, 3000, and 4000 series airplanes was published in the **Federal Register** on May 30, 1997 (62 FR 29308). That action proposed to require a one-time visual inspection of the rear cargo door and luggage auxiliary structure for corrosion, repetitive borescope inspections of the rear cargo door, and removal and repair of any corrosion found during the inspections. That action also required the drilling of drain holes and application of a corrosion preventive and sealing compound inside the rear cargo door, and modification of the rear cargo door to aid in future routine borescope inspections.

Comments

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

The commenter indicates that the proposed rule would have limited impact on its operations since it intends to retire the remainder of its fleet of affected airplanes.

Conclusion

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

Cost Impact

The FAA estimates that 37 airplanes of U.S. registry will be affected by this AD. It will take approximately 13 work hours per airplane to accomplish the required initial inspection, at an average labor rate of \$60 per work hour. The FAA has no way of determining how many repetitive inspections the owners/operators will incur over the life of the affected airplanes. Based on these figures, the cost impact of the initial inspection required by this AD on U.S. operators is estimated to be \$28,860, or \$780 per airplane.

It will take approximately 27 work hours per airplane to accomplish the required modification, at an average labor rate of \$60 per work hour. Required parts will be supplied by the manufacturer at no cost to the operators. Based on these figures, the cost impact of the modification required by this AD on U.S. operators is estimated to be \$59,940, or \$1,620 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

98-01-02 Fokker: Amendment 39-10266. Docket 96-NM-174-AD.

Applicability: All F28 Mark 1000, 2000, 3000, and 4000 series airplanes, certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent corrosion in the rear cargo door, which could result in structural failure of the cargo door and loss of the door during flight, and consequent rapid decompression, aerodynamic instability, and/or damage to other fuselage structures, accomplish the following:

(a) Within 2 years after the effective date of this AD, accomplish the requirements of paragraphs (a)(1), (a)(2), and (a)(3) of this AD, in accordance with Fokker Service Bulletin F28-52-111, dated March 12, 1994.

(1) Perform a one-time visual inspection of the rear cargo door and luggage auxiliary structure for corrosion. If any corrosion is found, prior to further flight, remove and repair it.

(2) Drill drain holes and apply a corrosion preventive and sealing compound inside the rear cargo door.

(3) Modify the rear cargo door to provide inspection holes for borescope inspections.

(b) Within 6,000 hours time-in-service (TIS) or 3 years after accomplishing the visual inspection required by paragraph (a)(1) of this AD, whichever occurs first; and thereafter at intervals not to exceed 6,000 hours TIS or 3 years, whichever occurs first: Perform a borescope inspection of the rear cargo door for corrosion in accordance with

Chapter 52-30-2 of the F28 Maintenance Manual. If any corrosion is detected, prior to further flight, remove and repair it in accordance with the maintenance manual.

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

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

(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) Except as provided by paragraph (b) of this AD, the actions shall be done in accordance with Fokker Service Bulletin F28-52-111, dated March 12, 1994. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Fokker Services B.V., Technical Support Department, P.O. Box 75047, 1117 ZN Schiphol Airport, the Netherlands. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in Dutch airworthiness directive BLA No. 1995-126 (A), dated November 30, 1995.

(f) This amendment becomes effective on February 4, 1998.

Issued in Renton, Washington, on December 22, 1997.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97-34003 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-NM-281-AD; Amendment 39-10268; AD 98-01-04]

RIN 2120-AA64

Airworthiness Directives; Fokker Model F27 Mark 050 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Fokker Model F27 Mark 050 series airplanes. This action requires a one-time inspection of the main landing gear (MLG) locklinks to determine if the lockwire that secures both platform bolts is in one piece and in position; and corrective action, if necessary. This amendment is prompted by the issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified in this AD are intended to prevent collapse of the MLG due to failure of the locklinks to lock in the down position.

DATES: Effective January 15, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 15, 1998.

Comments for inclusion in the Rules Docket must be received on or before January 30, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 97-NM-281-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The service information referenced in this AD may be obtained from Fokker Services B.V., Technical Support Department, P.O. Box 75047, 1117 ZN Schiphol Airport, the Netherlands. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

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

SUPPLEMENTARY INFORMATION: The Rijksluchtvaartdienst (RLD), which is the airworthiness authority for the Netherlands, notified the FAA that an unsafe condition may exist on all Fokker Model F27 Mark 050 series airplanes. The RLD advises that an operator of a Model F27 Mark 050 series airplane reported an incident in which the left main landing gear (MLG) had failed to lock in the down position and subsequently collapsed during roll-out after landing. Subsequent investigation revealed that, of the two bolts required to secure the downlock platform of the MLG locklink, one bolt was missing. Because the downlock platform was secured with only a single bolt, the

platform rotated and the MLG was prevented from reaching its overcentered and locked position. The reason for the missing bolt is being investigated and may be attributed to a problem that occurred during manufacture or maintenance. Additionally, another operator reported finding a broken and partly missing lockwire and a loose affected bolt. Such loose bolts or damaged/missing lockwire, if not corrected, could result in failure of the MLG to lock in the down position, which could cause the MLG to collapse.

Explanation of Relevant Service Information

Fokker has issued Service Bulletin SBF50-32-033, dated December 20, 1996, which describes procedures for a one-time inspection of the MLG locklinks to determine if the lockwire that secures both platform bolts is in one piece and in position; the service bulletin also describes procedures for correction of any discrepancy. The RLD classified this service bulletin as mandatory and issued Dutch airworthiness directive BLA 1996-146 (A), dated December 23, 1996, in order to assure the continued airworthiness of these airplanes in the Netherlands.

FAA's Conclusions

This airplane model is manufactured in the Netherlands and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.19) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the RLD has kept the FAA informed of the situation described above. The FAA has examined the findings of the RLD, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of the Rule

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

Cost Impact

None of the airplanes affected by this action is on the U.S. Register. All airplanes included in the applicability of this rule currently are operated by non-U.S. operators under foreign

registry; therefore, they are not directly affected by this AD action. However, the FAA considers that this rule is necessary to ensure that the unsafe condition is addressed in the event that any of these subject airplanes are imported and placed on the U.S. Register in the future.

Should an affected airplane be imported and placed on the U.S. Register in the future, it would require approximately 1 work hour to accomplish the required actions, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of this AD would be \$60 per airplane.

Determination of Rule's Effective Date

Since this AD action does not affect any airplane that is currently on the U.S. register, it has no adverse economic impact and imposes no additional burden on any person. Therefore, prior notice and public procedures hereon are unnecessary and the amendment may be made effective in less than 30 days after publication in the **Federal Register**.

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to

Docket Number 97-NM-281-AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

98-01-04 Fokker: Amendment 39-10268. Docket 97-NM-281-AD.

Applicability: All Model F27 Mark 050 series airplanes, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the

requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent collapse of the main landing gear (MLG) due to failure of the locklinks to lock in the down position, accomplish the following:

(a) Within 7 days after the effective date of this AD, inspect the left and right MLG locklinks to determine if the lockwire that secures both platform bolts is in one piece and in position, in accordance with Fokker Service Bulletin SBF50-32-033, dated December 20, 1996. If any discrepancy is found, prior to further flight, accomplish corrective actions in accordance with the service bulletin.

(b) As of the effective date of this AD, no person shall install on any airplane an MLG locklink unless it has been inspected and applicable corrective actions have been performed, in accordance with Fokker Service Bulletin SBF50-32-033, dated December 20, 1996.

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

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

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

(e) The actions shall be accomplished in accordance with Fokker Service Bulletin SBF50-32-033, dated December 20, 1996. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Fokker Services B.V., Technical Support Department, P.O. Box 75047, 1117 ZN Schiphol Airport, the Netherlands. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in Dutch airworthiness directive BLA 1996-146 (A), dated December 23, 1996.

(f) This amendment becomes effective on January 15, 1998.

Issued in Renton, Washington, on December 23, 1997.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97-34042 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-NM-224-AD; Amendment 39-10269; AD 98-01-05]

RIN 2120-AA64

Airworthiness Directives; British Aerospace Model HS 748 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain British Aerospace HS 748 series airplanes. This action requires installation of an aileron cable support block under the crew compartment floor. This amendment is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified in this AD are intended to prevent jamming or restriction of the aileron cable, which could lead to reduced controllability of the airplane.

DATES: Effective January 15, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 15, 1998.

Comments for inclusion in the Rules Docket must be received on or before January 30, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 97-NM-224-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The service information referenced in this AD may be obtained from AI(R) American Support, Inc., 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

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

SUPPLEMENTARY INFORMATION: The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, notified the FAA that an unsafe condition may exist on certain British Aerospace Model HS 748 series airplanes. The CAA advises that it has received three reports of low aileron cable tension when the aircraft has been flown in extremely low temperatures. If the aileron cables are not correctly tensioned, under certain control wheel loading conditions the aileron cable will sag, which may result in jamming or restriction of the aileron cable. This condition, if not corrected, could result in reduced controllability of the airplane.

Explanation of Relevant Service Information

The manufacturer has issued Jetstream Service Bulletin HS 748-27-63, Revision 4, dated May 12, 1995, which describes procedures for installation of an aileron cable support block under the crew compartment floor. Accomplishment of the actions specified in the service bulletin is intended to adequately address the unsafe condition.

The CAA classified this service bulletin as mandatory and issued British airworthiness directive 008-05-94 in order to assure the continued airworthiness of these airplanes in the United Kingdom.

FAA's Conclusions

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.19) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United

States, this AD is being issued to require accomplishment of the actions specified in the service bulletin described previously.

Cost Impact

None of the Model HS 748 series airplanes affected by this action are on the U.S. Register. All airplanes included in the applicability of this rule currently are operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, the FAA considers that this rule is necessary to ensure that the unsafe condition is addressed in the event that any of these subject airplanes are imported and placed on the U.S. Register in the future.

Should an affected airplane be imported and placed on the U.S. Register in the future, it would require approximately 8 work hours to accomplish the required actions, at an average labor charge of \$60 per work hour. Required parts would cost approximately \$100 per airplane. Based on these figures, the cost impact of this AD would be \$580 per airplane.

Determination of Rule's Effective Date

Since this AD action does not affect any airplane that is currently on the U.S. register, it has no adverse economic impact and imposes no additional burden on any person. Therefore, prior notice and public procedures hereon are unnecessary and the amendment may be made effective in less than 30 days after publication in the **Federal Register**.

Comments Invited

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments

submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 97-NM-224-AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

98-01-05 British Aerospace Regional Aircraft (Formerly British Aerospace, Aircraft Group): Amendment 39-10269. Docket 97-NM-224-AD.

Applicability: Model HS 748 airplanes having constructors numbers prior to 1760, excluding constructors numbers 1723 through 1727 inclusive; 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 (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent jamming or restriction of the aileron cable, which could lead to reduced airplane controllability, accomplish the following:

(a) Within 60 days after the effective date of this AD, install an aileron cable support block under the crew compartment floor in accordance with Jetstream Service Bulletin HS 748-27-63, Revision 4, dated May 12, 1995.

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

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

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

(d) The installation shall be done in accordance with Jetstream Service Bulletin HS 748-27-63, Revision 4, dated May 12, 1995, which contains the following list of effective pages:

Pate No.	Revision level shown on page	Date shown on page
1-3, 11	4	May 12, 1995
4-10	3	Sept. 1, 1994.

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from AI(R) American Support, Inc., 13850 Mclearen Road, Herndon, Virginia 20171. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in British airworthiness directive 008-05-94.

(e) This amendment becomes effective on January 15, 1998.

Issued in Renton, Washington, on December 23, 1997.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97-34041 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-NM-255-AD; Amendment 39-10267; AD 98-01-03]

RIN 2120-AA64

Airworthiness Directives; Fokker Model F27 Mark 050 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Fokker Model F27 Mark 050 series airplanes. This action requires modification of the air outlet opening of the engine air bypass duct. This amendment is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified in this AD are intended to prevent accumulation of ice in the engine air intake duct and subsequent ingestion of ice into the engine, which could result in engine power fluctuations and reduced controllability of the airplane.

DATES: Effective January 15, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 15, 1998.

Comments for inclusion in the Rules Docket must be received on or before January 30, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 97-NM-255-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The service information referenced in this AD may be obtained from Fokker Services B.V., Technical Support Department, P. O. Box 75047, 1117 ZN Schiphol Airport, the Netherlands. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

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

SUPPLEMENTARY INFORMATION: The Rijksluchtvaartdienst (RLD), which is the airworthiness authority for the Netherlands, notified the FAA that an unsafe condition may exist on certain Fokker Model F27 Mark 050 series airplanes. The RLD advises that it has received a report indicating that, during icing conditions, power fluctuations occurred on both engines of an airplane. The airplane had been modified previously in accordance with four service bulletins to improve heating of the engine air intake duct and to counteract the effects of electromagnetic interference on the engine anti-icing systems; these modifications also were introduced in order to prevent power fluctuations caused by ingestion of ice into the engines. However, service experience has shown that, in certain weather conditions, accumulation of ice in the engine air intake duct can still occur, allowing ingestion of ice into the engine. This condition, if not corrected, could result in engine power fluctuations and reduced controllability of the airplane.

Explanation of Relevant Service Information

Fokker has issued Service Bulletin SBF50-71-041, dated November 10, 1993, which describes procedures for modification of the air outlet opening of the engine air bypass duct. The

modification entails installing new parts in the engine bottom cowling to enlarge the outlet opening. Accomplishment of the actions specified in the service bulletin is intended to adequately address the unsafe condition. The RLD classified this service bulletin as mandatory and issued Dutch airworthiness directive BLA 1995-065 (A), dated June 30, 1995, in order to assure the continued airworthiness of these airplanes in the Netherlands.

FAA's Conclusions

This airplane model is manufactured in the Netherlands and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.19) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the RLD has kept the FAA informed of the situation described above. The FAA has examined the findings of the RLD, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of the Rule

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

Cost Impact

None of the Model F27 Mark 050 series airplanes affected by this action are on the U.S. Register. All airplanes included in the applicability of this rule currently are operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, the FAA considers that this rule is necessary to ensure that the unsafe condition is addressed in the event that any of these subject airplanes are imported and placed on the U.S. Register in the future.

Should an affected airplane be imported and placed on the U.S. Register in the future, it would require approximately 7 work hours to accomplish the required actions, at an average labor rate of \$60 per work hour. Required parts would cost approximately \$2,200. Based on these figures, the cost impact of this AD would be \$2,620 per airplane.

Determination of Rule's Effective Date

Since this AD action does not affect any airplane that is currently on the U.S. register, it has no adverse economic impact and imposes no additional burden on any person. Therefore, prior notice and public procedures hereon are unnecessary and the amendment may be made effective in less than 30 days after publication in the **Federal Register**.

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 97-NM-255-AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

98-01-03 Fokker: Amendment 39-10267.
Docket 97-NM-255-AD.

Applicability: Model F27 Mark 050 series airplanes, serial numbers 20103 through 20296 inclusive, 20304, 20305, 20308, and 20311; 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 (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent accumulation of ice in the engine air intake duct and subsequent ingestion of ice into the engine, which could result in engine power fluctuations and

reduced controllability of the airplane, accomplish the following:

(a) Within 3 months after the effective date of this AD, modify the air outlet opening of the engine air bypass duct in the left and right bottom engine cowling in accordance with Fokker Service Bulletin SBF50-71-041, dated November 10, 1993.

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

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

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

(d) The modification shall be done in accordance with Fokker Service Bulletin SBF50-71-041, dated November 10, 1993. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Fokker Services B.V., Technical Support Department, P. O. Box 75047, 1117 ZN Schiphol Airport, the Netherlands. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in Dutch airworthiness directive BLA 1995-065 (A), dated June 30, 1995.

(e) This amendment becomes effective on January 15, 1998.

Issued in Renton, Washington, on December 23, 1997.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97-34040 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF COMMERCE

Bureau of Economic Analysis

15 CFR Part 801

[Docket No. 970903222-7299-02]

RIN 0691-AA28

International Services Surveys: BE-93 Annual Survey of Royalties, License Fees, and Other Receipts and Payments for Intangible Rights Between U.S. and Unaffiliated Foreign Persons

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Final rule.

SUMMARY: These final rules amend the reporting requirements for the BE-93, Annual Survey of Royalties, License Fees, and Other Receipts and Payments Between U.S. and Unaffiliated Foreign Persons.

The BE-93 survey is conducted by the Bureau of Economic Analysis (BEA), U.S. Department of Commerce, under the International Investment and Trade in Services Survey Act. The data are needed to support U.S. trade policy initiatives, compile the U.S. balance of payments, input-output, and national income and product accounts, develop U.S. international price indexes for services, assess U.S. competitiveness in international trade in services, and improve the ability of U.S. businesses to identify and evaluate market opportunities.

The change to the BE-93 annual survey contained in these final rules is to add coverage of general use computer software royalties and license fees. This change will consolidate on one form all transactions in intangible rights between U.S. and unaffiliated foreign persons. Previously, royalties and license fees related to general use computer software were included on the BE-22, Annual Survey of Selected Services Transactions with Unaffiliated Foreign Persons, and all other royalties and license fees were included on the BE-93. Placing general use computer software royalties and license fees together with other royalties and license fees on the BE-93 will eliminate the possibility that some respondents would have to examine their accounting records on royalties and license fees for purposes of responding to two separate surveys. In addition, the consolidation will improve consistency with current international standards for the compilation of balance of payments accounts, which include general use computer software royalties and license

fees in the same category as all other royalties and license fees.

EFFECTIVE DATE: These rules will be effective January 30, 1998.

FOR FURTHER INFORMATION CONTACT: R. David Belli, Chief, International Investment Division (BE-50), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; phone (202) 606-9800.

SUPPLEMENTARY INFORMATION: In the September 26, 1997 *Federal Register*, volume 62, No. 187, 62 FR 40529-50531, BEA published a notice of proposed rulemaking setting forth revised reporting requirements for the BE-93, Annual Survey of Royalties, License Fees, and Other Receipts and Payments for Intangible Rights Between U.S. and Unaffiliated Foreign Persons. No comments on the proposed rules were received. Thus, these final rules are the same as the proposed rules.

These final rules amend 15 CFR part 801 by revising paragraph 801.9(b)(5)(I) to set forth revised reporting requirements for the BE-93, Annual Survey of Royalties, License Fees, and Other Receipts and Payments Between U.S. and Unaffiliated Foreign Persons. The survey is conducted by the Bureau of Economic Analysis (BEA), U.S. Department of Commerce, under the International Investment and Trade in Services Survey Act (P.L. 94-472, 90 Stat. 2059, 22 U.S.C. 3101-3108, as amended). Section 3103(a) of the Act provides that "The President shall, to the extent he deems necessary and feasible— * * * (1) conduct a regular data collection program to secure current information * * * related to international investment and trade in services * * *." In Section 3 of Executive Order 11961, as amended by Executive Order 12518, the President delegated the authority under the Act as concerns international trade in services to the Secretary of Commerce, who has redelegated it to BEA.

The BE-93 is an annual survey of U.S. royalty and license fee transactions for intangible rights with unaffiliated foreign persons. The data are needed to support U.S. trade policy initiatives, compile the U.S. balance of payments, input-output, and national income and product accounts, develop U.S. international price indexes for services, assess U.S. competitiveness in international trade in services, and improve the ability of U.S. businesses to identify and evaluate market opportunities.

The change to the BE-93 annual survey contained in these final rules is to add coverage of general use computer software royalties and license fees. In

the past, annual data on such fees and royalties were collected as part of an all-inclusive computer and data processing services category on the BE-22, Annual Survey of Selected Services Transactions with Unaffiliated Foreign Persons, and classified in "other services" in the U.S. balance of payments. However, this required some respondents to examine their accounting records on royalties and license fees for purposes of responding to two separate surveys and also make it impossible to classify these transactions in the most appropriate balance of payments category. (Current international standards recommend that computer software royalties and license fees be classified in "royalties and license fees" in the balance of payments, rather than in "other services".) Thus, BEA is moving coverage of general use computer software royalties and license fees from the BE-22 to the BE-93. To effect this change, these final rules strike language that previously excluded coverage of copyrights and other intellectual property rights related to computer software from the BE-93 rules. Separately, a final rule for the BE-22 survey will add language to exclude coverage of computer software royalties and license fees.

Reporting in the BE-93 annual survey is required from all U.S. persons whose total receipts from, or total payments to, unaffiliated foreign persons for intangible rights equaled or exceeded \$500,000 during the reporting year. The data are disaggregated by country and by type of intangible right.

Executive Order 12612

These final rules do not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under E.O. 12612.

Executive Order 12866

These final rules have been determined to be not significant for purposes of E.O. 12866.

Paperwork Reduction Act

The collection of information required in these final rules has been approved by OMB (OMB No. 0608-0017) under the Paperwork Reduction Act. Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection displays a currently valid OMB Control

Number; such a Control Number (0608-0017) has been displayed.

Public reporting burden for this collection of information is estimated to vary from less than one hour to 25 hours, with an overall average burden of 4 hours. This includes time for reviewing the instructions, searching existing sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Comments regarding the burden estimate or any other aspect of this collection of information should be addressed to: Director, Bureau of Economic Analysis (BE-1), U.S. Department of Commerce, Washington, DC 20230; and to the Office of Management and Budget, O.I.R.A. Paperwork Reduction Project 0608-17, Washington, DC 20530.

Regulatory Flexibility Act

The Assistant General Counsel for Legislation and Regulation, Department of Commerce, has certified to the Chief Counsel for Advocacy, Small Business Administration, under the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that these final rules will not have a significant economic impact on a substantial number of small entities. The exemption level for the survey excludes most small businesses from mandatory reporting. Reporting is required only if total receipts from, or total payments to, unaffiliated foreign persons for intangible rights equaled or exceeded \$500,000 during the year. Of those smaller business that must report, most will tend to have specialized operations and activities and will likely report only one type of royalty or license transaction; therefore, the burden on them should be small.

List of Subjects in 15 CFR Part 801

Economic statistics, balance of payments, foreign trade, penalties, reporting and recordkeeping requirements.

Dated: December 2, 1997.

J. Steven Landefeld,

Director, Bureau of Economic Analysis.

For the reasons set forth in the preamble, BEA amends 15 CFR Part 801, as follows:

PART 801—SURVEY OF INTERNATIONAL TRADE IN SERVICES BETWEEN U.S. AND FOREIGN PERSONS

1. The authority citation for 15 CFR Part 801 continues to read as follows:

Authority: 5 U.S.C. 301, 15 U.S.C. 4908, 22 U.S.C. 3101-3108, and E.O. 11961 (3 CFR,

1977 Comp., p. 860 as amended by E.O. 12013 (3 CFR, 1977 Comp., p. 147), E.O. 12318 (3 CFR, 1981 Comp., p. 173), and E.O. 12518 (3 CFR, 1985 Comp., p. 348).

2. Section 801.9 is amended by revising paragraph (b)(5)(i) to read as follows:

§ 801.9 Reports required.

* * * * *

(b) * * *

(5) * * *

(i) Who must report. Reports on Form BE-93 are required from U.S. persons who have entered into agreements with unaffiliated foreign persons to buy, sell, or use intangible assets or proprietary rights, excluding oil royalties and other natural resources (mining) royalties.

* * * * *

[FR Doc. 97-34031 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-06-M

DEPARTMENT OF COMMERCE

Bureau of Economic Analysis

15 CFR Part 801

[Docket No. 970903223-7300-02]

RIN 0691-AA30

International Services Surveys: BE-22 Annual Survey of Selected Services Transactions With Unaffiliated Foreign Persons

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Final rule.

SUMMARY: These final rules amend the reporting requirements for the BE-22, Annual Survey of Selected Services Transactions With Unaffiliated Foreign Persons. The BE-22 surveys is conducted by the Bureau of Economic Analysis (BEA), U.S. Department of Commerce, under the International Investment and Trade in Services Survey Act. It is the annual follow-on survey to the quinquennial BE-20, Benchmark Survey of Selected Services Transactions With Unaffiliated Foreign Persons, which was last conducted for 1996. Together, the two surveys produce a continuous annual time series of data on major types of services that are out of the scope of other international services surveys. In nonbenchmark years, universe estimates of these transactions are derived by adding to annually reported sample data extrapolations of data reported in the benchmark survey by companies exempt from annual reporting. The data are needed to support U.S. trade policy initiatives, compile the U.S. balance of payments, input-output, and national

income and product accounts, develop U.S. international price indexes for services, assess U.S. competitiveness in services, and improve the ability of U.S. businesses to identify and evaluate market opportunities.

Two major changes to the BE-22 annual survey are contained in these final rules: (1) coverage of the BE-22 annual survey is expanded to conform with the most recent BE-20 benchmark survey, which covered 1996, and (2) coverage of general use computer software royalties and license fees is dropped. To consolidate on one form all transactions in intangible rights between U.S. and unaffiliated foreign persons, coverage of general use computer software royalties and license fees is being moved from the BE-22 to the BE-93, Annual Survey of Royalties, License Fees, and Other Receipts and Payments for Intangible Rights Between U.S. and Unaffiliated Foreign Persons.

EFFECTIVE DATE: These rules will be effective January 30, 1998.

FOR FURTHER INFORMATION CONTACT: R. David Belli, Chief, International Investment Division (BE-50), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; phone (202) 606-9800.

SUPPLEMENTARY INFORMATION: In the September 26, 1997 **Federal Register**, volume 62, No. 187, 62 FR 50531-50533, BEA published a notice of proposed rulemaking setting forth reporting requirements for the BE-22, Annual Survey of Selected Services Transactions with Unaffiliated Foreign Persons. No comments on the proposed rule were received. Thus, these final rules are the same as the proposed rules.

These final rule amend 12 CFR part 801 by revising paragraph 801.9(b)(6)(ii) to set forth revised reporting requirements for the BE-22, Annual Survey of Selected Services Transactions With Unaffiliated Foreign Persons. The survey is conducted by the Bureau of Economic Analysis (BEA), U.S. Department of Commerce, under the International Investment and Trade in Services Survey Act (P.L. 94-472, 90 Stat. 2059, 22 U.S.C. 3101-3108, as amended). Section 3103(a) of the Act provides that "The President shall, to the extent he deems necessary and feasible * * * (1) conduct a regular data collection program to secure current information—related to international investment and trade in services * * *". In Section 3 of Executive Order 11961, as amended by Executive Order 12518, the President delegated the authority under the Act as concerns international trade in services to the Secretary of

Commerce, who has redelegated it to BEA.

The BE-22 survey is an annual survey of selected U.S. services transactions with unaffiliated foreign persons. It is intended to update the results of the BE-20 benchmark survey, which covers the universe of such transactions. In nonbenchmark years, universe estimates of these transactions are derived by adding to annually reported sample data extrapolations of data reported in the benchmark survey by companies exempt from annual reporting. The data are needed to support U.S. trade policy initiatives, compile the U.S. balance of payments, input-output, and national income and product accounts, develop U.S. international price indexes for services, assess U.S. competitiveness in, and promote, international trade in services, and improve the ability of U.S. businesses to identify and evaluate market opportunities for service trade.

In order to bring the BE-22 annual survey into conformity with the 1996 BE-20 benchmark survey, coverage of the BE-22 is expanded to include, for the first time, data on merchanting services (sales only), operational leasing services, selling agent services, and a variety of services included in a new "other" selected services category. This category covers satellite photography services, security services, actuarial services, salvage services, oil spill and toxic waste cleanup services, language translation services, and account collection services.

These final rules also drop coverage of general use computer software royalties and license fees from the BE-22. In the past, annual data on such fees and royalties were collected as part of an all-inclusive computer and data processing services category on the BE-22, and classified in "other services" in the U.S. balance of payments. However, this required some respondents to examine their accounting records on royalties and license fees for purposes of responding to two separate surveys and also made it impossible to classify these transactions in the most appropriate balance of payments category. (Current international standards recommend that computer royalties and license fees be classified in "royalties and license fees" rather than "other services" in the balance of payments.) Thus, BEA is moving coverage of general use computer software royalties and license fees from the BE-22 to the BE-93, Annual Survey of Royalties, License Fees, and Other Receipts and Payments for Intangible Rights Between U.S. and Unaffiliated Foreign Persons. To effect this change, these final rules strike language that previously included

coverage of copyrights and other intellectual property rights related to computer software on the BE-22. Separately, a proposed rulemaking for the BE-93 survey will add language to include coverage of computer software royalties and license fees.

Reporting in the BE-22 annual survey is required from U.S. persons with sales to, or purchases from, unaffiliated foreign persons in excess of \$1,000,000 in any of the services covered during the reporting year. Those meeting this criterion must supply data on the amount of their total sales or total purchases of each type of service in which their transactions exceeded this threshold amount. Except for sales of merchanting services, the data are also disaggregated by country. U.S. persons with purchases or sales during the reporting year of \$1,000,000 or less in a given type of covered service are asked to provide, on a voluntary basis, estimates only of their total purchases or total sales, as appropriate, for the given type of service.

Executive Order 12612

These final rules do not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under E.O. 12612.

Executive Order 12866

These final rules have been determined to be not significant for purposes of E.O. 12866.

Paperwork Reduction Act

The collection of information required in these final rules has been approved by OMB (OMB No. 0608-0060) under the Paperwork Reduction Act. Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection displays a currently valid OMB Control Number; such a Control Number (0608-0060) has been displayed.

Public reporting burden for this collection of information estimated to vary from 4 to 500 hours, with an overall average burden of 11.5 hours. This includes time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Comments regarding the burden estimate or any other aspect of this collection of information should be addressed to: Director, Bureau of Economic Analysis (BE-1), U.S.

Department of Commerce, Washington, DC 20230; and to the Office of Management and Budget, O.I.R.A., Paperwork Reduction Project 0608-0060, Washington, DC 20503.

Regulatory Flexibility Act

The Assistant General Counsel for Legislation and Regulation, Department of Commerce, has certified to the Chief Counsel for Advocacy, Small Business Administration, under the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that these final rules will not have a significant economic impact on a substantial number of small entities. The exemption level for the survey excludes most small businesses from mandatory reporting. Reporting is required only if total sales or purchases transactions with unaffiliated foreign persons in a covered type of service exceed \$1,000,000 during the year. Of those smaller businesses that must report, most will tend to have specialized operations and activities and will likely report only one type of service; therefore, the burden on them should be small.

List of Subjects in 15 CFR Part 801

Economic statistics, Balance of payments, Foreign trade, Penalties, Reporting and recordkeeping requirements.

Dated: December 2, 1997.

J. Steven Landefeld,

Director, Bureau of Economic Analysis.

For the reasons set forth in the preamble, BEA amends 15 CFR part 801, as follows:

PART 801—SURVEY OF INTERNATIONAL TRADE IN SERVICES BETWEEN U.S. AND FOREIGN PERSONS

1. The authority citation for 15 CFR Part 801 continues to read as follows:

Authority: 5 U.S.C. 301, 15 U.S.C. 4908, 22 U.S.C. 3101-3108, and E.O. 11961 (3 CFR, 1977 Comp., p. 860 as amended by E.O. 12013 (3 CFR, 1977 Comp., p. 147), E.O. 12318 (3 CFR, 1981 Comp., p. 173), and E.O. 12518 (3 CFR, 1985 Comp., p. 348).

2. Section 801.9 is amended by revising paragraph (b)(6)(ii) to read as follows:

§ 801.9 Reports required.

* * * * *

(b) * * *

(6) * * *

(ii) Covered services. With the exceptions given in this paragraph, the services covered by this survey are the same as those covered by the BE-20, Benchmark Survey of Selected Services Transactions With Unaffiliated Foreign

Persons-1996, as listed in § 801.10(c) of this part. The exceptions are elimination of coverage of general use computer software royalties and license fees from computer and data processing services, and the elimination of coverage of four small types of services—agricultural services; management of health care facilities; mailing, reproduction, and commercial art; and temporary help supply services.

* * * * *

[FR Doc. 97-34030 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-06-M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 54

[T.D. 98-4]

Technical Change Regarding Duty Free Entry of Metal Articles

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations, to conform with subheadings 9817.00.80 and 9817.00.90, Harmonized Tariff Schedule of the United States, relating to the duty free entry of metal articles imported to be used in remanufacture by melting or to be processed by shredding, shearing, compacting or similar processing which renders them fit only for the recovery of the metal content.

EFFECTIVE DATE: December 31, 1997.

FOR FURTHER INFORMATION CONTACT: Kathy Campanelli, National Commodity Specialist, Metals and Machinery Branch, (212) 466-5492.

SUPPLEMENTARY INFORMATION:

Background

As part of a continuing program to keep its regulations current, the Customs Service has determined that a change in § 54.5(a)(2), Customs Regulations (19 CFR 54.5(a)(2)), is necessary in order to bring the regulations into conformity with subheadings 9817.00.80 and 9817.00.90, Harmonized Tariff Schedule of the United States (HTSUS), relating to the duty free entry of metal articles imported to be used in remanufacture by melting or to be processed by shredding, shearing, compacting or similar processing which renders them fit only for the recovery of the metal content.

Discussion of Change

Heading 9817, HTSUS, provides for classes of articles entitled to duty free entry into the United States.

The classes of merchandise encompass unwrought metal including remelt scrap ingot (except copper, lead, zinc, and tungsten) in the form of pigs, ingots or billets (a) that are defective or damaged, or have been produced from melted down metal waste and scrap for convenience in handling and transportation without sweetening, alloying, fluxing or deliberate purifying, and (b) that cannot be commercially used without remanufacture; relaying or rerolling rails; and articles of metal (except articles of lead, of zinc or of tungsten, and not including metal-bearing materials provided for in section VI, chapter 26 or subheading 8548.10 and not including unwrought metal provided for in chapters 72-81) to be used in remanufacture by melting or to be processed by shredding, shearing, compacting or similar processing which renders them fit only for the recovery of the metal content.

Specifically, subheading 9817.00.80, provides for articles of copper and subheading 9817.00.90, provides for articles of any other metal fitting into one of the above referenced classes.

Part 54, Customs Regulations (19 CFR Part 54), provides procedures for the duty free entry of certain importations. Section 54.5, Customs Regulations (19 CFR 54.5) sets forth the scope of several exemptions from entitlement to duty free entry of metal articles classified in subheadings 9817.00.80 and 9817.00.90, HTSUS. The provision presently does not apply to:

1. Articles of lead, zinc, or tungsten;
2. Metal-bearing materials provided for in Chapter 26, HTSUS; or
3. Unwrought metal provided for in Section XV, HTSUS.

Inasmuch as subheadings 9817.00.80 and 9817.00.90, HTSUS, also exclude metal-bearing materials provided for in Section VI, HTSUS, as well as articles provided for in subheading 8548.10, HTSUS, § 54.5(a)(2), Customs Regulations, must be amended to include these exemptions. The amendment rectifies the omission of these exemptions.

Inapplicability of Public Notice and Comment and Delayed Effective Date Requirements, the Regulatory Flexibility Act, and Executive Order 12866

Inasmuch as this amendment merely conforms the Customs Regulations to existing law as noted above, pursuant to 5 U.S.C. 553(b)(B), notice and public

procedure thereon are unnecessary and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required. Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This amendment does not meet the criteria for a "significant regulatory action" as defined in E.O. 12866.

Drafting Information

The principal author of this document was Janet L. Johnson, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 54

Customs duties and inspection, Metals, Reporting and recordkeeping requirements.

Amendment to the Regulations

Part 54, Customs Regulations (19 CFR Part 54), is amended as set forth below.

PART 54—CERTAIN IMPORTATIONS TEMPORARILY FREE OF DUTY

1. The general authority citation for part 54 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Section XV, Note 5, Harmonized Tariff Schedule of the United States), 1623, 1624.

2. Section 54.5 is amended by revising paragraph (a)(2) to read as follows:

§ 54.5 Scope of exemptions; nondeposit of estimated duty.

(a) * * *

(2) Metal-bearing materials provided for in section VI, Chapter 26 or subheading 8548.10, HTSUS; or
* * * * *

Douglas M. Browning,

Acting Commissioner of Customs.

Approved: December 5, 1997.

Dennis M. O'Connell,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 97-33855 Filed 12-30-97; 8:45 am]

BILLING CODE 4820-02-P

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Part 1**

[TD 8749]

RIN 1545-AU34

Qualified Small Business Stock

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the 50-percent exclusion for gain from certain small business stock. The final regulations reflect changes to the law made by the Omnibus Budget Reconciliation Act of 1993 and provide guidance to the issuers and owners of the stock of certain small businesses.

DATES: This regulation is effective December 31, 1997. For dates of applicability of these regulations, see § 1.1202-2(e).

FOR FURTHER INFORMATION CONTACT: Catherine A. Prohofsky of the Office of the Assistant Chief Counsel (Income Tax and Accounting) at 202-622-4930 (not a toll-free call).

SUPPLEMENTARY INFORMATION:**Background**

Section 1202 of the Internal Revenue Code allows a taxpayer (other than a corporation) to exclude 50 percent of certain gain from the sale or exchange of qualified small business stock held for more than 5 years. This document contains amendments to the Income Tax Regulations (26 CFR part 1) that provide guidance relating to the effect of redemptions on the availability of this exclusion.

On June 6, 1996, the **Federal Register** published a notice of proposed rulemaking (IA-26-94), 61 FR 28821, relating to the effect of certain redemptions on the 50-percent exclusion of gain from the sale or exchange of qualified small business stock under section 1202. The proposed regulations provide that these redemptions are disregarded in determining whether the anti-churning rules of section 1202(c) are violated.

Four comments responding to this notice were received. A public hearing was held on October 3, 1996. After consideration of the comments, the proposed regulations under section 1202 are adopted as modified by this Treasury decision.

Summary of Comments and Modifications

The notice of proposed rulemaking requested comments on how to determine when an independent contractor has terminated services. One commentator suggested that the determination of whether services of an independent contractor were terminated should be based on all the facts and circumstances, with termination conclusively presumed if no further services were provided for six months. The IRS and Treasury Department have not adopted this suggestion, but are continuing to study this issue and request additional comments.

Commentators suggested an additional exception for all redemptions occurring in the ordinary course of business or for legitimate business reasons. The final regulations do not incorporate this suggestion. The exceptions in the final regulations relate to redemptions that are incident to certain events affecting a shareholder. Because of the extraordinary nature of these events and the fact that they are generally not within the control of the issuing corporation, the exceptions are unlikely to lead to avoidance of the requirement that qualified small business stock be purchased at original issue. The IRS and Treasury are concerned, however, that a much broader exception for redemptions that arise out of the ordinary business needs and purposes of the issuing corporation, and are not incident to extraordinary events affecting its shareholders, would be much more likely to undermine the original issue requirement.

Two commentators requested that the final regulations be effective for stock purchases by an issuing corporation at any time after August 10, 1993. The effective date has been modified in response to this suggestion. The final regulations will apply to stock issued after August 10, 1993. Thus, regardless of the date on which a redemption occurs (or on which the redeemed stock was issued) the redemption is treated as provided in the final regulations for purposes of determining whether stock issued after August 10, 1993, is qualified small business stock.

The Chief Counsel for Advocacy of the Small Business Administration recommended the inclusion of an exception for redemptions occurring in connection with the divorce of a shareholder. This suggestion has been adopted. The final regulations provide that redemptions of stock occurring incident to the divorce of a shareholder are disregarded in determining whether

redemptions exceed de minimis amounts.

The Chief Counsel for Advocacy also requested that the IRS and Treasury Department analyze the current use of section 1202. No exclusion under section 1202 can be claimed until 1998 because stock must be issued after August 10, 1993, to be qualified small business stock, and must be held for more than 5 years to qualify for the exclusion. Thus, the available tax return data do not provide the information necessary to analyze the current use of section 1202.

Minor clarifying changes in the regulatory language have also been made.

Special Analyses

It has been determined that this Treasury Decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Catherine A. Prohofsky, Office of the Assistant Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * * Section 1.1202-2 is also issued under 26 U.S.C. 1202(k). * * *

Par. 2. Sections 1.1202-0 and 1.1202-2 are added to read as follows:

§ 1.1202-0 Table of contents.

This section lists the major captions that appear in the regulations under § 1.1202-2.

§ 1.1202-2 Qualified small business stock; effect of redemptions.

- (a) Redemptions from taxpayer or related person.
 - (1) In general.
 - (2) De minimis amount.
- (b) Significant redemptions.
 - (1) In general.
 - (2) De minimis amount.
- (c) Transfers by shareholders in connection with the performance of services not treated as purchases.
- (d) Exceptions for termination of services, death, disability or mental incompetency, or divorce.
 - (1) Termination of services.
 - (2) Death.
 - (3) Disability or mental incompetency.
 - (4) Divorce.
 - (e) Effective date.

§ 1.1202-2 Qualified small business stock; effect of redemptions.

(a) *Redemptions from taxpayer or related person*—(1) *In general.* Stock acquired by a taxpayer is not qualified small business stock if, in one or more purchases during the 4-year period beginning on the date 2 years before the issuance of the stock, the issuing corporation purchases (directly or indirectly) more than a de minimis amount of its stock from the taxpayer or from a person related (within the meaning of section 267(b) or 707(b)) to the taxpayer.

(2) *De minimis amount.* For purposes of this paragraph (a), stock acquired from the taxpayer or a related person exceeds a de minimis amount only if the aggregate amount paid for the stock exceeds \$10,000 and more than 2 percent of the stock held by the taxpayer and related persons is acquired. The following rules apply for purposes of determining whether the 2-percent limit is exceeded. The percentage of stock acquired in any single purchase is determined by dividing the stock's value (as of the time of purchase) by the value (as of the time of purchase) of all stock held (directly or indirectly) by the taxpayer and related persons immediately before the purchase. The percentage of stock acquired in multiple purchases is the sum of the percentages determined for each separate purchase.

(b) *Significant redemptions*—(1) *In general.* Stock is not qualified small business stock if, in one or more purchases during the 2-year period beginning on the date 1 year before the issuance of the stock, the issuing corporation purchases more than a de minimis amount of its stock and the purchased stock has an aggregate value

(as of the time of the respective purchases) exceeding 5 percent of the aggregate value of all of the issuing corporation's stock as of the beginning of such 2-year period.

(2) *De minimis amount.* For purposes of this paragraph (b), stock exceeds a de minimis amount only if the aggregate amount paid for the stock exceeds \$10,000 and more than 2 percent of all outstanding stock is purchased. The following rules apply for purposes of determining whether the 2-percent limit is exceeded. The percentage of the stock acquired in any single purchase is determined by dividing the stock's value (as of the time of purchase) by the value (as of the time of purchase) of all stock outstanding immediately before the purchase. The percentage of stock acquired in multiple purchases is the sum of the percentages determined for each separate purchase.

(c) *Transfers by shareholders in connection with the performance of services not treated as purchases.* A transfer of stock by a shareholder to an employee or independent contractor (or to a beneficiary of an employee or independent contractor) is not treated as a purchase of the stock by the issuing corporation for purposes of this section even if the stock is treated as having first been transferred to the corporation under § 1.83-6(d)(1) (relating to transfers by shareholders to employees or independent contractors).

(d) *Exceptions for termination of services, death, disability or mental incompetency, or divorce.* A stock purchase is disregarded if the stock is acquired in the following circumstances:

(1) *Termination of services—(i) Employees and directors.* The stock was acquired by the seller in connection with the performance of services as an employee or director and the stock is purchased from the seller incident to the seller's retirement or other bona fide termination of such services;

(ii) *Independent contractors.*
[Reserved];

(2) *Death.* Prior to a decedent's death, the stock (or an option to acquire the stock) was held by the decedent or the decedent's spouse (or by both), by the decedent and joint tenant, or by a trust revocable by the decedent or the decedent's spouse (or by both), and—

(i) The stock is purchased from the decedent's estate, beneficiary (whether by bequest or lifetime gift), heir, surviving joint tenant, or surviving spouse, or from a trust established by the decedent or decedent's spouse; and

(ii) The stock is purchased within 3 years and 9 months from the date of the decedent's death;

(3) *Disability or mental incompetency.* The stock is purchased incident to the disability or mental incompetency of the selling shareholder; or

(4) *Divorce.* The stock is purchased incident to the divorce (within the meaning of section 1041(c)) of the selling shareholder.

(e) *Effective date.* This section applies to stock issued after August 10, 1993.

Approved: December 22, 1997.

Michael P. Dolan,

Deputy Commissioner of Internal Revenue.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 97-33987 Filed 12-30-97; 8:45 am]

BILLING CODE 4830-01-U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 301, 601, and 602

[TD 8742]

RIN 1545-AU42 and 1545-AV20

Requirements Respecting the Adoption or Change of Accounting Method; Extensions of Time To Make Elections

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing the procedures for requesting an extension of time to make certain elections under the Internal Revenue Code. In addition, the regulations provide the standards that the Commissioner will use in determining whether to grant taxpayers extensions of time to make certain elections including changes in accounting method and accounting period. The regulations also set forth the time for filing a Form 3115, Application for Change in Accounting Method, with the Commissioner. The regulations affect taxpayers requesting an extension of time to make certain elections and taxpayers requesting to change their method of accounting for federal income tax purposes.

DATES: These regulations are effective December 31, 1997.

FOR FURTHER INFORMATION CONTACT: Cheryl Lynn Oseekey, (202) 622-4970 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the

Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1488. Responses to this collection of information are required to obtain an extension of time to make an election.

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

The estimated annual burden per respondent is 10 hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, T:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to this collection of information must be retained as long as their contents may be 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.

Background

On June 27, 1996, temporary regulations relating to the standards the Commissioner will use to grant taxpayers extensions of time to make certain elections were published in the **Federal Register** (TD 8680, 61 FR 33365), and cross-referenced to a notice of proposed rulemaking published in the **Federal Register** on the same date (61 FR 33408). The regulations, §§ 301.9100-1T through 301.9100-3T, provide an automatic 6-month extension from the due date of the return excluding extensions to make statutory and regulatory elections whose due dates are the due date of the return or the due date of the return including extensions. The regulations also provide an automatic 12-month extension of time to make certain regulatory elections. For regulatory elections not eligible for the automatic extensions of time, the regulations provide the standards the Commissioner will use to determine whether to grant an extension of time to make the election. A public hearing on the regulations was held on October 30, 1996.

On May 15, 1997, temporary regulations setting forth the time for requesting a change in accounting method and the standards the Commissioner will use to grant an extension of time to request a change in

accounting method were published in the **Federal Register** (TD 8719, 62 FR 26740), and cross-referenced to a notice of proposed rulemaking published in the **Federal Register** on the same date (62 FR 26755). On May 27, 1997, corrections to TD 8719 were published in the **Federal Register** (62 FR 28630). The regulations extend the time for filing a Form 3115, Application for Change in Accounting Method, pursuant to §§ 1.446-1(e)(3)(i) and 601.204(b) by allowing a taxpayer to file its Form 3115 with the Commissioner anytime during the taxable year in which the taxpayer desires to make the change in method of accounting. The regulations also revised §§ 301.9100-1T and 301.9100-3T to provide that an extension of time to file a Form 3115 beyond the year provided in the regulations will be granted only in unusual and compelling circumstances. No public hearing on the regulations was requested or held.

One comment responding to the notice of proposed rulemaking published in the **Federal Register** on June 27, 1996 (61 FR 33408) was received. No comments responding to the notice of proposed rulemaking published in the **Federal Register** on May 15, 1997 (62 FR 26755) were received. After consideration of the comment received, the regulations are adopted as modified by this Treasury decision.

Public Comment

The commentator recommended several modifications to the regulations prior to their adoption as final regulations.

The commentator suggested that a request for extension of time to make an election should not be denied on the basis that the taxpayer fails to qualify for the underlying election. The commentator noted that the regulations provide that the granting of § 301.9100 relief is not a determination that the taxpayer is otherwise eligible to make the election. This suggested modification has not been adopted. The IRS and the Treasury Department believe it is in the interest of sound tax administration to deny § 301.9100 relief when it becomes apparent in considering the request for an extension of time that the taxpayer is not otherwise eligible to make the election. This ensures that the resources of the IRS are brought to bear in the resolution of the issue regarding eligibility at the earliest stage of the administrative process.

The commentator recommended that an extension of time to make an election be made available even when alternative

relief is provided by a statute, a regulation published in the **Federal Register**, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin. This suggested modification has not been adopted. The IRS and the Treasury Department want to retain the ability to tailor relief for specific elections.

The commentator recommended measuring the 12-month automatic extension for eligible regulatory elections whose deadlines are the due date of the return or the due date of the return including extensions from the extended due date when the taxpayer has obtained an extension. This suggested modification has been adopted. The commentator also recommended that the automatic 6-month extension for statutory and regulatory elections be available even when the return for the year of the election was not timely filed. This suggested modification has not been adopted.

The commentator recommended that the regulations not provide that the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any affected taxable years are closed by the period of limitations on assessment. This suggested modification was not adopted. There are two policies that must be balanced in formulating the standards for § 301.9100 relief. The first is the policy of promoting efficient tax administration by providing limited time periods for taxpayers to choose among alternative tax treatments and encouraging prompt tax reporting. The second is the policy of permitting taxpayers that are in reasonable compliance with the tax laws to minimize their tax liability by collecting from them only the amount of tax they would have paid if they had been fully informed and well advised. The IRS and the Treasury Department believe that the regulation achieves an appropriate balance between these policies. Furthermore, the language of the regulation does not foreclose in all circumstances consideration of whether the interests of the Government will not be prejudiced.

The commentator questioned the special rules for accounting method and accounting period regulatory elections. The regulations provide limited relief for accounting methods or periods subject to advance written consent from the Commissioner ordinarily not to exceed 90 days from the deadline for filing the Form 3115, Application for Change in Accounting Method, or the

Form 1128, Application to Adopt, Change, or Retain a Tax Year. The commentator suggested that the 90-day period be extended. The regulations published in the **Federal Register** on May 15, 1997 (TD 8719, 62 FR 26740) and corrected on May 27, 1997 (62 FR 28630) effectively extended the 90-day period for accounting methods by allowing the Form 3115 to be filed anytime during the taxable year in which the taxpayer desires to make the change in method of accounting. This rule is incorporated into the final regulations. However, a similar amendment was not made in regard to accounting period elections because extending the 90-day period would delay the filing of the short period return and result in less efficient tax administration.

The commentator recommended that the special rules for other accounting method regulatory elections be modified by eliminating the rule that, ordinarily, the interests of the Government are deemed to be prejudiced when the election requires an adjustment under section 481(a). This suggested modification was not adopted. The IRS and the Treasury Department believe it is in the interest of sound tax administration to generally preclude taxpayers from requesting, or otherwise making, a retroactive change in an adopted method of accounting, whether the change is from a permissible or impermissible method. See generally, Rev. Rul. 90-38 (1990-1 C.B. 57). In considering an exception, the IRS and the Treasury Department believe that § 301.9100 relief is most appropriate for accounting method elections that relate to nonrecurring transactions. These elections are generally made on a cut-off basis and a missed election would preclude accounting for a transaction in the year of the missed election under the elective method. In contrast, accounting method elections subject to section 481(a) generally will provide the benefit of the elective method for a transaction in the year of the missed election through an adjustment under section 481(a).

The commentator suggested that the regulations clarify when taxpayers may obtain an extension of time to file a request to change an accounting method or an accounting period under an unusual and compelling circumstances standard. This suggested modification was not adopted. What are unusual and compelling circumstances must be decided on a case-by-case basis in light of all applicable facts and circumstances.

Effective Date

The rules relating to the time for filing an application for change in accounting method apply to Forms 3115 submitted on or after December 31, 1997.

The rules relating to requests for an extension of time apply to requests submitted to the IRS on or after December 31, 1997. The rules relating to automatic extensions apply to elections for which corrective action is taken on or after December 31, 1997.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

Sections 1.446-1(e)(3)(i) and 601.204(b) in this regulation, originally published in the **Federal Register** for May 15, 1997 as a temporary regulation and cross-reference notice of proposed rulemaking, merely extend the time for filing a Form 3115, Application for Change in Accounting Method, with the Commissioner and, therefore, do not contain a new collection of information. Sections 301.9100-2 and 301.9100-3 of this regulation, originally published in the **Federal Register** for June 27, 1996 as a temporary regulation and cross-reference notice of proposed rulemaking, contain a collection of information. However, an initial regulatory flexibility analysis was not required because the regulations were published within 90 days of the enactment of Subtitle D of the Contract with America Advancement Act of 1996 (Public Law 104-21, 110 Stat. 847, 868 (1996)). With respect to these final regulations, it is hereby certified that the collection of information in those sections will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that, on average, no more than 500 requests for an extension of time to make an election are received on an annual basis. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

Pursuant to section 7805(f) of the Internal Revenue Code, these regulations were submitted to the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Cheryl Lynn Oseekey,

Office of Assistant Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects*26 CFR Part 1*

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

26 CFR Part 601

Administrative practice and procedure, Freedom of information, Reporting and recordkeeping requirements, Taxes.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 301, 601, and 602 are amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805. * * *

§ 1.446-1 [Amended]

Par. 2. Section 1.446-1 is amended as follows:

1. The first sentence of paragraph (e)(3)(i) is amended by removing the language "within 180 days after the beginning of" and adding "during" in its place.

2. Paragraph (e)(3)(iii) is revised to read as follows:

§ 1.446-1 General rule for methods of accounting.

* * * * *

(e) * * *

(3) * * *

(iii) This paragraph (e)(3) applies to Forms 3115 filed on or after December 31, 1997. For other Forms 3115, see § 1.446-1(e)(3) in effect prior to December 31, 1997 (§ 1.446-1(e)(3) as contained in the 26 CFR part 1 edition revised as of April 1, 1997).

§ 1.446-1T [Removed]

Par. 3. Section 1.446-1T is removed.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 4. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805. * * *

Par. 5. Section 301.9100-0 is added to read as follows:

§ 301.9100-0 Outline of regulations.

This section lists the paragraphs in §§ 301.9100-1 through 301.9100-3.

§ 301.9100-1 Extensions of time to make elections.

- (a) Introduction.
- (b) Terms.
- (c) General standards for relief.
- (d) Exceptions.
- (e) Effective dates.

§ 301.9100-2 Automatic extensions.

- (a) Automatic 12-month extension.
 - (1) In general.
 - (2) Elections eligible for automatic 12-month extension.
- (b) Automatic 6-month extension.
- (c) Corrective action.
- (d) Procedural requirements.
- (e) Examples.

§ 301.9100-3 Other extensions.

- (a) In general.
 - (b) Reasonable action and good faith.
 - (1) In general.
 - (2) Reasonable reliance on a qualified tax professional.
 - (3) Taxpayer deemed to have not acted reasonably or in good faith.
 - (c) Prejudice to the interests of the Government.
 - (1) In general.
 - (i) Lower tax liability.
 - (ii) Closed years.
 - (2) Special rules for accounting method regulatory elections.
 - (3) Special rules for accounting period regulatory elections.
 - (d) Effect of amended returns.
 - (1) Second examination under section 7605(b).
 - (2) Suspension of the period of limitations under section 6501(a).
 - (e) Procedural requirements.
 - (1) In general.
 - (2) Affidavit and declaration from taxpayer.
 - (3) Affidavits and declarations from other parties.
 - (4) Other information.
 - (5) Filing instructions.
 - (f) Examples.

Par. 6. Section 301.9100-1 is revised to read as follows:

§ 301.9100-1 Extensions of time to make elections.

(a) *Introduction.* The regulations under this section and §§ 301.9100-2 and 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. The regulations under this section and § 301.9100-2 also provide an automatic extension of time to make certain statutory elections. An extension of time is available for elections that a taxpayer is otherwise eligible to make. However,

the granting of an extension of time is not a determination that the taxpayer is otherwise eligible to make the election. Section 301.9100-2 provides automatic extensions of time for making regulatory and statutory elections when the deadline for making the election is the due date of the return or the due date of the return including extensions. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of § 301.9100-2.

(b) *Terms.* The following terms have the meanings provided below—

Election includes an application for relief in respect of tax; a request to adopt, change, or retain an accounting method or accounting period; but does not include an application for an extension of time for filing a return under section 6081.

Regulatory election means an election whose due date is prescribed by a regulation published in the **Federal Register**, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

Statutory election means an election whose due date is prescribed by statute.

Taxpayer means any person within the meaning of section 7701(a)(1).

(c) *General standards for relief.* The Commissioner in exercising the Commissioner's discretion may grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

(d) *Exceptions.* Notwithstanding the provisions of paragraph (c) of this section, an extension of time will not be granted—

(1) For elections under section 4980A(f)(5); or

(2) For elections that are expressly excepted from relief or where alternative relief is provided by a statute, a regulation published in the **Federal Register**, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(e) *Effective dates.* In general, this section and §§ 301.9100-2 and 301.9100-3 apply to all requests for an extension of time submitted to the Internal Revenue Service (IRS) on or after December 31, 1997. However, the automatic 12-month and 6-month extensions provided in § 301.9100-2 apply to elections for which corrective

action is taken on or after December 31, 1997. For other requests for an extension of time, see §§ 301.9100-1T through 301.9100-3T in effect prior to December 31, 1997 (§§ 301.9100-1T through 301.9100-3T as contained in the 26 CFR part 1 edition revised as of April 1, 1997).

Par. 7. Sections 301.9100-2 and 301.9100-3 are added to read as follows:

§ 301.9100-2 Automatic extensions.

(a) *Automatic 12-month extension—*
(1) *In general.* An automatic extension of 12 months from the due date for making a regulatory election is granted to make elections described in paragraph (a)(2) of this section provided the taxpayer takes corrective action as defined in paragraph (c) of this section within that 12-month extension period. For purposes of this paragraph (a), the due date for making a regulatory election is the extended due date of the return if the due date of the election is the due date of the return or the due date of the return including extensions and the taxpayer has obtained an extension of time to file the return. This extension is available regardless of whether the taxpayer timely filed its return for the year the election should have been made.

(2) *Elections eligible for automatic 12-month extension.* The following regulatory elections are eligible for the automatic 12-month extension described in paragraph (a)(1) of this section—

(i) The election to use other than the required taxable year under section 444;

(ii) The election to use the last-in, first-out (LIFO) inventory method under section 472;

(iii) The 15-month rule for filing an exemption application for a section 501(c)(9), 501(c)(17), or 501(c)(20) organization under section 505;

(iv) The 15-month rule for filing an exemption application for a section 501(c)(3) organization under section 508;

(v) The election to be treated as a homeowners association under section 528;

(vi) The election to adjust basis on partnership transfers and distributions under section 754;

(vii) The estate tax election to specially value qualified real property (where the Internal Revenue Service (IRS) has not yet begun an examination of the filed return) under section 2032A(d)(1);

(viii) The chapter 14 gift tax election to treat a qualified payment right as other than a qualified payment under section 2701(c)(3)(C)(i); and

(ix) The chapter 14 gift tax election to treat any distribution right as a qualified payment under section 2701(c)(3)(C)(ii).

(b) *Automatic 6-month extension.* An automatic extension of 6 months from the due date of a return excluding extensions is granted to make regulatory or statutory elections whose due dates are the due date of the return or the due date of the return including extensions provided the taxpayer timely filed its return for the year the election should have been made and the taxpayer takes corrective action as defined in paragraph (c) of this section within that 6-month extension period. This paragraph (b) does not apply to regulatory or statutory elections that must be made by the due date of the return excluding extensions.

(c) *Corrective action.* For purposes of this section, corrective action means taking the steps required to file the election in accordance with the statute or the regulation published in the **Federal Register**, or the revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter). For those elections required to be filed with a return, corrective action includes filing an original or an amended return for the year the regulatory or statutory election should have been made and attaching the appropriate form or statement for making the election. Taxpayers who make an election under an automatic extension (and all taxpayers whose tax liability would be affected by the election) must file their return in a manner that is consistent with the election and comply with all other requirements for making the election for the year the election should have been made and for all affected years; otherwise, the IRS may invalidate the election.

(d) *Procedural requirements.* Any return, statement of election, or other form of filing that must be made to obtain an automatic extension must provide the following statement at the top of the document: "FILED PURSUANT TO § 301.9100-2". Any filing made to obtain an automatic extension must be sent to the same address that the filing to make the election would have been sent had the filing been timely made. No request for a letter ruling is required to obtain an automatic extension. Accordingly, user fees do not apply to taxpayers taking corrective action to obtain an automatic extension.

(e) *Examples.* The following examples illustrate the provisions of this section:

Example 1. Automatic 12-month extension. Taxpayer A fails to make an election described in paragraph (a)(2) of this section when filing A's 1997 income tax return on March 16, 1998, the due date of the return. This election does not affect the tax liability of any other taxpayer. The applicable regulation requires that the election be made by attaching the appropriate form to a timely filed return including extensions. In accordance with paragraphs (a) and (c) of this section, A may make the regulatory election by taking the corrective action of filing an amended return with the appropriate form by March 15, 1999 (12 months from the March 16, 1998 due date of the return). If A obtained a 6-month extension to file its 1997 income tax return, A may make the regulatory election by taking the corrective action of filing an amended return with the appropriate form by September 15, 1999 (12 months from the September 15, 1998 extended due date of the return).

Example 2. Automatic 6-month extension. Taxpayer B fails to make an election not described in paragraph (a)(2) of this section when filing B's 1997 income tax return on March 16, 1998, the due date of the return. This election does not affect the tax liability of any other taxpayer. The applicable regulation requires that the election be made by attaching the appropriate form to a timely filed return including extensions. In accordance with paragraphs (b) and (c) of this section, B may make the regulatory election by taking the corrective action of filing an amended return with the appropriate form by September 15, 1998 (6 months from the March 16, 1998 due date of the return).

§ 301.9100-3 Other extensions.

(a) *In general.* Requests for extensions of time for regulatory elections that do not meet the requirements of § 301.9100-2 must be made under the rules of this section. Requests for relief subject to this section will be granted when the taxpayer provides the evidence (including affidavits described in paragraph (e) of this section) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

(b) *Reasonable action and good faith—(1) In general.* Except as provided in paragraphs (b)(3)(i) through (iii) of this section, a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer—

(i) Requests relief under this section before the failure to make the regulatory election is discovered by the Internal Revenue Service (IRS);

(ii) Failed to make the election because of intervening events beyond the taxpayer's control;

(iii) Failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the

taxpayer was unaware of the necessity for the election;

(iv) Reasonably relied on the written advice of the Internal Revenue Service (IRS); or

(v) Reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

(2) *Reasonable reliance on a qualified tax professional.* For purposes of this paragraph (b), a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not—

(i) Competent to render advice on the regulatory election; or

(ii) Aware of all relevant facts.

(3) *Taxpayer deemed to have not acted reasonably or in good faith.* For purposes of this paragraph (b), a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer—

(i) Seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief (taking into account any qualified amended return filed within the meaning of § 1.6664-2(c)(3) of this chapter) and the new position requires or permits a regulatory election for which relief is requested;

(ii) Was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) Uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the IRS will not ordinarily grant relief. In such a case, the IRS will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

(c) *Prejudice to the interests of the Government—(1) In general.* The Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief. This paragraph (c) provides the standards the Commissioner will use to determine when the interests of the Government are prejudiced.

(i) *Lower tax liability.* The interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election

had been timely made (taking into account the time value of money). Similarly, if the tax consequences of more than one taxpayer are affected by the election, the Government's interests are prejudiced if extending the time for making the election may result in the affected taxpayers, in the aggregate, having a lower tax liability than if the election had been timely made.

(ii) *Closed years.* The interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section. The IRS may condition a grant of relief on the taxpayer providing the IRS with a statement from an independent auditor (other than an auditor providing an affidavit pursuant to paragraph (e)(3) of this section) certifying that the interests of the Government are not prejudiced under the standards set forth in paragraph (c)(1)(i) of this section.

(2) *Special rules for accounting method regulatory elections.* The interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method regulatory election for which relief is requested—

(i) Is subject to the procedure described in § 1.446-1(e)(3)(i) of this chapter (requiring the advance written consent of the Commissioner);

(ii) Requires an adjustment under section 481(a) (or would require an adjustment under section 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made);

(iii) Would permit a change from an impermissible method of accounting that is an issue under consideration by examination, an appeals office, or a federal court and the change would provide a more favorable method or more favorable terms and conditions than if the change were made as part of an examination; or

(iv) Provides a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year.

(3) *Special rules for accounting period regulatory elections.* The interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances if an election is an accounting period regulatory election (other than the election to use

other than the required taxable year under section 444) and the request for relief is filed more than 90 days after the due date for filing the Form 1128, Application to Adopt, Change, or Retain a Tax Year (or other required statement).

(d) *Effect of amended returns*—(1)

Second examination under section 7605(b). Taxpayers requesting and receiving an extension of time under this section waive any objections to a second examination under section 7605(b) for the issue(s) that is the subject of the relief request and any correlative adjustments.

(2) *Suspension of the period of limitations under section 6501(a)*. A request for relief under this section does not suspend the period of limitations on assessment under section 6501(a). Thus, for relief to be granted, the IRS may require the taxpayer to consent under section 6501(c)(4) to an extension of the period of limitations on assessment for the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made.

(e) *Procedural requirements*—(1) *In general*. Requests for relief under this section must provide evidence that satisfies the requirements in paragraphs (b) and (c) of this section, and must provide additional information as required by this paragraph (e).

(2) *Affidavit and declaration from taxpayer*. The taxpayer, or the individual who acts on behalf of the taxpayer with respect to tax matters, must submit a detailed affidavit describing the events that led to the failure to make a valid regulatory election and to the discovery of the failure. When the taxpayer relied on a qualified tax professional for advice, the taxpayer's affidavit must describe the engagement and responsibilities of the professional as well as the extent to which the taxpayer relied on the professional. The affidavit must be accompanied by a dated declaration, signed by the taxpayer, which states: "Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and, to the best of my knowledge and belief, the request contains all the relevant facts relating to the request, and such facts are true, correct, and complete." The individual who signs for an entity must have personal knowledge of the facts and circumstances at issue.

(3) *Affidavits and declarations from other parties*. The taxpayer must submit detailed affidavits from the individuals having knowledge or information about the events that led to the failure to make a valid regulatory election and to the

discovery of the failure. These individuals must include the taxpayer's return preparer, any individual (including an employee of the taxpayer) who made a substantial contribution to the preparation of the return, and any accountant or attorney, knowledgeable in tax matters, who advised the taxpayer with regard to the election. An affidavit must describe the engagement and responsibilities of the individual as well as the advice that the individual provided to the taxpayer. Each affidavit must include the name, current address, and taxpayer identification number of the individual, and be accompanied by a dated declaration, signed by the individual, which states: "Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and, to the best of my knowledge and belief, the request contains all the relevant facts relating to the request, and such facts are true, correct, and complete."

(4) *Other information*. The request for relief filed under this section must also contain the following information—

(i) The taxpayer must state whether the taxpayer's return(s) for the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made is being examined by a district director, or is being considered by an appeals office or a federal court. The taxpayer must notify the IRS office considering the request for relief if the IRS starts an examination of any such return while the taxpayer's request for relief is pending;

(ii) The taxpayer must state when the applicable return, form, or statement used to make the election was required to be filed and when it was actually filed;

(iii) The taxpayer must submit a copy of any documents that refer to the election;

(iv) When requested, the taxpayer must submit a copy of the taxpayer's return for any taxable year for which the taxpayer requests an extension of time to make the election and any return affected by the election; and

(v) When applicable, the taxpayer must submit a copy of the returns of other taxpayers affected by the election.

(5) *Filing instructions*. A request for relief under this section is a request for a letter ruling. Requests for relief should be submitted in accordance with the applicable procedures for requests for a letter ruling and must be accompanied by the applicable user fee.

(f) *Examples*. The following examples illustrate the provisions of this section:

Example 1. Taxpayer discovers own error. Taxpayer A prepares A's 1997 income tax return. A is unaware that a particular regulatory election is available to report a transaction in a particular manner. A files the 1997 return without making the election and reporting the transaction in a different manner. In 1999, A hires a qualified tax professional to prepare A's 1999 return. The professional discovers that A did not make the election. A promptly files for relief in accordance with this section. Assume paragraphs (b)(3)(i) through (iii) of this section do not apply. Under paragraph (b)(1)(i) of this section, A is deemed to have acted reasonably and in good faith because A requested relief before the failure to make the regulatory election was discovered by the IRS.

Example 2. Reliance on qualified tax professional. Taxpayer B hires a qualified tax professional to advise B on preparing B's 1997 income tax return. The professional was competent to render advice on the election and B provided the professional with all the relevant facts. The professional fails to advise B that a regulatory election is necessary in order for B to report income on B's 1997 return in a particular manner. Nevertheless, B reports this income in a manner that is consistent with having made the election. In 2000, during the examination of the 1997 return by the IRS, the examining agent discovers that the election has not been filed. B promptly files for relief in accordance with this section, including attaching an affidavit from B's professional stating that the professional failed to advise B that the election was necessary. Assume paragraphs (b)(3)(i) through (iii) of this section do not apply. Under paragraph (b)(1)(v) of this section, B is deemed to have acted reasonably and in good faith because B reasonably relied on a qualified tax professional and the tax professional failed to advise B to make the election.

Example 3. Accuracy-related penalty. Taxpayer C reports income on its 1997 income tax return in a manner that is contrary to a regulatory provision. In 2000, during the examination of the 1997 return, the IRS raises an issue regarding the reporting of this income on C's return and asserts the accuracy-related penalty under section 6662. C requests relief under this section to elect an alternative method of reporting the income. Under paragraph (b)(3)(i) of this section, C is deemed to have not acted reasonably and in good faith because C seeks to alter a return position for which an accuracy-related penalty could be imposed under section 6662.

Example 4. Election not requiring adjustment under section 481(a). Taxpayer D prepares D's 1997 income tax return. D is unaware that a particular accounting method regulatory election is available. D files D's 1997 return without making the election and uses another permissible method of accounting. The applicable regulation provides that the election is made on a cut-off basis (without an adjustment under section 481(a)). In 1998, D requests relief under this section to make the election under the regulation. If D were granted an extension of time to make the election, D would pay no

less tax than if the election had been timely made. Assume that paragraphs (c)(2) (i), (iii), and (iv) of this section do not apply. Under paragraph (c)(2)(ii) of this section, the interests of the Government are not deemed to be prejudiced because the election does not require an adjustment under section 481(a).

Example 5. Election requiring adjustment under section 481(a). The facts are the same as in Example 4 of this paragraph (f) except that the applicable regulation provides that the election requires an adjustment under section 481(a). Under paragraph (c)(2)(ii) of this section, the interests of the Government are deemed to be prejudiced except in unusual or compelling circumstances.

Example 6. Under examination by the IRS. A regulation permits an automatic change in method of accounting for an item on a cut-off basis. Taxpayer E reports income on E's 1997 income tax return using an impermissible method of accounting for the item. In 2000, during the examination of the 1997 return by the IRS, the examining agent notifies E in writing that its method of accounting for the item is an issue under consideration. Any change from the impermissible method made as part of an examination is made with an adjustment under section 481(a). E requests relief under this section to make the change pursuant to the regulation for 1997. The change on a cut-off basis under the regulation would be more favorable than if the change were made with an adjustment under section 481(a) as part of an examination. Under paragraph (c)(2)(iii) of this section, the interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances because E seeks to change from an impermissible method of accounting that is an issue under consideration in the examination on a basis that is more favorable than if the change were made as part of an examination.

§§ 301.9100-1T, 301.9100-2T, and 301.9100-3T [Removed]

Par. 8. Sections 301.9100-1T, 301.9100-2T, and 301.9100-3T are removed.

PART 601—STATEMENT OF PROCEDURAL RULES

Par. 9. The authority citation for part 601 continues to read as follows:

Authority: 26 U.S.C. 301 and 552, unless otherwise noted.

§ 601.204 [Amended]

Par. 10. Section 601.204 is amended as follows:

1. In paragraph (b), the fourth sentence is amended by removing the language "within 180 days after the beginning of" and adding "during" in its place.

2. In paragraph (b), the last sentence is removed.

§ 601.204T [Removed]

Par. 11. Section 601.204T is removed.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 12. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 13. Section 602.101(c) is amended by removing the entries for §§ 301.9001-2T and 301.9001-3T, and adding the following entry in numerical order to the table to read as follows:

§ 602.101 OMB control numbers.

CFR part or section where identified and described	Current OMB control No.
301.9100-1	1545-1488

Michael P. Dolan,

Deputy Commissioner of Internal Revenue.

Approved: December 10, 1997.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 97-33357 Filed 12-30-97; 8:45 am]

BILLING CODE 4830-01-U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 8746]

RIN 1545-AU09

Amortizable Bond Premium

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the federal income tax treatment of bond premium and bond issuance premium. The regulations reflect changes to the law made by the Tax Reform Act of 1986 and the Technical and Miscellaneous Revenue Act of 1988. The regulations will provide needed guidance to holders and issuers of debt instruments.

DATES: *Effective date:* March 2, 1998.

Applicability dates: For dates of applicability of the final regulations, see *Effective Dates* under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: William E. Blanchard, (202) 622-3950 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-1491. Responses to these collections of information are required by the IRS to determine whether a holder of a bond has elected to amortize bond premium and whether an issuer or a holder has changed its method of accounting for premium.

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

The estimated annual burden per respondent varies from 0.25 hours to 0.75 hours, depending on individual circumstances, with an estimated average of 0.5 hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, T:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to the collections 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.

Background

Sections 1.171-1 through 1.171-4 of the Income Tax Regulations were promulgated in 1957 and last amended in 1968. In the Tax Reform Act of 1986, section 171(b) was amended to require that bond premium be amortized by reference to a constant yield. In the Technical and Miscellaneous Revenue Act of 1988, section 171(e) was amended to require that amortizable bond premium be treated as an offset to interest income.

On June 27, 1996, the IRS published a notice of proposed rulemaking in the **Federal Register** (61 FR 33396) relating to the federal income tax treatment of bond premium and bond issuance premium. A public hearing was not held because no one requested to speak at the hearing that had been scheduled for October 23, 1996. The IRS did receive

a few comments on the proposed regulations. The proposed regulations, with certain changes to respond to the comments, are adopted as final regulations.

Explanation of Provisions

In general, bond premium arises when a holder acquires a bond for more than the principal amount of the bond. Similarly, bond issuance premium arises when an issuer issues a bond for more than the principal amount of the bond. A holder will purchase, and an issuer will issue, a bond for more than its principal amount when the stated interest rate on the bond is higher than the current market yield for the bond.

The holder's treatment of bond premium is addressed in §§ 1.171-1 through 1.171-5. The issuer's treatment of bond issuance premium is addressed in § 1.163-13. In each case, the amortization of premium is based on constant yield principles. For this reason, the final regulations use concepts and definitions from the original issue discount (OID) regulations (in general, see §§ 1.1271-1 through 1.1275-7T).

Determination of Bond Premium

Under the proposed regulations, bond premium is defined as the excess of a holder's basis in a bond over the sum of the remaining amounts payable on the bond other than payments of qualified stated interest. The holder generally determines the amount of bond premium as of the date the holder acquires the bond.

The proposed regulations provide special rules that limit a holder's basis solely for purposes of determining bond premium. For example, if a bond is convertible into stock of the issuer at the holder's option, for purposes of determining bond premium, the holder must reduce its basis in the bond by the value of the conversion option. This reduction prevents the holder from inappropriately amortizing the cost of the embedded conversion option.

The final regulations adopt the rules of the proposed regulations for determining the amount of bond premium, if any, on a bond. However, in response to comments, the final regulations clarify the determination of basis in the case of a convertible bond acquired in a transferred basis transaction.

Amortization of Bond Premium

(a) In General

Under section 171, the holder of a taxable bond acquired at a premium may elect to amortize bond premium.

The holder of a tax-exempt bond acquired at a premium must amortize the premium. As premium is amortized, the holder's basis in the bond is reduced by a corresponding amount under section 1016(a)(5).

Under the proposed regulations, a holder amortizes bond premium by offsetting qualified stated interest income with bond premium. An offset is calculated for each accrual period using constant yield principles. However, the offset for an accrual period is only taken into account when the holder takes qualified stated interest into account under the holder's regular method of accounting. Thus, a holder using the cash receipts and disbursements method of accounting does not take bond premium into account until a qualified stated interest payment is received.

The final regulations adopt the rules in the proposed regulations for amortizing bond premium.

(b) Excess Premium

For certain bonds (for example, bonds that pay a variable rate of interest or that provide for an interest holiday), the amount of bond premium allocable to an accrual period could exceed the amount of qualified stated interest allocable to that period. The proposed regulations address this situation by providing that the excess bond premium is not allowed as a deduction but is carried forward to future accrual periods.

Several commentators stated that this excess premium should be allowable as a current deduction for the accrual period in which the excess occurs. In response to these comments, the final regulations adopt rules for excess premium that are similar to the rules for negative adjustments on contingent payment debt instruments and deflation adjustments on inflation-indexed debt instruments. Under the final regulations, any excess bond premium allocable to an accrual period is deductible by the holder under section 171(a)(1) for the accrual period. The amount deductible, however, is limited by the amount of the holder's prior income inclusions on the bond. If any of the excess bond premium is not deductible under section 171(a)(1), this amount is carried forward to the next accrual period and is treated as bond premium allocable to that period.

Bonds Subject to Certain Contingencies

If a bond provides for one or more alternative payment schedules, the yield of the bond cannot be determined without making assumptions about the actual payment schedule. The OID

regulations provide rules for making these assumptions. For example, the rules assume that an issuer will exercise a call option if doing so would minimize the yield of the debt instrument and that a holder will exercise a put option if doing so would maximize the yield of the debt instrument.

The proposed regulations under section 171 generally use similar assumptions to determine the holder's yield on a bond that provides for alternative payment schedules. However, in the case of an issuer's option on a taxable bond, the proposed regulations reverse the assumption in the OID regulations by assuming that the issuer will exercise the option only if doing so would increase the yield on the bond. See section 171(b)(1)(B)(ii). Thus, under the proposed regulations, a holder generally must amortize bond premium on a taxable bond by reference to the stated maturity date, even if it appears likely the bond will be called. In this case, if the bond is actually called, the proposed regulations provide that the holder may deduct the unamortized premium. If the bond is partially called and the partial call is not a pro-rata prepayment, the proposed regulations do not allow the holder to deduct a portion of the unamortized premium. Instead, the holder must recompute the yield of the bond on the date of the partial call and amortize the remaining premium by reference to the recomputed yield.

In general, the final regulations adopt the rules of the proposed regulations. In response to a comment, the final regulations limit the issuer rule for taxable bonds to call options.

Bond Issuance Premium

Under existing § 1.61-12(c), a corporate issuer treats premium received upon issuance of a bond as a separate item of income. Over the term of the bond, the premium is taken into income, and the full amount of the stated interest is deducted. The proposed regulations revise the treatment of bond issuance premium. Under the proposed regulations, bond issuance premium is amortized as an offset to the issuer's otherwise allowable interest deduction, not as a separate item of income. The amount of bond issuance premium amortized in any period is based on a constant yield. In addition, the proposed regulations apply to all issuers, not just corporate issuers.

In general, the final regulations adopt the rules in the proposed regulations for bond issuance premium. However, the final regulations contain several

important changes from the proposed regulations. First, in response to comments, the final regulations clarify the treatment of a debt instrument subject to an alternative payment schedule by explicitly cross-referencing § 1.1272-1(c). Second, the final regulations provide that, in the case of a debt instrument subject to a mandatory sinking fund provision, the issuer must determine the payment schedule by assuming that a pro rata portion of the debt instrument will be called under the sinking fund provision. This rule produces more economic interest accruals than the accruals determined by ignoring the sinking fund provision as under the proposed regulations. Third, the final regulations adopt rules for excess bond issuance premium allocable to an accrual period. These rules are similar to the rules for excess bond premium described above.

Aggregation Rules

Although the proposed regulations do not provide for an aggregate method of accounting for premium, comments were requested on the need for an aggregate method. Because no comments were received, the final regulations do not provide rules for an aggregate method of accounting for premium.

Bonds Not Subject to the Final Regulations

The final regulations generally apply to bonds acquired or issued at a premium. Certain bonds, however, are excluded from the application of the final regulations. For example, the final regulations exclude debt instruments described in section 1272(a)(6)(C) (regular interests in a REMIC, qualified mortgages held by a REMIC, and certain other debt instruments, or pools of debt instruments, with payments subject to acceleration). No inference is intended regarding the treatment of debt instruments described in section 1272(a)(6)(C).

Effective Dates

The final regulations relating to bond premium are effective for bonds acquired on or after March 2, 1998. However, if a holder makes the election to amortize bond premium for the taxable year containing March 2, 1998, or any subsequent taxable year, the regulations apply to bonds held on or after the first day of the taxable year in which the election is made.

The final regulations relating to bond issuance premium apply to debt instruments issued on or after March 2, 1998.

The final regulations also provide automatic consent for a taxpayer to change its method of accounting for premium in certain circumstances. Because the change is made on a cut-off basis, no items of income or deduction are omitted or duplicated. Therefore, no adjustment under section 481 is allowed.

Special Analyses

It is hereby certified that these regulations do not have significant economic impact on a substantial number of small entities. This certification is based upon the fact that the regulations merely require a taxpayer to attach to the taxpayer's return a statement that indicates whether the taxpayer is making an election under section 171 or is changing its accounting method for bond premium or bond issuance premium. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

It has been determined that this Treasury Decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

Several persons from the Office of Assistant Chief Counsel (Financial Institutions and Products) and the Treasury Department participated in the development of these regulations.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.171-2 also issued under 26 U.S.C. 171(e).

Section 1.171-3 also issued under 26 U.S.C. 171(e).

Section 1.171-4 also issued under 26 U.S.C. 171(c). * * *

Par. 2. Section 1.61-12 is amended by revising paragraph (c) to read as follows:

§ 1.61-12 Income from discharge of indebtedness.

* * * * *

(c) *Issuance and repurchase of debt instruments*—(1) *Issuance.* An issuer does not realize gain or loss upon the issuance of a debt instrument. For rules relating to an issuer's interest deduction for a debt instrument issued with bond issuance premium, see § 1.163-13.

(2) *Repurchase*—(i) *In general.* An issuer does not realize gain or loss upon the repurchase of a debt instrument. However, if a debt instrument provides for payments denominated in, or determined by reference to, a nonfunctional currency, an issuer may realize a currency gain or loss upon the repurchase of the instrument. See section 988 and the regulations thereunder. For purposes of this paragraph (c)(2), the term *repurchase* includes the retirement of a debt instrument, the conversion of a debt instrument into stock of the issuer, and the exchange (including an exchange under section 1001) of a newly issued debt instrument for an existing debt instrument.

(ii) *Repurchase at a discount.* An issuer realizes income from the discharge of indebtedness upon the repurchase of a debt instrument for an amount less than its adjusted issue price (within the meaning of § 1.1275-1(b)). The amount of discharge of indebtedness income is equal to the excess of the adjusted issue price over the repurchase price. See section 108 and the regulations thereunder for additional rules relating to income from discharge of indebtedness. For example, to determine the repurchase price of a debt instrument that is repurchased through the issuance of a new debt instrument, see section 108(e)(10).

(iii) *Repurchase at a premium.* An issuer may be entitled to a repurchase premium deduction upon the repurchase of a debt instrument for an amount greater than its adjusted issue price (within the meaning of § 1.1275-1(b)). See § 1.163-7(c) for the treatment of repurchase premium.

(iv) *Effective date.* This paragraph (c)(2) applies to debt instruments repurchased on or after March 2, 1998.

* * * * *

Par. 3. Section 1.163-13 is added to read as follows:

§ 1.163-13 Treatment of bond issuance premium.

(a) *General rule.* If a debt instrument is issued with bond issuance premium, this section limits the amount of the issuer's interest deduction otherwise allowable under section 163(a). In general, the issuer determines its interest deduction by offsetting the interest allocable to an accrual period with the bond issuance premium allocable to that period. Bond issuance premium is allocable to an accrual period based on a constant yield. The use of a constant yield to amortize bond issuance premium is intended to generally conform the treatment of debt instruments having bond issuance premium with those having original issue discount. Unless otherwise provided, the terms used in this section have the same meaning as those terms in section 163(e), sections 1271 through 1275, and the corresponding regulations. Moreover, unless otherwise provided, the provisions of this section apply in a manner consistent with those of section 163(e), sections 1271 through 1275, and the corresponding regulations. In addition, the anti-abuse rule in § 1.1275-2(g) applies for purposes of this section. For rules dealing with the treatment of bond premium by a holder, see §§ 1.171-1 through 1.171-5.

(b) *Exceptions.* This section does not apply to—

(1) A debt instrument described in section 1272(a)(6)(C) (regular interests in a REMIC, qualified mortgages held by a REMIC, and certain other debt instruments, or pools of debt instruments, with payments subject to acceleration); or

(2) A debt instrument to which § 1.1275-4 applies (relating to certain debt instruments that provide for contingent payments).

(c) *Bond issuance premium.* Bond issuance premium is the excess, if any, of the issue price of a debt instrument over its stated redemption price at maturity. For purposes of this section, the issue price of a convertible bond (as defined in § 1.171-1(e)(1)(iii)(C)) does not include an amount equal to the value of the conversion option (as determined under § 1.171-1(e)(1)(iii)(A)).

(d) *Offsetting qualified stated interest with bond issuance premium—(1) In general.* An issuer amortizes bond issuance premium by offsetting the qualified stated interest allocable to an accrual period with the bond issuance premium allocable to the accrual period.

This offset occurs when the issuer takes the qualified stated interest into account under its regular method of accounting.

(2) *Qualified stated interest allocable to an accrual period.* See § 1.446-2(b) to determine the accrual period to which qualified stated interest is allocable and to determine the accrual of qualified stated interest within an accrual period.

(3) *Bond issuance premium allocable to an accrual period.* The bond issuance premium allocable to an accrual period is determined under this paragraph (d)(3). Within an accrual period, the bond issuance premium allocable to the period accrues ratably.

(i) *Step one: Determine the debt instrument's yield to maturity.* The yield to maturity of a debt instrument is determined under the rules of § 1.1272-1(b)(1)(i).

(ii) *Step two: Determine the accrual periods.* The accrual periods are determined under the rules of § 1.1272-1(b)(1)(ii).

(iii) *Step three: Determine the bond issuance premium allocable to the accrual period.* The bond issuance premium allocable to an accrual period is the excess of the qualified stated interest allocable to the accrual period over the product of the adjusted issue price at the beginning of the accrual period and the yield. In performing this calculation, the yield must be stated appropriately taking into account the length of the particular accrual period. Principles similar to those in § 1.1272-1(b)(4) apply in determining the bond issuance premium allocable to an accrual period.

(4) *Bond issuance premium in excess of qualified stated interest—(i) Ordinary income.* If the bond issuance premium allocable to an accrual period exceeds the qualified stated interest allocable to the accrual period, the excess is treated as ordinary income by the issuer for the accrual period. However, the amount treated as ordinary income is limited to the amount by which the issuer's total interest deductions on the debt instrument in prior accrual periods exceed the total amount treated by the issuer as ordinary income on the debt instrument in prior accrual periods.

(ii) *Carryforward.* If the bond issuance premium allocable to an accrual period exceeds the sum of the qualified stated interest allocable to the accrual period and the amount treated as ordinary income for the accrual period under paragraph (d)(4)(i) of this section, the excess is carried forward to the next accrual period and is treated as bond issuance premium allocable to that period. If a carryforward exists on the date the debt instrument is retired, the

carryforward is treated as ordinary income on that date.

(e) *Special rules—(1) Variable rate debt instruments.* An issuer determines bond issuance premium on a variable rate debt instrument by reference to the stated redemption price at maturity of the equivalent fixed rate debt instrument constructed for the variable rate debt instrument. The issuer also allocates any bond issuance premium among the accrual periods by reference to the equivalent fixed rate debt instrument. The issuer constructs the equivalent fixed rate debt instrument, as of the issue date, by using the principles of § 1.1275-5(e).

(2) *Inflation-indexed debt instruments.* An issuer determines bond issuance premium on an inflation-indexed debt instrument by assuming that there will be no inflation or deflation over the term of the instrument. The issuer also allocates any bond issuance premium among the accrual periods by assuming that there will be no inflation or deflation over the term of the instrument. The bond issuance premium allocable to an accrual period offsets qualified stated interest allocable to the period. Notwithstanding paragraph (d)(4) of this section, if the bond issuance premium allocable to an accrual period exceeds the qualified stated interest allocable to the period, the excess is treated as a deflation adjustment under § 1.1275-7T(f)(1)(ii). See § 1.1275-7T for other rules relating to inflation-indexed debt instruments.

(3) *Certain debt instruments subject to contingencies—(i) In general.* Except as provided in paragraph (e)(3)(ii) of this section, the rules of § 1.1272-1(c) apply to determine a debt instrument's payment schedule for purposes of this section. For example, an issuer uses the payment schedule determined under § 1.1272-1(c) to determine the amount, if any, of bond issuance premium on the debt instrument, the yield and maturity of the debt instrument, and the allocation of bond issuance premium to an accrual period.

(ii) *Mandatory sinking fund provision.* Notwithstanding paragraph (e)(3)(i) of this section, if a debt instrument is subject to a mandatory sinking fund provision described in § 1.1272-1(c)(3), the issuer must determine the payment schedule by assuming that a pro rata portion of the debt instrument will be called under the sinking fund provision.

(4) *Remote and incidental contingencies.* For purposes of determining the amount of bond issuance premium and allocating bond issuance premium among accrual periods, if a bond provides for a

contingency that is remote or incidental (within the meaning of § 1.1275-2(h)), the issuer takes the contingency into account under the rules for remote and incidental contingencies in § 1.1275-2(h).

(f) *Example.* The following example illustrates the rules of this section:

Example—(i) Facts. On February 1, 1999, X issues for \$110,000 a debt instrument maturing on February 1, 2006, with a stated principal amount of \$100,000, payable at maturity. The debt instrument provides for unconditional payments of interest of \$10,000, payable on February 1 of each year. X uses the calendar year as its taxable year, X uses the cash receipts and disbursements method of accounting, and X decides to use annual accrual periods ending on February 1 of each year. X's calculations assume a 30-day month and 360-day year.

(ii) *Amount of bond issuance premium.* The issue price of the debt instrument is \$110,000. Because the interest payments on the debt instrument are qualified stated interest, the stated redemption price at maturity of the debt instrument is \$100,000. Therefore, the amount of bond issuance premium is \$10,000 (\$110,000 - \$100,000).

(iii) *Bond issuance premium allocable to the first accrual period.* Based on the payment schedule and the issue price of the debt instrument, the yield of the debt instrument is 8.07 percent, compounded annually. (Although, for purposes of simplicity, the yield as stated is rounded to two decimal places, the computations do not reflect this rounding convention.) The bond issuance premium allocable to the accrual period ending on February 1, 2000, is the excess of the qualified stated interest allocable to the period (\$10,000) over the product of the adjusted issue price at the beginning of the period (\$110,000) and the yield (8.07 percent, compounded annually). Therefore, the bond issuance premium allocable to the accrual period is \$1,118.17 (\$10,000 - \$8,881.83).

(iv) *Premium used to offset interest.* Although X makes an interest payment of \$10,000 on February 1, 2000, X only deducts interest of \$8,881.83, the qualified stated interest allocable to the period (\$10,000) offset with the bond issuance premium allocable to the period (\$1,118.17).

(g) *Effective date.* This section applies to debt instruments issued on or after March 2, 1998.

(h) *Accounting method changes—(1) Consent to change.* An issuer required to change its method of accounting for bond issuance premium to comply with this section must secure the consent of the Commissioner in accordance with the requirements of § 1.446-1(e). Paragraph (h)(2) of this section provides the Commissioner's automatic consent for certain changes.

(2) *Automatic consent.* The Commissioner grants consent for an issuer to change its method of accounting for bond issuance premium on debt instruments issued on or after

March 2, 1998. Because this change is made on a cut-off basis, no items of income or deduction are omitted or duplicated and, therefore, no adjustment under section 481 is allowed. The consent granted by this paragraph (h)(2) applies provided—

(i) The change is made to comply with this section;

(ii) The change is made for the first taxable year for which the issuer must account for a debt instrument under this section; and

(iii) The issuer attaches to its federal income tax return for the taxable year containing the change a statement that it has changed its method of accounting under this section.

PAR. 4. Sections 1.171-1 through 1.171-4 are revised to read as follows:

§ 1.171-1 Bond premium.

(a) *Overview—(1) In general.* This section and §§ 1.171-2 through 1.171-5 provide rules for the determination and amortization of bond premium by a holder. In general, a holder amortizes bond premium by offsetting the interest allocable to an accrual period with the premium allocable to that period. Bond premium is allocable to an accrual period based on a constant yield. The use of a constant yield to amortize bond premium is intended to generally conform the treatment of bond premium to the treatment of original issue discount under sections 1271 through 1275. Unless otherwise provided, the terms used in this section and §§ 1.171-2 through 1.171-5 have the same meaning as those terms in sections 1271 through 1275 and the corresponding regulations. Moreover, unless otherwise provided, the provisions of this section and §§ 1.171-2 through 1.171-5 apply in a manner consistent with those of sections 1271 through 1275 and the corresponding regulations. In addition, the anti-abuse rule in § 1.1275-2(g) applies for purposes of this section and §§ 1.171-2 through 1.171-5.

(2) *Cross-references.* For rules dealing with the adjustments to a holder's basis to reflect the amortization of bond premium, see § 1.1016-5(b). For rules dealing with the treatment of bond issuance premium by an issuer, see § 1.163-13.

(b) *Scope—(1) In general.* Except as provided in paragraph (b)(2) of this section and § 1.171-5, this section and §§ 1.171-2 through 1.171-4 apply to any bond that, upon its acquisition by the holder, is held with bond premium. For purposes of this section and §§ 1.171-2 through 1.171-5, the term *bond* has the same meaning as the term *debt instrument* in § 1.1275-1(d).

(2) *Exceptions.* This section and §§ 1.171-2 through 1.171-5 do not apply to—

(i) A bond described in section 1272(a)(6)(C) (regular interests in a REMIC, qualified mortgages held by a REMIC, and certain other debt instruments, or pools of debt instruments, with payments subject to acceleration);

(ii) A bond to which § 1.1275-4 applies (relating to certain debt instruments that provide for contingent payments);

(iii) A bond held by a holder that has made a § 1.1272-3 election with respect to the bond;

(iv) A bond that is stock in trade of the holder, a bond of a kind that would properly be included in the inventory of the holder if on hand at the close of the taxable year, or a bond held primarily for sale to customers in the ordinary course of the holder's trade or business; or

(v) A bond issued before September 28, 1985, unless the bond bears interest and was issued by a corporation or by a government or political subdivision thereof.

(c) *General rule—(1) Tax-exempt obligations.* A holder must amortize bond premium on a bond that is a tax-exempt obligation. See § 1.171-2(c) *Example 4.*

(2) *Taxable bonds.* A holder may elect to amortize bond premium on a taxable bond. Except as provided in paragraph (c)(3) of this section, a taxable bond is any bond other than a tax-exempt obligation. See § 1.171-4 for rules relating to the election to amortize bond premium on a taxable bond.

(3) *Bonds the interest on which is partially excludable.* For purposes of this section and §§ 1.171-2 through 1.171-5, a bond the interest on which is partially excludable from gross income is treated as two instruments, a tax-exempt obligation and a taxable bond. The holder's basis in the bond and each payment on the bond are allocated between the two instruments based on a reasonable method.

(d) *Determination of bond premium—(1) In general.* A holder acquires a bond at a premium if the holder's basis in the bond immediately after its acquisition by the holder exceeds the sum of all amounts payable on the bond after the acquisition date (other than payments of qualified stated interest). This excess is bond premium, which is amortizable under § 1.171-2.

(2) *Additional rules for amounts payable on certain bonds.* Additional rules apply to determine the amounts payable on a variable rate debt instrument, an inflation-indexed debt

instrument, a bond that provides for certain alternative payment schedules, and a bond that provides for remote or incidental contingencies. See § 1.171-3.

(e) *Basis*. A holder determines its basis in a bond under this paragraph (e). This determination of basis applies only for purposes of this section and §§ 1.171-2 through 1.171-5. Because of the application of this paragraph (e), the holder's basis in the bond for purposes of these sections may differ from the holder's basis for determining gain or loss on the sale or exchange of the bond.

(1) *Determination of basis*—(i) *In general*. In general, the holder's basis in the bond is the holder's basis for determining loss on the sale or exchange of the bond.

(ii) *Bonds acquired in certain exchanges*. If the holder acquired the bond in exchange for other property (other than in a reorganization defined in section 368) and the holder's basis in the bond is determined in whole or in part by reference to the holder's basis in the other property, the holder's basis in the bond may not exceed its fair market value immediately after the exchange. See paragraph (f) *Example 1* of this section. If the bond is acquired in a reorganization, see section 171(b)(4)(B).

(iii) *Convertible bonds*—(A) *General rule*. If the bond is a convertible bond, the holder's basis in the bond is reduced by an amount equal to the value of the conversion option. The value of the conversion option may be determined under any reasonable method. For example, the holder may determine the value of the conversion option by comparing the market price of the convertible bond to the market prices of similar bonds that do not have conversion options. See paragraph (f) *Example 2* of this section.

(B) *Convertible bonds acquired in certain exchanges*. If the bond is a convertible bond acquired in a transaction described in paragraph (e)(1)(ii) of this section, the holder's basis in the bond may not exceed its fair market value immediately after the exchange reduced by the value of the conversion option.

(C) *Definition of convertible bond*. A convertible bond is a bond that provides the holder with an option to convert the bond into stock of the issuer, stock or debt of a related party (within the meaning of section 267(b) or 707(b)(1)), or into cash or other property in an amount equal to the approximate value of such stock or debt.

(2) *Basis in bonds held by certain transferees*. Notwithstanding paragraph (e)(1) of this section, if the bond is transferred basis property (as defined in section 7701(a)(43)) and the transferor

had acquired the bond at a premium, the holder's basis in the bond is—

(i) The holder's basis for determining loss on the sale or exchange of the bond; reduced by

(ii) Any amounts that the transferor could not have amortized under this paragraph (e) or under § 1.171-4(c), except to the extent that the holder's basis already reflects a reduction attributable to such nonamortizable amounts.

(f) *Examples*. The following examples illustrate the rules of this section:

Example 1. Bond received in liquidation of a partnership interest—(i) *Facts*. PR is a partner in partnership PRS. PRS does not have any unrealized receivables or inventory items as defined in section 751. On January 1, 1998, PRS distributes to PR a taxable bond, issued by an unrelated corporation, in liquidation of PR's partnership interest. At that time, the fair market value of PR's partnership interest is \$40,000 and the basis is \$100,000. The fair market value of the bond is \$40,000.

(ii) *Determination of basis*. Under section 732(b), PR's basis in the bond is equal to PR's basis in the partnership interest. Therefore, PR's basis for determining loss on the sale or exchange of the bond is \$100,000. However, because the distribution is treated as an exchange for purposes of section 171(b)(4), PR's basis in the bond is \$40,000 for purposes of this section and §§ 1.171-2 through 1.171-5. See paragraph (e)(1)(ii) of this section.

Example 2. Convertible bond—(i) *Facts*. On January 11, 1998, A purchases for \$1,100 B corporation's bond maturing on January 1, 2001, with a stated principal amount of \$1,000, payable at maturity. The bond provides for unconditional payments of interest of \$30 on January 1 and July 1 of each year. In addition, the bond is convertible into 15 shares of B corporation stock at the option of the holder. On January 1, 1998, B corporation's nonconvertible, publicly-traded, three-year debt with a similar credit rating trades at a price that reflects a yield of 6.75 percent, compounded semiannually.

(ii) *Determination of basis*. A's basis for determining loss on the sale or exchange of the bond is \$1,100. As of January 1, 1998, discounting the remaining payments on the bond at the yield at which B's similar nonconvertible bonds trade (6.75 percent, compounded semiannually) results in a present value of \$980. Thus, the value of the conversion option is \$120. Under paragraph (e)(1)(iii)(A) of this section, A's basis is \$980 (\$1,100 - \$120) for purposes of this section and §§ 1.171-2 through 1.171-5. The sum of all amounts payable on the bond other than qualified stated interest is \$1,000. Because A's basis (as determined under paragraph (e)(1)(iii)(A) of this section) does not exceed \$1,000, A does not acquire the bond at a premium.

§ 1.171-2 Amortization of bond premium.

(a) *Offsetting qualified stated interest with premium*—(1) *In general*. A holder

amortizes bond premium by offsetting the qualified stated interest allocable to an accrual period with the bond premium allocable to the accrual period. This offset occurs when the holder takes the qualified stated interest into account under the holder's regular method of accounting.

(2) *Qualified stated interest allocable to an accrual period*. See § 1.446-2(b) to determine the accrual period to which qualified stated interest is allocable and to determine the accrual of qualified stated interest within an accrual period.

(3) *Bond premium allocable to an accrual period*. The bond premium allocable to an accrual period is determined under this paragraph (a)(3). Within an accrual period, the bond premium allocable to the period accrues ratably.

(i) *Step one: Determine the holder's yield*. The holder's yield is the discount rate that, when used in computing the present value of all remaining payments to be made on the bond (including payments of qualified stated interest), produces an amount equal to the holder's basis in the bond as determined under § 1.171-1(e). For this purpose, the remaining payments include only payments to be made after the date the holder acquires the bond. The yield is calculated as of the date the holder acquires the bond, must be constant over the term of the bond, and must be calculated to at least two decimal places when expressed as a percentage.

(ii) *Step two: Determine the accrual periods*. A holder determines the accrual periods for the bond under the rules of § 1.1272-1(b)(1)(ii).

(iii) *Step three: Determine the bond premium allocable to the accrual period*. The bond premium allocable to an accrual period is the excess of the qualified stated interest allocable to the accrual period over the product of the holder's adjusted acquisition price (as defined in paragraph (b) of this section) at the beginning of the accrual period and the holder's yield. In performing this calculation, the yield must be stated appropriately taking into account the length of the particular accrual period. Principles similar to those in § 1.1272-1(b)(4) apply in determining the bond premium allocable to an accrual period.

(4) *Bond premium in excess of qualified stated interest*—(i) *Taxable bonds*—(A) *Bond premium deduction*. In the case of a taxable bond, if the bond premium allocable to an accrual period exceeds the qualified stated interest allocable to the accrual period, the excess is treated by the holder as a bond premium deduction under section 171(a)(1) for the accrual period. However, the amount treated as a bond

premium deduction is limited to the amount by which the holder's total interest inclusions on the bond in prior accrual periods exceed the total amount treated by the holder as a bond premium deduction on the bond in prior accrual periods. A deduction determined under this paragraph (a)(4)(i)(A) is not subject to section 67 (the 2-percent floor on miscellaneous itemized deductions). See *Example 1* of § 1.171-3(e).

(B) *Carryforward.* If the bond premium allocable to an accrual period exceeds the sum of the qualified stated interest allocable to the accrual period and the amount treated as a deduction for the accrual period under paragraph (a)(4)(i)(A) of this section, the excess is carried forward to the next accrual period and is treated as bond premium allocable to that period.

(ii) *Tax-exempt obligations.* In the case of a tax-exempt obligation, if the bond premium allocable to an accrual period exceeds the qualified stated interest allocable to the accrual period, the excess is a nondeductible loss. If a regulated investment company (RIC) within the meaning of section 851 has excess bond premium for an accrual period that would be a nondeductible loss under the prior sentence, the RIC must use this excess bond premium to reduce its tax-exempt interest income on other tax-exempt obligations held during the accrual period.

(5) *Additional rules for certain bonds.* Additional rules apply to determine the amortization of bond premium on a variable rate debt instrument, an inflation-indexed debt instrument, a bond that provides for certain alternative payment schedules, and a bond that provides for remote or incidental contingencies. See § 1.171-3.

(b) *Adjusted acquisition price.* The adjusted acquisition price of a bond at the beginning of the first accrual period is the holder's basis as determined under § 1.171-1(e). Thereafter, the adjusted acquisition price is the holder's basis in the bond decreased by—

(1) The amount of bond premium previously allocable under paragraph (a)(3) of this section; and

(2) The amount of any payment previously made on the bond other than a payment of qualified stated interest.

(c) *Examples.* The following examples illustrate the rules of this section. Each example assumes the holder uses the calendar year as its taxable year and has elected to amortize bond premium, effective for all relevant taxable years. In addition, each example assumes a 30-day month and 360-day year. Although, for purposes of simplicity, the yield as stated is rounded to two decimal places, the computations do not reflect this

rounding convention. The examples are as follows:

Example 1. Taxable bond—(i) Facts. On February 1, 1999, A purchases for \$110,000 a taxable bond maturing on February 1, 2006, with a stated principal amount of \$100,000, payable at maturity. The bond provides for unconditional payments of interest of \$10,000, payable on February 1 of each year. A uses the cash receipts and disbursements method of accounting, and A decides to use annual accrual periods ending on February 1 of each year.

(ii) *Amount of bond premium.* The interest payments on the bond are qualified stated interest. Therefore, the sum of all amounts payable on the bond (other than the interest payments) is \$100,000. Under § 1.171-1, the amount of bond premium is \$10,000 (\$110,000 - \$100,000).

(iii) *Bond premium allocable to the first accrual period.* Based on the remaining payment schedule of the bond and A's basis in the bond, A's yield is 8.07 percent, compounded annually. The bond premium allocable to the accrual period ending on February 1, 2000, is the excess of the qualified stated interest allocable to the period (\$10,000) over the product of the adjusted acquisition price at the beginning of the period (\$110,000) and A's yield (8.07 percent, compounded annually). Therefore, the bond premium allocable to the accrual period is \$1,118.17 (\$10,000 - \$8,881.83).

(iv) *Premium used to offset interest.* Although A receives an interest payment of \$10,000 on February 1, 2000, A only includes in income \$8,881.83, the qualified stated interest allocable to the period (\$10,000) offset with bond premium allocable to the period (\$1,118.17). Under § 1.1016-5(b), A's basis in the bond is reduced by \$1,118.17 on February 1, 2000.

Example 2. Alternative accrual periods—(i) Facts. The facts are the same as in *Example 1* of this paragraph (c) except that A decides to use semiannual accrual periods ending on February 1 and August 1 of each year.

(ii) *Bond premium allocable to the first accrual period.* Based on the remaining payment schedule of the bond and A's basis in the bond, A's yield is 7.92 percent, compounded semiannually. The bond premium allocable to the accrual period ending on August 1, 1999, is the excess of the qualified stated interest allocable to the period (\$5,000) over the product of the adjusted acquisition price at the beginning of the period (\$110,000) and A's yield, stated appropriately taking into account the length of the accrual period (7.92 percent/2). Therefore, the bond premium allocable to the accrual period is \$645.29 (\$5,000 - \$4,354.71).

Although the accrual period ends on August 1, 1999, the qualified stated interest of \$5,000 is not taken into income until February 1, 2000, the date it is received. Likewise, the bond premium of \$645.29 is not taken into account until February 1, 2000. The adjusted acquisition price of the bond on August 1, 1999, is \$109,354.71 (the adjusted acquisition price at the beginning of the period (\$110,000) less the bond premium allocable to the period (\$645.29)).

(iii) *Bond premium allocable to the second accrual period.* Because the interval between payments of qualified stated interest contains more than one accrual period, the adjusted acquisition price at the beginning of the second accrual period must be adjusted for the accrued but unpaid qualified stated interest. See paragraph (a)(3)(iii) of this section and § 1.1272-1(b)(4)(i)(B). Therefore, the adjusted acquisition price on August 1, 1999, is \$114,354.71 (\$109,354.71 + \$5,000). The bond premium allocable to the accrual period ending on February 1, 2000, is the excess of the qualified stated interest allocable to the period (\$5,000) over the product of the adjusted acquisition price at the beginning of the period (\$114,354.71) and A's yield, stated appropriately taking into account the length of the accrual period (7.92 percent/2). Therefore, the bond premium allocable to the accrual period is \$472.88 (\$5,000 - \$4,527.12).

(iv) *Premium used to offset interest.* Although A receives an interest payment of \$10,000 on February 1, 2000, A only includes in income \$8,881.83, the qualified stated interest of \$10,000 (\$5,000 allocable to the accrual period ending on August 1, 1999, and \$5,000 allocable to the accrual period ending on February 1, 2000) offset with bond premium of \$1,118.17 (\$645.29 allocable to the accrual period ending on August 1, 1999, and \$472.88 allocable to the accrual period ending on February 1, 2000). As indicated in *Example 1* of this paragraph (c), this same amount would be taken into income at the same time had A used annual accrual periods.

Example 3. Holder uses accrual method of accounting—(i) Facts. The facts are the same as in *Example 1* of this paragraph (c) except that A uses an accrual method of accounting. Thus, for the accrual period ending on February 1, 2000, the qualified stated interest allocable to the period is \$10,000, and the bond premium allocable to the period is \$1,118.17. Because the accrual period extends beyond the end of A's taxable year, A must allocate these amounts between the two taxable years.

(ii) *Amounts allocable to the first taxable year.* The qualified stated interest allocable to the first taxable year is \$9,166.67 (\$10,000 × ¹/₁₂). The bond premium allocable to the first taxable year is \$1,024.99 (\$1,118.17 × ¹/₁₂).

(iii) *Premium used to offset interest.* For 1999, A includes in income \$8,141.68, the qualified stated interest allocable to the period (\$9,166.67) offset with bond premium allocable to the period (\$1,024.99). Under § 1.1016-5(b), A's basis in the bond is reduced by \$1,024.99 in 1999.

(iv) *Amounts allocable to the next taxable year.* The remaining amounts of qualified stated interest and bond premium allocable to the accrual period ending on February 1, 2000, are taken into account for the taxable year ending on December 31, 2000.

Example 4. Tax-exempt obligation—(i) Facts. On January 15, 1999, C purchases for \$120,000 a tax-exempt obligation maturing on January 15, 2006, with a stated principal amount of \$100,000, payable at maturity. The obligation provides for unconditional payments of interest of \$9,000, payable on

January 15 of each year. C uses the cash receipts and disbursements method of accounting, and C decides to use annual accrual periods ending on January 15 of each year.

(ii) *Amount of bond premium.* The interest payments on the obligation are qualified stated interest. Therefore, the sum of all amounts payable on the obligation (other than the interest payments) is \$100,000. Under § 1.171-1, the amount of bond premium is \$20,000 (\$120,000—\$100,000).

(iii) *Bond premium allocable to the first accrual period.* Based on the remaining payment schedule of the obligation and C's basis in the obligation, C's yield is 5.48 percent, compounded annually. The bond premium allocable to the accrual period ending on January 15, 2000, is the excess of the qualified stated interest allocable to the period (\$9,000) over the product of the adjusted acquisition price at the beginning of the period (\$120,000) and C's yield (5.48 percent, compounded annually). Therefore, the bond premium allocable to the accrual period is \$2,420.55 (\$9,000 — \$6,579.45).

(iv) *Premium used to offset interest.* Although C receives an interest payment of \$9,000 on January 15, 2000, C only receives tax-exempt interest income of \$6,579.45, the qualified stated interest allocable to the period (\$9,000) offset with bond premium allocable to the period (\$2,420.55). Under § 1.1016-5(b), C's basis in the obligation is reduced by \$2,420.55 on January 15, 2000.

§ 1.171-3 Special rules for certain bonds.

(a) *Variable rate debt instruments.* A holder determines bond premium on a variable rate debt instrument by reference to the stated redemption price at maturity of the equivalent fixed rate debt instrument constructed for the variable rate debt instrument. The holder also allocates any bond premium among the accrual periods by reference to the equivalent fixed rate debt instrument. The holder constructs the equivalent fixed rate debt instrument, as of the date the holder acquires the variable rate debt instrument, by using the principles of § 1.1275-5(e). See paragraph (e) *Example 1* of this section.

(b) *Inflation-indexed debt instruments.* A holder determines bond premium on an inflation-indexed debt instrument by assuming that there will be no inflation or deflation over the remaining term of the instrument. The holder also allocates any bond premium among the accrual periods by assuming that there will be no inflation or deflation over the remaining term of the instrument. The bond premium allocable to an accrual period offsets qualified stated interest allocable to the period. Notwithstanding § 1.171-2(a)(4), if the bond premium allocable to an accrual period exceeds the qualified stated interest allocable to the period, the excess is treated as a deflation adjustment under § 1.1275-7T(f)(1)(i).

See § 1.1275-7T for other rules relating to inflation-indexed debt instruments.

(c) *Yield and remaining payment schedule of certain bonds subject to contingencies—(1) Applicability.* This paragraph (c) provides rules that apply in determining the yield and remaining payment schedule of certain bonds that provide for an alternative payment schedule (or schedules) applicable upon the occurrence of a contingency (or contingencies). This paragraph (c) applies, however, only if the timing and amounts of the payments that comprise each payment schedule are known as of the date the holder acquires the bond (the acquisition date) and the bond is subject to paragraph (c)(2), (3), or (4) of this section. A bond does not provide for an alternative payment schedule merely because there is a possibility of impairment of a payment (or payments) by insolvency, default, or similar circumstances. See § 1.1275-4 for the treatment of a bond that provides for a contingency that is not described in this paragraph (c).

(2) *Remaining payment schedule that is significantly more likely than not to occur.* If, based on all the facts and circumstances as of the acquisition date, a single remaining payment schedule for a bond is significantly more likely than not to occur, this remaining payment schedule is used to determine and amortize bond premium under §§ 1.171-1 and 1.171-2.

(3) *Mandatory sinking fund provision.* Notwithstanding paragraph (c)(2) of this section, if a bond is subject to a mandatory sinking fund provision described in § 1.1272-1(c)(3), the provision is ignored for purposes of determining and amortizing bond premium under §§ 1.171-1 and 1.171-2.

(4) *Treatment of certain options—(i) Applicability.* Notwithstanding paragraphs (c)(2) and (3) of this section, the rules of this paragraph (c)(4) determine the remaining payment schedule of a bond that provides the holder or issuer with an unconditional option or options, exercisable on one or more dates during the remaining term of the bond, to alter the bond's remaining payment schedule.

(ii) *Operating rules.* A holder determines the remaining payment schedule of a bond by assuming that each option will (or will not) be exercised under the following rules:

(A) *Issuer options.* In general, the issuer is deemed to exercise or not exercise an option or combination of options in the manner that minimizes the holder's yield on the obligation. However, the issuer of a taxable bond is deemed to exercise or not exercise a call option or combination of call options in

the manner that maximizes the holder's yield on the bond.

(B) *Holder options.* A holder is deemed to exercise or not exercise an option or combination of options in the manner that maximizes the holder's yield on the bond.

(C) *Multiple options.* If both the issuer and the holder have options, the rules of paragraphs (c)(4)(ii)(A) and (B) of this section are applied to the options in the order that they may be exercised. Thus, the deemed exercise of one option may eliminate other options that are later in time.

(5) *Subsequent adjustments—(i) In general.* Except as provided in paragraph (c)(5)(ii) of this section, if a contingency described in this paragraph (c) (including the exercise of an option described in paragraph (c)(4) of this section) actually occurs or does not occur, contrary to the assumption made pursuant to paragraph (c) of this section (a change in circumstances), then solely for purposes of section 171, the bond is treated as retired and reacquired by the holder on the date of the change in circumstances for an amount equal to the adjusted acquisition price of the bond as of that date. If, however, the change in circumstances results in a substantially contemporaneous pro-rata prepayment as defined in § 1.1275-2(f)(2), the pro-rata prepayment is treated as a payment in retirement of a portion of the bond. See paragraph (e) *Example 2* of this section.

(ii) *Bond premium deduction on the issuer's call of a taxable bond.* If a change in circumstances results from an issuer's call of a taxable bond or a partial call that is a pro-rata prepayment, the holder may deduct as bond premium an amount equal to the excess, if any, of the holder's adjusted acquisition price of the bond over the greater of—

(A) The amount received on redemption; and

(B) The amounts that would have been payable under the bond (other than payments of qualified stated interest) if no change in circumstances had occurred.

(d) *Remote and incidental contingencies.* For purposes of determining and amortizing bond premium, if a bond provides for a contingency that is remote or incidental (within the meaning of § 1.1275-2(h)), the holder takes the contingency into account under the rules for remote and incidental contingencies in § 1.1275-2(h).

(e) *Examples.* The following examples illustrate the rules of this section. Each example assumes the holder uses the calendar year as its taxable year and has

lected to amortize bond premium, effective for all relevant taxable years. In addition, each example assumes a 30-day month and 360-day year. Although, for purposes of simplicity, the yield as stated is rounded to two decimal places, the computations do not reflect this rounding convention. The examples are as follows:

Example 1. Variable rate debt instrument—(i) *Facts.* On March 1, 1999, E purchases for \$110,000 a taxable bond maturing on March 1, 2007, with a stated principal amount of \$100,000, payable at maturity. The bond provides for unconditional payments of interest on March 1 of each year based on the percentage appreciation of a nationally-known commodity index. On March 1, 1999, it is reasonably expected that the bond will yield 12 percent, compounded annually. E uses the cash receipts and disbursements method of accounting, and E decides to use annual accrual periods ending on March 1 of each year. Assume that the bond is a variable rate debt instrument under § 1.1275-5.

(ii) *Amount of bond premium.* Because the bond is a variable rate debt instrument, E determines and amortizes its bond premium by reference to the equivalent fixed rate debt instrument constructed for the bond as of March 1, 1999. Because the bond provides for interest at a single objective rate that is reasonably expected to yield 12 percent, compounded annually, the equivalent fixed rate debt instrument for the bond is an eight-year bond with a principal amount of \$100,000, payable at maturity. It provides for annual payments of interest of \$12,000. E's basis in the equivalent fixed rate debt instrument is \$110,000. The sum of all amounts payable on the equivalent fixed rate debt instrument (other than payments of qualified stated interest) is \$100,000. Under § 1.171-1, the amount of bond premium is \$10,000 (\$110,000 - \$100,000).

(iii) *Bond premium allocable to each accrual period.* E allocates bond premium to the remaining accrual periods by reference to

the payment schedule on the equivalent fixed rate debt instrument. Based on the payment schedule of the equivalent fixed rate debt instrument and E's basis in the bond, E's yield is 10.12 percent, compounded annually. The bond premium allocable to the accrual period ending on March 1, 2000, is the excess of the qualified stated interest allocable to the period for the equivalent fixed rate debt instrument (\$12,000) over the product of the adjusted acquisition price at the beginning of the period (\$110,000) and E's yield (10.12 percent, compounded annually). Therefore, the bond premium allocable to the accrual period is \$870.71 (\$12,000 - \$11,129.29). The bond premium allocable to all the accrual periods is listed in the following schedule:

Accrual period ending	Adjusted acquisition price at beginning of accrual period	Premium allocable to accrual period
3/1/00	\$110,000.00	\$870.71
3/1/01	109,129.29	958.81
3/1/02	108,170.48	1,055.82
3/1/03	107,114.66	1,162.64
3/1/04	105,952.02	1,280.27
3/1/05	104,671.75	1,409.80
3/1/06	103,261.95	1,552.44
3/1/07	101,709.51	1,709.51
		10,000.00

(iv) *Qualified stated interest for each accrual period.* Assume the bond actually pays the following amounts of qualified stated interest:

Accrual period ending	Qualified stated interest
3/1/00	\$2,000.00
3/1/01	0.00
3/1/02	0.00
3/1/03	10,000.00
3/1/04	8,000.00
3/1/05	12,000.00

Accrual period ending	Qualified stated interest
3/1/06	15,000.00
3/1/07	8,500.00

(v) *Premium used to offset interest.* E's interest income for each accrual period is determined by offsetting the qualified stated interest allocable to the period with the bond premium allocable to the period. For the accrual period ending on March 1, 2000, E includes in income \$1,129.29, the qualified stated interest allocable to the period (\$2,000) offset with the bond premium allocable to the period (\$870.71). For the accrual period ending on March 1, 2001, the bond premium allocable to the accrual period (\$958.81) exceeds the qualified stated interest allocable to the period (\$0) and, therefore, E does not have interest income for this accrual period. However, under § 1.171-2(a)(4)(i)(A), E may deduct as bond premium \$958.81, the excess of the bond premium allocable to the accrual period (\$958.81) over the qualified stated interest allocable to the accrual period (\$0). For the accrual period ending on March 1, 2002, the bond premium allocable to the accrual period (\$1,055.82) exceeds the qualified stated interest allocable to the accrual period (\$0) and, therefore, E does not have interest income for the accrual period. Under § 1.171-2(a)(4)(i)(A), E's deduction for bond premium for the accrual period is limited to \$170.48, the excess of E's total interest inclusions on the bond in prior accrual periods (\$1,129.29) over the total amount treated by E as a bond premium deduction in prior accrual periods (\$958.81). Under § 1.171-2(a)(4)(i)(B), E must carry forward the remaining \$885.34 of bond premium allocable to the period ending March 1, 2002, and treat it as bond premium allocable to the period ending March 1, 2003. The amount E includes in income for each accrual period is shown in the following schedule:

Accrual period ending	Qualified stated interest	Premium allocable to accrual period	Interest income	Premium deduction	Premium carryforward
3/1/00	\$2,000.00	\$870.71	\$1,129.29		
3/1/01	0.00	958.81	0.00	\$958.81	
3/1/02	0.00	1,055.82	0.00	170.48	\$885.34
3/1/03	10,000.00	1,162.64	7,951.93		
3/1/04	8,000.00	1,280.27	6,719.73		
3/1/05	12,000.00	1,409.80	10,590.20		
3/1/06	15,000.00	1,552.44	13,447.56		
3/1/07	8,500.00	1,709.51	6,790.49		
		10,000.00			

Example 2. Partial call that results in a pro-rata prepayment—(i) *Facts.* On April 1, 1999, M purchases for \$110,000 N's taxable bond maturing on April 1, 2006, with a stated principal amount of \$100,000, payable at maturity. The bond provides for unconditional payments of interest of \$10,000, payable on April 1 of each year. N

has the option to call all or part of the bond on April 1, 2001, at a 5 percent premium over the principal amount. M uses the cash receipts and disbursements method of accounting.

(ii) *Determination of yield and the remaining payment schedule.* M's yield determined without regard to the call option

is 8.07 percent, compounded annually. M's yield determined by assuming N exercises its call option is 6.89 percent, compounded annually. Under paragraph (c)(4)(ii)(A) of this section, it is assumed N will not exercise the call option because exercising the option would minimize M's yield. Thus, for purposes of determining and amortizing

bond premium, the bond is assumed to be a seven-year bond with a single principal payment at maturity of \$100,000.

(iii) *Amount of bond premium.* The interest payments on the bond are qualified stated interest. Therefore, the sum of all amounts payable on the bond (other than the interest payments) is \$100,000. Under § 1.171-1, the amount of bond premium is \$10,000 (\$110,000 - \$100,000).

(iv) *Bond premium allocable to the first two accrual periods.* For the accrual period ending on April 1, 2000, M includes in income \$8,881.83, the qualified stated interest allocable to the period (\$10,000 offset with bond premium allocable to the period (\$1,118.17). The adjusted acquisition price on April 1, 2000, is \$108,881.83 (\$110,000 - \$1,118.17). For the accrual period ending on April 1, 2001, M includes in income \$8,791.54, the qualified stated interest allocable to the period (\$10,000 offset with bond premium allocable to the period (\$1,208.46). The adjusted acquisition price on April 1, 2001, is \$107,673.37 (\$108,881.83 - \$1,208.46).

(v) *Partial call.* Assume N calls one-half of M's bond for \$52,500 on April 1, 2001. Because it was assumed the call would not be exercised, the call is a change in circumstances. However, the partial call is also a pro-rata prepayment within the meaning of § 1.1275-2(f)(2). As a result, the call is treated as a retirement of one-half of the bond. Under paragraph (c)(5)(ii) of this section, M may deduct \$1,336.68, the excess of its adjusted acquisition price in the retired portion of the bond (\$107,673.37/2, or \$53,836.68) over the amount received on redemption (\$52,500). M's adjusted basis in the portion of the bond that remains outstanding is \$53,836.68 (\$107,673.37 - \$53,836.68).

§ 1.171-4 Election to amortize bond premium on taxable bonds.

(a) *Time and manner of making the election—(1) In general.* A holder makes the election to amortize bond premium by offsetting interest income with bond premium in the holder's timely filed federal income tax return for the first taxable year to which the holder desires the election to apply. The holder should attach to the return a statement that the holder is making the election under this section.

(2) *Coordination with OID election.* If a holder makes an election under § 1.1272-3 for a bond with bond premium, the holder is deemed to have made the election under this section.

(b) *Scope of election.* The election under this section applies to all taxable bonds held during or after the taxable year for which the election is made.

(c) *Election to amortize made in a subsequent taxable year—(1) In general.* If a holder elects to amortize bond premium and holds a taxable bond acquired before the taxable year for which the election is made, the holder may not amortize amounts that would

have been amortized in prior taxable years had an election been in effect for those prior years.

(2) *Example.* The following example illustrates the rule of this paragraph (c):

Example—(i) Facts. On May 1, 1999, C purchases for \$130,000 a taxable bond maturing on May 1, 2006, with a stated principal amount of \$100,000, payable at maturity. The bond provides for unconditional payments of interest of \$15,000, payable on May 1 of each year. C uses the cash receipts and disbursements method of accounting and the calendar year as its taxable year. C has not previously elected to amortize bond premium, but does so for 2002.

(ii) *Amount to amortize.* C's basis for determining loss on the sale or exchange of the bond is \$130,000. Thus, under § 1.171-1, the amount of bond premium is \$30,000. Under § 1.171-2, if a bond premium election were in effect for the prior taxable years, C would have amortized \$3,257.44 of bond premium on May 1, 2000, and \$3,551.68 of bond premium on May 1, 2001, based on annual accrual periods ending on May 1. Thus, for 2002 and future years to which the election applies, C may amortize only \$23,190.88 (\$30,000 - \$3,257.44 - \$3,551.68).

(d) *Revocation of election.* The election under this section may not be revoked unless approved by the Commissioner. Because a revocation of the election is a change in accounting method, a taxpayer must follow the rules under § 1.446-1(e)(3)(i) to request the Commissioner's consent to revoke the election. A revocation of the election applies to all taxable bonds held during or after the taxable year for which the revocation is effective. The holder may not amortize any remaining bond premium on bonds held at the beginning of the taxable year for which the revocation is effective. Therefore, no adjustment under section 481 is allowed upon the revocation of the election because no items of income or deduction are omitted or duplicated.

Par. 5. Section 1.171-5 is added to read as follows:

§ 1.171-5 Effective date and transition rules.

(a) *Effective date—(1) In general.* Sections 1.171-1 through 1.171-4 apply to bonds acquired on or after March 2, 1998. However, if a holder makes the election under § 1.171-4 for the taxable year containing March 2, 1998, or any subsequent taxable year, §§ 1.171-1 through 1.171-4 apply to bonds held on or after the first day of the taxable year in which the election is made.

(2) *Transition rule for use of constant yield.* Notwithstanding paragraph (a)(1) of this section, § 1.171-2(a)(3)

(providing that the bond premium allocable to an accrual period is determined with reference to a constant

yield) does not apply to a bond issued before September 28, 1985.

(b) *Coordination with existing election.* A holder is deemed to have made the election under § 1.171-4 for the taxable year containing March 2, 1998, if the holder elected to amortize bond premium under section 171 and that election is effective on March 2, 1998. If the holder is deemed to have made the election under § 1.171-4 for the taxable year containing March 2, 1998, §§ 1.171-1 through 1.171-4 apply to bonds acquired on or after the first day of that taxable year. See § 1.171-4(d) for rules relating to a revocation of an election under section 171.

(c) *Accounting method changes—(1) Consent to change.* A holder required to change its method of accounting for bond premium to comply with §§ 1.171-1 through 1.171-3 must secure the consent of the Commissioner in accordance with the requirements of § 1.446-1(e). Paragraph (c)(2) of this section provides the Commissioner's automatic consent for certain changes. A holder making the election under § 1.171-4 does not need the Commissioner's consent to make the election.

(2) *Automatic consent.* The Commissioner grants consent for a holder to change its method of accounting for bond premium with respect to taxable bonds to which §§ 1.171-1 through 1.171-3 apply. Because this change is made on a cut-off basis, no items of income or deduction are omitted or duplicated and, therefore, no adjustment under section 481 is allowed. The consent granted by this paragraph (c)(2) applies provided—

(i) The holder elected to amortize bond premium under section 171 for a taxable year prior to the taxable year containing March 2, 1998, and that election has not been revoked;

(ii) The change is made for the first taxable year for which the holder must account for a bond under §§ 1.171-1 through 1.171-3; and

(iii) The holder attaches to its return for the taxable year containing the change a statement that it has changed its method of accounting under this section.

Par. 6. Section 1.249-1 is amended by revising paragraph (c) and the first sentence of paragraph (d)(2) to read as follows:

§ 1.249-1 Limitation on deduction of bond premium on repurchase.

* * * * *

(c) *Repurchase premium.* For purposes of this section, the term *repurchase premium* means the excess

of the repurchase price paid or incurred to repurchase the obligation over its adjusted issue price (within the meaning of § 1.1275-1(b)) as of the repurchase date. For the general rules applicable to the deductibility of repurchase premium, see § 1.163-7(c). This paragraph (c) applies to convertible obligations repurchased on or after March 2, 1998.

(d) * * *

(2) * * * For a convertible obligation repurchased on or after March 2, 1998, a call premium specified in dollars under the terms of the obligation is considered to be a normal call premium on a nonconvertible obligation if the call premium applicable when the obligation is repurchased does not exceed an amount equal to the interest (including original issue discount) that otherwise would be deductible for the taxable year of repurchase (determined as if the obligation were not repurchased). * * *

* * * * *

Par. 7. Section 1.1016-5 is amended by revising paragraph (b) to read as follows:

§ 1.1016-5 Miscellaneous adjustments to basis.

* * * * *

(b) *Amortizable bond premium*—(1) *In general.* A holder's basis in a bond is reduced by the amount of bond premium used to offset qualified stated interest income under § 1.171-2. This reduction occurs when the holder takes the qualified stated interest into account under the holder's regular method of accounting.

(2) *Special rules for taxable bonds.* A holder's basis in a taxable bond is reduced by the amount of bond premium allowed as a deduction under § 1.171-3(c)(5)(ii) (relating to the issuer's call of a taxable bond) or under § 1.171-2(a)(4)(i)(A) (relating to excess bond premium).

(3) *Special rule for tax-exempt obligations.* A holder's basis in a tax-exempt obligation is reduced by the amount of excess bond premium that is treated as a nondeductible loss under § 1.171-2(a)(4)(ii).

* * * * *

§ 1.1016-9 [Removed]

Par. 8. Section 1.1016-9 is removed.

Par. 9. Section 1.1275-1 is amended by:

1. Redesignating paragraph (b)(2) as paragraph (b)(3).

2. Adding a new paragraph (b)(2).

The addition reads as follows:

§ 1.1275-1 Definitions.

* * * * *

(b) * * *

(2) *Bond issuance premium.* If a debt instrument is issued with bond issuance premium (as defined in § 1.163-13(c)), for purposes of determining the issuer's adjusted issue price, the adjusted issue price determined under paragraph (b)(1) of this section is also decreased by the amount of bond issuance premium previously allocable under § 1.163-13(d)(3).

* * * * *

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 10. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 11. Section 602.101, paragraph (c) is amended by:

1. Removing the following entry from the table:

§ 602.101 OMB Control numbers.

* * * * *

(c) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	*
1.171-3	1545-0172
* * * * *	*

2. Adding entries in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(c) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	*
1.163-13	1545-1491
* * * * *	*
1.171-4	1545-1491
1.171-5	1545-1491
* * * * *	*

Michael P. Dolan,

Acting Commissioner of Internal Revenue.

Approved: December 15, 1997.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

[FR Doc. 97-33647 Filed 12-30-97; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 20 and 25

[TD 8744]

RIN 1545-AR52

Disclaimer of Interests and Powers

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the treatment of disclaimers for estate and gift tax purposes. The regulations clarify certain provisions governing the disclaimer of property interests and powers and, in addition, conform the regulations to court decisions holding the current regulation invalid with respect to the disclaimer of joint property interests. The final regulations will affect persons who disclaim property interests, powers, or interests in jointly owned property.

DATES: *Effective date:*

The final regulations are effective December 31, 1997.

Applicability dates: The amendments to §§ 25.2518-1(a) and 25.2518-2(c)(3) (substituting the statutory language in section 2518(b)(2)(A) "transfer creating the interest," for "taxable transfer") and conforming changes to §§ 20.2041-3(d)(6)(i), 20.2046-1, 20.2056(d)-2(a) and (b), 25.2511-1(c)(1), 25.2514-3(c)(5), are applicable for transfers creating the interest or power to be disclaimed made on or after December 31, 1997. The amendments to § 25.2518-2(c)(4) (relating to the disclaimer of joint property and bank accounts) are applicable for disclaimers made on or after December 31, 1997.

FOR FURTHER INFORMATION CONTACT: James F. Hogan (202) 622-3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On August 21, 1996, the IRS published in the **Federal Register** (61 FR 43197) a notice of proposed rulemaking (REG-208216-91) amending the regulations under section 2518. The IRS received comments on the proposed regulations; however, no request for a public hearing was received so no public hearing was held. This document adopts final regulations with respect to this notice of proposed rulemaking.

The proposed regulations substituted the statutory language of section 2518(b)(2)(A), "transfer creating the interest," for "taxable transfer" as the

reference point for determining when the 9-month time period for making the disclaimer commences. This change clarifies that the starting point for the 9-month period is not dependent on the actual imposition of a transfer tax at the time that the interest to be disclaimed is created. Comments with respect to the clarification in the proposed regulation supported the change.

Under the proposed regulations, the one-half survivorship interest in jointly-held property that was unilaterally severable could be disclaimed within 9 months of the date of death of the first joint tenant to die. The proposed regulations did not extend the same treatment to joint interests that are not unilaterally severable (e.g., tenancies by the entirety), but the preamble invited comments on this subject.

The comments received unanimously suggested that a surviving joint tenant should be allowed to disclaim, within 9 months of the date of death of the first joint tenant to die, his or her survivorship interest in a tenancy, whether or not that tenancy is unilaterally severable. The comments noted that parties purchasing a residence often do not make an informed decision regarding whether the residence should be held as joint tenants or tenants by the entirety, and generally are not aware that the decision to take title to the property as either joint tenants with right of survivorship or tenants by the entirety will affect the ability to disclaim their interest in the property after the death of the first joint tenant to die.

Accordingly, the final regulations allow the disclaimer of jointly-held property that is not unilaterally severable on the same basis as joint property that is unilaterally severable. Thus, a surviving joint tenant may disclaim the one-half survivorship interest in property that the joint tenant held either in joint tenancy with right of survivorship or in tenancy by the entirety, within 9 months of the death of the first joint tenant to die. The rule also significantly simplifies the disclaimer of jointly-held property, eliminating certain special rules that were dependent on the application of section 2515 to the creation of the tenancy.

The proposed regulations provided rules regarding the disclaimer of interests in joint bank accounts and brokerage accounts, generally recognizing that the creation of such accounts are not completed gifts under certain circumstances. Comments noted that other kinds of investment accounts, such as accounts held at mutual funds, accord the parties rights that are similar

to the rights of parties with respect to joint bank accounts and brokerage accounts. Accordingly, the final regulations have expanded the special rule with respect to the disclaimer of jointly-held bank and brokerage accounts to include jointly-held investment accounts such as accounts held at mutual funds.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the Notice of Proposed Rulemaking preceding these regulations was submitted to the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Dale Carlton, Office of the Chief Counsel, IRS. Other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 20 and 25 are amended as follows:

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

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

Authority: 26 U.S.C. 7805 * * *

PAR. 2. Section 20.2041-3 is amended as follows:

- 1. Paragraph (d)(6)(i) is amended by revising the first sentence and by adding a new sentence after the first sentence.
- 2. Paragraph (d)(6)(iii) is added.

The additions and revisions read as follows:

§ 20.2041-3 Powers of appointment created after October 21, 1942.

* * * * *

(d) * * *

(6)(i) A disclaimer or renunciation of a general power of appointment created in a transfer made after December 31, 1976, is not considered to be the release of the power if the disclaimer or renunciation is a qualified disclaimer as described in section 2518 and the corresponding regulations. For rules relating to when the transfer creating the power occurs, see § 25.2518-2(c)(3) of this chapter. * * *

* * * * *

(iii) The first and second sentences of paragraph (d)(6)(i) of this section are applicable for transfers creating the power to be disclaimed made on or after December 31, 1997.

* * * * *

Par. 3. Section 20.2046-1 is revised to read as follows:

§ 20.2046-1 Disclaimed property.

(a) This section shall apply to the disclaimer or renunciation of an interest in the person disclaiming by a transfer made after December 31, 1976. For rules relating to when the transfer creating the interest occurs, see § 25.2518-2(c)(3) and (c)(4) of this chapter. If a qualified disclaimer is made with respect to such a transfer, the Federal estate tax provisions are to apply with respect to the property interest disclaimed as if the interest had never been transferred to the person making the disclaimer. See section 2518 and the corresponding regulations for rules relating to a qualified disclaimer.

(b) The first and second sentences of this section are applicable for transfers creating the interest to be disclaimed made on or after December 31, 1997.

Par. 4. Section 20.2056(d)-2 is amended as follows:

- 1. Paragraph (a) is amended by revising the first sentence and adding a new sentence after the first sentence.
 - 2. Paragraph (b) is revised.
 - 3. A new paragraph (c) is added.
- The additions and revisions read as follows:

§ 20.2056(d)-2 Marital deduction; effect of disclaimers of post-December 31, 1976 transfers.

(a) * * * If a surviving spouse disclaims an interest in property passing to such spouse from the decedent, which interest was created in a transfer made after December 31, 1976, the effectiveness of the disclaimer will be determined by section 2518 and the corresponding regulations. For rules relating to when the transfer creating the

interest occurs, see § 25.2518-2(c)(3) and (c)(4) of this chapter. * * *

(b) *Disclaimer by a person other than a surviving spouse.* If an interest in property passes from a decedent to a person other than the surviving spouse, and the interest is created in a transfer made after December 31, 1976, and—

(1) The person other than the surviving spouse makes a qualified disclaimer with respect to such interest; and

(2) The surviving spouse is entitled to such interest in property as a result of such disclaimer, the disclaimed interest is treated as passing directly from the decedent to the surviving spouse. For rules relating to when the transfer creating the interest occurs, see § 25.2518-2(c)(3) and (c)(4) of this chapter.

(c) *Effective date.* The first and second sentences of paragraphs (a) and (b) of this section are applicable for transfers creating the interest to be disclaimed made on or after December 31, 1997.

PART 25—GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

Par. 5. The authority citation for part 25 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 25.2518-2 is also issued under 26 U.S.C. 2518(b). * * *

Par. 6. Section 25.2511-1 is amended as follows:

1. In paragraph (c)(1), the fourth sentence is revised.

2. A new paragraph (c)(3) is added.

The additions and revisions read as follows:

§ 25.2511-1 Transfers in general.

* * * * *

(c)(1) * * * However, in the case of a transfer creating an interest in property (within the meaning of § 25.2518-2(c)(3) and (c)(4)) made after December 31, 1976, this paragraph (c)(1) shall not apply to the donee if, as a result of a qualified disclaimer by the donee, the interest passes to a different donee. * * *

* * * * *

(3) The fourth sentence of paragraph (c)(1) of this section is applicable for transfers creating an interest to be disclaimed made on or after December 31, 1997.

* * * * *

Par. 7. Section 25.2514-3 is amended as follows:

1. Paragraph (c)(5) is amended by revising the first sentence and adding a new sentence after the first sentence.

2. A new paragraph (c)(7) is added.

The additions and revisions read as follows:

§ 25.2514-3 Powers of appointment created after October 21, 1942.

* * * * *

(c) * * *

(5) * * * A disclaimer or renunciation of a general power of appointment created in a transfer made after December 31, 1976, is not considered a release of the power for gift tax purposes if the disclaimer or renunciation is a qualified disclaimer as described in section 2518 and the corresponding regulations. For rules relating to when a transfer creating the power occurs, see § 25.2518-2(c)(3).

* * *

* * * * *

(7) The first and second sentences of paragraph (c)(5) of this section are applicable for transfers creating the power to be disclaimed made on or after December 31, 1997.

* * * * *

Par. 8. Section 25.2518-1 is amended as follows:

1. Paragraph (a)(1) is revised.

2. In paragraph (a)(2), the last three sentences of the example are removed and four new sentences are added in their place.

3. A new paragraph (a)(3) is added.

The additions and revisions read as follows:

§ 25.2518-1 Qualified disclaimers of property; In general.

(a) * * * (1) *In general.* The rules described in this section, § 25.2518-2, and § 25.2518-3 apply to the qualified disclaimer of an interest in property which is created in the person disclaiming by a transfer made after December 31, 1976. In general, a qualified disclaimer is an irrevocable and unqualified refusal to accept the ownership of an interest in property. For rules relating to the determination of when a transfer creating an interest occurs, see § 25.2518-2(c) (3) and (4).

(2) * * *

Example. * * * The transfer creating the remainder interest in the trust occurred in 1968. See § 25.2511-1(c)(2). Therefore, section 2518 does not apply to the disclaimer of the remainder interest because the transfer creating the interest was made prior to January 1, 1977. If, however, W had caused the gift to be incomplete by also retaining the power to designate the person or persons to receive the trust principal at death, and, as a result, no transfer (within the meaning of § 25.2511-1(c)(2)) of the remainder interest was made at the time of the creation of the trust, section 2518 would apply to any disclaimer made after W's death with respect to an interest in the trust property.

(3) Paragraph (a)(1) of this section is applicable for transfers creating the interest to be disclaimed made on or after December 31, 1997.

* * * * *

Par. 9. Section 25.2518-2 is amended as follows:

1. The text of paragraph (c)(3) following the heading is redesignated as paragraph (c)(3)(i) and amended as follows:

a. In the first, eighth, and eleventh sentences, the word "taxable" is removed in each place it appears.

b. In the second and ninth sentences, the language "taxable transfer" is removed and "transfer creating an interest" is added in each place it appears.

c. In the third sentence the language "taxable transfers" is removed and "transfers creating an interest" is added.

d. The fourth, fifth, sixth, and seventh sentences are removed and five new sentences are added in their place.

2-3. A new paragraph (c)(3)(ii) is added.

4. Paragraph (c)(4) is revised.

5. In paragraph (c)(5), *Example (7)* is revised.

6. In paragraph (c)(5), *Example (8)* is removed.

7. In paragraph (c)(5), *Example (9)* is redesignated as *Example (12)* and is revised.

8. In paragraph (c)(5), *Example (10)* is redesignated as *Example (11)* and the first sentence is revised.

9. In paragraph (c)(5), new *Examples (8), (9), (10), (13), and (14)*, are added.

The additions and revisions read as follows:

§ 25.2518-2 Requirements for a qualified disclaimer.

* * * * *

(c) * * *

(3) *Transfer.* (i) * * * With respect to transfers made by a decedent at death or transfers that become irrevocable at death, the transfer creating the interest occurs on the date of the decedent's death, even if an estate tax is not imposed on the transfer. For example, a bequest of foreign-situs property by a nonresident alien decedent is regarded as a transfer creating an interest in property even if the transfer would not be subject to estate tax. If there is a transfer creating an interest in property during the transferor's lifetime and such interest is later included in the transferor's gross estate for estate tax purposes (or would have been included if such interest were subject to estate tax), the 9-month period for making the qualified disclaimer is determined with reference to the earlier transfer creating the interest. In the case of a general

power of appointment, the holder of the power has a 9-month period after the transfer creating the power in which to disclaim. If a person to whom any interest in property passes by reason of the exercise, release, or lapse of a general power desires to make a qualified disclaimer, the disclaimer must be made within a 9-month period after the exercise, release, or lapse regardless of whether the exercise, release, or lapse is subject to estate or gift tax. * * *

(ii) Sentences 1 through 10 and 12 of paragraph (c)(3)(i) of this section are applicable for transfers creating the interest to be disclaimed made on or after December 31, 1997.

(4) *Joint property*—(i) *Interests in joint tenancy with right of survivorship or tenancies by the entirety.* Except as provided in paragraph (c)(4)(iii) of this section (with respect to joint bank, brokerage, and other investment accounts), in the case of an interest in a joint tenancy with right of survivorship or a tenancy by the entirety, a qualified disclaimer of the interest to which the disclaimant succeeds upon creation of the tenancy must be made no later than 9 months after the creation of the tenancy regardless of whether such interest can be unilaterally severed under local law. A qualified disclaimer of the survivorship interest to which the survivor succeeds by operation of law upon the death of the first joint tenant to die must be made no later than 9 months after the death of the first joint tenant to die regardless of whether such interest can be unilaterally severed under local law and, except as provided in paragraph (c)(4)(ii) of this section (with respect to certain tenancies created on or after July 14, 1988), such interest is deemed to be a one-half interest in the property. (See, however, section 2518(b)(2)(B) for a special rule in the case of disclaimers by persons under age 21.) This is the case regardless of the portion of the property attributable to consideration furnished by the disclaimant and regardless of the portion of the property that is included in the decedent's gross estate under section 2040 and regardless of whether the interest can be unilaterally severed under local law. See paragraph (c)(5), Examples (7) and (8), of this section.

(ii) *Certain tenancies in real property between spouses created on or after July 14, 1988.* In the case of a joint tenancy between spouses or a tenancy by the entirety in real property created on or after July 14, 1988, to which section 2523(i)(3) applies (relating to the creation of a tenancy where the spouse of the donor is not a United States

citizen), the surviving spouse may disclaim any portion of the joint interest that is includible in the decedent's gross estate under section 2040. See paragraph (c)(5), *Example (9)*, of this section.

(iii) *Special rule for joint bank, brokerage, and other investment accounts (e.g., accounts held at mutual funds) established between spouses or between persons other than husband and wife.* In the case of a transfer to a joint bank, brokerage, or other investment account (e.g., an account held at a mutual fund), if a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other cotenant, such that the transfer is not a completed gift under § 25.2511-1(h)(4), the transfer creating the survivor's interest in the decedent's share of the account occurs on the death of the deceased cotenant. Accordingly, if a surviving joint tenant desires to make a qualified disclaimer with respect to funds contributed by a deceased cotenant, the disclaimer must be made within 9 months of the cotenant's death. The surviving joint tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant. See paragraph (c)(5), *Examples (12), (13), and (14)*, of this section, regarding the treatment of disclaimed interests under sections 2518, 2033 and 2040.

(iv) *Effective date.* This paragraph (c)(4) is applicable for disclaimers made on or after December 31, 1997.

(5) *Examples.* * * *

Example (7). On February 1, 1990, A purchased real property with A's funds. Title to the property was conveyed to "A and B, as joint tenants with right of survivorship." Under applicable state law, the joint interest is unilaterally severable by either tenant. B dies on May 1, 1998, and is survived by A. On January 1, 1999, A disclaims the one-half survivorship interest in the property to which A succeeds as a result of B's death. Assuming that the other requirements of section 2518(b) are satisfied, A has made a qualified disclaimer of the one-half survivorship interest (but not the interest retained by A upon the creation of the tenancy, which may not be disclaimed by A). The result is the same whether or not A and B are married and regardless of the proportion of consideration furnished by A and B in purchasing the property.

Example (8). Assume the same facts as in *Example (7)* except that A and B are married and title to the property was conveyed to "A and B, as tenants by the entirety." Under applicable state law, the tenancy cannot be unilaterally severed by either tenant. Assuming that the other requirements of section 2518(b) are satisfied, A has made a qualified disclaimer of the one-half

survivorship interest (but not the interest retained by A upon the creation of the tenancy, which may not be disclaimed by A). The result is the same regardless of the proportion of consideration furnished by A and B in purchasing the property.

Example (9). On March 1, 1989, H and W purchase a tract of vacant land which is conveyed to them as tenants by the entirety. The entire consideration is paid by H. W is not a United States citizen. H dies on June 1, 1998. W can disclaim the entire joint interest because this is the interest includible in H's gross estate under section 2040(a). Assuming that W's disclaimer is received by the executor of H's estate no later than 9 months after June 1, 1998, and the other requirements of section 2518(b) are satisfied, W's disclaimer of the property would be a qualified disclaimer. The result would be the same if the property was held in joint tenancy with right of survivorship that was unilaterally severable under local law.

Example (10). In 1986, spouses A and B purchased a personal residence taking title as tenants by the entirety. B dies on July 10, 1998. A wishes to disclaim the one-half undivided interest to which A would succeed by right of survivorship. If A makes the disclaimer, the property interest would pass under B's will to their child C. C, an adult, and A resided in the residence at B's death and will continue to reside there in the future. A continues to own a one-half undivided interest in the property. Assuming that the other requirements of section 2518(b) are satisfied, A may make a qualified disclaimer with respect to the one-half undivided survivorship interest in the residence if A delivers the written disclaimer to the personal representative of B's estate by April 10, 1999, since A is not deemed to have accepted the interest or any of its benefits prior to that time and A's occupancy of the residence after B's death is consistent with A's retained undivided ownership interest. The result would be the same if the property was held in joint tenancy with right of survivorship that was unilaterally severable under local law.

Example (11). H and W, husband and wife, reside in state X, a community property state. * * *

Example (12). On July 1, 1990, A opens a bank account that is held jointly with B, A's spouse, and transfers \$50,000 of A's money to the account. A and B are United States citizens. A can regain the entire account without B's consent, such that the transfer is not a completed gift under § 25.2511-1(h)(4). A dies on August 15, 1998, and B disclaims the entire amount in the bank account on October 15, 1998. Assuming that the remaining requirements of section 2518(b) are satisfied, B made a qualified disclaimer under section 2518(a) because the disclaimer was made within 9 months after A's death at which time B had succeeded to full dominion and control over the account. Under state law, B is treated as predeceasing A with respect to the disclaimed interest. The disclaimed account balance passes through A's probate estate and is no longer joint property includible in A's gross estate under section 2040. The entire account is, instead, includible in A's gross estate under section

2033. The result would be the same if A and B were not married.

Example (13). The facts are the same as Example (12), except that B, rather than A, dies on August 15, 1998. A may not make a qualified disclaimer with respect to any of the funds in the bank account, because A furnished the funds for the entire account and A did not relinquish dominion and control over the funds.

Example (14). The facts are the same as Example (12), except that B disclaims 40 percent of the funds in the account. Since, under state law, B is treated as predeceasing A with respect to the disclaimed interest, the 40 percent portion of the account balance that was disclaimed passes as part of A's probate estate, and is no longer characterized as joint property. This 40 percent portion of the account balance is, therefore, includible in A's gross estate under section 2033. The remaining 60 percent of the account balance that was not disclaimed retains its character as joint property and, therefore, is includible in A's gross estate as provided in section 2040(b). Therefore, 30 percent (1/2 x 60 percent) of the account balance is includible in A's gross estate under section 2040(b), and a total of 70 percent of the aggregate account balance is includible in A's gross estate. If A and B were not married, then the 40 percent portion of the account subject to the disclaimer would be includible in A's gross estate as provided in section 2033 and the 60 percent portion of the account not subject to the disclaimer would be includible in A's gross estate as provided in section 2040(a), because A furnished all of the funds with respect to the account.

* * * * *

Michael P. Dolan,
Deputy Commissioner of Internal Revenue.

Approved: December 10, 1997.

Donald C. Lubick,
Acting Assistant Secretary of the Treasury.
[FR Doc. 97-33394 Filed 12-30-97; 8:45 am]
BILLING CODE 4830-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[WA 29-1-6724, WA 57-7132; FRL-5934-8]

Approval and Promulgation of State Implementation Plans: Washington; Correcting Amendments

AGENCY: Environmental Protection Agency.

ACTION: Final rule; correcting amendments.

SUMMARY: This action corrects the incorporation by reference found in the approval of the Washington State Implementation Plan (SIP) revision published on September 22, 1997 and corrects a typographical error found in

the Washington SIP Table of Contents published on June 29, 1995.

DATES: This action is effective on December 31, 1997.

ADDRESSES: Copies of the State's request and other information supporting this proposed action are available for inspection during normal business hours at the following locations: EPA, Office of Air Quality (OAQ-107), 1200 Sixth Avenue, Seattle, Washington 98101, and the State of Washington Department of Ecology, 300 Desmond Drive, Lacey, WA 98503.

Documents which are incorporated by reference are available for public inspection at the Air and Radiation Docket and Information Center, EPA, 401 M Street, SW, Washington, D.C. 20460, as well as the above addresses.

FOR FURTHER INFORMATION CONTACT: Christine Lemmé, Office of Air Quality (OAQ-107), EPA, Seattle, Washington, (206) 553-0977.

SUPPLEMENTARY INFORMATION: (1) On September 22, 1997 (62 FR 49442), four revisions to the Washington SIP were approved. These revisions addressed the attainment of the National Ambient Air Quality Standard (NAAQS) for carbon monoxide in the Spokane, Washington urbanized area. The Spokane County Air Pollution Control Authority Motor Fuel Specifications for Oxygenated Gasoline were inadvertently omitted from the incorporation by reference section of the Part 52 amendment. This action corrects that omission by incorporating these regulations into the Washington SIP.

(2) On June 29, 1995 (60 FR 33736), EPA approved the recodification of the SIP table of contents submitted by the Washington Department of Ecology. A typographical error occurred in the bracketed portion of Section 2.2.415, WAC 173-415-030, and one of the "exceptions" was mistakenly omitted. It should now read, "Emission Standards [except section (1) and (3)(b)]". (Section (1) had been mistakenly omitted).

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

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

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

List of Subjects in 40 CFR Part 52

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

Dated: December 3, 1997.

Chuck Findley,
Acting Regional Administrator, Region X.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart WW—Washington

2. Section 52.2470 is amended by revising paragraph (c)(75) to read as follows:

§ 52.2470 Identification of plan.

* * * * *

(c) * * *

(75) On January 22, 1993, September 14, 1993, and April 30, 1996, the Director of the Washington Department of Ecology submitted to the Regional Administrator of EPA four revisions to the SIP consisting of amendments to the Spokane CO SIP.

(i) Incorporation by reference.

(A) Letter dated January 22, 1993, from Washington to EPA requesting approval of revisions to the Spokane CO portion of the Washington State Implementation Plan; the "Supplement to the State Implementation Plan for Washington State, Spokane Carbon Monoxide Nonattainment Area," dated January 1993, Sections 6.0, 6.1, 6.3, and 6.4.

(B) Letter dated September 14, 1993, from Washington to EPA providing supplementary information to that submitted on January 22, 1993; "Spokane County Carbon Monoxide Non-attainment Area 1990 Base Year

Emissions Inventory," dated November 1992.

(C) Two letters dated April 30, 1996, from Washington to EPA submitting two revisions to the SIP; "Supplement to A Plan for Attaining and Maintaining National Ambient Air Quality Standards for the Spokane Carbon Monoxide Nonattainment Area," dated March 1995; and "Supplement to the State Implementation Plan for Washington State, Spokane County Carbon Monoxide Nonattainment Area, Supplement 1 of 2," replacement pages for Sections 2.5 and 6.2 of Section 4.5.2.CO.1 of the State Implementation Plan, dated January 1996; "Supplement to the State Implementation Plan for Washington State, Spokane County Carbon Monoxide Nonattainment Area, Supplement 2 of 2," new Section 10.0, Contingency Measures, of Section 4.5.2.CO.1 of the State Implementation Plan, dated January 1996; and Spokane County Air Pollution Control Authority Motor Fuel Specifications for Oxygenated Gasoline, Regulation I, Article VI, Section 6.16, adopted July 6, 1995.

(ii) Additional material.

(A) Letter of September 29, 1995, submitting CO Periodic Emission Inventory Reports; "Spokane County Carbon Monoxide Nonattainment Area, 1993 Periodic Update Emissions Inventory," dated September 1995.

3. In § 52.2479 the table is amended by revising Section 2.2.415 to read as follows:

§ 52.2479 Contents of the federally approved, State submitted implementation plan.

* * * * *

Washington State Implementation Plan for Air Quality; State and Local Requirements

Table of Contents

* * * * *

2.2.415
 WAC 173-415 Primary Aluminum Plants
 173-415-010 Statement of purpose [02/19/91]
 173-415-020 Definitions [02/19/91 except sections (1) and (2)]
 173-415-030 Emission standards [02/19/91 except sections (1) and (3)(b)]
 173-415-045 Creditable stack height and dispersion techniques [02/19/91]
 173-415-050 New source review (NSR) [02/19/91]
 173-415-051 Prevention of significant deterioration (PSD) [02/19/91]
 173-415-060 Monitoring and reporting [02/19/91 except sections (1)(a)(b)(d)]
 173-415-070 Report of startup, shutdown, breakdown or upset conditions [02/19/91]

173-415-080 Emission inventory [02/19/91]

* * * * *
 [FR Doc. 97-33960 Filed 12-30-97; 8:45 am]
 BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[CO-001-0006a & CO-001-0021a; FRL-5934-2]

Clean Air Act Approval and Promulgation of PM₁₀ Implementation Plan for Colorado; Designation of Areas for Air Quality Planning Purposes; Steamboat Springs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA approves the State implementation plan (SIP) submitted by the State of Colorado to achieve attainment and maintenance of the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀), including among other things, control measures, technical analyses, quantitative milestones and contingency measures. The SIP was submitted by the Governor of Colorado with a letter dated September 16, 1997 to satisfy certain Federal requirements for an approvable SIP for the Steamboat Springs, Colorado moderate PM₁₀ nonattainment area, as designated effective January 20, 1994. In addition, EPA approves the Steamboat Springs emergency episode plan. EPA also amends the boundary for the Steamboat Springs nonattainment area to clarify the original description.

DATES: This action is effective on March 2, 1998 unless adverse comments are received by January 30, 1998. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Comments should be addressed to: Richard R. Long, Director, Air Program, EPA Region VIII at the address listed below. Copies of the State's submittal and other information are available for inspection during normal business hours at the following locations: Air Program, Environmental Protection Agency, Region VIII, 999 18th Street, suite 500, Denver, Colorado 80202-2405; and Colorado Department of Public Health and Environment, Air Pollution Control Division, 4300 Cherry Creek Drive South, Denver, Colorado 80222-1530.

FOR FURTHER INFORMATION CONTACT: Amy Platt, 8P2-A, Environmental Protection Agency, Region VIII, 999 18th Street, suite 500, Denver, Colorado 80202-2466, (303) 312-6449.

SUPPLEMENTARY INFORMATION:

I. Background

The Steamboat Springs, Colorado area was designated nonattainment for PM₁₀ and classified as moderate under section 107(d)(3) of the Clean Air Act, on December 21, 1993.¹ See 57 FR 43846 (September 22, 1992), 58 FR 67334 (December 21, 1993) and 40 CFR 81.306 (Routt County (part)). The Steamboat Springs designation became effective on January 20, 1994. The air quality planning requirements for moderate PM₁₀ nonattainment areas² are set out in Subparts 1 and 4 of Title I of the Act.³ EPA has issued a "General Preamble" describing EPA's preliminary views on how EPA intends to review SIPs and SIP revisions submitted under Title I of the Act, including those State submittals containing moderate PM₁₀ nonattainment area SIP requirements (see generally 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992)). Because EPA is describing its interpretations here only in broad terms, the reader should refer to the General Preamble for a more detailed discussion of the interpretations of title I advanced in this document and the supporting rationale. In this document and supporting rationale, EPA is applying its interpretations considering the specific factual issues presented.

A State containing a moderate PM₁₀ nonattainment area designated after the 1990 Amendments is required to submit, among other things, the following provisions within 18 months of the effective date of the designation (*i.e.*, these provisions were due for the Steamboat Springs area by July 20, 1995):

1. Provisions to assure that reasonably available control measures (RACM) (including such reductions in emissions

¹ The 1990 Amendments to the Clean Air Act made significant changes to the Act. See Pub. L. 101-549, 104 Stat. 2399. References herein are to the Clean Air Act, as amended ("the Act"). The Clean Air Act is codified, as amended, in the U.S. Code at 42 U.S.C. 7401, *et seq.*

² The requirements which are the subject of this document arise under the pre-existing PM NAAQS. EPA promulgated a new PM NAAQS on July 18, 1997, which became effective on September 16, 1997.

³ Subpart 1 contains provisions applicable to nonattainment areas generally and Subpart 4 contains provisions specifically applicable to PM₁₀ nonattainment areas. At times, Subpart 1 and Subpart 4 overlap or conflict. EPA has attempted to clarify the relationship among these provisions in the "General Preamble" and, as appropriate, in today's notice and supporting information.

from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology (RACT) shall be implemented no later than four years after designation (*i.e.*, January 20, 1998 for Steamboat Springs);

2. Either a demonstration (including air quality modelling) that the plan will provide for attainment as expeditiously as practicable but no later than the end of the sixth calendar year after the effective date of designation (*i.e.*, December 31, 1999 for Steamboat Springs), or a demonstration that attainment by that date is impracticable;

3. Quantitative milestones which demonstrate reasonable further progress (RFP) toward the attainment date (*i.e.*, December 31, 1999 for Steamboat Springs). Since the SIP for a new nonattainment area is due 18 months after the area is designated as nonattainment, the first 3-year milestone is to be achieved 4 1/2 years after nonattainment designation (*i.e.*, July 20, 1998 for Steamboat Springs) and the second milestone must be achieved three years after the first milestone or 7 1/2 years after nonattainment designation (*i.e.*, July 20, 2001 for Steamboat Springs);

4. Provisions to assure that the control requirements applicable to major stationary sources of PM₁₀ also apply to major stationary sources of PM₁₀ precursors except where the Administrator determines that such sources do not contribute significantly to PM₁₀ levels which exceed the NAAQS in the area. See sections 172(c), 188, and 189 of the Act; and

5. Contingency measures which consist of other available measures that are not part of the area's control strategy. These measures must take effect without further action by the State or EPA, upon EPA's determination that the area has failed to make RFP or attain the PM₁₀ NAAQS by the applicable deadline. See section 172(c)(9) of the Act.

II. This Action

Section 110(k) of the Act sets out provisions governing EPA's review of SIP submittals (see 57 FR 13565-13566). The Governor of Colorado submitted the Steamboat Springs PM₁₀ SIP with a letter dated September 16, 1997. The Steamboat Springs moderate nonattainment area plan includes, among other things, technical analyses, control measures to satisfy the RACM requirement, a demonstration (including air quality modelling) that attainment and maintenance of the PM₁₀ NAAQS will be achieved by the required dates, and enforceability documentation. In this final rulemaking, EPA announces

its approval of those elements of the Steamboat Springs PM₁₀ SIP which were due on July 20, 1995 and submitted on September 16, 1997.

In addition, EPA has determined that major sources of precursors of PM₁₀ do not contribute significantly to PM₁₀ levels in excess of the NAAQS in Steamboat Springs.⁴

Finally, EPA is amending the nonattainment area boundary description for Steamboat Springs in order to clarify the original description.

A. Analysis of State Submission

1. Procedural Background

The Act requires States to observe certain procedural requirements in developing implementation plans and plan revisions for submission to EPA. Section 110(a)(2) of the Act provides that each implementation plan submitted by a State must be adopted after reasonable notice and public hearing.⁵ Section 110(l) of the Act similarly provides that each revision to an implementation plan submitted by a State under the Act must be adopted by such State after reasonable notice and public hearing.

EPA also must determine whether a submittal is complete and therefore warrants further EPA review and action (see section 110(k)(1) and 57 FR 13565). EPA's completeness criteria for SIP submittals are set out at 40 CFR part 51, appendix V. EPA attempts to make completeness determinations within 60 days of receiving a submission. However, a submittal is deemed complete by operation of law if a completeness determination is not made by EPA six months after receipt of the submission.

To entertain public comment on the PM₁₀ implementation plan for Steamboat Springs, the Steamboat Springs City Council and the Routt County Commission held public hearings on June 6, 1995 and June 12, 1995, respectively. The State of Colorado, after providing adequate public notice, held a public hearing on September 21, 1995. After considering all public comments and following the public hearing, the Steamboat Springs PM₁₀ SIP was adopted by the Colorado Air Quality Control Commission (AQCC). The Steamboat Springs PM₁₀

⁴The consequences of this finding are to exclude these sources from the applicability of PM₁₀ nonattainment area control requirements. Note that EPA's finding is based on the current character of the area including, for example, the existing mix of sources in the area. It is possible, therefore, that future growth could change the significance of precursors in the area.

⁵Also Section 172(c)(7) of the Act requires that plan provisions for nonattainment areas meet the applicable provisions of Section 110(a)(2).

SIP was submitted by the Governor in a letter dated August 7, 1996. The Steamboat Springs PM₁₀ SIP was reviewed by EPA to determine completeness in accordance with the completeness criteria set out at 40 CFR part 51, appendix V. The submittal was found to be complete and a letter dated August 29, 1996 was forwarded to the Governor indicating the completeness of the submittal and the next steps in the review process.

Subsequently, the Steamboat Springs City Council and the Routt County Commission held public hearings on extensive revisions to the Steamboat Springs PM₁₀ SIP on September 17, 1996 and approved the revisions. The Colorado AQCC conducted a public hearing on the revised SIP on October 17, 1996 and adopted the revisions. In a January 31, 1997 letter from Margie Perkins, Air Pollution Control Division (APCD), to Richard Long, EPA, the State requested that EPA Region VIII delay processing of the original Steamboat Springs SIP submitted with the August 7, 1996 Governor's letter. The reason provided for the request was that the substantial revisions adopted on October 17, 1996 made the original SIP and regulations obsolete. These revisions were submitted by the Governor with a letter dated September 16, 1997, and the State requested that this documentation completely replace the August 7, 1996 submittal.

The September 16, 1997 Steamboat Springs PM₁₀ SIP submittal was reviewed by EPA to determine completeness in accordance with the completeness criteria set out at 40 CFR part 51, appendix V. The submittal was found to be complete and an October 20, 1997 letter was forwarded to the Governor indicating the completeness of the submittal and the next steps in the review process.

As requested by the State, this rulemaking action is specific to the September 16, 1997 submittal.

2. Accurate Emission Inventory

Section 172(c)(3) of the Act requires that nonattainment plan provisions include a comprehensive, accurate, current inventory of actual emissions from all sources of relevant pollutants in the nonattainment area. The emission inventory also should include a comprehensive, accurate, and current inventory of allowable emissions in the area. See, for example, section 110(a)(2)(K). Because the submission of such inventories is a necessary adjunct to an area's attainment demonstration (or demonstration that the area cannot practicably attain), the emission

inventories must be received with the submission (see 57 FR 13539).

The Colorado APCD chose 1991 as the Steamboat Springs base year emissions inventory of PM₁₀ emissions. The results indicate that area sources contribute approximately 99% of the total emissions for the area, of which re-entrained road dust (including paved and unpaved roads) contributes approximately 94% and woodburning contributes approximately 5%. Stationary sources accounted for less than 1% of the emission inventory.⁶

EPA is approving the emission inventory because it is accurate and comprehensive, and provides a sufficient basis for determining the adequacy of the attainment demonstration for this area consistent with the requirements of sections 172(c)(3) and 110(a)(2)(K) of the Act.⁷ For further details see the Steamboat Springs PM₁₀ SIP Technical Support Document (TSD) for this action.

The September 16, 1997 submittal also establishes an emission budget for the Steamboat Springs nonattainment area, which is to be used for Federal

conformity purposes. The PM₁₀ mobile source emission budget for 1999 is 16,661 pounds/day and for 2002 is 20,682 pounds/day for the modelling domain. These budgets are the 1999 and 2002 mobile source PM₁₀ emissions presented in Section G. of the SIP, which include emissions from vehicle exhaust, brake, and tire wear, controlled emissions from paved roads, and unpaved road emissions. These budgets are calculated for the emission inventory/modelling domain, which is somewhat larger than the nonattainment area.

3. RACM (Including RACT)

As noted, the moderate PM₁₀ nonattainment areas, designated after the 1990 Amendments, must submit provisions to assure that RACM (including RACT) are implemented no later than January 20, 1998 (see sections 172(c)(1) and 189(a)(1)(C)). The General Preamble contains a detailed discussion of EPA's interpretation of the RACM (including RACT) requirement (see 57 FR 13539-13545 and 13560-13561).

In broad terms, the State should identify available control measures and evaluate them for their reasonableness in light of the feasibility of the controls and the attainment needs of the area. See 57 FR 13540-13544. A State may reject an available control measure if the measure is technologically infeasible or the cost of the control is unreasonable. In addition, RACM does not require controls on emissions from sources that are insignificant (*i.e.*, *de minimis*) and does not require the implementation of all available control measures where an area demonstrates timely attainment and the implementation of additional controls would not expedite attainment.

Colorado's SIP revision for Steamboat Springs contains control measures for sources of re-entrained fugitive dust (including paved and unpaved roads) and woodburning (including fireplaces and woodstoves). In the following table, an outline is presented on these sources, their control measures, associated emissions reduction credit, and effective dates.

Source category	Control measure	PM ₁₀ emissions reduction	Effective date
Re-entrained fugitive dust.	Colorado Air Quality Control Commission State Implementation Plan-Specific Regulations for Nonattainment Areas, Steamboat Springs PM ₁₀ Nonattainment Area. Sections VIII.B, C. & D. Require compliance with specifications for street sanding materials, reduction in the amount of street sand applied, and street sweeping.	720 kg/day or approximately 1588 lbs/day fewer PM ₁₀ emissions than base year.	12/30/96
Woodburning	Section VIII.E.—Requires continued implementation of local programs to restrict the number and type of new solid fuel burning devices in the nonattainment area.	Existing local programs were given emission reduction credits in the base and attainment year emissions inventories.	

RACM does not require additional controls on other area sources since the plan demonstrates attainment of the NAAQS and implementation of additional controls would not further expedite attainment. Further, RACT does not require additional controls for the stationary sources in the Steamboat Springs nonattainment area because point source emissions in the area are *de minimis* and control of such sources would not expedite attainment of the PM₁₀ NAAQS.

There are also other Statewide control measures that already apply in the Steamboat Springs area, which will help curb PM₁₀ emissions in the Steamboat Springs nonattainment area. Specifically, Colorado Regulation No. 4 requires new wood stoves to meet the

emission requirements of EPA's Standards of Performance for New Residential Wood Heaters in 40 CFR 60.532(b), and Colorado Regulation No. 3 regulates the construction and modification of stationary sources of PM₁₀. These measures will help to

⁶Although emissions from the Craig and Hayden power stations were not included in the inventory because these sources are outside the inventory domain, the emissions were included in the

modelling analyses for the SIP to determine impacts on the nonattainment area.

⁷EPA issued guidance on PM-10 emissions inventories prior to the enactment of the Clean Air

Act Amendments in the form of the 1987 PM-10 SIP Development Guideline. The guidance provided in this document appears to be consistent with the revised Act.

reduce emissions from new stationary source growth and residential wood combustion. However, EPA is not acting on Regulation Nos. 3 and 4 at this time because EPA has previously approved these regulations. For further information, see the TSD accompanying this document.

A more detailed discussion of the source category contributions, associated control measures (including available control technology), and an explanation of why certain available control measures were not implemented can be found in the TSD. EPA has reviewed the State's documentation and concluded that it adequately justifies the control measures to be implemented. The implementation of Colorado's PM₁₀ nonattainment plan for Steamboat Springs will result in the attainment of the PM₁₀ NAAQS by December 31, 1999, and maintenance of the PM₁₀ NAAQS through 2002. EPA is approving the Steamboat Springs PM₁₀ plan's control strategy as satisfying the RACM (including RACT) requirement.

4. Demonstration

As noted, moderate PM₁₀ nonattainment areas designated subsequent to enactment of the 1990 Amendments must submit a demonstration (including air quality modelling) showing that the plan will provide for attainment as expeditiously as practicable, but no later than the end of the sixth calendar year after an area's designation to attainment (see section 188(c)(1) of the Act). In the case of Steamboat Springs, this attainment deadline is December 31, 1999, or the State must show that attainment by December 31, 1999, is impracticable.

The attainment demonstration presented in the September 16, 1997 submittal indicated that the PM₁₀ NAAQS will be attained by 1999 in the Steamboat Springs area. The 24-hour PM₁₀ NAAQS is 150 micrograms/cubic meter ($\mu\text{g}/\text{m}^3$), and the standard is attained when the expected number of days per calendar year with a 24-hour average concentration above 150 $\mu\text{g}/\text{m}^3$ is equal to or less than one (see 40 CFR 50.6). The annual PM₁₀ NAAQS is 50 $\mu\text{g}/\text{m}^3$, and the standard is attained when the expected annual arithmetic mean concentration is less than or equal to 50 $\mu\text{g}/\text{m}^3$ (id.).

EPA regulations provide that attainment be demonstrated by means of a proportional model or dispersion model or other procedure shown to be adequate and appropriate for such purposes. See 40 CFR 51.112(a). In general, EPA policy provides that the preferred approach for estimating the air quality impacts of emissions of PM₁₀ is

to use receptor modelling in combination with dispersion modelling.

The State utilized the monitoring and emissions data and control measure efficiencies presented in the Steamboat Springs PM₁₀ SIP as inputs in a dispersion modelling-based attainment demonstration. The dispersion model was used to predict concentrations of PM₁₀ for the Steamboat Springs nonattainment area. The model was first calibrated to accurately predict worst-case PM₁₀ levels for 1991, for which monitoring data is available. Based upon these accurate predictions for 1991, the State is confident that the model's predictive capabilities are very good, and also confident that the modelling results generated for the attainment year of 1999 are reliable.

The dispersion modelling for Steamboat Springs, submitted with the SIP on September 16, 1997, demonstrates attainment of the 24-hour PM₁₀ NAAQS by December 31, 1999 since the highest modelled concentration for that year is 115 $\mu\text{g}/\text{m}^3$ at the downtown Steamboat Springs receptor. Because no exceedances of the PM₁₀ annual NAAQS have been recorded in the Steamboat Springs area and because the attainment demonstration submitted with the Steamboat Springs SIP shows attainment of the 24-hour PM₁₀ NAAQS, EPA believes it is reasonable and adequate to assume that protection of the 24-hour standard will be sufficient to protect the annual standard as well. The dispersion modelling also demonstrates maintenance of the 24-hour PM₁₀ NAAQS by December 31, 2002, since the highest modelled concentration for that year is 123 $\mu\text{g}/\text{m}^3$. The control strategies relied on to demonstrate timely attainment and maintenance are summarized in the section above entitled "RACM (including RACT)." For a more detailed description of the attainment and maintenance demonstrations and the control strategies used, see the TSD accompanying this document.

5. PM₁₀ Precursors

The control requirements that are applicable to major stationary sources of PM₁₀ also apply to major stationary sources of PM₁₀ precursors, unless EPA determines such sources do not contribute significantly to PM₁₀ levels which exceed the NAAQS in that area (see section 189(e) of the Act). The General Preamble contains guidance addressing how EPA intends to implement section 189(e) (57 FR 13539-13542). An analysis of air quality and emissions data for the Steamboat Springs nonattainment area indicates

that exceedances of the NAAQS are attributable chiefly to direct particulate emissions from re-entrained road dust and residential wood burning (*i.e.*, area sources). The emissions inventory for Steamboat Springs did not reveal any major stationary sources of PM₁₀ precursors within the inventory domain. The chemical mass balance analysis of filters from high concentration days revealed insignificant source apportionments to secondaries (approximately 1% to ammonium nitrates and approximately 2% to ammonium sulfates). The dispersion modelling for the SIP included a screening of major PM₁₀ stationary sources outside of the nonattainment area, including the Hayden and Craig power plants, to determine impacts to the nonattainment area. These analyses revealed insignificant source apportionments in the nonattainment area to the Hayden and Craig power plants, which is logical given the distances that these plants are from the nonattainment area. Craig is approximately 37 miles from downtown Steamboat Springs and Hayden is approximately 18.5 miles from downtown Steamboat Springs.

Based upon the emissions inventory, chemical mass balance analyses, and dispersion modelling, EPA believes that the overall contribution of PM₁₀ precursors is insignificant. Therefore, EPA is making the determination that major sources of PM₁₀ precursors do not contribute significantly to PM₁₀ levels in excess of the NAAQS in Steamboat Springs. The consequence of this finding is to exclude any such sources from the applicability of PM₁₀ nonattainment area control requirements. Note that EPA's finding is based on the current character of the area including, for example, the existing mix of sources in the area. It is possible, therefore, that future growth could change the significance of precursors in the area. Further discussion of the analyses and supporting rationale for EPA's finding are contained in the TSD accompanying this document.

6. New Source Review

On August 18, 1994 (59 FR 42500-42506), EPA approved the State's nonattainment new source review (NSR) permitting regulations for sources of PM₁₀ in the State's PM₁₀ nonattainment areas. In that notice, EPA stated that, because the Steamboat Springs PM₁₀ nonattainment area SIP was not due to be submitted until July 20, 1995, EPA would determine the approvability of the State's NSR provisions for that nonattainment area when EPA took action on the State's SIP submittal for

Steamboat Springs. Since the State's NSR regulations meet all of the Federal requirements for new and modified major stationary sources of PM₁₀ locating in moderate PM₁₀ nonattainment areas (as discussed in the August 18, 1994 **Federal Register**), EPA finds that the State has met the nonattainment NSR permitting requirements for sources of PM₁₀ locating in the Steamboat moderate PM₁₀ nonattainment area. In addition, as discussed in Section 5. above, EPA finds that major stationary sources of PM₁₀ precursors do not contribute significantly to PM₁₀ levels in excess of the NAAQS in Steamboat Springs. The consequence of this finding is to exclude major stationary sources of PM₁₀ precursors in Steamboat Springs from the applicability of PM₁₀ nonattainment area control requirements, including nonattainment NSR permitting requirements. Thus, the State's nonattainment NSR regulations for Steamboat Springs are considered fully approvable.

7. Quantitative Milestones and Reasonable Further Progress

The PM₁₀ nonattainment area plans demonstrating attainment must contain quantitative emission reduction milestones which are to be achieved every three years until the area is redesignated attainment and which demonstrate reasonable further progress (RFP), as defined in section 171(1), toward timely attainment. While section 189(c) plainly provides that quantitative milestones are to be achieved until an area is redesignated attainment, it is silent in indicating the starting point for counting the first three-year period or how many milestones must be initially addressed. In the General Preamble, EPA addressed the statutory gap in the starting point for counting the three-year milestones, indicating that it would begin from the due date for the applicable implementation plan revision containing the control measures for the area (*i.e.*, November 15, 1991 for initial moderate PM₁₀ nonattainment areas). See 57 FR 13539. As to the number of milestones, EPA believes that at least two milestones must be initially addressed.

States containing moderate nonattainment areas designated subsequent to enactment of the 1990 Amendments are expected to initially submit two milestones. States are required to submit SIP's for these areas 18 months after their redesignation as nonattainment. The attainment date for new PM₁₀ nonattainment areas is "as expeditiously as practicable" but no later than the end of the sixth calendar

year after an area's designation as nonattainment. Therefore, the attainment date for Steamboat Springs is December 31, 1999.

Because the SIP revision, including the quantitative milestones element, for a new nonattainment area is due 18 months after the area is designated as nonattainment, the first 3-year milestone is to be achieved 4½ years after the nonattainment redesignation. Since Steamboat Springs redesignation became effective on January 20, 1994, the first 3-year milestone must be achieved by July 20, 1998 (*i.e.*, 1½ years prior to the attainment deadline). The second quantitative milestone must be achieved three years after the first milestone or 7½ years after the nonattainment designation. In Steamboat Springs, the second quantitative milestone must be achieved by July 20, 2001 (*i.e.*, 1½ years after the attainment deadline if the maximum of six years is needed to attain the PM₁₀ NAAQS). The second quantitative milestone should provide for continued emission reduction progress toward attainment and should provide for continued maintenance of the NAAQS after the attainment date for the area.⁸

Because all of the Steamboat Springs emission control measures will go into effect in 1996, and because measures have been developed to keep the area in attainment through 2002, the State believes, and EPA agrees, that the quantitative milestone requirements for emission reductions will be achieved.

8. Enforceability Issues

All measures and other elements in the SIP must be enforceable by the State and EPA (see sections 172(c)(6), 110(a)(2)(A) and 57 FR 13556). The EPA criteria addressing the enforceability of SIPs and SIP revisions were stated in a September 23, 1987 memorandum (with attachments) from J. Craig Potter, Assistant Administrator for Air and Radiation, *et al.* (see 57 FR 13541). Nonattainment area plan provisions also must contain a program to provide for

⁸Section 189(c) provides that quantitative milestones are to be achieved "until the area is redesignated attainment." However, this endpoint for quantitative milestones is speculative because redesignation of an area as attainment is contingent upon several factors and future events. Therefore, EPA believes it is reasonable for States to initially address the first two milestones. Addressing two milestones will ensure that the State continues to maintain the NAAQS beyond the attainment date for at least some period during which an area could be redesignated attainment. Requiring that additional milestones be addressed, at least initially, would place a potentially unnecessary planning burden on States containing areas that are redesignated attainment. However, in all instances, additional milestones must be addressed if an area is not redesignated attainment.

enforcement of control measures and other elements in the SIP (see section 110(a)(2)(C)).

The specific control measures contained in the SIP are addressed above in Section II.A.3., "RACM (including RACT)." The Colorado Air Quality Control Commission State Implementation Plan-Specific Regulation for Nonattainment Areas, Section VIII. Steamboat Springs PM₁₀ Nonattainment Area, became effective on December 30, 1996. This regulation requires the City of Steamboat Springs to continue implementation and enforcement of Ordinance No. 1191 (1991), Ordinance No. 1148 (1990), Ordinance No. 1045 (1988), and Ordinance No. 977 (1987). The State regulation also requires Routt County to continue implementation and enforcement of Resolution No. 91-032 (1991). The ordinance and resolutions will limit future growth in emissions from solid fuel burning devices. The State regulation also includes record keeping requirements. The City of Steamboat Springs and Routt County must each submit to the APCD by May 31st of each year a report that describes the tracking and enforcement of these local control strategies. The report must include information on compliance and enforcement activities that have occurred during the previous year so that the APCD can verify that the ordinances and resolution have been properly implemented.

The Colorado Air Quality Control Commission State Implementation Plan-Specific Regulation for Nonattainment Areas, Section VIII., Steamboat Springs PM₁₀ Nonattainment Area, also details specifications for street sanding materials, requirements for the reduction in the amount of street sand applied, and street sweeping requirements for Lincoln Avenue. These requirements will limit re-entrained road dust emissions in the area. To limit woodburning emissions in the area, the State regulation also requires continued implementation of local programs to restrict the number and type of new solid fuel burning devices in the nonattainment area. Annual recordkeeping and reporting requirements are detailed for each control strategy, as follows.

Beginning November 1, 1996, each user of street sanding materials must submit a report to the APCD which provides a copy of all independent tests performed on sanding materials. The report must also include the name and address of all suppliers of street sanding material along with a description of the location of the supplier's aggregate pit

from which all material was supplied. Files must be maintained for two years.

No later than May 31 of each year, beginning in 1997, the Colorado Department of Transportation must submit a report to the APCD which demonstrates compliance with the provisions for the reduction of street sand applied for the previous sanding season. Files must be maintained for two years.

No later than February 28 and May 31 of each year, beginning in 1997, the City of Steamboat Springs must submit a report to the APCD which demonstrates compliance with the street sweeping requirements for Lincoln Avenue. The reports must contain information for the period December 1—January 31 and February 1—March 31, respectively, as follows: (1) Date of sweeping operation; (2) specific segments of Lincoln Avenue swept; (3) type of equipment used; (4) equipment malfunctions and downtime, if any; (5) conditions of traffic lanes (dry, wet, snow packed, patchy ice, etc.); and (6) general weather conditions at time of sweeping operations. Files must be maintained for two years.

No later than May 31 of each year, beginning in 1997, the City of Steamboat Springs and Routt County must submit to the APCD a report containing information that describes the tracking and enforcement of the local woodburning ordinances and resolution. The annual report must include information on compliance and enforcement activities that have occurred during the previous year.

EPA has reviewed the Colorado Air Quality Control Commission State Implementation Plan-Specific Regulations for Nonattainment Areas, Section VIII., Steamboat Springs PM₁₀ Nonattainment Area, for enforceability and has determined that it meets all of the criteria included in the September 23, 1987 Potter Memorandum.

As discussed in Section II.A.3. above, there are also State-wide regulations that will impact the emissions of PM₁₀ in the Steamboat Springs nonattainment area. These regulations include Colorado Regulation No. 4, which requires all wood stoves sold after July 1, 1991 to meet the emission requirements of EPA's Standards of Performance for New Residential Wood Heaters in 40 CFR 60.532(b), and Colorado Regulation No. 3, which requires construction permits for new or modified stationary sources. EPA previously reviewed these regulations, and determined that they met the enforceability criteria of the September 23, 1987 Potter Memorandum and approved them as part of the SIP (see

the TSD for information on EPA approvals of these regulations).

The State of Colorado has a program that will ensure that the measures contained in the SIP are adequately enforced. The Colorado APCD has the authority to implement and enforce all emission limitations and control measures adopted by the AQCC. In addition, Colorado statute provides that the APCD shall enforce against any "person" who violates the emission control regulations of the AQCC, the requirements of the SIP, or the requirements of any permit. The definition of "person" includes any "municipal corporation, county, city and county or other political subdivision of the State," such as the City of Steamboat Springs and Routt County. Civil penalties of up to \$15,000 per day per violation are provided for in the State statute for any person in violation of these requirements, and criminal penalties are also provided for in the State statute.

Thus, EPA has determined that the control measures contained in the SIP revision for Steamboat Springs are enforceable and that the APCD has adequate enforcement capabilities to ensure compliance with those control measures and the State regulations. The TSD contains further information on the State-wide regulations, enforceability requirements, and a discussion of the personnel and funding intended to support effective implementation of the control measures.

9. Contingency Measures

As provided in section 172(c)(9) of the Act, all moderate nonattainment area SIPs that demonstrate attainment must include contingency measures. See generally 57 FR 13510–13512 and 13543–13544. Contingency measures should consist of other available measures that are not part of the area's control strategy. These measures must take effect without further action by the State or EPA, upon EPA's determination that the area has failed to make RFP or attain the PM₁₀ NAAQS by the applicable statutory deadline.

The Governor of Colorado submitted PM₁₀ contingency measures for the Steamboat Springs area with a September 16, 1997 letter. These measures, as discussed below, require additional street sweeping for Lincoln Avenue and the downtown core area within two months following EPA's determination that the Steamboat Springs moderate PM₁₀ nonattainment area failed to attain the PM₁₀ NAAQS or make reasonable further progress (RFP) in reducing emissions.

The City of Steamboat Springs will expand the sweeping program to include the traffic lanes of Lincoln Avenue from 13th Street west for one mile, and Lincoln Avenue from Old Fish Creek Falls Road to Pine Grove Road. These roadways must be swept within four days of the roadways becoming free and clear of snow and ice following each sanding deployment, as weather and street conditions permit. In addition, the traffic lanes of all streets within the downtown core area of Steamboat Springs, as bounded by 3rd Street, 12th Street, Yampa, and Oak. These roadways must be swept within four days of the roadways becoming free and clear of snow and ice following each sanding deployment, as weather and street conditions permit.

The State believes, and EPA agrees, that these contingency measures are adequate since the control measures implemented in the PM₁₀ SIP provide a safety margin by achieving more emissions reductions than needed to demonstrate attainment of the PM₁₀ NAAQS, as indicated by the State's predicted 24-hour attainment concentration of 115 µg/m³. For a detailed discussion of these contingency measures, see the TSD accompanying this document.

10. Emergency Episode Plan

EPA believes the Steamboat Springs emergency episode plan, as included in the September 16, 1997 submittal, is adequate. The plan describes the actions to be taken when conditions exist that have historically resulted in exceedances of the 24-hour PM₁₀ standard. Voluntary and mandatory activities include suspension of open burning, curtailment of wood/coal burning, and reduction of non-essential motor vehicle operations. For details on the emergency episode plan, please see the TSD.

11. Revisions to the Nonattainment Area Boundary

The Steamboat Springs nonattainment area boundary as codified in the **Federal Register** notice published on December 21, 1993 (see 58 FR 67334) is currently defined as the Steamboat Springs area airshed. See 40 CFR 81.306. This boundary description was intended to be responsive to comments received from the State of Colorado on EPA's September 22, 1992 proposed rulemaking to redesignate the area to nonattainment (see 57 FR 43846). In those comments, the State indicated that on June 20, 1991 the AQCC adopted a map which outlined the Steamboat Springs PM₁₀ nonattainment area. The map identified the nonattainment area

as a portion of Routt County which included the City of Steamboat Springs, as well as certain surrounding areas in Routt County. With its PM₁₀ SIP submittal dated August 12, 1996, the State provided a clearer description of the boundary by providing a legal description of the map outline. The following legal description of the nonattainment area represents the map outline adopted by the AQCC and used by APCD for SIP purposes:

On the East—The Routt National Forest.

On the South—The southern border of sections 19, 10, 21, T4N, R84W of the 6th P.M. and the southern border of sections 23, 24, T4N, R85W of the 6th P.M.

On the West—Beginning at the south western corner of section 23, T4N, R85W of the 6th P.M. North along the western border of sections 23, 14, 11, T4N, R85W. Thence, along the ridge which bisects sections 35, 36, 25, 24, 13, 14, 11, 12, 1, T5N, R85W, and sections 36, 25, 24, T6N, R85W. Thence heading northwest along the ridge which bisects sections 23, 15, 10, 9, 4, T6N, R85W of 6th P.M. Thence, heading northeast along the ridge which bisects sections 33, 34, 35, 36, 25, T7N, R85W and sections 30 and 10 of T7N, R84W. Thence, north along the N 1/2 of the western edge of section 19, to the NW corner of section 18, T7N, R84W.

On the North—The northern boundary of sections 16, 17, 18, T7N, R84W of 6th P.M.

The boundary was determined to be the reasonable Steamboat Springs air shed by considering factors such as local topography, meteorology, emissions sources, land use practices, and tourism. EPA is replacing the boundary description currently in 40 CFR 81.306 with this revised description to more clearly define the nonattainment area.

B. Update to Code of Federal Regulations

EPA is also updating 40 CFR 52.332, Moderate PM₁₀ nonattainment area plans, to reflect the approved status of the Telluride moderate PM₁₀ nonattainment area plan. EPA approved that SIP on October 4, 1996 (61 FR 51784), but neglected to update 40 CFR 52.332 at that time.

III. Final Action

EPA is approving the elements of the PM₁₀ SIP for the Steamboat Springs, Colorado nonattainment area that were due on July 20, 1995 and submitted to EPA by the Colorado Governor with a letter dated September 16, 1997, including among other things, control

measures, technical analyses, quantitative milestones and contingency measures. Additionally, EPA is approving the Steamboat Springs emergency episode plan. EPA is also amending the boundary description for the Steamboat Springs nonattainment area to clarify the original description.

Note that per an October 29, 1997 letter from the State, EPA is not acting on revisions to the Ambient Air Quality Standards for the State of Colorado which were included in the September 16, 1997 SIP submittal for informational purposes only.

EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this **Federal Register** publication, EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective March 2, 1998 unless, by January 30, 1998 adverse or critical comments are received.

If EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will be addressed in a subsequent final rule based on this action serving as a proposed rule. 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 on March 2, 1998.

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

IV. Administrative Requirements

A. Executive Order 12866

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

B. Regulatory Flexibility Act

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

include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, the Administrator certifies that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S. E.P.A.*, 427 U.S. 246, 256–66 (1976); 42 U.S.C. 7410(a)(2).

C. Unfunded Mandates

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

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

D. Submission to Congress and the General Accounting Office

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

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

E. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 2, 1998. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects

40 CFR Part 52

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

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: November 4, 1997.

Jack W. McGraw

Acting Regional Administrator.

40 CFR Parts 52 and 81 are amended as follows:

PART 52—[AMENDED]

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

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

2. Section 52.320 is amended by adding paragraph (c)(76) to read as follows:

§ 52.320 Identification of plan.

* * * * *

(c) * * *
(76) The Governor of Colorado submitted the moderate nonattainment area PM₁₀ State Implementation Plan (SIP) for Steamboat Springs, Colorado with a letter dated September 16, 1997. The submittal was made to satisfy those moderate PM₁₀ nonattainment area SIP requirements due for Steamboat Springs on July 20, 1995, including among other things, control measures, technical analyses, quantitative milestones, and contingency measures. The September 16, 1997 submittal also included the Steamboat Springs emergency episode plan.

(i) Incorporation by reference.
(A) Colorado Air Quality Control Commission Nonattainment Areas, 5 CCR 1001-20, Section VIII., Steamboat Springs PM₁₀ Nonattainment Area, adopted October 17, 1996 and effective on December 30, 1996.

(ii) Additional material.
(A) An October 29, 1997 letter from Margie M. Perkins, APCD, to Richard R. Long, EPA, clarifying that the regulation entitled "Ambient Air Quality Standards for the State of Colorado" was included in the September 16, 1997 Steamboat Springs SIP submittal for informational purposes only.

* * * * *

3. Section 52.329 is amended by revising paragraph (a) to read as follows:

§ 52.329 Rules and regulations.

(a) On January 14, 1993, the Governor of Colorado submitted revisions to the State's nonattainment new source review permitting regulations to bring the State's regulations up to date with the 1990 Amendments to the Clean Air Act. With these revisions, the State's regulations satisfy the part D new source review permitting requirements for the following nonattainment areas: the Canon City, Lamar, Pagosa Springs,

Aspen, Telluride, and Steamboat Springs moderate PM₁₀ nonattainment areas, the Denver/Metro Boulder, Longmont, Colorado Springs, and Fort Collins moderate carbon monoxide nonattainment areas, the Greeley not classified carbon monoxide nonattainment area, and the Denver transitional ozone nonattainment area.

* * * * *

4. Section 52.332 is amended by adding paragraphs (g) and (h) to read as follows:

§ 52.332 Moderate PM₁₀ nonattainment area plans.

* * * * *

(g) On March 17, 1993, December 9, 1993, and April 22, 1996, the Governor of Colorado submitted the moderate PM₁₀ nonattainment area plan for Telluride. The submittals were made to satisfy those moderate PM₁₀ nonattainment area SIP requirements which were due for Telluride on November 15, 1991. The December 9, 1993 submittal was also made to satisfy the PM₁₀ contingency measure requirements which were due for Telluride on November 15, 1993.

(h) On September 16, 1997 the Governor of Colorado submitted the moderate PM₁₀ nonattainment area plan for Steamboat Springs. The submittal was made to satisfy those moderate PM₁₀ nonattainment area SIP requirements which were due for Steamboat Springs on July 20, 1995.

PART 81—[AMENDED]

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

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

2. In § 81.306, the table for Colorado-PM₁₀ Nonattainment Areas is amended under Routt County (part) by revising the entry for "The Steamboat Springs Area Airshed" to read as follows:

§ 81.306 Colorado.

* * * * *

COLORADO—PM-10 NONATTAINMENT AREAS

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * *	* * *	* * *	* * *	* * *
Routt County (part)—Steamboat Springs <i>On the East</i> —The Routt National Forest. <i>On the South</i> —The southern border of sections 19, 10, 21, T4N, R84W of the 6th P.M. and the southern border of sections 23, 24, T4N, R85W of the 6th P.M.	1/20/94	Nonattainment	1/20/94	Moderate.

COLORADO—PM-10 NONATTAINMENT AREAS—Continued

Designated area	Designation		Classification	
	Date	Type	Date	Type
<p><i>On the West</i>—Beginning at the southwestern corner of section 23, T4N, R85W of the 6th P.M. North along the western border of sections 23, 14, 11, T4N, R85W. Thence, along the ridge which bisects sections 35, 36, 25, 24, 13, 14, 11, 12, 1, T5N, R85W, and sections 36, 25, 24, T6N, R85W. Thence heading northwest along the ridge which bisects sections 23, 15, 10, 9, 4, T6N, R85W of 6th P.M. Thence, heading northeast along the ridge which bisects sections 33, 34, 35, 36, 25, T7N, R85W and sections 30 and 10 of T7N, R84W. Thence, north along the N 1/2 of the western edge of section 19, to the NW corner of section 18, T7N, R84W.</p> <p><i>On the North</i>—The northern boundary of sections 16, 17, 18, T7N, R84W of 6th P.M.</p>				
* * * * *				

* * * * *
 [FR Doc. 97-33958 Filed 12-30-97; 8:45 am]
 BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80
[FRL-5942-6]
RIN 2060-AG76

Regulation of Fuels and Fuel Additives: Modifications to Standards and Requirements for Reformulated and Conventional Gasoline

AGENCY: Environmental Protection Agency (EPA).
ACTION: Final rule.

SUMMARY: Through the 1990 amendments to the Clean Air Act (CAA), Congress mandated that EPA promulgate regulations requiring that gasoline sold in certain areas be reformulated to reduce vehicle emissions of toxic and ozone-forming compounds. The EPA published rules for the certification and enforcement of reformulated gasoline (RFG) and provisions for non-reformulated or conventional gasoline on February 16, 1994.

Based on experience gained since the promulgation of these regulations, on July 11, 1997, EPA proposed a variety of changes to the regulations relating to emissions standards, emissions models, compliance related requirements and enforcement provisions. Today's rule finalizes certain of the changes proposed on July 11, 1997. This final rule adopts several revisions relating to use of the Complex Model, which is required for demonstrating compliance with the RFG standards and the anti-dumping standards for conventional gasoline beginning on January 1, 1998.

In addition, today's rule finalizes provisions that modify the affirmative defenses for truck carriers of motor vehicle fuel. Finally, this rule deletes the NO_x per-gallon minimum standards for RFG and increases the number of gasoline quality surveys, as a more cost-effective way to ensure that each area covered by the RFG program receives the full environmental benefits of the NO_x average standards in Phase I and II of the program. EPA will take final action on the remainder of the provisions proposed on July 11, 1997, at a later date.

The emissions benefits achieved from the RFG and conventional gasoline programs will not be reduced as a result of this final rule.

DATES: The effective date of this rule is January 1, 1998.

ADDRESSES: Materials relevant to this FRM are contained in Public Docket No. A-97-03, Waterside Mall (Room M-1500), Environmental Protection Agency, Air Docket Section, 401 M Street, S.W., Washington, D.C. 20460. Materials relevant to the final rule establishing standards for reformulated gasoline and anti-dumping standards for conventional gasoline are contained in Public Dockets—A-92-01 and A-92-12, and are incorporated by reference.

FOR FURTHER INFORMATION CONTACT: Marilyn Bennett, Fuels and Energy Division, U.S. EPA, 401 M Street, S.W. (6406J), Washington, D.C. 20460. Telephone: (202) 564-8989.

SUPPLEMENTARY INFORMATION:
Regulated Entities

Regulated categories and entities affected by this action include:

Category	Examples of regulated entities
Industry	Refiners and importers of motor vehicle fuel. Motor vehicle fuel tank truck carriers.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could be potentially regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria of Part 80, Subparts A, B, D, and E, of title 40 of the Code of Federal Regulations. If you have questions regarding applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

The preamble and regulatory language are also available electronically from the EPA Internet Web site. The official **Federal Register** version is made available on the day of publication on the primary Internet site listed below. The EPA Office of Mobile Sources also publishes these notices on the secondary Web site listed below.

Internet (Web)
<http://www.epa.gov/docs/fedrgstr/EPA-AIR/>
 (either select desired date or use Search feature)
<http://www.epa.gov/OMSWWW/>
 (look in What's New or under the specific rulemaking topic)

EPA believes this is sufficient lead time for regulated parties to implement the changes adopted here, as these noncontroversial changes are designed to increase the flexibility provided to parties under the regulations and to provide provisions necessary for demonstrating compliance with the

standards under the Complex Model. Although this final rule includes some new requirements, these requirements are reasonable and necessary to provide the increased flexibility also included in this rule. EPA notes that the general requirement in 5 U.S.C. 553(d) of the Administrative Procedure Act (APA), concerning publication or service of a substantive rule not less than 30 days prior to its effective date, does not apply here. CAA section 307(d)(1) provides that section 553 of the APA does not apply to promulgation or revision of any regulation pertaining to fuels or fuel

- § 80.45(c)(1)(iv)(B)
- § 80.45(c)(1)(iv)(D)(12)
- § 80.45(c)(1)(iv)(D)(13)
- § 80.45(d)(1)(iv)(B)
- § 80.45(f)(1)(ii)

II. Elimination of NO_x Per-Gallon Minimum Standards (§ 80.41(d)¹ and (f); § 80.68(b)(1)(iv))

In the final regulations establishing the RFG program (59 FR 7716 (February 16, 1994)) the Agency established both average standards for NO_x reductions and associated minimum per-gallon standards² for such reductions (separate standards were applied to VOC-controlled summertime gasoline and non-VOC-controlled winter gasoline). The standards set up for both the Simple Model and Phase I Complex Model (applicable in 1995 through 1999) were designed to hold NO_x emissions at baseline levels, while the Phase II standards (applicable beginning in 2000) added a more stringent standard for summertime NO_x reductions.

The averaging minimum standard in Phase II requires that each gallon (batch) of RFG in the high ozone season has at least a 3% reduction from the baseline; the corresponding Phase I standard holds any increase over baseline for a batch to 2.5%. Less stringent averaging

¹ In addition to deleting the NO_x per-gallon minimum standards for averaged RFG in the chart in § 80.41(d), this rule revises the chart to replace “≤32.6” for VOC-Control Region 1 per-gallon minimum reduction with “≥32.6”. This corrects a typographical error.

² These two types of standards, both applying to refineries that elect to comply by averaging, should not be confused with the per-gallon standard, which applies to refineries that elect not to average their compliance over a year, but rather to make gasoline that all (each gallon) meets a fixed standard. The latter approach to compliance will likely not be selected by most refineries for practical reasons having to do with the inherent variability in NO_x quality of gasoline from batch to batch.

additives under section 211 of the CAA. Even if section 553(d) of the APA were to apply, there is good cause under section 553(d)(3) to provide less than 30 days notice, for the reasons noted above.

The remainder of this preamble, which explains the basis and purposes of the regulatory changes finalized today, is organized into the following sections:

- I. Corrections to Complex Model (§ 80.45)
- II. NO_x Per-Gallon Minimum Standards (§ 80.41)(d) and (f); § 80.68(b)(1)(iv))
- III. Truck Carrier Defenses (§ 80.79(c)(3); § 80.2(ss); § 80.28(g)(1)(iii) and § 80.30(g)(1)(i))

- Corrects several small typographical errors in both the Phase I and Phase II equations.
- Corrects typographical error by changing “(E300 × 72 percent)” to “(E300—72 percent).”
- Corrects typographical error by changing Phase I coefficients to Phase II coefficients, i.e. change “80.32 + (0.390 × ARO)” to “79.75 + (0.385 × ARO).”
- Corrects typographical errors to the equation.
- Corrects the entry for aromatics “acceptable range” to read “0.0—55.0 volume percent.” This corrects a typographical error in the July 20, 1994 Direct Final Rule (59 FR 36961). The correct entry was included in the RFG final rule published on February 16, 1994 (59 FR 7826).

minimum standards apply outside of the high ozone season in Phase II. These minimum standards were not put in place to provide any incremental environmental benefit beyond that provided by the average standard, but rather to ensure an even distribution of program benefits from area to area and/or through time. An additional but secondary objective of the averaging minimum standard was to augment the detectability of non-RFG gasoline being illegally sold in RFG areas.

The Proposal

In the July 11, 1997 NPRM EPA proposed to eliminate the minimum averaging standards for NO_x in both phases of the program and to use an augmented RFG survey program to guard against any possible undesirable environmental effects of that action. The reasons for wanting to eliminate these standards are discussed at some length in the NPRM, but they center on avoiding the imposition of substantial additional RFG production costs on the industry without providing additional environmental benefits over and above those provided by the relevant average standard, where the purposes of the per-gallon minimum can also be served by the RFG surveys.

At the time of the 1994 final rule, data did not exist to adequately assess the variability, within refineries’ output, of NO_x quality or the factors that affect it across all of the batches of gasoline produced in a year. The final rule did not take into account extra costs resulting from compliance with the minimum standards. Such costs, which

- IV. Closely Integrated Facilities (§ 80.91(e))
- V. Standards Applicable to Refiners and Importers of Conventional Gasoline (§ 80.101)
- VI. Environmental and Economic Impacts
- VII. Public Participation
- VIII. Regulatory Flexibility Act
- IX. Submission to Congress and the General Accounting Office
- X. Executive Order 12866
- XI. Paperwork Reduction Act
- XII. Unfunded Mandates Act
- XIII. Statutory Authority

I. Corrections to Complex Model (§ 80.45)

would likely be sharply higher in Phase II, could be expected to elevate the price of RFG relative to that of conventional gasoline and might thus endanger public acceptance of Phase II RFG.

The NPRM discussed an expanded RFG survey program, along with the fungibility of the gasoline distribution system, as providing adequate protection against the kind of geographical and/or temporal unevenness of distribution of program benefits that the NO_x averaging minimum standards were intended to guard against. The proposal included an increase of 20 in the initial number of RFG surveys per year before adjustments have been made for the gallonage of opt-in areas and that of areas that may have failed surveys in prior years. The effect of these adjustments, given the current set of opt-in areas and recent survey failures for oxygen, would be to almost double the initial 20-survey increase when computing the number of week-long surveys to be conducted in the course of a year. The resulting increase brings the total number of surveys in a year to more than 150. The increase in survey coverage was intended to permit more careful scrutiny of gasoline quality across the geographical areas covered by the program (especially the opt-in areas) and to strengthen the ability of the surveys to deter environmentally harmful uses of the averaging flexibility, especially in areas supplied by a limited group of refineries.

Comments on the Proposal

Industry commenters were almost unanimous in supporting the proposed elimination of the NO_x minimums, citing reasons that were mostly similar to those given in the proposal. Most frequently, the argument was that the minimums, especially in Phase II, would raise the costs of making RFG above the level calculated in the 1994 Regulatory Impact Assessment and do so without securing any additional environmental benefit. The comments tended to confirm the conclusions EPA analysts had reached in the course of detailed interviews with a small number of refiners³, namely that refiners would comply with the minimum standards mostly by using a set of strategies that are not capital-intensive and do not result in NO_x reductions in excess of those required by the average standard.⁴

The only comments received from a non-industry source came from the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO). These comments generally agree with the appropriateness of eliminating the NO_x minimums, primarily as a way of strengthening the RFG program by improving its cost-effectiveness. They express the belief, though, that a strengthened survey program is needed to substitute for protections that would have been provided by the minimum standards for NO_x. They suggest some specific ways to strengthen the surveys as discussed below.

Almost all of the comments received recognized the importance of the RFG survey program in guarding against uneven distribution of NO_x benefits in the absence of the minimum standards. All of the industry comments that addressed the topic cited the surveys as the mechanism for providing the needed insurance against uneven distribution. Commenters disagreed, though, on the question of whether the currently prescribed survey program is adequate to serve this purpose in the absence of

³ These interviews and the business confidential information disclosed to EPA in them were discussed at some length in the July 11, 1997 NPRM. See 62 FR 37343.

⁴ Some general examples of the approaches identified in these interviews as likely to be used to bring sub-minimum batches above the standard include: finding another use for the poor NO_x quality gasoline or its components (shifting it to conventional gasoline, if that can be done without violating anti-dumping standards, or shifting it to other products) and buying conforming RFG on the spot market to take its place; reblending the poor NO_x quality batches with clean blendstocks purchased from the outside to make them conform to the minimum; or simply reducing RFG production.

the NO_x minimum standards; the American Petroleum Institute (API) and one other commenter supported the proposed increase in the number of surveys, while the National Petroleum Refiners Association and one other industry commenter questioned the need for the additional surveys, especially in light of the increased sampling involved in each survey as a result of the change to the complex model. Of the latter comments, one suggested that if the additional surveys were imposed, they should be split evenly between summer and winter seasons. API's comments took note of the fact that the RFG final rule did not prescribe summertime NO_x surveys for Phase II of the program and supported the addition of such surveys, provided that the NO_x minimum standards are eliminated.

STAPPA/ALAPCO's comments on the survey program made a number of suggestions aimed at strengthening the surveys' ability to take over the functions that would have been performed by the NO_x minimum standards. They recommend weighted representation of octane grades⁵, concentration of additional surveys in the high ozone season, and a greater emphasis on smaller, isolated RFG markets that, on the simple basis of gasoline volume, would tend to be neglected. They would like for EPA to work closely with stakeholders on survey questions, and support imposition of a severe penalty (in the form of a ratcheted standard) where NO_x surveys are failed.

EPA believes that, without the NO_x minimum standards, the survey program would be key to ensuring that uneven distribution of gasoline NO_x quality did not result in air quality problems. Since the most important consideration in regulating NO_x is its contribution to the formation of ground-level ozone, the Agency must be sure that survey coverage during the high ozone season is sufficiently intense to both deter misuse of averaging and to detect it if it should occur. To this end, the Agency believes that the increase in number of surveys proposed in the NPRM is necessary to ensure adequate coverage of opt-in areas. The suggestion of one commenter that the additional surveys should be split between summer and winter would, if implemented, defeat the purpose behind the increase, even though it would reduce the increase in survey costs

⁵ Careful stratification of the sample for each survey to accurately represent octane grades as well as station gasoline sales volume levels within each RFG area is already a feature of the survey design.

brought about by both the additional surveys and the increase in the size of each survey needed to meet precision requirements for NO_x.⁶ EPA agrees with STAPPA/ALAPCO regarding the greater attention that must be paid to the distribution system when allocating surveys. Isolated areas, while possibly not large in population, are more vulnerable to variability in the NO_x quality of gasoline shipments and should receive somewhat disproportionate coverage by the survey program. The reverse is also true to some extent—because of the severity and scope of the ratchet provisions, areas that share in a large fungible supply of gasoline are protected with some redundancy, a fact that could be used to provide isolated areas with greater protection when allocating surveys. To summarize regarding the surveys, in order to make elimination of the minimum standards appropriate, EPA believes that the survey program must be augmented so it will adequately perform the function previously performed by the NO_x per-gallon minimums.

The RFG final rule did not provide for summertime NO_x surveys in Phase II of the program on grounds that the per-gallon minimum standards (established under section 211(c) authority) were more than adequate to satisfy the requirements of section 211(k) of the CAA (see 57 FR 7774). With the minimum per-gallon standard for Phase II summertime eliminated, the surveys become necessary, as pointed out in API's comments, and will be required as part of today's action. EPA sees a summertime NO_x survey program in Phase II as necessary to replace the protections that were provided by the NO_x minimum standards.

Summary and conclusions regarding NO_x minimum standards

After a careful review of available data on the NO_x quality of gasolines produced under the simple model and study of the variability of the major causes of high NO_x emissions (sulfur

⁶ The increase in the sampling requirements of each survey (and survey series), while substantial in magnitude, is driven by the heterogeneity of the most important parameters in the NO_x emissions equation—olefins and, especially, sulfur. This increase, necessary to maintain the precision of the mean estimates of each 7-day "snapshot" of gasoline quality, nevertheless does not contribute at all to the number of such "snapshots" taken of gasoline NO_x quality during the crucial summer months. The adequacy of the survey program to perform the function originally intended for the NO_x minimum depends entirely on the Agency's ability to spread those individual survey "snapshots" over both the geographical areas covered by the program and the months of the high ozone season.

and olefins), EPA is convinced that the per-gallon minimums for NO_x would impose severe limitations on refineries' ability to make flexible use of averaging in production of complex model gasoline. In consequence, refiners' costs for compliance would exceed the cost of meeting the average standard. Rather than respond to this situation with capital investments that might actually further improve air quality, EPA believes that refiners are more likely to respond with costly and environmentally unproductive strategies for dealing with high NO_x batches. The added cost for making RFG would be an unnecessary burden. EPA is thus acting today to eliminate the averaging per-gallon minimum standards for NO_x reduction in both Phase I and Phase II of the RFG program.

As indicated in the NPRM, EPA believes that the geographical and temporal distribution objective that was the chief reason for the NO_x minimum standards can be achieved by the RFG survey program at lower cost to refiners and the public and without sacrificing air quality. Accordingly, in today's action EPA is increasing the number of surveys in the initial schedule by 20, as proposed, and requiring that week-long NO_x surveys be conducted in the summertime in Phase II, as was not previously required. EPA believes that the intensified survey coverage, if carefully allocated, coupled with the wide-ranging and costly consequences of NO_x survey failures, will motivate refiners to avoid actions that could compromise air quality in areas covered by the RFG program.

This final rule also makes minor changes to other sections of the regulations to delete references to the NO_x per gallon minimum standards and reflect the additional survey requirements. These changes affect the following sections: § 80.41(m); § 80.67(e)(4); § 80.68(c)(3); §§ 80.68(c)(13)(iv) (H) and (L); § 80.77(g)(2)(iv)(B); § 80.78(a)(1)(v)(C); and § 80.79(c)(1). In addition, this final rule modifies § 80.41(m) to clearly indicate that its provisions apply to failure of either a NO_x survey or failure of a NO_x survey series. This change conforms § 80.41(m) to other provisions of the regulations referring to survey activity involving NO_x, such as: § 80.68(b)(4)(ii) describing the consequences of failing to carry out an approved survey program; § 80.68(c)(4)(ii) defining a NO_x survey series; and § 80.68(c)(10) describing the conditions giving rise to failure of a NO_x survey or survey series.

III. Truck Carrier Defenses (§ 80.79(c)(3); § 80.2(ss); § 80.28(g)(1)(iii) and § 80.30(g)(1)(i))

Section 80.79(b) specifies the defenses for violations of the prohibited activities under the reformulated gasoline program. Section 80.79(b)(1) states that a party, who is presumed liable for a violation, can avoid liability if it can show: (1) that it did not cause the violation, (2) the existence of appropriate product transfer documents for the gasoline in question, and (3) that it conducted an appropriate quality assurance sampling and testing program.

These defenses apply to all regulated parties, including carriers. In addition, under § 80.79(b)(1)(iii)(B), a carrier may rely on a properly conducted quality assurance sampling and testing program conducted by another party. Carrier is defined at 40 CFR § 80.2(t) as a party who stores or transports gasoline without taking title to the gasoline.

For one category of carriers—truck carriers—sampling and testing may not always be the most appropriate form of quality assurance. The purpose of a quality assurance requirement is, first and foremost, to institutionalize preventive measures as the best way to detect and avoid violations. The most typical role of truck carriers in the gasoline distribution system is to transport gasoline from a terminal to a retail outlet or wholesale consumer. Most violations caused by truck carriers result when an inappropriate type of gasoline is delivered. For example, a truck carrier would have caused a violation if gasoline designated as conventional is delivered by the carrier to a retail outlet located in a reformulated gasoline covered area. The most appropriate quality assurance for a truck carrier to implement to avoid this type of violation would be driver training on the proper types of gasoline to deliver, and management oversight of product transfer documents to ensure the proper type of gasoline has been delivered.

It is EPA's understanding that truck carriers almost always load gasoline into empty truck compartments. To the extent this is true, it would be very unlikely the carrier could be responsible if the gasoline loaded into the truck failed to meet a regulated standard, such as benzene or oxygen content. As a result, sampling and testing of gasoline obtained from a truck compartment would not be particularly effective for detecting violations caused by the carrier. In addition, EPA has received comments from industry regarding the practicability of drawing samples from

truck compartments during the loading process, or subsequent to loading. These comments conclude that the technical aspects of collecting gasoline samples from truck compartments make such sampling difficult, but not impossible. For example, the sampler normally would be required to climb onto the top of the truck trailer in order to gain access to the compartment lid, which could be difficult particularly in adverse weather conditions.

As a result, EPA proposed to modify the defense elements under § 80.79 as they pertain to truck carriers to state that, instead of sampling and testing, an oversight program by a truck carrier may consist of a program to monitor compliance with the requirements related to gasoline transport or storage, such as a program to properly train truck drivers and review product transfer documents to ensure that the proper type of gasoline is delivered. In addition, EPA proposed to add a definition of tank truck carrier to § 80.2.

EPA did not propose a similar change to the reformulated gasoline defense provisions for carriers other than truck carriers, such as pipelines, barge operators, or for-hire terminals. EPA believes carriers in these other categories are better able to collect gasoline samples, and samples of the gasoline being transported or stored by these categories are collected for commercial reasons on a routine basis in the normal course of business. Nevertheless, EPA requested comments regarding whether the changes proposed for truck carriers should also be applied to other types of carriers.

EPA also proposed similar changes to the defense provisions for truck carriers in the case of violations of the volatility requirements at § 80.28(g)(1), and violations of the diesel sulfur requirements at § 80.30(g)(1). The rationale for changing the volatility and diesel sulfur defense provisions for truck carriers is the same as is discussed above for reformulated gasoline.

EPA received no comments on the proposed modifications to the defense elements for truck carriers at §§ 80.28, 80.30, and 80.79, or the definition of tank truck carrier at § 80.2, and these provisions are being finalized as proposed.

IV. Closely Integrated Facilities (§ 80.91(e))

Section 80.91(e)(1)(i) of the reformulated gasoline regulations provides for determination of a single set of baseline fuel parameters, upon petition and approval, for two or more facilities that are geographically proximate to each other, yet not within

a single refinery gate, and whose 1990 operations were significantly interconnected in 1990. While the existing provision permits EPA to set a single baseline that would then apply for each of several refineries, it does not permit these "closely integrated facilities" to be grouped together for all compliance purposes (including registration, record keeping and reporting). Rather, the provision allows a single baseline to be set for each facility it represents, and sections 80.41(h) and 80.101(h) require that each refinery comply with this baseline separately, except where authorized to group refineries for compliance purposes.⁷ Similarly, section 80.91(e)(1)(ii) permits EPA to set a single baseline for a blending facility which received 75 percent of its 1990 blendstock from a single refinery, or from one or more refineries owned by the same refiner and that are part of an aggregate baseline.

EPA proposed to amend the RFG and anti-dumping regulations by adding section 80.91(e)(1)(iii), which would require facilities that have been determined to be closely integrated and granted a single baseline by EPA to demonstrate compliance with all RFG and anti-dumping requirements as if they were one facility. Furthermore, the closely integrated facilities would have a single registration and would file a single set of compliance reports. EPA believes that this change will reduce costs (including paperwork costs) to industry without any significant negative environmental impact. EPA received no comments on this section and it is being promulgated as proposed.

For facilities that have established baselines, the single baseline assigned to the closely integrated facilities will be a volume-weighted average of the individual facility baselines. The refiner should generate the appropriate baseline data and calculations and submit this information to EPA for approval. EPA will notify the refiner when the new closely integrated facilities baseline is approved.

V. Standards Applicable to Refiners and Importers of Conventional Gasoline (§ 80.101)

A. Application of Compliance Baselines Under the Complex Model (§ 80.101(b)(3)(i))

Clean Air Act section 211(k)(8), the "anti-dumping" section, requires EPA to promulgate regulations that maintain

the quality of gasoline produced by each refinery, based on each refinery's 1990 gasoline quality, or "baseline." The intent of this section is to prevent refiners from shifting "dirty" blendstocks from RFG production to conventional gasoline production. This section thereby prevents the degradation in overall quality of the nation's conventional gasoline as compared to gasoline quality in 1990.

The anti-dumping regulations, at Subpart E, implement this Clean Air Act section through conventional gasoline standards that are set in relation to each refinery's 1990 baseline gasoline quality. However, in the case of a refinery that produces a volume of gasoline during an averaging period that exceeds the refinery's 1990, or baseline, volume, § 80.101 requires that the excess volume meet anti-dumping standards that are set in relation to a baseline that reflects average U.S. gasoline quality in 1990, called the "statutory" baseline. Thus, under § 80.101(f) a refiner who operates a refinery with such excess gasoline volume during an averaging period is required to calculate a "compliance baseline" that adjusts the 1990 refinery baseline to reflect the excess volume over 1990 levels.

The rationale for using compliance baselines is the same for both simple and complex model standards. However, under § 80.101(b) compliance baselines currently apply only to simple model standards. EPA believes the absence of a requirement to use compliance baselines for complex model standards was an error of omission when § 80.101 was promulgated, and as a result proposed requiring use of compliance baselines under the complex model. No comments were received on this proposal, and it is being finalized as proposed.

B. Elimination of the Baseline Adjustment by Refiners who also are Importers (§ 80.101(f)(3)) and Inclusion of a Prohibition to Prevent Import Gaming (§ 80.101(j))

Under the anti-dumping program all domestic refineries have individual baselines, while almost all imported gasoline currently is subject to the statutory baseline. However, the regulations include a provision, at § 80.101(f)(3), that requires an importer who also operates one or more refineries to use a baseline for imported gasoline that is the average of the individual refinery baselines. This requirement is intended to address a particular "gaming" concern: that a refiner who operates a refinery with a stringent

refinery baseline (a baseline cleaner than the statutory baseline), would produce conventional gasoline that would be exported and thereby would be excluded from the refinery's compliance calculations, but that then would be imported under the less stringent statutory baseline.

EPA now believes the requirement at § 80.101(f)(3) is unnecessary. There may be little risk of the form of gaming described above, in part due to the cost of transporting large volumes of gasoline out of the United States in order to be exported, and then transporting the same gasoline back into the United States in order to be imported. In addition, the current requirement provides a competitive advantage to refiner/importers who operate refineries with baselines that are dirtier than the statutory baseline. Further, EPA believes the gaming concern can be appropriately addressed by simply prohibiting parties from exporting and then importing gasoline for the purpose of obtaining a more favorable baseline for the gasoline.

For these reasons EPA proposed to eliminate the requirement for refiner/importers to calculate a special baseline for imported gasoline, and instead to prohibit the form of gaming described above. EPA received favorable comments on this proposal from three refiners and the change is being finalized as proposed.

C. Compliance Calculations for Oxygenates and Blendstocks (§ 80.101(g)(3))

The current regulations at § 80.101(g)(3) describe a method for calculating the emissions performance of a blendstock based on the difference in emissions performance of a baseline gasoline and of a hypothetical blend of baseline gasoline and the blendstock. However, use of this method is limited to refineries that include only blendstocks in the refinery compliance calculations at a single facility, and it may not be used for a refinery that includes both blendstocks and finished gasoline in the refinery compliance calculations. Similarly, the current regulations do not include a clear procedure for calculating the emissions performance for oxygenate that is included in a refinery's compliance calculations under § 80.101(d)(4). For further discussion see the preamble to the NPRM at 62 FR 37363-37365 (July 11, 1997).

As a result, EPA proposed to revise § 80.101(g)(3)⁸ to be appropriate for

⁸The July 11, 1997 NPRM proposed to reorganize § 80.101(g) and move the method for calculating the

⁷ Combined reports may be submitted for compliance with RFG baseline-related parameters (sulfur, olefin, and T90) and anti-dumping. Other reports must be filed by each facility.

calculating the exhaust toxics and NO_x emissions performance of all blendstocks, including oxygenates blended downstream of the refinery. The only comment on this proposal, submitted by a refinery association and an individual refiner, was that two terms were switched in one of the proposed equations. EPA agrees with this comment. As a result, with the exception of the revised equation the provision is being finalized as proposed.

Under this revised methodology, a refiner first determines the volume and properties of each batch of blendstock used. This determination requires the refiner to sample and test each blendstock batch, or in the case of oxygenates the normal oxygenate properties are used. The refiner then determines the blending rate, or volume fraction (F), of the blendstock.

Next, the refiner calculates the properties of a hypothetical gasoline that reflects the properties that result if gasoline having the refinery's "summer" or "winter" baseline values, as appropriate, are blended with the blendstock at the blending rate (F) previously determined. This calculation, which is a volume-weighted average of the blendstock properties and the gasoline properties,⁹ is illustrated by the following example.

Assume a refiner blends 25,000 gallons of reformate into 300,000 gallons of gasoline at a terminal. Assume the terminal-refinery is subject to the statutory baseline, that the reformate has a benzene content of 2.10 vol%, and that all of the gasoline produced using the reformate is classified as "summer." Under § 80.45(b)(2) the "summer" benzene statutory baseline is 1.53 vol%. The benzene content for the hypothetical gasoline blend (B_h) is calculated as 1.57 vol% using the following equation:

$$B_h = \frac{(1.53 \times 300,000) + (2.10 \times 25,000)}{300,000 + 25,000}$$

In the case of the calculated values for sulfur and oxygen, the specific gravities of the blendstock and gasoline are included in the calculation. The measured specific gravity of the

emissions performance of blendstocks from § 80.101(g)(3) to § 80.101(g)(5). Today's final rule modifies the current § 80.101(g)(3), but does not take final action on the reorganization of § 80.101(g) proposed in the NPRM. EPA intends to address the proposed reorganization of § 80.101(g) at the time it takes final action on the remaining provisions proposed in the NPRM.

⁹Although certain properties, such as distillation and RVP, do not blend in an exact linear manner, EPA is promulgating this approach as a reasonable approximation since there is no other method to more accurately attribute the emissions effect of such downstream blending operations.

blendstock is used, however the regulations specify specific gravity values that must be used for "summer" and "winter" gasolines.

The exhaust toxics and NO_x emissions performance of the hypothetical gasoline (HEP), and of a gasoline having the refinery's baseline values (BEP), are determined using the complex model. Finally, the refiner calculates the exhaust toxics and NO_x emissions performance of the blendstock portion the hypothetical gasoline blend, called the "equivalent emissions performance" or EEP. The exhaust toxics and NO_x equivalent emissions performance values for the blendstock, together with the applicable blendstock volume, is included in the refinery's compliance calculations as a separate batch.

Consider again the example of the terminal-refiner using reformate, and assume the hypothetical gasoline blend, when evaluated under the summer complex model, had a NO_x emissions performance of 685.6 mg/mi. Using the summer baseline emissions performance for NO_x under § 80.45(b)(3) (660.0 mg/mi) and the blendstock volume fraction previously calculated (0.077), the blendstock's NO_x equivalent emissions performance (EEP) is calculated to be 992.47 mg/mi using the following equation:

$$EEP = \frac{685.6 - (660.0 * (1 - 0.077))}{0.077}$$

The refiner in this example would include in the refinery's annual NO_x emissions performance compliance calculations a batch with a volume of 25,000 gallons (the blendstock volume), and a NO_x emissions performance of 992.47 mg/mi.

It should be noted that certain blendstocks, including oxygenates, when blended with gasoline may reduce exhaust toxics or NO_x emissions performance under the complex model. In such cases, the calculated equivalent emissions performance for the given blending fraction may yield a negative result under this methodology. Consider for example a hypothetical refiner with summer baseline fuel properties that provide a baseline for exhaust toxics (BEP) of 39.61 mg/mi under the complex model. If this refiner blends 6,000 gallons of ethanol into 125,000 gallons of gasoline over one summer month, resulting in a blendstock volume fraction of 0.046, the hypothetical fuel properties of that blend then result in exhaust toxics emissions performance (HEP) of 37.13 mg/mi. Using the equation provided in the regulations, the calculated equivalent emissions

performance for exhaust toxics for this oxygenate blendstock is -14.3 mg/mi. Thus, this refiner would include a batch of 6,000 gallons at an exhaust toxics emissions level of -14.3 mg/mi in its compliance calculations.

EPA also is requiring refiners to keep certain records for blendstocks included in refinery compliance calculations using the calculation procedures described above. Section 80.104 currently requires refiners to keep records of the test results for blendstock batches included in refinery compliance calculations. However, there is no current record keeping requirement for documents that support the blendstock volume fraction (F). As a result, EPA is including a new requirement in § 80.104 that refiners who include blendstock batches in refinery compliance calculations must keep records that reflect the volume of blendstocks blended and the volume of gasoline with which the blendstock is blended, the two terms used to calculate the blendstock volume fraction. This record keeping requirement was not specifically included in the proposal, but EPA believes it is a logical outgrowth of the proposal for calculating the exhaust toxics and NO_x emissions of blendstocks. In the absence of this record keeping requirement EPA could be unable to verify a refiner has used the proper blendstock volume fraction to calculate the exhaust toxics and NO_x emissions of blendstocks. Moreover, EPA believes this requirement normally would be met using documents that already are created and kept for commercial business purposes, i.e., documents that show movements of blendstock and gasoline to the blending tank and volume measurements of the blending tank.

D. Conventional Gasoline Complex Model Valid Range Limit as Standards (§ 80.101(b)(3)) and Emissions Performance Outside the Model Limits (§ 80.101(g)(8))

Both the Simple and the Complex Models include restrictions on the range of parameter values that may be used with these models. See §§ 80.42(c) and 80.45(f) for the Simple Model limits and the Complex Model limits, respectively. These parameter range limits are included because the Simple and Complex models have not been shown to accurately predict emissions when parameter values outside the range limits are used. For this reason, §§ 80.42(c) and 80.45(f) state that the models may not be used for fuels with parameter values that are outside the valid range limits.

The Complex Model standards apply to both reformulated and conventional gasoline. However, the Complex Model specifies different valid range limits for reformulated versus conventional gasoline. Compare § 80.45(f)(1)(i) (Complex Model range limits for reformulated gasoline) with § 80.45(f)(1)(ii) (Complex Model range limits for conventional gasoline).

EPA always has considered the valid range limits to constitute standards that apply to reformulated and conventional gasoline. Gasoline subject to simple or Complex Model standards must be evaluated for compliance with these standards. Where gasoline has property values outside the valid range limits, it cannot be evaluated and, therefore, it is unlawful to produce and sell such gasoline.

For this reason EPA proposed the parameter values of conventional gasoline would have to be within the applicable Complex Model valid range limits when the gasoline is certified by the refiner or importer.¹⁰

Several refiners commented that this would be unduly restrictive, particularly for a refinery with baseline properties close to or outside the valid range limits. A refinery's baseline properties reflect the average for each property for all gasoline produced at that refinery during 1990. However, a refinery's gasoline quality is not constant for any particular property, but varies across grades and during the year because of differences in season, crude oil, refinery turnarounds, and so on. As a result, if a refinery's 1990 baseline for a property is close to the valid range limit, it is reasonable to conclude that some significant percentage of the refinery's gasoline batches in 1990 had values for the property that were outside the valid range limit.

EPA has evaluated the proposed use of the valid range limits for conventional gasoline in light of the anti-dumping requirements for conventional gasoline under section 211(k)(8) of the Clean Air Act. The intent of the anti-dumping program is to maintain each refinery's gasoline quality at 1990 levels, in order to ensure there is no degradation in the overall quality of the nation's conventional gasoline. From this perspective each refiner

¹⁰ Under § 80.91(f)(2), refiners with baseline parameter values outside the valid range limits are allowed to use in the complex model parameter values that are somewhat outside the normal range limits for these parameters.

Today's final rule addresses the issue of complex model valid range limits for conventional gasoline, but does not address the valid range limits for RFG. EPA intends to address the proposal regarding valid range limits for RFG when it takes final action on the remaining provisions proposed in the NPRM.

should be allowed to continue producing the same types of conventional gasoline that were produced in 1990. However, the proposed imposition of valid range limits as per-gallon standards would force certain refiners to change their conventional gasoline quality relative to 1990 gasoline quality, particularly refiners with baseline parameter values close to the valid range limits.

As a result, one premise of the anti-dumping program (that refiners should be allowed to produce conventional gasoline with parameter values that are the same as for gasoline produced in 1990) conflicts with the limited ability of the Complex Model to reliably predict emissions when parameter values are outside the model's range limits.

EPA has decided to resolve this conflict by allowing refiners to produce individual batches of conventional gasoline with parameter values that are outside the Complex Model's valid range limits. EPA also is adopting additional requirements intended to minimize the volume of gasoline in this category and the risk of adverse environmental effects.

Thus, today's rule allows refiners to produce conventional gasoline without any per-batch restriction on parameter values, regardless of the complex model's valid range limits. This gives refiners and importers the same flexibility to produce particular batches of conventional gasoline having widely disparate parameter values as they had in 1990.

To mitigate the potential to cause harm to the environment from removing this per-gallon batch restriction, EPA is adding two additional requirements for conventional gasoline compliance. First, a limit on annual average parameter values is included. This standard, which applies for each parameter, is equal to the conventional gasoline complex model valid range limit or the refinery's baseline values, whichever is less stringent.¹¹ EPA believes this standard is appropriate because it is consistent with the refinery's 1990 baseline value for the parameter, which

¹¹ For example, if a refinery's sulfur baseline is 1,050 ppm the annual average sulfur content of the refinery's conventional gasoline cannot exceed 1,050 ppm, which is less stringent than the conventional gasoline valid range limit for sulfur of 1,000 ppm. However, if a refinery's sulfur baseline is 900 ppm the annual average limit would be the less stringent valid range limit of 1,000 ppm. Similarly, if a refinery's baseline for E200 is 28% the annual average E200 of the refinery's conventional gasoline cannot be less than 28%, which is less stringent than the conventional gasoline lower valid range limit for E200 of 30%. This is in addition to the annual average requirement for exhaust toxics and NO_x.

reflects the refinery's 1990 annual average for the parameter.

Second, where a refiner has parameter test results for conventional gasoline that are outside the current valid range limits, the regulations specify whether the exhaust toxics and NO_x emissions performance are calculated using the tested parameter value, or the valid range limit value. For each parameter, and for each emissions performance category, EPA has specified that the value which is most protective of the environment must be used.

For each parameter EPA evaluated whether higher exhaust toxics or NO_x emissions result if the valid range limit is used, or if a value outside the valid range limit is used. In each case the value that gives the higher emissions must be used, as specified in a table included in the regulations at § 80.101(g)(8).¹²

EPA believes it is appropriate to use the Complex Model to predict emissions in this manner, even though in certain cases parameter values outside the valid range limits are used. Based on engineering judgment it is likely the direction of a parameter's effect on emissions at the valid range limit continues outside the valid range limit, even though the magnitude of the effect becomes more speculative as the value moves away from the range limit.

Thus, for example, the Complex Model reports that both exhaust toxics and NO_x emissions increase as sulfur values increase from 950 ppm to 1,000 ppm, based on vehicle emissions test data. In addition, the Complex Model reports that exhaust toxics and NO_x emissions continue to increase as sulfur values increase above the 1,000 ppm valid range limit. These outside-the-range-limit-results reflect only an assumption that emissions effects outside the range limit are similar to emissions results inside the range limit, and do not reflect vehicle emissions test data for fuels having higher sulfur values. However, engineering judgment supports the likelihood that actual exhaust toxics and NO_x emissions continue to increase with sulfur values higher than 1,000 ppm.

The relative lack of confidence in the magnitude of the effect on emissions of

¹² Thus, for example, if a refiner has a tested sulfur value in excess of the valid range limit of 1,000 ppm, the exhaust toxics and NO_x emissions performance must be calculated under the Complex Model using the tested sulfur value, because emissions values increase as sulfur values increase above 1,000 ppm. In contrast, if a refiner has a tested RVP value of less than the 6.4 psi lower valid range limit, the exhaust toxics and NO_x emissions performance must be calculated using the 6.4 psi valid range limit, because emissions values decrease as RVP values decrease below 6.4 psi.

parameter values outside the valid range limits justifies use of these environmentally conservative requirements, i.e., required use of the parameter value (valid range limit or tested) that results in the greater emissions. A refiner can avoid this "worst case" requirement by producing conventional gasoline batches with parameter values within the valid range limits. In addition, the requirement that parameter limits must be met on an annual average basis, discussed above, will minimize the number of conventional gasoline batches that have parameter values outside the valid range limits, and the magnitude of the excursions for batches that do.

The current regulations include provisions for extending the conventional gasoline valid range limits for aromatics, olefins or benzene for certain refiners, at § 90.91(f)(2)(ii). In addition, EPA proposed to modify § 80.91(f)(2)(ii) to allow extended valid range limits for sulfur for certain refiners. These provisions apply to refiners with baseline values for parameter values that are outside the valid range limits, and allow such refiners to use the Complex Model to calculate the emissions of gasolines having properties outside the valid range limits.

However, in light of the changes being promulgated today that allow parties to calculate exhaust toxics and NO_x emissions for any conventional gasoline batch without constraint of the Complex Model's valid range limits, the valid range extension provisions at § 80.91(f)(2)(ii) are unnecessary. As a result, EPA is eliminating these valid range extension provisions.

In the NPRM, EPA proposed to promulgate the complex Model valid range limits as standards for both conventional gasoline and RFG under the authority of § 211(k), but not under § 211(c). EPA believed that it was not necessary to promulgate the valid range limits as standards under the authority of § 211(c) since the valid range limits are standards under the RFG and conventional gasoline regulations solely for the purpose of ensuring that the Complex Model will accurately predict emissions, and not for the independent purpose of achieving emissions reductions from the range limits themselves. EPA received adverse comment on the proposal to promulgate the valid range limits only under § 211(k). Since the issue of whether to promulgate the complex model valid range limits as standards under § 211(c) relates both conventional gasoline and RFG, EPA is reserving its decision on this issue until it takes final action on

the remainder of the July 11, 1997 NPRM provisions, including the provisions relating the valid range limits as standards for RFG. EPA is, therefore, at this time adopting the above changes regarding the conventional gasoline Complex Model valid range limits solely under the authority of §§ 211(k) and 301.

VI. Environmental and Economic Impacts

The Agency does not expect today's rule to have any adverse impact on the environment. Many of the revisions finalized today correct typographical and other minor errors in the final rule. The provisions relating to use of the Complex Model are the result of a determination that the existing regulatory requirements may be revised without detriment to the environment. Economic impacts will be generally beneficial to affected parties due to the additional flexibility adopted in today's final rule. In particular, the deletion of the NO_x per-gallon minimum standards for averaged RFG will relieve industry of a substantial cost burden, while the increased compliance surveys for NO_x will ensure that the full environmental benefits of the NO_x RFG standards are achieved. The environmental and economic impacts of the RFG and conventional gasoline programs are described in the Regulatory Impact Analysis supporting the December 1993 rule, which is available in Public Docket A-92-12 located at Room M-1500, Waterside Mall (ground floor), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

VII. Public Participation

EPA solicited comments on the need to take the actions proposed in the July 11, 1997 NPRM, including the actions finalized today. EPA met with representatives of the petroleum industry and other interested parties and considered their concerns and ideas in the development of this final rule. EPA also reviewed and considered all written comments on the provisions finalized today. Responses to comments are contained in the preamble to this final rule. All comments received by EPA are located in the EPA Air Docket, Docket A-97-03 (See ADDRESSES).

VIII. Regulatory Flexibility

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this rule will not have a significant economic impact on a substantial number of small entities.

Although the revisions to the reformulated and conventional gasoline regulations contained in today's final rule will affect small business refiners, importers and gasoline tank truck carriers, EPA has determined that this final rule will not have an *adverse* economic impact on these entities. Several actions taken in today's final rule will provide increased flexibility for all refiners and importers of gasoline, including small business refiners and importers. The deletion of the NO_x per-gallon minimum standards, in particular, will provide refiners and importers with greater flexibility to comply with the RFG regulations without compromising the environmental effect of the RFG program. In addition, this action eliminates the requirement for refiners of conventional gasoline who also import gasoline to calculate a special baseline for their imported product, and aids refiners and importers by allowing them to use a more flexible way of demonstrating compliance with the anti-dumping standards under the Complex Model. This action also provides additional affirmative defenses for truck carriers of motor vehicle fuel.

The EPA prepared a Regulatory Flexibility Analysis (RFA) for the final rule establishing standards for reformulated and conventional gasoline (59 FR 7716 (February 16, 1994)), which includes an analysis of the impact of the reformulated gasoline and anti-dumping regulations on small business entities. The RFA is in the docket for that rulemaking: EPA Air Docket A-92-2.

IX. Submission to Congress and the General Accounting Office

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

X. Executive Order 12866

Under Executive Order 12866 [58 FR 51735 (October 4, 1993)], the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) have an annual effect on the economy of \$100 million or more or

adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

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

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

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

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

XI. Paperwork Reduction Act

The information collection requirements proposed in the July 11, 1997 NPRM, including the provisions finalized today, have been submitted for approval to the Office of Management and Budget (OMB) under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) was prepared by EPA (ICR No. 1591.09) and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW. (mail code 2137); Washington, DC 20460, or by calling (202) 260-2740. Include the ICR and/or OMB number in any correspondence.

Most of the provisions finalized today make minor adjustments to the regulations and provide refiners and importers of gasoline with additional flexibility to comply with the regulations. Most of these changes will not result in any additional reporting, record keeping, or testing burdens. EPA is requiring refiners to keep certain records associated with revisions to the provisions for calculating the emissions performance of gasoline blendstocks. EPA, however, believes that this requirement normally will be met using documents that already are created and kept for commercial business purposes, i.e., documents that show movements of blendstock and gasoline to the blending tank and volume measurements of the blending tank. This requirement, therefore, is not expected to impose additional record keeping burdens on regulated parties.

This action also eliminates the per-gallon NO_x minimum standards for Complex Model averaged RFG, and increases the initial number of compliance surveys required beginning in 1998 and thereafter from 50 to 70.

EPA is eliminating the NO_x per-gallon minimum standards because these standards may impose substantial costs in producing RFG without commensurate benefits to the environment. (See Preamble Section II). The NO_x per-gallon minimum standards were included in the final rule as a tool to assure an even distribution of NO_x benefits from area to area. However, EPA believes that a less costly alternative, an increase in the number of required surveys, will achieve a similar level of assurance of even distribution of NO_x benefits.

The actual number of surveys required to be conducted by industry is based on the initial number of required surveys adjusted to take into account areas that opt into the RFG program and any additional surveys required as a result of any survey ratchets. EPA estimates that the incremental cost burden of the additional 20 surveys will be roughly \$1,100,000 industry-wide (20 additional surveys at approximately \$55,000 each). With adjustments for opt-in and ratcheted areas, EPA estimates that the increase in the total number of surveys required in 1998 due to the regulatory change finalized today will be 39, at a cost of approximately \$2,145,000 industry-wide, or about \$14,300 per RFG refiner or importer (\$2,145,000 ÷ 150 refiners/importers). The increased cost burden due to the additional survey requirements, however, will be more than offset by the elimination of the burden on industry imposed by the per-gallon NO_x minimum standards.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. Send comments on the ICR to the Director, OPPE Regulatory

Information Division; U.S. Environmental Protection Agency (2137); 401 M St., S.W.; Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., N.W., Washington, DC 20503, marked "Attention: Desk Officer for EPA." Comments are requested by January 30, 1998. Include the ICR number in any correspondence.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

XII. Unfunded Mandates Act

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

EPA has determined that the action proposed today does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local or tribal governments in the aggregate, or to the private sector. This action has the effect of reducing burdens of the reformulated gasoline and anti-dumping programs on regulated entities. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

XIII. Statutory Authority

The statutory authority for the actions adopted today is granted to EPA by sections 114, 211(c) and (k), and 301 of the Clean Air Act, as amended; 42 U.S.C. 7414, 7545(c) and (k), and 7601.

List of Subjects in 40 CFR Part 80

Environmental Protection, Air pollution control, Gasoline, Motor vehicle pollution.

Dated: December 23, 1997.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, part 80 of title 40 of the Code of Federal Regulations is amended as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

1. The authority citation for part 80 continues to read as follows:

Authority: Secs. 114, 211, and 301(a) of the Clean Air Act as amended (42 U.S.C. 7414, 7545, and 7601(a)).

2. Section 80.2 is amended by revising paragraph (ss) to read as follows:

§ 80.2 Definitions.

* * * * *

(ss) *Tank truck* means a truck and/or trailer used to transport or cause the transportation of gasoline or diesel fuel, that meets the definition of motor vehicle in section 216(2) of the Act.

* * * * *

3. Section 80.28 is amended by adding paragraph (g)(1)(iii) to read as follows:

§ 80.28 Liability for violations of gasoline volatility controls and prohibitions.

* * * * *

(g) * * *

(1) * * *

(iii) An oversight program under paragraph (g)(1)(ii) of this section need not include periodic sampling and testing of gasoline in a tank truck operated by a common carrier, but in lieu of such tank truck sampling and testing, the common carrier shall demonstrate evidence of an oversight program for monitoring compliance with the volatility requirements of § 80.27 relating to the transport or storage of gasoline by tank truck, such as appropriate guidance to drivers on compliance with applicable requirements and the periodic review of records normally received in the ordinary course of business concerning gasoline quality and delivery.

4. Section 80.30 is amended by revising paragraph (g)(1)(i) to read as follows:

§ 80.30 Liability for violations of diesel fuel control and prohibitions.

* * * * *

(g) * * *

(1) * * *

(i) Evidence of an oversight program conducted by the carrier, for monitoring the diesel fuel stored or transported by that carrier, such as periodic sampling

and testing of the cetane index and sulfur percentage of incoming diesel fuel. Such an oversight program need not include periodic sampling and testing of diesel fuel in a tank truck operated by a common carrier, but in lieu of such tank truck sampling and testing the common carrier shall demonstrate evidence of an oversight program for monitoring compliance with the diesel fuel requirements of § 80.29 relating to the transport or storage of diesel fuel by tank truck, such as appropriate guidance to drivers on compliance with applicable requirements and the periodic review of records normally received in the ordinary course of business concerning diesel fuel quality and delivery; and

* * * * *

5. Section 80.41 is amended by revising the introductory text and tables in paragraphs (d) and (f) and paragraph (m) to read as follows:

§ 80.41 Standards and requirements for compliance.

* * * * *

(d) *Phase I complex model averaged standards.* The Phase I “complex model” standards for compliance when achieved on average are as follows:

PHASE I COMPLEX MODEL AVERAGED STANDARDS

VOC emissions performance reduction (percent)	
Gasoline designated for VOC-Control Region 1:	
Standard	≥36.6
Per-Gallon Minimum	≥32.6
Gasoline designated for VOC-Control Region 2:	
Standard	≥17.1
Per-Gallon Minimum	≥13.1
Toxics air pollutants emissions performance reduction (percent)	≥16.5
NO _x emissions performance reduction (percent)	≥1.5
Oxygen content (percent, by weight):	
Standard	≥2.1
Per-Gallon Minimum	≥1.5
Benzene (percent, by volume):	
Standard	≤0.95
Per-Gallon Maximum	≤1.30

* * * * *

(f) *Phase II complex model averaged standards.* The Phase II “complex

model” standards for compliance when achieved on average are as follows:

PHASE II COMPLEX MODEL AVERAGED STANDARDS

VOC emissions performance reduction (percent):	
Gasoline designated for VOC-Control Region 1:	
Standard	≥29.0
Per-Gallon Minimum	≥25.0
Gasoline designated for VOC-Control Region 2:	
Standard	≥27.4
Per-Gallon Minimum	≥23.4
Toxics air pollutants emissions performance reduction (percent)	≥21.5
NO _x emissions performance reduction (percent):	
Gasoline designated as VOC-Controlled	≥6.8
Gasoline not designated as VOC-Controlled	≥1.5

PHASE II COMPLEX MODEL AVERAGED STANDARDS—Continued

Oxygen content (percent, by weight):	
Standard	≥2.1
Per-Gallon Minimum	≥1.5
Benzene (percent, by volume):	
Standard	≤0.95
Per-Gallon Minimum	≤1.30

(m) Effect of NO_x survey or survey series failure.

(1) On each occasion that a covered area fails a NO_x emissions reduction survey or survey series conducted pursuant to § 80.68, the required average NO_x emissions reductions for that covered area beginning in the year following the failure shall be increased in stringency by an additional 1.0%.

(2) In the event that a covered area for which required NO_x emissions reductions have been made more stringent passes all NO_x emissions reduction surveys and survey series in two consecutive years, the required average NO_x emissions reductions for that covered area beginning in the year following the second year of passed surveys and survey series shall be decreased in stringency by 1.0%.

(3) In the event that a covered area for which the required NO_x emissions reductions have been made less stringent fails a subsequent NO_x emissions reduction survey or survey series:

(i) The required average NO_x emission reductions for that covered area beginning in the year following this subsequent failure shall be increased in stringency by 1.0%; and

(ii) The required NO_x emission reductions for that covered area thereafter shall not be made less stringent regardless of the results of subsequent NO_x emissions reduction surveys or survey series.

6. Section 80.45 is amended by revising paragraphs (c)(1)(iv)(B), (c)(1)(iv)(D)(12), (c)(1)(iv)(D)(13); (d)(1)(iv)(B); and (f)(1)(ii) to read as follows:

§ 80.45 Complex emissions model.

* * * * *

(c) * * *

Fuel property	Acceptable range
Oxygen	0.00–4.0 weight percent.
Sulfur	0.0–1000.0 parts per million by weight.
RVP	6.4–11.0 pounds per square inch.
E200	30.0–70.0 evaporated percent.
E300	70.0–100.0 evaporated percent.
Aromatics	0.0–55.0 volume percent.
Olefins	0.0–30.0 volume percent.
Benzene	0.0–4.9 volume percent.

(1) * * *

(iv) * * *

(B) For fuels with E200, E300 and/or ARO levels outside the ranges defined in Table 6, Y_{VOC}(t) shall be defined:

(1) For Phase I:

$$Y_{VOC}(t) = 100\% \times 0.52 \times [\exp(v_1(et))/\exp(v_1(b)) - 1] + 100\% \times 0.48 \times [\exp(v_2(et))/\exp(v_2(b)) - 1] + \{100\% \times 0.52 \times [\exp(v^1(et))/\exp(v_1(b))] \times \{[(0.0002144 \times E200_{et}) - 0.014470] \times \Delta E200\} + \{[(0.0008174 \times E300_{et}) - 0.068624 - (0.000348 \times ARO_{et})] \times \Delta E300\} + \{[-0.000348 \times E300_{et}] + 0.0323712\} \times \Delta ARO\} \} + \{100\% \times 0.48 \times [\exp(v_1(et))/\exp(v_2(b))] \times \{[(0.000212 \times E200_{et}) - 0.01350] \times \Delta E200\} + \{[(0.000816 \times E300_{et}) - 0.06233 - (0.00029 \times ARO_{et})] \times \Delta E300\} + \{[-0.00029 \times E300_{2et}] + 0.028204\} \times \Delta ARO\} \}$$

(2) For Phase II:

$$Y_{VOC}(t) = 100\% \times 0.444 \times [\exp(v_1(et))/\exp(v_1(b)) - 1] + 100\% \times 0.556 \times [\exp(v_2(et))/\exp(v_2(b)) - 1] + \{100\% \times 0.444 \times [\exp(v_1(et))/\exp(v_1(b))] \times \{[(0.0002144 \times E200_{et}) - 0.014470] \times \Delta E200\} + \{[(0.0008174 \times E300_{et}) - 0.068624 - (0.000348 \times ARO_{et})] \times \Delta E300\} + \{[-0.000348 \times E300_{et}] + 0.0323712\} \times \Delta ARO\} \} + \{100\% \times 0.556 \times [\exp(v_2(et))/\exp(v_2(b))] \times \{[(0.000212 \times E200_{et}) - 0.01350] \times \Delta E200\} + \{[(0.000816 \times E300_{et}) - 0.06233 - (0.00029 \times ARO_{et})] \times \Delta E300\} + \{[-0.00029 \times E300_{et}] + 0.028204\} \times \Delta ARO\} \}$$

* * * * *

(D) * * *

(12) If the E300 level of the target fuel is less than 72 percent, then ΔE300 shall be set equal to (E300 – 72 percent).

(13) If the E300 level of the target fuel is greater than 94 volume percent and (79.75 + (0.385 × ARO)) also is greater than 94, then ΔE300 shall be set equal to (E300 – 94 volume percent). If the E300 level of the target fuel is greater than 95 volume percent and (79.75 + (0.385 × ARO)) also is greater than 94, then “E300 shall be set equal to 1 volume percent.

* * * * *

(d) * * *

(1) * * *

(iv) * * *

(B) For fuels with SUL, OLE, and/or ARO levels outside the ranges defined in Table 7 of paragraph (d)(1)(iv)(A) of this section, Y_{NOX}(t) shall be defined as:

(1) For Phase I:

$$Y_{NOX}(t) = 100\% \times 0.82 \times [\exp(n_1(et))/\exp(n_1(b)) - 1] + 100\% \times 0.18 \times [\exp(n_2(et))/\exp(n_2(b)) - 1] + \{100\% \times 0.82 \times [\exp(n_1(et))/\exp(n_1(b))] \times \{[(- 0.0000133 \times SUL_{et}) + 0.000692] \times \Delta SUL\} + \{[(- 0.000238 \times ARO_{et}) + 0.0083632] \times ARO\} + \{[(0.000733 \times OLE_{et}) - 0.002774] \times \Delta OLE\} \} + \{100\% \times 0.18 \times [\exp(n_2(et))/\exp(n_2(b))] \times \{0.000252 \times \Delta SUL\} + \{[(- 0.0001599 \times ARO_{et}) + 0.007097] \times \Delta ARO\} + \{[(0.000732 \times OLE_{et}) - 0.00276] \times \Delta OLE\} \}$$

(2) For Phase II:

* * * * *

(f) * * *

(1) * * *

(ii) For conventional gasoline:

* * * * *
 7. In § 80.67, paragraph (e)(4) is removed.

8. Section 80.68 is amended by revising paragraphs (b)(1)(iv), (c)(3), and (c)(13)(v) (H) and (L) to read as follows:

§ 80.68 Compliance Surveys.

* * * * *
 (b) * * *
 (1) * * *
 (iv) 70 surveys shall be conducted in 1998 and thereafter.

* * * * *
 (c) * * *
 (3) A VOC survey and a NO_x survey shall consist of any survey conducted during the period June 1 through September 15.

* * * * *
 (13) * * *
 (v) * * *
 (H) The results of the analyses of complex model samples for oxygenate type and oxygen weight percent, benzene, aromatic hydrocarbon, and olefin content, E-200, E-300, and RVP, the calculated NO_x and toxics emissions reduction percentage, and for each survey conducted during the period June 1 through September 15, the calculated VOC emissions reduction percentage;

* * * * *
 (L) The average toxics emissions reduction percentage for simple model samples and the percentage for complex model samples, the average benzene and oxygen percentages, and for each survey conducted during the period June 1 through September 15, the average VOC emissions reduction percentage for simple model samples and the percentage for complex model samples, and the average NO_x emissions reduction percentage for all complex model samples;

* * * * *
 9. Section 80.77 is amended by revising paragraph (g)(2)(iv)(B) to read as follows:

§ 80.77 Product transfer documentation.

* * * * *
 (g) * * *
 (2) * * *
 (iv) * * *
 (B) Beginning on January 1, 1998, for VOC-controlled gasoline, the VOC emissions performance minimum; and

* * * * *
 10. Section 80.78 is amended by revising paragraph (a)(1)(v)(C) to read as follows:

§ 80.78 Controls and prohibitions on reformulated gasoline.

(a) * * *

(1) * * *
 (v) * * *
 (C) Unless each gallon of such gasoline that is subject to complex model standards has a VOC emissions reduction percentage which is greater than or equal to the applicable minimum specified in § 80.41.

11. Section 80.79 is amended by revising paragraph (c) introductory text and paragraph (c)(1); and by adding paragraph (c)(3) to read as follows:

§ 80.79 Liability for violations of the prohibited activities.

* * * * *
 (c) *Quality assurance program.* In order to demonstrate an acceptable quality assurance program for reformulated gasoline at all points in the gasoline distribution network, other than at retail outlets and wholesale purchaser-consumer facilities, a party must present evidence of the following.

(1) Of a periodic sampling and testing program to determine if the applicable maximum and/or minimum standards for oxygen, benzene, RVP, or VOC emission performance are met.

* * * * *
 (3) An oversight program conducted by a carrier under paragraph (c)(1) of this section need not include periodic sampling and testing of gasoline in a tank truck operated by a common carrier, but in lieu of such tank truck sampling and testing the common carrier shall demonstrate evidence of an oversight program for monitoring compliance with the requirements of § 80.78 relating to the transport or storage of gasoline by tank truck, such as appropriate guidance to drivers on compliance with applicable requirements and the periodic review of records normally received in the ordinary course of business concerning gasoline quality and delivery.

12. Section 80.91 is amended by revising paragraph (e)(1)(iii) and adding paragraph (f)(2)(ii) to read as follows:

§ 80.91 Individual baseline determination.

* * * * *
 (e) * * *
 (1) * * *
 (iii) For facilities determined to be closely integrated gasoline producing facilities and for which EPA has granted a single set of baseline fuel parameter values per this paragraph (e)(1)(i):

(A) All reformulated gasoline and anti-dumping standards shall be met by such closely integrated facilities on an aggregate basis;

(B) A combined facility registration shall be submitted under §§ 80.76 and 80.103; and

(C) Record keeping requirements under §§ 80.74 and 80.104 and reporting requirements under §§ 80.75 and 80.105 shall be met for such closely integrated facilities on an aggregate basis.

* * * * *
 (f) * * *
 (2) * * *
 (ii) [reserved]

* * * * *
 13. Section 80.101 is amended by:
 a. Revising paragraph (b)(3);
 b. Revising paragraphs (f)(3) and (f)(4);
 c. Revising paragraph (g)(3) and adding (g)(8); and
 d. Adding paragraph (j).

§ 80.101 Standards applicable to refiners and importers.

* * * * *
 (b) * * *
 (3) *Complex model standards.*
 (i) Annual average levels of exhaust toxics emissions and NO_x emissions, weighted by volume for each batch and calculated using the applicable complex model under § 80.45, shall not exceed the refiner's or importer's compliance baseline for exhaust toxics and NO_x emissions, respectively.

(ii) Annual average levels of RVP, benzene, aromatics, olefins, sulfur, E200 and E300 shall not be greater than the conventional gasoline complex model valid range limits for the parameter under § 80.45(f)(1)(ii), or the refiner or importer's annual 1990 baseline for the parameter if outside the valid range limit, whichever is greater.

* * * * *
 (f) *Compliance baseline determination.*

* * * * *
 (3) [Reserved]
 (4) Any compliance baseline under paragraph (f)(1) of this section shall be adjusted for each averaging period as follows:

* * * * *
 (g) *Compliance calculations.*

* * * * *
 (3) Exhaust toxics and NO_x emissions performance of a blendstock batch shall be determined as follows:

(i) Determine the volume and properties of the blendstock.
 (ii) Determine the blendstock volume fraction (F) based on the volume of blendstock, and the volume of gasoline with which the blendstock is blended, using the following equation:

$$F = \frac{V_b}{V_b + V_g}$$

Where:
 F=blendstock volume fraction
 V_b=volume of blendstock

V_g =volume of gasoline with which the blendstock is blended.

(iii) For each parameter required by the complex model, calculate the parameter value that would result by combining, at the blendstock volume fraction (F), the blendstock with a gasoline having properties equal to the refinery's or importer's baseline, using the following formula:

$$CP_j = \frac{(BAP_j \times V_g) + (BLP_j \times V_b)}{V_g + V_b}$$

Where:

CP_j =calculated value for parameter j

BAP_j =baseline value for parameter j

BLP_j =value of parameter j for the blendstock or oxygenate

j=each parameter required by the complex model

(A) The baseline value shall be the refinery's "summer" or "winter" baseline, based on the "summer" or "winter" classification of the gasoline produced as determined under paragraphs (g)(5) or (g)(6) of this section. In the case of a refinery that is aggregated under paragraph (h) of this section, the refinery baseline shall be used, and not the aggregate baseline.

(B) The sulfur content and oxygen wt% computations under paragraph

(g)(3)(iii) of this section shall be adjusted for the specific gravity of the gasoline and blendstock using specific gravities of 0.749 for "summer" gasoline and of 0.738 for "winter" gasoline.

(C) In the case of "summer" gasoline, where the blendstock is ethanol and the volume fraction calculated under paragraph (g)(3)(ii) is equal to or greater than 0.015, the value for RVP calculated under paragraph (g)(3)(iii) of this section shall be 1.0 psi greater than the RVP of the gasoline with which the blendstock is blended.

(iv) Using the summer or winter complex model, as appropriate, calculate the exhaust toxics and NO_x emissions performance, in mg/mi, of:

(A) A hypothetical gasoline having properties equal to those calculated in paragraph (g)(3)(iii) of this section (HEP); and

(B) A gasoline having properties equal to the refinery's or importer's baseline (BEP).

(v) Calculate the exhaust toxics and NO_x equivalent emissions performance (EEP) of the blendstock, in mg/mi, using the following equation:

$$EEP_j = \frac{HEP_j - (BEP_j * (1 - F))}{F}$$

Where:

EEP_j =equivalent emissions performance of the blendstock for emissions performance j

BEP_j =emissions performance j of a gasoline having the properties of the refinery's baseline.

HEP_j =emissions performance j of a hypothetical blendstock/gasoline blend

F=blendstock volume fraction

j=exhaust toxics or NO_x emissions performance

(vi) For each blendstock batch, the volume, and exhaust toxics and NO_x equivalent emissions performance (EEP) shall be included in the refinery's compliance calculations.

* * * * *

(8) Emissions performance of conventional gasoline with parameters outside the complex model valid range limits. Notwithstanding the provisions of § 80.45(f)(2), in the case of any parameter value that does not fall within the complex model range limit in § 80.45(f)(1)(ii), the refinery or importer shall determine the emissions performance of the batch using the following parameter values:

Parameter outside the range limit	Parameter value to use for calculating	
	Exhaust toxics	NO_x
Sulfur	Test value ¹	Test value. ¹
RVP (summer only):		
< 6.4 psi	6.4 psi	6.4 psi.
> 11.0 psi	Test value ¹	Test value. ¹
Aromatics	Test value ¹	Test value. ¹
Olefins	Test value ¹	Test value. ¹
Benzene	Test value ¹	Test value. ¹
E200:		
< 30%	Test value ¹	30%
> 70%	70%	Test value. ¹
E300 < 70%	Test value ¹	Test value. ¹

¹ Test value is the value for a parameter determined pursuant to paragraph 80.101(i)(1)(i) of this section.

* * * * *

(j) Evasion of standards through exporting and importing gasoline. Notwithstanding the requirements of this section, no refiner or importer shall export gasoline and import the same or other gasoline for the purpose of evading a more stringent baseline requirement.

12. Section 80.104 is amended by adding paragraph (a)(2)(xi) to read as follows:

§ 80.104 Recordkeeping requirements.

* * * * *

- (a) * * *
- (2) * * *

(xi) In the case of blendstocks that are included in refinery compliance calculations using the procedures under § 80.101(g)(3), documents that reflect the volume of blendstock and the volume of gasoline with which the blendstock is blended.

* * * * *

[FR Doc. 97-34097 Filed 12-30-97; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-300595; FRL-5762-1]

RIN 2070-AB78

Hexythiazox; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a time-limited tolerance for combined residues of hexythiazox (trans-5-(4-

chlorophenyl)-*N*-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide) and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety in or on strawberries. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on strawberries. This regulation establishes a maximum permissible level for residues of hexythiazox 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 tolerance will expire and is revoked on July 1, 1998.

DATES: This regulation is effective December 31, 1997. Objections and requests for hearings must be received by EPA on or before March 2, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP-300595], 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-300595], 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, CM #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-300595]. 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: David Deegan, 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: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308-9358, e-mail: deegan.dave@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 a tolerance for combined residues of the insecticide hexythiazox (trans-5-(4-chlorophenyl)-*N*-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide) and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety, in or on strawberries at 3.0 part per million (ppm). This tolerance will expire and is revoked on July 1, 1998. EPA will publish a document in the **Federal Register** to remove the revoked tolerance 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(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(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. 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 Hexythiazox on Strawberries and FFDCA Tolerances

The state of California petitioned EPA to invoke provisions of FIFRA section 18 to allow emergency use of the chemical hexythiazox (Savey Ovicide/Miticide 50-WP, EPA Reg. No. 10163-208, manufactured by Gowan) on 18,000 acres of strawberries in California to control two-spotted spider mites. EPA reviewed this request and concluded that the state is suffering from an urgent and non-routine situation, qualifying for use of the requested product under section 18. EPA's review concluded that there are no effective alternative chemicals available to growers with which they can control this pest on strawberries. On November 14, 1997, EPA authorized California to allow hexythiazox to be used on 18,000 acres of strawberries to control two-spotted spider mites. The exemption expires on April 1, 1998.

As part of its assessment of this emergency exemption, EPA assessed the potential risks presented by residues of hexythiazox in or on strawberries. In doing so, EPA considered the new safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary 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 tolerance without notice and opportunity for public comment under section 408(e), as provided in section 408(l)(6). Although this tolerance will expire and is revoked on July 1, 1998, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on strawberries after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA, and the residues do not exceed a level that was authorized by this tolerance at the time of that application. EPA will take action to revoke this tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because this tolerance is being approved under emergency conditions EPA has not made any decisions about whether hexythiazox meets EPA's registration requirements for use on strawberries or whether a permanent tolerance for this use would be appropriate. Under these circumstances, EPA does not believe that this tolerance serves as a basis for registration of hexythiazox by a State for special local needs under FIFRA section 24(c). Nor does this tolerance serve as the basis for any State other than California 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 hexythiazox, 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 enactment 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 3 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, FFDC 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 (infants and children) 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 hexythiazox and to make a determination on aggregate exposure, consistent with section 408(b)(2), for a time-limited tolerance for combined residues of hexythiazox (trans-5-(4-chlorophenyl)-N-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide) and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety on strawberries at 3.0 ppm. EPA’s assessment of the dietary exposures and risks associated with establishing the tolerance 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 hexythiazox are discussed below.

1. *Acute toxicity.* An acute dietary risk assessment is not required, since EPA did not identify an acute toxicological endpoint.

2. *Short - and intermediate - term toxicity.* For short and intermediate-term Margin of Exposure (MOE) calculations, EPA recommended use of the maternal NOEL of 240 milligrams/kilogram/day (mg/kg/day) from the developmental toxicity study in rats. At the Lowest Effect Level (LEL) of 740 mg/kg/day, there was decreased food consumption, decreased body weight and increased ovarian weights.

3. *Chronic toxicity.* EPA has established the RfD for hexythiazox at

0.025 mg/kg/day. This RfD is based on a one year feeding study in dogs with a NOEL of 2.5 mg/kg/day and an uncertainty factor of 100. The Lowest Observed Effect Level (LOEL) of 12.5 mg/kg/day was based on hypertrophy of the adrenal cortex in both sexes.

4. *Carcinogenicity.* Hexythiazox has been classified as a Group C chemical (possible human carcinogen) by EPA, based on an increased incidence of female mouse liver tumors. EPA uses the Q₁* approach to assess this risk. The Q₁* is 0.039 mg/kg/day⁻¹.

B. Exposures and Risks

1. From food and feed uses.

Tolerances have been established (40 CFR 180.448) for the combined residues of hexythiazox (trans-5-(4-chlorophenyl)-N-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide), in or on a variety of raw agricultural commodities. Risk assessments were conducted by EPA to assess dietary exposures and risks from hexythiazox 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. The acute dietary (food only) risk assessment is not required for this pesticide use, as the EPA did not identify an acute dietary risk endpoint.

ii. *Chronic exposure and risk.* In conducting this chronic dietary risk assessment, EPA has made conservative assumptions -- 100% of strawberries, in addition to cotton seed commodities (oil and meal) (previously approved under provisions of section 18) and apple commodities will contain residues of hexythiazox and its metabolites and those residues will be at the level of the tolerance. Percent crop treated data were utilized for pear commodities. These conservative assumptions result in an overestimate of human dietary exposure. Thus, in making a safety determination for this tolerance, EPA is taking into account this conservative exposure assessment.

The published tolerances for the regulated residue of hexythiazox, plus this proposed section 18 use, result in a Anticipated Residue Contribution (ARC) that is equivalent to the following percentages of the RfD:

Subgroup	Percent
U.S. Population	<1
Nursing Infants	<1

Subgroup	Percent
Non-Nursing Infants (<1 year old)	<1
Children (1–6 years old)	<1
Children (7–12 years old)	<1

The subgroups listed above are: (1) the U.S. population (48 states); and (2) those for infants and children; and (3) the other subgroups for which the percentage of the RfD occupied is greater than that occupied by the subgroup U.S. population (48 states).

2. *From drinking water.* Based on information currently available to EPA, hexythiazox is considered persistent in soil. EPA's current data also indicates that hexythiazox and soil metabolites are not likely to leach to groundwater. There are no established Maximum Contaminant Levels for residues of hexythiazox in drinking water. No health advisory levels for hexythiazox in drinking water have been established.

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 (RfD's or acute dietary NOEL's) 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 hexythiazox to exceed the RfD if the tolerance being considered in this document were granted. The Agency has therefore concluded that the potential exposures associated with hexythiazox 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 tolerance is granted.

3. *From non-dietary exposure.* Hexythiazox is not currently registered for use on any residential non-food sites. The Agency does not expect there

to be any meaningful non-dietary residential exposure to hexythiazox.

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 hexythiazox 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, hexythiazox does not appear to produce a toxic metabolite produced by other substances. According to information evaluated related to this action, hexythiazox is a member of the thiazolidinone class of pesticides and there are no other members of this class. For the purposes of this tolerance action, therefore, EPA has not assumed that hexythiazox 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 conservative exposure assumptions described above, and taking into account the completeness and reliability of the toxicity data, EPA has concluded that dietary exposure (food only) to hexythiazox will utilize <1% of the RfD for the U.S. population. The major identifiable subgroup with the highest aggregate exposure is non-nursing infants. 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 hexythiazox in drinking water 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 hexythiazox 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. EPA believes that uses of hexythiazox may constitute a short- and/or intermediate-term exposure scenario. However, the Agency is not, at this time, able to complete a comprehensive residential risk assessment for many pesticides, including hexythiazox. Because there are no residential non-food uses registered for hexythiazox, and because there are no other chemicals that share its class, and based on the lack of an identified acute toxicological endpoint for hexythiazox, and the low percentage (<1%) of the RfD occupied by food and water, in the best scientific judgment of EPA, short- and intermediate-term aggregate risk will not exceed the Agency's level of concern.

D. Aggregate Cancer Risk for U.S. Population

Based on published tolerances (none are currently pending) and this proposed section 18 use, an upper bound lifetime dietary (food only) cancer risk estimate of 9.6×10^{-7} was calculated for the hexythiazox regulated residue. The calculation used the conservative exposure assumptions described above for generating ARC's and amortized the cancer risk over a 70-year lifetime (i.e., 5/70, for this 1st year section 18 use). This section 18 use contributes 4.1×10^{-6} to the upper bound lifetime dietary (food only) cancer risk and 2.9×10^{-7} if the cancer risk is amortized over a 70-year lifetime.

The cancer risk estimate for the existing hexythiazox uses plus the amortized risk estimate for strawberries does not exceed EPA's level of concern.

EPA believes the registered uses do not constitute a chronic exposure scenario. Thus, no non-dietary, non-occupational chronic exposure to hexythiazox is expected, or is a factor in aggregate cancer risk.

E. 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 hexythiazox, EPA considered data from developmental toxicity studies in the rat and rabbit and a two-generation reproduction study in the rat. This is generally the case -- edit if different studies. 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 MOE and uncertainty factor (usually 100 for

combined inter- and intra-species variability)) and not the additional tenfold MOE/uncertainty 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 MOE/safety factor.

ii. Developmental toxicity studies —

a. *Rats.* In the rat developmental study, the maternal (systemic) NOEL was 240 mg/kg/day. The maternal LOEL of 720 mg/kg/day was based on decreased food consumption and decreased body weight. The developmental (fetal) NOEL was 240 mg/kg/day. The developmental LOEL was based on slight delayed ossification.

b. *Rabbits.* In the rabbit developmental toxicity study, the maternal (systemic) NOEL was 1080 mg/kg/day at the highest dose tested (HDT). The developmental (fetal) NOEL was 1080 mg/kg/day at the highest dose tested.

iii. *Reproductive toxicity study* — *Rats.* In the 2-generation reproductive toxicity study in rats, the parental (systemic) NOEL was 20 mg/kg/day. The LOEL of 120 mg/kg/day was based on decreased body weight and decreased food consumption. The developmental NOEL was 20 mg/kg/day. The developmental LOEL of 120 mg/kg/day was based on decreased body weight and delayed maturation. The reproductive NOEL was 120 mg/kg/day at the highest dose tested.

iv. *Pre- and post-natal sensitivity.* The pre- and post-natal toxicology data base for hexythiazox is complete with respect to current toxicological data requirements. There are no pre- or post-natal toxicity concerns for infants and children, based on the results of the rat and rabbit developmental toxicity studies and the 2-generation rat reproductive toxicity study. In the developmental study in rats, the developmental NOEL and LOEL is the same as the maternal NOEL and LOEL demonstrating that no extra-sensitivity for infants and children is present. In rabbits, there are no maternal or developmental effects up to the limit dose of 1080 mg/kg/day HDT. In the 2-generation reproductive toxicity study in rats, there are no pup effects at doses below maternal effects and the common effects in both pups and parental animals decreased body weight also demonstrates that there is no extra-sensitivity for infants and children.

v. *Conclusion.* Based on the above, EPA concludes that reliable data support use of the standard 100-fold uncertainty factor and that an the

additional safety factor is not needed to protect the safety of infants and children.

2. *Chronic risk.* Using the conservative exposure assumptions described above, EPA has concluded that aggregate exposure to hexythiazox from food will utilize less than 1% of the RfD for infants and children. 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 hexythiazox in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the RfD. Therefore, taking into account the completeness and reliability of the toxicity data, the conservative exposure assessment and the fact that residential uses do not fall under a chronic exposure scenario, EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to hexythiazox residues.

V. Other Considerations

A. Metabolism In Plants and Animals

1. For the purpose of this section 18 request, the nature of the residue in plants is adequately understood. The residue of concern is hexythiazox and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety (as specified in 40 CFR 180.448).

2. Although no livestock commodity tolerances are established, the nature of the residue in animals is considered to be understood. The residue of concern is hexythiazox and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety.

B. Analytical Enforcement Methodology

Adequate methods to enforce the tolerance expression have been submitted for publication in PAM II. The approved method is designated as AMR 985-87 which has been used in a variety of commodities. This method is available in PP#5F3254, and by request from U.S. EPA, IRSD/PIRIB (7502C), 401 M St., SW., Washington DC 20460.

C. Magnitude of Residues

1. Residues of hexythiazox and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety (expressed as parent compound) are not expected to exceed 0.10 ppm in/on cotton, undelinted seed. A time-limited tolerance is being established at this level.

2. It is unknown if residues will concentrate in processed products of cotton seed. Therefore, the tolerance level for the RAC has been adjusted to account for any possible concentration of the residue. Additional tolerances on processed products of cotton are not required for this section 18 request.

3. Residue data are not available for cotton gin byproducts. For the purpose of this section 18 request, EPA has estimated residue levels in cotton gin byproducts. A search by EPA of the data currently available indicates two chemicals for which tolerances are established on both cotton gin byproducts and cotton seed. One use is for an at-planting use of an insecticide. The other cotton seed/cotton gin byproducts tolerance pair, 6 ppm and 100 ppm respectively, was established for a preharvest desiccant use of a herbicide. Since this preharvest desiccant use would be considered a worst case scenario, the hexythiazox residues on cotton gin byproducts will be estimated based on the concentration factor from that use, 16.6x (100/6). Thus, EPA estimates that the residue level of hexythiazox on cotton gin byproducts will be 2 ppm. A time-limited tolerance is being established at 2 ppm for hexythiazox residues in/on cotton gin byproducts. EPA notes that residue data for hexythiazox in/on cotton gin byproducts will be required for a section 3 registration decision to be made.

4. Tolerances for secondary residues of hexythiazox in livestock commodities are not established. Livestock feedstuffs for cattle (dairy and beef), poultry (discussed below) and swine are derived from cotton (meal, seed, and hulls). The maximum dietary burden from established tolerances on apples and

this time-limited tolerance are 0.53 ppm for beef cattle, and 0.51 ppm for dairy cattle. EPA has previously reviewed a hexythiazox feeding study in dairy cows, in which the only measurable residues were in kidney and liver. For the purpose of this time-limited tolerance, EPA has translated these data to swine commodities. Based upon available data, EPA would not expect detectable residues of hexythiazox and its metabolites in commodities derived from cattle (beef and dairy), and swine.

5. Poultry feedstuffs are derived from cotton (cotton seed meal). Data concerning the potential for secondary residues in poultry are available. The maximum dietary burden from poultry, resulting from use associated with this time-limited tolerance is 0.02 ppm. Hexythiazox tolerances are not established on other poultry feed items. Based upon the total radioactive residue levels from the poultry metabolism study, tolerances for secondary residues of hexythiazox in poultry commodities are not required for this section 18 request.

D. International Residue Limits

There are no Codex, Canadian or Mexican maximum residue limits established for hexythiazox and its metabolites on cotton seed. Thus, harmonization is not an issue for this time-limited tolerance.

E. Rotational Crop Restrictions

Strawberries are not normally rotated in southern California. Thus, rotational crop considerations are not an issue for this section 18.

VI. Conclusion

Therefore, the tolerance is established for combined residues of hexythiazox

(trans-5-(4-chlorophenyl)-N-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide) in strawberries at 3.0 ppm.

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 March 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-300595] (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 Rm. 1132 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticide Programs,

Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, 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 tolerance under FFDC 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 FFDC section 408(l)(6), such as the tolerances 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

Dated: December 19, 1997.

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

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

Peter Caulkins,
Acting Director, Registration Division, 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:

2. In § 180.448, paragraph (b) is amended by adding and alphabetically inserting the following commodity to the table to read as follows:

§ 180.448 Hexythiazox; tolerances for residues.

* * * * *
(b) * * *

Commodity	Parts per million	Expiration/Revocation Date
Strawberries	3.0	7/1/98

* * * * *

[FR Doc. 97-34104 Filed 12-30-97; 8:45 am]
BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-5941-6]

National Oil and Hazardous Substances Pollution Contingency Plan National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of deletion for North Hollywood dump superfund site, Shelby County, Tennessee, from the national priorities list.

SUMMARY: The Environmental Protection Agency (EPA) Region 4 announces the deletion of the North Hollywood Dump Superfund Site from the National Priorities List (NPL), Appendix B of 40 CFR part 300 which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). EPA and the State have determined that all appropriate Fund-financed responses under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, have been implemented and that no further cleanup is appropriate. Moreover, EPA and the State have determined that remedial actions conducted at the site to date have been protective of public health, welfare and the environment. This deletion does not preclude future action under Superfund.

EFFECTIVE DATE: December 31, 1997.

FOR FURTHER INFORMATION CONTACT: Robert Morris, Site Manager, U.S. Environmental Protection Agency,

Region 4, North Site Management Branch, 61 Forsyth Street, S.W., Atlanta, Georgia 30303, (404) 562-8794.

SUPPLEMENTARY INFORMATION: The Site to be deleted from the NPL is: North Hollywood Superfund Site in Shelby County, Tennessee.

A Notice of Intent to Delete for this site was published on October 10, 1997, (62 FR 52961). The closing date for comments on the Notice of Intent to Delete was November 10, 1997. EPA received no comments.

EPA identifies sites that appear to present a significant risk to the public health, welfare and the environment and it maintains the NPL as the list of those sites. Any site deleted from the NPL remains eligible for Fund-financed remedial actions in the future. Section 300.425(e)(3) of the NCP states that Fund-financed actions may be taken at sites deleted from the NPL. Deletion of a site from the NPL does not affect responsible party liability or impede agency efforts to recover costs associated with response efforts.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: December 16, 1997.

A. Stanley Meiburg,
Deputy Regional Administrator, Region 4.

For reasons set out in the preamble, 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

1. The authority citation for part 300 continues to read as follows:

Authority: 42 U.S.C. 9601-9657; 33 U.S.C. 1321(c)(2); E.O. 12777, 56 FR 54757, 3 CFR,

1991 Comp., p 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Appendix B—[Amended]

2. Table 1 of Appendix B to Part 300 is amended by removing the site for North Hollywood Dump, Memphis, Tennessee.

[FR Doc. 97-33743 Filed 12-30-97; 8:45 am]
BILLING CODE 6560-50-P

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 101-42 and 101-43

RIN 3090-AF39

Criteria for Reporting Excess Personal Property

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Temporary regulation; extension of effective date.

SUMMARY: The General Services Administration (GSA) is extending Federal Property Management Regulations provisions regarding criteria for reporting excess personal property to GSA.

DATES: Effective date: The temporary regulation published January 15, 1997 was effective from January 15, 1997 through January 15, 1998. The period of effectiveness is extended through January 15, 1999.

FOR FURTHER INFORMATION CONTACT: Martha Caswell, Office of Governmentwide Policy, GSA, 202-501-3828.

SUPPLEMENTARY INFORMATION: FPMR Temporary Regulation H-29 was published in the **Federal Register** and became effective January 15, 1997, 62

FR 2022. The expiration date of the temporary regulation is January 15, 1998. This supplement extends the expiration date through January 15, 1999.

List of Subjects in 41 CFR Parts 101-42 and 101-43

Archives and records, Computer technology, Information technology, Government procurement, Property management, Records management, and Telecommunications.

Therefore the effective date for Temporary Regulation H-29 published at 62 FR 2022, January 15, 1997, is extended through January 15, 1999.

Dated: December 23, 1997.

Thurman M. Davis, Sr.,

Deputy Administrator.

[FR Doc. 97-33970 Filed 12-30-97; 8:45 am]

BILLING CODE 6820-24-M

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101-43 and 101-46

[FPMR Temp. Reg. H-28]

RIN 3090-AG01

Relocation of FIRMR Provisions Relating to GSA's Role in the Disposal of Excess and Exchange/Sale Information Technology (IT) Equipment

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Temporary regulation; extension of effective date.

SUMMARY: The General Services Administration (GSA) is extending Federal Property Management Regulations provisions regarding disposal of information technology (IT) equipment.

DATES: *Effective date:* Temporary regulation H-28 published August 8, 1996 was effective August 8, 1996 through December 31, 1997. The period of effectiveness is extended through December 31, 1998.

FOR FURTHER INFORMATION CONTACT: Martha Caswell, Office of Governmentwide Policy, GSA, telephone 202-501-3228.

SUPPLEMENTARY INFORMATION: FPMR Temporary Regulation H-28 was

published in the **Federal Register** on August 8, 1996, 61 FR 41352. The expiration date of the temporary regulation is December 31, 1997. This supplement extends the expiration date through December 31, 1998.

Lists of Subjects in 41 CFR Parts 101-43 and 101-46

Archives and records, Computer technology, Information technology, Government procurement, Property management, Records management, and Telecommunications.

Therefore the effective date for Temporary Regulation H-28 published at 61 FR 41352, August 8, 1996, is extended through December 31, 1998.

Dated: December 23, 1997.

Thurman M. Davis, Sr.,

Deputy Administrator.

[FR Doc. 97-33969 Filed 12-30-97; 8:45 am]

BILLING CODE 6820-24-M

GENERAL SERVICES ADMINISTRATION

41 CFR Chapter 301

[FTR Amendment 68]

RIN 3090-AG43

Federal Travel Regulation; Maximum Per Diem Rates

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Final rule; correction.

SUMMARY: This document corrects an entry listed in the prescribed maximum per diem rates for locations within the continental United States (CONUS) contained in a final rule appearing in the **Federal Register** of Tuesday, December 2, 1997 (62 FR 63798). The rule increased/decreased the maximum lodging amounts in certain existing per diem localities, added new per diem localities, deleted a number of previously designated per diem localities, and added information to encourage employees to stay in a fire-safe approved accommodation.

EFFECTIVE DATE: January 1, 1998.

FOR FURTHER INFORMATION CONTACT: Joddy Garner, Office of Governmentwide Policy (MTT), Washington, DC 20405, telephone 202-501-1538.

SUPPLEMENTARY INFORMATION: In rule document 31590 beginning on page 63798 in the issue of Tuesday, December 2, 1997, make the following corrections:

Appendix A to Chapter 301 [Corrected]

1. On page 63802, under the State of Illinois, in the second line from the top, revise Aurora to read Aurora/Elgin in column one and revise the numbers 56, 30, and 86 to read 59, 30, and 89 in columns three, four, and five, respectively.

2. On page 63802, under the State of Illinois, in the fifth line from the top, remove Elgin, King in columns one and two, and the numbers 59, 30, and 89 in columns three, four and five, respectively.

3. On page 63802, under the State of Indiana, insert as a new eighteenth line from the top Madison, Jefferson in columns one and two, and the numbers 52, 30, and 82 in columns three, four, and five, respectively.

4. On page 63805, under the State of New Jersey, insert as a new twenty-ninth line from the top Belle Mead, Somerset in columns one and two, and the numbers 69, 34, and 103 in columns three, four, and five, respectively.

5. On page 63805, under the State of New Mexico, insert as a new forty-sixth line from the top Cloudcroft, Otero in columns one and two, and the numbers 87, 30, and 117 in columns three, four, and five, respectively.

6. On page 63806, under the State of New York, in the tenth line from the top, remove Palisades/Nyack, Rockland in columns one and two, and the numbers 61, 30, and 91 in columns three, four, and five, respectively.

7. On page 63809, under the State of West Virginia, insert as a new tenth line from the bottom Harpers Ferry, Jefferson in columns one and two, and the numbers 66, 30, and 96 in columns three, four, and five, respectively.

8. Appendix A to Chapter 301, the following entries are corrected to read as follows:

Appendix A to Chapter 301— Prescribed Maximum Per Diem Rates for CONUS

* * * * *

Per diem locality		Maximum lodging amount (includes applicable taxes) (a)	+	M&IE rate (b)	=	Maximum per diem rate ⁴ (c)
Key city ¹	County and/or other defined location					
CALIFORNIA						
*	*	*	*	*	*	*
Palm Springs	Riverside.					
(November 1–May 31)		81		38		119
(June 1–October 31)		50		38		88
*	*	*	*	*	*	*
Yosemite Nat'l Park	Mariposa.					
(April 1–October 31)		87		42		129
(November 1–March 31)		59		42		101
DELAWARE						
Dover	Kent.					
(May 1–September 30)		60		34		94
(October 1–April 30)		54		34		88
FLORIDA						
Stuart	Martin.					
(January 1–April 30)		69		34		103
(May 1–December 31)		63		34		97
Tampa/St. Petersburg	Hillsborough and Pinellas					
(January 1–April 30)		103		38		141
(May 1–December 31)		81		38		119
ILLINOIS						
Aurora/Elgin	Kane	59		30		89
INDIANA						
Madison	Jefferson	52		30		82
MAINE						
Bath	Sagadahoc.					
(June 1–September 30)		61		30		91
(October 1–May 31)		52		30		82
MASSACHUSETTS						
Cambridge/Lowell	Middlesex.					
(April 1–November 30)		127		34		161
(December 1–March 31)		116		34		150
NEW JERSEY						
Belle Mead	Somerset	69		34		103

(c)

Key city ¹	Per diem locality		Maximum lodging amount (includes applicable taxes) (a)	+	M&IE rate (b)	=	Maximum per diem rate ⁴ (c)
	County and/or other defined location						
NEW MEXICO	*	*	*	*	*	*	*
Cloudcroft	Otero		87		30		117
NEW YORK	*	*	*	*	*	*	*
Albany	Albany		68		38		106
SOUTH DAKOTA	*	*	*	*	*	*	*
Sturgis	Mead.		86		30		116
(June 15–August 31) .....	.....		50		30		80
(September 1–June 14) .....	.....					
TEXAS	*	*	*	*	*	*	*
Eagle Pass	Maverick		57		30		87
El Paso	El Paso		56		34		90
VIRGINIA	*	*	*	*	*	*	*
Harrisonburg .....	.....		54		30		84
WEST VIRGINIA	*	*	*	*	*	*	*
Harpers Ferry	Jefferson		66		30		96

Dated: December 23, 1997.

Peggy G. Wood,

Acting Director, Travel and Transportation Management Policy Division.

[FR Doc. 97-33971 Filed 12-30-97; 8:45 am]

BILLING CODE 6820-34-P

LEGAL SERVICES CORPORATION

45 CFR Part 1630

Cost Standards and Procedures

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule sets forth cost standards and procedures applicable to Legal Services Corporation (“LSC” or “Corporation”) grants and contracts. This rule contains substantial revisions which bring the Corporation’s cost standards and procedures into conformance with applicable provisions of the Inspector General Act, the

Corporation’s appropriations action, and relevant Office of Management and Budget (“OMB”) Circulars.

DATES: This rule is effective January 30, 1998.

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, (202) 336-8817.

SUPPLEMENTARY INFORMATION:

Background

On July 13, 1997, the Corporation’s Operations and Regulations Committee (“Committee”) held public hearings in Los Angeles, California, on draft revisions to the Corporation’s rule on cost standards and procedures and adopted a proposed rule that was published for public notice and comment on August 29, 1997 (62 FR 45778). The Corporation subsequently received five written comments on the proposed revisions.

On November 14, 1997, during public hearings in Washington, DC, the

Committee considered comments on the proposed revisions. After making additional revisions to the rule, the Committee recommended that the Corporation’s Board of Directors (“Board”) adopt the rule as final, which the Board did on November 15, 1997.

Revisions were necessary to bring the rule into conformance with Sec. 509 of Pub. L. 104-134, 110 Stat. 1321; the Inspector General Act (“IG Act”), 5 U.S.C. App. 3, as amended; the Audit for LSC Recipients and Auditors (“Audit Guide”); OMB Circular A-50, Audit Followup (September 29, 1982); OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations (November 19, 1993); OMB Circular A-122, Cost Principles for Non-Profit Organizations (May 8, 1997); and OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations (June 24, 1997).

Because the LSC Act specifies that the Corporation is not a Federal agency, OMB Circulars are generally not binding on the Corporation, unless Congress has specified elsewhere in the law that the Corporation must adhere to a specific Circular, as is the case in Sec. 509(k) of Pub. L. 104-134, which requires the Corporation to develop audit follow-up procedures which meet, at a minimum, the requirements of OMB Circular A-50. As a matter of discretion, however, the Corporation has adopted relevant provisions from OMB Circulars which are applicable to Federally funded non-profit organizations. For example, § I-2 of the Corporation's Audit Guide requires recipients and their auditors to adhere to OMB Circular A-133. This rule draws on that Circular, as well as Circulars A-110 and A-122, which contain cost standards and procedures applicable to non-profit organizations which receive Federal funds.

Scope and Effective Date

The requirements of this rule apply to all costs charged against Corporation grants or contracts on or after the rule's effective date. The requirements of this rule also apply to certain income derived from Corporation grants and contracts. This rule generally does not apply to funding obtained from sources other than the Corporation, except as provided by § 1630.11. The review and appeal process of § 1630.7 applies to questioned cost proceedings initiated by the Corporation on or after the effective date of this rule.

A section-by-section analysis of the rule follows.

Section-by-Section Analysis

Section 1630.2—Definitions

Paragraph (a) defines an allowed cost as a questioned cost which the Corporation has determined to be eligible for payment with LSC funds. This definition applies only to costs which either the Corporation or an authorized auditor has questioned during the course of an audit or investigation. Costs are generally allowable provided that they meet the nine criteria of § 1630.3(a).

Paragraph (b) defines corrective action as action taken by a recipient that: (1) Corrects identified deficiencies; (2) produces recommended improvements; or (3) demonstrates that audit or other findings are invalid or do not warrant further action. This definition comes from § 105 of OMB Circular A-133, which is applicable to LSC recipients through § I-2 of the LSC Audit Guide.

One comment noted that the third part of the rule's definition was

inconsistent with the customary usage of the term by Corporation recipients, which have not traditionally thought of corrective action as encompassing expression of disagreement with an auditor's finding. The third part of the definition comes from §§ 105 and 315(c) of OMB Circular A-133, which specify that a corrective action plan is the place to express disagreement with an audit finding. Thus, within OMB parlance, the expression of disagreement is "corrective action." To maintain consistency with the OMB definition, the Board decided to retain the third part of the rule's definition of corrective action.

One comment noted a significant difference between the OMB definition and the definition in this rule: while the rule's definition refers to "audit or other" findings, the OMB definition refers only to "audit" findings. The Corporation included "other" findings in its definition of corrective action in order to extend the scope of the definition to non-audit findings, such as findings from complaint investigations by Corporation management. For this reason, the Board has retained the reference to "other" findings in the rule's definition of corrective action.

Paragraph (c) defines derivative income as income resulting from certain Corporation-funded activities. This definition is adapted from the definition of "program income" which appears in § 2(x) of OMB Circular A-110. The term "derivative income" does not include income from publication activities, because these activities are subject to an exception under § 24(h) of OMB Circular A-110, which provides that recipients have no obligation to the Federal Government with respect to income earned from license fees and royalties from copyrighted materials.

One comment suggested that the Corporation should clarify whether funding obtained from other sources as a result of fundraising efforts conducted with LSC funds is LSC derivative income. It is not. The rule's definition of derivative income does not reach grants, contracts, or contributions from non-LSC sources.

Paragraph (d) defines disallowed cost as a questioned cost that the Corporation has determined may not be charged to LSC funds. This definition comes from Sec. 5(f)(3) of the IG Act.

Paragraph (e) defines final action as the completion of all corrective actions which the Corporation, in a management decision, has concluded are necessary to address findings and recommendations in an audit or other report. This definition comes from Sec. 5(f)(6) of the IG Act. The second

sentence of the definition states that, if the Corporation determines that no corrective action is necessary, final action occurs when the Corporation issues its management decision. One comment recommended deletion of this second sentence because the rule did not apply that portion of the definition. In order to maintain consistency with the definition in the IG Act, the Board chose not to revise the rule's definition of final action. Instead, the Board revised § 1630.7(d) to add clarification that, in the event that corrective action is unnecessary, final action occurs with the issuance of a management decision.

Paragraph (f) defines management decision as the evaluation by Corporation management of the findings and recommendations in an audit or other report, and the issuance of a final, written decision by Corporation management, including a description of the corrective action which Corporation management considers necessary to respond to the findings and recommendations. This definition comes from Sec. 5(f)(5) of the IG Act. A similar definition appears in § 105 of OMB Circular A-133.

Two comments sought clarification about the scope of the rule's definitions of final action and management decision. While the IG Act's definitions of management decision and final action refer only to "audit" reports, the definitions in the rule refer to "audit and other" reports. As explained above in the discussion of the definition of corrective action, the Corporation has included "other" findings in the rule's definitions in order to extend the scope of the definitions to non-audit findings, such as those resulting from complaint investigations by Corporation management.

Paragraph (g) defines questioned cost as a cost charged to Corporation funds which the Corporation or an authorized auditor has questioned because of: (1) A violation of applicable law; (2) a lack of adequate supporting documentation; or (3) an appearance that the cost is unnecessary or unreasonable. This definition comes from Sec. 5(f)(1) of the IG Act. A similar definition appears in § 105 of OMB Circular A-133.

The definition of questioned cost recognizes that other persons and entities, in addition to Corporation management, such as the Office of Inspector General ("OIG"), the General Accounting Office ("GAO"), independent public accountants, and other duly authorized auditors and audit organizations have authority to question costs incurred by Corporation recipients. However, this definition does not extend such authority to

persons or entities which are not duly authorized by applicable law to audit or investigate Corporation recipients.

Paragraph (h) defines recipient for the purposes of this part only. This definition reaches grantees receiving Corporation funds pursuant to either Sec. 1006(a)(1) or Sec. 1006(a)(3) of the LSC Act, in contrast to the definition of recipient appearing at 45 CFR § 1600.1, which defines recipients only as those entities receiving Corporation funds pursuant to Sec. 1006(a)(1)(A) of the Act.

Section 1630.3—Standards Governing Allowability of Costs Under Corporation Grants or Contracts

Paragraph (a)—Criteria for Allowability

Paragraph (a) of this section sets out nine criteria which determine whether costs are allowable under Corporation grants or contracts. These criteria generally conform to section A, paragraph 2, of Attachment A to OMB Circular A-122. Section 1630.5(b) contains a tenth, prior approval criterion which applies to a small number of specific costs. These two sections apply only to Corporation funds and income derived from Corporation-funded activities.

Subparagraph (a)(1) requires that costs be actually incurred in the performance of the grant or contract. This requirement is consistent with the accrual method of accounting, which is required by generally accepted accounting principles. Costs incurred just prior to the onset of a Corporation grant or contract, or just after the cessation of Corporation funding, are allowable with the prior approval of the Corporation as required by § 1630.5(b)(1). This is a change from the prior rule, which did not allow costs incurred prior to, or after the cessation of, Corporation funding.

Subparagraph (a)(2) requires that costs be reasonable and necessary to the performance of a Corporation grant or contract. The concept of reasonableness applies both to the amount of the cost and to the nature of the activity that the cost represents. Paragraph (b) of the rule describes in greater detail four considerations which enter into a determination of whether a cost is reasonable and necessary.

Subparagraph (a)(3) requires that costs be allocable to a Corporation grant or contract. Paragraph (c) describes in detail the considerations which govern the allocability of costs.

Subparagraph (a)(4) requires that costs be in compliance with the LSC Act, applicable appropriations law, Corporation rules, regulations,

guidelines, and instructions, the Accounting Guide for LSC Recipients, the terms and conditions of the grant or contract, and other applicable law. The cost of an activity prohibited or restricted by such law is not allowable under this rule and may result in a questioned or disallowed cost.

Subparagraph (a)(5) requires that recipients account for costs through the consistent application of established accounting policies and procedures. The Accounting Guide for LSC Recipients sets forth applicable principles, guidelines, and criteria for recipients' accounting systems.

Subparagraph (a)(6) requires that recipients account for costs consistently over time. This provision does not prevent recipients from modifying their cost allocation methods. However, recipients doing so should document the reasons for modification, especially if such modification results in the shifting of a particular type of cost from one funding source to another.

Subparagraph (a)(7) requires that recipients allocate costs in accordance with generally accepted accounting principles. The Accounting Guide for LSC Recipients contains guidance on accounting principles applicable to Corporation recipients.

Subparagraph (a)(8) requires that recipients not use Corporation funds to meet the cost matching requirements of other Federal funding sources, unless another Federal funding source has indicated in writing that recipients may do so. In at least one instance, another Federal funding source has done so. In 1980, the Department of Health and Human Services issued a Policy Announcement stating that recipients could use Corporation funds to meet the matching requirement of Title III funding for legal services.

Subparagraph (a)(9) requires that recipients document costs charged to Corporation funds in business records which are available during normal business hours to the Corporation and other persons or entities, such as the GAO, which are duly authorized by applicable law to conduct audits or investigations of Corporation recipients.

Paragraph (b)—Reasonableness

Paragraph (b) applies a four-part prudent person test to the determination of whether a cost is reasonable. The language of this provision comes from section A, paragraph 3, of Attachment A to OMB Circular A-122.

One comment noted that, because the language of subparagraph (b)(3) of the proposed rule referred to "persons concerned," the prudent person test could be read to hold recipients liable

for the actions of employees acting outside of their agency, even where recipients may have taken all reasonable steps to prevent the actions from occurring. Because this is not the Corporation's intent, the Board modified subparagraph (b)(3) to refer to "the recipient" instead of "persons concerned."

In general, when applying the prudent person test to determine whether a cost is reasonable, the Corporation will look at both the cost itself and the process by which the recipient decided to incur the cost. Generally, a cost is reasonable in nature and amount if it is comparable to similar costs incurred by other legal services programs in similar circumstances. Indicia of a prudent process include, but are not limited to, the solicitation of quotes from prospective vendors, documentation of the acquisition process, and board approval of unusually large costs.

If, for any reason, uncertainty exists as to the reasonableness of a cost, recipients may seek an advance understanding from the Corporation pursuant to § 1630.5(a). A request for an advance understanding should describe in reasonable detail the nature and amount of the cost. Provided that the actual costs does not vary significantly in nature or amount for the description in the request, an advance understanding ensures that the Corporation will not disallow the cost later on the grounds that it was unreasonable.

Paragraph (c)—Allocability

Paragraph (c) sets forth considerations which govern the allocability of costs charged to Corporation grants and contracts. In short, a cost is allocable to a grant or contract to the extent that it "benefits" the grant or contract. The language of this section comes from section A, paragraph 4, of Attachment A to OMB Circular A-122.

Some costs benefit a single grant, such as the salary cost of a Title III attorney who exclusively represents elder clients. Other costs benefit several different grants, such as the rental cost of an office which serves clients under LSC, IOLTA, and Title III grants. In the former instance, a recipient should allocate all of the Title III attorney's salary cost to the Title III grant. In the latter instance, a recipient should allocate a share of the office's rental costs to the LSC, IOLTA, and Title III grants, provided that each of those funding sources permit this type of cost.

This paragraph no longer contains a provision from the prior rule which prohibited the shifting of costs to avoid funding deficiencies or restrictions on

the uses of funds. The Board specifically sought comment on the deletion of this provision in the preamble to the proposed rule. The Corporation received no comments opposing the deletion.

The Board approved deletion of this provision, because § 1630.3(a)(4) already prevents recipients from charging the costs of restricted activities to LSC funds. Although the result of deleting this provision is to permit the shifting of otherwise allowable costs to Corporation funds, the Corporation encourages recipients to budget and allocate costs carefully so as to avoid accumulating deficits in their non-LSC funds which would necessitate year-end transfers of LSC funds to eliminate the deficits.

Paragraphs (d) and (e)—Direct and Indirect Costs

The salary of a Title III attorney who exclusively serves elder clients is a typical example of a *direct cost* as described by paragraph (d). Generally, recipients should treat the salaries and wages of attorneys and paralegals as direct costs. The rental cost of office space which is used to serve clients under two or more different grants is a typical example of an *indirect cost* as described by paragraph (e). The language of these two sections comes from sections B and C of Attachment A to OMB Circular A-122.

Paragraph (d)—Keeping of Personnel Activity Reports

Several comments observed that a reference to "time records" in paragraph (d) of the proposed rule could be read to require recipients to base their allocations of staff salaries and wages on timekeeping records kept pursuant to 45 CFR part 1635, the Corporation's timekeeping rule. This would require a significant number of recipients to modify their timekeeping systems, because many recipients do not include funding source information in the timekeeping records which they keep pursuant to 45 CFR part 1635.

The Corporation does not intend to impose such a requirement. The preamble to 45 CFR part 1635 clearly states that, while timekeeping records are one possible basis for cost allocations, the Corporation did not intend to require recipients to calculate cost allocations directly from timekeeping records kept pursuant to 45 CFR part 1635. (61 FR 14263, Apr. 1, 1996.) For this reason, the Board revised paragraph (d) to refer to "personnel activity reports" instead of "time records."

Accordingly, paragraph (d) requires that recipients keep personnel activity

reports to support salaries and wages which are allocated as direct costs. Paragraph 6(1)(2) of Attachment B to OMB Circular A-122 provides detailed guidance about the keeping of such reports. These reports should: (1) Be prepared at least monthly; (2) contain a reasonable, after-the-fact estimate of the distribution of activity of each compensated employee whose time is charged directly to a grant; and (3) be signed by either the employee or a supervisor having first-hand knowledge of the employee activity. The keeping of these records also satisfies the "labor-distribution" recordkeeping requirement of § 3-5.5(a) of the Accounting Guide for LSG Recipients.

Paragraph (f)—Allocation of Indirect Costs

Pursuant to paragraph (f) of this section, the allocation of indirect costs should be accomplished through an established cost allocation method. Because nearly all current recipients perform the single function of delivering legal services to low-income clients, paragraph (f) sets forth a simplified allocation method for allocating indirect costs among funding sources. The language of this paragraph comes from section D of Attachment A to OMB Circular A-122.

Generally, recipients should use an indirect cost allocation method which distributes costs equitably among all funding sources. Possible bases for allocating indirect costs include, but are not limited to, total direct costs, direct salaries and wages, attorney hours, numbers of cases, and numbers of employees.

Paragraph (g)—Exception for Certain Indirect Costs

Two comments noted that some funding sources do not permit the charging of certain indirect costs. Paragraph (g) creates an exception to accommodate this situation. If a recipient cannot allocate an indirect cost to one or more funding sources, the recipient should distribute the cost equitably among the funding sources which do permit the charging of the cost.

In the case of audit costs under Sec. 509(c) of Public Law 104-134, for example, recipients should distribute their audit costs on a pro rata basis among funding sources which do permit the charging of such costs. This allocation method satisfies the requirements of Sec. 509(c).

Paragraph (h)—Applicable Credits

Paragraph (h) defines and explains how to allocate applicable credits.

Applicable credits are receipts or reductions of expenditures which operate to offset or reduce expenses.

Paragraph (i)—Guidance

Because the LSC Act specifies that the Corporation is not a Federal agency, OMB Circulars are generally not binding on the Corporation or on recipients of its funds. However, the Corporation has relied on three relevant OMB Circulars in the development of these cost standards and procedures.

In particular, OMB Circulars A-110, A-122, and A-133 contain publicly noticed and commented standards which are applied throughout the Federal government to nonprofit organizations which receive Federal funds. In the event that questions arise about the allowability of costs under this part, the Corporation will look to these Circulars for guidance, to the extent that they are not inconsistent with law applicable to the Corporation and its recipients, including the Corporation's rules, regulations, and guidelines.

Section 1630.4—Burden of Proof

This section provides that the recipient has the burden of proving that costs charged to Corporation funds meet the requirements of §§ 1630.3 and 1630.5 of this part. When a recipient engages in an activity which is permissible only with non-LSC funds, the recipient also has the burden of showing that such costs are properly charged to non-LSC funds.

To meet this requirement, recipients must maintain accounting systems which are sufficient to demonstrate the allocation of costs to various funding sources, as required by this part and §§ 2-4.1 and 3-5 of the Accounting Guide for LSC Recipients. However, neither this rule nor the Accounting Guide requires recipients to maintain separate bank accounts for the purposes of segregating funds received from different funding sources.

Section 1630.5—Costs Requiring Corporation Prior Approval

Paragraph (a) of this section permits recipients to obtain an advance understanding from the Corporation prior to incurring costs that are exceptional in nature or amount. The language of this paragraph comes from section A, paragraph 6, of Attachment A to OMB Circular A-122.

An advance understanding as to the reasonableness or allocability of an exceptional cost guards against the possibility that the cost might come into question during a subsequent audit. The Corporation encourages recipients to

seek advance understandings prior to incurring costs which might be perceived later by an auditor as being other than ordinary and necessary to the operation of a legal services program.

Paragraph (b) of this section lists specific costs which recipients may not charge to Corporation funds without the Corporation's written prior approval. Because this paragraph applies to costs charged to LSC funds only, recipients charging the entire amount of such costs to non-LSC funds do not need to seek the Corporation's prior approval. Where recipients charge part of the cost to LSC funds and part of the cost to non-LSC funds, Corporation prior approval is necessary when the amount charged to LSC funds exceeds one of the threshold amounts in this paragraph. In the case of purchases of real property, Corporation prior approval is necessary when a recipient expends any amount of LSC funds to acquire real property.

Subparagraph (b)(1) requires recipients to obtain prior approval before charging certain pre-award and post-cessation-of-funding costs to Corporation funds. Two comments noted that the wording of this subparagraph, as it appeared in the proposed rule, could be read to apply to expenditures of LSC fund balances carried over by continuing recipients pursuant to 45 CFR part 1628. Because this was not the Corporation's intent, the Board approved a revision to this subparagraph, so that it now refers to "pre-award costs and costs incurred after the cessation of funding."

Pursuant to paragraph 34 of Attachment B to OMB Circular A-122, and with the Corporation's prior approval, pre-award costs may be charged to a Corporation grant if they are: (1) Incurred pursuant to the negotiation of and in anticipation of, the grant; (2) necessary to the performance of the grant; and (3) otherwise allowable during the actual term of the grant. Such costs include, but are not limited to, the hiring of staff and the acquisition of office space and equipment necessary to the performance of the grant.

With the prior approval of the Corporation, recipients may use some or all of their LSC funds remaining at the time of cessation of funding to fulfill their professional responsibilities to clients by closing out cases or by transferring them to other providers. In the rare event that termination of funding occurs during the term of a grant, paragraph 48 of Attachment B to OMB Circular A-122 provides detailed guidance on the allowability of costs incurred during the termination process.

The \$10,000 threshold of subparagraph (b)(2) applies to

individual items of personal property only. Corporation prior approval is no longer necessary for purchases and leases of individual items costing less than this amount, even if a purchase or lease of several related items with individual costs below \$10,000 has a combined cost which exceeds the threshold amount. However, the costs of acquiring such items must still meet the criteria of § 1630.3 of this part, including the requirement that such costs be reasonable and necessary to the performance of the grant or contract.

The use of Corporation funds to purchase real property, whether to pay part or all of an initial down payment or to pay part or all of the principal or interest payments on debt secured to finance the purchase, requires Corporation prior approval. Capital expenditures to improve real property also require Corporation prior approval, if the amount of LSC funds going toward such an expenditure exceeds \$10,000. Leases of real property do not require Corporation prior approval.

Paragraph (b) no longer requires prior approval of consultant contracts. However, recipients should be prepared to justify the costs of such contracts should they come into question during a subsequent audit or investigation. Subparagraph 35(b) of Attachment B to OMB Circular A-122 list several factors which govern the allowability of the costs of retaining consultants. These include: (1) The nature and scope of the service; (2) the necessity of contracting for the service; (3) the recipient's ability to perform the service itself; (4) the qualifications of the consultants; (5) and the adequacy of the contract agreement. In the event that there is likely to be any question about the reasonableness or allocability of a consultant contract, recipients may seek an advance understanding from the Corporation as provided by § 1630.5(a).

The elimination of the prior approval requirement for consultant contracts does not affect or supersede 45 CFR part 1627, which governs subgrants of LSC funds. As provided by part 1627, contracts using LSC funds to perform programmatic activities are subgrants which require Corporation prior approval, except that contracts for private attorney involvement in amounts not greater than \$25,000 do not require prior approval.

Section 1630.6—Timetable and Basis for Granting Prior Approval

Paragraph (a) requires the Corporation to grant prior approval of a cost when a recipient provides sufficient written information to demonstrate that the cost would be allowable under the

provisions of this part. When denying a request for prior approval, the Corporation must explain in writing why the cost would not be allowable.

Paragraph (b) provides a timetable for obtaining prior approval. If the Corporation fails to act within the timetable in this paragraph, it may not assert the absence of prior approval as a basis for disallowing a cost. However, to be allowable, the cost must nonetheless meet the nine criteria of § 1630.3(a).

Section 1630.7—Review of Questioned Costs and Appeal of Disallowed Costs

Paragraph (a) recognizes the statutory authority of the Corporation's OIG, the GAO, and authorizes independent auditors to question costs incurred by recipients. Section 509(k) of Public Law 104-134 requires Corporation management to develop procedures for, and to follow up on, significant audit findings reported to the Corporation. This section of the rule addresses that requirement, as it applies to findings of questioned costs.

If, after reviewing a questioned cost, the Corporation determines that there is a reasonable basis for disallowing the cost, paragraph (b) requires the Corporation to provide the recipient with written notice of its intent to disallow the cost. Paragraph (b) also establishes a five-year time limitation on the Corporation's ability to disallow costs.

When approving the proposed rule for public notice and comment, the Board adopted a three-year limitation on the Corporation's ability to disallow costs. One comment supported this shorter time period, on the grounds that it was long enough to permit the Corporation to review costs questioned during routine annual audits of recipients.

Both Corporation management and the OIG recommended that the Board adopt a five-year time period, on the grounds that a three-year time period might be too short to enable the Corporation to fulfill its statutory responsibility to follow up on questioned costs which might arise during the course of a GAO or OIG audit, or during a complaint investigation by Corporation management. Such an audit or investigation might occur at the end of the three-year period, and the time limitation in the proposed rule would prevent the Corporation from following up on a questioned cost finding. The Board agreed and revised paragraph (b) to provide for a five-year time limitation.

Paragraph (c) provides a 30-day time period during which recipients may

provide a written response to the Corporation with evidence and argument as to why the Corporation should not disallow part or all of a questioned cost. This paragraph guarantees that recipients will have at least one full opportunity to respond to a finding of a questioned cost which the Corporation has sought to disallow.

Paragraph (d) requires the Corporation to issue a management decision, as defined by § 1630.2(f), within 60 days of receiving a recipient's response to a notice of intent to disallow a questioned cost. If the Corporation's management decision disallows the cost, the recipient may appeal the disallowance as provided by paragraph (e), provided that the amount of the disallowed cost exceeds \$2,500.

One comment urged the Board to eliminate the \$2,500 appeal threshold, so that recipients could appeal all disallowed costs, no matter what the amount. In contrast, the Corporation's OIG recommended that the Board institute a higher threshold. Among other reasons, the OIG cited as a basis for this recommendation the likelihood that the cost of an appeal, in many instances, would exceed the amount of the disallowed cost itself.

After considering the Corporation's recent experience, which has involved an average of one appeal per year, the Board decided to retain the \$2,500 threshold as an appropriate balancing of the Corporation's and recipients' interests in the equitable and efficient resolution of disagreements about disallowed costs.

Section 1630.8—Recovery of Disallowed Costs and Other Corrective Action

Paragraphs (a) and (b) require the Corporation to recover disallowed costs and ensure that recipients take necessary corrective action to prevent the recurrence of circumstances giving rise to questioned costs. Final action with respect to a disallowed cost occurs when the Corporation has recovered the disallowed cost and the recipient has concluded all necessary corrective action specified in the Corporation's management decision.

The proposed rule included a provision which allowed the Corporation to recover, in connection with a disallowed cost, income which a recipient may have derived from the activity which resulted in the disallowed cost. One comment urged the deletion of this provision on the grounds that it was unnecessary and without legal basis.

Because the Corporation's experience shows that disallowed costs rarely result in derivative income, and because

relevant OMB Circulars and other applicable law do not provide for its recovery, the Board agreed to delete language providing for the recovery of derivative income from this section. The Board also deleted corresponding references to derivative income from §§ 1630.7(b) and 1630.11(b).

Section 1630.9—Other Remedies; Effect on Other Parts

Paragraph (a) requires Corporation management to refer instances of serious financial mismanagement, fraud, and defalcation of funds to the Corporation's OIG. In such instances, the Corporation may also initiate proceedings to suspend or terminate a recipient's funding. Paragraph (b) clarifies that the disallowance of a cost does not constitute a permanent reduction in a recipient's funding level.

Section 1630.10—Applicability to Subgrants

This section provides that recipients and subrecipients shall each be responsible for questioned costs incurred by subrecipients. In the event that a cost incurred by a subrecipient comes into question, both the recipient and the subrecipient will have access to the review and appeal procedures of § 1630.7.

Section 1630.11—Applicability to Non-LSC Funds

Paragraphs (a) and (b) provide that, in the event that a recipient expends non-LSC funds to pay for an activity for which non-LSC funds may not be expended pursuant to either Sec. 1010(c) of the LSC Act or Sec. 504 of Public Law 104-134, the Corporation may recover from the recipient's LSC funds an amount not to exceed the amount of non-LSC funds which the recipient expended on the prohibited activity. The activities for which recipients may not expend non-LSC funds are defined at 45 CFR §§ 1610.2 (a) and (b).

The provisions of this section do not apply to non-LSC funds spent on activities which are not subject to LSC restrictions on non-LSC funds. Thus, this section does not enable the Corporation to recover the costs of activities which are prohibited by or inconsistent with restrictions imposed by other funding sources. For example, if a recipient uses Title III funds to represent a client who does not meet Title III eligibility requirements, this section does not enable the Corporation to seek to recover the costs of representing that client.

Section 1630.12—Applicability to Derivative Income

Paragraph (a) requires proportional allocation of income derived from LSC-funded activities. Thus, for example, if a recipient has charged one-half of the cost of purchasing a photocopier to LSC funds and one-half of the cost to non-LSC funds, and the recipient uses the photocopier to provide photocopying services to another non-profit organization for a fee, then one-half of the income from the fee is LSC derivative income which should be allocated to the LSC fund. The remainder of the income is non-LSC derivative income which should be allocated to non-LSC funds. This allocation method is similar to that required by 45 CFR § 1642.5(a), which provides for the allocation of attorney fee awards.

Paragraph (b) specifies that LSC derivative income is subject to the requirements of this part, including the requirement that expenditures of such funds be in compliance with the restrictions of the LSC Act, regulations, and other applicable law. One comment sought a revision to this section clarifying that only that proportion of derivative income which is allocable to the LSC fund is subject to this subparagraph. The Board adopted the suggested revision, and the final rule reflects this clarification.

List of Subjects in 45 CFR Part 1630

Accounting, Government contracts, Grant programs-law, Hearing and appeal procedures, Legal services, Questioned costs.

For the reasons set forth in the preamble, the Corporation revises 45 CFR part 1630 to read as follows:

PART 1630—COST STANDARDS AND PROCEDURES

- | | |
|---------|--|
| Sec. | |
| 1630.1 | Purpose. |
| 1630.2 | Definitions. |
| 1630.3 | Standards governing allowability of costs under Corporation grants or contracts. |
| 1630.4 | Burden of proof. |
| 1630.5 | Costs requiring Corporation prior approval. |
| 1530.6 | Timetable and basis for granting prior approval. |
| 1630.7 | Review of questioned costs and appeal of disallowed costs. |
| 1630.8 | Recovery of disallowed costs and other corrective action. |
| 1630.9 | Other remedies; effect on other parts. |
| 1630.10 | Applicability to subgrants. |
| 1630.11 | Applicability to non-LSC funds. |
| 1630.12 | Applicability to derivative income. |
| 1630.13 | Time. |

Authority: 5 U.S.C. App. 3, 42 U.S.C. 2996e, 2996f, 2996g, 2996h(c)(1), and 2996i(c); Pub. L. 105-11, 111 Stat. 2440; Pub. L. 104-134, 110 Stat. 3009.

§ 1630.1 Purpose.

This part is intended to provide uniform standards for allowability of costs and to provide a comprehensive, fair, timely, and flexible process for the resolution of questioned costs.

§ 1630.2 Definitions.

(a) *Allowed costs* means a questioned cost that the Corporation, in a management decision, has determined to be eligible for payment from a recipient's Corporation funds.

(b) *Corrective action* means action taken by a recipient that:

- (1) Corrects identified deficiencies;
- (2) Produces recommended improvements; or
- (3) Demonstrates that audit or other findings are either invalid or do not warrant recipient action.

(c) *Derivative income* means income earned by a recipient from Corporation-supported activities during the term of a Corporation grant or contract, and includes, but is not limited to, income from fees for services (including attorney fee awards and reimbursed costs), sales and rentals of real or personal property, and interest earned on Corporation grant or contract advances.

(d) *Disallowed cost* means a questioned cost that the Corporation, in a management decision, has determined should not be charged to a recipient's Corporation funds.

(e) *Final action* means the completion of all actions that Corporation management, in a management decision, has concluded are necessary with respect to the findings and recommendations in an audit or other report. In the event that Corporation management concludes no corrective action is necessary, final action occurs when a management decision has been made.

(f) *Management decisions* means the evaluation by Corporation management of findings and recommendations in an audit or other report and the recipient's response to the report, and the issuance of a final, written decision by management concerning its response to such findings and recommendations, including any corrective actions which Corporation management has concluded are necessary to address the findings and recommendations.

(g) *Questioned cost* means a cost that a recipient has charged to Corporation funds which Corporation management, the Office of Inspector General, the

General Accounting Office, or an independent auditor or other audit organization authorized to conduct an audit of a recipient has questioned because of an audit or other finding that:

(1) There may have been a violation of a provision of a law, regulation, contract, grant, or other agreement or document governing the use of Corporation funds;

(2) The cost is not supported by adequate documentation; or

(3) The cost incurred appears unnecessary or unreasonable and does not reflect the actions a prudent person would take in the circumstances.

(h) *Recipient* as used in this part means any grantee or contractor receiving funds from the Corporation under sections 1006(a)(1) or 1006(a)(3) of the Act.

§ 1630.3 Standards governing allowability of costs under Corporation grants or contracts.

(a) *General criteria.* Expenditures by a recipient are allowable under the recipient's grant or contract only if the recipient can demonstrate that the cost was:

(1) Actually incurred in the performance of the grant or contract and the recipient was liable for payment;

(2) Reasonable and necessary for the performance of the grant or contract as approved by the Corporation;

(3) Allocable to the grant or contract;

(4) In compliance with the Act, applicable appropriations law, Corporation rules, regulations, guidelines, and instructions, the Accounting Guide for LSC Recipients, the terms and conditions of the grant or contract, and other applicable law;

(5) Consistent with accounting policies and procedures that apply uniformly to both Corporation-financed and other activities of the recipient;

(6) Accorded consistent treatment over time;

(7) Determined in accordance with generally accepted accounting principles;

(8) Not included as a cost or used to meet cost sharing or matching requirements of any other federally financed program, unless the agency whose funds are being matched determines in writing that Corporation funds may be used for federal matching purposes; and

(9) Adequately and contemporaneously documented in business records accessible during normal business hours to Corporation management, the Office of Inspector General, the General Accounting Office, and independent auditors or other audit organizations authorized to conduct audits of recipients.

(b) *Reasonable costs.* A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by a prudent person under the same or similar circumstances prevailing at the time the decision was made to incur the cost. If a questioned cost is disallowed solely on the ground that it is excessive, only the amount that is larger than reasonable shall be disallowed. In determining the reasonableness of a given cost, consideration shall be given to:

(1) Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the recipient or the performance of the grant or contract;

(2) The restraints or requirements imposed by such factors as generally accepted sound business practices, arms-length bargaining, Federal and State laws and regulations, and the terms and conditions of the grant or contract;

(3) Whether the recipient acted with prudence under the circumstances, considering its responsibilities to its clients and employees, the public at large, the Corporation, and the Federal government; and

(4) Significant deviations from the established practices of the recipient which may unjustifiably increase the grant or contract costs.

(c) *Allocable costs.* A cost is allocable to a particular cost objective, such as a grant, project, service, or other activity, in accordance with the relative benefits received. Costs may be allocated to Corporation funds either as direct or indirect costs according to the provisions of this section. A cost is allocable to a Corporation grant or contract if it is treated consistently with other costs incurred for the same purpose in like circumstance and if it:

(1) Is incurred specifically for the grant or contract;

(2) Benefits both the grant or contract and other work and can be distributed in reasonable proportion to the benefits received; or

(3) Is necessary to the overall operation of the recipient, although a direct relationship to any particular cost objective cannot be shown.

(d) *Direct costs.* Direct costs are those that can be identified specifically with a particular final cost objective, i.e., a particular grant award, project, service, or other direct activity of an organization. Costs identified specifically with grant awards are direct costs of the awards and are to be assigned directly thereto. Direct costs include, but are not limited to, the salaries and wages of recipient staff who are working on cases or matters that are

identified with specific grants or contracts. Salary and wages charged directly to Corporation grants and contracts must be supported by personnel activity reports.

(e) *Indirect costs.* Indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. Any direct cost of a minor amount may be treated as an indirect cost for reasons of practicality where the accounting treatment for such cost is consistently applied to all final cost objectives. Indirect costs include, but are not limited to, the costs of operating and maintaining facilities, and the costs of general program administration, such as the salaries and wages of program staff whose time is not directly attributable to a particular grant or contract. Such staff may include, but are not limited to, executive officers and personnel, accounting, secretarial and clerical staff.

(f) *Allocation of indirect costs.* Where a recipient has only one major function, i.e., the delivery of legal services to low-income clients, allocation of indirect costs may be by a simplified allocation method, whereby total allowable indirect costs (net of applicable credits) are divided by an equitable distribution base and distributed to individual grant awards accordingly. The distribution base may be total direct costs, direct salaries and wages, attorney hours, numbers of cases, numbers of employees, or another base which results in an equitable distribution of indirect costs among funding sources.

(g) *Exception for certain indirect costs.* Some funding sources may refuse to allow the allocation of certain indirect costs to an award. In such instances, a recipient may allocate a proportional share of another funding source's share of an indirect cost to Corporation funds, provided that the activity associated with the indirect cost is permissible under the LSC Act and regulations.

(h) *Applicable credits.* Applicable credits are those receipts or reductions of expenditures which operate to offset or reduce expense items that are allocable to grant awards as direct or indirect costs. Applicable credits include, but are not limited to, purchase discounts, rebates or allowances, recoveries or indemnities on losses, insurance refunds, and adjustments of overpayments or erroneous charges. To the extent that such credits relate to allowable costs, they shall be credited as a cost reduction or cash refund in the same fund to which the related costs are charged.

(i) *Guidance.* The Circulars of the Office of Management and Budget shall provide guidance for all allowable cost questions arising under this part when relevant policies or criteria therein are not inconsistent with the provisions of the Act, applicable appropriations law, this part, the Accounting Guide for LSC Recipients, Corporation rules, regulations, guidelines, instructions, and other applicable law.

§ 1630.4 Burden of proof.

The recipient shall have the burden of proof under this part.

§ 1630.5 Costs requiring Corporation prior approval.

(a) *Advance understandings.* Under any given grant award, the reasonableness and allocability of certain cost items may be difficult to determine. In order to avoid subsequent disallowance or dispute based on unreasonableness or nonallocability, recipients may seek a written understanding from the Corporation in advance of incurring special or unusual costs. If a recipient elects not to seek an advance understanding from the Corporation, the absence of an advance understanding on any element of a cost does not affect the reasonableness or allocability of the cost.

(b) *Prior approvals.* Without prior written approval of the Corporation, no cost attributable to any of the following may be charged to Corporation funds:

- (1) Pre-award costs and costs incurred after the cessation of funding;
- (2) Purchases and leases of equipment, furniture, or other personal, non-expendable property, if the current purchase price of any individual item of property exceeds \$10,000;
- (3) Purchases of real property; and
- (4) Capital expenditures exceeding \$10,000 to improve real property.

(c) *Duration.* The Corporation's approval or advance understanding shall be valid for one year, or for a greater period of time which the Corporation may specify in its approval or understanding.

§ 1630.6 Timetable and basis for granting prior approval.

(a) The Corporation shall grant prior approval of a cost if the recipient has provided sufficient written information to demonstrate that the cost would be consistent with the standards and policies of this part. If the Corporation denies a request for approval, it shall provide to the recipient a written explanation of the grounds for denying the request.

(b) Except as provided in paragraphs (c) and (d) of this section, the

Corporation may not assert the absence of prior approval as a basis for disallowing a questioned cost, if the Corporation has not responded to a written request for approval within sixty (60) days of receiving the request.

(c) If additional information is necessary to enable the Corporation to respond to a request for prior approval, the Corporation may make a written request for additional information within forty-five (45) days of receiving the request for approval.

(d) If the Corporation has made a written request for additional information about a cost as provided by paragraph (c) of this section, and if the Corporation has not responded within thirty (30) days of receiving in writing all additional, requested information, the Corporation may not assert the absence of prior approval as a basis for disallowing the cost.

§ 1630.7 Review of questioned costs and appeal of disallowed costs.

(a) When the Office of Inspector General, the General Accounting Office, or an independent auditor or other audit organization authorized to conduct an audit of a recipient has identified and referred a questioned cost to the Corporation, Corporation management shall review the findings of the Office of Inspector General, General Accounting Office, or independent auditor or other authorized audit organization, as well as the recipient's written response to the findings, in order to determine accurately the amount of the questioned cost, the factual circumstances giving rise to the cost, and the legal basis for disallowing the cost. Corporation management may also identify questioned costs in the course of its oversight of recipients.

(b) If Corporation management determines that there is a basis for disallowing a questioned cost, and if not more than five years have elapsed since the recipient incurred the cost, Corporation management shall provide to the recipient written notice of its intent to disallow the cost. The written notice shall state the amount of the cost and the factual and legal basis for disallowing it.

(c) Within thirty (30) days of receiving written notice of the Corporation's intent to disallow the questioned cost, the recipient may respond with written evidence and argument to show that the cost was allowable, or that the Corporation, for equitable, practical, or other reasons, should not recover all or part of the amount, or that the recovery should be made in installments. If the recipient does not respond to the Corporation's written notice,

Corporation management shall issue a management decision on the basis of information available to it.

(d) Within sixty (60) days of receiving the recipient's written response to the notice of intent to disallow the questioned cost, Corporation management shall issue a management decision stating whether or not the cost has been disallowed, the reasons for the decision, and the method of appeal as provided in this section.

(1) If Corporation management has determined that the questioned cost should be allowed, and that no corrective action by the recipient is necessary, final action with respect to the questioned cost occurs at the time when the Corporation issues the management decision.

(2) If Corporation management has determined that the questioned cost should be disallowed, the management decision shall also describe the expected recipient action to repay the cost, including the method and schedule for collection of the amount of the cost. The management decision may also require the recipient to make financial adjustments or take other corrective action to prevent a recurrence of the circumstances giving rise to the disallowed cost.

(e) If the amount of a disallowed cost exceeds \$2,500, the recipient may appeal in writing to the Corporation President within thirty (30) days of receiving the Corporation's management decision to disallow the cost. The written appeal should state in detail the reasons why the Corporation should not disallow part or all of the questioned cost. If the amount of a disallowed cost does not exceed \$2,500, or if the recipient elects not to appeal the disallowance of a cost in excess of \$2,500, the Corporation's management decision shall be final.

(f) Within thirty (30) days of receipt of the recipient's appeal of a disallowed cost in excess of \$2,500, the President shall either adopt, modify, or reverse the Corporation's management decision to disallow the cost. If the President has had prior involvement in the consideration of the disallowed cost, the President shall designate another senior Corporation employee who has not had prior involvement to review the recipient's appeal. The President shall also have discretion, in circumstances where the President has not had prior involvement in the disallowed cost, to designate another senior Corporation employee to review the recipient's appeal, provided that the senior Corporation employee has not had prior involvement in the disallowed cost.

(g) The decision of the President or designee shall be final and shall be based on the written record, consisting of the Corporation's notice of intent to disallow the questioned cost, the recipient's response, the management decision, the recipient's written appeal, any additional response or analysis provided to the President or designee by Corporation staff, and the relevant findings, if any, of the Office of Inspector General, General Accounting Office, or other authorized auditor or audit organization. Upon request, the Corporation shall provide a copy of the written record to the recipient.

§ 1630.8 Recovery of disallowed costs and other corrective action.

(a) The Corporation shall recover any disallowed costs from the recipient within the time limits and conditions set forth in the Corporation's management decision. Recovery of the disallowed costs may be in the form of a reduction in the amount of future grant checks or in the form of direct payment from the recipient to the Corporation.

(b) The Corporation shall ensure that a recipient which has incurred a disallowed cost takes any additional, necessary corrective action within the time limits and conditions set forth in the Corporation's management decision. The recipient shall have taken final action when the recipient has repaid all disallowed costs and has taken all corrective action which the Corporation has stated in its management decision is necessary to prevent the recurrence of circumstances giving rise to a questioned cost.

(c) In the event of an appeal of the Corporation's management decision, the decision of the President or designee shall supersede the Corporation's management decision, and the recipient shall repay any disallowed costs and take necessary corrective action according to the terms and conditions of the decision of the President or designee.

§ 1630.9 Other remedies; effect on other parts.

(a) In cases of serious financial mismanagement, fraud, or defalcation of funds, the Corporation shall refer the matter to the Office of Inspector General, and may take appropriate action pursuant to parts 1606, 1623, 1625, and 1640 of this chapter.

(b) The recovery of a disallowed cost according to the procedures of this part does not constitute a permanent reduction in the annualized funding level of the recipient, nor does it constitute a termination of financial

assistance under part 1606, a suspension of funding under part 1623, or a denial of refunding under part 1625.

§ 1630.10 Applicability to subgrants.

When disallowed costs arise from expenditures incurred under a subgrant of Corporation funds, the recipient and the subrecipient will be jointly and severally responsible for the actions of the subrecipient, as provided by 45 CFR part 1627, and will be subject to all remedies available under this part. Both the recipient and the subrecipient shall have access to the review and appeal procedures of this part.

§ 1630.11 Applicability to non-LSC funds.

(a) No costs attributable to a purpose prohibited by the LSC Act, as defined by 45 CFR 1610.2(a), may be charged to private funds, except for tribal funds used for the specific purposes for which they were provided. No cost attributable to an activity prohibited by or inconsistent with section 504, as defined by 45 CFR 1610.2(b), may be charged to non-LSC funds, except for tribal funds used for the specific purposes for which they were provided.

(b) According to the review and appeal procedures of 45 CFR 1630.7, the Corporation may recover from a recipient's Corporation funds an amount not to exceed the amount improperly charged to non-LSC funds.

§ 1630.12 Applicability to derivative income.

(a) Derivative income resulting from an activity supported in whole or in part with funds provided by the Corporation shall be allocated to the fund in which the recipient's LSC grant is recorded in the same proportion that the amount of Corporation funds expended bears to the total amount expended by the recipient to support the activity.

(b) Derivative income which is allocated to the LSC fund in accordance with paragraph (a) of this section is subject to the requirements of this part, including the requirement of 45 CFR 1630.3(a)(4) that expenditures of such funds be in compliance with the Act, applicable appropriations law, Corporation rules, regulations, guidelines, and instructions, the Accounting Guide for LSC recipients, the terms and conditions of the grant or contract, and other applicable law.

§ 1630.13 Time.

(a) *Computation.* Time limits specified in this part shall be computed in accordance with Rules 6(a) and 6(e) of the Federal Rules of Civil Procedure.

(b) *Extensions.* The Corporation may, on a recipient's written request for good

cause, grant an extension of time and shall so notify the recipient in writing.

Dated: December 24, 1997.

Victor M. Fortuno,

General Counsel.

[FR Doc. 97-34120 Filed 12-30-97; 8:45 am]

BILLING CODE 7050-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 970829216-7305-02; I.D. 080597F]

RIN 0648-AK14

Fisheries of the Exclusive Economic Zone Off Alaska; Allocation of Atka Mackerel to Vessels Using Jig Gear

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

ACTION: Final rule.

SUMMARY: NMFS implements Amendment 34 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP). The implementing regulations of Amendment 34 require an allocation of Atka mackerel to vessels using jig gear. Annually, up to 2 percent of the total allowable catch (TAC) specified for this species in the eastern Aleutian Islands District (AI)/Bering Sea subarea (BS) will be allocated to the jig gear fleet fishing in this area. This action is necessary to provide an opportunity to a localized, small-vessel jig gear fleet to fish for Atka mackerel in summer months. The large-scale trawl fisheries typically harvest the available TAC for this species early in the fishing year, which does not allow jig gear fishermen an opportunity for a summer fishery. This action is intended to further the goals and objectives of the FMP.

DATES: Effective January 30, 1998.

ADDRESSES: Copies of Amendment 34 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.

FOR FURTHER INFORMATION CONTACT: Susan Salveson, 907-586-7228.

SUPPLEMENTARY INFORMATION: The domestic groundfish fisheries in the exclusive economic zone of the Bering

Sea and Aleutian Islands management area (BSAI) are managed by NMFS under the FMP. The FMP was prepared by the North Pacific Fishery Management Council (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 June 1997 meeting, the Council adopted Amendment 34 to the FMP and recommended that NMFS prepare a rulemaking to implement the amendment. A notice of availability of Amendment 34 was published in the **Federal Register** on August 15, 1997 (62 FR 43689) and invited comments on the amendment through October 14, 1997. A proposed rule to implement Amendment 34 was published on September 22, 1997 (62 FR 49464), with comments invited through November 6, 1997. No comments were received either on Amendment 34 or on the proposed rule.

The rule implementing Amendment 34 requires an allocation of Atka mackerel to vessels using jig gear. Annually, up to 2 percent of the TAC specified for this species in the eastern AI/BS will be allocated to vessels using jig gear in this area. The amount of the allocation will be determined annually based on the anticipated harvest capacity of the jig gear fleet and will be published in the **Federal Register** as part of the annual groundfish specifications process.

NMFS has determined that this action is necessary for the conservation and management of the Atka mackerel fishery of the BSAI and for addressing resource allocation issues between the jig and trawl gear fisheries for this species. NMFS approved Amendment 34 on November 13, 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.

Classification

The Administrator, Alaska Region, NMFS, determined that Amendment 34 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 final rule has been determined to be not significant for purposes of E.O. 12866.

NMFS prepared an FRFA consisting of the EA/RIR, and the preamble to this final rule. The initial regulatory flexibility analysis (IRFA) concluded that this action would have a significant

positive economic impact on small entities to the extent that the jig gear fleet realized potential gains through increased harvests of Atka mackerel. Any loss in gross annual revenues that would be incurred by trawl catcher vessels under Amendment 34 would not be significant (i.e., would not exceed 5 percent of a vessel's total annual revenue) because these vessels are larger (> 60 ft (18.29 m)) in length and participate in other lucrative groundfish fisheries, including the Atka mackerel fishery in the Central and Western Aleutians. Additional explanation of these impacts is presented in the preamble to the proposed rule (62 FR 49464, September 22, 1997). No comments were received on the IRFA. Because the significant economic impacts on small entities are beneficial impacts, no steps have been taken to minimize them. Likewise, other alternatives that were rejected would not have benefited small entities as greatly as the selected alternative. A copy of the RIR/FRFA is available from NMFS (see **ADDRESSES**).

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: December 22, 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 § 679.20, paragraph (a)(8) is redesignated as paragraph (a)(9) and new paragraphs (a)(8) and (c)(6) are added to read as follows:

§ 679.20 General limitations.

* * * * *

(a) * * *

(8) *BSAI Atka mackerel*—(i) *TAC by gear*. Vessels using jig gear will be allocated up to 2 percent of the TAC of Atka mackerel specified for the Eastern Aleutian Islands District and Bering Sea subarea, after subtraction of reserves, based on the criteria specified at paragraph (a)(8)(ii) of this section. The remainder of the TAC, after subtraction of reserves, will be allocated to vessels using other authorized gear types.

(ii) *Annual specification*. The percentage of the Atka mackerel TAC

specified for the Eastern Aleutian Islands District and Bering Sea subarea that is allocated annually to vessels using jig gear will be published in the **Federal Register** as part of the proposed and final annual specifications under paragraph (c) of this section. The jig gear allocation will be based on the following criteria:

(A) The amount of Atka mackerel harvested by vessels using jig gear during recent fishing years;

(B) The anticipated harvest of Atka mackerel by vessels using jig gear during the upcoming fishing year; and

(C) The extent to which the jig gear allocation will support the development of a jig gear fishery for Atka mackerel while minimizing the amount of Atka mackerel TAC annually allocated to vessels using jig gear that remains unharvested at the end of the fishing year.

* * * * *

(c) * * *

(6) *BSAI Atka mackerel allocations.* The proposed, interim, and final specifications will specify the allocation of BSAI Atka mackerel among gear types as authorized under paragraph (a)(8) of this section.

* * * * *

[FR Doc. 97-33975 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-22-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 961126334-7052-02; I.D. 122297A]

Fisheries of the Exclusive Economic Zone Off Alaska; Closures of Specified Groundfish Fisheries in the Gulf of Alaska

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

ACTION: Closure.

SUMMARY: NMFS is closing specified groundfish fisheries in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the directed fishing allowances specified for the 1998 interim total allowable catch (TAC) amounts for the GOA.

DATES: Effective 0001 hrs, Alaska local time (A.l.t.), January 1, 1998, until superseded by the Final 1998 Harvest Specification for Groundfish, which will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mary Furuness, 907-586-7228.

SUPPLEMENTARY INFORMATION: The groundfish fishery in the exclusive economic zone of the GOA 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.

In accordance with § 679.20(d), if the Administrator, Alaska Region, NMFS (Regional Administrator), determines that the amount of a target species or "other species" category apportioned to a fishery or, with respect to pollock and Pacific cod, to an inshore or offshore component allocation, will be reached, the Regional Administrator may establish a directed fishing allowance for that species or species group. If the Regional Administrator establishes a directed fishing allowance, and that allowance is or will be reached before the end of the fishing year, NMFS will prohibit directed fishing for that species or species group in the specified GOA Regulatory Area or district (see 697.20(d)(1)(iii)).

NMFS has published interim 1998 harvest specifications for these groundfish fisheries (62 FR 65622, December 15, 1997). The Regional Administrator has determined that the following interim TAC amounts will be reached and are necessary as incidental catch to support other anticipated groundfish fisheries prior to the time that final specifications for groundfish are likely to be in effect for the 1998 fishing year:

Thornyhead rockfish	entire GOA.
Atka mackerel	entire GOA.
Sablefish	entire GOA.
"Other rockfish"	entire GOA.
Shortraker/rougheye rockfish.	entire GOA.
Pacific cod	offshore component, entire GOA.
Pollock	offshore component, entire GOA.
Deep-water flatfish ...	Western Regulatory Area.
Northern rockfish	Eastern Regulatory Area.

Consequently, in accordance with § 679.20(d)(i), the Regional Administrator establishes these interim TAC amounts as directed fishing allowances.

Further, The Regional Administrator finds that these directed fishing allowances will be reached before the end of 1998. Therefore, in accordance with § 679.20(d) NMFS is prohibiting directed fishing for these species in the specified areas.

These closures will be in effect beginning at 0001 hours, A.l.t., January 1, 1998, until superseded by the Final 1998 Initial Harvest Specifications for Groundfish.

While these closures are in effect, the maximum retainable bycatch amounts at § 679.20 (e) and (f) apply at any time during a fishing trip. Additional closures and restrictions may be found in existing regulations at 50 CFR part 679. These closures to directed fishing are in addition to closures and prohibitions found in regulations at 50 CFR part 679. Refer to § 679.2 for definitions of areas. The definitions of GOA deep-water flatfish and "Other rockfish" species categories are provided in the **Federal Register** publication of the interim 1998 harvest specifications (62 FR 65622, December 15, 1997).

NMFS may implement other closures at the time the Final 1998 Initial Harvest Specifications are implemented or during the 1998 fishing year, as necessary for effective conservation and management.

Classification

This action is required by § 679.20 and is exempt from review under E.O. 12866.

This action responds to the interim TAC limitations and other restrictions on the fisheries established in the interim 1998 harvest specifications for groundfish for the GOA. It must be implemented immediately to prevent overharvesting the 1998 interim TAC of several groundfish species in the GOA. A delay in the effective date is impracticable and contrary to the public interest. The fleet will begin to harvest groundfish on January 1, 1998. Further delay would only result in overharvest. NMFS finds for good cause that the implementation of this action should not be delayed for 30 days. Accordingly, under 5 U.S.C. 553(d), a delay in the effective date is hereby waived.

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

Dated: December 23, 1997.

Gary C. Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97-33974 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 971110265-7306-02; I.D. 101797A]

RIN 0648-AJ98

Fisheries of the Exclusive Economic Zone Off Alaska; Scallop Fishery Off Alaska; Change in Season Dates

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

ACTION: Final rule.

SUMMARY: NMFS changes the dates of the fishing season for Registration Area D (Yakutat), Registration Area E (Prince William Sound), and Registration Area H exclusive of the Kamishak District in the scallop fishery in the exclusive economic zone (EEZ) off Alaska. The new fishing season will begin on July 1 and end on February 15 of the following year. The intended effect of this action, which makes the Federal fishing season parallel to that of the State of Alaska scallop fishery, is to improve vessel safety and product quality, and to maintain consistency between Federal and State of Alaska fishing season regulations. This action is necessary to promote the conservation and management objectives of the Fishery Management Plan for the Scallop Fishery off Alaska (FMP).

DATES: Effective January 10, 1998.

ADDRESSES: Copies of the Environmental Assessment/Regulatory Impact Review (EA/RIR) prepared for this action may be obtained from Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori J. Gravel.

FOR FURTHER INFORMATION CONTACT: Kent Lind, 907-586-7228.

SUPPLEMENTARY INFORMATION:**Management Authority**

The scallop fishery in the EEZ off Alaska is managed by NMFS under the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act and approved by NMFS on July 26, 1995. Regulations implementing the FMP are set out at 50 CFR part 679. General regulations that also affect fishing in the EEZ are set out at 50 CFR part 600. Amendment 1 to the FMP established a cooperative State-Federal management regime under which each management action by the

State of Alaska (State) is mirrored by a parallel Federal management action. The purpose of this cooperative management regime is to give primary responsibility to the State of Alaska for managing scallop fishing in both state and Federal waters.

In March 1997, the Alaska State Board of Fisheries (Board) approved an industry proposal to change the scallop season dates in the Yakutat and Prince William Sound Registration Areas. Previously, the scallop fishery in those areas opened on January 10 and closed on June 30 of each year. The Board's action changes State regulations by specifying a season opening of July 1 and a closure of February 15 of the following year. The Board recommended that a parallel season change be made in the Federal regulations to prevent conflicting regulations at the state and Federal levels. The following two reasons were cited in the Board's decision to move the scallop season dates for these areas.

Changing circumstances in the scallop fishery.

The historical reason for a January opening in the Yakutat and Prince William Sound Registration Areas no longer exists under the current management regime. Prior to 1993, the Alaska Department of Fish and Game (ADF&G) did not establish Guideline Harvest Levels (GHLs) for each registration area. Instead, winter and summer openings were used in different areas to spread effort and to mirror the historical pattern of scallop fishing throughout the State. However, under Amendment 1 to the FMP, approved July 10, 1996, ADF&G and NMFS now establish GHLs or total allowable catch (TAC) amounts for each scallop registration area. Consequently, the January openings for Yakutat and Prince William Sound are no longer necessary to distribute effort between registration areas because the separate TACs established for each registration area accomplish the same objective.

Safety issues.

At its March 1997 meeting, the Board received extensive testimony from scallop fishermen who reported that January is an unsafe time to fish for scallops in the smaller vessels that compose most of the fleet. Fishing conditions are much safer in July than in January when severe winter storms are common in the Gulf of Alaska. Historically, the summer fishery in the western registration areas would extend into the fall and winter months. Vessel operators would typically begin scallop fishing in the Bering Sea and Alaskan

Peninsula during July and move to the more sheltered waters of Yakutat and Prince William Sound in the winter. However, in recent years, TAC limits and/or crab bycatch limits are reached relatively quickly in the western registration areas. No reason exists to delay the Yakutat and Prince William Sound scallop fisheries until January when the worst winter weather occurs.

Federal Response to Board Action

The Board has already amended the State regulations to establish a scallop fishing season of July 1 through February 15 for the corresponding state waters. Therefore, the goal under Amendment 1 to the FMP to maintain consistency between State and Federal scallop regulations requires NMFS to implement a parallel change for the Federal regulations. This revision to the Federal regulations is necessary to prevent conflicting fishing seasons at the State and Federal level and the resulting disruption to industry. If no action is taken, cooperative State-Federal management of the fishery would be impossible. State waters in Prince William Sound and Yakutat would open on July 1 while Federal waters would open on January 10. Furthermore, ADF&G and NMFS would be forced to split the TACs between State and Federal waters and manage each portion of the TAC separately.

A proposed rule to change the season dates in these registration areas was published in the **Federal Register** on November 24, 1997 (62 FR 62545) with comments invited through December 9, 1997. No comments were received on the proposed rule and no changes were made from the proposed rule.

Classification

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

NMFS has determined that there is good cause to waive a portion of the delayed effectiveness period under 5 U.S.C. section 553(d)(3) because the need to coordinate scallop season opening dates in State and Federal regulations requires that this action be effective on or before January 10, 1998. If it is not, Federal waters would open to fishing for scallops in Registration Areas D and E on January 10, while State waters would not open until July 1, resulting in increased costs to industry and a disruption of the orderly management of the fishery under the cooperative State/Federal management regime.

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 rule will not have a significant economic impact on a substantial number of small entities. No comments were received regarding this certification. Copies of the EA/RIR are available from NMFS (see ADDRESSES).

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: December 22, 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 part 679 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*, 773 *et seq.*, and 3631 *et seq.*

2. Section 679.64 is revised to read as follows:

§ 679.64 Seasons.

(a) Fishing for scallops in the Federal waters off Alaska is authorized from 0001 hours, A.l.t., July 1, through 1200 hours, A.l.t., February 15 of the following year, subject to the other provisions of this part, except as

provided in paragraphs (b) and (c) of this section.

(b) Fishing for scallops in the Federal waters of the Kamishak District of Scallop Registration Area H is authorized from 1200 hours, A.l.t., August 15 through 1200 hours, A.l.t., October 31, subject to the other provisions of this part.

(c) Fishing for scallops in the Federal waters of Registration Area A is authorized from 1200 hours A.l.t., January 10 through 1200 hours, A.l.t., June 30, subject to the other provisions of this part.

[FR Doc. 97-33973 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-22-F

Proposed Rules

Federal Register

Vol. 62, No. 250

Wednesday, December 31, 1997

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 54

[No. LS-96-006]

RIN 0581-AB44

Changes in Fees for Federal Meat Grading and Certification Services

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Agricultural Marketing Service (AMS) proposes revising the hourly fee rates for voluntary Federal meat grading and certification services. The hourly fees would be adjusted by this proposed rule to reflect the increased cost of providing service, and ensure that the Federal meat grading program is operated on a financially self-supporting basis as required by law.

DATES: Comments must be received on or before March 2, 1998.

ADDRESSES: Written comments may be mailed to Larry R. Meadows, Chief; USDA, AMS, LS, MGC; STOP 0248, Room 2628-S; 1400 Independence Avenue, SW.; Washington, DC 20250-0248. (For further information regarding comments, see "Comments" under SUPPLEMENTARY INFORMATION.)

FOR FURTHER INFORMATION CONTACT: Larry R. Meadows, Chief, Meat Grading and Certification (MGC) Branch, 202-720-1246.

SUPPLEMENTARY INFORMATION:

Regulatory Impact Analysis

This proposed rule was reviewed under the USDA procedures established to implement Executive Order 12866, and was determined to be not significant. Therefore, it has not been reviewed by the Office of Management and Budget.

Effect on Small Entities

This action was reviewed under the Regulatory Flexibility Act (Pub. L. 96-

354, 5 U.S.C. 601 *et seq.*), wherein the Administrator of AMS determined that this proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed hourly rate increase is necessary to recover the costs of providing voluntary Federal meat grading and certification services and for the program to continue serving the industry. To forestall a rate increase while maintaining operating efficiency, the program has significantly increased the use of automated information management technologies and decreased the number of support personnel and field offices. These cost-saving measures have not provided the margin necessary to operate the program. Since 1993, program costs have increased by approximately \$7,620,000 or an average of \$1,905,000 per year, and the programs required capital reserves are decreasing.

The program is required to keep at least 4 months of operating reserve. If the reserves drop to 4 months, the program must cut services. To avoid an interruption in services to our customers, the program must maintain more than the minimum reserve. At the beginning of fiscal year (FY) 1997, the program had 7.7 months of operating reserve. At the end of FY 1997, the program had only 7.23 months of operating reserve. Assuming that the rate increase were to take effect in April 1998, the capital reserve is projected to fall to 5.87 months by the end of FY 98.

In FY 1997, the unit cost of program services (revenue/total pounds graded and certified) was approximately \$0.00055 per pound. In FY 1998, including the proposed hourly rate increase, program services are projected to cost only \$0.000617 per pound or \$0.000149 per pound less than the \$0.000766 per pound program services cost in FY 1993.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act do not apply to this rulemaking as it does not require the collection of any information or data.

Comments

Interested persons are invited to submit written comments concerning this proposed rule. Comments must be sent in duplicate to the Washington, D.C., Office, MGC Branch, and should bear a reference to the date and page

number of this issue of the **Federal Register**. Comments submitted in reference to this document will be made available for public inspection during regular business hours.

Background

The Secretary of Agriculture is authorized by the Agricultural Marketing Act (AMA) of 1946, as amended, 7 U.S.C. 1621 *et seq.*, to provide voluntary Federal meat grading and certification services to facilitate the orderly marketing of meat and meat products and to enable consumers to obtain the quality of meat they desire. The AMA also provides for the collection of fees from users of Federal meat grading and certification services that are approximately equal to the cost of providing these services. The hourly fees for service are established by equitably distributing the projected annual program operating costs over the estimated hours of service—revenue hours—provided to users of the service. Program operating costs include salaries and fringe benefits of meat graders, supervision, travel, training, and all administrative costs of operating the program. Employee salaries and benefits account for approximately 80 percent of the total budget. Revenue hours include base hours, premium hours, and service performed on Federal legal holidays. As program operating costs change, the hourly fees must be adjusted to enable the program to remain financially self-supporting as required by law.

This proposed fee increase, the first since 1993, is necessary to offset increased program operating costs resulting from: (1) the congressionally-mandated, governmentwide salary increases for 1995, 1996, and 1997, (2) inflation of nonsalary operating costs since 1993, and (3) accumulated increases in CONUS per diem rates for the 4-year period from 1994 to 1997. Together, these cost increases total an estimated \$7,620,000 since 1993.

Since the last fee increase, the MGC Branch has continued to develop more efficient grading and certification procedures and services. At the same time, applicants for service have become more efficient in their production techniques. These two factors working in combination have resulted in the MGC Branch grading and certifying larger volumes of products and charging fewer revenue hours. Accordingly,

fewer revenue dollars are available to offset increases in operating expenses. In FY 1993, MGC Branch employees graded or certified 23,445,219,703 pounds of meat at an average of 49,902 pounds per revenue hour. In FY 1997, MGC Branch employees graded or certified 33,029,179,286 pounds of meat at an average of 73,699 pounds per revenue hour. While the average number of pounds graded and certified per hour have increased, the total number of revenue hours generated by Branch employees decreased from 469,819 in FY 1993 to 448,162 in FY 1997. In FY 1997, the program had a net operating loss of \$737,000. If revenues remain constant and costs continue to increase, program operating costs are projected to exceed total revenue by \$1,519,000 in FY 1998 and \$2,124,000 in FY 1999.

Since 1993, in an effort to control overhead costs, the MGC Branch has closed three field offices, reduced mid-level supervisory staff by 43 percent, and reduced the number of support staff by 29 percent. At the same time, the MGC Branch has become more reliant on automated information management systems for data collection and dissemination, account billing, and disbursements of employee entitlements. The reduction of field offices, supervisory staff, and support personnel and the increased reliance on automated systems enabled the MGC Branch to absorb increased operating costs in 1994, 1995, 1996, and 1997.

Despite the cost reduction efforts, the decrease in revenue hours plus the increase in salaries, nonsalary operating costs, and CONUS per diem rates have already resulted in a net operating loss for FY 1997, and will result in a net operating loss for FY 1998. Such operating deficits can only be balanced by adjusting the hourly fee rate charged to users of the service. Any further reduction in personnel, services, or management infrastructure beyond those already implemented would have a detrimental effect on the program's ability to provide meat grading and certification services and support the accurate and uniform application of such services.

In view of these considerations, the Agency proposes to increase the base hourly rate commitment applicants pay for voluntary Federal meat grading and certification services from \$36.60 to \$39.80. A commitment applicant is a user of the service who agrees, by commitment or agreement memorandum, to use meat grading and certification services for 8 consecutive hours per day, Monday through Friday, between the hours of 6 a.m. and 6 p.m.,

excluding legal holidays. The base hourly rate noncommitment applicants would pay for voluntary Federal meat grading and certification services would increase from \$39.00 to \$42.20, and would be charged to applicants who utilize the service for 8 consecutive hours or less per day, Monday through Friday, between the hours of 6 a.m. and 6 p.m., excluding legal holidays. The premium hourly rate for all applicants would increase from \$44.60 to \$47.80, and would be charged to users of the service for the hours worked in excess of 8 hours per day between the hours of 6 a.m. and 6 p.m.; for hours worked between 6 p.m. and 6 a.m., Monday through Friday; and for any time worked on Saturday and Sunday, except on legal holidays. The holiday rate for all applicants would increase from \$73.20 to \$79.60, and would be charged to users of the service for all hours worked on legal holidays.

List of Subjects in 7 CFR Part 54

Food grades and standards, Food labeling, Meat and meat products.

For the reasons set forth in the preamble, 7 CFR part 54 is amended as follows:

PART 54—MEATS, PREPARED MEATS, AND MEAT PRODUCTS (GRADING, CERTIFICATION, AND STANDARDS)

1. The authority citation for part 54 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

§ 54.27 [Amended]

2. In § 54.27, paragraph (a), “\$39.00” is removed and “\$42.20” is added in its place, “\$44.60” is removed and “\$47.80” is added in its place, “\$73.20” is removed “\$79.60” is added in its place, and in paragraph (b), “\$36.60” is removed and “\$39.80” is added in its place, “\$44.60” is removed and “\$47.80” is added in its place, and “\$73.20” is removed and “\$79.60” is added in its place.

Barry L. Carpenter,

Deputy Administrator, Livestock and Seed Program.

[FR Doc. 97–34095 Filed 12–30–97; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Food and Consumer Service

7 CFR Part 246

RIN 0584–AC59

Special Supplemental Nutrition Program for Women, Infants and Children (WIC): WIC Cereal Sugar Limit and Food Package Review

AGENCY: Food and Consumer Service, USDA.

ACTION: Notice of Intent to propose rulemaking; withdrawal.

SUMMARY: The Department published a **Federal Register** Notice of Intent on March 18, 1996 soliciting public comments on whether the existing Federal 6-gram sugar limit for WIC-eligible adult cereals should be changed. The 90-day comment period ended on June 17, 1996. USDA received 731 letters from a total of 878 commenters, representing a wide range of interested parties. The majority—809 commenters—expressed support for the continuation of the 6-gram sugar limit unchanged. In addition, several commenters suggested that USDA conduct a comprehensive review of the WIC food packages rather than focus on the single issue of the sugar content of WIC-eligible adult cereals.

The purpose of this Notice of Intent is to summarize the public comments received in response to the earlier Notice of intent and to announce the Department's intent to review the WIC food packages and recommend refinements that would best serve WIC Program objectives. USDA's Center for Nutrition Policy and Promotion will be spearheading this effort in conjunction with the Food and Consumer Service. Until this review is completed, the Department will not make any decisions about whether to propose a regulatory change in the Federal sugar cap for WIC-eligible adult cereals. Therefore, the current requirement that WIC-eligible adult cereals made available to women and child participants must contain no more than 21.2 grams of sucrose and other sugars per 100 grams of dry cereal (i.e., 6 grams of sugar per dry ounce of cereal) remains in effect.

FOR FURTHER INFORMATION CONTACT:

Barbara Hallman, Branch Chief, Policy and Program Development Branch, Supplemental Food Programs Division, Food and Consumer Service, USDA, 3101 Park Center Drive, Room 542, Alexandria, Virginia 22302, (703) 305–2730.

SUPPLEMENTARY INFORMATION:**Executive Order 12866**

This Notice of Intent has been determined to be significant for purposes of Executive Order 12866 and therefore has been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

This action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C 601-612) and thus is exempt from the provisions of this Act.

Paperwork Reduction Act

This Notice of Intent does not contain reporting or recordkeeping requirements subject to approval by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 USC 3507).

Executive Order 12372

This program is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.557 and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials [7 CFR part 3015, Subpart V, and final rule-related Notice of Intent published June 24, 1983 (48 FR 29114)].

Background

The Department's March 18, 1996 **Federal Register** Notice of Intent provided an overview of the different WIC food packages for women and child participants. These packages make available adult cereals that contain at least 28 milligrams of iron and no more than 21.2 grams of sucrose and other sugars (i.e., 6 grams of sugar per dry ounce of cereal) per 100 grams of dry cereal. The Notice of Intent summarized how this 6-gram sugar limit for WIC-eligible adult cereals (hereinafter called "WIC cereals") was established as a Federal requirement in 1980 through the rulemaking process. A complete recap of the sequence of events leading up to the development of the 6-gram sugar limit can be found in the March 18, 1996 Notice of Intent at 61 FR 10903.

In the Notice of Intent, as part of its continuing obligation to assure that Federal policies governing WIC nutritional standards are scientifically sound, the Department asked the public to comment on whether the 6-gram sugar limit should be retained as a Federal requirement for WIC cereals. The Department indicated in the Notice of Intent that, with the exception of dental caries, recent scientific studies fail to clearly document an association between sugar consumption and an

increased risk of developing chronic diseases. Therefore, the Notice of Intent solicited public comments to assist the Department in making a decision about whether to embark on a proposed change to the Federal regulations governing the sugar limit for WIC cereals.

The Department encouraged commenters to respond on how the current WIC cereal sugar limit should be revised, if a change in regulations was deemed appropriate. The Notice of Intent at 61 FR 10907 cited the following different positions that commenters were anticipated to take on this issue:

- Retain the current 6-gram sugar limit unchanged, counting all sugar, both naturally occurring and added, as part of the total sugar content of the cereal.
- Set a new sugar limit, either higher or lower than the current 6-gram level.
- Revise the 6-gram sugar limit to represent only the amount of sugar added during the manufacturing of a cereal, representing either a separate ingredient (e.g., table sugar, corn syrup, brown sugar, honey, and maltodextrin) or a separate component of a processed or man-made ingredient (e.g., marshmallow and caramel), and exclude the naturally occurring, inherent sugar in the cereal (e.g., sugars in grains, dried fruits, and nonfat dry milk).
- Eliminate the Federal sugar limit for WIC cereals.

The Notice of Intent further stated that commenters need not restrict their views to one of these options, but could also pose other alternatives. In addition, the Department urged commenters to discuss both the pros and cons of their recommendations as they specifically apply to the low-income, nutritionally at-risk WIC population. The Department also sought public views on how a change would impact WIC Program operations, such as the provision of nutrition education. Further, the Notice of Intent solicited feedback from the public on whether they believed that the 6-gram limit provided an adequate range of choices for both WIC agencies and participants, consistent with the nutritional purposes of the WIC Program.

Comment Analysis

The March 18, 1996 Notice of Intent had a 90-day comment period, which closed on June 17, 1996. USDA received 731 letters with a postmark of June 17 or earlier from a total of 878 commenters. Commenters represented a wide range of interested parties: the WIC community; professional nutrition/health care providers and associations;

members of Congress and State/local government officials; industry and related private support groups; public interest groups; and the general public. There was strong consensus among the overwhelming majority of commenters that the current cereal sugar limit continues to be appropriate for the low-income, nutritionally at-risk WIC population.

Of the 878 commenters, 809 supported retaining the current 6-gram sugar limit for WIC cereals. Supporters included, but were not limited to: the 33 WIC State agency directors who responded; 28 of the other 30 WIC State agency staff who responded; the National Association of WIC Directors; the 8 State/local WIC associations or coalitions that responded; 281 of the 308 WIC local agency directors and their staff who responded; 26 of 29 professional health/nutrition-related groups that responded, such as the American Dental Association and affiliated State dental societies/associations in California, Illinois, Iowa, Oregon, South Dakota, Texas, and Washington, the American Association of Public Health Dentistry, the American Dietetic Association and its affiliated State chapter in Maine, the Association of State and Territorial Public Health Nutrition Directors, the Society for Nutrition Education, the Association of Maternal and Child Health Programs, the American Public Health Association, and the American Academy of Pediatrics and its affiliated State chapter in Montana; 325 of the 341 individual nutrition/health professionals (mostly dentists, physicians and nutritionists) who responded; 21 of 24 members of Congress who responded before the due date; 2 of the 3 national cereal manufacturers that responded; and the 17 public interest groups that responded, such as the Food Research and Action Center, the Center on Budget and Policy Priorities, the Center for Science in the Public Interest, Public Voice for Food and Health Policy, Bread for the World, and the Migrant Legal Action Program, Inc.

Seven commenters suggested that USDA establish a lower sugar limit for WIC cereals. In most cases, their recommendations reflected general acceptance of the 6-gram sugar limit, but expressed a preference for an even lower sugar level. Three commenters wanted a modest 1-2 gram increase in the current sugar limit, or up to a maximum of 8 grams per dry ounce of cereal.

Twenty-seven commenters recommended that the current 6-gram limit be redefined to count only the

added sugars and to discount naturally occurring sugars found in cereal grains and ingredients, such as dried fruits. This group of commenters included: 1 WIC State agency staff person; 21 WIC local agency directors or their staff; 1 professional nutrition/health-related group, the American Heart Association; 1 non-WIC health/research facility; and 3 individual nutrition/health professionals or educators.

Twenty-six commenters favored a complete elimination of a sugar limit, of whom: 1 was a WIC local agency staff person; 2 represented the professional nutrition/health-related group known as the American Council on Science and Health; 7 were individual nutrition/health professionals or educators; 3 represented a non-WIC health/research facility; 12 represented the cereal, raisin or sugar industries and related private support groups; and 1 was a State official.

The Department classified 11 of the commenters, including 3 members of Congress, as expressing "other" points of view for one of the following reasons: they did not clearly state a preference for one of the options concerning the WIC cereal sugar limit cited in the Notice of Intent; they expressed an opinion not related to any option; or they wrote simply to provide information or make an inquiry, rather than to express an opinion about the sugar limit.

Five of the 878 commenters expressed two different positions in their letters (i.e., 4 commenters favored retaining or lowering the sugar limit and 1 commenter favored retaining or slightly raising the sugar limit). The dual positions of these 5 commenters were captured accordingly in the counts reported above.

As of April 4, 1997, USDA had received 166 more letters, representing 183 commenters, that were postmarked after the June 17, 1996 closing date. Late letters were read and considered by the Department, but were not included among the official counts cited above comprising the comment analysis. The majority of the late commenters expressed support for retaining the current sugar limit.

Discussion of Commenters' Opinions and Rationales

Eight hundred and fifty seven of the total 878 commenters who submitted letters during the 90-day comment expressed a preference to either retain, revise or eliminate the sugar limit. Presented below is a brief annotated list of commenters' major rationales related to each of these positions.

Position I: Retain the 6-Gram Sugar Limit Unchanged

Eight hundred and nine commenters expressed support for retaining unchanged the current sugar limit for WIC cereals. The current 6-gram sugar limit represents total grams of sugar contained in a 1-ounce serving of cereal. It includes grams of both naturally occurring and added sugars.

The total number of WIC State and local agency associations, directors and their staff and individual nutrition/health professionals who responded to the Notice of Intent represented about 728 commenters, of which approximately 680 argued against a change in the 6-gram WIC cereal sugar limit. Collectively, the main rationales the 809 commenters gave in defense of their position were:

Rationale 1: The 6-gram sugar limit is consistent with the Dietary Guidelines for Americans and the Food Guide Pyramid that recommend moderation in sugar intake.

Rationale 2: Including both naturally occurring and added sugar in the 6-gram sugar limit is consistent with the information displayed on Nutrition Facts panels of food labels that does not distinguish between naturally occurring or added sugars. Further, counting all sources of sugar in determining the total sugar content of a WIC cereal is appropriate because the human body cannot differentiate between the same types of sugar which are identical chemically whether they are naturally occurring or added.

Rationale 3: Greater amounts of sugar in WIC cereals would offer few if any nutritional benefits to WIC participants.

Rationale 4: The 6-gram sugar limit is consistent with WIC's mission to meet the special nutritional and health needs of a low-income, at-risk population.

Rationale 5: The 6-gram sugar limit represents an important nutrition standard for WIC foods and is relevant to WIC nutrition education goals.

Rationale 6: The 6-gram sugar limit provides an adequate range of cereal choices for WIC participants and State agencies.

Rationale 7: Numerous USDA reviews over several years (see 61 FR 10905) have concluded that the 6-gram sugar limit is an appropriate WIC food requirement.

Position II: Revise the 6-Gram Sugar Limit to Count Only Added Sugars

Twenty-seven commenters recommended that the 6-gram sugar limit be redefined to count only added sugars and exempt naturally occurring sugars in the grains and dried fruit

ingredients. Collectively, the main rationales these 27 commenters gave in defense of their position were:

Rationale 1: Redefining the 6-gram sugar limit, to enable more cereals containing dried fruits to become WIC eligible, would be consistent with the Dietary Guidelines recommendation concerning eating more fruits and vegetables.

Rationale 2: Redefining the 6-gram sugar limit would increase the variety of WIC cereals and dried fruit adds beneficial nutrients to cereals, such as dietary fiber, magnesium and zinc.

Position III: Eliminate the 6-Gram Sugar Limit for WIC Cereals

Twenty-six commenters stated that the current sugar limit for WIC cereals should be abolished. Collectively, the main rationales these 26 commenters gave in defense of their position were:

Rationale 1: The 6-gram sugar limit restricts the variety of WIC cereals and is inconsistent with newer research findings indicating that sugar consumption is not clearly associated with an increased risk of chronic diseases, except dental caries.

Rationale 2: The 6-gram sugar limit is arbitrary and capricious and is not based upon scientific evidence.

Conclusion

The Department would like to express its appreciation to all of the commenters who responded to the March 18, 1996 Notice of Intent to share their insights and views about this issue. Several commenters expressing various positions on the sugar limit suggested that rather than focusing on only one requirement of the WIC foods, i.e., the sugar restriction for WIC cereals, USDA should consider whether all of the nutritional aspects of the WIC food packages are still appropriate for the WIC population. Therefore, USDA has decided to conduct a review of the overall WIC food packages. This review will examine the WIC food packages and recommend refinements that would best serve WIC Program objectives. The review will assure that the WIC food packages are consistent with the fourth edition of the Dietary Guidelines for Americans jointly published by USDA and the U.S. Department of Health and Human Services in 1995, which was issued subsequent to the last review of the WIC food packages completed in 1992. Choosing a diet moderate in sugar content represents just one of the seven primary recommendations of the Dietary Guidelines. The Department believes that a more comprehensive assessment of the WIC food packages would be prudent at this time.

The USDA Center for Nutrition Policy and Promotion will be spearheading this effort in conjunction with the Food and Consumer Service. The Department expects to complete the WIC food package review by the summer of 1998. Until this review is completed, the Department will not make any decisions about whether to propose a regulatory change in the Federal sugar limit for WIC cereals. Consequently, the current Federal requirement that WIC cereals (hot or cold) made available to women and child participants must contain no more than 21.2 grams of sucrose and other sugars per 100 grams of dry cereal (i.e., 6 grams of sugar per dry ounce of cereal) remains in effect for an indefinite period of time.

Dated: December 17, 1997.

Shirley R. Watkins,

Under Secretary, Food, Nutrition and Consumer Services.

[FR Doc. 97-33844 Filed 12-30-97; 8:45 am]

BILLING CODE 3410-30-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-NM-191-AD]

RIN 2120-AA64

Airworthiness Directives; British Aerospace Model ATP Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to all British Aerospace Model ATP airplanes. This proposal would require revising the Airplane Flight Manual (AFM) to modify the limitation that prohibits positioning the power levers below the flight idle stop during flight, and to provide a statement of the consequences of positioning the power levers below the flight idle stop during flight. This proposal is prompted by incidents and accidents involving airplanes equipped with turboprop engines in which the ground propeller beta range was used improperly during flight. The actions specified by the proposed AD are intended to prevent loss of airplane controllability, or engine overspeed and consequent loss of engine power caused by the power levers being positioned below the flight idle stop while the airplane is in flight.

DATES: Comments must be received by January 30, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 97-NM-191-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mark Quam, Aerospace Engineer, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2145; fax (425) 227-1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 97-NM-191-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 97-NM-191-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

In recent years, the FAA has received reports of 14 incidents and/or accidents involving intentional or inadvertent operation of the propellers in the ground beta range during flight on airplanes equipped with turboprop engines. (For the purposes of this proposal, beta is defined as the range of propeller operation intended for use during taxi, ground idle, or reverse operations as controlled by the power lever settings aft of the flight idle stop.)

Five of the fourteen in-flight beta occurrences were classified as accidents. In each of these five cases, operation of the propellers in the beta range occurred during flight. Operation of the propellers in the beta range during flight, if not prevented, could result in loss of airplane controllability, or engine overspeed with consequent loss of engine power.

Communication between the FAA and the public during a meeting held on June 11-12, 1996, in Seattle, Washington, revealed a lack of consistency of the information on in-flight beta operation contained in the FAA-approved airplane flight manual (AFM) for airplanes that are not certificated for in-flight operation with the power levers below the flight idle stop. (Airplanes that are certificated for this type of operation are not affected by the above-referenced conditions.)

U.S. Type Certification of the Airplane

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of Section 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. The FAA has reviewed all available information, and determined that AD action is necessary for products of these type designs that are certificated for operation in the United States.

FAA's Determinations

The FAA has examined the circumstances and reviewed all available information related to the incidents and accidents described previously. The FAA finds that the Limitations Section of the AFM's for certain airplanes must be revised to prohibit positioning the power levers below the flight idle stop while the airplane is in flight, and to provide a statement of the consequences of positioning the power levers below the flight idle stop. The FAA has determined that the affected airplanes include those that are equipped with turboprop engines and that are not

certificated for in-flight operation with the power levers below the flight idle stop.

Explanation of the Requirements of the Proposed AD

Since an unsafe condition has been identified that is likely to exist or develop on British Aerospace Model ATP airplanes, the proposed AD would require revising the Limitations Section of the AFM to modify the limitation that prohibits the positioning of the power levers below the flight idle stop while the airplane is in flight, and to add a statement of the consequences of positioning the power levers below the flight idle stop while the airplane is in flight.

Interim Action

This is considered interim action until final action is identified, at which time the FAA may consider further rulemaking.

Cost Impact

The FAA estimates that 10 British Aerospace Model ATP airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed actions, and that the average labor rate is \$60 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be \$600, or \$60 per airplane.

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

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities

under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

British Aerospace Regional Aircraft

[Formerly Jetstream Aircraft Limited; British Aerospace (Commercial Aircraft) Limited]; Docket 97-NM-191-AD.

Applicability: All Model ATP airplanes, certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent loss of airplane controllability, or engine overspeed and 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) Within 30 days after the effective date of this AD, revise the Limitations Section of the FAA-approved Airplane Flight Manual (AFM) to include the following statements. This action may be accomplished by inserting a copy of this AD into the AFM.

"Roll-over Lever

Use is restricted to ground operation only. In-flight operations at power settings below

flight idle are prohibited. Power settings below flight idle may lead to a loss of aircraft control, or may result in an engine overspeed condition and consequent loss of engine power."

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

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM-113.

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

Issued in Renton, Washington, on December 22, 1997.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97-34001 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-NM-277-AD]

RIN 2120-AA64

Airworthiness Directives; Construcciones Aeronauticas, S.A. (CASA) Model C-212 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain CASA Model C-212 series airplanes. This proposal would require a one-time inspection to detect discrepancies of the spherical bearing of the aileron control rod, and corrective action, if necessary; and installation of an improved retainer washer in the movable joint of the aileron control rod. This proposal is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified by the proposed AD are intended to prevent loss of the movable joint of the aileron control rod, caused

by deterioration of the hinges, which could result in reduced controllability of the airplane.

DATES: Comments must be received by January 30, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 97-NM-277-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Construcciones Aeronauticas, S.A., Getafe, Madrid, Spain. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

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

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 97-NM-277-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 97-NM-277-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

The Dirección General de Aviación Civil (DGAC), which is the airworthiness authority for Spain, notified the FAA that an unsafe condition may exist on certain CASA Model C-212 series airplanes. The DGAC advises that, on at least one airplane, deteriorated hinges have been found in the aileron control rod located at the bottom of the flight control column. The deterioration of the hinges resulted from incorrect dimensions of the retainer washer in the joint of the aileron control rod. This condition, if not corrected, could result in loss of the movable joint of the aileron control rod, and consequent reduced controllability of the airplane.

Explanation of Relevant Service Information

CASA has issued Service Bulletin SB-212-27-48, dated February 28, 1996, which describes procedures for a one-time inspection to detect wear of the spherical bearing of the aileron control rod; and corrective action, if necessary. This service bulletin also describes procedures for installation of an improved retainer washer in the movable joint of the aileron control rod. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition. The DGAC classified this service bulletin as mandatory and issued Spanish airworthiness directive 05/96, dated May 13, 1996, in order to assure the continued airworthiness of these airplanes in Spain.

FAA's Conclusions

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

Explanation of Requirements of Proposed Rule

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

Cost Impact

The FAA estimates that 38 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 5 work hours per airplane to accomplish the proposed actions, and that the average labor rate is \$60 per work hour. Required parts would cost approximately \$56 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be \$13,528, or \$356 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Construcciones Aeronauticas, S.A. (CASA):
Docket 97-NM-277-AD.

Applicability: Model C-212 series airplanes, as listed in CASA Service Bulletin SB-212-27-48, dated February 28, 1996; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent loss of the movable joint of the aileron control rod, caused by deterioration of the hinges, which could result in reduced controllability of the airplane, accomplish the following:

(a) Within 100 flight hours after the effective date of this AD, accomplish the requirements of paragraphs (a) (1) and (a)(2) of this AD in accordance with CASA Service Bulletin SB-212-27-48, dated February 28, 1996.

(1) Perform an inspection of the spherical bearings of the aileron control rod to detect discrepancies. If any discrepancy is found, prior to further flight, replace the whole terminal. And

(2) Install an improved retainer washer in the movable joint of the aileron control rod.

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

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

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

Note 3: The subject of this AD is addressed in Spanish airworthiness directive 05/96, dated May 13, 1996.

Issued in Renton, Washington, on December 22, 1997.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97-34002 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-CE-81-AD]

RIN 2120-AA64

Airworthiness Directives; EXTRA Flugzeugbau GmbH Model EA-300 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 EXTRA Flugzeugbau GmbH (EXTRA) Model EA-300 airplanes. The proposed action would require removing the elevator mass balance and replacing it with a reinforced mass balance of improved design using new stop nuts. The proposed AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. The actions specified by the proposed AD are intended to prevent damage and possible jamming of the airplane's control system, which, if not corrected, could cause loss of control of the airplane.

DATES: Comments must be received on or before January 27, 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-81-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 EXTRA Flugzeugbau, GmbH, Schwarze Heide 21, 46569 Hunxe, Germany, telephone 49-2358-9137-0; facsimile 49-2858-9137-30. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Karl M. Schletzbaum, Aerospace Engineer, Small Airplane Directorate, Aircraft Certification Service, 1201 Walnut, suite 900, Kansas City, Missouri 64106, telephone (816) 426-6932; facsimile (816) 426-2169.

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-81-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-81-AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

The Luftfahrt-Bundesamt (LBA), which is the airworthiness authority for

Germany, recently notified the FAA that an unsafe condition may exist on certain EXTRA Model EA-300 airplanes. The LBA reports that during routine inspections, inspectors found cracks at the elevator mass balance support. These conditions, if not detected and corrected, could result in jamming of the airplane's control system causing loss of control of the airplane.

Relevant Service Information

EXTRA has issued EA-300, Elevator Mass Balance Service Bulletin No. 300-1-92, Issue A, dated March 27, 1992, which specifies procedures for inspecting the elevator mass balance attachment plate and replacing the elevator mass balance with a reinforced mass balance of improved design.

The LBA classified this service bulletin as mandatory and issued German AD 92-199 EXTRA, dated April 13, 1992, in order to assure the continued airworthiness of these airplanes in Germany.

The FAA's Determination

This airplane model is manufactured in Germany 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 LBA has kept the FAA informed of the situation described above.

The FAA has examined the findings of the LBA, 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.

Differences Between the Manufacturer's Service Information and the Proposed Action

The FAA has determined that it is more beneficial and less cumbersome to require a replacement of each elevator mass balance and forego an initial inspection. The FAA is proposing this alternative because the one-time replacement is more time and labor efficient. The LBA and the manufacturer are requiring, prior to further flight:

- (1) an initial inspection for cracks, and
- (2) if cracks are found, replacing the part, prior to further flight, and
- (3) if no cracks are found, replacing the part prior to accumulating certain hours time-in-service.

The one time replacement proposed in this AD would take precedence over the instructions for repetitively inspecting and replacing required in the

German AD and manufacturer's service bulletin.

The FAA has also reviewed the compliance times recommended by the manufacturer and by the LBA AD.

This review showed compliance prior to further flight, which grounds airplanes, and a second compliance, after the initial inspection.

The FAA decided that one compliance time and one action is less cumbersome and would not present any undue burden on any of the owner/operators of any U.S.-registered airplanes. Therefore, the compliance time stated in the body of the proposed AD would take precedence over the compliance time recommended by the manufacturer and the LBA for Germany.

Explanation of the Provisions of the Proposed AD

Since an unsafe condition has been identified that is likely to exist or develop in other EXTRA Model EA-300 airplanes of the same type design registered in the United States, the proposed AD would require removing each elevator mass balance, and replacing each elevator mass balance with a reinforced elevator mass balance of improved design (part number (P/N) PC-33202.1B), using new stop nuts.

Cost Impact

The FAA estimates that 20 airplanes in the U.S. registry would be affected by the proposed AD, that it would take approximately 3 workhours per airplane to accomplish the proposed action, and that the average labor rate is approximately \$60 an hour. Parts cost approximately \$100 per airplane. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be \$5,600 or \$280 per airplane.

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:

Extra Flugzeugbau GmbH: Docket No. 97-CE-81-AD.

Applicability: Model EA-300 airplanes (serial numbers V1, and 001 through 034), 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 (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 50 hours time-in-service (TIS) after the effective date of this AD, unless already accomplished.

To prevent possible jamming of the airplane's control system, which, if not corrected, could cause loss of control of the airplane, accomplish the following:

(a) Replace the elevator mass balance with a new reinforced elevator mass balance (part number (P/N) PC-33202.1B), using new stop nuts in accordance with the Instructions section of the EXTRA EA-300, Elevator Mass Balance, Service Bulletin No. 300-1-92, Issue A, dated March 27, 1992.

(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, Small Airplane Directorate, Aircraft Certification Service, 1201 Walnut, suite 900, Kansas City, Missouri 64106. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate.

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

(d) All persons affected by this directive may obtain copies of the document referred to herein upon request to Extra Flugzeugbau, GmbH, Schwarze Heide 21, 46569 Hunxe, Germany; 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.

Note 3: The subject of this AD is addressed in German AD 92-199 Extra, dated April 13, 1992.

Issued in Kansas City, Missouri, on December 23, 1997.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97-34046 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG-100841-97]

RIN 1545-AU97

Agreements for Payment of Tax Liability in Installments

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to terminations of agreements for the payment of tax liabilities in installments (installment agreements). The proposed regulations reflect changes made to section 6159 of the Internal Revenue Code of 1986 (Code) by the Taxpayer Bill of Rights 2. The proposed regulations provide a procedure for requesting an independent administrative review of an alteration, modification, or termination of an installment agreement.

DATES: Written comments and requests for a public hearing must be received by March 2, 1998.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG-100841-97), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m.: CC:DOM:CORP:R (REG-100841-97), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at <http://www.irs.usstreas.gov/prod/taxregs/comments.html>.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Kevin B. Connelly, (202) 622-3640 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Procedure and Administration Regulations (26 CFR part 301) relating to installment agreements under section 6159 of the Code. Section 201 of the Taxpayer Bill of Rights 2 (TBOR2), Pub. L. No. 104-168, 110 Stat. 1452 (1996), amended section 6159 to provide that the Secretary may not alter, modify, or terminate an installment agreement unless notice of such action is given not later than 30 days before the date of the action. The notice must explain why the Secretary intends to take the proposed action. Section 202 of TBOR2 provides that the Secretary shall provide an independent administrative review of the termination of an installment agreement upon request of the taxpayer. These proposed regulations reflect the change made by Section 202 of TBOR2. In addition, although the IRS rarely alters or modifies an installment agreement, the proposed regulations give taxpayers the right to an independent administrative review of alterations or modifications.

Explanation of Provisions

Sections 201 and 202 of TBOR2 amended section 6159 of the Code with respect to installment agreements. Section 201 provides that the Secretary may not alter, modify, or terminate an installment agreement unless notice of such action is given to the taxpayer at least 30 days before the action. The notice must explain why the Secretary intends to take the proposed action.

Notice is not necessary if collection of the tax to which the installment agreement relates is in jeopardy.

Prior to the enactment of TBOR2, Section 6159 of the Code required notice only if the Internal Revenue Service intended to alter, modify, or terminate an installment agreement because of a change in the taxpayer's financial condition. Section 301.6159-1(c)(4) of the regulations that are being amended by this notice of proposed rulemaking, however, already requires 30 days notice whenever the IRS intends to alter, modify, or terminate any agreement, regardless of the reason for the action. The only exception to this rule is that no notice is required if collection of the tax to which the installment agreement relates is in jeopardy. In addition, existing paragraph (c)(4) requires the notice to explain the reason for the intended action. In light of existing paragraph (c)(4), the regulations do not have to be amended to reflect section 201 of TBOR2.

Section 202 of TBOR2 provides that, upon request by a taxpayer, the Secretary shall provide an independent administrative review of the termination of an installment agreement. In addition, although the IRS rarely alters or modifies an installment agreement, the proposed regulations grant taxpayers the right to request an independent administrative review of alterations or modifications. Procedures for requesting an independent administrative review are contained in the proposed regulations.

When the Internal Revenue Service intends to terminate an installment agreement, it currently sends the taxpayer a written notice of its intent. The notice (1) informs the taxpayer why the Internal Revenue Service intends to terminate the agreement, (2) notifies the taxpayer that the Internal Revenue Service intends to levy the taxpayer's property, (3) explains that the taxpayer has a right to request an independent review of the Internal Revenue Service's decision, and (4) tells the taxpayer to call the telephone number listed on the notice within 30 days of the date of the notice if the taxpayer wishes to stay collection and request the Internal Revenue Service to review its decision. If the taxpayer timely calls the telephone number listed on the notice, the employee attempts to resolve the case with the taxpayer. If the taxpayer and the employee are not able to resolve the case to the taxpayer's satisfaction, a conference is set up with a manager. If the manager and the taxpayer are unable to resolve the case, the manager forwards the case to Appeals for an

independent administrative review. Absent jeopardy, collection action is stayed until the appeals officer has informed the taxpayer of a decision.

The proposed regulations provide that, if a taxpayer disagrees with a determination to alter, modify, or terminate an installment agreement, the taxpayer may initiate an independent administrative review of the determination by calling the telephone number listed on the notice within 30 days of the date of the notice. This will set the review process in motion.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments that are submitted timely (a signed original and eight (8) copies) to the IRS. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Kevin B. Connelly, Office of Assistant Chief Counsel (General Litigation) CC:EL:GL, IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.6159-1 is amended by revising paragraphs (c)(4) and (g) to read as follows:

§ 301.6159-1 Agreements for payment of tax liability in installments.

* * * * *

(c) * * *

(4) *Notice.* Unless the director determines that collection of the tax is in jeopardy, the director will notify the taxpayer in writing at least 30 days before altering, modifying, or terminating an installment agreement pursuant to paragraph (c)(1) or (2) of this section. A notice provided pursuant to this paragraph must briefly describe the reason for the intended alteration, modification, or termination. If the taxpayer disagrees with the director's decision to terminate, alter, or modify the installment agreement, the taxpayer has the right to an independent administrative review. The taxpayer may initiate an independent administrative review by calling the telephone number listed on the notice within 30 days of the date of the notice. If, upon calling the telephone number listed on the notice, the dispute is not resolved to the taxpayer's satisfaction, the taxpayer must speak with a manager. If, after speaking with a manager, the dispute still is not resolved to the taxpayer's satisfaction, the taxpayer may request the Office of Appeals to independently review the decision. The Office of Appeals shall conduct a review to determine whether the facts and circumstances warrant the alteration, modification, or termination of the taxpayer's installment agreement.

* * * * *

(g) *Effective date.* This section is applicable December 23, 1994, except that paragraph (c)(4) of this section is applicable on the date final regulations are published in the **Federal Register**.

Michael P. Dolan,
Deputy Commissioner of Internal Revenue.
[FR Doc. 97-33790 Filed 12-30-97; 8:45 am]
BILLING CODE 4830-01-U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[Reg-251502-96]

RIN 1545-AU68

Civil Cause of Action for Certain Unauthorized Collection Actions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to civil causes of action for damages caused by unlawful collection actions of officers and employees of the Internal Revenue Service (IRS). The proposed regulations reflect amendments made by the Taxpayer Bill of Rights 2. The proposed regulations affect all taxpayers who file civil actions for damages caused by unlawful collection actions of officers or employees of the IRS.

DATES: Written comments and requests for a public hearing must be received by March 2, 1998.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (Reg-251502-96), Room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (Reg-251502-96), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.ustreas.gov/prod/tax__regs/comments.html.

FOR FURTHER INFORMATION CONTACT: Kevin B. Connelly, (202) 622-3640 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Procedure and Administration Regulations (26 CFR part 301) relating to civil actions for damages caused by unlawful collection actions of officers or employees of the IRS. The Taxpayer Bill of Rights 2 (TBOR2), Public Law 104-168, 110 Stat. 1465 (1996), amended section 7433 of the Internal Revenue Code of 1986 (Code) by raising the cap on the amount a taxpayer may be awarded for damages caused by unlawful collection actions from \$100,000 to \$1,000,000. Under

prior law, a suit for damages could not be brought unless the taxpayer first exhausted administrative remedies available within the IRS. TBOR2 eliminated this jurisdictional prerequisite but authorized federal district courts to reduce damage awards if the taxpayer fails to exhaust administrative remedies. The proposed regulations reflect these changes.

Explanation of Provision

Section 801 of TBOR2 amended section 7433(a) of the Code by increasing from \$100,000 to \$1,000,000 the cap on the amount of damages that a taxpayer may recover in Federal district court from the United States for damages caused by any unauthorized collection actions of an officer or employee of the IRS occurring after July 30, 1996. Section 802 of TBOR2 amended section 7433(d)(1) of the Code by providing that a taxpayer's failure to exhaust administrative remedies available within the IRS shall only be a factor that the court may consider in determining whether to reduce the amount of an award. In actions filed prior to the enactment of TBOR2, the failure to exhaust administrative remedies was a jurisdictional bar to an action. The proposed regulations reflect the changes made by TBOR 2.

The regulations that are being amended by these proposed regulations currently provide that administrative remedies shall be considered exhausted on the earlier of: (1) the date the decision is rendered by the IRS on an administrative claim for damages filed in accordance with the manner and form set forth in the regulations; or (2) the date six months after the date an administrative claim is filed in accordance with the manner and form set forth in the regulations. 26 CFR § 301.7433-1(d). An exception to this rule is provided with respect to civil actions filed in federal district court prior to July 31, 1996. Under this exception, if an administrative claim is filed during the last six months of the period of limitations for filing a civil action for damages under section 7433 of the Code, administrative remedies shall be considered exhausted on the date the administrative claim is filed. The exception was included in the current regulations because, prior to the enactment of TBOR2, the failure to exhaust administrative remedies was a jurisdictional bar to an action. Without the exception, if a taxpayer filed an administrative claim during the last six months of the period of limitations and the IRS did not consider the claim before the limitations period expired, the taxpayer automatically would have

been barred from filing suit. These provisions still apply to actions that were filed on or before July 30, 1996, the enactment date of TBOR2.

With respect to actions filed after July 30, 1996, the proposed regulations do not contain the exception for administrative claims filed during the last six months of the period of limitation because the failure to exhaust administrative remedies is no longer a bar to an action. Since the enactment of TBOR2, the failure to exhaust administrative remedies is just one factor the court may consider in determining whether to reduce an award of damages. Pursuant to the notice of proposed rulemaking, if a taxpayer waits until the last six months of the period of limitations to file an administrative claim, the IRS does not reach a determination before the limitations period expires, and the taxpayer files a timely action under section 7433, the court may consider the facts and circumstances of the case and decide what effect the late filing of the claim should have on the amount of damages awarded.

The proposed manner and form for filing an administrative claim for damages remain the same as those set forth in the current regulations at 26 CFR 301.7433-1(e)(1) and (2). The claim must be sent in writing to the district director (marked for the attention of the Chief, Special Procedures Function) of the district in which the taxpayer resides. The claim must include: (1) The name, current address, current home and work telephone numbers and any convenient times to be contacted, and taxpayer identification number of the taxpayer making the claim; (2) the grounds, in reasonable detail, for the claim (include copies of any available substantiating documentation or correspondence with the Internal Revenue Service); (3) a description of the injuries incurred by the taxpayer filing the claim (include copies of any available substantiating documentation or evidence); (4) the dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available substantiating documentation or evidence); and (5) the signature of the taxpayer or duly authorized representative.

The notice of proposed rulemaking does not have a new effective date paragraph because amended paragraphs (a), (d), and (e) set forth the effective dates of the new statutory provisions as well as the statutory provisions they are replacing.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments that are submitted timely (a signed original and eight (8) copies) to the IRS. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Kevin B. Connelly, Office of Assistant Chief Counsel (General Litigation) CC:EL:GL, IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordingkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. In § 301.7433-1, paragraphs (a), (d), (e), and (f) are revised to read as follows:

§ 301.7433 Civil cause of action for certain unauthorized collection actions.

(a) *In general.* If, in connection with the collection of a federal tax with respect to a taxpayer, an officer or an employee of the Internal Revenue Service recklessly or intentionally disregards any provision of the Internal Revenue Code or any regulation promulgated under the Internal Revenue Code, such taxpayer may bring a civil action for damages against the United States in federal district court. The taxpayer has a duty to mitigate damages. The total amount of damages recoverable is the lesser of \$1,000,000 (\$100,000 if the act giving rise to damages occurred before July 31, 1996) or the sum of—

(1) The actual, direct economic damages sustained as a proximate result of the reckless or intentional actions of the officer or employee; and

(2) Costs of the action.

* * * * *

(d) *Exhaustion of administrative remedies in suits brought prior to July 31, 1996—(1) General.* With respect to civil actions filed in federal district court prior to July 31, 1996, no action may be maintained before the exhaustion of administrative remedies. Administrative remedies are exhausted on the earlier of the following dates—

(i) The date the decision is rendered on an administrative claim filed in accordance with paragraph (f) of this section; or

(ii) The date six months after the date an administrative claim is filed in accordance with paragraph (f) of this section.

(2) *Exception.* If an administrative claim is filed in accordance with paragraph (f) of this section during the last six months of the period of limitations described in paragraph (g) of this section, the taxpayer may file an action in federal district court any time after the administrative claim is filed and before the expiration of the period of limitations.

(3) *No action in federal district court for any sum in excess of the dollar amount sought in the administrative claim.* With respect to civil actions filed in federal district court prior to July 31, 1996, no action may be instituted for any sum in excess of the amount (already incurred and estimated) of the administrative claim filed under paragraph (f) of this section, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time the administrative claim was filed, or upon allegation and proof of intervening facts relating to the amount of the claim.

(e) *Exhaustion of administrative remedies in suits brought after July 30, 1996—(1) General.* With respect to civil actions filed in federal district court after July 30, 1996, the amount of damages awarded under paragraph (a) of this section may be reduced if the court determines that the taxpayer has not exhausted the administrative remedies available within the Internal Revenue Service.

(2) *Administrative remedies exhausted.* Administrative remedies shall be considered exhausted on the earlier of—

(i) The date the decision is rendered on a claim filed in accordance with paragraph (f) of this section; or

(ii) The date six months after the date an administrative claim is filed in accordance with paragraph (f) of this section.

(f) *Procedures for an administrative claim—(1) Manner.* An administrative claim for damages shall be sent in writing to the district director (marked for the attention of the Chief, Special Procedures Function) of the district in which the taxpayer resides.

(2) *Form.* The administrative claim shall include—

(i) The name, current address, current home and work telephone numbers and any convenient times to be contacted, and taxpayer identification number of the taxpayer making the claim;

(ii) The grounds, in reasonable detail, for the claim (include copies of any available substantiating documentation or correspondence with the Internal Revenue Service);

(iii) A description of the injuries incurred by the taxpayer filing the claim (include copies of any available substantiating documentation or evidence);

(iv) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available substantiating documentation or evidence); and

(v) The signature of the taxpayer or the taxpayer's duly authorized representative as defined in paragraph (f)(3) of this section.

(3) *Duly authorized representative.* For purposes of paragraph (f)(2)(v) of this section, a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has

a written power of attorney executed by the taxpayer.

* * * * *

Michael P. Dolan,

Deputy Commissioner of Internal Revenue.

[FR Doc. 97-33791 Filed 12-30-97; 8:45 am]

BILLING CODE 4830-01-U

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Parts 250, 243 and 290, and 43 CFR Part 4

RIN 1010-AC21 and AC08

Administrative Appeals Process and Policy for Release of Third-Party Proprietary Information

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of a public workshop, withdrawal of a proposed rule.

SUMMARY: The Minerals Management Service (MMS) has withdrawn the proposed rule published in the **Federal Register** on April 4, 1997 (62 FR 16116), which would have authorized release of third-party proprietary information in certain circumstances to parties involved in appeals and alternative dispute resolution efforts. In addition, MMS plans to revise the notice of proposed rule published in the **Federal Register** on October 28, 1996 (61 FR 55607), which would have amended regulations governing the administrative appeals process. Based in large part on a report from the Royalty Policy Committee, which provides advice to the Secretary of the Interior under the authority of the Federal Advisory Committee Act, MMS plans to revise its regulations governing its administrative appeals and alternative dispute resolution processes, including authority for disclosure of third-party proprietary information. The MMS will hold a public workshop to discuss these matters before issuing the revised notice of proposed rule. Interested parties are invited to attend and participate in the workshop and are requested to register in advance.

DATES: The public workshop will be held on Tuesday, January 27, 1998, 8:30 a.m.—3:00 p.m., Mountain Standard Time.

ADDRESSES: The workshop will be held at the Embassy Suites, Denver Southeast, 7525 East Hampden Avenue, Denver, Colorado 80231, telephone number (303) 696-6644.

FOR FURTHER INFORMATION CONTACT: Mr. Hugh Hilliard, Chief, Appeals Division

(MS 9300), or Ms. Charlotte Bennett, Appeals Division, Minerals Management Service, 1849 C Street, NW., Washington, D.C. 20240, telephone number (202) 208-2622, fax number (202) 219-5565, e-mail: Hugh Hilliard@mms.gov or Charlotte_Bennett@mms.gov.

SUPPLEMENTARY INFORMATION: In response to the notice of proposed rule to amend regulations governing the administrative appeals process, published in the **Federal Register** on October 28, 1996 (61 FR 55607), MMS received as a comment a comprehensive report from the Royalty Policy Committee (RPC), which adopted a recommendation from its Appeal and Alternative Dispute Resolution Subcommittee. The RPC, which is composed of representatives from States, Indian tribes and allottees, the mineral industries, other Federal agencies, and the public, advises the Secretary of the Interior under a charter authorized by the Federal Advisory Committee Act. On March 27, 1997, the RPC sent its report to the Secretary and requested adoption of its proposal in lieu of the October 28, 1996, proposed rule.

The Secretary sent a response to the RPC on September 22, 1997, stating that the Department planned to prepare revised proposed regulations to implement the RPC proposal, with several changes. In general, the changes proposed by the RPC, as modified and approved by the Secretary, will be as follows:

- Increase efforts to resolve policy disputes before conducting audits of royalty payments;
- Further encourage informal resolution of disputes;
- Clarify the standing of Indian lessors and states in the administrative appeals process; and
- Restructure the appeals process to encourage earlier development of the administrative record, facilitate settlement efforts, impose time limitations on the appeals process, and allow for appeals to be filed with the Interior Board of Land Appeals (IBLA) rather than with MMS so that appellants can obtain a faster, more independent review of legal issues raised on appeal.

The Secretary also stated that the public would have the opportunity to comment on these proposed regulations, which could change before they become final.

Thus, MMS intends to withdraw the October 28, 1996 (61 FR 55607), notice of proposed rule when it publishes the revised notice of proposed rule responding to the RPC report. Since the

revised proposed rule will contain provisions that will allow for appeals to be considered by the IBLA much earlier than they are under current procedures, MMS plans to rely on regulations for release of third-party proprietary information as set out at 43 CFR 4.31. Consequently, MMS has withdrawn the April 4, 1997 (62 FR 16116), proposed rule, but will incorporate in the revised notice of proposed rule on the appeals process any contents of the withdrawn rule that may be needed to supplement current regulations at 43 CFR 4.31.

The revised notice of proposed rule will affect not only appeals involving actions taken by officials of the MMS's Royalty Management Program, but also will affect appeals involving actions taken by the Offshore Minerals Management program of MMS under the regulations at 30 CFR Part 250. In addition, the rule will affect activities of the Office of Hearings and Appeals, Interior Board of Land Appeals, as set out at 43 CFR Part 4 (though these effects are expected to be limited to appeals generated by actions of the Minerals Management Service).

While MMS and the Department's Office of Hearings and Appeals plan to move quickly to issue a new notice of proposed rule on this subject, we also want to take the opportunity to have further public input by holding a public workshop.

We invite participation at the workshop by representatives of states, Indian tribes and allottees, the minerals industries, and the general public. We plan to present our initial views as to what will be in the revised proposed rule and to engage in open discussion with participants about any suggestions for improvement. The date and location of the workshop have been coordinated with the next meeting of the Royalty Policy Committee in order to facilitate participation by Committee members.

In order to help us plan for a successful workshop, we would appreciate your preregistration by January 15. If you plan to attend, please contact Ms. Charlotte Bennett, using the methods provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice, and provide your name, address, and telephone and fax numbers. This will help us to ensure sufficient space for all and to provide you with any relevant information available in advance of the meeting. In particular, we hope to distribute some information in advance about what we expect to include in the revised notice of proposed rule.

Background materials on the subject can be found on the MMS internet homepage at <http://www.mms.gov/>

<http://www.mms.gov/> (also accessible through the general MMS homepage at <http://www.mms.gov/>) of by contacting the Appeals Division at the address listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Relevant background would include the prior notices of proposed rules, the March 27, 1997, RPC report, and the Secretary's letter of September 22, 1997.

Dated: December 22, 1997.

Walter D. Cruickshank,

Associate Director for Policy and Management Improvement.

[FR Doc. 97-34096 Filed 12-30-97; 8:45 am]

BILLING CODE 4310-MR-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD11-95-003]

RIN 2115-AE47

Drawbridge Operation Regulations; Oakland Inner Harbor Tidal Canal, CA

AGENCY: Coast Guard, DOT.

ACTION: Proposed rule; termination.

SUMMARY: The Coast Guard is terminating rulemaking which would have amended the regulation for the draws of the Alameda County vehicular bridges crossing the Oakland Inner Harbor Tidal Canal at the following locations: Park Street, mile 7.3; Fruitvale Avenue, mile 7.7; High Street, mile 8.1; as well as the U.S. Army Corps of Engineers railroad bridge, mile 7.7 at Fruitvale Avenue. The proposed rule did not meet the reasonable needs of navigation. The County apparently is no longer interested in pursuing this rulemaking.

DATES: This proposed rulemaking is terminated December 12, 1997.

FOR FURTHER INFORMATION CONTACT: Jerry P. Olmes, Bridge Section, Eleventh Coast Guard District, Building 50-6, Coast Guard Island, Alameda, CA 94501-5100, telephone (510) 437-3515.

SUPPLEMENTARY INFORMATION:

Regulatory History

On May 9, 1995, the Coast Guard published the NPRM in the **Federal Register** (60 FR 24599). The Coast Guard received 18 letters in response to the NPRM, 6 of which requested a public hearing. The Coast Guard then decided to reopen the comment period and hold a public hearing; a notice of reopening of the comment period and of the public hearing was published in the **Federal**

Register on September 12, 1995 (60 FR 47317). The comment period was extended until October 31, 1995, and a public hearing was held on October 5, 1995.

The majority of respondents objected to the proposal for reasons of safety and inconvenience to waterway users. Based on the comments received, the Coast Guard denied the request. The Coast Guard offered a counter proposal, but the County did not respond to the counter proposal.

For the reasons stated in the preamble, the Coast Guard is terminating all further rulemaking under docket number CGD11-95-003.

Dated: December 12, 1997.

J.C. Card,

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

[FR Doc. 97-34081 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-14-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[CO-001-0006b & CO-001-0021b; FRL-5934-3]

Clean Air Act Approval and Promulgation of PM₁₀ Implementation Plan for Colorado; Designation of Areas for Air Quality Planning Purposes; Steamboat Springs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State implementation plan (SIP) submitted by the State of Colorado to achieve attainment and maintenance of the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀), including among other things, control measures, technical analyses, quantitative milestones and contingency measures. The SIP was submitted by the Governor of Colorado with a letter dated September 16, 1997 to satisfy certain Federal requirements for an approvable SIP for the Steamboat Springs, Colorado moderate PM₁₀ nonattainment area, as designated effective January 20, 1994. In addition, EPA proposes to approve the Steamboat Springs emergency episode plan. EPA also proposes to amend the boundary for the Steamboat Springs nonattainment area to clarify the original description.

In the Final Rules Section of this **Federal Register**, EPA is approving the

State's SIP revisions as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision and anticipates no adverse comments. A detailed rationale for EPA's actions is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated and the direct final rule will become effective. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this document should do so at this time.

DATES: Comments on this proposed rule must be received in writing by January 30, 1998.

ADDRESSES: Written comments on this action should be addressed to Richard R. Long, 8P2-A, at the EPA Regional Office listed below. Copies of the State's submittal and documents relevant to this proposed rule are available for inspection during normal business hours at the following locations: Air Program, Environmental Protection Agency, Region VIII, 999 18th Street, suite 500, Denver, Colorado 80202-2405; and Colorado Department of Health, Air Pollution Control Division, 4300 Cherry Creek Drive South, Denver, Colorado 80222-1530.

FOR FURTHER INFORMATION CONTACT: Amy Platt, Air Program, EPA, Region VIII, at (303) 312-6449.

SUPPLEMENTARY INFORMATION: See the information provided in the Direct Final action which is located in the Rules Section of this **Federal Register**.

Dated: November 4, 1997.

Jack W. McGraw,

Acting Regional Administrator.

[FR Doc. 97-33959 Filed 12-30-97; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[I.D. 121197E]

RIN 0648-AJ16

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Resubmission of Disapproved and Revised Measure in Amendment 11

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

ACTION: Notice of availability of a revised, previously disapproved measure in an amendment to a fishery management plan; request for comments.

SUMMARY: NMFS announces that the Gulf of Mexico Fishery Management Council (Council) has resubmitted a previously disapproved measure, originally contained in Amendment 11 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, for review, approval, and implementation by NMFS. The measure would define optimum yield (OY). Written comments are requested from the public.

DATES: Written comments must be received on or before March 2, 1998.

ADDRESSES: Comments should be mailed to the Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702.

Requests for copies of the Resubmission of the Previously Disapproved Measure, Originally Contained in Amendment 11, which includes an environmental assessment and a regulatory impact review, should be sent to the Gulf of Mexico Fishery Management Council, 3081 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619-2266; Phone: 888-883-1844; Fax: 813-225-7015.

FOR FURTHER INFORMATION CONTACT: Robert Sadler, 813-570-5305.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires each regional fishery management council to submit any fishery management plan or amendment to NMFS for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an amendment, immediately publish a document in the **Federal Register**

stating that the amendment is available for public review and comment.

Based on a preliminary evaluation of Amendment 11 in August 1995, the Regional Administrator, Southeast Region, NMFS, disapproved the definition of OY proposed in Amendment 11, because it was determined to be inconsistent with the Magnuson Fishery Conservation and Management Act. The disapproved definition of OY would have set OY for each stock based on a SPR level corresponding to $F_{0.1}$ until an alternative operational definition that optimizes ecological, economic, and social benefits to the Nation has been developed.

The Council's Spawning Potential Ratio (SPR) Strategy Committee considered NMFS' disapproval and recommended a 30- to 40-percent SPR level as a revised OY. SPR is defined as the number of eggs that could be produced by an average female over its lifetime when the stock is fished, divided by the number of eggs that could be produced by an average female over its lifetime when the stock is unfished. The Council's Reef Fish Stock Assessment Panel (RFSAP) recommended that OY be based on a 35-percent SPR level and that the fishing mortality rate at the 35-percent SPR level be used as a surrogate for the

fishing mortality rate that produces maximum sustainable yield (MSY). The Council considered these recommendations, NMFS' prior disapproval, and public comment, and subsequently resubmitted the revised OY definition to NMFS for review under Amendment 11. The revised definition would initially set OY for each reef fish stock managed under the FMP at a yield level that would result in at least a 30-percent SPR for that stock. This measure allows the Council to propose setting OY based on a more conservative (higher) SPR level, if the RFSAP indicates that the biological information supports such action.

Comments from the Southeast Fisheries Science Center (SEFSC) indicate that OY should be defined at a more conservative level than 30-percent SPR for those species for which biological information is presently unavailable, and for other species that change sex, may be especially vulnerable to overfishing, and are believed to be less resilient as they mature. The SEFSC recommended that OY be defined as a fishing mortality rate that allows a 40-percent SPR for these 15 species: Red porgy, rock hind, speckled hind, yellowedge grouper, red hind, jewfish, red grouper, misty grouper, warsaw grouper, snowy

grouper, Nassau grouper, yellowmouth grouper, gag, scamp, and yellowfin grouper. The SEFSC concluded that approval of the resubmitted OY definition would risk overfishing, since application of the proposed OY definition to the 15 listed species may not be based on the best available scientific information. The SEFSC also indicated that the proposed definition may be inconsistent with the Magnuson-Stevens Act provisions regarding OY and MSY. Comments on these concerns are specifically invited.

If approved, no Federal regulatory action (i.e., no proposed and final rules) will be necessary to implement the revised and resubmitted measure.

In accordance with the Magnuson-Stevens Act, NMFS is evaluating the resubmitted measure; comments received by March 2, 1998, will be considered in the approval/disapproval decision. All comments received during the comment period will be addressed in a notice of approval or disapproval.

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

Dated: December 23, 1997.

Gary C. Matlock,

*Director, Office of Sustainable Fisheries,
National Marine Fisheries Service.*

[FR Doc. 97-34077 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-22-F

Notices

Federal Register

Vol. 62, No. 250

Wednesday, December 31, 1997

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to Integrated BioControl Systems, Inc., an exclusive license to Serial No. 08/863,261, filed May 27, 1997, entitled "Synthetic Diet for Rearing the Ectopterous Parasitoid, *Catolaccus grandis*." Serial No. 08/863,261 is a continuation of Serial No. 08/404,779. Notice of Availability for Serial No. 08/404,779 was published in the **Federal Register** on December 14, 1997.

DATES: Comments must be received on or before March 1, 1998.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, Room 415, Building 005, BARC-West, Beltsville, Maryland 20705-2350.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301-504-5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights to this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as Integrated BioControl Systems, Inc., has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within sixty (60) days from the date of this published Notice, the Agricultural Research Service receives written

evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard M. Parry, Jr.,
Assistant Administrator.

[FR Doc. 97-34020 Filed 12-30-97; 8:45 am]
BILLING CODE 3410-03-P

DEPARTMENT OF AGRICULTURE

Food and Consumer Service

Summer Food Service Program for Children; Program Reimbursement for 1998

AGENCY: Food and Consumer Service, USDA.

ACTION: Notice.

SUMMARY: This notice informs the public of the annual adjustments to the reimbursement rates for meals served in the Summer Food Service Program for Children (SFSP). These adjustments reflect changes in the Consumer Price Index and are required by the statute governing the Program.

EFFECTIVE DATE: January 1, 1998.

FOR FURTHER INFORMATION CONTACT: Robert M. Eadie, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Consumer Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 1007, Alexandria, Virginia 22302, (703) 305-2620.

SUPPLEMENTARY INFORMATION: This action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601-612) and thus is exempt from the provisions of that Act. In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), no new recordkeeping or reporting requirements have been included that are subject to approval from the Office of Management and Budget.

This action is exempted from review by the Office of Management and Budget under Executive Order 12866.

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.559 and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials (7 CFR Part 3015, Subpart V, and final rule related notice published at 48 FR 29114, June 24, 1983).

Definitions

The terms used in this Notice shall have the meaning ascribed to them in the regulations governing the Summer Food Service Program for Children (7 CFR Part 225).

Background

Pursuant to section 13 of the National School Lunch Act (42 U.S.C. 1761) and the regulations governing the SFSP (7 CFR Part 225), notice is hereby given of adjustments in Program payments for meals served to children participating in the SFSP during the 1998 Program. Adjustments are based on changes in the food away from home series of the Consumer Price Index (CPI) for All Urban Consumers for the period November 1996 through November 1997.

The new 1998 reimbursement rates in dollars are as follows:

MAXIMUM PER MEAL REIMBURSEMENT RATES

Operating Costs	
Breakfast	\$1.190
Lunch or Supper	2.080
Supplement .....	.4800
Administrative Costs	
a. For meals served at rural or self-preparation sites:	
Breakfast .....	.1175
Lunch or Supper .....	.2175
Supplement .....	.0600
b. For meals served at other types of sites:	
Breakfast .....	.0925
Lunch or Supper .....	.1800
Supplement .....	.0475

The total amount of payments to State agencies for disbursement to Program sponsors will be based upon these Program reimbursement rates and the number of meals of each type served.

The above reimbursement rates for operating costs, before being rounded down to the nearest whole cent, as required by Public Law 104-193, represent a 2.52 percent increase during 1997 (from 154.7 in November 1996 to 158.6 in November 1997) in the food away from home series of the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor. The Department points out that the SFSP administrative reimbursement rates continue to be adjusted up or

down to the nearest quarter-cent, as has previously been the case.

Authority: Secs. 9, 13 and 14, National School Lunch Act, as amended (42 U.S.C. 1758, 1761 and 1762a).

Dated: December 24, 1997.

George A. Braley,

Acting Administrator, Food and Consumer Service.

[FR Doc. 97-34137 Filed 12-30-97; 8:45 am]

BILLING CODE 3410-30-M

DEPARTMENT OF AGRICULTURE

Forest Service

BlueGrass Bound Timber Sale; Idaho Panhandle National Forests; Boundary County, Idaho

AGENCY: Forest Service, USDA.

ACTION: Notice, cancellation of notice of intent to prepare an environmental impact statement.

SUMMARY: On December 30, 1994, notice was published in the **Federal Register** [FR 67696] that an environmental impact statement would be prepared to assess the effects of timber harvest and road construction within the Boundary Creek drainage on the Bonners Ferry Ranger District, Idaho Panhandle National Forests.

That notice is hereby cancelled.

Changes in Agency direction have resulted in changes to the proposed action and substantial reductions in their anticipated effects and a determination that documentation in an environmental impact statement is no longer necessary.

DATES: This action is effective December 31, 1998.

FOR FURTHER INFORMATION CONTACT: Pat Cooley, project leader, Bonners Ferry Ranger District, Idaho Panhandle National Forests, Route 4, Box 4860, Bonners Ferry, Idaho 83805-9764.

SUPPLEMENTARY INFORMATION: The proposed actions of timber harvest and road construction and alternatives, including taking no action at this time, are being assessed and documented in the Blue-Grass Bound environmental assessment. It is anticipated that the pre-decision environmental assessment will be available for 30-day public comment period in February, 1998. After this public comment period, the comments will be analyzed and considered in reaching a decision regarding this proposal. The decision will be documented in a Decision Notice.

I am the responsible official for this environmental analysis. My address is Bonners Ferry Ranger District, Route 4

Box 4860, Bonners Ferry, ID 83805-9764.

Dated: December 18, 1997.

Elaine J. Zieroth,

District Ranger.

[FR Doc. 97-33997 Filed 12-30-97; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF AGRICULTURE

Forest Service

Southwest Oregon Provincial Interagency Executive Committee (PIEC), Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Southwest Oregon PIEC Advisory Committee will meet on January 15 at the Best Western Motel at 1143 Chetco Ave., Brookings, Oregon. The meeting will begin at 9 a.m. and continue until 5 p.m. Agenda items to be covered include: (1) Coordinated watershed restoration between federal and non-federal land managers; (2) province monitoring priorities; (3) forest health issues; (4) report from local BLM and Forest Service on local issues; and (5) public comment. All Province Advisory Committee meetings are open to the public.

FOR FURTHER INFORMATION CONTACT:

Direct questions regarding this meeting to Chuck Anderson, Province Advisory Committee staff, USDA, Forest Service, Rogue River National Forest, 333 W. 8th Street, Medford, Oregon 97501, phone 541-858-2322.

Dated: December 17, 1997.

James T. Gladen,

Forest Supervisor, Designated Federal Official.

[FR Doc. 97-34106 Filed 12-30-97; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF AGRICULTURE

Forest Service

Southwest Washington Provincial Advisory Committee; Meeting Notice

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Southwest Washington Provincial Advisory Committee will meet on Friday, January 23, 1998, in Vancouver, Washington, at the Educational Service District 112 (2500 NE 65th Avenue). The meeting will begin at 10 a.m. and continue until 5 p.m. The purpose of the meeting is to: (1) Review and prioritize watershed restoration projects for 1998 and 1999,

(2) Provide information on the Intergovernmental Advisory Committee Survey, (3) Share 1997 Advisory Committee Annual Report Information, and (4) Public Open Forum. All Southwest Washington Provincial Advisory Committee meetings are open to the public. Interested citizens are encouraged to attend. The "open forum" provides opportunity for the public to bring issues, concerns, and discussion topics to the Advisory Committee. The "open forum" is scheduled as part of agenda item (4) for this meeting. Interested speakers will need to register prior to the open forum period. The committee welcomes the public's written comments on committee business at any time.

FOR FURTHER INFORMATION CONTACT:

Direct questions regarding this meeting to Sue Lampe, Public Affairs, at (360) 891-5091, or write Forest Headquarters Office, Gifford Pinchot National Forest, 10600 N.E. 51st Circle, Vancouver, WA 98682.

Dated: December 22, 1997.

Robert Yoder,

Province Lead Staff.

[FR Doc. 97-34000 Filed 12-30-97; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF AGRICULTURE

Forest Service

Timber Sale Contracts; Change in Stumpage Rate Adjustment Procedure

AGENCY: Forest Service, USDA.

ACTION: Notice; adoption of final procedure.

SUMMARY: The Forest Service gives notice of adoption of a revised stumpage rate adjustment procedure, by which rates bid on timber can be adjusted in response in market changes after the contract is awarded. The procedure will be applied to most timber sale contracts in the western States. In an August 7, 1996, **Federal Register** notice (61 FR 41124), the Forest Service proposed eliminating the stumpage rate adjustment procedure entirely. After considering the public comment, the Forest Service has decided to continue to use stumpage rate adjustment in timber sale contracts, but to modify the procedures so that 100 percent of the difference between current and base lumber price indices is added to tentative rates during periods of increasing lumber prices and 100 percent of the difference is subtracted from tentative rates during periods of declining prices. The effect of this change is to equalize the risk of lumber

price fluctuations between purchasers and the Forest Service on future timber sale contracts and, thereby, satisfy Office of Inspector General audit recommendations.

DATES: This policy is effective January 30, 1998.

FOR FURTHER INFORMATION CONTACT: Rex Baumbach, Timber Management Staff, (202) 205-0855.

SUPPLEMENTARY INFORMATION:

Background

The Forest Service sells timber to private purchasers through competitive bidding. The agency awards the timber sale contract to the responsible bidder submitting the highest qualified bid.

Title 36, Code of Federal Regulations, Part 223 allows for the adjustment of contract (stumpage) rates during the term of a timber sale contract. These regulations state that:

Timber may be appraised and sold at a lump-sum value or at a rate per unit of measure which rate may be adjusted during the period of the contract and as therein specified in accordance with formulas or other equivalent specifications for the following reasons: (a) Variations in lumber or other product value indices between the price index base specified in the contract and the price index actually experienced during the cutting of the timber * * *.

Under contract to the Forest Service, the Western Wood Products Association provides the lumber price indices that the agency uses for stumpage rate adjustment.

In the western states, except Alaska, most timber sales with contract terms exceeding 1 year include a provision which allows contract rates to be adjusted during the term of the contract by the use of lumber price indices. The purpose of the stumpage rate adjustment procedure is to allow a timber sale purchaser's stumpage payments to follow the price trends of the primary forest product (lumber) manufactured from National Forest System timber. This procedure was intended to help reduce the risk of loss to a timber purchaser holding a timber sale contract during periods of declining lumber prices and to benefit the Government by increasing stumpage receipts during periods of rising lumber prices.

The Forest Service first adopted a stumpage rate adjustment procedure in the 1950's to reduce the risk, both to industry and the Government, of holding long-term timber sale contracts. In the 1950's and 1960's, timber sale contract periods often exceeded 10 years, and the procedure was a means to reduce the risk to both parties due to price fluctuations in the lumber market.

During this era, stumpage rates would vary, either up or down, by 50 percent of the change in lumber prices.

In 1971, with the introduction of Forest Service Form 2400-6 Timber Sale Contract, the initial stumpage rate adjustment procedure was changed to a formula which provided for stumpage prices to increase by 50 percent of the change in lumber prices when lumber prices are rising and to decrease by 100 percent of the change in lumber prices when lumber prices are falling. The purpose of this adjustment was to account for increased costs to timber sale purchasers during the course of the contract term. In March, 1983, it was expanded to include western Washington and Oregon.

In September, 1991, the Department of Agriculture Office of Inspector General, issued a report (Audit Report No. 08099-122-SF dated 9/91—Stumpage Rate Adjustment on Timber Sales) which found that the 50 percent upwards and 100 percent downwards stumpage rate adjustment procedure lowers the risk of market fluctuations to the purchaser at the monetary expense of the Government. The audit recommended either eliminating the stumpage rate adjustment procedure or modifying it so that adjustments to stumpage are the same percentage for both periods of rising and falling lumber prices.

On August 7, 1996, the Forest Service published a notice in the **Federal Register** proposing to eliminate the stumpage rate adjustment procedure entirely. However, after considering the public comments received, the Forest Service has decided to continue to use stumpage rate adjustment in timber sale contracts, but to modify the procedure used to change stumpage rates. Under the revised procedure, 100 percent of the difference between current and base lumber price indices will be added to tentative rates during periods of increasing lumber prices and 100 percent of the difference will be subtracted from tentative rates during periods of declining prices. The effect of this change is to equalize the risk of lumber price fluctuations between purchasers and the Forest Service on future timber sale contracts, while making timber sale purchasers responsible for any increased logging and manufacturing cost increases due to their delay in harvest.

Summary of Comments

The Forest Service received 22 responses. Comments were received from 15 timber sale purchasers, four timber industry associations, two companies related to the timber

industry, and one individual. Many of the responses endorsed the comments of specific timber industry associations.

The following describes the comments received by general topics and the agency's response to them.

Reasons for Retaining the Stumpage Rate Adjustment Procedure

Comment. Fifteen respondents commented that the 1991 Office of Inspector General (OIG) report is outdated and contains conclusions which are in error, because the sample size was small and non-random, covered a narrow geographic range, and covered a short timeframe. These respondents noted that the OIG audit findings conflict with the paper titled "Analysis of Stumpage Rate Adjustment Policy on Western National Forests" (SRA Policy Study) by Ervin G. Schuster and Michael J. Niccolucci which was published in the *Western Journal of Applied Forestry* (vol. 10, no. 2, pp. 53-58, April 1995).

Response. The OIG report was not intended to be a comprehensive study. As the respondents state, the OIG analysis had certain limitations. That is why the Forest Service conducted the SRA Policy Study. The SRA Policy Study includes a larger and random sample, a greater geographic range, and a longer time period. However, the findings of the OIG analysis do not conflict with the findings of the SRA Policy Study. The SRA Policy Study notes that the "results from the two studies are essentially identical * * *." While the OIG and SRA Policy Study were useful, neither was determinative in the selection of the revised policy.

Comment. Five respondents suggested that all proposed changes in the contract should be proposed at one time, rather than making piecemeal changes. Stumpage rate adjustment needs to be evaluated with other changes.

Response. The agency realizes that it would be desirable to consider all possible contract changes at one time. For this reason, the comment period for the proposed changes in stumpage rate adjustment procedure was extended so that it corresponded to the comment period for proposed market-related contract term addition changes (published October 21, 1996, at 61 FR 54589).

There will always be a need for periodic revisions of portions of the timber sale contract to meet changing situations. The revision of stumpage rate adjustment procedures will make the price paid for timber by purchasers more responsive to changing lumber prices, while holding timber sale purchasers responsible for increased

inflationary costs due to their delay in harvest. There is no reason to delay implementing this stumpage rate adjustment change indefinitely while a more comprehensive contract revision is developed.

Comment. Six respondents stated that it is not fair to withdraw stumpage rate adjustment procedures, unless other financial security provisions are also withdrawn.

Response. As explained in response to other comments which follow, the agency has decided to not abolish stumpage rate adjustment procedures. However, the procedures are being modified to make them more responsive to changing lumber prices, while holding timber sale purchasers responsible for increased inflationary costs due to their delay in harvest. Financial security contract provisions have been developed incrementally over time. The current change is part of this incremental process. There is no valid reason to withdraw other procedures that have proved themselves to be necessary to protect the public's financial interests.

Comment. Five respondents felt that prior to eliminating stumpage rate adjustment, it must be shown that the revised market-related contract term addition policies work, since market-related contract term addition and stumpage rate adjustment are complementary policies.

Response. As already noted, the agency is modifying stumpage rate adjustment procedures, rather than abolishing them. Further, the agency agrees that market-related contract term addition and stumpage rate adjustment are complimentary policies. However, the complimentary nature of the two policies does not provide a valid reason to delay this change.

Comment. Fifteen respondents noted that the Forest Service proposal to eliminate stumpage rate adjustment appears to be premised on the fact that contract terms are now shorter than in the 1960's and 1970's. However, these respondents noted that while contract length is shorter now, many timber sales receive extensions of time for harvest, and the lumber market is more volatile now than in the past. Therefore, they argued that stumpage rate adjustment is still needed to mitigate market risk for both the timber sale purchaser and the Forest Service.

These respondents provided information to show that volume weighted contract lengths for non-salvage timber sales have declined from 1981 to 1996 from approximately 4 years to approximately 3 years. The respondents also submitted data to show that, for green sales sold from

calendar year 1994 though the second calendar year quarter of 1996, 80 percent of the timber sales and 48 percent of the volume was in contracts shorter than 3 years. Their point was that, while there are a large number of short contracts, the majority of the volume remains in longer contracts. Further, the respondent's analysis asserted that nearly one-half of all timber sales in Regions 1 and 6 received contract term extensions, in increasing contract length on these sales by nearly 1½ years. The respondents also provided data to show that lumber markets are more volatile than in the past.

Response. There is a significant volume of timber, over 80 percent, in contracts that exceed 2 years in length, and many of these sales may receive contract term extensions. When contracts have a long term, stumpage rate adjustment provides a valuable tool for ensuring the viability of contracts by reflecting lumber market changes. Stumpage rate adjustment reduces the price of timber when lumber price changes for both the timber sale purchaser and the Government. Stumpage rate adjustment reduces the price of timber when lumber markets decline, thus preventing possible purchaser default, and provides increased revenues to the Government when lumber prices increase. Upon consideration of comments and its own analysis, the agency agrees that it is important to continue to provide stumpage rate adjustment on timber sale contracts that are longer than 1 year in length.

Comment. Six respondents stated that because the Forest Service timber program is sporadic, the agency should retain all policy tools to deal with declining markets, including stumpage rate adjustment.

Response. The agency does not agree that the timber program is sporadic. After reducing the volume sold in the early 1990's, the volume sold has leveled off at approximately 4 billion board feet. The agency does agree, however, that policy tools to address volatile timber markets should be retained, including stumpage rate adjustment.

Comment. Nine respondents felt that if the stumpage rate adjustment procedures were eliminated small companies, without timberlands, would be penalized more than large companies. They argued that large companies can mix expensive Forest Service timber with timber from their own lands, while small companies would not be able to purchase enough volume at lower prices to mix with their high-priced timber. These respondents

felt that stumpage rate adjustment provides an equitable procedure for all sizes of companies to reduce the cost of high-priced Forest Service timber during market declines.

Response. The agency agrees that the stumpage rate adjustment procedure provides an equitable mechanism to assist purchasers in responding to declining markets. Therefore, the stumpage rate adjustment procedure will be retained.

Comment. Eleven respondents stated that elimination of stumpage rate adjustment would result in additional risk for all companies. They argued that the additional risk would make it more difficult for small companies to obtain loans and bonds and that these companies would need to use cash to meet financial security requirements, reducing the number of companies that can purchase timber sales, thereby reducing competition and timber sale bids.

Response. The agency realizes that purchasers could have a higher risk from lumber price decreases if stumpage rate adjustment were eliminated and, in turn, small companies might have more difficulty obtaining loans and bonds. As previously stated, the agency has concluded that it will not eliminate the stumpage rate adjustment procedure, but will modify it to fairly distribute the risks to purchases and the Government.

Comment. One respondent felt that not allowing for market price changes to be reflected in stumpage rate adjustment will increase the number of sales with no bids.

Response. The SRA Policy Study indicated that sales without stumpage rate adjustment receive lower bids. This finding may support the respondents conclusion that eliminating stumpage rate adjustment in timber sale contracts will increase the number of sales with no bids. Recognition of the effects of stumpage rate adjustment on prices and sales bid provided an additional reason for concluding that a stumpage rate adjustment procedure should be retained.

Comment. Ten respondents felt that elimination of stumpage rate adjustment would result in reduced receipts, reduced opportunity to collect trust funds, and reduced payments to counties.

Response. This comment is consistent with the SRA Policy Study results and supports the agency's decision to retain a stumpage rate adjustment procedure.

Comment. Ten respondents commented that elimination of stumpage rate adjustment will result in more defaulted sales and increase mill

closures. One respondent also stated that mill closures would add to a shortage of wood products for consumer use.

Response. Upon further consideration, the agency agrees that, without the stumpage rate adjustment procedure, more mills are likely to experience financial difficulty and default their timber sales during a lumber market downturn, and there is a risk that, in such an adverse situation, some of these mills might go out of business. A decline in the number of mills might reduce competition for Forest Service timber sales. However, mill closures are unlikely to contribute to a shortage of wood products. Remaining mills should have ample capacity to process timber from Forest Service sales.

Comment. In contrast to the vast majority of comments, one respondent commented that stumpage rate adjustment should be eliminated if it cannot be continued with the current procedures. This respondent's reasons were that: (1) Stumpage rate adjustment is almost impossible for the Government and purchaser to manage with lump sum sales because there are different rates on different payment units, and there is uncertainty about the volumes harvested each month; (2) Forest Service timber is now a smaller part of available volume and with a small volume the complexity of managing the stumpage rate adjustment process is not justified; and (3) the indices do not represent the actual lumber markets for many companies. This respondent felt that the current procedure of increasing timber prices by 50 percent of lumber price increases compensates for cost inflation and the burden of dealing with these complexities.

Response. The agency agrees that, with lump-sum timber sales, stumpage rate adjustment may complicate the purchaser's financial planning. However, Forest Service units must do similar planning and have found that these complications are manageable. The stumpage rate adjustment process uses 10 indices that are directly related to species that are sold. It is not feasible to have separate indices for each product that is marketed. Timber sales purchasers can manage inflationary cost increases by timing their harvest. No change is being made based on this comment.

Applicability to Existing Contracts

Comment. One respondent stated that converting existing contracts to flat rates would not be equitable, because the contracts were bid at higher prices with the assumption that stumpage rate

adjustment would protect the timber sale purchaser from lumber market declines.

Response. Based on the SRA Policy Study, which found that stumpage rate adjustment timber sales received higher bids, it is possible purchasers may have bid higher prices assuming they could be protected during market declines. In any case, the agency has decided not to eliminate stumpage rate adjustment.

Comment. Eight respondents stated that elimination of stumpage rate adjustment would cause expensive contract claims.

Response. While it might be true that elimination of stumpage rate adjustment could result in claims, the contract does provide for eliminating stumpage rate adjustment when a suitable index is no longer available. The Government and purchasers anticipate, upon execution of the contract, that stumpage rate adjustment may be eliminated in certain circumstances. In any case, the agency has decided not to eliminate stumpage rate adjustment.

Stumpage Rate Adjustment Procedures

Comment. Fifteen respondents commented that the current requirement that increases stumpage 50 percent for any lumber price increase and decreases stumpage 100 percent for any lumber price decrease is not unfair to the Government, since inflation needs to be accounted for and since fixed costs increase when production decreases. These respondents asserted that operational and equipment costs do not track the lumber markets. They also stated that the Forest Service should not receive 100 percent of the benefit for a market increase when they have a monopoly on timber supply in this country and can influence the price through their policies.

Response. The agency recognizes that inflation may occur and that fixed costs per unit of output change when production is increased or decreased. However, purchasers have control of when trees will be harvested and can minimize the adverse effect of inflation by harvesting the trees promptly. In addition, when markets are good, production increases and this reduces the fixed cost per unit of production, offsetting or partially offsetting inflationary cost increases.

The current and new policies both decrease stumpage prices for 100 percent of any lumber price decrease. Neither operational cost increases or increases in the fixed cost of production per unit of measure are reflected in this reduced price.

Finally, the agency does not have a monopoly on timber supply in this

country. The Forest Service supplies only about 10 percent of the volume consumed and does not intentionally influence price with its policies.

Comment. One respondent stated that the current system with adjustments of 50 percent when lumber prices are up and 100 percent when lumber prices are down is skewed in favor of the Forest Service. An equitable system would be one which was revenue neutral over time, when compared with a flat rate system.

Response. The agency does not agree that the current system is skewed in favor of the Forest Service. In fact, based on the respondent's criterion, the current system is skewed in favor of the timber sale purchaser. No change is being made based on this comment.

Comment. One respondent commented that the 100 percent down provision of the stumpage rate adjustment procedure protects both the purchaser and the agency from default. Also, that the 50 percent up feature allows the Forest Service to benefit from lumber price increases and that this is the Forest Service compensation for the protection afforded purchasers during down markets.

Response. The agency agrees that the Forest Service receives a benefit in down markets by avoiding contract defaults, but this benefit is not equal to the benefit the purchaser now receives in increasing markets.

Comment. One respondent stated that if the current system must be changed, both the Forest Service and the purchaser would receive compensation for the risks they are taking if a 50 percent up and 50 percent down procedure were used.

Response. The agency agrees, but believes that a 100 percent up and 100 percent down procedure would better protect purchasers during down markets.

Comment. One respondent stated that, if the procedure must change, that the 100 percent down and 100 percent up alternative is preferable to 50 percent down and 50 percent up. In either case, the procedure would have to be reflected in the appraisal process, since bid prices will be directly affected. Because purchasers would be assuming more risk than at present. This respondent felt that bid prices would go down, and that this market change must be reflected in the appraisal.

Response. The agency agrees that the preferable alternative is the 100 percent down and 100 percent up procedure, because purchasers are fully protected from falling lumber prices and the Government is fairly compensated for the reduced revenues it receives in

down markets by obtaining greater revenues in up markets. In addition, this procedure would reduce the incentive to delay harvest in the hope that prices will increase.

The agency also agrees that this change will have to be considered in timber sale appraisals, until such time as timber sales in the appraisal base period fully reflect this change.

Which Indices To Use

Comment. Nine respondents stated that alternatives to the currently used Western Wood Products Association indices might not truly reflect lumber selling prices, because the indices could be more easily manipulated by non-manufacturers. In addition, ten respondents stated that alternatives to the Western Wood Products Association indices do not include a major portion of western lumber production, are not weighted by volume sold, are not based on actual sales invoices, and cannot be audited.

Response. The agency has contracted with the Western Wood Products Association for indices, so this comment is moot.

Regulatory Procedures

Comment. Fifteen respondents stated that the policy needs to be reviewed for regulatory impact under Executive Order 12866. The policy will affect individual purchasers, reduce revenue to the Government, and affect payments to counties.

Response. The policy has been reviewed for regulatory impact under Executive Order 12866 and determined not to have a significant economic effect. The SRA Policy Study indicates that eliminating stumpage rate adjustment would reduce bids by approximately 4 percent (weighted average of all Regions) and reduce receipts from stumpage by an additional 5 percent. Approximately 75 percent of the volume in the western Regions (except Alaska) is sold with stumpage rate adjustment. In fiscal year 1996, the volume harvested on stumpage rate adjustment contracts had a value of approximately \$275 million. The possible loss of 9 percent of this revenue (\$25 million) is under the \$100 million economic effect.

The policy being adopted, however, has an even smaller economic effect than the proposal to eliminate stumpage rate adjustment. The SRA Policy Study indicates that changing to a policy of 100 percent up and 100 percent down adjustments would increase revenue by approximately 7 percent. The SRA Policy Study was not able to estimate the possible reduction in bids that will

occur when this policy is implemented, but if bids are reduced by 5 percent there will be a small positive effect on government receipts, perhaps \$5 million.

Comment. Ten respondents stated that the proposal needs a comprehensive analysis under the Regulatory Flexibility Act, because it fails to describe the potential impacts on small business, which includes the possibility that the banking and bonding industries may withdraw from the federal timber sale program, if stumpage rate adjustment is eliminated. These respondents concluded if this occurred, small businesses would have a more difficult time purchasing Forest Service timber sales.

Response. The proposed policy was reviewed under the Regulatory Flexibility Act. The respondents did identify a possible effect on small businesses, if stumpage rate adjustment were eliminated. The increased risk of default in falling markets might mean that the banking and bonding industries would be less likely to work with small businesses. As explained in response to a previous comment, this is one of the reasons that the Forest Service is choosing to not eliminate the stumpage rate adjustment procedure. The 100 percent up and 100 percent down procedure that will be implemented will not have a significant economic impact on either large or small businesses.

Comment. Ten respondents stated that the potential reduction in 25 percent payments, if flat rates are imposed, is an unfunded mandate on counties because they will have to find another source of revenue.

Response. As explained in an earlier response, eliminating stumpage rate adjustment might have a total effect of \$25 million, and 25 percent of this is well below the \$100 million criteria for the preparation of an unfunded mandates statement. When the policy is implemented, the effect on revenue to counties should be a slight increase.

Conclusion

Based on consideration of the comments received, the agency has decided to provide a stumpage rate adjustment procedure where 100 percent of any decreases in lumber price are reflected as a reduction in timber prices, subject to the limitation that prices cannot decrease below base rates. For falling markets, this is the same as the current procedure. The procedure for rising markets, however, will be changed so that 100 percent of any lumber price increase will be reflected as an increase in timber prices, subject to the limitation that timber prices

cannot increase by more than the difference between base rates and tentative rates. The current procedure for rising markets is to reflect only 50 percent of any lumber price increase.

The current procedure is inequitable to the public because the purchaser is protected from any lumber price decrease, while still getting the benefit of one-half of any lumber price increase. The current policy, established when inflation was high, recognized that the costs of logging and manufacturing also increase with time. To offset this effect, however, the timber sale purchaser can choose to harvest the timber early in the contract period, minimizing the risk of inflationary costs.

This revised stumpage rate adjustment procedure retains full protection for the timber sale purchaser when lumber prices decline. As compensation for this reduction in risk due to lumber price decreases, the public gets the benefit of lumber price increases, while the purchaser has the ability to time harvest to minimize cost increases due to inflation.

The revised stumpage rate adjustment procedure will be implemented through an amendment to chapter 2430 of the Forest Service Manual which will guide agency employees as follows:

FSM 2431.34—Stumpage Rate Adjustment. Except for situations that are disadvantageous to the Government, Forest Service timber sale contracts that exceed 1 year in contract length in the western United States should provide for stumpage rate adjustment. For example, do not include a stumpage rate adjustment provision for sales that lack a significant amount of sawtimber, when an index is not available for the predominant species in the sale, when there is no reasonably accurate conversion to board feet, or for other similar situations. When providing for stumpage rate adjustment, use contract provision C/CT3.2—Escalation Procedure, which provides that 100 percent of the difference between current and base lumber price indices will be added to tentative rates during periods of increasing lumber prices and 100 percent of the difference will be subtracted from tentative rates during periods of declining prices.

Regulatory Impact

This policy has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this is not a significant policy. This policy will not have an annual effect of \$100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment,

public health or safety, nor State or local governments. This policy will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this policy is not subject to OMB review Executive Order 12866.

Moreover, this policy has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), and it is hereby certified that this action will not have a significant economic impact on a substantial number of small entities as defined by that act. The decision to retain a stumpage rate adjustment procedure and to equalize the risks in declining or increasing markets treats small and large purchasers equally.

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, which the President signed into law on March 22, 1995, the Department has assessed the effects of this policy on State, local, and tribal governments and the private sector. This action does not compel the expenditure of \$100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Environmental Impact

This action falls within a category of actions excluded from documentation in an Environmental Impact Statement or an Environmental Assessment. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43180; September 18, 1992) excludes from documentation in an environmental assessment or impact statement "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions." The agency's assessment is that this policy falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Controlling Paperwork Burdens on the Public

The policy does not require any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 not already approved for use and, therefore, imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and

implementing regulations at 5 CFR part 1320 do not apply.

Dated: November 24, 1997.

Ronald E. Stewart,

Acting Associate Chief.

[FR Doc. 97-34051 Filed 12-30-97; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of availability of Record of Decision for Waimea-Paauilo Watershed, Hawaii County, Hawaii

AGENCY: USDA Natural Resources Conservation Service.

ACTION: Notice of availability of record of decision.

SUMMARY: Kenneth M. Kaneshiro, Responsible Federal Official for projects administered under the provisions of Public Law 83-566 in the State of Hawaii, is hereby providing notification that a record of decision to proceed with the installation of the Waimea-Paauilo Watershed project, signed December 16, 1997, is available.

The record of decision documents the intent to implement Alternative 5—Kauahi Reservoir Plan as set forth in the final Watershed Plan-Environmental Impact Statement (FEIS) for the Waimea-Paauilo Watershed, Hawaii County, Hawaii. The project will address the problems of inadequate and inconsistent irrigation water supply that prevent area farmers from full utilization of cropland and cause crop damage and losses during drought. The project will also address inconsistent supply and distribution of livestock drinking water to Waimea area ranches. The Selected Plan proposes the following improvements to the Waimea Irrigation System installation of a 131-million gallon reservoir, reservoir supply pipeline, extension of the irrigation water distribution system pipeline, and installation of a livestock drinking water system. The economic benefits derived by implementation of the irrigation water supply components will exceed economic costs. The social and cultural benefits of the livestock drinking water system, which will primarily serve native Hawaiian ranchers, has been judged by the funding source, the Department of Hawaiian Home Lands, to justify its construction. The project meets the needs of the sponsoring local organizations.

The record of decision documents that the Waimea-Paauilo Watershed

project uses all practicable means, consistent with other essential considerations of national policy, to meet the goals established in the National Environmental Policy Act. The FEIS has been prepared, reviewed, and accepted in accordance with the National Environmental Policy Act.

ADDRESSES: Single copies of this record of decision may be obtained from Kenneth M. Kaneshiro, State Conservationist, Natural Resources Conservation Service, 300 Ala Moana Blvd., Room 4316, P.O. Box 50004, Honolulu, Hawaii 96850.

FOR FURTHER INFORMATION CONTACT: Michael Kolman, Assistant State Conservationist, Natural Resources Conservation Service, 300 Ala Moana Blvd., Room 4316, P.O. Box 50004, Honolulu, Hawaii 96850, telephone (808) 541-2602.

(This activity is listed in the Catalog of Federal Domestic Assistance under No. 10.904, Watershed Protection and Flood Prevention, and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials.)

Kenneth M. Kaneshiro,

State Conservationist.

[FR Doc. 97-33996 Filed 12-30-97; 8:45 am]

BILLING CODE 3410-16-M

DEPARTMENT OF COMMERCE

Submission For OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.

Title: Report of Privately Owned Building or Zoning Permits Issued
Form Number(s): C-404, C-404(I), C-404(B).

Agency Approval Number: 0607-0094.

Type of Request: Revision of a currently approved collection.

Burden: 30,716 hour.

Number of Respondents: 18,900.

Avg Hours Per Response: 25 minutes.

Needs and Uses: The Census Bureau conducts the Report of Privately Owned Building or Zoning Permits Issued to collect data to provide estimates of the number and valuation of new residential housing units authorized by building permits. We use the data, a component of the index of leading economic indicators, to estimate the number of housing units started, completed, and sold, if single-family,

and to select samples for the Census Bureau's demographic surveys. Policymakers, planners, businessmen/women, and others use the detailed geographic data collected from state and local officials on new residential construction authorized by building permits to monitor growth and plan for local services, and to develop production and marketing plans. This survey is the only source of statistics on residential construction for states and smaller geographic areas.

The most significant revision we are making in this submission is that we plan to no longer collect any data on publicly-owned construction projects because we no longer need these data. Additionally, some other items have been either combined or dropped because of changing data needs.

We are seeking an agreement with outside sources to provide funding for the collection of much of the private construction projects data we now collect (all projects except new residential housekeeping buildings which we will continue to collect, regardless). We plan to discontinue collecting these data if no reimbursement agreement is made, as we can no longer fund their collection. This would reduce considerably the scope of the information collection. This request provides for the contingent collection of these data.

Affected Public: State, local, or tribal government.

Frequency: Monthly and annually.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 USC, Sections 8(b), 9(b), 161, and 182; and Title 15 USC, Section 1525.

OMB Desk Officer: Nancy Kirkendall, (202) 395-7313.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482-3272, Department of Commerce, room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Nancy Kirkendall, OMB Desk Officer, room 10201, New Executive Office Building, Washington, DC 20503.

Dated: December 23, 1997.

Madeleine Clayton,

Management Analyst, Office of Management and Organization.

[FR Doc. 97-33998 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

Submission For OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.

Title: Survey of Building and Zoning Permit Systems.

Form Number(s): C-411.

Agency Approval Number: 0607-0350.

Type of Request: Reinstatement, with change, of an expired collection.

Burden: 500 hours.

Number of Respondents: 2,000.

Avg Hours Per Response: 15 minutes.

Needs and Uses: The Census Bureau conducts the Survey of Building and Zoning Permit Systems to gather data from State and local building permit officials on the existence of new permit issuing systems or changes to existing systems. The survey is sent to building permit officials when we have reason to believe that a new permit-issuing system has been established or changes have been made to an existing system. The questionnaire asks for such items as geographic coverage and types of construction for which permits are issued. We use data gathered in this survey to update the universe of building permit-issuing places, the sampling frame for the Building Permits Survey (BPS) and the Survey of Construction (SOC). These two sample surveys provide widely used measures of construction activity, including the economic indicators *Housing Units Authorized by Building Permits* and *Housing Starts*.

In this submission we are dropping two questions and adding two others because of changing data needs. There will be no net change in respondents' time burden in completing the form. Additionally, we are seeking an agreement with outside sources to provide funding for the collection of much of the information we now collect about types of construction for which permits are issued (all construction except new residential housekeeping buildings which we will continue to collect, regardless). We plan to discontinue collecting these data if no reimbursement agreement is made, as we can no longer fund their collection. This would reduce considerably the scope of the information collection. This request provides for the contingent collection of these data.

Affected Public: State, local, or tribal government.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 USC, Sections 8(b), 9(b), 161, and 182; and Title 15 USC, Section 1525.

OMB Desk Officer: Nancy Kirkendall, (202) 395-7313.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482-3272, Department of Commerce, room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Nancy Kirkendall, OMB Desk Officer, room 10201, New Executive Office Building, Washington, DC 20503.

Dated: December 23, 1997.

Madeleine Clayton,

Management Analyst, Office of Management and Organization.

[FR Doc. 97-33999 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-580-008]

Color Television Receivers From the Republic of Korea; Notice of Termination of Anticircumvention Inquiry

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of termination of anticircumvention inquiry.

EFFECTIVE DATE: December 31, 1997.

FOR FURTHER INFORMATION CONTACT: Jim Terpstra or Holly Kuga, Office of AD/CVD Enforcement, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482-3965, and 4737 respectively.

Termination of Inquiry

On August 11, 1995, the International Brotherhood of Electrical Workers, the International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, and the Industrial Union Department (collectively the petitioners), filed an application requesting that the Department conduct an anti-circumvention inquiry of the antidumping duty order on color television receivers from the Republic of

Korea. Pursuant to that application, the Department initiated an anti-circumvention inquiry on January 19, 1996 (61 FR 1339, January 19, 1996). On December 19, 1997, petitioner submitted a letter requesting that the Department terminate the anticircumvention inquiry. Accordingly, we are terminating the inquiry.

Dated: December 19, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 97-33980 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-580-008]

Color Television Receivers From Korea; Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of affirmative preliminary determination of changed circumstances antidumping duty administrative review and intent to revoke.

SUMMARY: In response to a request from Samsung Electronics Co., Ltd. (Samsung), the Department of Commerce (the Department) is conducting a changed circumstances review of the antidumping duty order on color television receivers (CTVs) from the Republic of Korea (Korea) (49 FR 18336, April 30, 1984).

We have preliminarily determined that it is appropriate to partially revoke this AD order with respect to Samsung.

EFFECTIVE DATE: December 31, 1997.

FOR FURTHER INFORMATION CONTACT: Jim Terpstra or Holly Kuga, Antidumping and Countervailing Duty Enforcement, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-3965, or 482-4737, respectively.

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise

indicated, all references to the Department's regulations are to 19 CFR Part 353 (1997).

Background

On April 30, 1984, the Department published in the **Federal Register** (49 FR 18336) the antidumping duty order on CTVs from the Republic of Korea (the order). On July 20, 1995, the Department received a request by Samsung for a changed circumstances administrative review to consider revocation of the antidumping duty order, as it applies to Samsung. In their request, Samsung cited three reasons why the Department should revoke the antidumping duty order. First, the timing of certain court decisions on previous administrative reviews of this order prevented Samsung from filing in a timely manner for revocation under Section 751 (a) of the Act. Second, Samsung was found not to be dumping CTVs in the United States during the last six years that shipments from Korea had occurred. Third, Samsung has not shipped CTVs to the United States since early 1991. Zenith Electronics Corporation, a domestic interested party, and other petitioners filed objections to Samsung's request on August 4, 1995 and August 11, 1995, respectively.

Pursuant to Samsung's request, the Department published an initiation of changed circumstance review in the **Federal Register** on June 24, 1996 (61 FR 32426). On December 6, 1996, the Department issued the changed circumstance questionnaire to Samsung, who filed its response on February 24, 1997. Petitioners submitted their comments on Samsung's questionnaire response on June 17, 1997. Subsequently, both petitioners and Samsung have submitted additional comments.

On December 19, 1997, Petitioners requested that the anticircumvention inquiry on Korean CTVs be terminated. Accordingly, on December 19, 1997, we terminated that inquiry.

Scope of Review

Imports covered by this review include Samsung CTVs, complete and incomplete, from the Republic of Korea. This merchandise is classifiable under the 1996 Harmonized Tariff Schedule (HTS) as item 8528.12.04, 8528.12.08, 8528.12.12, 8528.12.16, 8528.12.20, 8528.12.24, 8528.12.28, 8528.12.32, 8528.12.36, 8528.12.40, 8528.12.44, 8528.12.48, 8528.12.52, 8528.12.56, 8528.12.62, 8528.12.64, 8528.12.68, 8528.12.72, 8528.12.76, 8528.12.80, 8528.12.84, and 8528.12.88. The order covers all CTVs regardless of HTS classification. The HTS subheadings are

provided for convenience and for customs purposes. The written description of the scope of the order remains dispositive.

Analysis

Based upon our analysis, we preliminarily determine that changed circumstances exist sufficient to warrant partial revocation of the antidumping duty order on CTVs with respect to Samsung. Therefore, we intend to partially revoke the order with respect to Samsung. The Department may grant a partial revocation of an antidumping duty order under 19 CFR 353.25(b). To do so it must find that producers or resellers have sold the subject merchandise at not less than foreign market value for a period of not less than three consecutive years and that it is not likely that the producers or resellers will in the future sell the merchandise at not less than foreign market value. 19 CFR 353.25(a)(2)(i) and (ii). Further, the producers or resellers must agree in writing to immediate reinstatement in the order if the Department concludes that the producer or reseller, subsequent to revocation, sold the merchandise at less than foreign market value. 19 CFR 353.25(a)(2)(iii).

In the present case, Samsung has met the eligibility requirement of three consecutive years of *de minimis* margins, and the Department has found that it is not likely that Samsung will sell the merchandise at not less than foreign market value in the future. Samsung sold subject merchandise at not less than foreign market value for a period of six consecutive years.

Samsung has also argued that because it has not shipped CTVs from Korea to the United States, it is not likely that dumping will resume. We do not consider this argument relevant because the Department explicitly excluded the lack of shipments as a basis for revocation. See Antidumping Duties, Final Rule, 54 FR 12742; March 28, 1989.

Nonetheless, if Samsung were to resume shipping CTVs from Korea, we do not find it likely that such imports would be sold in the United States at prices less than foreign market value. Samsung has established a significant history of selling Korean CTVs in the United States at prices that are not less than foreign market value. Absent evidence that conditions in the United States or Korean CTV markets have changed, or that Samsung's pricing methods have changed after its six years of *de minimis* margins, the Department preliminarily finds that Samsung is not likely to resume dumping of CTVs in

the United States. Accordingly, we find that the antidumping duty order as to Samsung is no longer necessary and preliminarily determine to revoke the order in part as to Samsung, provided Samsung agrees in writing to immediate reinstatement in the order in the event it sells the merchandise at less than normal value subsequent to revocation.

The Unions have argued that Samsung is likely to resume dumping based on Samsung's price and cost data. They contend that price comparison data submitted by Samsung indicate that Samsung would sell CTVs at less than normal value if the company resumed shipments of CTVs from Korea. Further, the Unions contend that Samsung will likely resume shipments from Korea for newly developed technologies which its operations in Mexico cannot produce.

As stated above, the likelihood of Samsung resuming shipments is not relevant to our finding here. Instead, we must address the issue of whether dumping would be likely to occur if shipments were to resume. Petitioners claim that Samsung's prices in Korea are likely to be significantly higher than prices Samsung is charging on shipments of CTVs from Mexico sold in the United States. Petitioners' arguments are premised on their allegation that Samsung's shipments from Mexico are circumventing the order on CTVs from Korea. However, on December 19, 1997, petitioners requested that the Department terminate the anti-circumvention inquiry, and the Department has not address the issue of potential circumvention.

Thus, petitioners have not addressed the issue of potential price differentials between Samsung's sales in the Korean and U.S. markets if Samsung were to resume sales from Korea. With respect to the Unions' argument that products resulting from newly developed or developing technologies are likely to be dumped, we do not find persuasive evidence of record that shows that such products are likely to be dumped.

Public Comment

Interested parties are invited to submit comments on these preliminary results. In light of the termination of the Anticircumvention Inquiry, interested parties are encouraged to submit comments on the likelihood of resumption issue in particular. Case briefs and/or written comments from interested parties may be submitted no later than 30 days after the date of publication/notification of this notice. Rebuttal briefs and rebuttals to comments, limited to issues raised in those briefs or comments, may be filed

no later than 37 days after publication/notification of this notice. Any hearing, if requested, will be held 44 days after publication/notification of this notice.

Affirmative Preliminary Determination of Changed Circumstances

Based on our analysis discussed above, we preliminarily find that it is appropriate to partially revoke the AD order with respect to Samsung. This preliminary affirmative changed circumstances determination is in accordance with section 751(b) of the Act and 19 C.F.R. 353.22(f).

Dated: December 19, 1997.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 97-33981 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-475-818]

Certain Pasta From Italy; Correction of Notice of Court Decision

AGENCY: International Trade Administration, Import Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: On December 15, 1997, the Department published a Notice in the **Federal Register** (62 FR 65673) concerning a decision of the United States Court of International Trade (CIT) in the case of *De Cecco et al. v. United States et al.* (Slip Op. 97-143, October 23, 1997). The notice indicated that absent an appeal of this decision, or, if the decision were to be appealed, upon a "conclusive" court decision affirming the CIT's judgment, the Department would implement the CIT's determination with respect to entries of merchandise produced or imported by firms enumerated in the notice. Barilla Alimentari S.p.A., a party to the litigation, should have been listed as a producer in the notice, but was not. The corrected notice appears below.

EFFECTIVE DATE: November 3, 1997.

FOR FURTHER INFORMATION CONTACT:

Edward Easton or John Brinkmann, at (202) 482-1777 or (202) 482-5288, respectively, Office of AD/CVD Enforcement II, Import Administration, International Trade Administration, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On June 14, 1996, the Department published its final determination of sales at less than fair value in the antidumping duty investigation of certain pasta from Italy. On July 24, 1996, the Department published an amended final determination. Subsequently, De Cecco, *et al.*, filed lawsuits with the Court challenging the extension of provisional measures described above. On October 2, 1997, the CIT issued its opinion granting plaintiffs' and plaintiff-intervenors' motions. In its opinion, the CIT found that the Department had improperly extended the provisional measures period, as there had not been a proper request from exporters to extend this period. On October 23, 1997, the CIT directed the Department to issue instructions to implement its decision.

In its decision in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) ("*Timken*"), the United States Court of Appeals for the Federal Circuit held that, pursuant to 19 U.S.C. 1516a(e), the Department must publish a notice of a court decision that is not "in harmony" with a Department determination, and must suspend liquidation of entries pending a "conclusive" court decision. The decision of the CIT in *De Cecco* constitutes a decision not in harmony with the Department's final determination. This notice fulfills the publication requirements of *Timken*.

Absent an appeal, or if appealed, upon a "conclusive" court decision affirming the CIT's judgment, the Department will direct the U.S. Customs Service to: (1) Lift the suspension of liquidation, release any bonds or other security posted, and refund any and all cash deposits paid as estimated antidumping duties on any and all entries of the subject merchandise were produced by the following producers—
F.lli De Cecco di Filippo Fara San Martino S.p.A.,
Rummo S.p.A. Molina e Pastificio,
La Molisana Industrie Alimentari S.p.A.,
Pastificio Fratelli Pagani S.p.A.,
Barilla Alimentari S.p.A, and
Industria Alimentari Colavita S.p.A.—
or imported by the following importers—

Agrusa, Inc.,
Bel Canto Fancy Foods, Ltd.,
Cento Fine Foods, Inc. (Alanric Food Distributors),
George De Lallo Co., Inc.,
Domil, Inc.,
Ferrara Food Co., Inc.,

Gourmet Award Foods, I.T. & M, Inc., Italfoods, Inc., La Pace Imports, Ltd., Med-USA Corporation, Musco Food Corp., The Pastene Companies, Ltd., Rienzi & Sons, Ron-Son Mushroom Products, Inc., Santini Foods, Inc., Sinco, Inc., and World Finer Foods, Inc— and were entered, or withdrawn from warehouse for consumption, after May 18, 1996, and before July 24, 1996; and (2) liquidate those entries without regard to any antidumping duty; and (3) pay any such refunds of cash deposits in accordance with law, including interest, from the date of entry at the rate(s) as announced from time to time by the Customs Service pursuant to Title 19, United States Code, Section 1505(c). Liquidation of such entries is suspended pending final and conclusive disposition.

Dated: December 23, 1997.

Richard W. Moreland,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 97-34138 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-428-820]

Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From Germany: Antidumping Duty Administrative Review: Extension of Time Limit

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limit.

SUMMARY: The Department of Commerce (the Department) is extending the time limit of the final results of the antidumping duty administrative review of Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Germany. This review covers the period January 27, 1995 through July 31, 1996.

EFFECTIVE DATE: December 31, 1997.

FOR FURTHER INFORMATION CONTACT: Nancy Decker or Linda Ludwig, Office of AD/CVD Enforcement, Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C.; telephone (202) 482-0196 or 482-3833, respectively.

SUPPLEMENTARY INFORMATION: Due to the complexity of issues involved in this case, it is not practicable to complete this review within the original time limit. The Department is extending the time limit for completion of the final results until March 9, 1998, in accordance with Section 751(a)(3)(A) of the Trade and Tariff Act of 1930, as amended by the Uruguay Round Agreements Act of 1994. See memorandum to Robert S. LaRussa from Joseph A. Spetrini regarding the extension of the case deadline, dated December 16, 1997.

This extension is in accordance with 751(a)(3)(A) of the Tariff Act of 1930, as amended (19 U.S.C. § 1675 (a)(3)(A)).

Dated: December 16, 1997.

Joseph A. Spetrini,

Deputy Assistant Secretary, Enforcement Group III.

[FR Doc. 97-34140 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In-Quota Rate of Duty

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Publication of Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In-Quota Rate of Duty.

SUMMARY: The Department of Commerce, in consultation with the Secretary of Agriculture, has prepared its annual list of foreign government subsidies on articles of cheese subject to an in-quota rate of duty during the period October 1, 1996 through September 30, 1997. We are publishing the current listing of those subsidies that we have determined exist.

EFFECTIVE DATE: January 1, 1998.

FOR FURTHER INFORMATION CONTACT: Russell Morris, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., N.W., Washington, D.C. 20230, telephone: (202) 482-2786.

SUPPLEMENTARY INFORMATION: Section 702(a) of the Trade Agreements Act of 1979 (as amended) (the Act) requires the Department of Commerce (the Department) to determine, in consultation with the Secretary of Agriculture, whether any foreign government is providing a subsidy with respect to any article of cheese subject to an in-quota rate of duty, as defined in section 702(g)(b)(4) of the Act, and to publish an annual list and quarterly updates of the type and amount of those subsidies. We hereby provide the Department's annual list of subsidies on cheeses that were imported during the period October 1, 1996 through September 30, 1997.

The Department has developed, in consultation with the Secretary of Agriculture, information on subsidies (as defined in section 702(g)(b)(2) of the Act) being provided either directly or indirectly by foreign governments on articles of cheese subject to an in-quota rate of duty. The appendix to this notice lists the country, the subsidy program or programs, and the gross and net amount of each subsidy for which information is currently available.

The Department will incorporate additional programs which are found to constitute subsidies, and additional information on the subsidy programs listed, as the information is developed.

The Department encourages any person having information on foreign government subsidy programs which benefit articles of cheese subject to an in-quota rate of duty to submit such information in writing to the Assistant Secretary for Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230.

This determination and notice are in accordance with section 702(a) of the Act.

Dated: December 23, 1997.

Richard W. Moreland,

Acting Assistant Secretary for Import Administration.

Appendix—Subsidy Programs on Cheese Subject to an In-Quota Rate of Duty

Country	Program(s)	Gross ¹ subsidy	Net ² subsidy
Austria	European Union Restitution Payments	\$0.23	\$0.23

Country	Program(s)	Gross ¹ subsidy	Net ² subsidy
Belgium	EU Restitution Payments	0.09	0.09
Canada	Export Assistance on Certain Types of Cheese	0.26	0.26
Denmark	EU Restitution Payments	0.16	0.16
Finland	EU Restitution Payments	0.30	0.30
France	EU Restitution Payments	0.04	0.04
Germany	EU Restitution Payments	0.24	0.24
Greece	EU Restitution Payments	0.00	0.00
Ireland	EU Restitution Payments	0.17	0.17
Italy	EU Restitution Payments	0.04	0.04
Luxembourg	EU Restitution Payments	0.09	0.09
Netherlands	EU Restitution Payments	0.11	0.11
Norway	Indirect (Milk) Subsidy	0.40	0.40
	Consumer Subsidy	0.18	0.18
	Total	0.18	0.18
Portugal	EU Restitution Payments	0.12	0.12
Spain	EU Restitution Payments	0.03	0.03
Switzerland	Deficiency Payments	0.32	0.32
U.K.	EU Restitution Payments	0.10	0.10

¹ Defined in 19 U.S.C. 1677(5).

² Defined in 19 U.S.C. 1677(6).

[FR Doc. 97-34139 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Notice of Prospective Grant of Exclusive Patent License; Thorlabs, Inc.

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of prospective grant of exclusive patent license.

SUMMARY: The National Institute of Standards and Technology ("NIST"), U.S. Department of Commerce, is contemplating the grant of a field of use exclusive license in the United States to practice the invention embodied in U.S. Patent Application 08/802,607; "Axial Translation Precision Position Post;" filed February 19, 1997; NIST Docket No. 96-043. The grant of the license, in the field of use of optics, photonics, and laser research, is contemplated to Thorlabs, Inc., having a place of business in Newton, New Jersey.

DATES: Comments must be received in writing no later than March 2, 1998.

ADDRESSES: Comments on the Prospective Grant must be submitted to: Ernest Graf, National Institute of Standards and Technology, Industrial Partnerships Program, Building 820, Room 213, Gaithersburg, MD 20899.

FOR FURTHER INFORMATION CONTACT: Ernest R. Graf, National Institute of Standards and Technology, Industrial

Partnerships Program, Building 820, Room 213, Gaithersburg, MD 20899.

SUPPLEMENTARY INFORMATION: This is a notice in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i). The prospective exclusive license, in the field of use of optics, photonics, and laser research, will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The license may be granted unless, within sixty days from the date of this published notice, NIST receives written evidence and argument which establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7. The availability of the invention for licensing was published in the **Federal Register**, Vol. 62, No. 120 (June 23, 1997).

U.S. Patent Application 08/802,607 describes a positioning post and precision translation mechanism for use in optic experiments and other scientific and engineering research. The positioning post is a translation stage contained within a 12.7 mm diameter cylinder. One end of the cylinder will translate relative to the other with minimal rotation, backlash, and wobble. Several positioning posts may be used in series to provide multi-axis positioning. A copy of the patent application may be obtained from NIST at the foregoing address.

NIST may enter into a Cooperative Research and Development Agreement (CRADA) to perform further research on the invention for purposes of commercialization. The CRADA may be conducted by NIST without any additional charge to any party that licenses the patent. NIST may grant the

licensee an option to negotiate for royalty-free exclusive licenses to any jointly owned inventions which arise from the CRADA as well as an option to negotiate for exclusive royalty-bearing licenses for NIST employee inventions which arise from the CRADA.

Dated: December 23, 1997.

Michael R. Rubin,

Deputy Chief Counsel.

[FR Doc. 97-34073 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-13-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122397A]

Fisheries of the Exclusive Economic Zone Off Alaska; Recordkeeping and Reporting Requirements; Public Workshop

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

ACTION: Notice of workshop.

SUMMARY: NMFS announces a workshop to explain provisions of the 1998 recordkeeping and reporting requirements for the Alaska groundfish fisheries, introduce the proposed electronic reporting system, provide detailed instructions on completion and submittal of the required forms and logsheets, and answer questions on recordkeeping and reporting from members of the fishing industry and other interested parties.

DATES: January 6, 1998, from 8:00 a.m. to 5:00 p.m.

ADDRESSES: The workshop will be held at the NMFS Alaska Fisheries Science Center, Building 9, 7600 Sand Point Way, NE., Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Patsy A. Bearden, 907-586-7228.

SUPPLEMENTARY INFORMATION: This workshop is scheduled by NMFS in response to requests by the affected fishing industry for a training workshop on the groundfish recordkeeping and reporting system.

Dated: December 23, 1997.

Gary C. Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97-33976 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-22-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122397B]

Endangered Species; Permits

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

ACTION: Receipt of applications for scientific research permits (1112, 1113) and for a modification to a scientific research permit (1025).

SUMMARY: Notice is hereby given that the NMFS Southwest Fisheries Science Center, Tiburon, CA (1112) and that Dr. Sylvia Galloway, Laboratory Director of the National Ocean Service - Marine Forensics Laboratory (1113) have applied in due form for permits for take of an endangered species for scientific research purposes. Notice is also given that the California Department of Fish and Game at Sacramento, CA (CDFG) has applied in due form for a second modification to a permit (1025) providing authorization for takes of an endangered species for scientific research purposes.

DATES: Written comments or requests for a public hearing on either of these applications must be received on or before January 30, 1998.

ADDRESSES: The applications and related documents are available for review in the following offices, by appointment:

For permits 1025 and 1112: Protected Species Division, NMFS, 777 Sonoma Avenue, Room 325, Santa Rosa, CA 95404-6528 (707-575-6064).

For permit 1113: Director, Southeast Region, NMFS, NOAA, 9721 Executive

Center Drive, St. Petersburg, FL 33702-2432 (813-893-3141).

All documents may also be reviewed by appointment in the Office of Protected Resources, F/PR3, NMFS, 1315 East-West Highway, Silver Spring, MD 20910-3226 (301-713-1401).

FOR FURTHER INFORMATION CONTACT: For permits 1025 and 1112: Lisa Holsinger at Protected Species Division, NMFS, 777 Sonoma Avenue, Room 325, Santa Rosa, CA 95404-6528 (707-575-6064).

For permit 1113: Terri Jordan, Endangered Species Division, Office of Protected Resources, (301-713-1401).

SUPPLEMENTARY INFORMATION: NMFS Southwest Fisheries Science Center (1112) and Dr. Sylvia Galloway, Laboratory Director of the National Ocean Service - Marine Forensics Laboratory (1113) request permits, and CDFG (1025) requests modification 2 to permit 1025, under the authority of section 10 of the Endangered Species Act of 1973 (ESA) (16 U.S.C. 1531-1543) and the NMFS regulations governing ESA-listed fish and wildlife permits (50 CFR parts 217-227).

NMFS Southwest Fisheries Science Center (1112) requests a scientific research permit for a take of juvenile, endangered, Sacramento River winter-run chinook salmon (*Oncorhynchus tshawytscha*) associated with a study designed to determine the interannual variability of growth, development, health, and ecology of juvenile salmonids within the San Francisco Estuary and the Gulf of the Farallones. Parameters to be estimated include residence times and migration rates of juvenile salmonids through the estuary and growth, energy status, pathology, feeding ecology, and contaminant accumulation during residence in the estuary and Gulf. A small number of juvenile, ESA-listed, naturally-produced, winter-run chinook salmon are proposed to be collected (with midwater trawl, surface trawl, high-speed rope trawl, purse seine, beach seine, and hook-and-line). The permit is requested for 1998 through 2003.

Dr. Sylvia Galloway, Laboratory Director of the National Ocean Service - Marine Forensics Laboratory (1113) requests authorization to possess and conduct research on listed, non-marine mammal, non-reptilian species using tissue samples (fin clips, barbels, blood, muscle, skin) to provide technical support that is responsive to NOAA goals involving protected and endangered species, via law enforcement. The applicant requests the ability to maintain samples of listed non-marine mammal, non-reptilian species obtained from permitted individuals and by Federal, state, or

local law enforcement agents for archival purposes.

Permit 1025 authorizes CDFG annual takes of adult and juvenile, endangered, naturally-produced Sacramento River winter-run chinook salmon (*Oncorhynchus tshawytscha*) associated with scientific research. For modification 2, CDFG requests an increase in the take of juvenile, ESA-listed fish associated with Study 1 of their permit. CDFG greatly underestimated the take associated with this study for the 1997 brood year and hence, exceeded their take authorization for this study. Study 1 evaluates the timing and relative abundance of juvenile anadromous salmonids emigrating to the Sacramento-San Joaquin Delta. An increase in indirect mortalities of juvenile, ESA-listed fish associated with study 1 is also requested. Modification 2 to permit 1025 is requested for the 1997-1998 emigration season only. Permit 1025 expires on June 30, 2001.

Those individuals requesting a hearing should set out the specific reasons why a hearing on any of these applications would be appropriate (see **ADDRESSES**). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in these application summaries are those of the applicants and do not necessarily reflect the views of NMFS.

Dated: December 23, 1997.

Joseph Blum,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 97-34076 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-22-F

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration (NTIA)

Advisory Committee on Public Interest Obligations of Digital Television Broadcasters; Notice of Open Meeting

December 31, 1997.

ACTION: Notice is hereby given of a meeting of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, created pursuant to Executive Order 13038.

SUMMARY: The President established the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (PIAC) to advise the Vice President on the public interest

obligations of digital broadcasters. The Committee will study and recommend which public interest obligations should accompany broadcasters' receipt of digital television licenses. The President designated the National Telecommunications and Information Administration as secretariat for the Committee.

AUTHORITY: Executive Order 13038, signed by President Clinton on March 11, 1997.

DATES: The meeting will be held on Friday, January 16, 1998 from 8:30 a.m. until 5:30 p.m.

ADDRESSES: The meeting is scheduled to take place in the Lounge of the Export-Import Bank of the United States, 11th Floor, 811 Vermont Avenue, N.W., Washington, D.C. 20571. This location is subject to change. If the location changes, another **Federal Register** notice will be issued. Updates about the location of the meeting will also be available on the Advisory Committee's homepage at www.ntia.doc.gov/pubintadvcom/pubint.htm or you may call Karen Edwards at 202-482-8056.

FOR FURTHER INFORMATION CONTACT: Karen Edwards, Designated Federal Officer and Telecommunications Policy Specialist, at the National Telecommunications and Information Administration; U.S. Department of Commerce, Room 4716; 14th Street and Constitution Avenue, N.W.; Washington, DC 20230. Telephone: 202-482-8056; Fax: 202-482-8058; E-mail: piac@ntia.doc.gov.
MEDIA INQUIRIES: Please contact Paige Darden at the Office of Public Affairs, at 202-482-7002.

Agenda

Friday, January 16
Opening remarks
Briefings on the technology of digital broadcasting and the implications for new programming services
Briefings on educational programming in the digital era
Public comment
Committee business
Closing remarks

This agenda is subject to change. For an updated, more detailed agenda, please check the Advisory Committee homepage at www.ntia.doc.gov/pubintadvcom/pubint.htm.

Public Participation

The meeting will be open to the public, with limited seating available on a first-come, first-served basis. Please bring a form of picture identification such as a driver's license or passport for clearance into the building on the day of the meeting. This meeting is

physically accessible to people with disabilities. Any member of the public requiring special services, such as sign language interpretation or other ancillary aids, should contact Karen Edwards at least five (5) working days prior to the meeting at 202-482-8056 or at piac@ntia.doc.gov.

Any member of the public may submit written comments concerning the Committee's affairs at any time before or after the meeting. The Secretariat's guidelines for public comment are described below and are available on the Advisory Committee website (www.ntia.doc.gov/pubintadvcom/pubint.htm) or by calling 202-482-8056.

Guidelines for Public Comment

The Advisory Committee on Public Interest Obligations of Digital Television Broadcasters welcomes public comments.

Oral Comment: In general, opportunities for oral comment will usually be limited to no more than five (5) minutes per speaker and no more than thirty (30) minutes total at each meeting.

Written Comment: Written comments must be submitted to the Advisory Committee Secretariat at the address listed below. Comments can be submitted either by letter addressed to the Committee (please place "Public Comment" on the bottom left of the envelope and submit at least thirty-five (35) copies) or by electronic mail to piac@ntia.doc.gov (please use "Public Comment" as the subject line). Written comments received within three (3) working days of a meeting and comments received shortly after a meeting will be compiled and sent as briefing material to Committee members prior to the next scheduled meeting.

Obtaining Meeting Minutes

Within thirty (30) days following the meeting, copies of the minutes of the meeting may be obtained over the Internet at www.ntia.doc.gov/pubintadvcom/pubint.htm, by phone request at 202-482-8056 or 202-501-6195, by email request at piac@ntia.doc.gov or by written request to Karen Edwards; Advisory Committee on Public Interest Obligations of Digital Television Broadcasters; National Telecommunications and Information Administration; U.S. Department of Commerce, Room 4716; 14th Street and

Constitution Avenue N.W.; Washington, DC 20230.

Shirl Kinney,

Deputy Assistant Secretary for Communications and Information.

[FR Doc. 97-34078 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-60-P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of an Import Restraint Limit and Guaranteed Access Level for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Honduras

December 23, 1997.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing an import limit and guaranteed access level.

EFFECTIVE DATE: January 1, 1998.

FOR FURTHER INFORMATION CONTACT: Roy Unger, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927-5850. For information on embargoes and quota re-openings, call (202) 482-3715.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The import restraint limit and guaranteed access level for textile products in Categories 352/652, produced or manufactured in Honduras and exported during the period January 1, 1998 through March 26, 1998, are based on limits notified to the Textiles Monitoring Body pursuant to the Uruguay Round Agreement on Textiles and Clothing (ATC) and a Memorandum of Understanding (MOU) dated September 15, 1995 between the Governments of the United States and Honduras.

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to establish the 1998 limit and guaranteed access level.

A description of the textile and apparel categories in terms of HTS numbers is available in the **CORRELATION:** Textile and Apparel

Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 62 FR 66057, published on December 17, 1997).

Requirements for participation in the Special Access Program are available in **Federal Register** notices 51 FR 21208, published on June 11, 1986; 52 FR 26057, published on July 10, 1987; 54 FR 50425, published on December 6, 1989; 61 FR 38236, published on July 23, 1996, and 62 FR 49206, published on September 19, 1997.

J. Hayden Boyd,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 23, 1997.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended; and the Uruguay Round Agreement on Textiles and Clothing (ATC), you are directed to prohibit, effective on January 1, 1998, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, wool and man-made fiber textile products in Categories 352/652, produced or manufactured in Honduras and exported during the period beginning on January 1, 1998 and extending through March 26, 1998 in excess of 2,634,919 dozen of which not more than 1,941,519 dozen shall be in Categories 352-K/652-K¹.

The limit set forth above is subject to adjustment pursuant to the provisions of the ATC and administrative arrangements notified to the Textiles Monitoring Body.

Products in the above categories exported during 1997 shall be charged to the applicable category limit for that year (see directive dated November 19, 1996) to the extent of any unfilled balance. In the event the limit established for that period has been exhausted by previous entries, such products shall be charged to the limit set forth in this directive.

Also pursuant to the ATC and a Memorandum of Understanding dated September 15, 1995 between the Governments of the United States and Honduras; and under the Special Access Program, as set forth in 51 FR 21208 (June 11, 1986), 52 FR 26057 (July 10, 1987), 54 FR 50425 (December 6, 1989), 61 FR 49439 (September 20, 1996), effective on January 1, 1998, a guaranteed access level of 11,643,836 dozen is being established for properly certified textile products assembled in

Honduras from fabric formed and cut in the United States in textile products in Categories 352/652 which are re-exported to the United States from Honduras during the period January 1, 1998 through March 26, 1998.

Any shipment for entry under the Special Access Program which is not accompanied by a valid and correct certification and Export Declaration in accordance with the provisions of the certification requirements established in the directive of July 18, 1996 shall be denied entry unless the Government of the Republic of Honduras authorizes the entry and any charges to the appropriate specific limit. Any shipment which is declared for entry under the Special Access Program but found not to qualify shall be denied entry into the United States.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

J. Hayden Boyd,

Acting Chairman, Committee for the Implementation of Textile Agreements

[FR Doc. 97-34064 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-DR-F

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Restraint Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Macau; Correction

December 24, 1997.

In the table on page 66055 of the document published in the **Federal Register** on December 17, 1997, second column, add Category 464 to Group II. The Group II designation should read as follows: 400-431, 433-438, 440-448, 459pt., 464 and 469pt., as a group.

J. Hayden Boyd,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 97-34061 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-DR-F

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Restraint Limits for Certain Cotton, Wool and Man-Made Fiber Textiles and Textile Products and Silk Blend and Other Vegetable Fiber Apparel Produced or Manufactured in the Philippines; Correction

December 23, 1997.

In the first column on page 64362 of the document published in the **Federal Register** on December 5, 1997, make the following corrections:

1. Move Categories 361, 369-S and 611 from Group II to Group I. The limits for Categories 361, 369-S and 611 remain unchanged.

2. The new Group II designation shall be as follows:

200-227, 300-326, 332, 359-O, 360, 362, 363, 369-O, 400-414, 434-438, 440, 442, 444, 448, 459pt., 464, 469pt., 600-607, 613-629, 644, 659-O, 666, 669-O, 670-O, 831, 833-838, 840-846, 850-858 and 859pt., as a group

3. Change the 1998 Group II limit from 189,927,480 square meters equivalent to 170,236,390 square meters equivalent.

J. Hayden Boyd,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 97-34063 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-DR-F

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of the Paperless ELVIS (Electronic Visa Information System) Requirement for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in Singapore

December 23, 1997.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs eliminating the paper visa requirement.

EFFECTIVE DATE: January 1, 1998.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

¹ Category 352-K: only HTS numbers 6107.11.0010, 6107.11.0020, 6108.19.9010, 6108.21.0010, 6108.21.0020, 6108.91.0005, 6108.91.0015, 6108.91.0025, 6109.10.0005, 6109.10.0007, 6109.10.0009, 6109.10.0037; Category 652-K: 6107.12.0010, 6107.12.0020, 6108.11.0010, 6108.11.0020, 6108.22.9020, 6108.22.9030, 6108.92.0005, 6108.92.0015, 6108.92.0025, 6109.90.1047 and 6109.90.1075.

On December 17, 1997 the Governments of the United States and Singapore signed the Electronic Visa Information System (ELVIS) Arrangement. This arrangement provides for electronic transmission of visa information to the U.S. Customs Service by the Government of Singapore for textile products exported to the United States which describes the shipment and includes the visa number assigned to the shipment. The transmission certifies the country of origin and authorizes the shipment to be charged against any applicable quota.

Effective on January 1, 1998, for entry into the United States the paper visa requirement is eliminated for textile products, produced or manufactured in Singapore and exported on or after January 1, 1998. The Government of Singapore must issue an ELVIS transmission for each shipment of textile products, as defined in the Arrangement, for textile products exported on or after January 1, 1998.

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to eliminate the paper visa requirement and to require the Government of Singapore to issue an ELVIS transmission for shipments of certain textile products, produced or manufactured in Singapore and exported to the United States on or after January 1, 1998.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 62 FR 66057, published on December 17, 1997). Also see 47 FR 6683, published on February 16, 1982; 60 FR 56576, published on November 9, 1995; 61 FR 65548, published on December 13, 1996; 61 FR 69082, published on December 31, 1996; and 61 FR 46952, published on September 5, 1997.

Interested persons are advised to take all necessary steps to ensure that textile products that are entered into the United States for consumption, or withdrawn from warehouse for consumption, will meet the visa requirements set forth in the letter published below to the Commissioner of Customs.

J. Hayden Boyd,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 23, 1997.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on February 10, 1982, as amended, by the Chairman, Committee for the Implementation of Textile Agreements, that directed you to prohibit entry of certain cotton, wool and man-made fiber textile products, produced or manufactured in Singapore for which the Government of Singapore has not issued an appropriate export visa.

Effective on January 1, 1998, the paper visa will no longer be required for the entry of shipments of textile products, produced or manufactured in Singapore and exported to the United States on or after January 1, 1998.

Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), Executive Order 11651 of March 3, 1972, as amended, the Uruguay Round Agreement on Textiles and Clothing (ATC); and pursuant to the Electronic Visa Information System (ELVIS) Arrangement dated December 17, 1997 between the Governments of the United States and the Republic of Singapore, you are directed to prohibit, effective on January 1, 1998, entry into the Customs territory of the United States (i.e., the 50 states, the District of Columbia and the Commonwealth of Puerto Rico) for consumption and withdrawal from warehouse for consumption of cotton, wool and man-made fiber textile products in Categories 200-239, 300-369, 400-469 and 600-670, including part categories, produced or manufactured in Singapore and exported on or after January 1, 1998 for which the Government of Singapore has not transmitted an appropriate ELVIS (Electronic Visa Information System) transmission fully described below. Should additional categories or part categories become subject to import quota the entire category(s) or part category(s) shall be included in the coverage of this arrangement.

An ELVIS message must accompany each commercial shipment of the aforementioned textile products.

A. Each ELVIS message will include the following information:

i. The visa number. The visa number shall be in the standard nine digit letter format, beginning with one numeric digit for the last digit of the year of export, followed by the two character alpha country code specified by the International Organization for Standardization (ISO) (the code for Singapore is "SG"), and a six digit numerical serial number identifying the shipment; e.g., 8SG123456.

ii. The date of issuance. The date of issuance shall be the day, month and year on which the visa was issued.

iii. The correct category(s), part category(s), quantity(s) and unit(s) of quantity in the shipment as set forth in the U.S. Department of Commerce Correlation and in the Harmonized Tariff Schedule of the United States, annotated or successor documents. Quantities must be stated in whole numbers. Decimals or fractions will not be accepted.

iv. The manufacturer ID number (MID). The MID shall begin with "SG," followed by the first three characters from each of the first

two words of the name of the manufacturer, followed by the largest number on the address line up to the first four digits, followed by three letters from the city name.

B. Entry of a shipment shall not be permitted:

i. if an ELVIS transmission has not been received for the shipment from Singapore;

ii. if the ELVIS transmission for that shipment is missing any of the following:

- a. visa number
- b. category or part category
- c. quantity
- d. unit of measure
- e. date of issuance
- f. manufacturer ID number

iii. if the ELVIS transmission for the shipment does not match the information supplied by the importer or the Customs broker acting as an agent on behalf of the importer with regard to any of the following:

- a. visa number
- b. category or part category
- c. unit of measure
- iv. if the quantity being entered is greater than the quantity transmitted.

v. if the visa number has previously been used, except in the case of a split shipment, or canceled, except when an entry has already been made using the visa number.

C. A new, correct ELVIS transmission from Singapore is required before a shipment that has been denied entry for one of the circumstances mentioned in paragraph B.i-v will be released.

D. Visa waivers will only be considered for paragraph B.i., if the shipment qualifies as a one-time special purpose shipment that is not part of an ongoing commercial enterprise. A visa waiver may be issued by the Department of Commerce at the request of the Embassy in Washington for the Government of Singapore. A visa waiver only waives the requirement to present a transmission at entry, it does not waive any quota requirements.

E. Shipments will not be released for twenty-four hours or 1 calendar day in the event of a system failure. If system failure exceeds twenty-four hours or 1 calendar day, for the remaining period of the system failure the U.S. Customs Service will only release shipments that have been authorized by the Government of Singapore through the use of the visa waiver procedures.

F. If import quotas are in force, U.S. Customs Service shall charge only the actual quantity in the shipment to the correct category limit. If a shipment from Singapore has been allowed entry into the commerce of the United States with an incorrect ELVIS transmission, or no ELVIS transmission, or system failure, and redelivery is requested but cannot be made, and after the Government of Singapore does not issue a new ELVIS transmission or request a visa waiver (if applicable), the shipment will be charged to the correct category limit whether a waiver is provided or a new ELVIS message is transmitted.

Other Provisions.

A. The date of export is the actual date the merchandise finally leaves the country of origin. For merchandise exported by carrier, this is the day on which the carrier last departs the country of origin.

B. Merchandise imported for the personal use of the importer and not for resale, regardless of value, and properly marked commercial sample shipments valued at U.S.\$250 or less, do not require an ELVIS transmission for entry and shall not be charged to agreement levels, if applicable.

The actions taken concerning the Government of Singapore with respect to imports of textiles and textile products in the foregoing categories have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, these directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1). This letter will be published in the **Federal Register**.

Sincerely,

J. Hayden Boyd,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 97-34062 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-DR-F

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

New Export Visa Stamp for Certain Textiles and Textile Products Produced or Manufactured in Hong Kong

December 23, 1997.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs providing for the use of a new export visa stamp.

EFFECTIVE DATE: January 1, 1998.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

Beginning on January 1, 1998, the Government of the Hong Kong Special Administrative Region will start issuing a new circular visa stamp. The visa number, date of issue, category(ies) and quantity(ies) will be printed by computer inside the circular stamp. This new visa will be issued on Export Licenses covering shipments of textile products, produced or manufactured in Hong Kong and exported on or after January 1, 1998.

Effective on January 1, 1998, textile products produced or manufactured in

Hong Kong and exported on or after January 1, 1998 shall be accompanied by a circular visa which includes the visa number, date of issue, category(ies) and quantity(ies) printed by computer inside the circular stamp. There will be a grace period from January 1, 1998 through January 31, 1998 during which the old or the new visa will be acceptable. The new visa stamp must accompany goods exported after January 31, 1998. If the merchandise is not accompanied by the appropriate visa, products will be denied entry and a new visa must be obtained.

A facsimile of the new visa stamp is on file at the U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC, room 3100.

See 58 FR 2400, published on January 19, 1993.

J. Hayden Boyd,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 23, 1997.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on January 14, 1983, as amended, by the Chairman, Committee for the Implementation of Textile Agreements. That directive directed you to prohibit entry of certain textiles and textile products, produced or manufactured in Hong Kong for which the Government of Hong Kong has not issued an appropriate visa.

Beginning on January 1, 1998, the Government of the Hong Kong Special Administrative Region will start issuing a new circular visa stamp. The visa number, date of issue, category(ies) and quantity(ies) will be printed by computer inside the circular stamp. This new visa will be issued on Export Licenses covering shipments of textile products, produced or manufactured in Hong Kong and exported on or after January 1, 1998.

Effective on January 1, 1998, you are directed to accept shipments of textile products, produced or manufactured in Hong Kong and exported on or after January 1, 1998 which are accompanied by a circular visa issued by the Government of Hong Kong Special Administrative Region which includes the visa number, date of issue, category(ies) and quantity(ies) printed by computer inside the circular stamp. There will be a grace period from January 1, 1998 through January 31, 1998 during which the old or the new visa will be acceptable. The new visa stamp must accompany goods exported after January 31, 1998. If the merchandise is not accompanied by the appropriate visa, products will be denied entry and a new visa must be obtained.

A facsimile of the new visa stamp is enclosed with this letter.

Shipments entered or withdrawn from warehouse according to this directive which are not accompanied by an appropriate export visa shall be denied entry and a new visa must be obtained.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

J. Hayden Boyd,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 97-34065 Filed 12-30-97; 8:45 am]

BILLING CODE 3510-DR-F

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 98-C0003]

In the Matter of Century Products Company, a Corporation; Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Provisional acceptance of a settlement agreement under the Consumer Product Safety Act.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of 16 CFR 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with Century Products Company, a corporation, containing a civil penalty of \$225,000.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by January 15, 1998.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 98-C0003, Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

FOR FURTHER INFORMATION CONTACT: Melvin I. Kramer, Trial Attorney, Office of Compliance and Enforcement, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504-0626.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: December 24, 1997.

Sadye E. Dunn,
Secretary.

Settlement Agreement and Order

1. This Settlement Agreement and Order, entered into between Century Products Company, a corporation (hereinafter, "Century"), and the staff of the Consumer Product Safety Commission (hereinafter, "staff"), pursuant to the procedures set forth in 16 CFR 1118.20, is a compromise resolution of the matter described herein, without a hearing or determination of issues of law and fact.

The Parties

2. The staff is the staff of the Consumer Product Safety Commission (hereinafter, "Commission"), an independent federal regulatory agency of the United States government, established by Congress pursuant to section 4 of the Consumer Product Safety Act (hereinafter, "CPSA"), as amended, 15 U.S.C. § 2053.

3. Respondent Century is a corporation organized and existing under the laws of the State of Delaware with its principal corporate offices located at 9600 Valley View Rd., Macedonia, OH 44056. Century has an operating division named Okla Homer Smith Furniture Manufacturing Co., Inc. (hereinafter, "OHS"), located at 416 South Fifth St., Ft. Smith, AR 72901, which manufactures cribs and juvenile furniture.

Staff Allegations

4. Section 15(b) of the CPSA, 15 U.S.C. § 2064(b), requires a manufacturer of a consumer product who, *inter alia*, obtains information that reasonably supports the conclusion that the product contains a defect which could create a substantial product hazard or creates an unreasonable risk of serious injury or death, to immediately inform the Commission of the defect or risk.

A. Wooden Cribs

5. Between April 1992 and December 31, 1993, Century through its OHS division, manufactured and sold, nationwide, approximately 278,000 wooden cribs of various models.

6. From April 1992 to December 31, 1993, OHS changed its method of attaching the slats to the side rails of these cribs, by using glue only. This allowed the slats to loosen, and partially or completely detach from the rails. If this occurs, a child could become entrapped in the larger space created by the missing or loosened slat, and could be asphyxiated.

7. From February 1993 to June 1993, Respondent learned of five non-fatal entrapment incidents in which an infant became entrapped in the side rail because of missing or loosened side rail slats.

8. On September 28, 1993, a child became entrapped and was asphyxiated in one of these wooden cribs where a slat had fallen out.

9. In January 1994, Century changed its method of attaching the slats to the side rails of these cribs from gluing only to nailing and gluing, to prevent this kind of an incident.

10. When initially contacted by the staff about the death, OHS admitted knowing of the fatal incident referenced in paragraph 8 above, but failed to immediately provide the information sought by the staff under section 15(b) of the CPSA.

11. Not until June 30, 1994, after repeated attempts by the staff to obtain this information, did Century, through its OHS division, provide a "Full Report" containing the information required by section 15(b) of the CPSA and 16 CFR § 1115.13, including a number of additional incidents.

12. Although Century, through its OHS division had obtained sufficient information to reasonably support the conclusion that these wooden cribs contained a defect which could create a substantial product hazard, or created an unreasonable risk of serious injury or death, it failed to report such information to the Commission in a timely manner, as required by section 15(b) of the CPSA. This is a violation of section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4).

13. Respondent's failure to report to the Commission, as required by section 15(b) of the CPSA, was committed "knowingly", as that term is defined in Section 20(d) of the CPSA, 15 U.S.C. § 2069(d), and Century is subject to civil penalties under Section 20 of the CPSA.

B. Strollers

14. Between February 1995 and October 1995, Century manufactured and sold approximately 166,000 Travelite Sports Strollers (hereinafter, "Stroller" and "Strollers"), models 11-171, 11-181 and 11-191.

15. The Strollers contain two defects: (a) if the front wheels of the Stroller hit a curb or other stationary object, the fold locks can break causing the stroller to fold unexpectedly, and (b) the buckle on the restraint strap may unlatch during normal use. If the fold lock fails or the restraint buckle unlatches, the child occupant could fall out of the Stroller and be seriously injured.

16. Between June 1995 and June 1996, Century learned of more than 500 reports of failures involving the Stroller's fold locks, including 29 injuries to children occupying the Stroller.

17. Between June 1995 and November 1996, Century learned of approximately 60 reports of failures involving the Stroller's restraint buckle, including approximately 20 injuries to the child occupant.

18. Between August 1995 and October 1995, Century made several design and materials changes to the fold lock and the restraint buckle in an attempt to address the problems in question.

19. On June 5, 1996, Century providing a "Full Report" regarding the fold locks, pursuant to section 15(b) of the CPSA and 16 CFR § 1115.13.

20. On November 1, 1996, Century provided a "Full Report" regarding the restraint buckle, pursuant to section 15(b) of the CPSA and 16 CFR § 1115.13.

21. Although Century had obtained sufficient information to reasonably support the conclusion that the Stroller contained defects which could create a substantial product hazard, or created an unreasonable risk of serious injury or death, it failed to report such information to the Commission in a timely manner, as required by section 15(b) of the CPSA. This is a violation of section 19(a)(4) of the CPSA.

22. Century's failure to report to the Commission, as required by section 15(b) of the CPSA, was committed "knowingly", as that term is defined in section 20(d) of the CPSA, and Century is subject to civil penalties under section 20 of the CPSA.

Response of Century

23. Century denies each and all of the staff allegations with respect to the Wooden Cribs and the Strollers. Century also denies that the Wooden Cribs or the Strollers contain defects which create or which could create a substantial product hazard within the meaning of section 15 of the CPSA. In particular, the September 28, 1993 incident involving a wooden crib was the result of misuse of the product. Century further denies that it obtained information sufficient to support an obligation to report nor had any obligation to report the incidents regarding the Wooden Cribs or the Strollers to the Commission under section 15(b) of the CPSA, and thus denies that it is subject to civil penalties under section 20 of the CPSA. Century makes no admission whatsoever of any fault, liability, or statutory violation.

24. Despite believing that the Wooden Cribs and Strollers contained no

substantial product hazard within the meaning of section 15(a) of the CPSA, 15 U.S.C. § 2064(a), Century voluntarily reported to the CPSC and voluntarily conducted corrective action programs with respect to the Wooden Cribs and the Strollers.

25. By entering into the Settlement Agreement and Order, Century does not admit any liability or wrongdoing. This Settlement Agreement and Order is agreed to by Century to avoid incurring additional legal costs and does not constitute, and is not evidence of, an admission of any liability or wrongdoing by Century.

Agreement of the Parties

26. The Commission has jurisdiction in this matter.

27. Century knowingly, voluntarily and completely waives any rights it may have (1) to an administrative or judicial hearing with respect to the Commission's claim for a civil penalty, (2) to judicial review or other challenge or contest of the validity of the Commission's action with regard to its claim for a civil penalty, (3) to a determination by the Commission as to whether a violation of Section 15(b) of the CPSA, has occurred, (4) to a statement of findings of fact and conclusions of law with regard to the Commission's claim for a civil penalty, and (5) to any claims under the Equal Access to Justice Act.

28. This Settlement Agreement and Order settles any allegations of violation of section 15(b) of the CPSA regarding the products described in paragraphs 5 and 14 above. In addition, having reviewed all of the information regarding Century's Fold N' Go Playard, models 10-710 and 10-810, (top rail) and Century's Lil Napper Infant Swings, models 12-344, 12-345, 12-475, and 12-476, (restraint system), which Century has disclosed to the staff as of the effective date of this Settlement Agreement and Order, the Commission agrees that it will not seek any civil penalty regarding these two products, pursuant to sections 19(a)(4) and 20 of the CPSA, for failure to comply with the reporting requirements.

Notwithstanding the foregoing provisions of this paragraph, the CPSC shall not be precluded from seeking action with respect to the above referenced products on the grounds that Century failed to report based on

information in its possession or control, but not disclosed to the CPSC as of the effective date of this Settlement Agreement and Order, or based on information received by it after the effective date of this Settlement Agreement and Order, unless Century had actual knowledge that the CPSC had been "adequately informed", within the meaning of section 15(b) of the CPSA and its regulations, 16 CFR § 1115.

29. Nothing in this Settlement Agreement and Order shall be construed to preclude the CPSC from pursuing a corrective action or other relief not described above.

30. This Settlement Agreement and Order becomes effective only upon its final acceptance by the Commission and service of the incorporated Order upon Respondent.

31. Upon provisional acceptance of this Settlement Agreement and Order by the Commission, the Commission shall place this Agreement and Order on the public record and shall publish it in the **Federal Register** in accordance with the procedure set forth in 16 CFR 1118.20(e). If the Commission does not receive any written request not to accept the Settlement Agreement and Order within 15 days, the Agreement and Order shall be deemed finally accepted on the 16th day after the date it is published in the **Federal Register**, in accordance with 16 CFR 1118.20(f).

32. Upon final acceptance of this Settlement Agreement and Order, the Commission shall issue the attached Order, incorporated herein by reference.

33. The provisions of this Settlement Agreement and Order shall apply to Century and its successors and assigns.

34. For purposes of section 6(b) of the CPSA, 15 U.S.C. § 2055(b), this matter shall be treated as if a complaint had issued, and the Commission may publicize the terms of the Settlement Agreement and Order.

35. Century agrees to immediately inform the Commission if it learns of any additional incidents involving the products and alleged defects identified above.

36. This Agreement may be used in interpreting the Order. Agreements, understands, representations, or interpretations made outside of this Settlement Agreement and Order may not be used to vary or to contradict its terms.

Dated: December 4, 1997.

Century Products Company.

James Connors,

President and CEO of Century Products Company.

Counsel to Century Products Company.

Christopher Smith,

Margo Shatz Block,

Arent Fox Kintner Plotkin & Kahn.

The Consumer Product Safety Commission.

Alan H. Schoem,

Associate Executive Director, Office of Compliance.

Eric L. Stone,

Director, Division of Administrative Litigation, Office of Compliance.

Dated: December 5, 1997.

Melvin I. Kramer,

Trial Attorney, Division of Administrative Litigation, Office of Compliance.

Ronald G. Yelenik,

Trial Attorney, Division of Administrative Litigation, Office of Compliance.

Order

Upon consideration of the Settlement Agreement between Respondent Century Products Company, a corporation, and the staff of the Consumer Product Safety Commission, and the Commission having jurisdiction over the subject matter and over Century Products Company, and it appearing the Settlement Agreement is in the public interest, it is

Ordered, that the Settlement Agreement be and hereby is accepted, and it is

Ordered, that within 20 days of the service of the Final Order upon Respondent, Century Products Company shall pay to the order of the U.S. Treasury a civil penalty in the amount of two hundred and twenty-five thousand dollars (\$225,000).

Further ordered, Century shall immediately inform the Commission if it learns of any additional incidents involving the products and alleged defects identified herein.

Provisionally accepted and Provisional Order issued on the 24th day of December, 1997.

By Order of the Commission.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 97-34088 Filed 12-30-97; 8:45 am]

BILLING CODE 6355-01-M

DEPARTMENT OF DEFENSE**Office of the Secretary****Proposed Collection; Comment Request**

AGENCY: Office of the Under Secretary of Defense (Personnel and Readiness).

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Under Secretary of Defense (Personnel and Readiness) announces the following proposed reinstatement of a public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of burden of the proposed information collection; (c) ways to enhance the quality utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by March 2, 1998.

ADDRESSES: Written comments and recommendations on the proposed information collection should be sent to the Office of the Under Secretary of Defense (Personnel and Readiness) (Force Management Policy/Personnel Support Families and Education/Community Support Policy), ATTN: Colonel Jack Padgett, 4000 Defense Pentagon, Washington, DC 20301-4000.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the above address or call at (703) 693-6184.

Title, Associated Form, and OMB Control Number: "Application for Discharge of Member or Survivor of Member of Group Certified to Have Performed Active Duty with the Armed Forces of the United States" DD Form 2168, 0704-0100.

Needs and Uses: This information collection requirement is necessary to implement Public Law 95-202, Section 401, which directs the Secretary of Defense to determine if civilian employment or contractual service rendered by groups to the Armed Forces of the United States shall be considered active duty. This information is

collected on DD Form 2168, "Application for Discharge of Member of Survivor of Member of Group Certified to Have Performed Active Duty with the Armed Forces of the United States," which provides the necessary data to assist each of the Military Departments in determining if an applicant was a member of a group which has performed active military service. Those individuals who have been recognized as a member of an approved group are eligible for benefits provided for by laws administered by the Veteran's Administration.

Affected Public: Individuals or households.

Annual Burden Hours: 1500.

Number of Respondents: 3000.

Responses Per Respondent: 1.

Average Burden Per Response: .5 hours.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:**Summary of Information Collection**

Public law 95-202 directed the Secretary of Defense to determine if civilian employment or contractual service rendered by groups to the Armed Forces of the United States shall be considered active duty. Individuals recognized as a member of an approved group will be eligible for benefits provided for by the laws of the Veteran's Administration. The information collected on DD Form 2168, "Application for Discharge of Member or Survivor of Member of Group Certified to Have Performed Active Duty with the Armed Forces of the United States." is necessary to assist each of the Military Departments in determining if an applicant was a member of a group which has been found to have performed active military service and to assist in issuing an appropriate certificate of service. Information provided by the applicant will include: the name of the group served with; dates and place of service; highest grade/rank/rating held during service; highest pay grade; military installation where ordered to report; specialty/job title(s). If the information requested on the DD Form 2168 is compatible with that of a corresponding approved group, and the applicant can provide supporting evidence, he or she will receive veteran's status in accordance with provisions of DoD Directive 1000.20. Information from the DD Form 2168 will be extracted and used to complete the DD Form 214, "Certificate for Release or Discharge from Active Duty."

Dated: December 23, 1997.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 97-33978 Filed 12-30-97; 8:45 am]

BILLING CODE 5000-01-M

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: Domestic Preparedness Hotline User Survey; No Form; OMB Number 0702-[to be determined].

Type of Request: New Collection.

Number of Respondents: 600.

Responses Per Respondent: 1.

Annual Responses: 600.

Average Burden Per Response: 15 minutes.

Annual Burden Hours: 150.

Needs and Uses: The information collection requirement is necessary to obtain information from users regarding the features of a hotline for reporting instances of chemical, biological, or weapons of mass destruction. Respondents are firefighters, hazardous materials responders, emergency medical services, and emergency planners/managers from 150 metropolitan areas in the U.S. They are the intended hotline user group. The purpose of this information collection is to obtain input from this user group on the features they would like to have incorporated into a hotline for reporting emergencies of a chemical, biological, or weapons of mass destruction nature.

Affected Public: State, Local, or Tribal Government.

Frequency: One time.

Respondent Obligation: Voluntary.

OMB Desk Officer: Mr. Edward C. Springer.

Written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive 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: December 2, 1997.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 97-33977 Filed 12-30-97; 8:45 am]

BILLING CODE 5000-01-M

DEPARTMENT OF DEFENSE

Defense Logistics Agency

Privacy Act of 1974; System of Records

AGENCY: Defense Logistics Agency

ACTION: Notice to Alter a Record System.

SUMMARY: The Defense Logistics Agency proposes to alter a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The alteration will be effective without further notice on January 30, 1998, unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Privacy Act Officer, Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Salus at (703) 767-6183.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the Federal Register and are available from the address above.

The specific changes to the record system being altered are set forth below followed by the notice, as altered, published in its entirety.

An altered system report, as required by 5 U.S.C. 552a(r) of the Privacy Act was submitted on December 15, 1997, to the House Committee on Government Reform and Oversight, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 23, 1997.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

S270.30 DLA-B

SYSTEM NAME:

Biography File (February 22, 1993, 58 FR 10869).

CHANGES:

* * * * *

SYSTEM IDENTIFIER:

Delete entry and replace with 'S180.20 CA.'

* * * * *

SYSTEM LOCATION:

Delete entry and replace with 'Office of Congressional and Public Affairs, Headquarters Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221, and the Public Affairs Offices of the Defense Logistics Agency Primary Level Field Activities (DLA PLFAs). Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.'

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with 'Selected civilian and military personnel currently and formerly assigned to DLA and other persons affiliated with DLA and the Department of Defense (DoD).'

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with '5 U.S.C. 301, Departmental Regulations and 10 U.S.C. 133, Under Secretary of Defense for Acquisition and Technology.'

* * * * *

PURPOSE(S):

Delete entry and replace with 'Information is maintained as background material for news and feature articles covering activities, assignments, retirements, and reassignments of key individuals; for use in introductions; in the preparation of speeches for delivery at change of command, retirement, award ceremonies, community relations events; for congressional functions; and for site visits.'

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

Delete entry and replace with 'In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To officials of federal, state, and local agencies and private sector entities for use as background information for introductions, briefings, Congressional testimony, or meetings.

The 'Blanket Routine Uses' set forth at the beginning of DLA's compilation of systems of records notices apply to this system.'

* * * * *

SAFEGUARDS:

Delete entry and replace with 'Records are maintained in a secure, limited access, or monitored area. Physical entry by unauthorized persons is restricted by the use of locks, guards, or administrative procedures. Access to personal information is limited to those who require the records to perform their official duties. All personnel whose information are trained in the proper safeguarding and use of the information.'

* * * * *

RETENTION AND DISPOSAL:

Delete entry and replace with 'Files are retained in current files area and destroyed 2 years after retirement, transfer, death, or termination of affiliation with DLA or DoD.'

* * * * *

S180.20 CA

SYSTEM NAME:

Biography File.

SYSTEM LOCATION:

Office of Congressional and Public Affairs, Headquarters Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221, and the Public Affairs Offices of the Defense Logistics Agency Primary Level Field Activities (DLA PLFAs). Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Selected civilian and military personnel currently and formerly assigned to DLA and other persons

affiliated with DLA and the Department of Defense (DoD).

CATEGORIES OF RECORDS IN THE SYSTEM:

Biographical information provided by the individual.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations and 10 U.S.C. 133, Under Secretary of Defense for Acquisition and Technology.

PURPOSE(S):

Information is maintained as background material for news and feature articles covering activities, assignments, retirements, and reassignments of key individuals; for use in introductions; in the preparation of speeches for delivery at change of command, retirement, award ceremonies, community relations events; for congressional functions; and for site visits.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To officials of federal, state, and local agencies and private sector entities for use as background information for introductions, briefings, Congressional testimony, or meetings.

The 'Blanket Routine Uses' set forth at the beginning of DLA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in paper and computerized form.

RETRIEVABILITY:

Retrieved alphabetically by last name of individual.

SAFEGUARDS:

Records are maintained in a secure, limited access, or monitored area. Physical entry by unauthorized persons is restricted by the use of locks, guards, or administrative procedures. Access to personal information is limited to those who require the records to perform their official duties. All personnel whose official duties require access to the information are trained in the proper safeguarding and use of the information.

RETENTION AND DISPOSAL:

Files are retained in current files area and destroyed 2 years after retirement, transfer or death, or termination of affiliation with DLA or DoD.

SYSTEM MANAGER(S) AND ADDRESS:

Staff Director, Office of Congressional and Public Affairs, Headquarters Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, Virginia 22060-6221, and the Commanders of the PLFAs. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Privacy Act Officer, Headquarters Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221, or the Privacy Act Officer of the PLFA involved. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system of records should address written inquiries to the Privacy Act Officer, Headquarters Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221, or the Privacy Act Officer of the PLFA involved. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.

CONTESTING RECORD PROCEDURES:

The DLA rules for accessing records, for contesting contents and appealing initial agency determinations are contained in DLA Regulation 5400.21, 32 CFR part 323, or may be obtained from the Privacy Act Officer, Headquarters, Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221.

RECORD SOURCE CATEGORIES:

Record subject and record subject's employing agency or organization.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 97-33979 Filed 12-30-97; 8:45 am]

BILLING CODE 5000-04-F

DEPARTMENT OF DEFENSE

Department of the Navy

Determination of Surplus for the Disposal and Reuse of Marine Corps Air Station Tustin, CA

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: This notice provides information regarding the local redevelopment authority that has been established to plan the reuse of Marine Corps Air Station Tustin, California, and the surplus property that is located at that base closure site.

FOR FURTHER INFORMATION CONTACT: Richard Anderson, Real Estate and Base Closure Section Head, Commandant of the Marine Corps (Code LFL3), Headquarters US Marine Corps, 2 Navy Annex, Washington, D.C. 20380-1775, Telephone (703) 696-0865. For more detailed information regarding particular properties identified in this Notice (i.e., acreage, floor plans, condition, exact street address, etc.), contact Al Murphy, Base Realignment and Closure Office, COMCABWEST, Code 1AS, Headquarters Marine Corps Air Station, El Toro, PO BOX 95001, Santa Ana, CA 92709-5001, Telephone (714) 726-5305.

SUPPLEMENTARY INFORMATION: In 1991, Marine Corps Air Station Tustin was designated for closure under the authority of the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, as amended. Pursuant to this designation, on October 1, 1993, land and facilities at this installation were declared excess to the Department of Navy and available to other Department of Defense components and other Federal agencies. With the exception of the land and facilities excluded from this Notice, it is not anticipated that any other land or facilities will be made available to such components or other Federal agencies.

Notice of Surplus Property

Pursuant to paragraph (7)(B) of Section 2905 (b) of the Defense Base Closure and Realignment Act of 1990, as amended by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, the following information regarding the redevelopment authority for and surplus property at Marine Corps Air Station Tustin, CA, is published in the **Federal Register**.

Redevelopment Authority

The local redevelopment authority for Marine Corps Air Station Tustin, for

purposes of implementing the provisions of the Defense Base Closure and Realignment Act of 1990, as amended, is the City of Tustin. The Mayor of the City has established a committee to provide recommendations to the Tustin City Council concerning the redevelopment plan for the Air Station. This committee is known as the "Marine Corps Air Station Closure Task Force" and is chaired by a member of the Tustin City Council. A cross section of community interests is represented on the committee. Daily operations of the local redevelopment authority are managed by Christine Shingleton, Assistant City Manager, 300 Centennial Way, Tustin, CA 92680, Telephone (714) 573-3107 and Dana Ogdon, Senior Planner, Telephone (714) 573-3116.

Surplus Property Descriptions

The following is a list of the land and facilities at Marine Corps Air Station Tustin that are declared surplus to the needs of the Federal Government.

Land

Approximately 1594 acres of improved and unimproved fee simple land at Marine Corps Air Station Tustin, located within the cities of Tustin and Irvine (incorporated), Orange County, will be available. In general, all areas will be available when the installation closes in July, 1999. Of this total acreage, approximately 530 acres is undeveloped land, of which 360 acres are currently being utilized for agricultural activities.

Excluded from this determination of surplus is a parcel of property of approximately 15.9 acres that includes a United States Armed Services Reserve Center and its supporting facilities. This compound will be transferred to the Department of the Army for the use of the United States Army Reserve upon operational closure of the Marine Corps Air Station.

Buildings

The following is a summary of the buildings and other improvements located on the above-described land that will also be available when the installation closes. Two blimp hangars are listed on the National Register of Historic Places with some associated buildings, connecting roads, blimp mooring mats, etc., that are part of an eligible historic district. Property numbers are available on request.

- Administrative/office facilities (9 structures) Comments: Approx. 48,754 square feet.
- Airfield operations facility (1 structure) Comments: Approx. 6,085 square feet.

- Auditorium (1 structure) Comments: Approx. 5,700 square feet.
- Aviation maintenance facilities (28 structures) Comments: Approx. 646,743 square feet. Includes two blimp hangars, both listed on the National Register of Historic Places. Blimp hangars are approx. 300,000 square feet each.
- Bachelor quarters housing (12 structures) Comments: Approx. 390,921 square feet. Eleven structures are designed with units consisting of two living spaces with a shared bathroom. One contains large open bay rooms.
- Chapel (1 structure) Comments: Approx. 3,803 square feet.
- Child care facilities (2 structures) Comments: Approx. 18,973 square feet.
- Community support facilities (4 structures) Comments: Approx. 19,212 square feet.
- Bowling Alley (1 structure) Comments: Approx. 5,640 square feet.
- Fire protection (4 structures) Comments: Approx. 12,977 square feet.
- Hazardous materials storage facilities (16 structures) Comments: Approx. 7,043 square feet.
- Hazardous waste storage facilities (24 structures) Comments: Approx. 6,869 square feet.
- Housing units (1537 units) Comments: 2, 3, 4 bedroom townhouse, duplexes, and apartments.
- Instructional facilities (7 structures) Comments: Approx. 78,396 square feet. Classroom and general training type facility.
- Maintenance production facilities (19 structures) Comments: Approx. 77,234 square feet. Ground support equipment shops, auto/truck repair shops, paint booths, wash and grease racks.
- Medical/Dental facility (1 structure) Comments: Approx. 11,210 square feet.
- Mess and dining facilities (5 structures) Comments: Approx. 48,541 square feet. Club facilities, enlisted mess hall, cafeteria.
- Miscellaneous facilities (27 structures) Comments: Approx. 58,054 square feet. Includes filling station, pavilion, security gate houses, etc.
- Recreational facilities (17 structures) Comments: Tennis, basketball, volleyball, and racquetball courts. Football, baseball, and softball fields. Picnic grounds with ancillary facilities.
- Paved areas (airfield) Comments: Approx. 916,588 square yards. Includes runway, taxiway, van pads, access apron, washrack pavement.

- Paved areas (roads and other surface areas) Comments: Approx. 245,992 square yards consisting of roads and 2 bridges. Approx. 560,251 square yards consisting of other surface areas, i.e., sidewalks, parking lots, and airfield center mat.
- Utility facilities (46 structures) Comments: Measuring systems vary; Gas, telephone, electric, storm drainage, water, sewer, oil-water separators, fire alarm system, fire protection systems, compressed air distribution line, JP5 aviation fuel supply line located on and off base with associated property interests.
- Warehouse/storage facilities (32 structures) Comments: Approx. 171,640 square feet.

Redevelopment Planning

Pursuant to Section 2905(b)(7)(F) of the Defense Base Closure and Realignment Act of 1990, as amended, the local redevelopment authority has prepared a redevelopment plan that considered the interests of state and local governments, representatives of the homeless, and other interested parties located in the vicinity of Marine Corps Air Station Tustin, California, and has submitted that plan to the Secretary of Housing and Urban Development pursuant to Section 2905(b)(7)(G).

Dated: December 24, 1997.

Saundra K. Melancon,

Paralegal Specialist, Alternate Federal Register Liaison Officer.

[FR Doc. 97-34121 Filed 12-30-97; 8:45 am]

BILLING CODE 3810-FF-P

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Teleconference Meeting

AGENCY: National Assessment Governing Board; Education.

ACTION: Notice of Closed Teleconference meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting, by teleconference of the National Assessment Governing Board's Special Committee to Review the Voluntary National Tests Development Contract. This notice also describes the functions of the Board. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act.

DATES: January 9, 1998.

TIME: 10:30 a.m. to 12:00 noon (et).

LOCATION: National Assessment Governing Board, 800 North Capitol Street, NW, Suite 825, Washington, DC 20002-4233 Telephone: 202-357-6938.

FOR FURTHER INFORMATION CONTACT:

Mary Ann Wilmer, Operations Officer,
National Assessment Governing Board,
Suite 825, 800 North Capitol Street, NW,
Washington, DC, 20002-4233,
Telephone: (202) 357-6938.

SUPPLEMENTARY INFORMATION: The
National Assessment Governing Board
is established under section 412 of the
National Education Statistics Act of
1994 (Title IV of the Improving
America's Schools Act of 1994) (Public
Law 103-382).

The Board is established to formulate
policy guidelines for the National
Assessment of Educational Progress.
The Board is responsible for selecting
subject areas to be assessed, developing
assessment objectives, identifying
appropriate achievement goals for each
grade and subject tested, and
establishing standards and procedures
for interstate and national comparisons.
Under Public Law 105-78, the National
Assessment Governing Board is granted
exclusive authority over developing
Voluntary National Tests pursuant to
contract number RJ97153001 and is
required to review within 90 days (i.e.,
by February 11, 1998) and modify the
contract to the extent the Board
determines necessary; if the contract
cannot be modified to the extent the
Board determines necessary, the
contract shall be terminated, and a new
contract negotiated.

On January 9, 1998 the National
Assessment Governing Board's Special
Committee to Review the Voluntary
National Tests Development Contract
will hold a closed meeting by
teleconference. The purpose of the
meeting is for the NAGB Special
Committee to review the Test
Development Contract, to formulate its
recommendations to the NAGB for
modification or termination and
recompetition of the Development
Contract for the Voluntary National
Tests. This information relates to the
source selection criteria by which
government contracts may be modified
or awarded. Not only would the
disclosure of such data implicate
proscriptions set forth in the Federal
Acquisition Regulations, but also such
disclosure would significantly frustrate
a proposed agency action. Specifically,
disclosure of the Subcommittee's
discussion prematurely, including
contract specifications and government
cost estimates, could affect private
decisions made by the contractor which
might damage the financial interests of
the government as a whole, by, for
example, increasing the costs to the
government, and might make it
impossible for the two sides to reach

agreement. Such matters are protected
by exemption 9B of Section 552b(c) of
Title 5 U.S.C.

A summary of the activities of this
closed meeting and other related
matters, which are informative to the
public and consistent with the policy of
the Section 5 U.S.C. 552b, will be
available to the public within 14 days
after the meeting. Records are kept of all
Board proceedings and are available for
public inspection at the U.S.

Department of Education, National
Assessment Governing Board, Suite 825,
800 North Capitol Street, NW,
Washington, DC, from 8:30 a.m. to 5:00
p.m.

Roy Truby,

*Executive Director, National Assessment
Governing Board.*

[FR Doc. 97-34004 Filed 12-30-97; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF EDUCATION**National Assessment Governing Board
Meeting**

ACTION: Notice of public hearings.

SUMMARY: The National Assessment
Governing Board (NAGB), US
Department of Education, is announcing
two public hearings on the Voluntary
National Tests (VNT). These hearings
are being conducted pursuant to Public
Law 105-78, which gives NAGB
"exclusive authority over all policies,
direction, and guidelines for developing
voluntary national tests."

Public and private parties and
organizations with an interest in the
Voluntary National Tests for 4th grade
reading and 8th grade mathematics are
invited to present written and oral
testimony. The purpose of the hearings
is to gather recommendations on the test
specifications or blueprint for the
proposed VNT based on the National
Assessment of Educational Progress
(NAEP) in 4th grade reading and 8th
grade mathematics. The proposed tests
will be individualized versions of
NAEP, and the Board intends to ensure
that they are fully consistent with
NAEP's content and performance
standards. In carrying out its
responsibilities, the Board plans to
consult widely and wishes to receive a
broad range of input and views. We
encourage your participation. Results of
the hearings are particularly important
as they will provide broad public input
to the Governing Board for on
specifications for the Voluntary
National Tests.

DATES: The dates of the public hearings
have been set as follows:

- January 21, 1998 in Washington,
DC.

- January 27, 1998 in Chicago, IL.
On each day, the reading hearing will
begin at 9:30 a.m. and adjourn at 12:00
noon, and the mathematics hearing will
begin at 1:30 p.m. and adjourn at 4:00
p.m. You are invited to present either
oral and/or written testimony. Oral
presentations should not exceed five
minutes. Written testimony should be
mailed to the address below no later
than January 31, 1998: Aspen Systems
Corporation, 2277 Research Boulevard,
Mail Stop 4-D, Rockville, Maryland
20850, Attn: Munira Mwalimu.

Please include your name, address,
and any organization you may
represent. All testimony will become
part of the public record and will be
considered by the Governing Board in
deciding on specifications for the
proposed national tests, which will be
designed to show whether individual
students can meet NAEP standards for
basic, proficient, or advanced
performance. Presenters may also
register online at www.nagb.org or by
calling (800) 638-2785 between 9 a.m.
and 5 p.m. EST.

Locations:

January 21

The Capital Hilton, 16th and K Streets
NW, Washington, DC 2036, (202) 393-
1000.

January 27

Chicago Hilton and Towers, 720 S.
Michigan Avenue, Chicago, IL 60605,
(312) 922-4400.

Written Statements

Written statements may be submitted
for the public record in lieu of oral
testimony no later than January 31,
1998. These statements should be sent
directly to Aspen Systems (see
aforementioned address) in the
following format:

I. Issues and Questions Addressed:
Identify the issue(s) and question(s) to
which the testimony is directed. For
example, "Specifications for 4th grade
Voluntary National Test in reading."

II. Summary: Briefly summarize the
major points and recommendations
presented in the testimony.

III. Discussion: The narrative should
provide information, points of view and
recommendations that will enable the
Governing Board to consider all factors
relevant to the question(s) the testimony
addresses. Respondents are encouraged
to limit this section of their written
statements to ten (10) pages. The
discussions may be appended with
documents of any length providing
further explanation.

Hearings Objectives and Procedures

The National Assessment Governing Board seeks participation in the hearings from a wide spectrum of individuals and organizations to receive recommendations regarding the reading and mathematics specifications for the Voluntary National Tests at grade 4 in reading and grade 8 in mathematics. The schedule of speakers shall be such as to provide a broad spectrum of viewpoints and interests, while being contained to a practical amount of time. The goal of the hearings is to provide a medium for maximum input and guidance from the public to include teachers, principals, school board members, curriculum specialists, local school administrators, parents, and concerned citizens.

The Governing Board will provide a brief background to the hearings, with the majority of the time being devoted to presentations by scheduled speakers. To assist in appropriately scheduling speakers, testimony should include the following information:

- (1) Name, address, and telephone number of each person to appear.
- (2) Affiliation (if any).
- (3) A brief statement of the issues and/or concerns that will be addressed.
- (4) Whether a written statement will be submitted for the record.

Individuals who do not register in advance will be permitted to register and speak at the meeting in order of registration, if time permits. Speakers should plan to limit their total remarks to no more than five (5) minutes.

While it is anticipated that all persons desiring to do so will have an opportunity to speak, time limits may not allow this to occur. The Governing Board will make the final determination on the selection and scheduling of speakers.

However, all written statements presented at the hearings will be accepted and incorporated into the public record. Written statements received after January 31, 1998 will be accepted; however, inclusion in the public record cannot be guaranteed. Governing Board members will preside at each of the hearings. The proceedings will be audiotaped. On request, the hearings will be signed for the hearing-impaired, and a bilingual speaker (Spanish-English) can be made available on site.

Additional Information

Additional information on the Voluntary National Tests can be obtained at by contacting Mary Crovo, National Assessment Governing Board, 800 North Capitol Street, NW, Suite 825,

Washington, DC 20002-4233, Telephone: 202-357-6938 or NAGB's web site at www.nagb.org.

Steps After Hearing

The Governing Board will review and analyze all comments and opinions received in response to this announcement. Results of the testimony will be used by the National Assessment Governing Board to determine the specifications for the Voluntary National Tests in reading and mathematics. The Board plans to take action on the specifications in March 1998. A record of all the proceedings will be kept at the National Assessment Governing Board offices, 800 North Capitol Street NW, Suite 825, Washington, DC 20002, and will be available for public inspection.

Roy Truby,

Executive Director, National Assessment Governing Board.

[FR Doc. 97-34005 Filed 12-30-97; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: National Assessment Governing Board; Education.

ACTION: Notice of Teleconference meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming teleconference meeting of Subject Area Committees 1 and Subject Area Committee #2 of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act.

DATES: January 8, and 9, 1998.

TIME: January 8, Subject Area Committee #1, 10:00 a.m. to 12:00 noon, (open); January 9, Subject Area Committee #2, 1:00 to 3:00 p.m., (open).

LOCATION: National Assessment Governing Board, Suite 825, 800 North Capitol Street, NW, Washington, D.C., 20002-4233, Telephone: (202) 357-6938.

FOR FURTHER INFORMATION CONTACT: Mary Ann Wilmer, Operations Officer, National Assessment Governing Board, Suite 825, 800 North Capitol Street, N.W., Washington, D.C., 20002-4233, Telephone: (202) 357-6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 412 of the National Education Statistics Act of

1994 (Title IV of the Improving America's Schools Act of 1994), (Pub. L. 103-382).

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress. The Board is responsible for selecting subject areas to be assessed, developing assessment objectives, identifying appropriate achievement goals for each grade and subject tested, and establishing standards and procedures for interstate and national comparisons. Under P.L. 105-78, the National Assessment Governing Board is granted exclusive authority over developing Voluntary National Tests pursuant to contract number RJ97153001 and is required to review within 90 days (i.e., by February 11, 1998) and modify the contract to the extent the Board determines necessary, if the contract cannot be modified to the extend the Board determines necessary, the contract shall be terminated, and a new contract negotiated.

On January 8 between the hours of 10:00 a.m. until 12:00 noon, the Subject Area Committee #1 of the National Assessment Governing Board will hold a teleconference meeting to discuss Committee and staff Voluntary National Tests reviews for reading. On January 9 between the hours of 1:00 to 3:30 p.m. Subject Area Committee #2 will meet to discuss Committee and staff reviews of the Voluntary National Tests for math. Because these are teleconference meetings, facilities will be provided so the public will have access to the Committee's deliberations.

Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite 825, 800 North Capitol Street, N.W., Washington, D.C., from 8:30 a.m. to 5:00 p.m.

Roy Truby,

Executive Director, National Assessment Governing Board.

[FR Doc. 97-34006 Filed 12-30-97; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Office of General Counsel; Preparation of Report to Congress on Price-Anderson Act

AGENCY: Office of General Counsel, DOE.

ACTION: Notice of inquiry concerning preparation of report to Congress on the Price-Anderson Act.

SUMMARY: The Department of Energy (the "Department" or "DOE") is

requesting public comments concerning the continuation or modification of the provisions of the Price-Anderson Act (the "Act"). These comments will assist the Department in the preparation of a report on the Act to be submitted to Congress by August 1, 1998 as required by the Atomic Energy Act (AEA).

DATES: Public comments must be received by January 30, 1998. Reply comments must be received by February 13, 1998.

ADDRESSES: Send 5 written copies of public comments or reply comments to: U.S. Department of Energy, Office of General Counsel, GC-52, 1000 Independence Ave. SW., Washington, DC 20585. If possible, a copy should also be e-mailed to PAA.notice@hq.doe.gov. This Notice, the comments submitted to DOE, and other relevant information will be available on the internet at "www.gc.doe.gov". The comments also may be examined between 9 a.m. and 4 p.m. at the U.S. Department of Energy, Freedom of Information Reading Room, Room 1E-190, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-6020.

FOR FURTHER INFORMATION CONTACT: Ben McRae or Jeanette Helfrich, U.S. Department of Energy, Office of General Counsel, GC-52, 1000 Independence Ave. SW., Washington, DC 20585, (202) 586-6975.

SUPPLEMENTARY INFORMATION:

I. Background

Section 170p.¹ of the AEA requires DOE² to submit to the Congress by August 1, 1998 a report on the need to continue or modify provisions of the Act (section 170 of the AEA). DOE believes it is important to provide an early opportunity for public

¹ Section 170p. of the AEA requires that the Secretary of Energy and the NRC "submit to the Congress by August 1, 1998, detailed reports concerning the need for continuation or modification of the provisions of [the Act], taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors and shall include recommendations as to the repeal or modification of any of the provisions of [the Act]."

² References to DOE also include its predecessor organizations, Energy Research and Development Administration (ERDA) and the Atomic Energy Commission (AEC). The AEC was established in 1946 by the AEA. In 1974, the AEC was abolished and all its functions were transferred to the Nuclear Regulatory Commission (NRC) and ERDA by the Energy Reorganization Act of 1974, Pub. L. No. 93-438. In 1977, ERDA was abolished and its functions transferred to DOE by the DOE Organization Act, Pub. L. No. 95-91. It should be noted that section 11f. of the AEA defines "Commission" as the AEC. Accordingly, references in the AEA to the Commission should be read as DOE or NRC or both DOE and NRC depending on the statutory context.

participation in the development of this report in a manner consistent with its public participation policy set forth in DOE P 1210.1.³ Thus, DOE is issuing this Notice of Inquiry to seek views from members of the public to assist DOE in development of its recommendations as to whether provisions of the Act should be continued, modified, or eliminated. In order to assist in the preparation of comments, the Department is including in this Notice: (1) A summary of the Act and (2) a list of questions concerning potential issues that might be addressed in the report to Congress. In order to promote public participation, the Department has established a website at which the public comments will be available. To promote a dialogue, additional comments may be filed to reply (reply comments) to the positions set forth in the original comments. These reply comments also will be available at the website.

II. Summary of the Act

A. Introduction

The Act was enacted in 1957 as an amendment to the AEA to establish a system of financial protection for persons who may be liable for and persons who may be injured by a nuclear incident.⁴ In the case of most DOE activities, the system of financial protection currently takes the form of an indemnification by DOE ("DOE Price-Anderson indemnification") for legal liability for a nuclear incident or a precautionary evacuation⁵ arising from activity under a DOE contract. The DOE Price-Anderson indemnification: (1) Provides omnibus coverage of all persons who might be legally liable; ⁶ (2) indemnifies fully all legal liability up to the statutory limit on such liability (approximately \$8.96 billion for a

³ DOE P 1210.1 provides: "Public participation provides a means for the Department to gather the most diverse collection of opinions, perspectives, and values from the broadest spectrum of the public, enabling the Department to make better, more informed decisions. Public participation benefits stakeholders by creating an opportunity to provide input and influence decisions * * *. Stakeholders are defined as those individuals and groups in the public and private sectors who are interested in and/or affected by the Department's activities and decisions." This includes contractors, subcontractors, suppliers, workers, and neighbors.

⁴ The original two-fold purpose of the Act was: (1) To encourage growth and development of the nuclear industry through the increased participation of private industry; and (2) to protect the public by assuring that funds were available to compensate for damages and injuries sustained in the event of a nuclear incident. S. Rep. No. 296, 85th Cong., 1st Sess. (1957), U.S. Code Cong. & Ad. News 1816.

⁵ The 1988 amendments extended coverage of the DOE Price-Anderson indemnification to precautionary evacuations. See *infra* Part II.D.

⁶ See *infra* Part II.B.

nuclear incident in the U.S.);⁷ (3) covers all DOE contractual activity that might result in a nuclear incident in the U.S.;⁸ (4) is not subject to the availability of funds;⁹ and (5) is mandatory¹⁰ and exclusive.¹¹

The Price-Anderson system has been extended and amended approximately every ten years. The most recent amendment occurred in 1988 with the enactment of the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, ("1988 Amendments"), which extended the authority to grant the DOE Price-Anderson indemnification until August 1, 2002.¹²

B. Who Is Entitled to Indemnification?

Originally, the availability of the DOE Price-Anderson indemnification with respect to individual contractors was subject to agency discretion.¹³ The 1988

⁷ See *infra* Parts II.C, II.E.

⁸ See *infra* Part II.D.

⁹ The Anti-Deficiency Act, 31 U.S.C. 1341 *et seq.*, prohibits federal agencies from incurring obligations or expenditures in advance of, or in excess of, appropriations. Section 170j. of the AEA waives the provisions of the Anti-Deficiency Act with respect to indemnity agreements entered into under the Act and thus, in advance of appropriations, permits an obligation to be incurred to provide whatever funds are needed to satisfy a DOE Price-Anderson indemnification.

¹⁰ See *infra* Part II.B.

¹¹ Section 170d.(1)(B)(I)(i) makes the DOE Price-Anderson indemnification "the exclusive means of indemnification for public liability arising from [DOE] activities" undertaken pursuant to a contract to which the DOE Price-Anderson indemnification is applicable. In the absence of this section, several other indemnification mechanisms might be available to cover liability for nuclear incidents resulting from activity under a DOE contract. For example, both Pub. L. No. 85-804 and section 162 of the AEA provide for the waiver of certain statutory provisions (such as the Anti-Deficiency Act) relating to contracts under certain conditions. Certain DOE activities would qualify for the use of these provisions to provide DOE contractors with an indemnification similar to the DOE Price-Anderson indemnification. Indemnification under either Pub. L. No. 85-804 or section 162 is not the same, however, as the DOE Price-Anderson indemnification because, among other things, the Act provides for public protection features as well as indemnification. Another indemnification mechanism is the general contract authority indemnity, described at 48 CFR Subpart 950.71, which DOE may provide in certain limited circumstances to protect a DOE contractor against liability for uninsured losses. The general contract authority indemnity is "expressly subject to the availability of funds." 48 CFR section 950.7101(a).

¹² For a general description of the NRC's Price-Anderson system, see The Price-Anderson System, Office of Nuclear Reactor Regulation, NRC, NUREG/BR-0079, Revision 1. See also 10 CFR section 140.11, 58 FR 42852 (Aug. 12, 1993) (latest inflation adjustment by NRC pursuant to section 170t. that changed the per reactor contribution to the retrospective pool from \$63,000,000 to \$75,500,000).

¹³ Prior to the enactment of the 1988 Amendments, section 170d. of the AEA provided that DOE "may * * * enter into agreements of indemnification * * * with its contractors * * *

Amendments modified the Price-Anderson system to make the DOE Price-Anderson indemnification mandatory. The 1988 Amendments require DOE to enter into agreements to indemnify its contractors and other persons to the extent the contractor or other person is legally liable for damage resulting from a nuclear incident or precautionary evacuation arising out of or in connection with contractual activities.¹⁴

In addition to the contractor that is party to the indemnification agreement, indemnity coverage is available to all "persons indemnified" under the Act. The term "person" is broadly defined to include every possible individual or entity, except the Nuclear Regulatory Commission or DOE.¹⁵ The term "person indemnified" is defined as the person with whom an indemnity agreement is executed, e.g., a DOE contractor, "and any other person who may be liable for public liability" for a nuclear incident.¹⁶ This provision extends the protection of the DOE Price-Anderson indemnification to any person, including those persons who have no legal relationship to DOE or the indemnified contractor, who may be liable for a nuclear incident within the United States arising under a DOE

under contracts * * * involving activities under the risk of public liability for a substantial nuclear incident." DOE used this discretionary authority to include the DOE Price-Anderson indemnification in contracts for which it made a finding that an activity under the contract involved the risk of a substantial nuclear incident. Thus, prior to the enactment of the 1988 Amendments, the extension of the DOE Price-Anderson indemnification was a matter of contract negotiation and required an explicit provision in the contract between DOE and a contractor.

¹⁴ Section 170d.(1)(A) provides that the Secretary of Energy "shall * * * enter into agreements of indemnification under this subsection with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability * * *." Consistent with this statutory mandate, DOE includes the DOE Price-Anderson indemnification in all contracts that involve any risk of public liability, even though such a contractual provision is no longer a condition precedent to indemnification by DOE of its contractors and any other person indemnified with respect to legal liability for a nuclear incident resulting from activity pursuant to a DOE contract. 56 FR 57824, 57825 (Nov. 14, 1991) (final rule amending DOE Acquisition Regulations (DEAR) relating to the DOE Price-Anderson indemnification codified at 48 CFR Parts 950, 952 and 970). See also *infra* n.19 on treatment of DOE contractors covered by NRC Price-Anderson system.

¹⁵ Section 11s. defines "person" as "(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than [DOE or NRC], any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing."

¹⁶ Section 11t.

contract.¹⁷ Thus, a subcontractor, a supplier, a shipper, or other third party is covered even if it is not party to the indemnity agreement between DOE and the contractor.¹⁸

DOE is not authorized to indemnify activities undertaken pursuant to a NRC license that extends NRC Price-Anderson coverage to such activities.¹⁹ Thus, if a nuclear incident resulted from an activity undertaken pursuant to a NRC license and the NRC license provided for Price-Anderson coverage, the NRC license would govern legal liability resulting from the incident, including the limit on the aggregate amount of liability and the source of funds to compensate the liability. If, however, the NRC decided not to provide for Price-Anderson coverage in the license, the DOE Price-Anderson indemnification would apply to the incident.

C. What Liabilities Are Covered by the Indemnification?

Section 170d. of the AEA requires DOE to indemnify the contractor, and any other person who may be liable, for "public liability * * * arising out of or in connection with the contractual activities." The intended scope of this coverage can be derived from the statutory definitions of public liability and other related terms.

Public liability is defined as "any legal liability arising out of or resulting from a nuclear incident or precautionary

¹⁷ With respect to a nuclear incident outside the United States arising under a DOE contract, section 11t. requires a legal relationship by restricting "person indemnified" to the contractor and "any other person who may be liable * * * by reason of his activities under any contract * * * or any project to which indemnification * * * has been extended or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project."

¹⁸ The coverage was intentionally broad and extended to any person who may be liable for public liability. S. Rep. No. 1677, 87th Cong., 2d Sess. (1962), U.S. Code Cong. & Ad. News 2207, 2215-16. In the hearings on the original Act, "the question of protecting the public was raised where some unusual incident, such as negligence in maintaining an airplane motor, should cause an airplane to crash into a reactor and thereby cause damage to the public. Under this bill, the public is protected and the airplane company can also take advantage of the indemnification and other proceedings." S. Rep. No. 296, 85th Cong., 1st Sess. (1957), U.S. Code Cong. & Ad. News 1803, 1818.

¹⁹ Section 170d.(1)(A) provides that DOE shall not provide the DOE Price-Anderson indemnification for activities "subject to the financial protection requirements under subsection b. or agreements of indemnification under subsection c. or k." Section 170a. requires the NRC to include Price-Anderson coverage in all licenses for reactors, regardless of size. Section 170a. grants NRC discretionary authority to include Price-Anderson coverage in non-reactor licenses. NRC has not exercised this discretionary authority with respect to any NRC-licensed facility currently in operation.

evacuation * * *"²⁰ Legal liability is not defined in the Act, but the legislative history indicates clearly that state tort law determines what legal liabilities are covered.²¹ The 1988 amendments confirmed the substantive role of state tort law.²²

In a limited number of situations, the Act provides that certain provisions of state law may be superseded by uniform rules prescribed by the Act such as the limitation on the awarding of punitive damages.²³ In addition, with respect to an extraordinary nuclear occurrence, the Act provides for the waiver of certain defenses. Such waivers would result, in effect, in strict liability,²⁴ the elimination of charitable and governmental immunities,²⁵ and the substitution of a three-year discovery rule in place of statutes of limitations that would normally bar all suits after a specified number of years.²⁶ Moreover,

²⁰ Section 11w. defines "public liability" as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation, (including all reasonable additional costs incurred by a State or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i) Claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; (iii) * * * claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs * * *."

²¹ S. Rep. No. 1605, 89th Cong., 2d Sess. (1966), U.S. Code Cong. & Ad. News 3201, 3206.

²² The 1988 amendments added section 11hh. which defines "public liability action" as "any suit asserting public liability." The definition contains an explicit statement that "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [] section [170]." The legislative history indicates that the purpose of this language was to reemphasize that the substantive law of the state in which a nuclear incident occurs would apply unless inconsistent with the provisions of the Act. H.R. Rep. No. 104, 100th Cong., 1st Sess. Part I at 29 (1987).

²³ Section 170s. prohibits a court from awarding "punitive damages * * * against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification * * *." See also section 170q. (limitation on the awarding of precautionary evacuation costs as defined in section 11gg.) and section 170r. (limitation on liability of lessors).

²⁴ Section 170n.(1) waives "(i) Any issue or defense as to the conduct of the claimant or fault of the persons indemnified."

²⁵ Section 170n.(1) waives "(ii) any issue or defense as to charitable or governmental immunity." See also section 170d.(1)(B)(I)(II) that permits DOE to require a similar waiver with respect to "any nuclear incident arising out of nuclear waste activities subject to" a DOE contract.

²⁶ Section 170n.(1) waives "(iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof."

the Act provides that the U.S. District Court for the district in which a nuclear incident occurs shall have original jurisdiction "with respect to any [suit asserting] public liability * * * without regard to the citizenship of any party or the amount in controversy"²⁷ and provides for special procedures to expedite the legal proceedings and the distribution of compensation.²⁸

D. What is a nuclear Incident?

"Nuclear incident" is defined in section 11q. of the Act, in pertinent part, as "any occurrence, * * * within the United States²⁹ causing, within or outside the United States, [damage or injury] arising out of or resulting from the * * * hazardous properties of source,³⁰ special nuclear,³¹ or byproduct material³² * * * ." (footnotes added). Congress intended to give a broad rather than restrictive meaning to the words and designed the definition of nuclear incident to protect the public against any form of damage arising from the special dangerous properties of the materials used in the atomic energy program.³³ Furthermore, a contractor is fully indemnified for public liability even if the public liability was caused

²⁷ Section 170n.(2).

²⁸ Sections 170n.(3) and 170o.

²⁹ Section 11bb. defines the United States "when used in a geographical sense [to] include[] all Territories and possessions of the United States, the Canal Zone and Puerto Rico." Territories include the United States territorial sea, which Presidential Proclamation No. 5928 (Dec. 27, 1988, 54 FR 777) defines as the maritime area that extends twelve miles offshore. Prior to the issuance of this Proclamation, the United States territorial sea was defined as the maritime area that extended three miles offshore. Territories do not include the United States exclusive economic zone ("EEZ"), which is the maritime area between twelve miles offshore and two hundred miles offshore.

³⁰ Section 11z. defines "source material" as "(1) uranium, thorium, or any other material which is determined * * * to be source material; or (2) ores containing one or more of the foregoing materials, * * *."

³¹ Section 11aa. defines "special nuclear material" as (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material * * * determine[d] to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material."

³² Section 11e. defines "byproduct material" as "(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." For purposes of this Notice, source material, special nuclear material and byproduct material are referred to collectively as "nuclear material."

³³ S. Rep. No. 296, 85th Cong., 1st Sess. (1957), U.S. Code Cong. & Ad. News 1803, 1817.

by acts of gross negligence or willful misconduct.³⁴

Nuclear incident is defined also to include the following occurrences outside the United States: (1) Activities pursuant to a DOE contract that involves nuclear material "owned by, and used by or under contract with, the United States,"³⁵ or (2) an NRC-licensed reactor located on an offshore stationary platform,³⁶ or (3) a shipment of nuclear material from one NRC licensee to another NRC licensee.³⁷

The 1988 amendments added indemnity for a precautionary evacuation resulting from an event that is not a nuclear incident but poses an imminent danger of injury or damage from radiological properties of nuclear material, or high-level radioactive waste or spent nuclear fuel, or transuranic waste, and is initiated by an authorized State or local official to protect the public health and safety.³⁸

E. What Is the Amount of Indemnification and Compensation Provided?

Section 170d.(2) provides that agreements of indemnification shall require the Secretary to "indemnify the persons indemnified against [public liability] * * * to the full extent of the aggregate public liability of the persons indemnified for each nuclear incident, including such legal costs of the contractor as are approved by its Secretary." Section 170e. establishes specific limits on the aggregate amount of public liability for any one nuclear

³⁴ S. Rep. No. 296, 85th Cong., 1st Sess. (1957), U.S. Code Cong. & Ad. News 1803, 1819. The Senate Report indicates that Congress rejected the suggestion that willful damage be excluded because "the damage to the public is the same, whether caused by any means—willful or nonwillful."

³⁵ Section 11q. provides that "when used in section 170d., [nuclear incident] shall include any occurrence outside the United States if such occurrence involves [nuclear] material owned by, and used by or under contract with, the United States." See also section 170d.(5) that limits the DOE Price-Anderson indemnification for such occurrences to \$100,000,000 and section 170e. that limits the aggregate "public liability" for such occurrences to a corresponding amount.

³⁶ Section 11q. provides that "when used in section 170c., [nuclear incident] shall include any such occurrence outside both the United States and any other nation if such occurrence * * * [involves nuclear] material licensed pursuant to chapters 6, 7, 8, and 10 of this Act, which is used in connection with the operation of a licensed stationary production or utilization facility * * *."

³⁷ Section 11q. provides that "when used in section 170c., [nuclear incident] shall include any such occurrence outside both the United States and any other nation if such occurrence * * * [involves nuclear] material licensed pursuant to chapters 6, 7, 8, and 10 of this Act, * * * which moves outside the territorial limits of the United States in transit from one person licensed by the [NRC] to another person licensed by the [NRC]."

³⁸ Sections 11g. and 170d.(1).

incident. For a nuclear incident resulting from DOE contractual activity within the United States, public liability is limited by a formula that results in a current limit of approximately \$8.96 billion.³⁹ This limitation on aggregate public liability has the effect of limiting the amount of legal liability for damage that courts in the United States can assess under applicable state tort law.

Section 170e.(2) provides that Congress will "take whatever action is deemed necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims" if damage from a nuclear incident exceeds the statutory limit on aggregate public liability. Moreover, section 170i. requires the President to submit a compensation plan to Congress that "provide[s] for full and prompt compensation for all valid claims" no later than 90 days after the determination by a court that the liability limit may be exceeded.

F. To what extent are indemnified contractors, subcontractors and suppliers accountable for their actions?

The 1988 Amendments added a new section 234A to the AEA that establishes a system of civil penalties for violation of DOE nuclear safety requirements by contractors, subcontractors, and suppliers covered by the DOE Price-Anderson indemnification.⁴⁰ The

³⁹ Section 170e. establishes the limitations on aggregate public liability for various types of nuclear incidents. Specifically, section 170e.(1)(B) establishes the limit for a nuclear incident resulting from DOE contractual activities within the United States on the basis of the formula set forth in section 170b. for calculating the financial protection required for commercial power plants with a rated capacity of 100,000 electrical kilowatts or more. In general, the section 170b. formula is a combination of the maximum amount of private insurance available (currently approximately \$200 million) plus a retrospective premium pool that would result from contributions after a nuclear incident of up to \$75,500,000 for each licensed commercial power plant, but not more than \$10,000,000 in any one year. See also section 170d.(3)(A) and (B) under which the DOE Price-Anderson indemnification "shall at all times remain equal to or greater than the maximum amount of financial protection required of" commercial powerplants and "shall not, at any time, be reduced in the event that the maximum amount of financial protection required of [commercial powerplants] is reduced." Section 170e.(4) establishes \$100,000,000 as the limit for a nuclear incident resulting from DOE contractual activities outside the United States.

⁴⁰ Section 234A provides that any contractor, subcontractor or supplier covered by the DOE Price-Anderson indemnification "who violates * * * any applicable rule, regulation or order related to nuclear safety * * * shall be subject to a civil penalty of not to exceed \$100,000 for each such violation [and] * * * each day of such violation shall constitute a separate violation * * * ." The \$100,000 amount has been adjusted for inflation as

section 234A civil penalties were intended to improve the accountability of indemnified contractors, subcontractors and suppliers for nuclear safety during the conduct of DOE activities without affecting the operation of the Price-Anderson system. Thus, the actual or potential imposition of a section 234A civil penalty does not affect the coverage by the DOE Price-Anderson indemnification of a contractor or any other person indemnified.

The procedural rules for implementing the section 234A civil penalties are set forth in 10 CFR part 820.⁴¹ Pursuant to mandatory language in section 234A.d., these procedural rules exempt specific non-profit DOE contractors operating specific DOE facilities from the imposition of civil penalties.⁴² In addition, pursuant to discretionary authority granted by section 234A.b.(2), DOE promulgated procedural rules to provide for the automatic remission of civil penalties imposed on other nonprofit educational institutions.⁴³

As a matter of policy, DOE has decided to impose the section 234A civil penalties only with respect to a DOE Nuclear Safety Requirement set forth in the Code of Federal Regulations, a Compliance Order, or any program, plan, or other provision required to implement such Requirement or Compliance Order.⁴⁴ DOE has set forth nuclear safety requirements in 10 CFR part 830 (Nuclear Safety Management),⁴⁵ and 10 CFR part 835 (Occupational Radiation Protection).⁴⁶

required by subsequent legislation and now is \$110,000. 10 CFR section 820.80, 62 FR 46181 (Sept. 2, 1997).

⁴¹ 10 CFR part 820, Procedural Rules for DOE Nuclear Activities, Notice of inquiry and request for public comments, 54 FR 38865 (Sept. 21, 1989); Notice of proposed rulemaking, 56 FR 64290 (Dec. 9, 1991); Clarification, 57 FR 20796 (May 15, 1992); Final rule, 58 FR 43680 (Aug. 17, 1993); Interim rule and amendment of Appendix A—General Statement of Enforcement Policy, 62 FR 52479 (Oct. 8, 1997). See also Ruling 1995-1, 61 FR 4209 (Feb. 5, 1996) (interpreting scope of 10 CFR parts 830 and 835).

⁴² 10 CFR section 820.20(c).

⁴³ 10 CFR section 820.20(d).

⁴⁴ 10 CFR section 820.20(b); see 10 CFR section 820.2 which defines "DOE Nuclear Safety Requirements" and, for purposes of the assessment of civil penalties, limits the definition to those requirements identified in 820.20(b).

⁴⁵ 10 CFR part 830, Notice of proposed rulemaking, 56 FR 64316 (Dec. 9, 1991); Final rule issued only for Quality Assurance and definitions, 59 FR 15843 (April 5, 1994); Notice of limited reopening of the comment period and availability of draft final rules, 60 FR 45381 (Aug. 31, 1995); corrected 60 FR 47498 (Sept. 13, 1995).

⁴⁶ 10 CFR part 835, Notice of proposed rulemaking, 56 FR 64334 (Dec. 9, 1991); Final rule, 58 FR 65458 (Dec. 14, 1993); Notice of proposed rulemaking to amend, 61 FR 67600 (Dec. 23, 1996).

The 1988 amendments also added section 223c which provides specific criminal penalty provisions for knowing and willful violations by individual officers and employees of contractors, subcontractors and suppliers covered by the DOE Price-Anderson indemnification without exceptions for nonprofit entities.

III. List of Questions

The following list of questions represents a preliminary attempt to identify potential issues that might arise in responding to the section 170p. mandate that DOE report "concerning the need for continuation or modification of the provisions of [the Act] taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors." The list of questions does not represent a determination of the actual topics to be addressed in the Report. The list has been included in this Notice solely to assist in the formulation of comments and is not intended to restrict the issues that might be addressed in the comments or in DOE's report.

Comments should identify the specific provision of the Act to which a position is expressed, and the policy and legal rationale for the position. Comments should identify whether a position applies to all DOE activities⁴⁷ or only to certain specified activities. If a position only applies to certain DOE activities, be specific, to the extent possible, as to the activities to which the position applies and the reasons for treating the identified DOE activities differently.

1. Should the DOE Price-Anderson indemnification be continued without modification?

2. Should the DOE Price-Anderson indemnification be eliminated or made discretionary with respect to all or specific DOE activities? If discretionary, what procedures and criteria should be used to determine which activities or

In addition, DOE has proposed 10 CFR part 834 (Radiological Protection of the Public and the Environment), Notice of proposed rulemaking, 58 FR 16268 (March 25, 1993); Notice of limited reopening of the comment period and availability of draft final rule, 60 FR 45381 (Aug. 31, 1995); corrected 60 FR 47498 (Sept. 13, 1995); Notice of limited reopening of the comment period, 61 FR 6799 (Feb. 22, 1996) (terrestrial biota).

⁴⁷ DOE performs a wide variety of activities, including but not limited to, operation of reactors, production and provision of reactor fuel, enrichment activities, weapons-related activities, defense research, non-defense research, operation of accelerators, management of low and high level radioactive waste, management of spent fuel, environmental remediation, transportation, non-proliferation and nuclear risk reduction activities.

categories of activities should receive indemnification?

3. Should there be different treatment for "privatized arrangements" (that is, contractual arrangements that are closer to contracts in the private sector than the traditional "management and operating" contract utilized by DOE and its predecessors since the Manhattan Project in the 1940's)? Privatized arrangements can include but are not limited to fixed-priced contracts, contracts where activity is conducted at the contractor's facility located off a DOE site, contracts where activity is conducted at the contractor's facility located on a DOE site, or contracts where a contractor performs the same activity for DOE as it does for commercial entities and on the same terms.

4. Should there be any change in the current system under which DOE activities conducted pursuant to an NRC license are covered by the DOE Price-Anderson indemnification, except in situations where the NRC extends Price-Anderson coverage under the NRC system? For example, (1) should the DOE Price-Anderson indemnification always apply to DOE activities conducted pursuant to an NRC license or (2) should the DOE Price-Anderson indemnification never apply to such activities, even if NRC decides not to extend Price-Anderson coverage under the NRC system?

5. Should the DOE Price-Anderson indemnification continue to provide omnibus coverage, or should it be restricted to DOE contractors or to DOE contractors, subcontractors, and suppliers? Should there be a distinction in coverage based on whether an entity is for-profit or not-for-profit?

6. If the DOE indemnification were not available for all or specified DOE activities, are there acceptable alternatives? Possible alternatives might include Pub. L. No. 85-804, section 162 of the AEA, general contract indemnity, no indemnity, or private insurance. To the extent possible in discussing alternatives, compare each alternative to the DOE Price-Anderson indemnification, including operation, cost, coverage, risk, and protection of potential claimants.

7. To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of DOE to perform its various missions? Explain your reasons for believing that performance of all or specific activities would or would not be affected?

8. To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the willingness of existing or potential contractors to

perform activities for DOE? Explain your reasons for believing that willingness to undertake all or specific activities would or would not be affected?

9. To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of DOE contractors to obtain goods and services from subcontractors and suppliers?

Explain your reasons for believing that the availability of goods and services for all or specific DOE activities would or would not be affected?

10. To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of claimants to receive compensation for nuclear damage resulting from a DOE activity? Explain your reasons for believing the ability of claimants to be compensated for nuclear damage resulting from all or specific DOE activities would or would not be affected?

11. What is the existing and the potential availability of private insurance to cover liability for nuclear damage resulting from DOE activities? What would be the cost and the coverage of such insurance? To what extent, if any, would the availability, cost and coverage be dependent on the type of activity involved? To what extent, if any, would the availability, cost and coverage be dependent on whether the activity was a new activity or an existing activity? If DOE Price-Anderson indemnification were not available, should DOE require contractors to obtain private insurance?

12. Should the amount of the DOE Price-Anderson indemnification for all or specified DOE activities inside the United States (currently approximately \$8.96 billion) remain the same or be increased or decreased?

13. Should the amount of the DOE Price-Anderson indemnification for nuclear incidents outside the United States (currently \$100 million) remain the same or be increased or decreased?

14. Should the limit on aggregate public liability be eliminated? If so, how should the resulting unlimited liability be funded? Does the rationale for the limit on aggregate public liability differ depending on whether the nuclear incident results from a DOE activity or from an activity of a NRC licensee?

15. Should the DOE Price-Anderson indemnification continue to cover DOE contractors and other persons when a nuclear incident results from their gross negligence or willful misconduct? If not, what would be the effects, if any, on: (1) The operation of the Price-Anderson system with respect to the nuclear incident, (2) other persons indemnified,

(3) potential claimants, and (4) the cost of the nuclear incident to DOE? To what extent is it possible to minimize any detrimental effects on persons other than the person whose gross negligence or willful misconduct resulted in a nuclear incident? For example, what would be the effect if the United States government were given the right to seek reimbursement for the amount of the indemnification paid from a DOE contractor or other person whose gross negligence or willful misconduct causes a nuclear incident?

16. Should the DOE Price-Anderson indemnification be extended to activities undertaken pursuant to a cooperative agreement or grant?

17. Should the DOE Price-Anderson indemnification continue to cover transportation activities under a DOE contract? Should coverage vary depending on factors such as the type of nuclear material being transported, method of transportation, and jurisdictions through which the material is being transported?

18. To what extent, if any, should the DOE Price-Anderson indemnification apply to DOE clean-up sites? Should coverage be affected by the applicability of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or other environmental statutes to a DOE clean-up site?

19. To what extent, if any, should the DOE Price-Anderson indemnification be available for liability resulting from mixed waste at a DOE clean-up site?

20. Should the definition of nuclear incident be expanded to include occurrences that result from DOE activity outside the United States where such activity does not involve nuclear material owned by, and used by or under contract with, the United States? For example, should the DOE Price-Anderson indemnification be available for activities of DOE contractors that are undertaken outside the United States for purposes such as non-proliferation, nuclear risk reduction or improvement of nuclear safety? If so, should the DOE Price-Anderson indemnification for these additional activities be mandatory or discretionary?

21. Is there a need to clarify what tort law applies with respect to a nuclear incident in the United States territorial sea? Should the applicable tort law be based on state tort law?

22. Should the definition of nuclear incident be modified to include all occurrences in the United States exclusive economic zone? What would be the effects, if any, on the shipment of nuclear material in the United States exclusive economic zone if such a modification were or were not made?

What would be the effects, if any, on the response to an incident involving nuclear material in the United States exclusive economic zone if such a modification were or were not made?

23. Should the reliance of the Act on state tort law continue in its current form? Should uniform rules already established by the Act be modified, or should there be additional uniform rules on specific topics such as causation and damage? Describe any modification or additional uniform rule that would be desirable and explain the rationale.

24. Should the Act be modified to be consistent with the legal approach in many other countries under which all legal liability for nuclear damage from a nuclear incident is channeled exclusively to the operator of a facility on the basis of strict liability? If so, what would be the effect, if any, on the system of financial protection, indemnification and compensation established by the Act?

25. Should the procedures in the Act for administrative and judicial proceedings be modified? If so, describe the modification and explain the rationale?

26. Should there be any modification in the types of claims covered by the Price-Anderson system?

27. What modifications in the Act or its implementation, if any, could facilitate the prompt payment and settlement of claims?

28. Should DOE continue to be authorized to issue civil penalties pursuant to section 234A of the AEA? Should section 234A be modified to make this authority available with respect to DOE activities that are not covered by the DOE Price-Anderson indemnification? Should DOE continue to have authority to issue civil penalties if the Act is modified to eliminate the DOE Price-Anderson indemnification with respect to nuclear incidents that results from the gross negligence or willful misconduct of a DOE contractor?

29. To what extent does the authority to issue civil penalties affect the ability of DOE to attain safe and efficient management of DOE activities? To what extent does this authority affect the ability of DOE and its contractors to cooperate in managing the environment, health, and safety of DOE activities through mechanisms such as integrated safety management? To what extent does this authority help contain operating costs including the costs of private insurance if it were to be required?

30. Should there continue to be a mandatory exemption from civil penalties for certain nonprofit contractors? Should the exemption

apply to for-profit subcontractors and suppliers of a nonprofit contractor? Should the exemption apply to a for-profit partner of a nonprofit contractor?

31. Should DOE continue to have discretionary authority to provide educational nonprofit institutions with an automatic remission of civil penalties? If so, should the remission be available where the nonprofit entity has a for-profit partner, subcontractor, or supplier?

32. Should the maximum amount of civil penalties be modified? If so, how?

33. Should the provisions in section 234A.c. concerning administrative and judicial proceedings relating to civil penalties be modified? If so, how?

34. Should there be any modification in the authority in section 223.c. to impose criminal penalties for knowing and willful violations of nuclear safety requirements by individual officers and employees of contractors, subcontractors and suppliers covered by the DOE Price-Anderson indemnification? Should this authority be extended to cover violations by persons not indemnified?

Issued in Washington, DC on December 23, 1997.

Eric J. Fygi,

Acting General Counsel.

[FR Doc. 97-34036 Filed 12-30-97; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[FERC-525]

Information Collection Submitted for Review and Request for Comments

December 24, 1997.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of submission for review by the Office of Management and Budget (OMB) and request for comments.

SUMMARY: The Federal Energy Regulatory Commission (Commission) has submitted the energy information collection listed in this notice to the Office of Management and Budget (OMB) for review under provisions of Section 3507 of the Paperwork Reduction Act of 1995 (Pub. L. No. 104-13). Any interested person may file comments on the collection of information directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission

received no comments in response to an earlier **Federal Register** notice of August 8, 1997 (62 FR 42768) and has made this notation in its submission to OMB.

DATES: Comments regarding this collection of information are best assured of having their full effect if received or on before January 30, 1998.

ADDRESSES: Address comments to Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission, Desk Officer, 726 Jackson Place, NW., Washington, DC 20503. A copy of the comments should also be sent to Federal Energy Regulatory Commission, Division of Information Services, Attention: Mr. Michael Miller, 888 First Street NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT:

Michael Miller may be reached by telephone at (202) 208-1415, by fax at (202) 273-0873, and by e-mail at mmiller@ferc.fed.us.

SUPPLEMENTARY INFORMATION:

Description

The energy information collection submitted to OMB for review contains:

1. *Collection of Information:* FERC-525 "Financial Audits".

2. *Sponsor:* Federal Energy Regulatory Commission.

3. *Control No.:* OMB No. 1902-0092. The Commission is now requesting that OMB approve a three-year extension of the current expiration date, with no changes to the existing collection. There is a decrease in the reporting burden because the Commission is revamping its audit program to concentrate on compliance with issues related to Order Nos. 636 and 888 including issues that impede competition among companies. This shift in the emphasis of its audits is to gather information necessary to evaluate the regulatory implications of overseeing industry practices and standards in a competitive environment. These are mandatory collection requirements.

4. *Necessity of Collection of Information:* Submission of the information is necessary to enable the Commission to carry out its responsibilities in implementing the provisions of the Federal Power Act (FPA), the Natural Gas Act (NGA), and the Interstate Commerce Act (ICA). The information reported under Commission identifier FERC-525 is filed in accordance with Sections 4(b), 208, 301(b), 302, 307 and 308 of the FPA, Sections 6, 8(b), 9 and 10 of the NGA and Sections 19 and 20 of the ICA. The Commission also conducts reviews to ensure respondents comply with

requirements established under Commission Order Nos. 636 and 888. These audits are performed to ensure that financial records and reports of entities regulated by the Commission comply with its accounting and reporting requirements and to provide assurance of the reliability of companies' financial data for both the Commission and investor purposes. The information gathered during the audits forms the basis of the audit staff's opinion regarding the reliability of financial data filed with the Commission by companies; the extent of conformance by companies to the Uniform System of Accounts and other regulations of the Commission, and compliance with the Commission's regulation for open access transportation of natural gas and electric energy including standards of conduct and electronic bulletin board posting of transportation/transmission availability and pricing.

5. *Respondent Description:* The respondent universe currently comprises, on average, 77 respondents.

6. *Estimated Burden:* 7,700 total burden hours, 77 respondents, 1 response annually, 100 hours per response (average).

7. *Estimated Cost Burden to Respondents:* 7,700 hours ÷ 2,088 hours per year × \$110,000 per year = \$405,846, average cost per respondent = \$5,271.

Statutory Authority: Sections 4(b), 208, 301(b), 302, 307, 308 of the FPA, 16 U.S.C. 792-828g; Sections 6, 8(b), 9 and 10 of the NGA, 15 U.S.C. 717-717w; and Sections 19 and 20 of the ICA, 49 U.S.C. 19 and 20.

Lois D. Cashell,

Secretary.

[FR Doc. 97-34108 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98-137-000]

ANR Pipeline Company; Notice of Request Under Blanket Authorization

December 24, 1997.

Take notice that on December 16, 1997, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed in Docket No. CP98-137-000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations (18 CFR 157.205, 157.211) under the Natural Gas Act (NGA) for authorization to install and operate a new turbine meter at an existing meter station in Branch County, Michigan, under ANR's blanket

certificate issued in Docket No. CP82-480-000, pursuant to Section 7 of the NGA, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

ANR proposes to install and operate a 2-inch turbine meter at its existing Coldwater Lakes Meter Station in Branch County, Michigan. ANR estimates the cost of installing the meter at \$19,000. It is stated that ANR is installing the meter to accommodate increasing deliveries at the meter station. It is explained that ANR delivered 58,212 Mcf of natural gas at the Coldwater Lakes Meter Station in the 12-month period from July 1, 1995, through June 30, 1996, and 88,713 Mcf in the 12-month period for the following 12-month period, with most of the increase occurring during the winter months.

It is asserted that the volumes to be delivered will be within the certificated entitlements of the customer, Peoples Natural Gas Company (Peoples), and that the gas will be transported under ANR's Part 284 blanket certificate issued in Docket No. CP88-532-000. It is further asserted that the volume of gas delivered to Peoples will not affect ANR's peak day or annual requirements and that deliveries can be made without detriment or disadvantage to ANR's other customers.

Any person or the Commission's staff my, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97-34114 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98-459-000]

Bangor Energy Resale, Inc.; Notice of Issuance of Order

December 23, 1997.

Bangor Energy Resale, Inc. (Bangor Energy) filed an application to engage in wholesale power sales at market-based rates, and for certain waivers and authorizations. In particular, Bangor Energy requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liabilities by Bangor Energy. On December 23, 1997, the Commission issued an Order Conditionally Accepting For Filing Proposed Market-Based Rates (Order), in the above-docketed proceeding.

The Commission's December 23, 1997 Order granted the request for blanket approval under Part 34, subject to the conditions found in Ordering Paragraphs (D), (E), and (G):

(D) Within 30 days of the date of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by Bangor Energy should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practices and Procedure, 18 CFR 385.211 and 385.214.

(E) Absent a request to be heard within the period set forth in Ordering Paragraph (D) above, Bangor Energy is hereby authorized to issue securities and assume obligations and liabilities as guarantor, indorser, surety or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of Bangor Energy, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(G) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of Bangor Energy's issuances of securities or assumptions of liabilities * * *.

Notice is hereby given that the deadline for filing motions to intervene

or protests, as set forth above, is January 22, 1998.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, N.E., Washington, D.C. 20426.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97-34118 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM98-5-97-000]

Chandeleur Pipe Line Company; Notice of Proposed Changes in FERC Gas Tariff

December 23, 1997.

Take notice that on December 18, 1997, Chandeleur Pipe Line Company (Chandeleur) tendered for filing proposed changes in its FERC Gas Tariff, Second Revised Volume No. 1, Sheet No. 5.

Chandeleur is proposing to change its Fuel and Line Loss Allowance from 0.7% to 0.6%, to become effective January 1, 1998.

Chandeleur states that copies of the filing were served upon the company's jurisdictional customers and 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, D.C. 20426, in accordance with Sections 385.214 and 375.211 to the Commission's Rules and Regulations. All such motions or protests should be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97-34015 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****Cinergy Services, Inc., The Cincinnati Gas & Electric Co. and PSI Energy, Inc., Notice of Filing**

December 23, 1997.

Take notice that on December 5, 1997, Cinergy Services, Inc., on behalf of The Cincinnati Gas & Electric Company and PSI Energy, Inc., filed a revision to its filing in the above-captioned docket. This revision was made in accordance with the Commission's November 20, 1997, letter order in this 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 January 5, 1998. 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. 97-34016 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. OA97-643-000]

Citizens Utilities Company; Notice of Filing

December 23, 1997.

Take notice that on December 15, 1997, Citizens Utilities Company (Citizens), tendered for filing compliance tariff sheets. The purpose of the revised tariff sheets is to conform Citizens Open Access Transmission Tariff to reflect the provisions of the September 12, 1997, Settlement Agreement in Docket Nos. ER95-1586-000, *et al.*, which was approved by the Commission on November 13, 1997. In accordance with the September 12, Settlement, Citizens requests an effective date of July 9, 1996, for the compliance tariff sheets.

Any person desiring to be heard or to protest said filings 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 January 5, 1998. 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. 97-34019 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. CP98-140-000]

Columbia Gas Transmission Corporation; Notice of Request Under Blanket Authorization

December 23, 1997.

Take notice that on December 17, 1997, Columbia Gas Transmission Corporation (Columbia), 1700 MacCorkle Avenue, S.E., Charleston, West Virginia 25314-1599, filed in Docket No. CP98-140-000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.211) for authorization to certificate an existing point of delivery originally installed under Section 311 of the Natural Gas Policy Act (NGPA) to Power Resources, Inc. (Power Resources) in Geauga County, Ohio, under Columbia's blanket certificate issued in Docket No. CP83-76-000 pursuant to Section 7 of the Natural Gas Act (NGA), all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Columbia requests NGA certification of the delivery point to Power Resources in order that it may be used to provide both Part 284, Subpart B and Subpart G transportation.

Columbia states that it constructed the new point of delivery to Power Resources, Inc., in Geauga County, Ohio pursuant to Section 311 of the NGPA, and that it was placed in service on

November 4, 1997. Columbia states that interconnecting facilities installed by Columbia included a 2-inch tap and 15 feet of 4-inch pipe and 20 feet of 4-inch pipe for a riser.

Columbia states that the transportation service to be provided through the existing point of delivery will be interruptible service provided under Columbia's Interruptible Transportation Service Rate Schedule ITS.

Columbia states that the quantities of natural gas to be provided through the existing point will be 1,000 Dth per day, and will be within Columbia's authorized level of service. Columbia also states that there will be no impact on Columbia's existing design day and annual obligation to its customers as a result of the NGA certification of the existing point of delivery for transportation service.

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 therefore, 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. 97-34008 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. ER98-449-000]

COM/Energy Marketing, Inc.; Notice of Issuance of Order

December 23, 1997.

COM/Energy Marketing, Inc. (COM/Energy) filed an application to engage in the wholesale sale of electric capacity and energy at market-based rates, and for certain waivers and authorizations. In particular, COM/Energy requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liabilities by COM/

Energy. On December 23, 1997, the Commission issued an Order Accepting For Filing Proposed Market-Based Rates (Order), or in the above-docketed proceeding.

The Commission's December 23, 1997 Order granted the request for blanket approval under Part 34, subject to the conditions found in Ordering Paragraphs (C), (D), and (F):

(C) Within 30 days of the date of issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by COM/Energy should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.211 and 385.214.

(D) Absent a request to be heard within the period set forth in Ordering Paragraph (C) above, COM/Energy is hereby authorized to issue securities and assume obligations and liabilities as guarantor, indorser, surety or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of COM/Energy, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(F) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of COM/Energy's issuances of securities or assumptions of liabilities * * *.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is January 22, 1998.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, N.E., Washington, D.C. 20426.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97-34117 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER98-265-001 and ER98-266-001]

Consolidated Edison Company of New York, Inc.; Notice of Refund Report

December 23, 1997.

Take notice that on December 15, 1997, Consolidated Edison Company of New York, Inc. (Con Edison), tendered for filing with the Commission, its Refund Report made in compliance with the Commission's Order issued December 3, 1997, in the above referenced docket.

Con Edison states that no refund is due to PECO Energy Company or Sonat Power Marketing, L.P.

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 protests should be filed on or before January 5, 1998. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Copies of the filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97-34018 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97-346-000]

Equitrans, L.P.; Notice of Informal Settlement Conference

December 23, 1997.

Take notice that an informal settlement conference will be convened in this proceeding on January 7, 1998 at 9:30 a.m., at the Office of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, for the purpose of exploring the possible settlement of the above-referenced docket.

Any party, as defined by 18 CFR 385.102(c), or any participant, as defined by 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

For additional information, please contact Irene E. Szopo at (202) 208-1602.

Lois D. Cashell,

Secretary.

[FR Doc. 97-34013 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC98-20-000]

Idaho Power Company; Notice of Filing

December 24, 1997.

Take notice that on December 3, 1997, Idaho Power Company tendered for filing an application pursuant to Section 203 of the Federal Power Act seeking an order authorizing the implementation of a proposed corporate reorganization to create a holding company structure. Pursuant to the proposed reorganization, Idaho Power Company would become a wholly-owned subsidiary of a new parent, IPHC, which has been organized under the laws of the State of Idaho.

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 January 5, 1998. Protests will be considered by the Commission determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97-34110 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. ER98-64-000]

Metropolitan Edison Company, Pennsylvania Electric Company, PECO Energy Company, and PP&L, Inc. and UGI Utilities, Inc.; Notice of Filing

December 23, 1997.

Take notice that on December 11, 1997, Metropolitan Edison Company and Pennsylvania Electric Company (doing business as GPU Energy), PECO Energy Company, and, jointly, PP&L, Inc., and UGI Utilities, Inc., filed a 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, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,*Acting Secretary.*

[FR Doc. 97-34017 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

Act (NGA), all as more fully set forth in the request which is on file with the Commission and open to public inspection.

National Fuel states that it proposes to construct and operate a residential sales tap for delivery of approximately 150 Mcf of natural gas annually to National Fuel Gas Distribution Corporation (Distribution) at an estimated cost of \$1,500, for which Distribution will reimburse National Fuel. National Fuel asserts that service through the proposed tap will be made pursuant to National Fuel's Rate Schedule EFT. It is indicated that the proposed tap will be located in Elk County, PA.

Any person or the Commission's Staff may, within 45 days of the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214), a motion to intervene 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 activities 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 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,*Secretary.*

[FR Doc. 97-34007 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

the Commission and open to public inspection.

NGT specifically proposes to abandon and remove a 1-inch inactive tap on Line Am-46, at station 194+57 in Hempsted County, Arkansas. NGT constructed this tap in 1941 to deliver natural gas to a rural domestic customer of Arkla, a distribution division of NorAm Energy Corp. (Arkla). Arkla has removed its distribution meter and the landowner has requested that NGT remove the tap to allow construction on the property. The abandonment cost of the facilities is \$258, and the landowner has agreed to reimburse NGT for these costs.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the natural Gas Act.

Lois D. Cashell,*Secretary.*

[FR Doc. 97-34113 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. CP98-139-000]

National Fuel Gas Supply Corporation; Notice of Request Under Blanket Authorization

December 23, 1997.

Take notice that on December 17, 1997, National Fuel Gas Supply Corporation (National Fuel), 10 Lafayette Square, Buffalo, New York 14203, filed in Docket No. CP98-139-000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.211) for approval to construct and operate a new residential sales tap, under National Fuel's blanket certificate issued in Docket No. CP83-4-000, pursuant to Section 7 of the Natural Gas

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. CP98-138-000]

NorAm Gas Transmission Company; Notice of Request Under Blanket Authorization

December 24, 1997.

Take notice that on December 17, 1997, NorAm Gas Transmission Company (NGT), 1600 Smith Street, Houston, Texas 77002, filed in Docket No. CP98-138-000 a request pursuant to Sections 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.216) for authorization to abandon certain facilities in Arkansas under NGT's blanket certificate issued in Docket No. CP82-384-000 and CP82-384-001 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. CP98-146-000]

Northern Natural Gas Company; Notice of Request Under Blanket Authorization

December 24, 1997.

Take notice that on December 18, 1997, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124-1000, filed in Docket No. CP98-146-000 a request pursuant to Sections 157.205, and 157.212, of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.212) for authorization to install four new delivery points and appurtenant facilities in Sterling and Glasscock Counties, Texas to accommodate incremental interruptible natural gas deliveries to Conoco, Inc. (Conoco)

under Northern's blanket certificate issued in Docket No. CP82-401-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Northern States that it requests authorization to install the proposed delivery points to accommodate incremental interruptible natural gas deliveries to Conoco under Northern's currently effective throughput service agreements. Northern asserts that Conoco has requested the proposed delivery points for use at their plants. Northern estimates a cost of \$97,074 to construct the proposed delivery points. Conoco will reimburse Northern for the total cost to construct the proposed delivery points.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97-34111 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98-445-000]

Northern/AES Energy LLC; Notice of Issuance of Order

December 23, 1997.

Northern/AES Energy LLC (Northern/AES) filed an application to engage in the wholesale sale of electric capacity and energy at market-based rates, and for certain waivers and authorizations. In particular, Northern/AES requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liabilities by Northern/AES. On December 23, 1997, the Commission issued an Order

Conditionally Accepting For filing Proposed Market-Based Rates (Order), in the above-docketed proceeding.

The Commission's December 23, 1997 Order granted the request for blanket approval under Part 34, subject to the conditions found in Ordering Paragraphs (C), (D), and (F):

(c) Within 30 days of the date of issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by Northern/AES should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.211 and 385.214.

(D) Absent a request to be heard within the period set forth in Ordering Paragraph (C) above, Northern/AES is hereby authorized to issue securities and assume obligations and liabilities as guarantor, indorser, surety or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of Northern/AES, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(F) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of Northern/AES's issuances of securities or assumptions of liabilities * * *.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is January 22, 1998.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, N.E., Washington, D.C. 20426.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97-34116 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98-145-000]

Northwest Pipeline Corporation; Notice of Request Under Blanket Authorization

December 24, 1997.

Take notice that on December 18, 1997, Northwest Pipeline Corporation

(Northwest), 295 Chipeta Way, Salt Lake City, Utah 84158, filed in Docket No. CP98-145-000 a request pursuant to Sections 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.216) for authorization to abandon by removal its Dr. Gambile Farm Tap (Farm Tap) located on Northwest's Grants Pass Lateral in Douglas County, Oregon, under Northwest's blanket certificate issued in Docket No. CP82-433-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Northwest states that the Farm Tap was originally constructed to deliver natural gas to The Washington Water Power Company's (Water Power) predecessor for service to a single customer; however, there have been no deliveries to the Farm Tap since October 1995. Northwest states that by letter dated November 12, 1997, Water Power stated that the Farm Tap is no longer needed and can be abandoned. Northwest states that it currently has no firm contractual obligations to provide service to the delivery point.

Northwest proposes to abandon the Farm Tap by removing the two one-inch regulators and related piping and all the above ground appurtenances at the station site, including the fence. Northwest states that the cost of removing the facilities will be approximately \$1,500.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97-34112 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. EC 96-19-012, et al. (not consolidated)]

Pacific Gas and Electric Company, et al.; Order Establishing Comment Date and Directing Notification

Issued December 23, 1997.

The entities shown on the Attachment have made various filings in the listed dockets that concern the restructuring of the California electric market. The dates of filing are indicated on the Attachment.

Any person desiring to be heard or to protest or comment on any of the filings listed in the Attachment should file, in each particular proceeding and referencing the appropriate docket number, a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR §§ 385.211 and 385.214). All such motions, protests or comments should be filed on or before January 16, 1998. 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.

The California Independent System Operator Corporation (ISO) has notified the Commission "of a delay in the start of its operation of markets and formal assumption of control of the transmission systems of the three investor-owned utilities * * *" ISO Notice, filed December 23, 1997, at 1. The California Power Exchange Corporation (PX) has also notified the Commission of "the delay in the start of its operations." PX Notice, filed December 23, 1997, at 1. In order to afford the Commission and the affected parties adequate notice, we will direct the ISO to provide the Commission at least 15 days notice before the date that the ISO will commence operations. Similarly, we will direct the PX to provide the Commission at least 15 days notice before it will commence operations.

The Commission has consistently shown great flexibility in addressing filings in this proceeding, notwithstanding severe time constraints and changes in the proposals before us. As we move forward, the Commission requests that the California participants assist us in maintaining the regularity of

our processes by timely filings and advance notice.

The Commission orders:

(A) Motions to intervene, protests or comments should be filed on or before January 16, 1998.

(B) The ISO shall provide the Commission at least 15 days notice prior to the date that the ISO commences operations.

(C) The PX shall provide the Commission at least 15 days notice prior to the date that the PX commences operations.

By the Commission.

Lois D. Cashell,
Secretary.

Filings Addressed by This Order

Pacific Gas and Electric Company, *et al.*, Docket Nos. EC96-19-012 and ER96-1663-013, filed on December 16, 1997.

The California Independent System Operator Corporation's (ISO's) report regarding the selection of Must-Run Generating Stations.

El Segundo Power, LLC, Docket No. ER98-941-000, filed on December 4, 1997;

AES Alamitos, L.L.C., Docket No. ER98-984-000, filed on December 9, 1997;

AES Huntington Beach, L.L.C., Docket No. ER98-985-000, filed on December 9, 1997;

AES Redondo Beach, L.L.C., Docket No. ER98-986-000, filed on December 9, 1997.

Amendments to SoCal Edison's Must-Run Agreements (filed in Docket No. ER98-441-000) to designate the new owners of the Must-Run units to provide the service.

California Independent System Operator Corporation, Docket No. ER98-1019-000, filed on December 9, 1997.

Interim Black Start agreement.

California Independent System Operator Corporation, Docket Nos. ER98-1028-000, ER98-1029-000, ER98-1030-000 and ER98-1032-000, filed on December 10, 1997.

Agreements between the ISO and neighboring Control Area Operators.

California Independent System Operator Corporation, Docket No. ER98-1103-000, filed on December 12, 1997.

Agreement for the ISO to use Pacific Gas and Electric Company's, San Diego Gas & Electric Company's and SoCal Edison's system control facilities.

California Independent System Operator Corporation, Docket Nos. ER98-990-000, through ER98-991-000, ER98-994-000 through ER98-995-000, ER98-998-000 through ER98-1001-000, ER98-1003-000 through ER98-1018-000, and ER98-1020-000 through ER98-1021-000, filed on December 9, 1997.

Executed agreements between the ISO and Scheduling Coordinators.

California Independent System Operator Corporation, Docket Nos. ER98-992-000, ER98-996-000, ER98-997-000, and ER98-1002-000, filed on December 9, 1997.

Agreements between the ISO and Participating Generators.

[FR Doc. 97-34107 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. RP98-93-000]

Southern Natural Gas Company; Notice of Refund Report

December 23, 1997.

Take notice that on December 19, 1997 Southern Natural Gas Company (Southern) tendered for filing a Refund Report.

Southern states that pursuant to Section 23.3 of the General Terms and Conditions of Southern's Tariff the Refund Report sets forth Rate Schedule ISS revenues to be refunded to Rate Schedule CSS customers.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protest should be filed on or before December 31, 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 in the Public Reference Room.

Lois D. Cashell,
Secretary.

[FR Doc. 97-34014 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. CP98-147-000]

Texas Eastern Transmission Corporation; Notice of Request Under Blanket Authorization

December 23, 1997.

Take notice that on December 18, 1997, Texas Eastern Transmission Company (Tetco), 5400 Westheimer Court, P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP98-147-000 a request pursuant to Sections

157.205 and 157.211, of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.211) for approval to construct and operate facilities for Elizabethtown Gas Company in Union County, New Jersey, under Tetco's blanket certificate issued in Docket No. CP82-535-000 pursuant to Section 7 of the Natural Gas Act (NGA), all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Tetco states that it proposes to construct, install, own, operate and maintain a four-inch tap valve and four-inch check valve on Tetco's existing twenty-four-inch crossover header from Lines Nos. One and Two and a six-inch tap valve and six-inch check valve on Tetco's existing Line No. Twenty in Union County, New Jersey. Tetco asserts that Elizabethtown will install, or cause to be installed, a dual four-inch meter run, two hundred-fifty feet of connecting pipeline and electronic gas measurement equipment. Tetco asserts that the transportation service through the proposed facilities will be rendered pursuant to Tetco's Rate Schedule FT and that Tetco's tariff does not prohibit the addition of delivery points. Tetco further asserts that its proposal will be accomplished without detriment or disadvantage to Tetco's existing customers.

Any person or the Commission's Staff may, within 45 days of the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214), a motion to intervene 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 activities 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 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,
Secretary.

[FR Doc. 97-34010 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98-141-000]

Texas Gas Transmission Corporation; Notice of Request Under Blanket Authorization

December 23, 1997.

Take notice that on December 17, 1997, Texas Gas Transmission Corporation (Texas Gas), Post Office Box 20008, filed a request with the Commission in Docket No. CP98-141-000, pursuant to Sections 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (NGA) for authorization to construct a secondary meter run at its Union City Delivery Point in Obion County, Tennessee, authorized in blanket certificate issued in Docket No. CP82-407-000, all as more fully set forth in the request on file with the Commission and open to public inspection.

Texas Gas proposes to add a second 4-inch meter run at its Union City Delivery Point on Texas Gas's Main Line System in Obion County, Tennessee, in order to provide more accurate measurement at the Union City Delivery Point through which Texas Gas renders natural gas service to United Cities Gas Company for service to the City of Union City, Tennessee.

Any person or the Commission's staff may, within 45 days after the Commission has issued this notice, 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 NGA (18 CFR 157.205) a protest to the request. If no protest is filed within the allowed time, 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 NGA.

Lois D. Cashell,
Secretary.

[FR Doc. 97-34009 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98-128-000]

Wyoming Interstate Company, LTD and Colorado Interstate Gas Company; Notice of Application

December 24, 1997.

Take notice that on December 12, 1997, Wyoming Interstate Company, LTD (WIC), 2000 M Street, N.W., Suite 300, Washington, D.C. 20036, and Colorado Interstate Gas Company (CIG), P.O. Box 1087, Colorado Springs, Colorado 80944, filed jointly in Docket No. CP98-128-000 an application pursuant to Section 7(c) of the Natural Gas Act for authorization to construct and operate compression and appurtenant facilities in Albany County, Wyoming, and Weld County, Colorado, and to abandon and acquire pipeline capacity, all as more fully set forth in the application on file with the Commission and open to public inspection.

WIC proposes to construct and operate an additional 4,680 horsepower compressor and appurtenant facilities at the existing Laramie Compressor Station in Wyoming, and to construct and operate an additional 2,700 horsepower compressor at the existing Cheyenne-WIC Compressor Station in Colorado. CIG and WIC request that the Commission authorize CIG to abandon, via lease to WIC, the incremental capacity stemming from the increased compression. CIG and WIC request that, since CIG will continue to use the existing capacity of its Powder River Line to serve its firm obligations, WIC be authorized to abandon, by lease to CIG, a portion of the additional compression that corresponds to that additional capacity.

WIC proposes to charge shippers using the incremental facilities an incremental charge which is higher than its existing rates. Because of the mutual benefits of the two leases, no separate leasing charge is proposed by either WIC or CIG. WIC convened an open season for the additional capacity and secured a 10-year firm contract with Western Gas Resources, Inc., for the additional capacity.

Any person desiring to be heard or to make any protest with reference to said application should on or before January 14, 1998, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR

385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that 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 WIC or CIG to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 97-34115 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP97-168-000 and CP97-169-000]

Alliance Pipeline L.P.; Notice of Availability of the Draft Environmental Impact Statement for the Proposed Alliance Pipeline Project

December 23, 1997.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared this draft environmental impact statement (EIS) on natural gas pipeline facilities proposed by Alliance Pipeline L.P. (Alliance) in the above-referenced dockets.

The draft EIS was prepared to satisfy the requirements of the National Environmental Policy Act. The staff concludes that approval of the proposed project, with appropriate mitigating measures as recommended, would have

limited adverse environmental impact. The draft EIS evaluates alternatives to the proposal, including system alternatives, and requests comments on them.

The draft EIS assesses the potential environmental effects of the construction and operation of the following facilities in North Dakota, Minnesota, Iowa, and Illinois:

- Approximately 890 miles of 36-inch-diameter mainline pipeline;
- Seven compressor stations totaling 320,000 horsepower;
- Five meter stations;
- A total of 0.9 mile of 36-inch-diameter lateral pipeline connecting the proposed meter stations to the mainline pipeline;
- A measurement and pressure control station;
- Forty-eight block valves installed along the pipeline and at each compressor station; and
- Three internal tool or "pig" launchers and four pig receivers.

In addition, the draft EIS addresses the potential environmental impact associated with construction and operation of a natural gas liquids extraction plant planned by Aux Sable Liquid Products L.P. in connection with Alliance's pipeline.

The purpose of Alliance's proposed facilities is to transport up to 1.3 billion cubic feet per day of natural gas produced in western Canada to interconnections with existing pipeline systems in the Chicago area. The planned Aux Sable Plant would extract the natural gas liquids that may be present in Alliance's pipeline.

Comment Procedures and Public Meetings

Any person wishing to comment on the draft EIS may do so. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send two copies of your comments to: Lois Cashell, Secretary, Federal Energy Regulatory Commission, 888 First St., N.E., Room 1A, Washington, DC 20426;
- Reference Docket Nos. CP97-168-000 and CP97-169-000; and
- Mail your comments so that they will be received in Washington, DC on or before February 16, 1998.

In addition to written comments we will hold several public meetings in the project area to receive comments on the draft EIS. We will announce in a future notice, the locations and times of those public meetings.

Interested groups and individuals are encouraged to attend and present oral comments on the environmental impact

described in the draft EIS. Transcripts of the meetings will be prepared.

After these comments are reviewed, any significant new issues are investigated, and modifications are made to the draft EIS, a final EIS will be published and distributed by the staff. The final EIS will contain the staff's responses to timely comments received on the draft EIS.

Comments will be considered by the Commission but will not serve to make the commentator a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214).

Anyone may intervene in this proceeding based on this draft EIS. You must file your request to intervene as specified above. You do not need intervenor status to have your comments considered.

The draft EIS has been placed in the public files of the FERC and is available for public inspection at: Federal Energy Regulatory Commission, Public Reference and Files Maintenance Branch, 888 First Street, N.E., Room 2A, Washington, DC 20426, (202) 208-1371.

A limited number of copies are available from Public Reference and Files Maintenance Branch identified above. In addition, the draft EIS has been mailed to Federal, state, and local agencies; public interest groups; individuals who requested a copy of the draft EIS; libraries; newspapers; and parties to this proceeding.

Additional information about the proposed project is available from Paul McKee in the Commission's Office of External Affairs, at (202) 208-1088.

Lois D. Cashell,

Secretary.

[FR Doc. 97-34109 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 11243-002 Alaska]

Whitewater Engineering Corporation; Notice of Availability of Final Environmental Assessment

December 23, 1997.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47897), the Office of Hydropower Licensing has reviewed the

application for an original license for the Power Creek Project, and has prepared a Final Environmental Assessment (FEA) for the project. The project would be located near Cordova, Alaska. On October 8, 1997, the Commission staff issued and distributed to all parties requested that comments be filed with the Commission within 30 days. Comments were filed and are addressed in the FEA. The FEA contains the staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with the appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

Copies of the FEA are available for review in the Public Reference Room, Room 2A, of the Commission's offices at 888 First Street, N.E., Washington, D.C. 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 97-34012 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Non-Project Use of Project Lands (Construction of a Boat Launch Facility)

December 23, 1997.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. Type of Application: Non-project Use of Project Lands (Construction of a Boat Launch Facility).

b. Project No.: 2105-061; Moonspinner Resort.

c. Date Filed: September 4, 1997.

d. Applicant: Pacific Gas & Electric Company (PG & E).

e. Name of Project: Upper North Fork Feather River Project (Lake Almanor).

f. Location: The proposed boat launch facility would be located in Big Cove on the eastern shore of Lake Almanor Peninsula.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. § 791(a)-825(r).

h. Applicant contact: Bill Zemke, Pacific Gas & Electric Company, Mail Code N11C, P.O. Box 770000, San Francisco, CA 94177, (415) 973-1646.

i. FERC contact: J.K. Hannula, (202) 219-0116.

j. Comment date: January 29, 1998.

k. Description of the Application: PG & E requests approval to permit

Moonspinner Resort (Brett and Judy Womack) to build a new boat launch ramp and six boat slips. Approximately 5,700 cubic yards of material would be dredged during construction. The boat launch facility is located in Eleanor Cove, a part of Big Cove.

1. This notice also consists of the following standard paragraphs: B, C1, and D2.

B. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C1. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Lois D. Cashell,

Secretary.

[FR Doc. 97-34011 Filed 12-30-97; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS-400123; FRL-5763-8]

Toxics Data Reporting Committee of the National Advisory Council for Environmental Policy and Technology; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting.

SUMMARY: Under the Federal Advisory Committee Act, EPA gives notice of a 2-day meeting of the Toxics Data Reporting Committee of the National Advisory Council for Environmental Policy and Technology. This will be the third meeting of the Toxics Data Reporting (TDR) Committee, whose mission is to provide advice to EPA regarding the Agency's Toxics Release Inventory (TRI) Program.

DATES: The public meeting will take place on January 29-30, 1998, from 8:30 a.m. to 5 p.m. Written and electronic comments in response to this notice should be received by January 16, 1998.

ADDRESSES: The meeting will be held at: L'Enfant Plaza, 480 L'Enfant Plaza SW., Washington, DC 20024, (202) 484-1000.

Each comment must bear the docket control number "OPPTS-400123." All comments should be sent in triplicate to: OPPT Document Control Officer (7407), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Room G099, East Tower, Washington, DC 20460.

Comments and data may also be submitted electronically to: oppt.ncic@epamail.epa.gov. Follow the instructions under Unit II. of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

All comments which contain information claimed as CBI must be clearly marked as such. Three sanitized copies of any comments containing information claimed as CBI must also be submitted and will be placed in the public record for this rulemaking. Persons submitting information on any portion of which they believe is entitled to treatment as CBI by EPA must assert a business confidentiality claim in accordance with 40 CFR 2.203(b) for each such portion. This claim must be made at the time that the information is submitted to EPA. If a submitter does not assert a confidentiality claim at the time of submission, EPA will consider this as a waiver of any confidentiality claim and the information may be made available to the public by EPA without further notice to the submitter.

FOR FURTHER INFORMATION CONTACT: Cassandra Vail, telephone: (202) 260-0675, fax number: (202) 401-8142, e-mail: vail.cassandra@epamail.epa.gov, or Michelle Price, telephone: (202) 260-3372, fax number: (202) 410-8142, e-mail: price.michelle@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

At the 2-day meeting, the TDR Committee will continue the discussions begun at the January 29-30 meeting regarding how the Agency's characterizes the TRI data through the annual public data release. Concerns have been raised that EPA's presentation of the TRI data can lead to public misperception of the data. The Committee will be discussing possible recommendations on ways to more clearly present release data to the public to distinguish between the various methods of disposal while still making it possible to present meaningful statistics on a national basis about releases. In addition the TDR Committee will discuss how section 8 of the Form R collects information required by the Pollution Prevention Act concerning waste management and source reduction of toxic chemicals.

EPA would like specific comment on three issues relating to section 8 of the Form R.

1. *Reporting of waste sent to publicly owned treatment works.* In particular, the Agency is interested in comments on how toxic chemicals in wastes sent to publicly owned treatment works (POTWs) should be reported in section 8. Historically, these chemicals have been reported as treated in section 8.7 unless the toxic chemicals are metals. If the toxic chemical is a metal, the facility would report the toxic chemical as released in section 8.1 with the understanding that metals cannot be destroyed and are usually landfilled after treatment by POTWs. Because some chemicals can be "treated" to a limited extent at POTWs and other chemicals cannot be "treated" at all and are ultimately released by the POTW, EPA is soliciting comment on how these chemicals should be reported in section 8. One option to address this issue is that EPA could provide in the instructions a list of chemicals and the treatment (destruction) efficiency expected to occur at POTWs with secondary treatment capabilities. EPA would make available for review and comment a list of toxic chemicals identified as released by POTWs. The reporter could use the list to apportion quantities of the chemical to be reported in section 8.1 (releases) and section 8.7 (quantities treated off-site).

2. *Public perception.* EPA is asking for comment on how the generation of the toxic chemical reported to have been managed as a waste is perceived by the public. Section 8 collects information on waste managed at the facility whether or not the waste was generated at the reporting facility. Some individuals are concerned about public misperception of the data in section 8 because of the focus on the amount of waste managed at the facility, not waste generated. EPA would like comments on ways to change section 8 of the Form R which would continue to allow the user to assess wastes managed by the facility but would minimize the perception that the wastes reported in section 8 were generated by the reporting facility.

3. *Addition of data element.* The Agency is requesting comment regarding adding a data element that would indicate if the toxic chemical is recycled on-site or off-site more than once during the calendar year and if so, how many times it is recycled. For example, a facility recycles batches of 100 pounds of the toxic chemical 10 times throughout the year. The recycling process is 98 percent efficient with the other two percent being sent off-site for disposal. The facility would report 9,800 pounds as recycled on-site in section 8.4 and 200 pounds in as released in section 8.1. In section 8.4, the facility would also indicate that the toxic chemical was recycled 10 times. The public could then determine that although the facility recycled 9,800 pounds of the toxic chemical, because the facility recycled 10 times, it actually only recycled 98 pounds each time.

A meeting summary from the December 9-10 TDR Committee meeting will be available on the TRI Home Page. The address of the TRI Home Page is <http://www.epa.gov/opptintr/tri>. This summary can be found under the heading "TRI Stakeholder Dialogue." In addition, the agenda and an issue paper outlining topics for discussion at the January 29-30 Committee meeting will also be available at this same site prior to the meeting. Oral presentations or statements by interested parties will be limited to 5 minutes. Interested parties are encouraged to contact Cassandra Vail, to schedule presentations before the Committee.

II. Public Record and Electronic Submissions

The official record for this action, as well as the public version, has been established for this action under docket control number "OPPTS-400123" (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 12 noon to 4 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located in the TSCA Nonconfidential Information Center, Rm. NE-B607, 401 M St., SW., Washington, DC.

Electronic comments can be sent directly to EPA at: oppt.ncic@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number "OPPTS-400123." Electronic comments on this action may be filed online at many Federal Depository Libraries.

Dated: December 22, 1997.

Cassandra Vail,
Designated Federal Official.

[FR Doc. 97-34102 Filed 12-30-97; 8:45 am]
BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY

[FRL-5942-8]

Public Meetings of the Urban Wet Weather Flows Advisory Committee, the Storm Water Phase II Advisory Subcommittee, and the Sanitary Sewer Overflow Advisory Subcommittee

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Notice is given that the Environmental Protection Agency (EPA) is convening a public meeting of the Storm Water Phase II Advisory Subcommittee. The Storm Water Phase II Advisory Committee will discuss the latest draft of the proposed rule and other related topics for program implementation.

DATES: February 5-6, 1998. On the first day, the meeting will start at 10:00 a.m. EST and end at 5:00 p.m. On the second day, the meeting will begin at 8:00 a.m. and end at approximately 5:00 p.m.

ADDRESSES: The meeting will be held at The Madison Hotel, Fifteenth & M Streets, NW, Washington, DC. The telephone number is (202) 862-1600.

FOR FURTHER INFORMATION CONTACT: Sharie Centilla, Office of Wastewater Management, at (202) 260-6052, or

Internet:
centilla.sharie@epamail.epa.gov.

Dated: December 23, 1997.

Alfred W. Lindsey,

Deputy Director, Office of Wastewater Management, Designated Federal Official.

[FR Doc. 97-34098 Filed 12-30-97; 8:45 am]

BILLING CODE 6560-50-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-5942-7]

Public Meetings of the Urban Wet Weather Flows Advisory Committee, the Storm Water Phase II Advisory Subcommittee, and the Sanitary Sewer Overflow Advisory Subcommittee

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Notice is given that the Environmental Protection Agency (EPA) is convening two public meetings of the Storm Water Phase II Advisory Subcommittee. These meetings are open to the public without need for advance registration. The Storm Water Phase II Advisory Committee will discuss the proposed rule and other related topics for program implementation.

DATES: May 7-8, 1998 and June 25-26, 1998. On the first day, the meeting will start at 10:00 a.m. EST and end at 5:00 p.m. On the second day, the meeting will begin at 8:00 a.m. and end at approximately 5:00 p.m.

ADDRESSES: Both meetings will be held at The Arlington Hilton & Towers, 950 N. Stafford Street, Arlington, VA. The telephone number is (703) 812-5109.

FOR FURTHER INFORMATION CONTACT: Sharie Centilla, Office of Wastewater Management, at (202) 260-6052, or Internet: centilla.sharie@epamail.epa.gov.

Dated: December 23, 1997.

Alfred W. Lindsey,

Deputy Director, Office of Wastewater Management, Designated Federal Official.

[FR Doc. 97-34099 Filed 12-30-97; 8:45 am]

BILLING CODE 6560-50-M

ENVIRONMENTAL PROTECTION AGENCY

[OPP-50839; FRL-5763-7]

Issuance of an Experimental Use Permit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted an experimental use permit to the following applicant. The permit is in accordance with, and subject to, the provisions of 40 CFR part 172, which defines EPA procedures with respect to the use of pesticides for experimental use purposes.

FOR FURTHER INFORMATION CONTACT: By mail: Joanne Miller, 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: 1921 Jefferson Davis Highway, Rm. 237, CM #2, Arlington, VA, 703-305-6224, e-mail: miller.joanne@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA has issued the following experimental use permit:

7969-EUP-37. Extension. BASF Corporation, P.O. Box 13528, Research Triangle Park, NC 27709. This experimental use permit allows the use of 609 pounds of the herbicide sodium salt of diflufenzopyr on 1,740 acres of corn to evaluate the control of various broadleaf weeds and grasses. The program is authorized only in the States of Colorado, Georgia, Iowa, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, North Carolina, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, and Wisconsin. The experimental use permit is effective from March 1, 1998 to October 1, 1998. This permit is issued with the limitation that all treated crops are destroyed or used for research purposes only.

Persons wishing to review this experimental use permit are referred to the designated product manager. Inquires concerning this permit should be directed to the person cited above. It is suggested that interested persons call before visiting the EPA office, so that the appropriate file may be made available for inspection purposes from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection,
Experimental use permits.

Dated: December 21, 1997.

James Jones,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 97-34100 Filed 12-30-97; 8:45 am]

BILLING CODE 6560-50-F

FEDERAL COMMUNICATIONS COMMISSION

[DA 97-2685]

Commission Will Not Enforce Restrictions on Lottery Advertisements With Respect to Stations Licensed in New Jersey

Released: December 23, 1997.

The Commission has received numerous inquiries concerning the December 16, 1997, decision of the United States District Court for the District of New Jersey in *Players International, Inc., et al. v. United States and FCC*, Civil Action No. 96-4911. In the interest of clarifying the FCC's enforcement position in light of this ruling, the Officer of General Counsel and the Mass Media Bureau are issuing this Public Notice.

In the *Players* decision, the court declared that the restrictions on the broadcast of lottery information contained in Title 18 United States Code, Section 1304, and Section 73.1211 of the Commission's Rules, "unconstitutionally infringe upon plaintiffs' First Amendment rights." The district court has not issued an injunction against the enforcement of the restrictions.

After consultation with the Department of Justice, the Commission has decided, consistent with its response to a similar case in the Ninth Circuit, *Valley Broadcasting v. United States*, 107 F.3d 1328 (9th Cir. 1997), that it will not enforce the ban on the broadcast of lottery information against stations licensed to communities in New Jersey. This policy of non-enforcement applies to any such broadcasts which air from December 16, 1997, the date of the district court's decision, unless and until such time as that decision is overturned or otherwise altered or stayed.

We caution broadcasters that they should ensure that the broadcast of information regarding lotteries is not prohibited or otherwise restricted by New Jersey state law.

For further information, contact Catherine Withers, Mass Media Bureau, (202) 418-1430.

Federal Communications Commission.

Renee Licht,

Deputy Chief, Mass Media Bureau.

[FR Doc. 97-34086 Filed 12-30-97; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2245]

Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings

December 23, 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 January 15, 1998. 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: Telecommunications Services Inside Wiring Customer Premises Equipment (CS Docket No. 95-184).

Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring (MM Docket No. 92-260).

Number of Petitions Filed: 8.

Subject: Amendment of the Commission's Rules to Establish a Radio Astronomy Coordination Zone in Puerto Rico (ET Docket No. 96-2, RM-8165).

Number of Petitions Filed: 1.

Federal Communications Commission.

Magalie Roman Salas,
Secretary.

[FR Doc. 97-34087 Filed 12-30-97; 8:45 am]

BILLING CODE 6712-01-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 January 13, 1998.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. *Craig Dwight Heath*, Phoenix, Arizona, and Robert Theodore Heath, Newton, Illinois, both individually and as co-trustees for the Heath Trust for First National Bancshares in Newton, Inc.; to retain voting shares of First National Bancshares in Newton, Inc., Newton, Illinois, and thereby indirectly retain First National Bank in Newton, Newton, Illinois.

Board of Governors of the Federal Reserve System, December 24, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97-34091 Filed 12-30-97; 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 January 26, 1998.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02106-2204:

1. *The Independent Mutual Holding Company*, Laconia, New Hampshire; to become a bank holding company by acquiring 100 percent of the voting shares of Laconia Savings Bank, Laconia, New Hampshire.

2. *West Coast Bancorp*, Lake Oswego, Oregon; to merge with Centennial Holdings, Ltd., Olympia, Washington, and thereby indirectly acquire Centennial Bank, Olympia, Washington.

B. Federal Reserve Bank of Atlanta (Lois Berthaume, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303-2713:

1. *First American Corporation*, Nashville, Tennessee; to merge with Deposit Guaranty Corporation, Jackson, Mississippi, and thereby indirectly acquire Deposit Guaranty National Bank, Jackson, Mississippi.

In connection with this application, Applicant also has applied to acquire G&W Life Insurance Company, Jackson, Mississippi, and Deposit Guaranty Mortgage Company of Florida, Inc., Tallahassee, Florida, and thereby engage in extending credit and servicing loans and credit insurance activities, pursuant to §§ 225.28(b)(1) and (b)(11) of the Board's Regulation Y.

C. Federal Reserve Bank of Kansas City (D. Michael Manies, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. *Gold Banc Acquisition Corp, Inc. II*, Leawood, Kansas; to become a bank holding company by acquiring 100 percent of the voting shares of Farmers Bancshares of Oberlin, Inc., Oberlin, Kansas, and thereby indirectly acquire Farmers National Bank, Oberlin, Kansas.

D. Federal Reserve Bank of Dallas (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. *Texas Regional Bancshares, Inc.*, McAllen, Texas, and Texas Regional Delaware, Inc., Wilmington, Delaware (Applicants); to merge with Brownsville Bancshares, Inc., Brownsville, Texas, and thereby indirectly acquire BNB Bancshares, Inc., Wilmington, Delaware, and Brownsville National Bank, Brownsville, Texas.

In connection with this application, Applicants also have applied to merge with TB&T Bancshares, Inc., Brownsville, Texas, and thereby indirectly acquire Texas Bank & Trust Company, Brownsville, Texas.

In addition, Applicants have applied to merge with Raymondville Bancorp,

Inc., Raymondville, Texas, and thereby indirectly acquire Bank of Texas, Raymondville, Texas.

E. Federal Reserve Bank of San Francisco (Pat Marshall, Manager of Analytical Support, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105-1579:

1. *South Valley Bancorp, Inc.*, Klamath Falls, Oregon; to become a bank holding company by acquiring 80 percent of the voting shares of South Valley Bank & Trust, Klamath Falls, Oregon.

Board of Governors of the Federal Reserve System, December 24, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97-34092 Filed 12-30-97; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 13, 1998.

A. Federal Reserve Bank of New York (Betsy Buttrill White, Senior Vice President) 33 Liberty Street, New York, New York 10045-0001:

1. *HUBCO, Inc.*, Mahwah, New Jersey; to acquire Poughkeepsie Financial Corp., Poughkeepsie, New York, and thereby indirectly acquire Bank of the Hudson, Poughkeepsie, New York, and

thereby engage in operating a federal chartered savings bank, pursuant to § 225.28(b)(4)(ii) of the Board's Regulation Y.

2. *Swiss Bank Corporation*, Basle Switzerland; to acquire Brunswick Warburg, Inc., New York, New York, and thereby engage in financial and investment advisory activities, pursuant to § 225.28(b)(6) of the Board's Regulation Y, and securities brokerage activities, riskless principal activities, private placement services and other transactional services, pursuant to § 225.28(b)(7) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 24, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97-34093 Filed 12-30-97; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM

Federal Open Market Committee; Domestic Policy Directive of November 12, 1997

In accordance with § 271.5 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on November 12, 1997.¹ The directive was issued to the Federal Reserve Bank of New York as follows:

The information reviewed at this meeting suggests that economic activity continued to grow rapidly in recent months. In labor markets, hiring has remained robust and the civilian unemployment rate fell to 4.7 percent in October, its low for the current economic expansion. Industrial production increased very rapidly in the third quarter, and appears to have remained strong in October. Retail sales also rose sharply in the third quarter, though at a moderating pace as the summer progressed. Housing starts, while fluctuating from month to month, were little changed on balance in the third quarter. Business fixed investment posted unusually strong increases in the latest quarter, and available indicators point to further sizable gains in coming months. The nominal deficit on U.S. trade in goods and services widened substantially on average in July and

August from its rate in the second quarter. Price inflation has remained subdued despite some increase in the pace of advance in labor compensation.

Short-term interest rates have registered small mixed changes since the day before the Committee meeting on September 30, 1997, while bond yields have fallen somewhat. Share prices in U.S. equity markets have fluctuated widely in turbulent trading activity and are down on balance over the period; equity markets in other countries, notably in Asia have been volatile as well and some have registered very large declines. In foreign exchange markets, the trade-weighted value of the dollar in terms of the other G-10 currencies declined somewhat on balance over the intermeeting period. The dollar appreciated significantly, however, in terms of the currencies of a number of Asian and Latin American countries.

Growth of M2 and M3 appears to have moderated further in October from the unusually brisk rates of August. For the year through October, M2 expanded at the upper bound of its range for the year and M3 at a rate substantially above the upper bound of its range. Total domestic nonfinancial debt has expanded in recent months at a pace somewhat below the middle of its range.

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. In furtherance of these objectives, the Committee at its meeting in July reaffirmed the ranges it had established in February for growth of M2 and M3 of 1 to 5 percent and 2 to 6 percent respectively, measured from the fourth quarter of 1996 to the fourth quarter of 1997. The range for growth of total domestic nonfinancial debt was maintained at 3 to 7 percent for the year. For 1998, the Committee agreed on a tentative basis to set the same ranges as in 1997 for growth of the monetary aggregates and debt, measured from the fourth quarter of 1997 to the fourth quarter of 1998. The behavior of the monetary aggregates will continue to be evaluated in the light of progress toward price level stability, movements in their velocities, and developments in the economy and financial markets.

In the implementation of policy for the immediate future, the Committee seeks conditions in reserve markets consistent with maintaining the federal funds rate at an average of around 5-1/2 percent. In the context of the Committee's long-run objectives for price stability and sustainable economic growth, and giving careful consideration to economic, financial, and monetary

¹ Copies of the Minutes of the Federal Open Market Committee meeting of November 12, 1997, which include the domestic policy directive issued at that meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

developments, a somewhat higher federal funds rate would or a slightly lower federal funds rate might be acceptable in the intermeeting period. The contemplated reserve conditions are expected to be consistent with moderate growth in M2 and M3 over coming months.

By order of the Federal Open Market Committee, December 22, 1997.

Donald L. Kohn,

Secretary, Federal Open Market Committee.

[FR Doc. 97-34057 Filed 12-30-97; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act Meeting

TIME AND DATE: 10:00 a.m. (EST) January 12, 1998.

PLACE: 4th Floor, Conference Room 4506, 1250 H Street, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of the minutes of the December 8, 1997, Board member meeting.
2. Thrift Savings Plan activity report by the Executive Director.

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Trabucco, Director, Office of External Affairs, (202) 942-1640.

Dated: December 29, 1997.

Roger W. Mehle,

Executive Director, Federal Retirement Thrift Investment Board.

[FR Doc. 97-34223 Filed 12-29-97; 3:10 pm]

BILLING CODE 6760-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

The Office of the Secretary

Information Collection Activity Under Emergency Review by the Office of Management and Budget (OMB)

Title: Correction Notice for Survey of Biomedical Equipment Manufacturers for Year 2000 Compliance

Correction

On December 22, 1997 the Department of Health and Human Services published a document in the Federal Register concerning the survey of biomedical equipment manufacturers for Year 2000 compliance. It is located on page 62 FR 66869. The fourth sentence of the first full paragraph of the second column is incorrect. It reads

“Also, section 518 of the Food, Drug and Cosmetic Act requires notification of users or purchasers when a device presents a reasonable risk of substantial harm to public health.” The sentence should read “Also, section 518 of the Food, Drug and Cosmetic Act requires notification of users and purchasers when a device presents an unreasonable risk of substantial harm to public health.”

Dated: December 23, 1997.

Tom Joyce,

Reports Clearance Officer.

[FR Doc. 97-34079 Filed 12-30-97; 8:45 am]

BILLING CODE 4150-04-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of a Cooperative Agreement With the Association of Hispanic Colleges and Universities

The Office of Minority Health (OMH), Office of Public Health and Science, announces that it will enter into an umbrella cooperative agreement with the Association of Hispanic Colleges and Universities (HACU). This cooperative agreement will establish the broad programmatic framework in which specific projects can be funded as they are identified during the project period.

The purpose of this cooperative agreement is to assist HACU to expand and exchange its activities relevant to health issues affecting the Hispanic community in areas such as development of member colleges and universities, improving access to and the quality of postsecondary educational opportunities for Hispanic students, and meeting the needs of business, industry, health and government through linkages and expertise. It is anticipated that future activities will focus on programs and policies aimed at improving the overall educational and health status of Hispanics in order to eliminate the educational gaps which exist between Hispanics and others. OMH will provide consultation, including administrative and technical assistance as needed, for the execution and evaluation of all aspects of this cooperative agreement. OMH will also participate and/or collaborate with the awardee in any workshops or symposia to exchange current information, opinions, and research findings during this agreement.

Authorizing Legislation

This cooperative agreement is authorized under Section 1707(d)(1) of the Public Health Service Act.

Background

Recognizing the importance of the educational needs of our Nation's Hispanic community, President Clinton signed Executive Order 12900, Educational Excellence for Hispanic Americans, on February 22, 1994. This Executive Order set in motion a process for interagency collaboration to identify and correct the shortcomings of the educational system serving Hispanic Americans. In keeping with the intent of the Executive Order, the Office of Minority Health will enter into a cooperative agreement with HACU.

Assistance will be provided only to the Hispanic Association of Colleges and Universities. HACU is the national association of institutions of higher education representing 127 Hispanic-serving institutions (HSI), specifically nonprofit, accredited colleges and universities where Hispanic students constitute a minimum of 25% of the total enrollment. No other applications are solicited. HACU is the only organization capable of administering this cooperative agreement because it:

1. Developed and established an infrastructure to coordinate and implement various educational program initiatives to support activities of HSIs of higher education;
2. Established the information sharing capability among the HSIs and adapted for the development of policy recommendations for legislators and policy makers in government, corporations, foundations, and the media;
3. Provides technical assistance and other support to member institutions to obtain grants, contracts, and other financial support;
4. Sponsors national workshops, seminars and conferences on topics specific to the concerned institutions, targeting those activities which enhance Hispanic students and aiding their successful graduation rates;
5. Provides a specialized research capability in organizational characteristics and factors which contribute to Hispanic educational success;
6. Established memoranda of understanding (MOUs) with the Department of Commerce, Interior, Transportation, Energy, and Agriculture, as well as with the U.S. Coast Guard, the Federal Aviation Administration, and Bureau of Land Management, thereby creating partnerships with Federal agencies to diversify their work force;
7. Demonstrated experience in assisting Federal agencies to partner with HSIs to operate a National Internship Program for Hispanic college students; and

8. Has extensive experience in managing a Hispanic Education Leadership Fund for Hispanic students.

This cooperative agreement will be awarded in FY 1998 for a 12-month budget period within a project period of 5 years. Continuation awards within the project period will be made on the basis of satisfactory progress and the availability of funds.

Where To Obtain Additional Information

If you are interested in obtaining additional information regarding this project, contact Guadalupe Pacheco, Office of Minority Health, 5515 Security Lane, Suite 1000, Rockville, Maryland 20852 or telephone (301) 443-5084.

Catalogue of Federal Domestic Assistance Number. The CFDA number is 93.004

Dated: December 17, 1997.

Clay E. Simpson, Jr.,

Deputy Assistant Secretary for Minority Health.

[FR Doc. 97-34070 Filed 12-30-97; 8:45 am]

BILLING CODE 4160-17-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of a Cooperative Agreement With the Inter-University Program for Latino Research

The Office of Minority Health (OMH), Office of Public Health and Science, announces that it will enter into an umbrella cooperative agreement with the Inter-University Program for Latino Research (IUPLR). This cooperative agreement will establish the broad programmatic framework in which specific projects can be funded as they are identified during the project period.

The purpose of this cooperative agreement is to assist IUPLR to expand and enhance its activities relevant to health issues affecting the Hispanic community in areas such as health promotion, illness prevention, and health services research, educational, and research training activities. Enhancing the IUPLR research infrastructure and the capacity of affiliated researchers is intended to improve the health status of Hispanics. It is anticipated that future activities will focus on programs and policies aimed at improving the overall health status of Hispanics in order to eliminate health disparities which exist between Hispanics and others. OMH will provide consultation, including administrative and technical assistance as needed, for the execution and evaluation of all aspects of this cooperative agreement. OMH will also participate and/or

collaborate with the awardee in any workshops or symposia to exchange current information, opinions, and research findings during this agreement.

Authorizing Legislation

This cooperative agreement is authorized under Section 1707(d)(1) of the Public Health Service Act.

Background

Assistance will be provided only to the Inter-University Program for Latino Research (IUPLR). No other applications are solicited. Because of its experience and present capacity, IUPLR is the only organization capable of administering this cooperative agreement because it has:

1. Developed, expanded, and manages an infrastructure to conduct health services research with multi-disciplinary teams and program evaluations that deal with Latino health issues.

2. Developed links between the academic research community, community-based organizations, and providers upon which health care intervention, education, and training programs may be developed to reduce morbidity and mortality among populations affected by risk factors associated with poverty, ethnicity, and immigration.

3. Established itself as the key source of multi-disciplinary Latino researchers, interdisciplinary research, and policy analyses.

4. Developed and supports the Society for Latino Health Research composed of the nation's leading experts on health education, disease prevention, health promotion, and health services and social services research aimed at reducing mortality, morbidity, and promoting health behaviors among Latinos and Latino communities.

5. Developed research and policy analyses on factors associated with increased risk of illness and disease, particularly poverty, ethnicity, and immigration.

6. Developed a collaborative network of University based research centers capable of conducting national, regional, and local epidemiological, health outcomes, and other health services research on issues affecting the Latino populations of the United States.

This cooperative agreement will be awarded in FY 1998 for a 12-month budget period within a project period of 5 years. Continuation awards within the project period will be made on the basis of satisfactory progress and the availability of funds.

Where To Obtain Additional Information

If you are interested in obtaining additional information regarding this project, contact Guadalupe Pacheco, Office of Minority Health, 5515 Security Lane, Suite 1000, Rockville, Maryland 20852 or telephone (301) 443-5084.

The Catalogue of Federal Domestic Assistance number of 93.004.

Dated: December 17, 1997.

Clay E. Simpson, Jr.,

Deputy Assistant Secretary for Minority Health.

[FR Doc. 97-34071 Filed 12-30-97; 8:45 am]

BILLING CODE 4160-17-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of a Cooperative Agreement With the National Hispanic Medical Association

The Office of Minority Health (OMH), Office of Public Health and Science, announces that it will enter into an umbrella cooperative agreement with The National Hispanic Medical Association (NHMA). This cooperative agreement will establish the broad programmatic framework in which specific projects can be funded as they are identified during the project period.

The purpose of this cooperative agreement is to assist NHMA to expand and enhance its activities relevant to health issues affecting the Hispanic community in areas such as access to health care, health promotion, disease prevention, medical and health services research, medical student and faculty recruitment, cultural competence curriculum in medical education, and health policy that impacts the medically underserved in the United States. It is anticipated that future activities will focus on programs and policies aimed at improving the overall health status of Hispanics in order to eliminate the health gaps which exist between Hispanics and others. OMH will provide consultation, including administrative and technical assistance as needed, for the execution and evaluation of all aspects of this cooperative agreement. OMH will also participate and/or collaborate with the awardee in any workshops or symposia to exchange current information, opinions, and research findings during this agreement.

Authorizing Legislation

This cooperative agreement is authorized under Section 1707(d)(1) of the Public Health Service Act.

Background

Assistance will be provide only to the NHMA. No other applications are solicited. NHMA is the only organization capable of administering this cooperative agreement because it:

1. Established an infrastructure for a national office.

2. Developed the National Advisory Committee for policy and program direction.

3. Implemented national strategic planning meetings to meet with Hispanic physicians and to discuss their priority issues.

4. Developed and maintains a national database of Hispanic physicians and Hispanic medical residents.

5. Maintains a membership resume bank and speakers bureau.

6. Develops pertinent policy papers addressing Hispanic health issues that affect Hispanic physicians and Hispanic consumers.

7. Conducts annual membership conference to showcase the important roles and expertise of Hispanic physicians in health promotion, service delivery, research, and policy across the United States.

8. Supports a leadership development and mentorship program for medical students and physicians.

9. Supports presentations and participation a major national health conferences.

10. Collaborates and forms partnerships with other organizations that focus on increasing the representation of Hispanics in the medical professions.

11. Maintains active membership in the following coalitions: American Medical Association Minority Physicians Consortium; Association of American Medical Colleges Diversity in the Health Professions Coalition; the Coalition for Hispanic Advancement; the Hispanic Health-Education Coalition; and Americans for a Fair Chance.

12. Maintains a Website and provides Hispanic physicians with a monthly news bulletin.

13. Works to develop cultural competency training for health providers and information on managed care and quality of health care standards.

This cooperative agreement will be awarded in FY 1998 for a 12-month budget period within a project period of

5 years. Continuation awards within the project period will be made on the basis of satisfactory progress and the availability of funds.

Where To Obtain Additional Information

If you are interested in obtaining additional information regarding this project, contact Guadalupe Pacheco, Office of Minority Health, 5515 Security Lane, Suite 1000, Rockville, Maryland 20852 or telephone (303) 443-5084.

The Catalogue of Federal Domestic Assistance number is 93.004.

Dated: December 17, 1997.

Clay E. Simpson, Jr.,

Deputy Assistant Secretary for Minority Health.

[FR Doc. 97-34072 Filed 12-30-97; 8:45 am]

BILLING CODE 4160-17-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

Public Meeting of the Inter-tribal Council on Hanford Health Projects (ICHHP), in Association With the Meeting of the Citizens Advisory Committee on Public Health Service Activities and Research at Department of Energy (DOE) Sites: Hanford Health Effects Subcommittee

The Agency for Toxic Substances and Disease Registry (ATSDR) and the Centers for Disease Control and Prevention (CDC) announce the following meeting.

Name: Public Meeting of the Inter-tribal Council on Hanford Health Projects (ICHHP), in association with the meeting of the Citizens Advisory Committee on Public Health Service Activities and Research at DOE Sites: Hanford Health Effects Subcommittee (HHES).

Time and Date: 9 a.m.-5 p.m., January 14, 1998.

Place: Doubletree Hotel/Jantzen Beach, 909 North Hayden Island Drive, Portland, Oregon 97217, telephone 503/283-4466, fax 503/283-4743.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 50 people.

Background: A Memorandum of Understanding (MOU) was signed in October 1990 and renewed in November 1992 between ATSDR and DOE. The MOU delineates the responsibilities and procedures for ATSDR's public health

activities at DOE sites required under sections 104, 105, 107, and 120 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund"). These activities include health consultations and public health assessments at DOE sites listed on, or proposed for, the Superfund National Priorities List and at sites that are the subject of petitions from the public; and other health-related activities such as epidemiologic studies, health surveillance, exposure and disease registries, health education, substance-specific applied research, emergency response, and preparation of toxicological profiles.

In addition, under an MOU signed in December 1990 with DOE and replaced by an MOU signed in 1996, the Department of Health and Human Services (HHS) has been given the responsibility and resources for conducting analytic epidemiologic investigations of residents of communities in the vicinity of DOE facilities, workers at DOE facilities, and other persons potentially exposed to radiation or to potential hazards from non-nuclear energy production and use. HHS has delegated program responsibility to CDC.

Community involvement is a critical part of ATSDR's and CDC's energy-related research and activities and input from members of the ICHHP is part of these efforts. The ICHHP will work with the HHES to provide input on Native American health effects at the Hanford, Washington, site.

Purpose: The purpose of this meeting is to address issues that are unique to tribal involvement with the HHES, including considerations regarding a proposed medical monitoring program and discussions of cooperative agreement activities designed to provide support for capacity-building activities in tribal environmental health expertise and for tribal involvement in HHES.

Matters To Be Discussed: Agenda items will include a dialogue on issues that are unique to tribal involvement with the HHES. This will include exploring cooperative agreement activities in environmental health capacity building and providing support for tribal involvement in and representation on the HHES.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Jim Carpenter, Public Health Advisor, ATSDR, E-32, 1600 Clifton Road, NE, Atlanta, Georgia 30333, telephone 404/639-6027, fax 404/639-4699.

Dated: December 19, 1997.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 97-34044 Filed 12-30-97; 8:45 am]

BILLING CODE 4163-70 P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

Citizens Advisory Committee on Public Health Service Activities and Research at Department of Energy (DOE) Sites: Hanford Health Effects Subcommittee

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Agency for Toxic Substances and Disease Registry (ATSDR) and the Centers for Disease Control and Prevention (CDC) announce the following meeting.

Name: Citizens Advisory Committee on Public Health Service Activities and Research at DOE Sites: Hanford Health Effects Subcommittee (HHES).

Times and Dates: 9 a.m.-5 p.m., January 15, 1998; 6:30 p.m.-8:30 p.m., January 15, 1998; 8 a.m.-3 p.m., January 16, 1998.

Place: Doubletree Hotel/Jantzen Beach, 909 North Hayden Island Drive, Portland, Oregon 97217, telephone 503/283-4466, fax 503/283-4743.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 150 people.

Background: A Memorandum of Understanding (MOU) was signed in October 1990 and renewed in November 1992 between ATSDR and DOE. The MOU delineates the responsibilities and procedures for ATSDR's public health activities at DOE sites required under sections 104, 105, 107, and 120 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund"). These activities include health consultations and public health assessments at DOE sites listed on, or proposed for, the Superfund National Priorities List and at sites that are the subject of petitions from the public; and other health-related activities such as epidemiologic studies, health surveillance, exposure and disease registries, health education, substance-specific applied research, emergency response, and preparation of toxicological profiles.

In addition, under an MOU signed in December 1990 with DOE and replaced by an MOU signed in 1996, the Department of Health and Human Services (HHS) has been given the responsibility and resources for conducting analytic epidemiologic investigations of residents of communities in the vicinity of DOE facilities, workers at DOE facilities, and other persons potentially exposed to radiation or to potential hazards from non-nuclear energy production and use. HHS has delegated program responsibility to CDC.

Purpose: This subcommittee is charged with providing advice and recommendations to the Director, CDC, and the Administrator, ATSDR, regarding community, American Indian tribes, and labor concerns pertaining to CDC's and ATSDR's public health activities and research at this DOE site. Activities shall focus on providing a forum for community, American Indian Tribal, and

labor interaction and serve as a vehicle for community concern to be expressed as advice and recommendations to CDC and ATSDR.

Matters To Be Discussed: Agenda items include: ATSDR's proposed medical monitoring program, ATSDR's planning for an exposure subregistry program, and solicitations of subcommittee concerns to be addressed by ATSDR and CDC. There will also be updates from the Inter-tribal Council on Hanford Health Projects, and reports from the following Work Groups: Outreach/Special Populations, Public Health Activities, and Health Studies.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Jim Carpenter, Public Health Advisor, ATSDR, E-32, 1600 Clifton Road, NE, Atlanta, Georgia 30333, telephone 404/639-6027, fax 404/639-4699.

Dated: December 19, 1997.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 97-34045 Filed 12-30-97; 8:45 am]

BILLING CODE 4163-70-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Advisory Committee Meeting; Amendment of Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an amendment to the notice of meeting of the Orthopaedic and Rehabilitation Devices Panel of the Medical Devices Advisory Committee. This meeting was announced in the **Federal Register** of December 15, 1997. The amendment is being made to reflect a change in the agenda and procedure which will change the order of reclassification petitions being presented to the committee and will also change the order of the open public hearings associated with each petition. There are no other changes. This amendment will be announced at the beginning of the open portion of the meeting.

FOR FURTHER INFORMATION CONTACT: Jodi H. Nashman, Center for Devices and Radiological Health (HFZ-410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301-594-2036, or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-5072 in the Washington, DC area), code 12521.

Please call the Information Line for up-to-date information on this meeting.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of December 15, 1997 (62 FR 65709), FDA announced that a meeting of the Orthopaedic and Rehabilitation Devices Panel of the Medical Devices Advisory Committee would be held on January 12 and 13, 1998. On page 65709, beginning in the 3d column, the *Agenda* and *Procedure* portions are amended to read as follows:

Agenda: On January 12, 1998, the committee will discuss and make recommendations for reclassification petitions for non- and semi-constrained shoulders and constrained elbows. On January 13, 1998, the committee will discuss and make recommendations for reclassification petitions for patellofemoral knees and uni- and total patellofemorotibial knees, and for classification of calcium sulfate pre-formed pellets (plaster of paris pellets).

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by January 5, 1998. Oral presentations from the public regarding reclassification petitions for non- and semi-constrained shoulders and constrained elbows will be scheduled between approximately 11 a.m. and 12 m. on January 12, 1998. Oral presentations from the public regarding reclassification petitions for patellofemoral knees and uni- and total patellofemorotibial knees, as well as for classification of calcium sulfate pre-formed pellets (plaster of paris pellets) will be scheduled between approximately 7:30 a.m. and 8:30 a.m. on January 13, 1998. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person by January 5, 1998, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: December 24, 1997.

Michael A. Friedman,

Deputy Commissioner for Operations.

[FR Doc. 97-34058 Filed 12-24-97; 10:56 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Eye Institute; Meeting**

Notice of the Meeting of the National Advisory Eye Council Pursuant to Pub. L. 92-463, notice is hereby given of the meeting of the National Advisory Eye Council (NAEC) on January 29, 1998, Executive Plaza North, Conference Room G, 6130 Executive Boulevard, Bethesda, Maryland.

The NAEC meeting will be open to the public on January 29 from 8:30 a.m. until approximately 11:30 a.m. Following opening remarks by the Director, NEI, there will be presentations by the staff of the Institute and discussions concerning Institute programs and policies. Attendance by the public at the open session will be limited to space available.

In accordance with provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. and sec. 10(d) of Public Law 92-463, the meeting of the NAEC will be closed to the public on January 29 from approximately 11:30 a.m. until adjournment at approximately 5:00 p.m. for the review, discussion, and evaluation of individual grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Lois DeNinno, Council Assistant, National Eye Institute, EPS, Suite 350, 6120 Executive Boulevard, MSC-7164, Bethesda, Maryland 20892-7164, (301) 496-9110, will provide a summary of the meeting, roster of committee members, and substantive program information upon request. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. DeNinno in advance of the meeting.

(Catalog of Federal Domestic Assistant Program No. 93.867, Vision Research: National Institutes of Health)

Dated: December 23, 1997.

LaVeen Ponds,

Acting Committee Management Officer, NIH.
[FR Doc. 97-34022 Filed 12-30-97; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute on Alcohol Abuse and Alcoholism; 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:

Purpose/Agenda: To review and evaluate grant applications.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel.

Date of Meeting: January 9, 1998 (Telephone Conference).

Time: 11:00 a.m. to adjournment.

Place of Meeting: Wilco Building, 6000 Executive Boulevard, Suite 409, Rockville MD 20892-7003.

Contact Person: Sean O'Rourke, 6000 Executive Boulevard, Suite 409, Rockville MD 20892-7003, 301-443-2861.

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. The proposal and discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the proposal, 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. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; and 93.891, Alcohol Research Center Grants; National Institutes of Health).

Dated: December 23, 1997.

LaVeen Ponds,

Acting Committee Management Officer, NIH.
[FR Doc. 97-34023 Filed 12-30-97; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4263-N-64]

Notice of Proposed Information Collection for Public Comment Consolidated Planning

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of proposed information collection for public comments.

SUMMARY: The proposed information collection requirements for Consolidated Planning for Community Planning and Development (CPD) programs described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments Due:

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Sheila E. Jones, Department of Housing and Urban Development, 451 7th Street, SW, Room 7230, Washington, D.C. 20410.

FOR FURTHER INFORMATION CONTACT: Sal Sclafani, Acting Director, Policy Division 202-708-0614, ex. 4364.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35 as amended). As required under 5 CFR 1320.8(d)(1), HUD and OMB are seeking comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information submission of responses.

Title of Proposal: Consolidated Plan.
Description of the Need for the Information and Proposed Uses: The Information is needed to provide HUD

with preliminary assessment as to the statutory and regulatory eligibility of proposed grantee projects. A secondary need is informing citizens of intended uses for program funds.

Agency Form Numbers (if applicable):

The Department's collection of this information is in compliance with statutory provisions of the Cranston-Gonzalez National Affordable Housing Act of 1990 that requires the participating jurisdictions submit a Comprehensive Housing Affordability Strategy (Section 216(5)), the 1974

Housing and Community Development Act, as amended, that requires states and localities to submit a Community Development Plan (Section 104(b)(4) and Section 104(b)(m) and statutory provisions of these Acts that require states and localities to submit applications for these formula grant programs.

Members of the Affected Public: State and local governments participating in the Community development Block Grant Program (CDBG), the HOME Investment Partnerships (HOME) program, the Emergency Shelter Grants (ESG) program, or the Housing

Opportunities for Persons with AIDS/HIV (HOPWA) program.

Since the original approval of the Consolidated Planning paperwork reduction estimate in 1995 (OMB Control Number 2506-0117), additional localities have qualified for assistance under the Community Development Block Grant (CDBG) program, thus increasing the overall burden calculation. Additionally, this submission includes paperwork estimates associated with narrative information required by the Consolidated Annual Performance and Evaluation Report. Reporting on annual

performance was not included in the original Consolidated Plan paperwork estimate that was submitted to OMB. There have been several minor regulatory changes made to existing CDDBG regulations and those for the HOME Investment Partnerships (HOME) program which have resulted in a slight increase in overall burden hour calculations. Each of these regulatory changes have been submitted for comment in the National Register and to OMB independently.

The revised paperwork estimates are as follows:

Task	Number of respondents	Frequency of response	Total U.S. burden hours
Consolidated Plan:			
Localities	1,000	1	316,025
States	50	1	47,950
Performance Report:			
Localities	1,000	1	100,000
States	50	1	12,000
Total			475,975

Status of the proposed information collection: Reinstatement, with minor changes or a previously approved collection for which approval is near expiration and the request for OMB approval's for three years. The current OMB approval expires March 31, 1998.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 23, 1997.

Fred Karnas, Jr.,

Deputy Assistant Secretary for Economic Development.

[FR Doc. 97-34082 Filed 12-30-97; 8:45 am]

BILLING CODE 4210-29-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4263-N-65]

Notice of Proposed Information Collection for Public Comment

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due: March 2, 1998.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 8226, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Judson James at 202-708-1336, x130 (this is not a toll-free number) for copies of the proposed data collection instruments and other available documents.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

The Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including

through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Evaluation of the Fair Housing Election Process.

Description of the need for the information and proposed use: The information collected is part of an evaluation that will help the Department assess the decision made by complainants to elect to pursue their Title VIII complainant either through the administrative process provided by HUD or by going to federal courts. Interviews with complainants and respondents will be used to determine the reasons for the choice made and its consequences for the resolution of the complaint. Evaluation results will be used by the Office of the Administrative Judge and other HUD officials interested in improving the effectiveness of the administrative processing the Title VIII complaints.

Telephone interviews will be conducted with a sample of 500 complainants and 500 respondents in the 1,250 most recent Title VIII cases subject to the election process.

Members of affected public: Individuals who are principal participants in recent Title VIII cases will be interviewed as part of this data collection effort.

Estimation of the total numbers of respondents, frequency of response, and hours needed to prepare the information collection including number of hours of response:

Interview respondents	Number of respondents	Responses per respondent	Minutes per respondent	Total burden hours
Complainants	500	1	30	250
Respondents	500	1	24	200
Total	1,000	.....	.....	450

Status of the proposed information collection: Awaiting OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 18, 1997.

Paul A. Leonard,

Deputy Assistant Secretary for Policy Development.

[FR Doc. 97-34084 Filed 12-30-97; 8:45 am]

BILLING CODE 4210-62-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4170-N-16]

Notice of Submission of Proposed Information Collection to OMB

AGENCY: Office of Public and Indian Housing—HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below had been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department has already solicited public comments on the subject proposal.

DATES: The due date for comments is January 7, 1998.

ADDRESSES: Interested persons were invited to submit comments regarding this proposal. Comments must be received within seven (7) days from the date of this Notice. Comments should refer to the proposal by name and should be sent to: Joseph F. Lackey, Jr., HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Reports Management Officer, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, telephone (202) 708-0050. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Weaver.

SUPPLEMENTARY INFORMATION: This Notice informs the public that the Department of Housing and Urban Development (HUD) has submitted to OMB, for emergency processing, an information collection package with respect to proposed Indian Housing Plan (IHP) form for the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA).

On October 26, 1996, the President signed into law the NAHASDA, which streamlines the process of providing housing assistance to Native Americans. Specifically, it eliminates several separate programs of assistance and replaces them with a single block grant program, effective October 1, 1997.

The collection of information being requested is necessary so that the Secretary shall allocate any amounts made available for assistance under this Act for the future fiscal years, in accordance with the formula established pursuant to section 302, among Indian tribes that comply with the requirements under this Act for a grant under this Act.

These forms meet the minimum requirements for an IHP required by the United States Department of Housing and Urban Development. To be eligible for grants, respondents must submit the IHP which meets the minimum requirements of the NAHASDA. IHPs originally had a submission deadline of November 3, 1997. On October 1, 1997, the NAHASDA legislation became effective. The Department concluded that new IHP submission dates were needed to enable tribes/tribally designated housing entities (TDHEs) additional time to formulate their plan to comply with NAHASDA requirements. Language in the transition notice advises all tribes/TDHEs that an IHP can be submitted no earlier than the publication of the final regulations implementing NAHASDA and no later than July 1, 1998.

Additionally, seven comments were received on the paperwork requirements for the NAHASDA IHP and were submitted to the NAHASDA Negotiated Rulemaking Committee. The Committee

reviewed these comments and the Department streamlined the IHP forms per these suggestions and eliminated requirements that were determined to be unnecessary for submission of a tribe's plan.

The Department has submitted the proposal for the collection of information to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35). The Department has requested emergency clearance of the collection of information, as described below, with approval being sought by January 12, 1998.

(1) Title of the information collection proposal: Indian Housing Plan (IHP) form.

(2) Summary of the collection of information.

5-Year Plan

For an Indian tribe to receive funding they must submit to the Secretary, for each fiscal year, a housing plan which shall be in a form prescribed by the Secretary and shall contain, with respect to the 5-year period beginning without the fiscal year for which the plan is submitted, the following information:

(A) Mission Statement—A general statement for the mission of the Indian tribe to serve the needs of the low-income families in the jurisdiction of the Indian tribe during the period.

(A) Goals and Objectives—A statement of the goals and objectives of the Indian tribe to enable the tribe to serve the needs identified in paragraph (1) during the period.

(B) Activities Plan—An overview of the activities planned during the period including an analysis of the manner in which the activities will enable tribe to meet its mission, goals, and objectives.

1-Year Plan

For an Indian tribe to receive funding they must submit to the Secretary, for each fiscal year, a housing plan which shall be in a form prescribed by the Secretary and shall contain, the following information relating to the upcoming fiscal year for which

assistance under this Act is to be made available:

(A) Goals and Objectives—A statement of the goals and objectives of the Indian tribe to enable the tribe to serve the needs identified in paragraph (1) during the period.

(B) Statement of Needs—A statement of the housing needs of the low-income Indian families residing in the jurisdiction of the Indian tribe and the means by which such needs will be addressed during the period.

(C) Financial Resources—An operating budget for the recipient, in a form prescribed by the Secretary.

(D) Affordable Housing Resources—A statement of the affordable housing resources currently available and to be made available during the period.

(E) Certification of Compliance—Evidence of compliance which shall include certification that the recipient will comply with title II of the Civil Rights Act of 1968 in carrying out this Act and other applicable Federal statutes; certification that the recipient will maintain adequate insurance coverage for housing units; certification that eligibility, admission and occupancy policies are in effect; certification that policies are available for review by the Secretary and the public governing the management and maintenance of housing assisted with grant amounts provided under this Act.

(3) Description of the need for the information and its proposed use: The IHP describes how the tribe will implement its affordable housing activities. The Secretary shall conduct a limited review of each IHP submitted to the Secretary to ensure that the plan complies with the requirements of section 102 of the Act. The Secretary shall have the discretion to review a plan only to the extent that the Secretary considers review is necessary.

All federally recognized tribes or State recognized tribes are eligible to apply for NAHASDA funding. The estimated number of respondents is 400. The proposed frequency of the response to the collection is one time. A plan under this section may cover more than 1 Indian tribe, but only if the certification requirements under section 102(d)—Participation of Tribally Designated Housing Entity, are complied with by each such grant beneficiary covered. (5) Estimate of the total reporting and record keeping burden that will result the collection of information:

Reporting Burden: Number of respondents: 400.

Total burden hours (@400 per response): 42,000.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated December 23, 1997.

David S. Cristy,

Director, IRM Policy and Management Division.

[FR Doc. 97-34083 Filed 12-30-97; 8:45 am]

BILLING CODE 4210-33-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM-070-1320-01; NMNM 3752, NMNM 3753, NMNM 3754, NMNM 3755, NMNM 3835, NMNM 3837, NMNM 3918, NMNM 3919, NMNM 6802, NMNM 7235, and NMNM 8745]

Notice of Coal Action, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability, Record of Decision (ROD) for the Ark Land Company Preference Right Lease Applications (PRLA's) San Juan County, New Mexico.

SUMMARY: The PRLA process requires that ROD be made available to the public. The ROD is the document announcing the BLM's decision regarding PRLA commercial quantities determinations. This action establishes the availability of the ROD for Ark Land Company's PRLA's.

Copies of the ROD can be obtained at the New Mexico State Office, Bureau of Land Management, P.O. Box 27115, Santa Fe, New Mexico 87502-0115.

Dated: December 19, 1997.

Robert E. Armstrong,

Acting DSD, Resource Planning, Use, and Protection.

[FR Doc. 97-34027 Filed 12-30-97; 8:45 am]

BILLING CODE 4310-FB-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK-931-1310-00-NPRA]

Northeast National Petroleum Reserve-Alaska Draft Integrated Activity Plan/ Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of additional public hearings.

SUMMARY: The Bureau of Land Management announces two additional public hearings for the purpose of gathering public testimony regarding the Northeast National Petroleum Reserve-Alaska Draft Integrated Activity Plan/

Environmental Impact Statement (IAP/EIS), and its effects on subsistence.

DATES:

January 17, 1998, 7:30 p.m., Robert James Community Center, Wainwright, Alaska
January 28, 1998, 3:00 p.m. and 7:00 p.m., Holiday Inn, Financial District, 750 Kearny Street, San Francisco, California

FOR FURTHER INFORMATION CONTACT:

Gene Terland (907-271-3344; gterland@ak.blm.gov) or Jim Ducker (907-271-3369; jducker@ak.blm.gov). They can be reached by mail at the Bureau of Land Management (930), Alaska State Office, 222 West 7th Avenue, Anchorage, Alaska 99513-7599.

SUPPLEMENTARY INFORMATION: The Bureau of Land Management published a Notice of Availability for the IAP/EIS on December 12, 1997 (62 CFR 65440, December 12, 1997). That Notice indicates that public hearings will be held in seven locations. The Bureau of Land Management has since received requests from the public for additional meetings, and this announcement provides notice of two additional meetings.

Dated: December 22, 1997.

Gene R. Terland,

Acting Associate State Director.

[FR Doc. 97-34048 Filed 12-30-97; 8:45 am]

BILLING CODE 4310-JA-P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Central Valley Project Improvement Act, California

AGENCY: Bureau of Reclamation, Department of the Interior.

ACTION: Notice of extension of time for review of draft programmatic environmental impact statement (DPEIS).

SUMMARY: The Bureau of Reclamation (Reclamation) is extending the public review period to April 17, 1998, for the DPEIS for the Central Valley Project Improvement Act (CVPIA). The notice of availability for the DPEIS was published in the **Federal Register** on November 7, 1997 (62 FR 60266). The public review period was originally to end on February 6, 1998.

DATES: Public comments on the DPEIS should be submitted on or before April 17, 1998. There will be two sets of public meetings on the DPEIS: forums and hearings. The forums will be information meetings designed to assist

the public in understanding the DPEIS. The hearings will be to receive comments on the DPEIS. The public hearing identified for January 7 through 15, 1998, in the original **Federal Register** notice will be changed to public forums. Formal comments on the DPEIS for the administrative record will not be taken at these meetings. The forum dates and locations are:

- January 7, 1998, at 7:00 p.m. at the Elks Lodge, 355 Gilmore Road, Red Bluff, California
- January 8, 1998, at 7:00 p.m. at the Tradewinds Lodge, 400 South Main Street, Fort Bragg, California
- January 13, 1998, at 7:00 p.m. at the Holiday Inn, 2233 Ventura Street, Fresno, California
- January 14, 1998, at 7:00 p.m. at the Oakland Federal Building, 1301 Clay Street, Oakland, California
- January 15, 1998, at 7:00 p.m. in the Yosemite Room at the Sacramento Inn, 1401 Arden Way, Sacramento, California

The NEW dates for public hearings to receive comments on the DPEIS will be held:

- April 1, 1998, at 7:00 p.m. at the Elks Lodge, 355 Gilmore Road, Red Bluff, California
- April 2, 1998, at 7:00 p.m. at the Tradewinds Lodge, 400 South Main Street, Fort Bragg, California
- April 7, 1998, at 7:00 p.m. at the Airport Holiday Inn, 5090 East Clinton Street, Fresno, California
- April 8, 1998, at 2:00 p.m. at the Oakland Federal Building, 1301 Clay Street, Oakland, California
- April 9, 1998, at 7:00 p.m. in the Sierra Room at the Sacramento Inn, 1401 Arden Way, Sacramento, California

ADDRESSES: Written comments on the DPEIS should be addressed to Mr. Alan Candlish, Bureau of Reclamation, MP-120, 2800 Cottage Way, Sacramento CA 95825. Request for either a computer diskette or printed copy of the DPEIS should be addressed to Ms. Alisha Sterud, Bureau of Reclamation, MP-120, 2800 Cottage Way, Sacramento CA 95825. Her telephone number is (916) 978-5190.

FOR FURTHER INFORMATION CONTACT: If requesting a copy of the DPEIS, contact Ms. Alisha Sterud at Bureau of Reclamation, MP-120, 2800 Cottage Way, Sacramento CA 95825, or by telephone at (916) 978-5190. For additional information, contact Mr. Alan Candlish at Bureau of Reclamation, MP-120, 2800 Cottage Way, Sacramento CA 95828, or by telephone at (916) 978-5190.

Dated: December 18, 1997.

Kirk C. Rodgers,

Deputy Regional Director.

[FR Doc. 97-34119 Filed 12-30-97; 8:45 am]

BILLING CODE 4310-94-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-398]

Certain Multiple Implement, Multi-Function Pocket Knives and Related Packaging and Promotional Material; Notice of Commission Determination Not To Review An Initial Determination Terminating the Investigation Based on Withdrawal of the Complaint

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (ID) terminating the above-captioned investigation on the basis of complainants' withdrawal of their complaint.

FOR FURTHER INFORMATION CONTACT: Rhonda M. Hughes, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-205-3083.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 27, 1997, based on a complaint filed by Swiss Army Brands, Inc., Swiss Army Brand Ltd. (SAB), and Precise Imports Corporation d/b/a Precise International. Six firms were named as respondents, viz., Arrow Trading Co., Inc. of New York; International Branded Cutlery Inc. of New York; Ewins Hardware Pte. Ltd. of Singapore; Thomas Jewelers of Utah; China Light Industrial Products Import and Export Co. of China; and Sapp Brothers of Nebraska.

On November 25, 1997, the presiding administrative law judge (ALJ) issued an ID (Order No. 10) granting complainants' motion to withdraw the complaint and terminate the investigation. On December 3, 1997, respondents filed a petition for review of the ID. On December 10, 1997, complainants and the Commission investigative attorney filed responses to the petition for review.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, and Commission rule 210.42, 19 CFR § 210.42 (1997).

Copies of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, DC 20436, telephone 202-205-2000. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov> or <ftp://ftp.usitc.gov>).

Issued: December 23, 1997.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 97-34034 Filed 12-30-97; 8:45 am]

BILLING CODE 7020-02 P

INTERNATIONAL TRADE COMMISSION

Titanium Sponge From Japan, Kazakstan, Russia and Ukraine

AGENCY: United States International Trade Commission (Commission).

ACTION: Request for comments regarding the institution of section 751(b) review investigations concerning the U.S. Tariff Commission's affirmative determination in investigation No. AA1921-51, *Titanium Sponge from the U.S.S.R.*, to the extent it applies to imports from Kazakstan, Russia, and Ukraine, and the Commission's affirmative determination in investigation No. 731-TA-161, *Titanium Sponge from Japan*.

SUMMARY: The Commission invites comments from the public on whether changed circumstances exist sufficient to warrant the institution of investigations pursuant to section 751(b) of the Tariff Act of 1930 (19 U.S.C. § 1675(b)) (the Act), as amended by the Uruguay Round Agreements Act, P.L. 103-465 (1994), to review the affirmative determinations of the Commission and the U.S. Tariff Commission in the above investigations.¹ The purpose of the proposed review investigations is to determine whether revocation of the existing antidumping orders on imports of titanium sponge from Japan, Kazakstan, Russia, and Ukraine is likely to lead to continuation or recurrence of material injury. 19 U.S.C.

¹ The U.S. Tariff Commission was the predecessor agency to the Commission.

§ 1675(b)(2)(A). Titanium sponge is provided for in subheading 8108.10.50 of the Harmonized Tariff Schedule of the United States.

FOR FURTHER INFORMATION CONTACT: Jonathan Seiger (202-205-3183) or Vera Libeau (202-205-3176), Office of Investigations, U.S. International Trade Commission, 500 E Street S.W., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the Commission may also be obtained by accessing its internet server (<http://www.usitc.gov> or <ftp://ftp.usitc.gov>).

SUPPLEMENTARY INFORMATION:

Background

On July 23, 1968, in investigation No. AA1921-51, the U.S. Tariff Commission issued an affirmative injury determination with respect to imports of titanium sponge from the U.S.S.R.. Subsequently, the Department of the Treasury (Treasury) issued an antidumping finding covering these imports (33 FR 12138, Aug. 28, 1968).² On November 7, 1984, in inv. No. 731-TA-161, the Commission issued an affirmative threat of injury determination with respect to imports of titanium sponge from Japan. Commerce issued an antidumping order covering these imports on November 30, 1984 (49 FR 47053, Nov. 30, 1984).

On December 9, 1997, the Commission received a request to review its affirmative determinations, as it applied to imports from Russia, in the light of changed circumstances (the request), pursuant to section 751(b) of the Act (19 U.S.C. § 1675(b)). The request was filed by counsel on behalf of TMC Trading International, Ltd., an Irish trading company involved in the distribution of titanium sponge from Russia, and TMC USA, Inc., its U.S. affiliate. The alleged changed circumstances include: (1) the different market position of the U.S. industry currently, as opposed to its position at the time of the finding; (2) the decision

by the U.S. industry to refocus its investment capital away from titanium sponge capacity towards titanium melt and fabricating capacity; (3) the cessation of titanium sponge production by the original petitioner; (4) the redirection of demand for titanium sponge away from military applications toward commercial and aerospace applications; (5) evidence that demand for titanium sponge is expected to remain strong for at least the next two to three years, and possibly as long as five years; (6) significant declines in titanium sponge capacity in the republics of the former Soviet Union generally, and particularly in Russia, which is the republic covered by the order in question, and; (7) the elimination of dumping margins on imports from Russia.

Because the alleged changed circumstances predominantly relate to the domestic industry and are not limited to imports from Russia, submissions should also address the possibility of the Commission self-initiating reviews of the outstanding orders on Japan (49 F.R. 47053, Nov. 30, 1984), Kazakstan (33 FR 12138, Aug. 28, 1968), and Ukraine (33 FR 12138, Aug. 28, 1968).

Written Comments Requested

Pursuant to section 207.45(b) of the Commission's Rules of Practice and Procedure (19 CFR 207.45(b)), the Commission requests comments concerning whether the alleged changed circumstances are sufficient to warrant institution of review investigations.

Written Submissions

In accordance with section 201.8 of the Commission's rules (19 CFR 201.8), the signed original and 14 copies of all written submissions must be filed with the Secretary to the Commission, 500 E Street, S.W., Washington, DC 20436. All comments must be filed no later than February 6, 1998, which is at least 30 days after the date of publication of this notice in the **Federal Register**. The Commission's determination regarding initiation of a review investigation is due within 30 days of the close of the comment period. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request business confidential treatment under section 201.6 of the Commission's rules (19 CFR 201.6). Such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. Each sheet must be clearly marked at the top "Confidential Business Information." The Commission

will either accept the submission in confidence or return it. All nonconfidential written submissions will be available for public inspection in the Office of the Secretary.

Copies of the non-confidential version of the request and any other documents in this matter are available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary to the Commission; telephone 202-205-2000.

Issued: December 23, 1997.

By order of the Commission.

Donna R. Koehnke,
Secretary.

[FR Doc. 97-34033 Filed 12-30-97; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF JUSTICE

President's Advisory Board on Race

ACTION: President's Advisory Board on Race; notice of meeting.

SUMMARY: The President's Advisory Board on Race will meet on January 13 and 14, 1998, in Phoenix, Arizona at a site or sites to be determined. The morning meeting on January 13, 1998 will start at approximately 10:00 a.m. and will end at approximately 1:00 p.m. The agenda will include a meeting of corporate and labor leaders, as well as other employee representatives, to discuss the experiences and challenges associated with race in the workplace. The events on the first day will also include visits of Advisory Board members to local Promising Practices in the area of employment. The events on January 13th will conclude with a meeting with regional representatives of American Indian tribes that will start at approximately 5:00 p.m. and end at approximately 7:00 p.m.

On January 14, 1997 the meeting will begin at approximately 9:00 a.m. and will end at approximately 6:00 p.m. The meeting will focus attention on existing racial disparities in employment and ensuring economic opportunities for all Americans.

The meetings will be open to public on a first-come, first-seated basis. Interested persons are encouraged to attend. Members of the public will be provided an opportunity to make comments at the meeting on January 14th. Members of the public may also submit to the contact person, any time before or after the meeting, written statements to the Board. Written comments may be submitted by mail, telegram or facsimile, and should contain the writer's name, address and

²In 1992, the Department of Commerce (Commerce), in response to the division of the former Soviet Union into 15 independent states, changed the original antidumping finding against the U.S.S.R. to 15 separate antidumping orders covering the Baltic states and the republics of the former Soviet Union (57 F.R. 36070 (1992)). Commerce has since revoked all of the orders except those on imports from Kazakstan, Russia, and Ukraine.

commercial, government, or organizational affiliation, if any.

FOR FURTHER INFORMATION:

Contact our main office number, (202) 395-1010, for the exact location of the meetings. Other comments or questions regarding this meeting may be directed to Randy Ayers, (202) 395-1010, or via facsimile, (202) 395-1020.

Dated: December 24, 1997.

Robert Wexler,

General Counsel.

[FR Doc. 97-34141 Filed 12-30-97; 8:45 am]

BILLING CODE 4410-AR-M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

December 22, 1997.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in

accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. Chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor, Departmental Clearance Officer, Todd R. Owen ((202) 219-5096 ext. 143) or by E-Mail to Owen-Todd@dol.gov. Individuals who use a telecommunications device for the deaf (TTY/TDD) may call (202) 219-4720 between 1:00 p.m. and 4:00 p.m. Eastern time, Monday-Friday.

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for BLS, DM, ESA, ETA, MSHA, OSHA, PWBA, or VETS, Office of Management and Budget, Room 10235, Washington, DC 20503 ((202) 395-7316), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Mine Safety and Health Administration.

Title: Ventilation Plans, Tests and Examinations in Underground Coal Mines.

OMB Number: 1219-0088 (Extension, with change).

Affected Public: Businesses or other for profit; small businesses or organizations.

Cite/reference	Total respondents	Frequency	Total responses	Average time per response	Burden
75.310	980	Weekly	64,512	7 minutes	7,523
75.312	1,003	Daily	1,293	.24485 minutes	99,739
75.321(c)(d)	980	Monthly	11,760	.3325 minutes	3,920
75.312(g)	620	On occasion	7,440	5 minutes	620
75.312(g)(2)(ii)	23	On occasion	276	10 minutes	46
75.342	980	Monthly	27,612	.1669 minutes	4,610
75.351(h)	60	Monthly	1,560	3.836	5,984
75.360	980	On occasion	448,490	3.279 hrs	1,470,667
75.361	980	On occasion	15,000	30 minutes	7,500
75.362	980	On occasion	864,535	.7434 minutes	642,744
75.363	980	On occasion	76,700	.1333 minutes	10,224
75.364	980	On occasion	44,740	9.1837 hours	410,878
75.370	980	On occasion	1,878	20.355 hours	38,226
75.382	300	Weekly	15,000	1 hour	15,000
Totals .....	.....	.....	2,262,566	1.20376 hours	2,717,687

Total Burden Cost (capital/startup): 0.

Total Burden Cost (operating/maintaining): \$194,256.

Requires operators of underground coal mines to keep records of the results of certain tests and examinations which are required to be performed to monitor the ventilation system. The information is used to insure that the integrity of the ventilation system is being maintained and that a safe working environment is being provided to miners.

Todd R. Owen,

Departmental Clearance Officer.

[FR Doc. 97-33693 Filed 12-30-97; 8:45 am]

BILLING CODE 4510-43-M

NATIONAL SCIENCE FOUNDATION

Notice of Permit Modification Request Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit modification request received under the Antarctic Conservation Act of 1978, P.L. 95-541.

SUMMARY: Notice is hereby given that the National Science Foundation (NSF) has received a request to modify a permit issued to conduct activities regulated under the Antarctic Conservation Act of 1978 (Public Law 95-541; Code of Federal Regulations Title 45, Part 670).

DATES: Interested parties are invited to submit written data, comments, or vies with respect to the permit modification on or before January 30, 1998. The permit modification request may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia, 22230.

FOR FURTHER INFORMATION CONTACT: Joyce A. Jatko or Nadene G. Kennedy at the above address or (703) 306-1030.

Description of Permit Modification Requested

1. On December 27, 1996, the National Science Foundation issued a permit (97WM-4) to Dr. Rennie S. Holt at the National Oceanic and Atmospheric Administration's (NOAA) Antarctic Marine Living Resources (AMLR) Program after posting a notice in the November 21, 1996 **Federal Register**. Public comments were not received. The issued permit was for the use and release of designated pollutants associated with the construction and operation of a research field camp at Camp Shirreff, Livingston Island, Antarctica (62°28'S60°47'W). During the first season at Cape Shirreff, only limited research activities were conducted as most of the effort was focused on camp construction. In the coming seasons, the AMLR Program proposes to expand research activities, providing a more comprehensive research program. One project of this expanded program proposes to use the doubly labeled water (tritiated and oxygen-18) method to measure the free-ranging foraging energetics of Antarctic fur seals (*Arctocephalus gazella*). Use of tritium labeled water was not included in the original permit request. The scope of this application for a permit modification pertains to waste management issues involved with the use and handling of the radioactive isotope tritium. The duration of the requested modification is coincident with the current permit which expires on April 30, 2001.

All radioisotope materials will be handled only by researchers trained in their proper handling and use. For each season it is anticipated that approximately 55 mCi ³H₂O will be used for research purposes. All wastes generated from the research activities will be double bagged, packaged in appropriate containers lined with absorbent pads, and will be returned to the University of California Environmental Health and Safety Office, Santa Cruz for disposal. Conditions of the permit modification would include an annual report of all activities involving the tritium and a declaration by the institutional radiation safety officer that all materials returned from the Antarctic have been received.

Joyce A. Jatko,

Acting Permit Officer.

[FR Doc. 97-34038 Filed 12-30-97; 8:45 am]

BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to Pub. L. 97-415, the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. Pub. L. 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 December 6, 1997, through December 18, 1997. The last biweekly notice was published on December 17, 1997 (62 FR 66133).

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 30, 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.

Untimely 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 26, 1997.

Description of amendments request:
Carolina Power & Light Company (CP&L) has proposed amendments to the Technical Specifications (TS) for the Brunswick Steam Electric Plant Units 1 and 2 (BSEP 1 & 2) to revise certain instrumentation allowable values. The revised values were calculated using a methodology and format consistent with that provided in NUREG-1433, Revision 1, "Standard Technical Specifications General Electric Plants, BWR/4." The current TS are based on the uncertainty associated with the trip unit portion of the instrumentation circuitry. The proposed values are based on the uncertainty associated with the entire instrumentation loop (sensor and trip unit). The NRC has previously approved this methodology for BSEP 1 & 2 as part of a 5 percent power uprate amendment dated November 1, 1996.

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 affect accident mitigation instrumentation allowable values. The changes will not affect the accident mitigation instrumentation functions. No changes will occur in the way in which equipment is operated. Therefore, the probability of a previously evaluated accident can not be affected.

The proposed changes establish the allowable values for certain functions in accordance with the CP&L setpoint methodology, which has been approved, by the NRC, for use at the BSEP. The proposed changes do not affect the actual instrument setpoints. The proposed allowable values were calculated by applying calibration based errors to the trip setpoint values; thereby establishing an operability limit associated with the entire loop of an instrumentation function to ensure sufficient margin to protect analytical limits. The changes do not affect the analytical limits associated with the involved instrumentation functions. The involved instrumentation will continue to perform its accident mitigation functions as designed. Therefore, the consequences of a previously evaluated accident are not increased.

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 do not affect the actual instrument setpoints nor do they affect the accident mitigation instrumentation functions. No changes will occur in the way in which equipment is operated. The involved instrumentation will continue to perform its accident mitigation functions as designed. Therefore, the proposed license amendments can not create the possibility of a new or different kind of accident.

3. The proposed license amendments do not involve a significant reduction in a margin of safety.

The proposed changes affect accident mitigation instrumentation allowable values. The changes will not affect the accident mitigation instrumentation functions. No changes will occur in the way in which equipment is operated. The proposed changes establish the allowable values for certain functions in accordance with the CP&L setpoint methodology which has been approved, by the NRC, for use at the BSEP. The proposed allowable values were calculated by applying calibration based errors to the trip setpoint values; thereby establishing an operability limit associated with the entire loop of an instrumentation function to ensure sufficient margin to protect analytical limits. The changes do not affect the analytical limits associated with the involved instrumentation functions. The involved instrumentation will continue to perform its accident mitigation functions as designed. Therefore, the proposed license amendments do not involve a significant reduction in the 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 No. 50-400, Shearon Harris

Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina

Date of amendment request: October 29, 1997.

Description of amendment request: Technical Specifications (TS) 3.8.1.1.a.3, 3.8.1.1.b.4, and 3.8.1.1.d.2 presently require a plant shutdown and declaring the redundant required feature

inoperable, when the required feature powered from the operable A.C. source is inoperable. The proposed change clarifies the intent of this TS to permit the applicable redundant required feature TS to direct a plant shutdown when required. The proposed amendment changes the existing TS 3.8.1.1.a.3, 3.8.1.1.b.4, and 3.8.1.1.d.2 to eliminate the separate requirement for plant shutdown and instead allows the applicable required redundant feature TS to direct the plant shutdown when required.

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:

This change does not involve a significant hazards consideration for the following reasons:

1. The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed amendment will not introduce any new equipment or require existing equipment to function different from that previously evaluated in the Final Safety Analysis Report (FSAR) or TS. The changes are consistent with NUREG-1431 and the Commission's Final Policy Statement on Technical Specification Improvements.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed amendment will not introduce any new equipment or require existing equipment to function different from that previously evaluated in the Final Safety Analysis Report (FSAR) or TS. The changes are consistent with NUREG-1431 and the Commission's Final Policy Statement on Technical Specification Improvements. The proposed amendment will not create any new accident scenarios, because the change does not introduce any new single failures, adverse equipment or material interactions, or release paths.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed amendment does not involve a significant reduction in the margin of safety.

Margin of safety for acceptable TS action times have been determined for each TS related system. The proposed change will not alter individual system TS action times. HNP [the Harris Nuclear Plant] proposes to change the requirement to shutdown after expiration of the completion time of an inoperable A.C. source concurrent with an inoperable required feature. Instead of requiring a

shutdown, the required feature on the inoperable A.C. source will be declared inoperable and the individual TS will be implemented.

In most cases with both redundant features inoperable, a plant shutdown will be required by TS 3.0.3. In the few instances where additional time is allowed by the individual TS for both redundant required features being inoperable, then an immediate plant shutdown would not be required. The allowed out of service time for loss of individual safety functions has been previously analyzed for HNP TS and NUREG-1431, Revision 1.

Therefore, the proposed change does not involve a significant reduction in the 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: Cameron Village Regional Library, 1930 Clark Avenue, Raleigh, North Carolina 27605.

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.

Florida Power and Light Company, et al.

[Docket Nos. 50-335 and 50-389]

St. Lucie Plant, Unit Nos. 1 and 2, St. Lucie County, Florida

Date of amendment request: December 1, 1997.

Description of amendment request: The proposed amendment revises the Unit 1 and Unit 2 Environmental Protection Plans (EPP) Section 4, "Environmental Conditions," and Section 5, "Administrative Procedures," to incorporate the proposed terms and conditions of the Incidental Take Statement included in the Biological Opinion issued by the National Marine Fisheries Service (NMFS) on February 7, 1997. The proposed amendment also revises the wording in the Unit 1 EPP to make it consistent with the Unit 2 EPP.

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) Operation of the facility in accordance with the proposed amendment would not involve a significant increase in the

probability or consequences of an accident previously evaluated.

The changes are administrative in nature and would in no way affect the initial conditions, assumptions, or conclusions of the St. Lucie Unit 1 or Unit 2, accident analyses. In addition, the proposed changes would not affect the operation or performance of any equipment assumed in the accident analyses.

Based on the above information, we conclude that the proposed changes would not significantly increase the probability or consequences of an accident previously evaluated.

(2) Use of the modified specification would not create the possibility of a new or different kind of accident from any previously evaluated.

The changes are administrative in nature and would in no way impact or alter the configuration or operation of the facilities and would create no new modes of operation. We conclude that the proposed changes would not create the possibility of a new or different kind of accident.

(3) Use of the modified specification would not involve a significant reduction in a margin of safety.

As indicated in the discussion of Criterion 1, the changes are administrative in nature and would in no way affect plant or equipment operation or the accident analysis. We conclude that the proposed changes would not result in 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 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: Indian River Community College Library, 3209 Virginia Avenue, Fort Pierce, Florida 34981-5596.

Attorney for licensee: M.S. Ross, Attorney, Florida Power & Light, P.O. Box 14000, Juno Beach, Florida 33408-0420.

NRC Project Director: Frederick J. Hebdon.

IES Utilities Inc.

[Docket No. 50-331]

Duane Arnold Energy Center, Linn County, Iowa

Date of amendment request: October 30, 1996.

Description of amendment request: The proposed amendment, included as part of the proposed conversion from current Technical Specifications (CTS) to improved Technical Specifications (ITS), would modify the Surveillance Requirements (SRs) recommended in NUREG-1433 LOC 3.5.1 by revising the combinations (Conditions C, D, G, and I of ITS 3.5.1) of emergency core cooling

systems/subsystems that may be out of service. The combinations are supported by the Duane Arnold Energy Center (DAEC) Loss-of-Coolant Accident (LOCA) analysis.

Condition C

ITS 3.5.1 Action C establishes Required Actions and Completion Times for the situation when one core spray (CS) subsystem and one or two residual heat removal (RHR) pump(s) are inoperable. The proposed specification is less restrictive than CTS 3.5.A.4, which allows one RHR pump to be inoperable for 30 days, and CTS 3.5.A.5, which allows two RHR pumps (i.e., the low pressure coolant injection (LPCI) subsystem) to be inoperable for up to 7 days, provided the remaining RHR (i.e., LPCI) active components, both CS subsystems, the containment spray subsystem, and the diesel generators are verified to be operable. The CTS does not allow one CS subsystem and one or two RHR pump(s) to be inoperable at the same time. The LOCA analysis presented in NEDC-31310P, (Duane Arnold Energy Center SAFER/GESTR-LOCA Loss-of-Coolant Accident Analysis), indicates that an adequate level of protection is provided by the remaining operable ECCS subsystems. The accident analysis also demonstrates that in this condition, the peak clad temperature remains below the regulatory limit. However, another single failure may place the plant in a condition where adequate core cooling may not be available during a DBA-LOCA. Therefore, a Completion Time of 72 hours has been proposed to either restore the inoperable CS subsystem or the inoperable RHR pump(s).

Condition D

ITS 3.5.1 Action D establishes Required Actions and Completion Times for the situation when two CS subsystems are inoperable. The proposed specification is less restrictive than CTS 3.5.A.2, which allows only one CS subsystem to be inoperable. CTS 3.5.A.6 would require the plant to be in Hot Shutdown within 12 hours and Cold Shutdown within the following 24 hours if both CS subsystems were inoperable. With two CS subsystems inoperable, the LOCA analysis presented in NEDC-31310P, (Duane Arnold Energy Center SAFER/GESTR-LOCA Loss-of-Coolant Accident Analysis), indicates that the remaining operable low pressure ECCS subsystem consisting of LPCI with four RHR pumps operable (only 3 pumps required), provides adequate protection. However, another single failure may place the plant in a condition where

adequate core cooling may not be available during a Design Basis Accident LOCA. Therefore, a Completion Time of 72 hours has been proposed to restore one CS subsystem to operable status.

Condition G

ITS 3.5.1 Action G establishes Required Actions and Completion Times for the situation when HPCI and one RHR pump are inoperable. The proposed specification is less restrictive than CTS 3.5.D.2, which allows continued operation if HPCI is inoperable only if both CSs, LPCI, ADS, and RCIC are verified to be operable. While the LPCI subsystem is technically operable with only 3 of 4 RHR pumps operable, the CTS is currently interpreted by DAEC to require all 4 RHR pumps to be operable for the requirements of CTS 3.5.D.2 to be met, as a single RHR pump has more makeup capability than the HPCI System. Thus for mitigating small and intermediate break LOCAs, one LPCI pump, in combination with ADS, is more than adequate core cooling. The condition of when HPCI and one RHR pump are inoperable is bounded by the analysis in NEDC-31310P, Duane Arnold Energy Center, SAFER/GESTR-LOCA Loss-of-Coolant Accident Analysis. Since the remaining operable low pressure ECCS subsystems are more than capable of performing their intended function, and RCIC and ADS are Operable, the proposed Action G maintains LOCA analysis assumptions for ECCS Operability. The proposed ITS condition allows 7 days to restore the HPCI System or the RHR pump to operable status. The licensee considers the 7 day Completion Time reasonable in that the LOCA analysis demonstrates that in this condition, the peak clad temperature remains below the regulatory limit. The 7 day Completion Time also provides the benefit of potentially avoiding an unnecessary plant shutdown while the safety functions are still capable of being performed.

Condition I

ITS 3.5.1 Action I establishes Required Actions and Completion Times for the situation when HPCI and one ADS valve are inoperable. The proposed Specification is less restrictive than CTS 3.5.D.2, which allows continued operation if HPCI is inoperable only if both CSs, LPCI, ADS, and RCIC are verified to be operable. While ADS is capable of performing its design function with only 3 of 4 valves operable, per NEDC-31310P, Duane Arnold Energy Center, SAFER/GESTR-

LOCA Loss-of-Coolant Accident Analysis, the CTS requires all 4 ADS valves to be operable for the requirements of CTS 3.5.D.2 to be met. The proposed specification is less restrictive than CTS 3.5.F.2, which allows continued operation when one ADS valve is inoperable only if HPCI is verified to be operable. Since all low pressure ECCS subsystems remain capable of performing their design function and ADS is still capable of performing its design function, ITS 3.5.1 Action I maintains LOCA assumptions to ensure an adequate level of protection is maintained. The proposed condition allows 72 hours to restore the HPCI system or the ADS valve to operable status, since another single failure (i.e., loss of another ADS valve), may place the plant in a condition where adequate core cooling may not be available during a small or intermediate break LOCA.

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:

For Condition C

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change will allow one Core Spray subsystem and one or two RHR pump(s) to be inoperable for up to 72 hours. The ECCS subsystems affected by this change are not assumed to be initiators of analyzed events. Therefore, the proposed change does not increase the probability of any accident. The role of these ECCS subsystems is in the mitigation of accident consequences. The proposed change does not allow unlimited continuous operation with the plant in a condition where an additional single failure could result in a loss of ECCS function. The proposed change does not increase the consequences of an accident because accident analysis presented in NEDC-31310P, Duane Arnold Energy Center SAFER/GESTR-LOCA Loss-of-Coolant Accident Analysis, indicates that an adequate level of protection is maintained by the ADS System and the remaining Operable ECCS subsystems when one Core Spray subsystem and one or two RHR pump(s) are inoperable. Therefore, this change will not involve a significant increase in the consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change will not involve any physical changes to plant systems, structures, or components (SSCs), or the manner in which these SSCs are operated, maintained, modified, tested or inspected. The change ensures the remaining ECCS capability is adequate to mitigate the consequences of accidents. Therefore, this change will not create the possibility of a new or different

kind of accident from any accident previously evaluated.

3. Does this change involve a significant reduction in a margin of safety?

The proposed change does not significantly reduce the margin of safety because accident analysis presented in NEDC-31310P, Duane Arnold Energy Center SAFER/GESTR-LOCA Loss-of-Coolant Accident Analysis, indicates that the plant is protected by the ADS System and the remaining ECCS subsystems when one Core Spray subsystem and one or two RHR pump(s) are inoperable. The accident analysis demonstrates that in this condition, the peak clad temperature remains below the regulatory limit. However, with one Core Spray subsystem and one or two RHR pump(s) inoperable, another single failure may place the plant in a condition where adequate core cooling may not be available during a DBA-LOCA. Therefore, a Completion Time of 72 hours has been assigned to either restore the inoperable Core Spray subsystem or the RHR pump. In addition, this change provides the benefit of potentially avoiding an unnecessary plant shutdown (due to a Completion Time being provided for one Core Spray subsystem and one or two RHR pump(s)) when the remaining ECCS subsystems and the ADS are capable of mitigating potential events. Therefore, this change does not involve a significant reduction in a margin of safety.

For Condition D

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change will allow both Core Spray subsystems to be inoperable for up to 72 hours. The ECCS subsystems affected by this change are not assumed to be initiators of analyzed events. Therefore, the proposed change does not increase the probability of any accident. The role of these ECCS subsystems is in the mitigation of accident consequences. The proposed change does not allow unlimited continuous operation with the plant in a condition where an additional single failure could result in a loss of ECCS function. The proposed change does not increase the consequences of an accident because accident analysis presented in NEDC-31310P, Duane Arnold Energy Center SAFER/GESTR-LOCA Loss-of-Coolant Accident Analysis, indicates that an adequate level of protection is maintained by the ADS System and remaining Operable ECCS subsystem when two Core Spray subsystems or inoperable. Therefore, this change will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change will not involve any physical changes to plant systems, structures, or components (SSCs), or the manner in which these SSCs are operated, maintained, modified, tested, or inspected. The change ensures the remaining ECCS capability is adequate to mitigate the consequences of accidents. Therefore, this change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does this change involve a significant reduction in a margin of safety?

The proposed change does not significantly reduce the margin of safety because accident analysis presented in NEDC-31310P, Duane Arnold Energy Center SAFER/GESTR-LOCA Loss-of-Coolant Accident Analysis, indicates that the plant is protected by the ADS System and the remaining ECCS subsystem when two Core Spray subsystems are inoperable. The accident analysis demonstrates that in this condition, the peak clad temperature remains below the regulatory limit. However, with both Core Spray subsystems inoperable, another single failure may place the plant in a condition where adequate core cooling may not be available during a DBA-LOCA. Therefore, a Completion Time of 72 hours has been assigned to restore one inoperable Core Spray subsystem. In addition this change provides the benefit of potentially avoiding an unnecessary plant shutdown (due to a Completion Time being provided for both Core Spray subsystems inoperable) when the remaining ECCS subsystem and the ADS are capable of mitigating potential events. Therefore, this change does not involve a significant reduction in a margin of safety.

Condition G

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change will allow the HPCI System and one RHR pump to be inoperable for up to 7 days. The ECCS subsystems affected by this change are not assumed to be initiators of analyzed events. Therefore, the proposed change does not increase the probability of any accident. The role of these ECCS subsystems is in the mitigation of accident consequences. The proposed change does not allow unlimited continuous operation with the plant in a condition where an additional single failure could result in a loss of ECCS function. The proposed change does not increase the consequences of an accident because accident analysis presented in NEDC-31310P, Duane Arnold Energy Center SAFER/GESTR-LOCA Loss-of-Coolant Accident Analysis, indicated that an adequate level of protection is maintained by the ADS System and the remaining Operable ECCS subsystems when HPCI and one RHR pump are inoperable. Therefore, this change will not involve a significant increase in the consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change will not involve any physical changes to plant systems, structures, or components (SSCs), or the manner in which these SSCs are operated, maintained, modified, tested, or inspected. The change ensures the remaining ECCS capability is adequate to mitigate the consequences of accidents. Therefore, this change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does this change involve a significant reduction in a margin of safety?

The proposed change does not significantly reduce the margin of safety because accident

analysis presented in NEDC-31310P, Duane Arnold Energy Center SAFER/GESTR-LOCA Loss-of-Coolant Accident Analysis, indicates that the plant is protected by the ADS System and the remaining ECCS subsystems when HPCI and one RHR pump are inoperable. The accident analysis demonstrates that in this condition, the peak clad temperature remains below the regulatory limit. However, with both HPCI and one RHR pump inoperable, another single failure may place the plant in a condition where adequate core cooling may not be available during an accident. Therefore, a Completion Time of 7 days has been assigned to either restore the inoperable HPCI System or the RHR pump. In addition, this change provides the benefit of potentially avoiding an unnecessary plant shutdown (due to a Completion Time being provided for the HPCI System and one RHR pump inoperable) when the remaining ECCS subsystems and the ADS are capable of mitigating potential events. Therefore, this change does not involve a significant reduction in a margin of safety.

Condition 1

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change will allow the HPCI system and one ADS valve to be inoperable for up to 72 hours. The ECCS subsystems affected by this change are not assumed to be initiators or analyzed events. Therefore, the proposed change does not increase the probability of any accident. The role of these ECCS subsystems is in the mitigation of accident consequences. The proposed change does not allow unlimited continuous operation with the plant in a condition where an additional single failure could result in a loss of ECCS function. The proposed change does not increase the consequences of an accident because accident analysis presented in NEDC-31310P, Duane Arnold Energy Center SAFER/GESTR-LOCA Loss-of-Coolant Accident Analysis, indicates that an adequate level of protection is maintained by the remaining ADS valves (the ADS design function is maintained) in combination with the remaining Operable ECCS subsystems when HPCI and one ADS valve are inoperable. Therefore, this change will not involve a significant increase in the consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change will not involve any physical changes to plant systems, structures, or components (SSCs) or the manner in which these SSCs are operated, maintained, modified, tested, or inspected. The change ensures the remaining ECCS capability in adequate to mitigate the consequences of accidents. Therefore, this change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does this change involve a significant reduction in a margin of safety?

The proposed change does not significantly reduce the margin of safety because accident analysis presented in NEDC-31310P, Duane Arnold Energy Center SAFER/GESTR-LOCA

Loss-of-Coolant Accident Analysis, indicates that the plant is protected by the remaining ADS valves and the low pressure ECCS subsystems when HPCI and one ADS valve are inoperable. The accident analysis demonstrates that in this condition, the peak clad temperature remains below the regulatory limit. However, with both HPCI and one ADS valve inoperable, another single failure (i.e., of an ADS valve) may place the plant in a condition where adequate core cooling may not be available during a small or intermediate break LOCA. Therefore, a Completion Time of 72 hours has been assigned to either restore the inoperable HPCI System or the ADS valve. In addition, this change provides the benefit of potentially avoiding an unnecessary plant shutdown (due to a Completion Time being provided for the HPCI System and one ADS valve inoperable) when the remaining ECCS subsystems and ADS valves are capable of mitigating potential events. Therefore, this 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: Cedar Rapids Public Library, 500 First Street, S.E., Cedar Rapids, Iowa 52401.

Attorney for licensee: Jack Newman, Kathleen H. Shea, Morgan, Lewis, & Bockius, 1800 M Street, NW., Washington, DC 20036-5869.

Acting NRC Project Director: Richard P. Savio.

Indiana Michigan Power Company

[Docket Nos. 50-315 and 50-316]

Donald C. Cook Nuclear Plant, Units 1 and 2, Berrien County, Michigan

Date of amendment requests: August 1, 1997 (AEP:NRC:0906H).

Description of amendment requests: The proposed amendments would revise Technical Specification surveillance 4.7.1.2.b. to delete the requirement that the test be performed at a specified secondary steam supply 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:

Criterion 1

The proposed changes will not significantly increase the probability or consequences of an accident previously evaluated.

This is an administrative change intended to clarify the technical specification. There will be no change to the test procedure as a result of this clarification. The proposed change better correlates with the accident requirements for which TDAFP [turbine driven auxiliary feed pump] flow is required, and the change is consistent with the present requirement of testing the TDAFP at a secondary side pressure greater than 310 psig.

Criterion 2

The proposed changes will not create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed change does not physically modify the plant, nor does it result in the installation of equipment which could introduce a new failure mechanism.

Criterion 3

The proposed change does not involve a significant reduction in a margin of safety. The proposed change does not affect the performance of the TDAFP. Thus, the TDAFP remains capable of providing the required flow under accident conditions, and no safety margins are reduced.

This is an administrative change intended to clarify the technical specification. There will be no change to the test procedure as a result of this clarification.

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 requests involve no significant hazards consideration.

Local Public Document Room

location: Maud Preston Palenske Memorial Library, 500 Market Street, St. Joseph, MI 49085.

Attorney for licensee: Gerald Charnoff, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Project Director: Richard P. Savio, Acting.

Indiana Michigan Power Company

[Docket Nos. 50-315 and 50-316]

Donald C. Cook Nuclear Plant, Units 1 and 2, Berrien County, Michigan

Date of amendment requests: August 11, 1997 (AEP:NRC:1265).

Description of amendment requests: The proposed amendments would revise the Technical Specifications (TS) to allow the filling of the emergency core cooling system (ECCS) accumulators without declaring ECCS equipment inoperable.

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:

Criterion 1

This amendment request does not involve a significant increase in the probability or consequences of an accident previously evaluated because the proposed changes to the T/S represent the possibility of an event that has such a low probability as to not be considered credible. A calculation was performed that demonstrated the CDF resulting from the accumulator fill line operation with all of the conditions assumed above is approximately 3×10^{-10} per year. This is well below the NEI guidelines of 1×10^{-6} for acceptable risk for a given evolution. Therefore, based on probabilistic considerations and the robust design of the pumps, we conclude the risk associated with this proposed change will not result in a significant increase in the probability or consequences of a previously evaluated accident.

Criterion 2

The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated. The change does not involve a physical change to the plant, but does involve a change in the plant operating configuration. The possibility of a LBLOCA [large break loss of coolant accident] occurring during the accumulation fill evolution has been evaluated and determined to not be credible. Westinghouse has confirmed the accumulator fill line was not modeled in the accident analyses due to the extremely short duration of the fill operation and the extremely small amount of flow that the fill line is capable of passing. The overall effect this configuration would have on the capability of the SI [safety injection] pump to perform its design function, should a LBLOCA occur during the extremely brief window of opportunity, is negligible and would not create a new type of accident.

Criterion 3

This proposed change does not involve a significant reduction in a margin of safety, as the risk from the postulated sequence of events is insignificant. Additionally, engineering evaluation has determined that the real response of an SI pump under the postulated conditions would not be severe. The rugged construction of the pumps, and the design margin built into them, are factors that support the engineering judgment that the affected pump would continue to operate for some time, at some capacity beyond the manufacturer's design limit. As a result of exceeding the limit, the pump may experience some cavitation and require additional corrective maintenance, but would be expected to deliver a significant fraction of its design flow.

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 requests involve no significant hazards consideration.

Local Public Document Room location: Maud Preston Palenske

Memorial Library, 500 Market Street, St. Joseph, MI 49085.

Attorney for licensee: Gerald Charnoff, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Project Director: Richard P. Savio, Acting.

Niagara Mohawk Power Corporation

[Docket No. 50-410]

Nine Mile Point Nuclear Station, Unit 2, Oswego County, New York

Date of amendment request: October 7, 1997.

Description of amendment request: The proposed amendment would revise Technical Specifications (TS) to change the setpoints of Surveillance Requirements (SRs) 4.9.6.a, 4.9.6.f, and 4.9.6.g for the refueling platform main hoist. Specifically, each refueling platform crane or hoist used for handling control rods or fuel assemblies within the reactor pressure vessel would be demonstrated operable by:

- a. Demonstrating operation of the overload cutoff on the main hoist when the load exceeds 1600 +100/ - 0 pounds (rather than 1200 +50/ - 50 pounds).
- f. Demonstrating operation of the loaded interlock on the main hoist when the load exceeds 700 +50/ - 0 pounds (rather than 485 +50/ - 50 pounds).
- g. Demonstrating operation of the redundant loaded interlock on the main hoist when the load exceeds 700 +50/ - 0 pounds (rather than 550 +50/ - 50 pounds).

The proposed amendment, in effect, would authorize replacement of the existing triangular refueling platform mast with a round, heavier mast (General Electric Model NF-500) which includes an installed camera/TV system.

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 operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change revises the setpoints for three TS SRs based on modifications to the refueling platform mast. The new mast is essentially a direct replacement for the existing mast, with the exception that the new mast is approximately 400 lbs. heavier, which directly affects the setpoints. No change in the frequency or manner in which the surveillances are performed is proposed. Refueling interlocks will continue to function as designed. No changes to the methods in which plant systems are operated are

required. The same design criteria and standards were applied to the new mast, including the seismic capability of the refueling platform with the heavier mast. Therefore, none of the precursors of previously evaluated accidents are affected, and no new failure modes are introduced.

Based on the additional weight of the new mast and camera/TV system, the revised GESTAR [General Electric GESTAR II document NEDE-24011-P-A-11-U5] criteria for fuel rod damage (more conservative threshold level), the use of GE11 [9x9] fuel for the bundle drop analysis, the number of damaged fuel rods has increased slightly for the potential fuel handling accident. The results of this increase were evaluated and dispositioned against the bounding calculation to show that the current USAR [updated safety analysis report] analysis bounds the revised radiological consequences which remain well within the GDC [General Design Criterion] 19 and 10CFR[part]100 limits. The systems that are available to mitigate the consequences of any accident have not been affected and are still capable of performing their required functions. Therefore, this change will not involve a significant increase in the probability or consequences of an accident previously evaluated.

The operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change revises the setpoints for three TS SRs based on installation of a new refueling platform which is heavier than the current mast. No change in the frequency or manner in which the surveillances are performed has occurred. Refueling interlocks will continue to function as designed. No changes to the methods in which plant systems are operated are required. The same design criteria and standards were applied to the new mast, including the seismic capability of the refueling platform with the heavier mast. The basic function and operation of the refueling platform is unchanged. The uptravel stop and downtravel mechanical cutoff setpoints are not being changed and will continue to ensure that adequate water shielding is maintained. As such, the change does not introduce any new failure modes or conditions that may create a new or different kind of accident. Therefore, this change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not involve a significant reduction in a margin of safety.

The proposed change revises three TS SR setpoints based on installation of a new refueling platform mast. No change in the frequency or manner in which the surveillances are performed has occurred. Refueling interlocks will continue to function as designed. No changes to the methods in which plant systems are operated are required. The same design criteria and standards were applied to the new mast, including the seismic capability of the

refueling platform with the heavier mast. The addition of a camera/TV system will provide enhanced visibility for fuel handling activities and additional assurance that the grapple is oriented over the correct fuel bundle.

The additional weight of the new mast has been evaluated and the operability requirements as described in the TS and TS Bases are unchanged. The modification and revised setpoints do not change the function of the refueling platform main hoist. The revised setpoints will continue to assure the lifting capacity of the main hoist will not be sufficient to result in damage to core internals or the reactor pressure vessel in the event that they are accidentally engaged.

The necessary systems are still available to mitigate any potential radiological consequences of the increased number of damaged fuel rods. The radiological consequences remain within the bounds of the current safety analysis and well below the GDC 19 and 10CFR[Part]100 limits. Therefore, the change does not involve any 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 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: Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126.

Attorney for licensee: Mark J. Wetterhahn, Esquire, Winston & Strawn, 1400 L Street, NW., Washington, DC 20005-3502.

NRC Project Director: S. Singh Bajwa.

Niagara Mohawk Power Corporation

[Docket No. 50-410]

Nine Mile Point Nuclear Station, Unit 2, Oswego County, New York

Date of amendment request: October 31, 1997.

Description of amendment request: The proposed amendment would revise Technical Specifications (TSs) to support installation of the General Electric Nuclear Measurement Analysis and Control (NUMAC) Power Range Neutron Monitor (PRNM) System. The TS changes apply to Sections 2.2, "Limiting Safety System Settings"; 3/4.3.1, "Reactor Protection System Instrumentation" and its corresponding Bases; and 3/4.3.6, "Control Rod Block Instrumentation."

Basis for proposed no significant hazards consideration determination: The NUMAC-PRNM will monitor groups of Local Power Range Monitor (LPRM) signals and, together with the Oscillation Power Range Monitor

(OPRM), initiate a reactor scram upon identifying neutron flux oscillations characteristic of a thermal-hydraulic instability. The NUMAC-PRNM will replace the existing Average Power Range Monitor (APRM) System and will ultimately support the activation of the OPRM. The proposed modification is in response to Generic Letter 94-02, "Long-Term Solutions and Upgrade of Interim Operating Recommendations for Thermal-Hydraulic Instabilities in Boiling Water Reactor." Except for minor deviations, the proposed TS changes are consistent with General Electric Licensing Topical Report (LTR), NEDC-32410P-A, "Nuclear Measurement Analysis and Control Power Range Neutron Monitor (NUMAC-PRNM) Retrofit Plus Option III Stability Trip Function," which was approved by the NRC staff September 5, 1995. Changes with respect to response time testing requirements would be based on Supplement 1 to NEDC-32410P-A, approved by the NRC staff December 26, 1996.

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 operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not involve a significant increase in the probability or consequences of an accident previously evaluated.

As discussed in NEDC-32410P-A, the NUMAC-PRNM modification and associated changes to the TS involve systems that are intended to detect the symptoms of certain events or accidents mitigating actions. The worst case failure of the systems involved would be a failure to initiate mitigative actions (i.e., scram or rod block), but no failure can cause an accident and therefore the probability of precursors of any accidents previously evaluated is not increased. The NUMAC-PRNM system performs the same operations as the existing equipment, reduces the need for tedious operator action during normal conditions and allows the operator to focus more on overall plant conditions. Automatic self-test and increased operator information available with the NUMAC-PRNM system is likely to reduce the burden during off-normal conditions as well. The NUMAC-PRNM system is compatible with the environmental conditions at the mounting location (e.g., temperature, humidity, seismic, electromagnetic fields) such that system performance will not be degraded when compared to the system being replaced. Therefore, the proposed change will not result in a significant increase in the probability of any accidents previously evaluated.

The proposed changes to the RPS [reactor protection system] and Control Rod Block instrumentation TSs are necessitated by the NUMAC-PRNM replacement. As discussed in the evaluation, in the 4 APRM channel

configuration, any two of the four APRM channels and one 2-out-of-4 voter channel in each RPS trip system are required to function for the APRM safety trip function to be accomplished. Therefore, the proposed TS change requires that 3 of the 4 APRM channels be operable. This assures at least two APRM channels to each of the 2-out-of-4 voter channels are available in the event of a single APRM channel failure and one APRM is bypassed. Also, the proposed TS requires a minimum of two 2-out-of-4 voter channels per RPS trip system (i.e., all four voter channels). This assures that at least one voter channel per trip system is available even in the event of a single voter channel failure. Surveillance testing requirements were revised to take advantage of certain features of the NUMAC-PRNM (digital) replacement of the existing analog APRM system. These advantages included improved accuracy, stability, self-testing, reduced drift, and constant time for digital processing. Testing of the RPS and Control Rod Block instrumentation will continue to be performed as described in the evaluation to assure that the reliability and performance of these systems will not be adversely affected.

The proposed NUMAC-PRNM replacement system has been specifically designed to assure that the system response times meet the current acceptance limits (worst case). As a result, due to statistical variations resulting from the sampling and update cycles, the response time is typically faster than required in order to assure the required response time is always met. The architecture of the NUMAC-PRNM system has reduced segmentation compared to the existing PRM system. Examples of the reduced segmentation are combining previously separate functions, several input channels sharing an input board, and a central loop processor for many channels. The replacement equipment includes up to 5 LPRM inputs on a single module compared to one per module on the current system. Up to 17 LPRM signals are processed through one preprocessor. The recirculation flow signals are processed in the same hardware as the LPRM processing. The net effect of these architectural aspects is that there are some single failures that cause a greater loss of "sub-functionality" than in the current system. However, other architectural and functional aspects have an offsetting effect. Redundant power supplies are used so that a single failure of AC power has no effect on the overall NUMAC-PRNM system functions while still resulting in a half scram, as does the current system. Continuous automatic self-test also assures that if a single failure does occur, it is much more likely to be detected immediately. The net effect is that from a total system level, there is no increased risk of loss of critical functionality or reduction in safety margins due to the architecture of the replacement system.

Failure analysis indicates that a software common cause failure is not a significant contributor to the unavailability of the NUMAC-PRNM. However, in spite of that conclusion, means are provided within the system to mitigate the effects of such a failure and alert an operator. Therefore, such a failure, even if it occurred, will not increase

the consequences of a previously evaluated accident. To reduce the likelihood of common cause failures of software controlled functions, thorough and careful verification and validation (V&V) activities are performed both for the requirements and the implementing software design. In addition, the software is designed to limit the loading that external systems or equipment can place on the system, thus significantly reducing the risk that some abnormal dynamic condition external to the system can cause an overload. For conservatism, however, despite, these V&V activities, common cause failures of software controlled functions due to residual software design faults are assumed to occur. Both the software and hardware are designed to manage the consequences of such failures. Safety outputs are designed to be fail safe by requiring dynamic update of output modules or data signals, where failure to update the information is detected by simple receiving hardware, which in turn, forces a trip. This aspect covers all but rather complex failures where the hardware or software executes a portion of the overall logic but fails to process some portion of the new information (inputs "freeze") or some portion of the logic (outputs "freeze"). To help reduce the likelihood of complex failures, a watchdog timer is used which is updated by a very simple software routine that in turn monitors the operational cycle time of all tasks in the system. The software design is such that as long as all tasks are updating at the design rate, it is likely that software controlled functions are executing as intended. Conversely, if any task fails to update at the design rate, that is a strong indication of at least some unanticipated condition. If such a condition occurs, its watchdog timer will not be updated, the computer will be restarted, and the outputs will detect an abnormal condition and provide an alarm.

It is very difficult to quantify a software common cause failure rate. Analyses for the current system did consider common cause failures and assessed them to be at a rate of about 0.3 times the random failure rate. The reference analysis uses a field basis for the random rates. The analysis for the replacement design uses conservative estimates for failure rates of equipment that are actually a little higher than those assumed for the current equipment. The methodology being applied concludes that the common mode failure rate for the replacement system is somewhat higher than the current system. However, that is offset by more frequent surveillance tests performed by the self-test that result in an estimated slightly lower unavailability for the NUMAC-PRNM scram function compared to the current PRM system. The USAR, in general, considers the failure rate of the function, not that of sub-components. On that basis, there will not be an increase, due to software common cause failure, in the probability of a malfunction analyzed in the USAR.¹²¹ The NUMAC-PRNM human-machine interface design does not introduce an increased burden or constraints on the operators' ability to adequately respond to an accident such that there would be more severe consequential effects. The information available to the operators is the same as with

the current system. No actions are required by the operator to obtain information normally used and equivalent to that available with the current equipment. However, the replacement system does provide more direct accessible information regarding the condition of the equipment, including automatic self-test, which can aid the operator in diagnosing unusual situations beyond those defined in the licensing basis.

The replacement system has a significantly lower power requirement and is generally smaller, reducing somewhat the seismic loading on the panels. The equipment qualification also includes EMI [electro magnetic induction] emissions which, combined with the fact that the replacement equipment is mounted in its own cabinet (replaces all of the current equipment), minimized the likelihood of significant impact on other existing equipment.

The replacement equipment makes increased use of qualified optical methods to provide both safety and functional isolation between safety-related and nonsafety-related systems. Where fiber optic methods cannot be used, the isolation provided is comparable to or better than that provided in the current system.

The net electrical and thermal load for the replacement system is less than that for the current system. Accordingly, the replacement system had adequate cabinet cooling and no forced cooling is required.

The replacement system meets or exceeds all applicable requirements for separation, independence and grounding. The use of fiber optic connections between the APRM and RBM [rod block monitor] improves the separation and reduces the dependence of the system on common grounds. However, for noise rejection, the equipment design and manufacturing requirements assure improved grounding of the actual equipment.

No change in wiring or grounding external to the panels containing the replacement equipment is necessary for correct operation of the replacement equipment.

NEDC-3241OP-A, Section 3.2.3, discusses different plant configurations for recirculation flow channels, including the case where plants currently (before implementing the NUMAC PRNM system) have four flow channels. Absence of any discussion in the LTR related to separation for plants originally having four flow channels implies that those plants are expected to meet full separation requirements. The LTR includes a further statement that "The criterion is to maintain equal or better protection against single failures while allowing bypassing of the APRM channel that processes the flow signal."

The NMPC [Niagara Mohawk Power Corporation] NUMAC PRNM system has four recirculation low channels, but the flow input circuits for two of the four are not separated from each other outside the PRNM panel. As a result, a single failure that causes both of these flow signals to go high could, depending on the specific value, cause the APRM flow biased trip setpoint in two channels to go to the clamped setpoint. If, at the same time, a third channel is bypassed, the APRM flow-biased trip setpoint for the

APRM system could be non-conservative. (NOTE: The flow signals are compared to one another. Should the flow signals not be within specified limits, an alarm and a control rod block would be initiated.)

Despite the fact that two of the four flow input circuits are not separated from each other outside the PRNM panel, the replacement system is judged to be adequate with the current field routing of flow signals and meets the LTR criteria. This conclusion is based on the fact that there is no credible fault in the circuits within the duct, in which the flow signals are routed, that can damage the other circuits. Also, there is no credible external fault that can damage the circuits inside the duct. Therefore, it is concluded that the separation between the two flow input circuits is adequate to meet the system single failure requirements in that no credible single failure will disable the flow inputs to more than one APRM channel. Additionally, there are no reload licensing transient analyses that take credit for the flow-biased simulated thermal power scram setpoint.

The replacement design has been specifically designed to have the same or more conservative "fail safe" failure modes as the current system. For example, in the case of a single power bus failure, the current system loses about one half of the LPRM information and an output trip occurs. For the replacement system, that failure still results in an output trip, but no LPRM information is lost. In the current system, a static failure in several areas in the system could result in a "fail-as-is" state of the outputs. In the replacement system, dynamic coupling starting in the main processor and going to the final output virtually eliminates "fail-as-is" failure modes and replaces them with "fail tripped" modes.

The replacement system has the same loss of power failure mode as the current system relative to the trip outputs and for loss of AC [alternating current] power. For loss of DC [direct current] power, the replacement system in most cases continues to operate normally due to redundancy of the power supplies. Therefore, the consequences are no different or improved compared to those considered in the USAR.

Both the current system and the replacement system automatically startup on application of power (or re-application). However, the replacement system may take slightly longer to reach normal operation due to initializing activities. However, no USAR evaluations take credit for rapid start of the PRM. Therefore, the slightly longer startup time from point of power application is bounded by the USAR analysis. Upon application of power, once the system is set up for the specific application, it automatically returns to those settings upon application of power. All such setup parameters are stored in non-volatile memory.

Human-machine interfaces (HMI) failures in the current system could be related to misadjusted settings, incorrect reading of meters, and failure to return the equipment to the normal operating configuration. There are comparable failure modes for some of these in the digital system where an

erroneous potentiometer adjustment in the current system is equivalent to an erroneous digital entry in the replacement system. Certain potential "failure to reconfigure" errors in the current system have no counterpart in the replacement system because any "reconfiguration" is automatically returned to normal by the system. Also, since parameters are available for review at any time, even if an error such as a digital entry error occurs, it is more likely that the error would be almost immediately detected by recognition that the displayed value is not the correct one. Failure analysis of the current system assumes certain rates of human error. The rates for the replacement system will be lower, and hence are bounded by the USAR analysis. The NUMAC-PRNM system has been approved as an acceptable neutron monitoring replacement by the NRC.

Therefore, based on the above discussions, the proposed change will not result in a significant increase in the consequences of any accident previously evaluated.

The operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not create the possibility of a new or different kind of accident from any accident previously evaluated.

NMPC proposes to replace the existing RPS APRM system with the NUMAC-PRNM system and make associated changes to the RPS and Control Rod Block TS instrumentation sections. As discussed in NEDC-3241OP-A, no new system level failure modes are created with the replacement system. The NUMAC-PRNM modification and associated changes to the TSs involve systems that are intended to detect the symptoms of certain events or accidents and initiate mitigating actions. The worst case failure of the systems involved would be a failure to initiate mitigative actions (i.e., scram or rod block), but no failure can cause an accident. This is unchanged from the current system. The proposed changes do not modify the basic functional requirements of the affected equipment, create any new system interfaces or interactions nor create any new system failure modes or sequence of events that could lead to an accident. The replacement system is more tolerant of degraded power than the current system. Software common cause failures can at most cause the system to fail to perform its safety function. As with system level failures, software failures could fail to initiate actions to mitigate the consequences of an accident, but would not cause one. Surveillance testing will continue to be performed to assure reliability and maintain current performance levels.

The NUMAC-PRNM system is a digital system with software (firmware) control. As such, it has "central" processing points and software controlled digital processing where the current system has analog and discrete component processing. The result is that the specific failures of hardware and potentially common cause software are different from the current system. Also, automatic self-test results in some cases in a direct trip as a result of a hardware failure where the current system may have remained "as is." However, when these are evaluated at the system level,

there are no new effects. In general, the USAR assumes simplistic failure modes (relays for example) but does not specifically evaluate effects added by the NUMAC-PRNM such as self-test detection and automatic trip or alarm. The effects of software common cause failures are mitigated by hardware design and system architecture. The replacement system is fully qualified to operate in its installed location and will not affect other equipment. The NUMAC-PRNM system has been approved as an acceptable neutron monitoring replacement by the NRC. Therefore, the proposed change will not create the possibility of a new or different kind of accident from any previously evaluated.

The operation of Nine Mile Point Unit 2, in accordance with the proposed amendment, will not involve a significant reduction in a margin of safety.

The proposed modification and associated TS changes will not adversely affect the performance characteristics of the RPS and Control Rod Block instrumentation nor will it affect the ability of the subject instrumentation to perform its intended function. As stated in NEDC-3241OP-A, the replacement system has improved channel trip accuracy compared to the current system and meets or exceeds system requirements assumed in setpoint analysis. Also, the channel response time is within acceptable limits, the channel indicated accuracy is improved over the current system, and the replacement system does not cause a plant parameter for any analyzed event to fall outside of acceptable limits. The surveillance testing and frequencies proposed will assure reliability of the RPS and Control Rod Block instrumentation. In addition, the subject equipment was qualified, where appropriate, to assure its intended safety function is performed. Therefore, the proposed changes do not involve 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 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: Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126.

Attorney for licensee: Mark J. Wetterhahn, Esquire, Winston & Strawn, 1400 L Street, NW., Washington, DC 20005-3502.

NRC Project Director: S. Singh Bajwa.

Pacific Gas and Electric Company

[Docket Nos. 50-275 and 50-323]

Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2, San Luis Obispo County, California

Date of amendment requests: July 30, 1997.

Description of amendment requests: The proposed amendments would revise the combined Technical Specifications (TS) for the Diablo Canyon Power Plant Unit Nos. 1 and 2 to add a limiting condition for operation and surveillance requirements for a residual heat removal (RHR) pump trip on low refueling water storage tank (RWST) level to TS 3/4.3.2, "Engineered Safety Features Actuation System Instrumentation."

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.

This change assures the availability of the refueling water storage tank (RWST) low-level trip of the residual heat removal (RHR) pumps by establishing limits on the time that a channel can be out of service to 72 hours and establishing surveillance criteria to verify the operation of the logic. The RHR system is used to respond to loss of coolant accidents (LOCAs) and other (e.g., secondary side) accidents that could result in initiation of a safety injection signal, and is not a precursor to any of these events as evaluated in safety analyses. Under accident conditions the RWST serves as the source of water for the emergency core cooling system (ECCS) pumps and the containment spray pumps. The RWST and the RHR pump trip are accident mitigation components and are not precursors for any accident evaluated in the safety analyses.

The existing Technical Specification (TS) would allow one RWST level indication channel to be inoperable indefinitely, and has an allowed outage time (AOT) for two channels inoperable of up to seven days. Additionally, the existing TS does not apply to the RWST low-level RHR pump trip logic. The new TS provides controls that require that all three RWST low-level trip channels be maintained operable while the plant is in Modes 1 to 4, and provides for an AOT for one channel inoperable of up to 72 hours, if the inoperable channel is placed in the cut-out mode within 6 hours. By placing the inoperable channel in the cut-out mode, the possibility of a channel failure causing an RHR pump failure to start at the onset of an accident is precluded even with a single active failure. This assures that the consequences of an accident are not increased.

The change will have no effect on the probability of a physical failure of an RHR pump because it only ensures the presence of a pump trip signal when required. Therefore, there is no increase in the probability of failure of an RHR train to function as designed. This change will have no effect on the probability of any other ECCS equipment failure as it only affects the presence of a trip signal for the RHR pumps.

The new TS 3.3.2 item would provide controls that require that all three RWST level channels be maintained operable while the plant is in operating Modes 1 to 4 (power operation through hot shutdown). By maintaining the three channels operable, the RHR pump actuation/trip logic operability is assured so that the RHR and RWST can in all cases perform their intended accident mitigation functions following a design basis event as evaluated in the safety analyses.

Therefore, the 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.

The RHR system is used to respond to LOCAs and other (e.g., secondary side) accidents that could result in initiation of a safety injection signal. Under accident conditions the RWST serves as the initial source of water for injection by the RHR and other ECCS pumps, and is the source of water for the containment spray pumps. This change does not affect operation of the systems as it relates to their response to accident conditions. It provides additional assurance that the RHR pump trip logic will operate as designed by establishing administrative controls on the time the system is susceptible to a single failure. No new failure modes have been introduced.

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 change does not involve a significant reduction in a margin of safety.

The relevant margin of safety is based on the RHR pumps starting and then automatically stopping at the correct RWST water level. The new TS 3.3.2 item provides controls that require all three RWST level channels be maintained operable while the plant is in Modes 1 to 4. By maintaining the three channels operable, the capability of the RHR pump actuation/trip logic to survive a single active failure is assured. Therefore, the trip logic operability is assured and the margin is preserved. This change also provides additional assurances that the remaining water in the RWST at the time of switchover is consistent with that assumed in the Final Safety Analysis Report and Safety Evaluation Reports.

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 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Local Public Document Room
location: California Polytechnic State University, Robert E. Kennedy Library, Government Documents and Maps Department, San Luis Obispo, California 93407.

Attorney for licensee: Richard F. Locke, Esq., Pacific Gas and Electric Company, P.O. Box 7442, San Francisco, California 94120.

NRC Project Director: William H. Bateman.

Pennsylvania Power and Light Company

[Docket Nos. 50-387 and 50-388]

Susquehanna Steam Electric Station, Units 1 and 2, Luzerne County, Pennsylvania

Date of amendment request: June 25, 1997.

Description of amendment request: The amendments would modify the Susquehanna Steam Electric Station, Units 1 and 2 Technical Specifications to reflect an increase in the secondary containment bypass leakage. Specifically, Section 3.6.1.2 is changed to replace the leakage of 1.2 scf per hour for any one main steam line drain with 25.43 scfh for secondary containment bypass leakage from all sources; Section 3.6.1.2 is changed to include the Main Steam Line Drain, high-pressure coolant injection (HPCI) system drain, and reactor core isolation cooling (RCIC) system drain leakages as part of the 300 scfh leakage requirement; and Section 3/4.6.1.2 is changed to include a discussion which related the secondary containment bypass leakage TS to the radiological dose analyses.

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.

Of the potential accidents described in FSAR [Final Safety Analysis Report] Chapters 6 and 15, only a "Decrease in Reactor Coolant Inventory" as described in FSAR Section 15.6.5 is affected by the proposed action. The specific accident of concern is a design basis LOCA [loss-of-coolant accident] concurrent with a LOOP [loss-of-offsite power] which results in RPV [reactor pressure vessel] depressurization and failure to recover RPV level above the FW [feedwater] spargers. For this accident, the current licensing basis offsite and control room dose analyses assume a secondary containment bypass leakage rate of 9 scfh and primary containment water (called ESF [engineered safety function]) leakage of 5 gpm. The current licensing basis analyses do not attribute this leakage to any specific pathway.

The proposed action does not increase the probability of a previously analyzed accident in any way. The condition of concern is the

result of an accident and as such does not contribute to the initiation of an accident as analyzed in the FSAR.

Of concern is whether or not the proposed action significantly increases the consequences of an accident as previously evaluated. Calculations of off-site dose assuming SCBL [secondary containment bypass leakage] of 28 scfh, primary containment water leakage of 20 gpm, and crediting suppression pool scrubbing show decreases in thyroid dose, but slight increases in whole body dose when compared with dose calculations performed to support the removal of the MSIV-LCS [main steam isolation valve-leakage control system]. This result is expected because the effect of suppression pool scrubbing is factored into the revised licensing basis analysis. Suppression pool scrubbing is effective in reducing iodine release but has no assumed effect on the removal of noble gases. Since the methodology/assumptions for scrubbing are acceptable to the NRC [Nuclear Regulatory Commission] per the guidance in SRP [Standard Review Plan] Section 6.5.5 and the values for decontamination factors are conservative, the judgment may be made that considerable margin is preserved within the analysis.

Although the whole body dose with SCBL of 28 scfh and water leakage of 20 gpm is increased from the previously approved MSIV-LCS dose analysis, the increase is small (about 1 rem at the two hour site boundary; less than 0.1 rem 30 day LPZ [low population zone]). The total dose including the increase is still well below the 10CFR100 whole body regulatory limit of 25 rem to which SSES [Susquehanna Steam Electric Station] was licensed. No change in operating procedures is anticipated. Calculated post accident control room thyroid dose decreases as a result of this change, and the increase in control room whole body dose is less than 0.05 rem, well below the 10CFR50, Appendix A, GDC [General Design Criterion] 19 dose limits outlined in NUREG-0800. Thus, no appreciable effect on operator response will occur as a result of this change.

The addition of the HPCI and RCIC Steam Line Drains to the Tech Spec for MSIV leakage is being performed as a result of the modification which eliminated the MSIV Leakage Control System (MSIV LCS). At the time this modification was performed, these lines were not identified as potential SCBL pathways. However, because leakage from the HPCI and RCIC drain lines are part of the same pathway to the condenser which is now used by the main steam line drains (MSLD) and included in the Technical Specifications, they must be combined with the MSIV's and MSLD to be less than 300 scfh. This change only affects the accounting of the various drain leakages in the valve testing program. The justification for this change is the same justification provided in the ITS [Improved Technical Specification] submittal (PLA-4488, August 1, 1996) which adds the MSLD to this Technical Specification. The test pressure change to allow testing at Pa was previously proposed in PLA-4502, September 23, 1996. One additional change to delete a footnote related to the removal of the MSIV Leakage Control System is

included because this system has been removed from Susquehanna SES.

Since the increase in SCBL and primary containment water leakage result in only a small increase in the doses previously evaluated by the NRC and the other changes do not affect the dose analyses, the proposed change does not result in a significant increase in the 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.

Because the FSAR analysis already assumes SCBL and ESF leakage occur and the other changes do not affect the type of accident[s] that are postulated to occur, the proposed change does not present the possibility of an accident of a different type. Additionally, the change in dose analysis methodology does not create an accident or malfunction of a different type since it only involves the analysis of the effects of such accidents or malfunctions.

Therefore, the proposed change does 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.

This question addresses changes in system parameters only. Dose consequences are addressed in Section 1 above. The only Technical Specification dealing with SCBL is T.S. 3.6.1.2 which requires the leakage from any one Main Steam Line Drain (MSLD) Valve to be less than or equal to 1.2 scfh when tested at Pa (45.0 psig). As noted earlier, the current licensing basis accident dose analysis assumes a total of 9 scfh for bypass leakage and 5 gpm for primary containment water leakage but does not attribute them to any particular source. The proposed action increases the assumed SCBL from 9 to 28 scfh and water leakage from 5 gpm to 20 gpm. These leakage rates are insignificant in terms of SGTS [standby gas treatment system] flows or water loss from ECCS systems. These leakage rates do not affect building temperatures or pressures so that they become closer to acceptance limits. Likewise, no other system parameter values become closer to limits as a result of these changes in leakage. Consequently, the existing margin of safety between the licensing basis analysis and system parameter acceptance limits is not reduced. The changes to the HPCI, RCIC, and main steam line drain leakage only affect the accounting for the various leakages in the leakage testing program. The deletion of the footnote is administrative because the MSIV Leakage Control System has been removed from the Susquehanna SES. The change in test pressure was previously evaluated in PLA-4502, September 23, 1996. Thus, no decrease in margin of safety results.

The NRC staff has reviewed the licensee's analysis and notes that a discussion of the administrative change to delete a footnote in Section 3.6.1.2 is in the third section of the no significant hazards consideration. The staff finds that this administrative change also

does not involve a significant increase in the probability or consequences of an accident previously evaluated and does not create the possibility of a new or different kind of accident from any accident previously evaluated. Based on this staff 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: Osterhout Free Library, Reference Department, 71 South Franklin Street, Wilkes-Barre, PA 18701.

Attorney for licensee: Jay Silberg, Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street NW., Washington, DC 20037.

NRC Project Director: John F. Stolz.

Pennsylvania Power and Light Company

[Docket No. 50-387]

Susquehanna Steam Electric Station, Unit 1, Luzerne County, Pennsylvania

Date of amendment request: August 26, 1997.

Description of amendment request: The amendment would modify the Susquehanna Steam Electric Station, Unit 1 Technical Specifications to change the definitions in Section 1.0 to make them applicable to ATRIUM-10 fuel (reflecting the new design), to include the Unit 1 Cycle 11 flow dependent minimum critical power ratio (MCPR) Safety Limits in Sections 2.1.2 and 3.4.1.1.2, to change Section 5.3.1 to reflect the ATRIUM-10 design, and to include Siemens Power Corporation methodology topical reports and references to the methodology in Section 6.9.3.2.

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 applicable sections of the FSAR [Final Safety Analysis Report] are Chapters 5, 6.3, 9, and 15 of the FSAR. Chapter 5 discusses the results of the ASME [American Society of Mechanical Engineers] overpressure analysis for the reactor pressure boundary. Chapter 6.3 discusses the LOCA [loss-of-coolant accident]. Chapter 9 discusses fuel storage and handling. Chapter 15 describes the transient and accident analyses, a majority of which have been dispositioned to be non-limiting. A discussion of the impact of the Technical Specification changes is provided below.

The change to Definitions 1.2 and 1.3 makes the definitions applicable to ATRIUM™-10. There are no effects on safety functions from this change.

A cycle specific MCPR Safety Limit analysis was performed for PP&L [Pennsylvania Power and Light Company] by SPC [Siemen Power Corporation]. This analysis used NRC [Nuclear Regulatory Commission] approved methods described in Technical Specification Reference 13 (ANF-524(P)(A), Revision 2 and Supplement 1 Revision 2), as modified by EMF-97-010(P), Rev. 1. The SAFETY LIMIT MCPR calculation statistically combines uncertainties on feedwater flow, feedwater temperature, core flow, core pressure, core power distribution, and the uncertainty in the Critical Power Correlation. The SPC analysis used cycle specific power distributions and calculated MCPR values such that at least 99.9% of the fuel rods are expected to avoid boiling transition during normal operation or anticipated operational occurrences. The SAFETY LIMIT MCPRs are specified as a function of core flow. The resulting two-loop and single-loop values (Technical Specification Sections 2.1.2 and 3.4.1.1.2) are included in the proposed change. Thus, the cladding integrity and its ability to contain fission products are not adversely affected.

The MCPR methodology for ATRIUM™-10 fuel (SPC report EMF-97-010(P), Rev. 1), included in the revised Technical Specifications via reference (Section 6.9.3.2) and previously approved by the NRC for Unit 2 Cycle 9, describes conservative methods for developing the MCPR Safety Limits and Operating Limits for the U1C11 reload of ATRIUM™-10 fuel in the Susquehanna Steam Electric Station. This methodology conservatively accounts for a flow dependence in the ATRIUM™-10 critical power test data as well as an increased correlation uncertainty for high local peaking factor rods. The results of using this methodology are core flow dependent MCPR Safety Limits plus conservative MCPR Operating Limits for Unit 1 Cycle 11. The resulting MCPR Safety Limits and Operating Limits will continue to assure that at least 99.9% of the fuel rods are expected to avoid boiling transition during normal operation or anticipated operational occurrences. Thus, the cladding integrity and its ability to contain fission products are not adversely affected. The proposed change in MCPR methodology does not physically affect the plant or its systems.

Using the approach discussed in EMF-97-010(P), Rev. 1, analyses of the Pump Seizure accident with the new MCPR methodology (SPC report EMF-97-010(P), Rev. 1) will demonstrate that the NRC acceptance criterion (i.e., small fraction of 10CFR100 dose limits) is met.

The change to the Design Features (Section 5.3) increases the maximum allowable lattice average enrichment. Analyses have demonstrated that the ATRIUM™-10 fuel will remain subcritical (k -effective < 0.95) in both the spent fuel pool and the new fuel vault. Thus, the change to maximum allowable lattice average enrichment has no impact on safety functions. The description

of a fuel assembly (Section 5.3) is also revised to reflect the ATRIUM™-10 central water channel, and reference to an active fuel length of 150 inches was deleted. This change reflects the physical characteristics of the ATRIUM™-10 fuel and has no impact on the probability or consequences of an event.

Included in the revised Technical Specifications via reference (Section 6.9.3.2) are additional NRC approved methodology reports. The NRC approved topical reports contain methodology which is used to assure safe operation of Unit 1 with ATRIUM™-10 fuel. These methodologies assure that the core meets appropriate margins of safety for all expected plant operational conditions ranging from refueling and cold shutdown of the reactor through power operation. Thus, the results obtained from the analyses will provide assurance that the reactor will perform its design safety function during normal operation and design basis events.

The BASES changes for Section 2.1.1 (THERMAL POWER, Low Pressure or Low Flow) reflect that the Safety Limit is valid for both 9x9-2 and ATRIUM™-10. BASES for Section 2.1.2 were changed to refer to Section 6.9.3.2 for applicable references.

Therefore, the proposed action does 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.

The changes to the Unit 1 Technical Specifications (Definitions, MCPR safety limits, Design Features, and inclusion of methodology references) to allow use of ATRIUM™-10 fuel do not require any physical plant modifications, physically affect any plant components, or entail significant changes in plant operation. Thus, the proposed change does not create the possibility of a previously unevaluated operator error or a new single failure. The consequences of transients and accidents will remain within the criteria approved by the NRC. Therefore, the proposed change does 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 applicable Technical Specification Sections include 1.0, 2.0, 3/4.4, 5.3, and 6.9.3.2.

The changes to the Unit 1 Technical Specifications discussed in Item 1 above do not require any physical plant modifications, physically affect any plant components, or entail significant changes in plant operation. Therefore, the proposed change will not jeopardize or degrade the function or operation of any plant system or component governed by Technical Specifications. The consequences of transients and accidents will remain within the criteria approved by the NRC. The proposed MCPR Safety Limits and the NRC approved methods and revised MCPR methodology detailed in the references added to Section 6.9.3.2 maintain an equivalent margin of safety as defined in the BASES of the applicable Technical Specification sections.

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: Osterhout Free Library, Reference Department, 71 South Franklin Street, Wilkes-Barre, PA 18701.

Attorney for licensee: Jay Silberg, Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street NW., Washington, DC 20037.

NRC Project Director: John F. Stolz.

Southern California Edison Company, et al.

[Docket Nos. 50-361 and 50-362]

San Onofre Nuclear Generating Station, Unit Nos. 2 and 3, San Diego County, California

Date of amendment requests: June 18, 1997.

Description of amendment requests: The licensee proposes to revise Technical Specification (TS) 3.8.1, "AC Sources—Operating" and applicable Bases. This change will more clearly reflect safety analysis and testing conditions.

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 would revise Technical Specification (TS) TS 3.8.1, "AC Sources—Operating," Surveillance Requirement (SRs) 3.8.1.1, 3.8.1.2, 3.8.1.7, 3.8.1.10, 3.8.1.11, 3.8.1.12, 3.8.1.13, 3.8.1.14, 3.8.1.15, 3.8.1.16, 3.8.1.17, 3.8.1.19, and 3.8.1.20 and applicable Bases to more clearly reflect surveillance test conditions and system design requirements. Changes to the SRs include more restrictive voltage and frequency acceptability limits. The new requirements reflect the system design requirements in order to ensure Class 1E system operability, meet the requirements of the safety analysis, and to agree with the existing test surveillances.

In addition, the discussion regarding design basis reactive power loading is eliminated since this cannot be readily controlled during testing.

Operation of the facility would remain unchanged as a result of the proposed change and no assumptions or results of any

accident analyses are affected. Therefore, the proposed change will not involve a 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 evaluated.

The proposed change would revise Technical Specification (TS) TS 3.8.1, "AC Sources—Operating," Surveillance Requirement (SRs) 3.8.1.1, 3.8.1.2, 3.8.1.7, 3.8.1.10, 3.8.1.11, 3.8.1.12, 3.8.1.13, 3.8.1.14, 3.8.1.15, 3.8.1.16, 3.8.1.17, 3.8.1.19, and 3.8.1.20 and applicable Bases to more clearly reflect surveillance test conditions and system design requirements.

Operation of the facility would remain unchanged as a result of the proposed change. Therefore, the proposed change 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 change would revise Technical Specification (TS) TS 3.8.1, "AC Sources—Operating," Surveillance Requirement (SRs) 3.8.1.1, 3.8.1.2, 3.8.1.7, 3.8.1.10, 3.8.1.11, 3.8.1.12, 3.8.1.13, 3.8.1.14, 3.8.1.15, 3.8.1.16, 3.8.1.17, 3.8.1.19, and 3.8.1.20 and applicable Bases to more clearly reflect surveillance test conditions and system design requirements. Changes to the SRs include more restrictive voltage and frequency acceptability limits. The new requirements reflect the system design requirements in order to ensure Class 1E system operability, meet the requirements of the safety analysis, and to agree with the existing test surveillances.

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 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Local Public Document Room location: Main Library, University of California, P. O. Box 19557, Irvine, California 92713.

Attorney for licensee: T. E. Oubre, Esquire, Southern California Edison Company, P. O. Box 800, Rosemead, California 91770.

NRC Project Director: William H. Bateman.

Southern California Edison Company, et al.

[Docket Nos. 50-361 and 50-362]

San Onofre Nuclear Generating Station, Unit Nos. 2 and 3, San Diego County, California

Date of amendment requests: November 14, 1997 (supersedes February 1, 1994, amendment request).

Description of amendment requests:

The licensee proposes to revise the licensing basis as described in the Updated Final Safety Analysis Report Section 3.5, "Missile Protection," to allow the use of NUREG-0800, "Standard Review Plan" methodology in evaluating tornado-generated missiles. In particular, a probability based criteria is proposed to evaluate missile barrier requirements consistent with Section 3.5.1.4 of NUREG-0800.

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.

NUREG-0800, Standard Review Plan (SRP) Section 3.5.1.4, Revision 0 and Section 3.5.1.5 Revision 1 provide a conservatively acceptable probability threshold for safety due to damage caused by postulated missile strikes. Section 3.5.1.4, Revision 0 uses 10^{-7} per year for a tornado-generated missile strike, and Section 3.5.1.5 Revision 1 uses 10^{-7} per year for exceeding 10 CFR Part 100 limits.

The proposed criteria of probability of damage to critical exposed equipment (as defined in San Onofre Updated Final Safety Analysis Report proposed Table 3.5-13) of 10^{-7} per year per unit is consistent with this guidance.

The probability of damage to exposed critical components due to a postulated missile strike of 10^{-7} is so small as to be negligible. Therefore, this change does 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.

This amendment request establishes a conservative criteria for tornado-generated missiles consistent with the SRP guidance and will not create a new or different kind of accident from any accident that has been previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

This proposed change is consistent with the methodology and acceptance criteria of the SRP, and the SRP criteria ensures that there will be no undue risk to the health and safety of the public. Therefore, there will be no 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 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Local Public Document Room location: Main Library, University of California, P. O. Box 19557, Irvine, California 92713.

Attorney for licensee: T.E. Oubre, Esquire, Southern California Edison Company, P. O. Box 800, Rosemead, California 91770.

NRC Project Director: William H. Bateman.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia

Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

[Docket Nos. 50-424 and 50-425]

Date of amendments request: August 8, 1997, as supplemented October 10, 1997. This application and supplement supersedes the October 4, 1996, application, noticed in the **Federal Register** on November 19, 1996 (61 FR 58903), in its entirety.

Description of amendments request: The proposed amendments would change the Technical Specifications to credit soluble boron in the spent fuel pool for maintenance of subcriticality and increase the allowable fuel enrichment to 5.0 percent U-235 as follows:

1. Revisions to the Table of Contents

The Table of Contents would be revised to include two additional Technical Specifications 3.7.17, "Fuel Storage Pool Boron Concentration," and 3.7.18, "Fuel Assembly Storage in the Fuel Storage Pool" and add Figures 3.7.18-1, 3.7.18-2, and 4.3.1-1 through 4.3.1-9 describing burnup credit, checkerboard configurations and interface requirements. These changes would be added to support crediting soluble boron in the fuel storage pool criticality analyses.

2. Addition of Technical Specifications 3.7.17 and 3.7.18

Technical Specifications 3.7.17, "Fuel Storage Pool Boron Concentration," and 3.7.18, "Fuel Assembly Storage in the Fuel Storage Pool," would be added to credit soluble boron in the fuel storage pool criticality analyses, and specify acceptable enrichment-burnup combinations for storage of fuel in the fuel storage pool.

3. Revision to Technical Specification 4.3.1.1

Design Features Section 4.3.1.1 would be revised to reflect the increased maximum enrichment assumed in the fuel storage pool criticality analyses, add a requirement to maintain K_{eff} less than 1.0 when fully flooded with unborated water, change the 0.95 K_{eff} requirement from "if fully flooded with unborated water" to "when fully flooded with water borated to 450 ppm (Unit 1) or 500 ppm (Unit 2)," and to add a reference to Specification 3.7.18 for allowable enrichment-burnup combinations. Requirements for fuel that do not meet the

requirements of Specification 3.7.18, would also be added to Section 4.3.1.1, including Figures 4.3.1-1 through 4.3.1-9 depicting acceptable enrichment-burnup requirements and checkerboard configurations.

4. Revisions to the Table of Contents (Bases)

The Table of Contents would be revised to include two additional Technical Specification Bases Sections B 3.7.17 "Fuel Storage Pool Boron Concentration" and B 3.7.18 "Fuel Assembly Storage in the Fuel Storage Pool."

5. Addition of Bases for Technical Specifications 3.7.17 and 3.7.18

Two additional Technical Specification Bases Sections B 3.7.17, "Fuel Storage Pool Boron Concentration" and B 3.7.18, "Fuel Assembly Storage in the Fuel Storage Pool" would be added to credit soluble boron in the fuel storage pool criticality analyses.

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 radiological consequences of 5.0 weight percent U-235 fuel on accidents previously evaluated in the Vogtle FSAR [Final Safety Analysis Report] are not significant. Increasing the enrichment up to and including 5.0 weight percent U-235 has minor effects on the radiological source terms and subsequently the potential releases both normal and accidental are not significantly affected. Evaluations performed (WCAP-12610-P-A, Reference 5 [of the licensee's application]) considered the source term, gap fraction, and the accident doses for a maximum fuel enrichment of 5.0 weight percent U-235. It was concluded that operating with and storing fuel with 5.0 weight percent U-235 enrichment may result in minor changes in the normal annual releases of long half-life fission products that are not significant. Also, the radiological consequences of accidents are minimally affected due to the very small changes in the core inventory and the fact that the currently assumed gap fractions remain bounding.

The use of the slightly higher enrichment for VEGP [Vogtle Electric Generating Plant] fuel will not result in burnups in excess of those currently allowed for VEGP. The cycle design methods and limits will remain the same as are currently licensed. Therefore, the use of fuel with the higher enrichment will not result in conditions outside those currently allowed for VEGP.

There is no increase in the probability of a fuel assembly drop accident in the fuel storage pool when considering the presence of soluble boron in the pool water for criticality control. The handling of the fuel assemblies in the fuel storage pool has always been performed in borated water.

Fuel assembly placement will be controlled pursuant to approved fuel

handling procedures and will be in accordance with the spent fuel rack storage configuration limitations in the Technical Specifications. The consequences of a misplaced assembly have been included in the analysis supporting this revision to the Technical Specifications.

There is no increase in the consequences of the accidental misloading of a fuel assembly into the fuel storage pool racks because criticality analyses demonstrate that the pool will remain subcritical following an accidental misloading of an assembly. There are no credible dilution events that reduce the subcriticality margin below the 5% margin recommended in NRC guidance (references 1, 2, and 3 [of the licensee's application]). Even if the fuel storage pool were diluted to a boron concentration of 0 ppm the No Soluble Boron 95/95 analysis demonstrates that the pool will remain subcritical. The proposed Technical Specifications limitations will ensure that an adequate fuel storage pool boron concentration will be maintained.

There is no increase in the probability of the loss of normal cooling to the fuel storage pool water due to the presence of soluble boron in the pool water for subcriticality control, because a concentration of soluble boron similar to the proposed limit has always been maintained in the fuel storage pool water.

The loss of normal cooling to the fuel storage pool will cause an increase in the temperature of the fuel storage pool water. This will cause a decrease in water density which would normally result in an addition of negative reactivity. However, since Boraflex is not considered to be present, and the fuel storage pool water has a high concentration of boron, a density decrease causes a positive reactivity addition. The amount of soluble boron required to offset this postulated accident was evaluated for the allowed storage configurations. The amount of soluble boron necessary to mitigate these accidents and ensure that the K_{eff} will be maintained less than or equal to 0.95 has been included in the fuel storage pool boron concentration. Because adequate soluble boron will be maintained in the pool water, the consequences of a loss of normal cooling to the fuel storage pool will not be increased.

Therefore, based on the conclusions of the above analysis, the proposed changes will 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 analyzed.

The potential for criticality accidents in the fuel storage pool are not new or different types of concerns. The potential criticality accidents have been reanalyzed in the Criticality Analysis report (Enclosure 5 [of the licensee's application]) to demonstrate that the pool remains subcritical.

Soluble boron has been maintained in the fuel storage pool water since its initial operation. The possibility of a fuel storage pool dilution is not affected by the proposed change to the Technical Specifications.

Therefore, the implementation of Technical Specification controls for the soluble boron will not create the possibility of a new or different kind of accidental pool dilution.

With credit for soluble boron now a major factor in controlling subcriticality, an evaluation of fuel storage pool dilution events was completed. The results of the evaluation concluded that no credible events would result in a reduction of the criticality margin below the 5% margin recommended by the NRC. In addition, the No Soluble Boron 95/95 criticality analysis assures that dilution to 0 ppm will not result in criticality.

Proposed Technical Specifications 3.7.17, 3.7.18 and 4.3.1.1 which ensure the maintenance of the fuel storage pool boron concentration and storage configuration, do not represent new concepts. The actual boron concentration in the fuel storage pool has been maintained at a higher value than the proposed limits for the Unit 1 and 2 fuel storage pools for refueling purposes. The criticality analysis (Enclosure 5 [of the licensee's application]) determined that a boron concentration of 450 ppm (Unit 1) and 500 ppm (Unit 2) results in a K_{eff} [less than or equal to] 0.95.

There is no significant change in plant configuration, equipment design, or usage of plant equipment. The safety analysis for dilution accidents has been expanded; however, the criticality analyses assure that the pool will remain subcritical with no credit for soluble boron. Therefore, the proposed changes will not create the possibility of a new or different kind of accident.

3. The proposed change does not result in a significant reduction in the margin of safety.

Proposed Technical Specifications 3.7.17, 3.7.18, and 4.3.1.1 and the associated fuel storage pool boron concentration and storage requirements will provide adequate margin to assure that the fuel storage array will always remain subcritical by the 5% margin recommended by the NRC. Those limits are based on the criticality analysis (Enclosure 5 [of the licensee's application]) performed in accordance with the Westinghouse fuel storage rack criticality analysis methodology described in Reference 4 [of the licensee's application].

While the criticality analysis utilized credit for soluble boron, the storage configurations have been defined using K_{eff} calculations to ensure that the spent fuel rack K_{eff} will be less than 1.0 with no soluble boron.

Soluble boron credit is used to offset off-normal conditions (such as a misplaced assembly) and to provide subcritical margin such that the fuel storage pool K_{eff} is maintained less than or equal to 0.95.

The combination of the No Soluble Boron 95/95 K_{eff} calculation which shows that the K_{eff} will remain less than 1.0 when flooded with unborated water and the unavailability of the large volumes of water which are necessary to dilute the fuel storage pool to a K_{eff} of > 0.95 , provide a level of safety comparable to the conservative criticality analysis methodology required by References 1, 2, and 3 [of the licensee's application].

Therefore, the proposed changes in this license amendment will not result in a

significant reduction in the plant's 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: Burke County Public Library, 412 Fourth Street, Waynesboro, Georgia.

Attorney for licensee: Mr. Arthur H. Domy, Troutman Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia.

NRC Project Director: Herbert N. Berkow.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia

Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

[Docket Nos. 50-424 and 50-425]

Date of amendment request: September 4, 1997, as supplemented November 20, 1997.

Description of amendment request: The proposed amendments would revise the Technical Specifications (TS) to change the capacity of the Vogtle Unit 1 spent fuel storage pool from 288 to 1476 assemblies, and would revise the design features description to reflect the criticality analyses and storage cell spacing. Specifically, the changes would be as follows:

1. Figure 3.7.18-1 would be replaced with a revised figure based on the criticality analyses for the Unit 1 racks containing boron.

2. The criticality information for Unit 2 would be placed unchanged into Section 4.3.1.2, and Section 4.3.1.1. would be revised to address Unit 1.

3. Design Features Section 4.3.1.1.c would be revised to indicate 600 ppm as the required amount of soluble boron to maintain K_{eff} less than or equal to 0.95.

4. Design Features Section 4.3.1.1.d would be revised to include the reference K_{eff} that is equivalent to the combination of burnup and initial enrichment defined by Figure 3.7.18-1.

5. Design Features Section 4.3.1.1.e would be revised to indicate that fuel assemblies with up to 5 weight percent U-235 may be stored in 3-out-of-4 checkerboard storage configurations; delete Figure 4.3.1-1; eliminate the reference to 2-out-of-4 storage for the Unit 1 pool and include the reference K acceptable for all cell storage in the Unit 1 fuel storage racks.

6. Design Features Section 4.3.1.1.f would be revised to include the pitch of the Unit 1 fuel storage racks.

7. Design Features Section 4.3.3 would be revised to indicate the Unit 1 fuel storage pool capacity of 1476 fuel assemblies.

8. The titles on Figures 4.3.1-4, 4.3.1-6, and 4.3.1-7 would be revised to reflect the elimination of 2-out-of-4 storage configuration requirements for the Unit 1 fuel storage pool.

Changes to the TS Bases are also proposed.

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 analyses methodologies are the same as previously approved for use by the NRC. The results of the analyses resulted in fuel pool boron concentrations, and fuel assembly storage limitations that are similar to those already submitted to the NRC. The increased number of fuel assemblies will remain less than the number previously accepted by the NRC for storage in VEGP [Vogtle Electric Generating Plant] Unit 2, which has a similarly designed and constructed facility, with the exception of the number of fuel storage locations.

Therefore, based on the conclusions of the above analysis, the proposed changes will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The effects of accidents that could affect the fuel were analyzed for the fuel storage racks, however the types of accidents have not changed. The fuel to be stored in the Unit 1 pool is expected to meet the all cell storage requirements. The racks will be placed in the Unit 1 pool without lifting any loads over spent fuel. After installation of the new racks, the Unit 1 pool will have 1476 storage locations which is well within the 2098 locations that the pool and structure is capable of storing, based on its similarity to the Unit 2 pool.

Therefore, the proposed changes will not create the possibility of a new or different kind of accident.

3. The changes to the technical specifications are necessary to incorporate the parameters resulting from the criticality analyses. The criticality analyses were performed using methods and criteria previously accepted by the NRC. The requirements are similar to the previously submitted requirements. The margins of safety provided by the previous technical specifications are not significantly affected because the new racks are based on the same acceptance values. The larger number of fuel assemblies to be stored in the Unit 1 pool remains well within the capability of the pool.

Therefore, the proposed changes in this license amendment will not result in a significant reduction in the plant's 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: Burke County Public Library, 412 Fourth Street, Waynesboro, Georgia.

Attorney for licensee: Mr. Arthur H. Dombey, Troutman Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia.
NRC Project Director: Herbert N. Berkow.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia

Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia

[Docket Nos. 50-424 and 50-425]

Date of amendment request: November 20, 1997.

Description of amendment request: The proposed amendment would change the Technical Specifications (TS) to provide for the following with regard to the Reactor Trip System (RTS) and Engineered Safety Feature Actuation System (ESFAS) instrumentation trip setpoints:

1. The inequalities as they are applied to the Trip Setpoint column of Tables 3.3.1-1 and 3.3.2-1 would be deleted, and the column heading would be changed from "Trip Setpoint" to "Nominal Trip Setpoint."

2. A footnote would be added to the new "Nominal Trip Setpoint" column of Tables 3.3.1-1 and 3.3.2-1 that would allow the trip setpoints to be set more conservative than the nominal value as necessary to respond to plant conditions.

3. The Allowable Value for Table 3.3.1-1, Function 14.b, Turbine Trip—Turbine Stop Valve Closure, would be revised from "[greater than or equal to] 96.7% open" to "[greater than or equal to] 90% open."

4. Footnotes l and m of Table 3.3.1-1 would be revised to refer to the "Nominal Trip Setpoint" and delete the inequalities applied to the trip setpoints.

5. A superscript "(a)" would be deleted from the heading of the "Trip Setpoint" column on page 6 of 8 of Table 3.3.1-1.

6. Notes 1 and 2 to Table 3.3.1-1, Overtemperature ΔT and Overpower ΔT , respectively, would be revised to refer to the "Nominal Trip Setpoint." In addition, these notes will be revised to delete the inequalities from the values for the constants K_1 through K_6 (except for K_5 [greater than or equal to] 0 for decreasing temperature and $K_6 = 0$ for T [less than or equal to] T'), and for T', T'', and P'.

7. The inequality applied to the ESFAS Allowable Value for Steam Line Pressure—Low (Table 3.3.2-1, Function 1.e) would be changed from "[less than or equal to]" to "[greater than or equal to]."

Associated changes to the TS Bases are also proposed.

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 proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

No. The proposed changes affect only the presentation of the trip set points for the RTS and ESFAS in the VEGP [Vogtle Electric Generating Plant] Units 1 and 2 TS. The calibration of the channels whose setpoints are specified in the TS will continue to be performed in a manner consistent with the setpoint methodology described in WCAP-11269 Rev. 1. There will be no adverse effect on the ability of those channels to perform their safety functions as assumed in the safety analyses. Since there will be no adverse affect on the trip setpoints or the instrumentation associated with those trip setpoints, there will be no increase in the probability of any accident previously evaluated. Similarly, since the ability of the instrumentation to perform its safety function is not adversely affected, there will [be] no increase in the consequences of any accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

No. The proposed change affects only the presentation of trip setpoint requirements in the TS. Plant operation will not be changed, and the response of safety related equipment as assumed in the accident analyses will not be adversely affected. Therefore, the proposed change does not involve a new or different kind of accident than any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety [?]

No. As described above, the RTS and ESFAS instrumentation will remain capable of performing its safety function as assumed in the accident analyses. The treatment of trip setpoints as nominal values is consistent with the methodology used to establish those setpoints. As such, margin is not affected by the proposed change.

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: Burke County Public Library, 412 Fourth Street, Waynesboro, Georgia.

Attorney for licensee: Mr. Arthur H. Dombey, Troutman Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia.

NRC Project Director: Herbert N. Berkow.

Vermont Yankee Nuclear Power Corporation

[Docket No. 50-271]

Vermont Yankee Nuclear Power Station, Windham County, Vermont

Date of amendment request: October 10, 1997, as supplemented October 31, 1997.

Description of amendment request: The proposed amendment would revise the Technical Specifications (TS) to reflect the installation of a generator no-load disconnect to facilitate use of the main step-up transformer backfeed as the delayed access offsite power source. Also, the amendment would revise existing limiting conditions for operation and required action statements for operation with inoperable ac power sources to be consistent with current guidance.

Specifically, the changes proposed are: (1) TS Limiting Conditions for Operation Section—Normal Operation, 3.10.A.4 (2) TS Limiting Conditions for Operation Section—Operation with Inoperable Components, 3.10.B.3, (3) TS Surveillance Requirements—Normal Operation, 4.10.A.4, (4) TS Surveillance Requirements—Operation with Inoperable Components, Section 4.10.B.3, (5) Bases Section 3.10.A, (6) Bases Section 3.10.B, (7) Bases Section 4.10.A, and (8) Bases Section 4.10.B

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 amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed amendment removes credit for the Vernon Tie, Vermont Yankee's station blackout source of power, from the Technical Specifications and reflects the installation of the generator no load disconnect as part of the backfeed. Neither the backfeed through the main transformers nor the Vernon Tie are accident initiators; therefore, the change does not involve a significant increase in the probability of an accident previously evaluated. The change does not affect the capability, availability, maintenance or operation of the Vernon Tie. Installation of the generator no load disconnect switch is being implemented by a design change in order to enhance plant safety by reducing time necessary to establish the backfeed through the main transformer. A separate 10 CFR 50.59 evaluation is being prepared to document that the modification does not create an unreviewed safety question.

The proposed amendment also clarifies the allowable out of service times, and required actions; and updates surveillance requirements for the immediate and delayed access offsite power sources. These changes

do not involve a significant increase in the probability or consequences of an accident previously evaluated. Modification of a technical specification out of service time and required action cannot affect the probability or consequences of an accident. Enhancing surveillance requirements to provide assurance that the backfeed can be achieved when required and to provide assurance that remaining power sources are available when an offsite source is unavailable improves plant safety and does not increase the probability or consequences of an accident.

Therefore, the change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) The proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed amendment removes the Vernon Tie, Vermont Yankee's station blackout source of power, as a delayed access source from the Technical Specifications and reflects the improvements to the main transformer backfeed delayed access source because of installation of the generator no load disconnect. Neither the removal of the Vernon Tie from Technical Specifications nor the improvements to the delayed access power source (backfeed) can create the possibility of a new or different kind of accident from any previously evaluated.

The proposed amendment also clarifies the allowed outage times, and action statements; and updates surveillance requirements for the immediate and delayed access offsite power sources. A clarification of a technical specification out of service time and required action cannot create a new or different kind of accident from any accident previously evaluated. Enhancing surveillance requirements to provide assurance that the backfeed can be achieved when required and to provide assurance that remaining power sources are available when an offsite source is unavailable improves plant safety and cannot create a new or different kind of accident from any accident previously evaluated.

Therefore, this change would not create the possibility of a different type of accident than previously evaluated.

(3) The proposed amendment will not involve a significant reduction in a margin of safety.

The proposed amendment removes the Vernon Tie, Vermont Yankee's station blackout source of power, as a delayed source of offsite power from the Technical Specifications and reflects the improvements to the main transformer backfeed delayed access source because of installation of the generator no load disconnect. No existing safety margins are adversely affected. The backfeed is modified so that it may be established in sufficient time to "assure that specified acceptable fuel design limits and design conditions of the reactor coolant pressure boundary are not exceeded". Vernon Tie will not be affected by the modification and remain available as a station blackout source; thus this change does not involve a significant reduction in the margin of safety.

The proposed amendment also clarifies the allowed out of service times, and required actions; and updates surveillance requirements for the immediate and delayed access offsite power sources. A clarification of a technical specification out of service time and required action does not involve a significant reduction in the margin of safety in the Technical Specifications. Enhancing surveillance requirements to provide assurance that the backfeed can be achieved when required and to provide assurance that remaining power sources are available when an offsite source is unavailable improves plant safety and does not involve a significant reduction in the 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: Brooks Memorial Library, 224 Main Street, Brattleboro, VT 05301.

Attorney for licensee: Mr. David R. Lewis, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037-1128.

NRC Project Director: Ronald Eaton, Acting Director.

Vermont Yankee Nuclear Power Corporation

[Docket No. 50-271]

Vermont Yankee Nuclear Power Station, Windham County, Vermont

Date of amendment request: November 20, 1997.

Description of amendment request: The proposed amendment would revise the existing requirements for the Auxiliary Electrical Power Systems as identified in Technical Specifications (TSs) 3/4.10.A and TS 3.10.A.2.b. The specific changes are:

(1) The requirements in TS 3.10.A.2.b. are revised to omit the allowance for Spare Charger AB to substitute for either Charger A or B.

(2) The Bases in TS 3.10.A. are revised to omit the statements that justify Spare Charger AB to substitute for either Charger A or Charger B.

The proposed changes provide more limiting requirements for operation with the standby battery charger in service.

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) Operation of the facility in accordance with the proposed amendment would not involve a significant increase in the probability or consequences of an accident previously evaluated.

Neither batteries, nor their chargers, are considered to be an initiator of any previously analyzed accident. Therefore, this change will not significantly increase the probability of any previously analyzed accident.

At least one Battery System is required to be available to mitigate the consequences of a Design Basis Accident. This change removes an allowance which places the unit in a more vulnerable condition through the unrestricted use of the spare battery charger. Since this change limits such a condition, it maintains the assumptions of the safety analysis, and therefore, will not significantly increase the consequences of any previously analyzed accident.

(2) Operation of the facility in accordance with the proposed amendment would not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not necessitate a physical alteration of the plant (no new or different type of equipment will be installed) nor is operation of the currently installed equipment changed. The change will, however, limit a currently allowed configuration with the spare charger and is more conservative. Thus, this change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) Operation of the facility in accordance with the proposed amendment would not involve a significant reduction in the margin of safety.

The proposed change continues to provide the previous margin of safety regarding the capability to withstand a single failure. At least one Battery System will continue to be available to provide the required safety function. The change will limit a currently allowed configuration with the spare charger and is thus more conservative. Therefore, this change will not significantly reduce 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: Brooks Memorial Library, 224 Main Street, Brattleboro, VT 05301.

Attorney for licensee: Mr. David R. Lewis, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037-1128.

NRC Project Director: Ronald Eaton, Acting Director.

Vermont Electric and Power Company

[Docket Nos. 50-280 and 50-281]

Surry Power Station, Unit Nos. 1 and 2, Surry County, Virginia

Date of amendment request:
November 5, 1997.

Description of amendment request:
The proposed change to Technical

Specifications 5.3 and 5.4 would reflect an increase in the maximum permitted fuel enrichment to 4.3 weight percent U²³⁵ from the current 4.1 weight percent U²³⁵. Fuel burnup limits and reactor operating power level would remain unchanged.

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:

Virginia Electric and Power Company has reviewed the Technical Specifications changes for Surry Units 1 and 2 against the criteria of 10 CFR 50.92. It has been concluded that use of fuel with the slightly higher initial enrichment does not involve a significant hazards consideration as defined in 10 CFR 50.92. An increase in the maximum initial fuel enrichment from 4.1 to 4.3 weight percent U²³⁵ will not:

1. Involve a significant increase in the probability of occurrence or the consequences of an accident previously evaluated. The only accidents for which the probability of occurrence is potentially affected by the fuel enrichment involve criticality events during handling and storage. Analyses have demonstrated that the K-effective will be low enough to ensure subcriticality during both normal operation and under postulated accident conditions during the handling and storage of both new and spent fuel. Therefore, the probability of occurrence of criticality during fuel handling or storage is not increased. Safety analyses of record are based on inputs which bound the proposed increase in fuel enrichment. Since no changes to the fuel burnup limits are requested, the radiological consequences of previously evaluated accident scenarios will not be increased. Therefore, neither the probability of occurrence nor the consequences of any accident previously evaluated is significantly increased.

2. Create the possibility for a new or different type of accident from any accident previously evaluated. Fuel with the higher initial enrichment will meet all applicable design criteria and will operate within existing Technical Specifications limits. Adherence to these standards and criteria precludes new challenges to components and systems that could introduce a new type of accident. All design and performance criteria will continue to be met. In addition, the use of a slightly higher initial fuel enrichment does not involve any alteration to plant equipment or procedures which would introduce any new or unique operational modes or accident precursors. Therefore, the possibility for a new or different kind of accident from any accident previously evaluated is not created.

3. Involve a significant reduction in the margin of safety. Surry Units 1 and 2 will continue to operate in compliance with the Technical Specifications, ensuring that the plants continue to provide acceptable levels of protection for the health and safety of the public. The Technical Specifications are

based upon assumption[s] made in the safety and accident analyses, including those relating to the fuel enrichment and the design of the fuel storage areas. Analyses have demonstrated that subcriticality will be ensured during fuel storage and handling accident scenarios for both new and spent fuel. Additionally, safety analyses of record for core operation will remain applicable for Surry Unit 1 and 2 cores which use fuel with the slightly higher U²³⁵ enrichment. Therefore, the regulated margin of safety as defined in the Bases to the Surry Technical Specifications is not reduced.

Based on the preceding information, it has been determined that the use of fuel with an initial enrichment of up to 4.3 weight percent U²³⁵ satisfies the no significant hazards consideration criteria of 10 CFR 50.92.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 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: Swern Library, College of William and Mary, Williamsburg, Virginia 23185.

Attorney for licensee: Michael W. Maupin, Esq., Hunton and Williams, Riverfront Plaza, East Tower, 951 E. Byrd Street, Richmond, Virginia 23219.

NRC Project Director: James E. Lyons.

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.

Commonwealth Edison Company

[Docket Nos. STN 50-454 and STN 50-455]

Byron Station, Unit Nos. 1 and 2, Ogle County, Illinois, Docket Nos. STN 50-456 and STN 50-457, Braidwood Station, Unit Nos. 1 and 2, Will County, Illinois

Date of application for amendments: June 30, 1997, as supplemented on September 25, 1997.

Brief description of amendments: The amendments grant partial credit for boron in the spent fuel pools to maintain the subcriticality.

Date of issuance: December 4, 1997.

Effective date: Immediately, to be implemented within 30 days.

Amendment Nos.: 94, 94, 86 and 86. *Facility Operating License Nos. NPF-37, NPF-66, NPF-72 and NPF-77:* The amendments revised the Technical Specifications.

Date of initial notice in Federal Register: October 22, 1997 (62 FR 54868).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 4, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: For Byron, the Byron Public Library District, 109 N. Franklin, P.O. Box 434, Byron, Illinois 61010; for Braidwood, the Wilmington Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481.

Duquesne Light Company, et al.

[Docket Nos. 50-334 and 50-412]

Beaver Valley Power Station, Unit Nos. 1 and 2, Shippingport, Pennsylvania

Date of application for amendments: March 14, 1997, as supplemented, July 29, 1997, and August 13, 1997. The July 29, 1997, and August 13, 1997, letters provided clarifying information that did

not change the initial proposed no significant hazards consideration determination or expand the amendment request beyond the scope of the May 7, 1997, **Federal Register** notice.

Brief description of amendments: These amendments relocate certain administrative control Technical Specifications (TSs) from the Beaver Valley Power Station, Unit Nos. 1 and 2 (BVPS-1 and BVPS-2), TSs to the licensee's operational quality assurance program description, which is presented in Section 17.2 of the BVPS-2 Updated Final Safety Analysis Report (UFSAR). Section 17.2 of the BVPS-2 UFSAR contains the quality assurance program description for both BVPS-1 and BVPS-2. The following TSs are being relocated to the quality assurance program description.

BVPS-2 TS 6.2.3 (Independent Safety Evaluation Group)
BVPS-1 and BVPS-2 TS 6.5.1 (Onsite Safety Committee)
BVPS-1 and BVPS-2 TS 6.5.2 (Offsite Review Committee)
BVPS-1 and BVPS-2 TS 6.8.2 (Procedures, Review and Approval)
BVPS-1 and BVPS-2 TS 6.8.3 (Temporary Procedure Changes, Review and Approval)
BVPS-1 and BVPS-2 TS 6.10.1 (Records Retention, At least 5 Years)
BVPS-1 and BVPS-2 TS 6.10.2 (Records Retention, Duration of Operating License)

Date of issuance: December 10, 1997. *Effective date:* Both units, as of date of issuance, to be implemented within 60 days.

Amendment Nos.: 209 and 87. *Facility Operating License Nos. DPR-66 and NPF-73:* Amendments revised the Technical Specifications, and Appendix C of the License.

Date of initial notice in Federal Register: May 7, 1997 (62 FR 24986). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 10, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: B. F. Jones Memorial Library, 663 Franklin Avenue, Aliquippa, PA 15001.

Entergy Operations, Inc.

[Docket No. 50-382]

Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: July 17, 1996, as supplemented by letters dated June 3, and July 7, 1997. Also, application dated April 11, 1997.

Brief description of amendment: The amendment changes the Appendix A Technical Specification (TS) 3.7.1.3 by increasing the minimum required contained water volume in Condensate Storage Pool from 82 percent to 91 percent indicated level. In addition, this amendment expands the applicability of TS 3.7.1.3 to include Mode 4 operational requirements. The amendment also deletes Action (b) in TS 3.7.1.3 and its associated surveillance requirement in Waterford 3 TSs.

Date of issuance: December 18, 1997.

Effective date: December 18, 1997, to be implemented within 60 days.

Amendment No.: 137.

Facility Operating License No. NPF-38: Amendment revised the Technical Specifications.

Date of initial notice in Federal Register: March 26, 1997 (62 FR 14461), July 30, 1997 (62 FR 40849) and April 22, 1997 (62 FR 19624).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 18, 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.

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: August 26, 1997.

Brief description of amendment: The amendment involves a revision to the design basis of the Emergency Diesel Generator (EDG) Air Handling System at Crystal River 3 resulting from the EDG upgrade modification which increased the 200-hour and 2000-hour service ratings for each EDG.

Date of issuance: December 12, 1997.

Effective date: December 12, 1997.

Amendment No.: 160.

Facility Operating License No. DPR-31: Amendment revises the Final Safety Analysis Report.

Date of initial notice in Federal Register: September 24, 1997 (62 FR 50004).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 12, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: Coastal Region Library, 8619 W. Crystal River, Florida 34428

Indiana Michigan Power Company

[Docket Nos. 50-315 and 50-316]

*Donald C. Cook Nuclear Plant, Unit Nos. 1 and 2, Berrien County, Michigan**Date of application for amendments:* September 19, 1997 (AEP:NRC:1278).

Brief description of amendments: The amendments modify Technical Specification 4.5.2.d.1 to delete the interlock that would close the Residual Heat Removal (RHR) suction valves if the Reactor Coolant System (RCS) pressure were to increase to 600 psig while retaining the interlock that would prevent the suction valves from opening while the RCS pressure is above the RHR system design pressure. This change maintains the open interlock function and allows continued deactivation of the isolation valves to assure RHR availability and provide low temperature overpressure protection.

Date of issuance: December 10, 1997.*Effective date:* December 10, 1997, with full implementation within 45 days.*Amendment Nos.:* 219 and 203.*Facility Operating License Nos. DPR-58 and DPR-74:* Amendments revised the Technical Specifications.*Date of initial notice in Federal Register:* October 22, 1997 (62 FR 54861).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 10, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: Maud Preston Palenske Memorial Library, 500 Market Street, St. Joseph, Michigan 49085.

Pennsylvania Power and Light Company

[Docket Nos. 50-387 and 50-388]

*Susquehanna Steam Electric Station, Units 1 and 2, Luzerne County, Pennsylvania**Date of application for amendments:* October 7, 1996, as supplemented by letter dated May 9, 1997.

Brief description of amendments: These amendments modify Susquehanna Steam Electric Station, Units 1 and 2, Technical Specifications Table 3.3.2-2 by revising the trip setpoints and allowable values for secondary containment isolation radiation monitors.

Date of issuance: December 8, 1997.*Effective date:* December 8, 1997.*Amendment Nos.:* 170 and 143.*Facility Operating License Nos. NPF-14 and NPF-22:* The amendments revised the Technical Specifications.

Date of initial notice in Federal Register: December 18, 1996 (61 FR 66716).

The May 9, 1997, letter provided clarifying information that did not change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 8, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: Osterhout Free Library, Reference Department, 71 South Franklin Street, Wilkes-Barre, PA 18701.

Pennsylvania Power and Light Company

[Docket Nos. 50-387 and 50-388]

*Susquehanna Steam Electric Station, Units 1 and 2, Luzerne County, Pennsylvania**Date of application for amendments:* April 4, 1997, as supplemented April 14, June 6, and September 2, 1997.

Brief description of amendments: These amendments clarify the scope of the surveillance requirements for response time testing of instrumentation in the reactor protection system, isolation actuation system, and emergency core cooling system in the Technical Specifications for each unit (Sections 4.3.1.3, 4.3.2.3, and 4.3.3.3).

Date of issuance: December 8, 1997.*Effective date:* December 8, 1997.*Amendment Nos.:* 171 and 144.*Facility Operating License Nos. NPF-14 and NPF-22:* The amendments revised the Technical Specifications.*Date of initial notice in Federal Register:* April 17, 1997 (62 FR 17885).

The April 14, June 6, and September 2, 1997, letters provided clarifying information that did not change the original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 8, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: Osterhout Free Library, Reference Department, 71 South Franklin Street, Wilkes-Barre, PA 18701.

Power Authority of the State of New York

[Docket No. 50-333]

*James A. FitzPatrick Nuclear Power Plant, Oswego County, New York**Date of application for amendment:* December 14, 1995, as supplemented September 26, 1997.

Brief description of amendment: The amendment proposes to change the James A. FitzPatrick Technical Specifications to incorporate the inservice testing requirements of Section XI of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code.

Date of issuance: December 2, 1997.*Effective date:* As of the date of issuance to be implemented within 30 days.*Amendment No.:* 241.*Facility Operating License No. DPR-59:* Amendment revised the Technical Specifications.*Date of initial notice in Federal Register:* January 22, 1996 (61 FR 1635).

The September 26, 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 December 2, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room location: Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126.

Rochester Gas and Electric Corporation

[Docket No. 50-244]

*R. E. Ginna Nuclear Power Plant, Wayne County, New York**Date of application for amendment:* September 29, 1997, as supplemented October 8, 1997.

Brief description of amendment: The amendment revises the Ginna Station Technical Specifications (TS) to allow referencing of revision of the Ginna Station pressure and temperature limits report for the reactor coolant system pressure and temperature limits and low temperature overpressure protection limits. The amendment also corrects a typographical error in the TSs.

Date of issuance: December 9, 1997.*Effective date:* December 9, 1997.*Amendment No.:* 70.*Facility Operating License No. DPR-18:* Amendment revised the Technical Specifications.

Date of initial notice in Federal Register: November 5, 1997 (62 FR 59921).

The September 29 and October 8, 1997, superseded in their entirety the applications dated December 13, 1996, April 24, 1997, and June 3, 1997.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 9, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room
location: Rochester Public Library, 115 South Avenue, Rochester, New York 14610.

Southern California Edison Company, et al.

[Docket Nos. 50-361 and 50-362]

San Onofre Nuclear Generating Station, Unit Nos. 2 and 3, San Diego County, California

Date of application for amendments: December 22, 1995, as supplemented by letter dated November 25, 1997.

Brief description of amendments: These amendments revise License Conditions 2.E and 2.G for the San Onofre Nuclear Generating Station (SONGS), Units 2 and 3. The amendments delete the physical protection program reporting requirement from License Condition 2.G, and clarify in License Condition 2.E that not all documents composing the physical protection program plans necessarily contain safeguards information.

Date of issuance: December 16, 1997.

Effective date: December 16, 1997.

Amendment Nos.: Unit 2—138; Unit 3—130.

Facility Operating License Nos. NPF-10 and NPF-15: The amendments revised the Facility Operating Licenses.

Date of initial notice in Federal Register: November 5, 1997 (62 FR 59921). The November 25, 1997, letter provided additional clarifying information and did not change the initial no significant hazards consideration determination. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 16, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room
location: Main Library, University of California, P. O. Box 19557, Irvine, California 92713.

Virginia Electric and Power Company, et al.

[Docket Nos. 50-338 and 50-339]

North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia

Date of application for amendments: May 14, 1997, as supplemented October 15, 1997. The October 15, 1997, submittal provided clarifying information only, and did not change the proposed no significant hazards consideration determination.

Brief description of amendments: The proposed action consists of changes to the Technical Specifications (TS) revising Surveillance Requirement 4.7.1.7.2.a for both units to clarify the testing and inspection methodology of the turbine governor control valves. The proposed changes also provide clarification in the TS Bases Section 3/4 7.1.7 for the Turbine Valve Freedom Testing of the turbine governor control valves.

Date of issuance: December 4, 1997.

Effective date: December 4, 1997.

Amendment Nos.: 207 and 188.

Facility Operating License Nos. NPF-4 and NPF-7: Amendments revised the Technical Specifications.

Date of initial notice in Federal Register: July 30, 1997 (62 FR 40860).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 4, 1997.

No significant hazards consideration comments received: No.

Local Public Document Room
location: The Alderman Library, Special Collections Department, University of Virginia, Charlottesville, Virginia 22903-2498.

Dated at Rockville, Maryland, this 24th day of December 1997.

For the Nuclear Regulatory Commission.

Elinor G. Adensam,

Acting Director, Division of Reactor Projects—III/IV, Office of Nuclear Reactor Regulation.
[FR Doc. 97-33968 Filed 12-30-97; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Membership on the Executive Resources Board

AGENCY: Nuclear Regulatory Commission.

ACTION: Appointment to the Executive Resources Board for the Senior Executive Service.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has announced the following appointments to the NRC

Executive Resources Board. The Executive Resources Board is responsible for providing institutional continuity in executive personnel management by overseeing NRC's Senior Executive Service (SES) and Senior Level System (SLS) succession planning, merit staffing, and position management activities.

Appointees

L. Joseph Callan, Executive Director for Operations, Chair
Karen D. Cyr, General Counsel
Anthony J. Galante, Chief Information Officer
Jesse L. Funches, Chief Financial Officer
Hugh L. Thompson, Jr., Deputy Executive Director for Regulatory Programs
Ashok C. Thadani, Acting Deputy Executive Director for Regulatory Effectiveness
Patricia G. Norry, Deputy Executive Director for Management Services
Samuel J. Collins, Director, Office of Nuclear Reactor Regulation
Carl J. Paperiello, Director, Office of Nuclear Material Safety and Safeguards
Malcolm R. Knapp, Acting Director, Office of Nuclear Regulatory Research
Timothy T. Martin, Director, Office for the Analysis and Evaluation of Operational Data
Edward L. Halman, Director, Office of Administration
Paul E. Bird, Director, Office of Human Resources
Irene P. Little, Director, Office of Small Business and Civil Rights
John C. Hoyle, Secretary of the Commission
Hubert J. Miller, Regional Administrator, Region I
Luis A. Reyes, Regional Administrator, Region II
A. Bill Beach, Regional Administrator, Region III
Ellis W. Merschoff, Regional Administrator, Region IV

EFFECTIVE DATE: December 18, 1997.

FOR FURTHER INFORMATION CONTACT: Carolyn J. Swanson, Secretary, Executive Resources Board, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 (301) 415-7530.

Dated at Rockville, Maryland, this 19th day of December, 1997.

For the U.S. Nuclear Regulatory Commission.

Paul E. Bird,

Director, Office of Human Resources.

[FR Doc. 97-34075 Filed 12-30-97; 8:45 am]

BILLING CODE 7590-01-P

OFFICE OF MANAGEMENT AND BUDGET**Deferral of the Effective Date of Managerial Cost Accounting Standards for the Federal Government in SFFAS No. 4**

AGENCY: Office of Management and Budget.

ACTION: Notice of document availability.

SUMMARY: This Notice indicates the availability of the ninth Statement of Federal Financial Accounting Standards (SFFAS), "Deferral of the Effective Date of Managerial Cost Accounting Standards for the Federal Government in SFFAS No. 4." The statement was recommended by the Federal Accounting Standards Advisory Board (FASAB) and adopted in its entirety by the Office of Management and Budget (OMB).

ADDRESSES: Copies of SFFAS No. 9, "Deferral of the Effective Date of Managerial Cost Accounting Standards for the Federal Government in SFFAS No. 4," may be obtained for \$1.75 each from the Superintendent of Documents, Government Printing Office, Washington, DC 20402-9325 (telephone 202-512-1800), Stock No. 041-001-00494-7.

FOR FURTHER INFORMATION CONTACT: James Short (telephone: 202-395-3124), Office of Federal Financial Management, Office of Management and Budget, 725 17th Street, N.W., Room 6025, Washington, DC 20503.

SUPPLEMENTARY INFORMATION: This Notice indicates the availability of the ninth Statement of Federal Financial Accounting Standards (SFFAS), "Deferral of the Effective Date of Managerial Cost Accounting Standards for the Federal Government in SFFAS No. 4." The standard was recommended by the Federal Accounting Standards Advisory Board (FASAB) and adopted in its entirety by the Office of Management and Budget (OMB) on November 3, 1997.

Under a Memorandum of Understanding among the General Accounting Office, the Department of the Treasury, and OMB on Federal Government Accounting Standards, the Comptroller General, the Secretary of the Treasury, and the Director of OMB decide upon principles and standards after considering the recommendations of FASAB. After agreement to specific principles and standards, they are published in the **Federal Register** and distributed throughout the Federal Government.

This Notice is available on the OMB home page on the Internet which is

currently located at <http://www.whitehouse.gov/WH/EOP/omb>, under the caption "**Federal Register Submissions.**"

G. Edward DeSeve,
Controller.

[FR Doc. 97-34074 Filed 12-30-97; 8:45 am]

BILLING CODE 3110-01-P

OFFICE OF PERSONNEL MANAGEMENT**Proposed Collection; Comment Request for Reclearance of an Information Collection: Form OPM 1530**

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Public Law 104-13, May 22, 1995), this notice announces that the Office of Personnel Management intends to submit to the Office of Management and Budget a request for reclearance of an information collection. OPM Form 1530, Report of Medical Examination of Person Electing Survivor Benefit (CSRS), is used to collect sufficient information from the required medical examination regarding an annuitant's health. This information is used to determine whether the insurable interest survivor benefits election can be allowed.

Approximately 500 OPM Forms 1530 will be completed annually. We estimate it takes approximately 90 minutes to complete the form. The annual burden is 750 hours.

Comments are particularly invited on:

- Whether this collection of information is necessary for the proper performance of functions of the Office of Personnel Management, and whether it will have practical utility;
- Whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; and
- Ways in which we can minimize the burden of the collection of information on those who are to respond, through use of the appropriate technological collection techniques or other forms of information technology.

For copies of this proposal, contact Jim Farron on (202) 418-3208, or E-mail to jmfarron@opm.gov.

DATES: Comments on this proposal should be received on or before March 2, 1998.

ADDRESS: Send or deliver comments to—Lorraine E. Dettman, Chief, Operations Support Division, Retirement and Insurance Service, U.S. Office of Personnel Management, 1900 E Street, NW, Room 3349, Washington, DC 20415.

FOR INFORMATION REGARDING

ADMINISTRATIVE COORDINATION—CONTACT: Mary Beth Smith-Toomey, Management Services Division, (202) 606-0623.

U.S. Office of Personnel Management.

Janice R. Lachance,

Director.

[FR Doc. 97-34053 Filed 12-30-97; 8:45 am]

BILLING CODE 6355-01-P

OFFICE OF PERSONNEL MANAGEMENT**Proposed Collection, Comment Request; SF-85, SF-85P, SF-86, AND SF-86A**

AGENCY: Office of Personnel Management.

ACTION: Proposed collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104-13) and 5 CFR 1320.5 (a) (I) (vi), this notice announces that OPM intends to submit to the Office of Management and Budget (OMB) a request for reclearance of four (4) information collections described below and solicits comments on them.

The Standard Form 85, Questionnaire for Non-Sensitive Positions, is completed by appointees to Non-Sensitive duties with the Federal government. Information collected on this form is used by the Office of Personnel Management and by other Federal agencies to initiate the background investigation required to determine basic suitability for Federal employment in accordance with 5 U.S.C. 3301, 3302, and E. O. 10577 (5 CFR Rule V). The number of respondents annually who are not Federal appointees is expected to be 10 with a total reporting hours of 5.

The Standard Form 85P, Questionnaire for Public Trust Positions, is completed by persons seeking placement in positions currently labeled "public trust" positions because of their enhanced responsibilities, and for certain sensitive positions that do not require access to classified information. Information collected on this form is used by the Office of Personnel Management and by other Federal agencies to initiate the background investigation required to determine suitability for placement in

public trust/ other sensitive, non-access positions in accordance with 5 U.S.C. 3301, 3302, E.O. 10577 (5 CFR Rule V), and Office of Management and Budget Circular A-130, Management of Federal Information Resources, revised June 25, 1993, and its Appendix III, Security of Federal Automated Computer Systems, issued December 12, 1985. The number of respondents annually who are not Federal employees is expected to be 1500 with total reporting hours of 1500.

The Standard Form 86, Questionnaire for National Security Positions, is completed by persons performing, or seeking to perform, national security duties for the Federal government. This information collection also includes Standard Form 86A, Continuation Sheet for Questionnaires SF-86, SF-85P, and SF-85, which is used to provide formatted space to continue answers to questions. Information collected is used by the Office of Personnel Management and by other Federal agencies to initiate the background investigation required to determine placement in national security positions in accordance with 42 U.S.C. 2165, 22 U.S.C. 2585, and E.O. 10450, Security Requirements for Government Employment, issued April 27, 1953. The number of respondents annually who are not Federal employees is expected to be 172,150 with total reporting hours of 258,225.

Comments are particularly invited on:

- Whether this collection of information is necessary for the proper performance of functions of the Office of Personnel Management, and whether it will have practical utility;
- Whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; and
- Ways in which we can minimize the burden of collection of information on those who respond, through the use of appropriate technological collection techniques or other forms of information technology.

To obtain copies of this proposal please contact James M. Farron at (202) 418-3208 or by E-mail to jmfarron@opm.gov.

DATES: Comments on this proposal should be received on or before March 2, 1998. Submit comments on this proposal to Richard A. Ferris, Office of Personnel Management, Investigations Service, Room 5416, 1900 E. Street N.W., Washington D.C. 20415.

U.S. Office of Personnel Management.

Janice R. Lachance,
Director.

[FR Doc. 97-34055 Filed 12-30-97; 8:45 am]

BILLING CODE 6325-01-P

OFFICE OF PERSONNEL MANAGEMENT

Submission For OMB Review; Comment Request for the Revised Information Collection; RI 30-10

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Public Law 104-13, May 22, 1995), this notice announces that the Office of Personnel Management will submit to the Office of Management and Budget a request for a revised information collection. RI 30-10, Disabled Dependent Questionnaire, is used to collect sufficient information about the medical condition and earning capacity for OPM to be able to determine whether a disabled adult child is eligible for health benefits coverage and/or survivor annuity payments under the Civil Service Retirement System or the Federal Employees Retirement System.

Approximately 2,500 RI 30-10 forms are completed annually. Each form takes approximately 60 minutes to complete. The annual estimated burden is 2,500 hours.

For copies of this proposal, contact Jim Farron on (202) 418-3208, or E-mail to jmfarron@opm.gov

DATES: Comments on this proposal should be received on or before January 30, 1998.

ADDRESSES: Send or deliver comments to—

Lorraine E. Dettman, Chief, Operations Support Division, Retirement and Insurance Service, U.S. Office of Personnel Management, 1900 E Street, NW, Room 3349, Washington, DC 20415-0001

and

Joseph Lackey, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW, Room 3002, Washington, DC 20503.

FOR INFORMATION REGARDING

ADMINISTRATIVE COORDINATION—CONTACT: Mary Beth Smith-Toomey, Budget & Administrative Service Division, (202) 606-0623, U.S. Office of Personnel Management.

Janice R. Lachance,
Director.

[FR Doc. 97-34054 Filed 12-30-97; 8:45 am]

BILLING CODE 6325-01-P

OFFICE OF PERSONNEL MANAGEMENT

Submission for OMB Review; Comment and Request Form OPM- 1386B

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3506-3507), the Office of Personnel Management plans to submit to the Office of Management and Budget a request to extend its approval of form OPM-1386B, Applicant Race and National Origin Questionnaire. The form gathers information concerning the race and national origin of applicants for employment under the Outstanding Scholar provision of the Luevano Consent Decree, 93 F.R.D. 68 (1981).

This notice begins the formal continuation that originally began in 1995. OPM published Notices of Intent in the **Federal Register** on October 27, 1995, and February 21, 1996. The process for continuation was not completed in time. An emergency request for continuation was published on September 9, 1997.

Under the terms of 44 U.S.C. 3507, the public is invited to comment on the need for this information, its practical utility, the accuracy of OPM's burden estimate, and on ways to minimize the reporting burden.

DATES: Comments will be considered if received on or before March 2, 1998.

ADDRESSES: Send or deliver written comments to Mary Lou Lindholm, Associate Director for Employment, U.S. Office of Personnel Management, 1900 E Street, NW., Room 6F08, Washington, DC 20415, and Joseph Lackey, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, NW., Room 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT:

For copies of the form, and further information, contact Christina Vay on 202-606-0830, FAX 202-606-2329, or e-mail address CMVAY@OPM.GOV.

SUPPLEMENTARY INFORMATION:

Purpose of Form OPM-1368B

A Federal court decree, issued in 1981 and still binding, requires recordkeeping on Federal employment selection procedures, including race and national origin (RNO) data, to determine the "relative impact of the procedure upon Blacks and upon Hispanics as compared with non-Hispanic whites."

OPM and other agencies use form OPM-1368B to collect the RNO data from applicants being considered for selection under the Outstanding Scholar provision of the decree. Using the standardized form makes it easier to collect and consolidate the required data for use by the Federal Government and by the plaintiffs. OPM and agencies do not need to use form OPM-1368B to collect data on applicants being considered through traditional examining processes; court-required data on those applicants are collected as part of an application process not required for Outstanding Scholars.

The form OPM-1368B is not considered in the selection process, but is used only to collect statistical data.

Annual Reporting Burden

Approximately 100,000 forms will be processed annually. The average estimated response time is 5 minutes for a total public burden of 8,333 hours.

U.S. Office of Personnel Management.

Janice R. Lachance,

Director.

[FR Doc. 97-34056 Filed 12-30-97; 8:45 am]

BILLING CODE 6325-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39479; File No. SR-CBOE-97-61]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by The Chicago Board Options Exchange, Inc. to Delete References to Market Performance Committee and Floor Procedure Committee and Make Other Conforming Changes

December 22, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 2, 1997, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Exchange has designated the proposed rule change as concerned solely with the administration of the Exchange under Section 19(b)(3)(A) of the Act, which renders the proposal effective upon filing of this proposal by the

Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to delete from its rules any specific references to a particular Floor Procedure Committee or Market Performance Committee. The term "appropriate" will be added to all references that currently relate to these committees. The text of the proposed rule change is available at the Office of the Secretary, the CBOE and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed amendment is to delete from the CBOE rules any specific references to, and add "appropriate" to all references that currently relate to, a particular Floor Procedure Committee ("FPC") or Market Performance Committee ("MPC"). For instance, any reference to "SPX Floor Procedure Committee" or "OEX Market Performance Committee" will be changed to "appropriate Floor Procedure Committee" or "appropriate Market Performance Committee."

The Exchange is proposing to make the change at this time because it recently determined to create two new committees, the Index Floor Procedure Committee and the Index Market Performance Committee. These two committees will replace the OEX Floor Procedure Committee and the OEX Market Performance Committee, respectively. In addition to governing the trading or market performance issues of S&P 100 Index Options ("OEX"), the new committees likely will be given jurisdiction over options on the Dow Jones Industrial Average ("DJX"), Nasdaq 100 Index options ("NDX"), and, in the case of the Index Market

Performance Committee, the S&P Index Options ("SPX"). The Exchange is retaining the SPX Floor Procedure Committee to oversee SPX trading issues.

In trying to accommodate these new committees specifically in the rules, the Exchange believes a better approach is to make reference to the "appropriate" FPC or the "appropriate" MPC. In this way, the Exchange will have the flexibility to delegate the functions under the rules to the appropriate committee and will not have to make a rule change merely, for instance, to accommodate a future change in the title of a committee or to accommodate the delegation of a new product to a committee. As the authority exercised by these committees is delegated pursuant to Exchange rules, the title of the committees exercising their authority should not be relevant.

The Exchange is also proposing to delete Interpretation .08 to Rule 6.20. Interpretation .08 permits a member of a FPC to act in the capacity of a Floor Official. However, the Exchange believes that members of the appropriate MPC should handle this role because Floor Officials commonly deal with issues under the jurisdiction of the MPC. Members of the appropriate MPC can act as Floor Officials under Interpretation .09 to Rule 6.20.

The Exchange also is deleting references to the SPX Advisory Committee in Rule 24.15(a)(i) because this committee no longer exists. Additionally, the Exchange is proposing to delete Rule 24A.1(s) because it is unnecessary as a result of the proposed rule change. Finally, the Exchange is proposing to change all references to Floor "Procedures" Committee to Floor "Procedure" Committee for consistency.

The CBOE believes the proposed rule change is consistent with the requirements of Section 6(b)(5)³ of the Act which requires, among other things, that the rules of the Exchange be designed to promote just and equitable principles of trade, foster cooperation among persons engaged in facilitating securities transactions, and protect investors and the public interest. The CBOE believes that this proposal complies with the Act because the CBOE is amending its rules to generalize certain committee references to facilitate compliance.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change does not impose any burden on competition that is not

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78f(b)(5)

necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated this proposal as concerned solely with the administration of the Exchange under Section 19(b)(3)(A)(iii)⁴ of the Act and Rule 19b-4(e)(3)⁵ thereunder, which renders the proposal effective upon filing with the Commission.

At any time within sixty days of the filing of this proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of CBOE. All submissions should refer to File No. SR-CBOE-97-61 and should be submitted by January 21, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97-34059 Filed 12-30-97; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39480; File No. SR-CBOE-97-36]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 1 to Proposed Rule Change Revising the Exchange Rules Governing the Halting and Resumption of Trading in Index Options

December 22, 1997.

I. Introduction

On July 25, 1997, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to revise the Exchange rules governing the halting and resumption of trading in index options on the Exchange.

The proposed rule change was published for comment in Securities Exchange Act Release No. 38962 (Aug. 22, 1997), 62 FR 45890 (Aug. 29, 1997). No comments were received on the proposal. The Exchange filed Amendment No. 1 to the proposed rule change with the Commission on September 15, 1997.³ This order approves the proposed rule change including, on an accelerated basis, Amendment No. 1.

II. Description of the Proposal

The Exchange seeks to amend Exchange Rule 24.7, "Trading Halts or Suspensions," to eliminate certain fixed percentage tests that presently apply to the decision to halt trading in index options as well as the decision to resume trading after such a halt. The proposed rule change also makes certain

conforming changes to related Exchange rules.⁴

A. Trading Halts

Currently, under Exchange Rule 24.7(a)(i), one of the enumerated factors that the designated Exchange officials may consider in deciding whether to halt trading in an index option is whether trading has been halted or suspended in underlying stocks whose weighted value presents "20% or more of the index value." The Exchange has expressed concern that by including a fixed percentage test among those factors that "may be considered," the present rule may imply that it would be improper for the designated Exchange officials to consider trading interruptions in underlying stocks whose weighted value represents less than 20% of the index value.

The Exchange believes this interpretation conflicts with the purpose of Exchange Rule 24.7, which grants designated Exchange officials the discretion to halt index option trading whenever they "conclude in their judgment that such action is appropriate in the interests of a fair and orderly market and to protect investors." Because Exchange Rule 24.7(a)(i)-(iv) sets forth a non-exclusive list of factors that Exchange officials may consider in exercising that discretion, the Exchange contends it would be inappropriate to forbid those officials from considering trading disruptions in underlying stocks that fall below a predetermined level. Accordingly, the proposed rule change would clarify that Exchange officials, in evaluating whether to halt trading in index options, are not limited to situations in which 20% of the underlying stocks have halted, but rather may consider "the extent to which" trading is not occurring in the underlying stocks.

In addition, the proposed rule change would provide Exchange officials with the flexibility to consider not only whether trading in underlying stocks has been "halted or suspended," but also whether such trading is "not occurring." The term "halted or suspended" indicates that Exchange authorities have taken formal action to discontinue trading in stock. However, in deciding whether to continue trading a derivative instrument like an index

¹ 15 U.S.C. § 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 amends Exchange Rule 24.13, "Trading Rotations," Interpretation .03, and eliminates the 50% fixed test as a factor in the determination whether an opening rotation in an index option class may be delayed. See Letter from Paul E. Dengel, Schiff Hardin & Waite, to Michael Walinskas, Senior Special Counsel, Division of Market Regulation, Commission, dated September 10, 1997.

⁴ The Commission notes that this proposed rule change does not address or impact the Exchange's circuit breaker trading halt rule and policy. However, the proposal makes a conforming change to Exchange Rule 24.7(c) that amends certain language cross referencing the Exchange's circuit breaker trading halt rule, Exchange Rule 6.3B, "Trading Halts Due to Extraordinary Market Volatility."

⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

⁵ 17 CFR 240.19b-4(e)(3).

⁶ 17 CFR 200.30-3(a)(12).

option, Exchange officials should be able to consider the full extent to which underlying stocks are not trading, whether trading is not occurring because of formal exchange action, systemic problems, market emergencies, or other cause. The proposed rule change would clarify that in determining whether to halt index option trading, Exchange officials may consider the extent to which "trading is not occurring" in the underlying stocks, without limiting that consideration to formal halts or suspensions.

The Exchange also believes that Exchange Rule 24.7 may imply that the Exchange is required to calculate, on an ongoing basis, the extent to which stocks underlying a subject index are trading. The Exchange contends that such calculations would be difficult to perform on a real time basis for those indexes comprised of a large number of stocks (e.g., the Russell 2000, which consists of 2000 stocks), or those indexes for which data on trading halts is not readily available (e.g., NDX, an index based on over-the-counter stocks). The removal of the fixed percentage tests from Exchange Rule 24.7 is expected to rectify any misperception regarding the Exchange's duty to maintain and calculate trading information for stocks underlying an index on which options are traded.

B. Resumption Of Trading After Trading Halts

The proposed rule change would eliminate the provision in Exchange Rule 24.7(b) that makes trading in a fixed percentage of stocks underlying an index a prerequisite to the resumption of index options trading after a trading halt. Currently, trading may resume when the designated Exchange officials determine either (i) that the conditions that led to the halt no longer are present; or (ii) that the interests of a fair and orderly market are served by a resumption of trading. However, Exchange Rule 24.7(b) provides that in no event may trading resume until the Exchange has determined that trading is occurring in underlying stocks whose weighted value presents more than 50% of the index value.

The Exchange has represented that it would continue its practice of assessing the extent to which underlying stocks are trading in deciding whether to resume trading after an index options trading halt. However, the Exchange believes it is inappropriate to delay the resumption of trading until the level of trading in stocks underlying an index has reached a predetermined, fixed level, particularly since it often may be difficult to make a precise

determination of trading activity for indexes with a large number of constituent stocks.

Accordingly, the proposed rule change would eliminate the 50% fixed test and instead would specify that one of the factors that Exchange officials may consider in determining whether the "interests of a fair and orderly market are served by a resumption of trading" is "the extent to which trading is occurring in stocks underlying the index." According to the Exchange, the proposed rule change would enable the Exchange to resume trading as soon as conditions warrant, without interposing an artificial barrier that might result from a fixed percentage test. The Exchange believes the proposed rule change continues to provide Exchange officials with the opportunity to give appropriate weight to the extent to which underlying stocks are trading.

In addition, the proposed rule change would clarify that index options trading may resume only upon a determination by the designated Exchange officials that such a resumption is in the interests of a fair and orderly market. The present form of Exchange Rule 24.7(b) allows trading to resume (subject to the 50% requirement) when the designated Exchange officials determine either (i) that the conditions that led to the halt no longer are present; or (ii) that a resumption of trading would serve the interests of a fair and orderly market. Read literally, Exchange Rule 24.7(b) would permit trading to resume if the conditions that led to the halt no longer are present, even if a resumption of trading would be contrary to the interests of a fair and orderly market. Such an interpretation would conflict with the Exchange's practice and run counter to the Act. Accordingly, the proposed rule change would state that: (1) index options trading may resume only if the designated Exchange officials determine that such a resumption would be in the interests of a fair and orderly market,⁵ and (2) the fact that the conditions leading to the halt no longer are present is one of several factors which Exchange officials may consider in determining whether the interests of a fair and orderly market would be served by a resumption of trading.

The proposed rule change also conforms the cross reference to

⁵ A similar change has been made to Exchange Rule 6.3(b), "Trading Halts," which generally governs the resumption of trading after a trading halt in an equity option class. As a result, trading in an equity option class that has been the subject of a halt may resume only upon a determination by two Floor Officials that such a resumption is in the interests of a fair and orderly market. See Securities Exchange Act Release No. 39292 (Nov. 3, 1997), 62 FR 60738 (Nov. 12, 1997).

Exchange Rule 6.3B that appears in Exchange Rule 24.7(c) to the current language of the referenced rule. Exchange Rule 6.3B sets forth the Exchange's circuit breaker trading halt policy, the text of which was recently amended.⁶

Finally, the proposed rule change would add Interpretation .02 to Exchange Rule 24.7 to address the manner in which trading is to resume after a trading halt. This topic is not directly addressed under current Exchange Rule 24.7, although the last sentence of existing Exchange Rule 24.7(b) contemplates that a rotation will be used. Proposed Interpretation .02 would adopt the identical procedure that now governs the resumption of trading after a circuit breaker halt. The procedure is set forth in Interpretation .02 to Exchange Rule 6.3B and provides that trading will resume by a rotation after a trading halt unless the designated Exchange officials conclude that a different method of reopening is appropriate under the circumstances. The officials may determine, among other things, not to employ a rotation, to use an abbreviated rotation, or otherwise to vary the manner of the rotation. The Exchange seeks to adopt proposed Interpretation .02 so that comparable rules govern the resumption of trading after circuit breaker halts as well as halts effected for other reasons.

III. Discussion

For the reasons discussed below, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and with the requirements of Section 6(b).⁷ In particular, the Commission believes the proposed rule change is consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

While the current language of Exchange Rule 24.7(a) states that the 20% fixed test is one of several factors that may be considered in determining whether to halt index options trading, the Exchange has expressed concern that the test may be interpreted as having a mandatory rather than

⁶ See Securities Exchange Act Release No. 38221 (Jan. 31, 1997), 62 FR 5871 (Feb. 7, 1997).

⁷ 15 U.S.C. § 78f(b).

permissive application.⁸ The Commission finds that the Exchange is justified in its efforts to clarify Exchange policy regarding the halting of index options trading. Market participants should possess a clear understanding of the rules and procedures which the Exchange is bound to observe when considering the halting of trading in index options.

The Exchange currently may halt trading in index options classes when the designated Exchange officials have determined that "such action is appropriate in the interests of a fair and orderly market and to protect investors." The 20% fixed test represents one of several non-exhaustive factors that *may* be considered by Exchange officials when determining whether to halt trading pursuant to Exchange Rule 24.7. It provides Exchange officials and market participants notice that it may be appropriate to effect a trading halt in index options trading whenever a number of component securities underlying a substantial value of the index are not trading. The proposed rule change continues to provide such notice, albeit without a specific numerical guideline.

Accordingly, the Commission believes it is appropriate for the Exchange to replace the 20% fixed test with language indicating that Exchange officials may consider the extent to which "trading is not occurring" in stocks underlying an index when deciding whether to halt index options trading. The revised language properly reflects that in determining whether to halt index options trading pursuant to Exchange Rule 24.7, Exchange officials may consider all types of events that disrupt trading including, for example, formal halts or suspensions, systemic problems, market emergencies, or natural disasters.

The Commission also believes it is reasonable for the Exchange to remove the mandatory 50% fixed test from Exchange Rule 24.7(b) and include "the extent to which trading is occurring in stocks underlying the index" as a factor

to be considered when deciding whether to resume index options trading. The Exchange believes that the determination whether trading should resume after a halt can be made without regard to fixed thresholds by evaluating whether key stocks have reopened, and by examining the speed with which stocks in general are reopening. The Commission recognizes that adherence to a mandatory, fixed percentage test prevents the Exchange from relying primarily on such indicators. As a result, the Exchange could remain closed to market participants longer than desirable. The revised language permits Exchange officials to use their expert judgment in determining whether to resume trading from a halt. Exchange Rule 24.7 will continue to require Exchange officials to consider the extent to which trading is occurring in the stocks underlying the index, but absent the strict 50% fixed test.

Although the Commission recognizes the Exchange's need for flexible trading halt rules, it expects the Exchange to apply revised Exchange Rule 24.7 in a manner which ensures that trading is occurring in a substantial number of stocks underlying an index before trading in index options is allowed to resume. As the Commission has previously noted, "[i]t is questionable whether fair markets can be maintained in derivative index products when many of the index's component securities are not trading"⁹ The Commission is concerned that unless a substantial number of stocks underlying an index are trading, the related index options may be mispriced and fail to accurately reflect the current market value of all underlying stocks. While it would be counterproductive for the Commission to define "substantial" in numerical terms, or discuss what constitutes an acceptable level of trading in stocks underlying an index, the Commission nonetheless expects the Exchange to maintain fair markets in its index option products.

The Commission further believes it is reasonable for the Exchange to establish procedures governing the resumption of trading in index options after a trading halt. Although the current text of Exchange Rule 24.7(b) contemplates the use of a rotation in such circumstances, the Commission recognizes the need for definite procedures, particularly because confusion may still linger from the event that precipitated the trading halt. Furthermore, by adopting the identical procedure that currently

governs the resumption of trading following a circuit breaker halt, the Exchange's policies and rules will be consistent with respect to the resumption of trading after halts.

The Commission finds good cause for approving proposed Amendment No. 1 prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission notes that Amendment No. 1 makes a conforming change to Exchange Rule 24.13, "Trading Rotations," Interpretation .03, that is consistent with the Exchange's decision to eliminate fixed percentage thresholds from the determination whether index options trading should be halted or resumed. In place of a 50% fixed test, Amendment No. 1 substitutes "the extent to which trading is not occurring" as a factor in deciding whether to delay an opening rotation in index options. The Commission believes that Amendment No. 1 helps establish uniformity among the Exchange's rules and procedures relating to halts and delays in index options trading. Accordingly, the Commission believes it is consistent with Section 6(b)(5) of the Act¹⁰ to approve Amendment No. 1 to the proposed rule change on an accelerated basis.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1 to the proposed rule change. 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 submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any persons, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-CBOE-97-36 and should be submitted by January 21, 1998.

⁸Uncertainty regarding the nature of the 20% fixed test dates back to 1988 when the Commission approved a proposed rule change that modified Exchange Rule 24.7. The Commission allowed the Exchange to revise its trading halt policy so that the 20% benchmark would no longer be the primary test but, instead, one of the facts to be considered when deciding whether to halt trading in index options. Although the Commission permitted the Exchange to reconfigure Exchange Rule 24.7 to make the 20% fixed test permissive, rather than mandatory, the Commission said it "believes the proposed amendment does not reflect a change in CBOE's trading halt policy." See Securities Exchange Act Release No. 26198 (Oct. 19, 1988), 53 FR 41637 (Oct. 24, 1988).

⁹The October 1987 Market Break: A Report by the Division of Market Regulation, February, 1988, at 8-22.

¹⁰15 U.S.C. § 78f(b)(5).

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR-CBOE-97-36), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97-34060 Filed 12-30-97; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39482; File No. SR-NASD-97-86]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Small Order Execution System Tier Classification

December 22, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on December 12, 1997, the National Association of Securities Dealers ("NASD" or Association) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization.² 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 NASD is submitting this filing to effectuate The Nasdaq Stock Market, Inc.'s ("Nasdaq") periodic reclassification of Nasdaq National Market ("NNM") securities into appropriate tier sizes for purposes of

determining the maximum size order for a particular security eligible for execution through Nasdaq's Small Order Execution System ("SOES").

Specifically, under the proposal, 544 NNM securities will be reclassified into a different SOES tier size effective January 1, 1998. Since the NASD's proposal is an interpretation of existing NASD rules, there are no language changes.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements and a copy of the Notice-to-Members may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the rule change is to effectuate Nasdaq's periodic reclassification of NNM securities into appropriate tier sizes for purposes of determining the maximum size order for a particular security eligible for execution through SOES. Nasdaq periodically reviews the SOES tier size applicable to each NNM security to determine if the trading characteristics of the issue have changed so as to warrant a tier size adjustment. Such a review was conducted using data as of September 30, 1997, pursuant to the following established criteria.³

NNM securities with an average daily non-block volume of 3,000 shares or more a day, a bid price less than or equal to \$100, and three or more market makers are subject to a minimum quotation size requirement of 1,000 shares and a maximum SOES order size of 1,000 shares;

NNM securities with an average daily non-block volume of 1,000 shares or more a day, a bid price less than or equal to \$150, and two or more market makers are subject to a minimum quotation size requirement of 500 shares and a maximum SOES order size of 500 shares; and

NNM securities with an average daily non-block volume of less than 1,000 shares a day, a bid price less than or equal to \$250, and two or more market makers are subject to a

minimum quotation size requirement of 200 shares and a maximum SOES order size of 200 shares.

Pursuant to the application of this classification criteria, 544 NNM securities will be reclassified effective January 1, 1998. These 544 NNM securities are set out in the NASD's Notice to Members 97-90 (December, 1997).

In ranking NNM securities pursuant to the established classification criteria, Nasdaq followed the changes dictated by the criteria with three exceptions. First, an issue was not moved more than one tier size level. For example, if an issue was previously categorized in the 1,000-share tier size, it would not be permitted to move to the 200-share tier even if the reclassification criteria showed that such a move was warranted. In adopting this policy, Nasdaq was attempting to maintain adequate public investor access to the market for issues in which the tier size level decreased and help ensure the ongoing participation of market makers in SOES for issues in which the tier size level increased. Second, for securities priced below \$1 where the reranking called for a reduction in tier size, the tier size was not reduced. Third, for the top 50 Nasdaq securities based on market capitalization, the SOES tier sizes were not reduced regardless of whether the reranking called for a tier-size reduction.

2. Statutory Basis

The NASD believes the proposed rule change is consistent with Section 15A(b)(6) of the Act.⁴ Section 15A(b)(6) requires that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the NASD believes that the reassignment of NNM securities within SOES tier size levels will further these ends by providing an efficient mechanism for small, retail investors to execute their orders on Nasdaq and by providing investors with the assurance that they can effect trades up to a certain size at the best prices quoted on Nasdaq.

¹¹ 15 U.S.C. § 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² See letter from Robert E. Aber, Vice President and General Counsel, Nasdaq, to Katherine England, Assistant Director, SEC, dated Dec. 11, 1997 ("Amendment No. 1"). The Exchange initially submitted the proposal on December 4, 1997. However, at the Commission's request, the Exchange filed Amendment No. 1 to the proposed rule change on December 12, 1997. Amendment No. 1 corrects a typographical error in the SOES tier-size classification criteria used by the Nasdaq. Amendment No. 1 also clarifies that, despite the typographical error, the correct criteria set out in NASD Rules 4613(a)(2) and 4710(g) was used by Nasdaq in reclassifying the SOES tier sizes. The correction was also made in the Notice to Members 97-90.

³ The classification criteria are set forth in NASD Rule 4613(a)(2) and the footnote to NASD Rule 4710(g).

⁴ 15 U.S.C. § 78o-3.

B. Self-Regulatory Organization's Statement on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Association has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule and, therefore, has become effective pursuant to Section 19(b)(3)(A)(i) of the Act⁵ and subparagraph (e) of Rule 19b-4 thereunder.⁶

At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-97-86 and should be submitted by January 21, 1998.

⁵ 15 U.S.C. 78s(b)(3)(A).

⁶ 17 CFR 240.19b-4(e).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97-33993 Filed 12-30-97; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-39478; File No. SR-NASD-97-85)

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to NASD Rule 2460 Concerning Payments for Market Making

December 22, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),¹ notice is hereby given that on December 1, 1997, the National Association of Securities Dealers, Inc. ("NASD"), through its wholly owned subsidiary, NASD Regulation, Inc. ("NASD Regulation") 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.² The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD Regulation, pursuant to Section 19(b)(3)(A)(i) of the Act³ and Rule 19b-4(e)(i) under the Act,⁴ is proposing this interpretation of NASD Rule 2460 concerning payments for market

⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. § 78s(b)(1).

² The proposal was originally filed with the Commission on November 18, 1997, but was withdrawn on December 1, 1997. See Letter from Alden S. Adkins, Vice President and General Counsel, NASD Regulation, to Richard C. Strasser, Assistant Director, Division of Market Regulation, Commission. (File No. SR-NASD-97-84). On December 22, 1997, the NASD filed Amendment No. 1 with the Commission. See Letter from Alden S. Adkins, Vice President and General Counsel, NASD Regulation, to Richard C. Strasser, Assistant Director, Division of Market Regulation, Commission. In addition, several minor technical corrections authorized by NASD Regulation are included in this Notice. Telephone conversation between David A. Spotts, Office of the General Counsel, NASD Regulation, and Elaine M. Darroch, Office of Market Supervision, Division of Market Regulation, Commission (December 4, 1997).

³ 15 U.S.C. § 78s(b)(3)(A)(i).

⁴ 17 CFR 240.19b-4(e)(i).

making. The text of the letter setting forth the interpretation is attached as Exhibit 1.

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 filing. 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

NASD Regulation is proposing to issue a staff interpretation of NASD Rule 2460 to clarify the position of NASD Regulation with respect to the application of the rule to certain member broker-dealers that participate in a Freddie Mac Interdealer Cash Market Trading Initiative, as described below.

NASD Rule 2460—Payments for Market Making

On July 3, 1997, the SEC approved NASD Rule 2460 ("Rule"),⁵ which explicitly prohibits an NASD member or person associated with a member from accepting any payment or other consideration from issuers or the issuers' affiliates or promoters, directly or indirectly, for: (1) publishing a quotation, (2) acting as a market maker, or (3) submitting an application in connection therewith. The rule was intended, among other things, to assure that members act in an independent capacity when publishing a quotation or making a market in an issuer's securities.

NASD Regulation originally proposed this new rule and requested comment from members and the public in Notice to Members 96-83 ("NTM 96-83") in December 1996. As stated in NTM 96-83, it has been a longstanding policy and position of the NASD that a broker-dealer is prohibited from receiving compensation or other payments from an issuer for listing, quoting, or making a market in an issuer's securities or for covering the member's out-of-pocket

⁵ Securities Exchange Act Release No. 38812 (July 3, 1997), 62 FR 37105 (July 10, 1997) (File No. SR-NASD-97-29).

expenses for making a market, or for submitting an application to make a market in an issuer's securities.⁶ As stated in Notice to Members 75-16 (February 1975), such payments may be viewed as a conflict of interest since they may influence the member's decision as to whether to quote or make a market in a security and, thereafter, the prices that the member would quote.

In the past, certain broker-dealers have entered into arrangements with issuers to accept payments from the issuers, their affiliates or promoters to make a market in the issuer's securities, or for covering out-of-pocket expenses of the member incurred in the course of market making, or for submitting an application to act as a market maker. As stated above, NASD Regulation believes that such conduct may be viewed as a conflict of interest. NASD Regulation believes that a market maker should have considerable latitude and freedom to commence or terminate market making activities in an issuer's securities. The decision by a firm to make a market in a given security and the question of what price the firm will quote for that security generally are dependent on a number of factors, including, among others, supply and demand, the firm's expectations toward the market, its current inventory position, and exposure to risk and competition. This decision should not be influenced by payments to the member from issuers or promoters.

NASD Rule 2460 establishes a fair practice standard regarding a particular course of conduct of a member. Members should be mindful that certain actions of a member in accepting a fee from an issuer for making a market, or accepting an unsolicited payment from an issuer where the member makes a market in the issuer's securities, in addition to violating NASD Rule 2460, could also violate the anti-fraud provisions of the federal securities laws and NASD Rule 2120, an NASD anti-fraud provision. Further, the payment by an issuer to a market maker to facilitate market making activities could also violate the registration requirements of Section 5 of the Securities Act of 1933 ("Securities Act").⁷

Freddie Mac Interdealer Cash Market Trading Initiative

The Federal Home Loan Mortgage Corporation ("Freddie Mac") is a government-sponsored enterprise created pursuant to the Federal Home

Loan Mortgage Corporation Act, Title III of the Emergency Home Finance Act of 1970, as amended, to provide a continuous flow of funds for residential mortgages.⁸ To finance its mortgage purchase activities, Freddie Mac sells its securities to investors directly and through securities dealers. The primary financing vehicle for its mortgage purchases is the sale of Mortgage Passthrough Certificates ("PCs"). These securities are exempt from registration under the Securities Act and the Exchange Act. In 1990, Freddie Mac redesigned its fixed-rate PC structure and issues a new type of PC, called Gold PC. Since the Gold PCs were entirely new and a separate product, there was limited initial liquidity in the Gold PC market. As a result, dealers responded to the initial lack of liquidity in the Gold PC market, with its potential volatility, by maintaining primary Federal National Mortgage Association ("Fannie Mae") security positions, and by entering into synthetic transactions in the swap market.⁹

As a result of the above, Freddie Mac launched a program to encourage dealers to purchase Gold PCs directly, rather than through the swap market mechanism (the "Initiative"). Freddie Mac and The Bond Market Association ("BMA") submitted to the staff of NASD Regulation a letter dated October 7, 1997, regarding the application of NASD Rule 2460 to members participating in the Initiative.

⁸ Freddie Mac's statutory purpose is to, among other things, promote access to mortgage credit throughout the Nation by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing (12 U.S.C. § 1451(b)).

⁹ In the years following 1990, Freddie Mac has built a supply of tradable Gold PCs in an attempt to achieve a liquid market of 30-year Gold PCs (\$152 billion as of September 1, 1997). The dealer response, however, has primarily remained unchanged in maintaining Fannie Mae Mortgage-Backed Security ("MBS") positions and entering into synthetic transactions in the swap market despite the availability of a sizable amount of tradable Gold PCs. Broker-dealers primarily enter into Gold PC transactions synthetically as opposed to direct transactions in the Gold PC cash market. The synthetic transactions are structured generally as follows: A dealer will first purchase a 30-year Fannie Mae MBS in the cash market with a forward delivery (with a fixed settlement date in the future). The dealer will enter into another separate transaction in the swap market. The dealer will swap the obligation to buy the Fannie Mae MBS for a commitment to purchase (accept delivery at settlement) Gold PCs.

To gain an understanding of the relative size of the cash market for MBS, the following statistics are provided. In 1996, the average cash market volume on the interdealer broker screens for MBS was approximately \$20 billion per month. Of this, approximately 96% was conducted in Fannie Mae MBS transactions and approximately 4% was conducted directly in the cash market in 30-year Gold PCs.

The Initiative includes offering dealers "credits" for trading directly on the interdealer cash market, as opposed to the swap market. Freddie Mac has developed procedures and internal controls to calculate trading volume credits monthly to the dealers and assure proper administration of the program. According to the October 7, 1997 letter from Freddie Mac and the BMA, this Initiative is intended to be temporary, and the value of the credits were selected so as to provide a nominal economic incentive over the transaction costs on the swap market, while not providing so much of an incentive as to alter pricing of the securities in the open market.¹⁰ The credits awarded under this Initiative may only be redeemed through transactions with Freddie Mac, that is, the credits are utilized by participating broker-dealers to reduce the fees associated with future transactions with Freddie Mac.

Due to unique characteristics of the Initiative, Freddie Mac presented principally three arguments why NASD Rule 2460 was not intended to cover the Initiative: (1) The Initiative promotes Freddie Mac's statutory purpose; (2) the Initiative does not affect the integrity of the marketplace; and (3) the Initiative is intended to be temporary.

First, Freddie Mac represents that the Initiative appears to promote Freddie Mac's statutory purpose, in that, Freddie Mac was created by Congress to provide a conduit for ensuring a continuous supply of funds from the capital markets to the mortgage markets. Freddie Mac purchases mortgages daily and finances them primarily with the issuance of MBS. The prices Freddie Mac pays for its mortgage purchases is based directly on the prices at which it sells its PCs. Freddie Mac represents that this Initiative was developed to eliminate certain unnecessary costs in the mortgage finance system by improving interdealer PC liquidity through

¹⁰ To normalize the environment for dealers to accumulate credits) so as not to favor larger dealers who naturally conduct a higher volume business), a system for accumulation of credits was established that would be based on the individual dealer's level of participation. Credits are awarded on the current volume traded on the cash screens. Credits are awarded at an increasing rate when dealers exceed their previous monthly cash trading volume, as calculated since the beginning of the Initiative, that the dealers have traded on the cash screens. This feature was designed to limit the duration of the Initiative by creating momentum in moving dealers progressively away from the swap market.

Under this Initiative, credits are redeemable at a value of 1/64th of a point (or \$156.25 per million). This value was selected so as to provide nominal economic incentive over the additional 1/4th to 3/8ths of a 32nd (or \$78.13 to \$117.20 per million) in the transaction cost of executing a synthetic Gold PC in the MBS cash and swap markets.

⁶ See Notices to Members 75-16 (February 1975) and 92-50 (October 1992).

⁷ 15 U.S.C. § 77e.

encouraging dealers to purchase Gold PCs directly, as opposed to entering into transactions in the swap market.¹¹

Second, Freddie Mac represents that the Initiative does not appear to affect the integrity of the marketplace, since the nature and characteristics of the agency mortgage pass-through securities market is unique and appears outside of the intended scope of NASD Rule 2460. The dealers in this market trade PCs and similar securities essentially as fungible products and trade these securities indiscriminately on the interdealer broker screens to meet customer demand. As a result, the concept of market making a particular security in this market has little application. In addition, Freddie Mac represents that the incentives which lead a broker-dealer to make a quotation on a PC differ from traditional equity trading. Customer demand in fixed-income securities is based primarily on changes in interest rates, supply and demand, and the quality of the credit backing the security. In the agency MBS market, the credit of the three primary agencies (Freddie Mac, Fannie Mae and Government National Mortgage Association) is considered comparable, the supply of the securities is considered plentiful, and a well-developed forward trading market permits ready hedging of positions. This market differs from the characteristics of the traditional equity market.

Accordingly, Freddie Mac represents that, given the number of comparable securities in the yield-driven debt market, it is unlikely that certain dealer credits to purchase Gold PCs would mislead market participants to purchase the Gold PCs versus other comparable securities.

Further, Freddie Mac represents that this Initiative is intended to be temporary. It is expected that dealer behavior will eventually become self-

¹¹ Currently, broker-dealers enter into gold PC transactions synthetically, first by conducting a transaction in a 30-year Fannie Mae MBS followed by a subsequent swap transaction into or out of Gold PCs. This process subjects Gold PCs to an additional bid-ask spread (that of the cash market and that of the swap market) of 1/8th to 1/4th of a 32nd (or up to \$78.13 per million). In addition, the two-step process results in broker fees for the trading on the interdealer screens of an additional 1/16th to 1/8th of a 32nd (or up to \$39.07 per million). Thus, this persistent trading pattern creates additional costs in the marketplace, preventing investors from obtaining up to 3/8ths of 1/32nd (or \$117.20 per million) of the true economic value of the Gold PCs that an efficient market would produce.

As of May 1997, the average monthly dollar volume of cash trades in Fannie Mae MBS and Gold PCs approximated \$19,239 million, \$1,021 million, respectively. As of that date, the average monthly swap trades in Gold PCs and MBS approximated \$4,177 million.

sustaining and no further incentives will be required.

Based on the above information and representations presented by Freddie Mac, and the importance of the role of Freddie Mac in promoting liquidity of these instruments under statutory mandate, it is NASD Regulation's opinion that the participation of member firms in the Freddie Mac Initiative as described in the letter would not be deemed in violation of NASD Rule 2460.

NASD Regulation believes that this interpretation maintains investor protection and clarifies a member's obligations under NASD Rule 2460 while participating in the Freddie Mac Interdealer Cash market Trading Initiative. Accordingly, NASD Regulation believes that the interpretation is consistent with the provisions of Section 15A(b)(6) in that it protects investors and the public interest, and is designed to promote just and equitable principles of trade.

(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 purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(i) of the Exchange Act¹² and Rule 19b-4(e)(1)¹³ thereunder in that it constitutes a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and

¹² 15 U.S.C. § 78s(b)(3)(A)(i).

¹³ 17 CFR 240.19b-4(e)(1).

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 No. SR-NASD-97-85 and should be submitted by January 21, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,
Deputy Secretary.

Exhibit 1

November 25, 1997.

Ms. Gail Vance, Associate General Counsel,
Freddie Mac, 8200 Jones Branch Drive,
McLean, VA 22102-3110.

Mr. George P. Miller, Vice President and
Deputy General Counsel, The Bond Market
Association, 40 Broad Street, New York,
NY 10004-9400.

Re: Interpretive Guidance Under NASD Rule
2460.

Dear Ms. Vance and Mr. Miller: We are in receipt of your letter dated October 7, 1997 in which you request interpretive guidance of NASD Rule 2460 (Rule) and its potential application to Freddie Mac's Interdealer Cash Market Trading initiative ("Initiative"). As represented in your letter, Freddie Mac launched this Initiative on June 2, 1997 in an attempt to encourage dealers to purchase Gold PCs directly, as opposed to entering into swap market transactions.

Background

As stated in your letter, Freddie Mac is a government-sponsored enterprise created pursuant to the Federal Home Loan Mortgage Corporation Act, Title III of the Emergency Home Finance Act of 1970, as amended, to provide a continuous flow of funds for residential mortgages.¹ To finance its mortgage purchase activities, Freddie Mac sells its securities to investors directly and

¹⁴ 17 C.F.R. 200.30-3(a)(12).

¹ Freddie Mac's statutory purpose is to, among other things, promote access to mortgage credit throughout the Nation by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing (12 U.S.C. Section 1451(b)).

through securities dealers. The primary financing vehicle for its mortgage purchases is the sale of Mortgage Passthrough Certificates (PCs). These securities are exempt from registration under the Securities Act of 1933 and the Exchange Act of 1934. In 1990, Freddie Mac redesigned its fixed-rate PC structure and issued a new type of PC, called Gold PC. Since the Gold PCs were entirely new and a separate product, there was limited initial liquidity in the Gold PC market. As a result, dealers responded to the initial lack of liquidity in the Gold PC market, with its potential volatility, by maintaining primary Fannie Mae security positions, and by entering into synthetic transactions in the swap market.

As a result of the above, Freddie Mac launched this Initiative to encourage dealers to purchase Gold PCs directly, rather than through the swap market mechanism. The Initiative includes offering dealers "credits" for trading directly on the interdealer cash market, as opposed to the swap market. Freddie Mac has developed procedures and internal controls to calculate trading volume credits monthly to the dealers and assure proper administration of the program. According to your letter, this Initiative is intended to be temporary, and the value of the credits were selected so as to provide a nominal economic incentive over the transaction costs on the swap market, while not providing so much of an incentive as to alter pricing of the securities in the open market. More important, the credits awarded under this Initiative may only be redeemed through transactions with Freddie Mac.

Discussion

NASD Rule 2460 prohibits NASD members from receiving payments or other consideration from an issuer for publishing a quotation or acting as a maker in a security, or for submitting an application to make a market in the issuer's securities. The definition of "consideration" specifically includes offering securities products on terms that are more favorable than those granted or offered to the public. The Rule was intended to prevent certain conflicts of interest that may influence a broker-dealer's decision regarding whether to quote or make a market in a security and prices that are quoted and to prevent a misleading appearance of market activity based on such conflicts. Paragraph (b) of the Rule also provides an exemption, among others, for certain payment to members for "bona fide" services, including, but not limited to, investment banking services.

Due to unique characteristics of the Freddie Mac Initiative, you principally present three arguments why the Rule was not intended to cover your Initiative: (1) the Initiative promotes Freddie Mac's statutory purpose; (2) the Initiative does not affect the integrity of the marketplace; and (3) the Initiative is intended to be temporary.

First, you represent that the Initiative appears to promote Freddie Mac's statutory purpose, in that, Freddie Mac was created by Congress to provide a conduit for ensuring a continuous supply of funds from the capital markets to the mortgage markets. Freddie Mac purchases mortgages daily and finances

them primarily with the issuance of mortgage-backed securities. The prices Freddie Mac pays for its mortgage purchases is based directly on the prices at which it sells its PCs. It has been represented in your letter that this Initiative was developed to eliminate certain unnecessary costs in the mortgage finance system by improving interdealer PC liquidity through encouraging dealers to purchase Gold PCs directly, as opposed to entering into transactions in the swap market.

Second, you represent that the Initiative does not appear to affect the integrity of the marketplace, since the nature and characteristics of the agency mortgage pass-through securities market is unique and appears outside of the intended scope of the Rule. Since the dealers in this market trade these securities as fungible products (i.e., PCs, Mortgage-backed securities, Ginnie Maes) and trade on the interdealer broker screens daily as a matter of course to meet their customer's demand, the concept of market making a particular security has little application in this marketplace.

In addition, you represent that the incentives which lead a broker-dealer to make a quotation on a PC differ from traditional equity trading. Customer demand in fixed-income securities is based primarily on changes in interest rates, supply and demand, and the quality of the credit backing the security. In the agency mortgage-backed securities market, the credit of the three primary agencies (Freddie Mac, Fannie Mae and Ginnie Mae) is considered comparable, the supply of the securities is considered plentiful, and a well-developed forward trading market permits ready hedging of positions. This market differs from the characteristics of the traditional equity market. Accordingly your letter represents that, given the number of comparable securities in the yield driven debt market, it is unlikely that certain dealer credits to purchase Gold PCs would mislead market participants to purchase the Gold PCs versus other comparable securities.

Lastly, you represent that this Initiative is intended to be temporary. According to your letter, it is expected that dealer behavior will eventually become self-sustaining and no further incentives will be required.

Based on the above information and the representations presented by Freddie Mac, and the importance of the role of Freddie Mac in promoting liquidity of these instruments under statutory mandate, it is the staff's opinion that the participation of member firms in the Freddie Mac Initiative as described in your letter would not be deemed in violation of Rule 2460.

I hope this letter is responsive to your inquiry. Please note that the opinions expressed herein are staff opinions only and have not been reviewed or endorsed by the Board of Directors of NASD Regulation. This letter responds only to the issues that you have raised based on the facts as described, and does not address any other rule or interpretation of the Association, or all the possible regulatory and legal issues involved.

Sincerely,

David A. Spotts,
Office of General Counsel, NASD Regulation,
Inc.

[FR Doc. 97-33994 Filed 12-30-97; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39477; File No. SR-PCX-97-43]

Self-Regulatory Organizations; Order Granting Accelerated Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 to Proposed Rule Change by the Pacific Exchange, Inc. Relating to Its Specialist Evaluation Program

December 22, 1997.

On November 17, 1997, the Pacific Exchange, Inc. ("PCX" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to extend its pilot program regarding the evaluation of its equity specialists until January 1, 1999, and to implement certain changes to the pilot program.

The proposed rule change was published for comment in Securities Exchange Act Release No. 39358 (November 25, 1997), 62 FR 64035 (December 3, 1997). No comments were received on the proposal. The Exchange filed Amendment No. 2 to the proposed rule filing on December 5, 1997.³ This order approves the proposed rule change, as amended, on an accelerated basis.

I. Description

On October 1, 1996, the Commission approved a nine-month pilot program for the evaluation of PCX equity specialists.⁴ On June 3, 1997, the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 2 states that the Equity Allocation Committee ("EAC") will consider mitigating circumstances on a case-by-case basis. The restrictions will apply in all cases in which the specialist fails to meet the standards; any failure to impose the restrictions should not be routine and should only occur in exceptional circumstances which demonstrate that imposing the restrictions is not justified. For example, the EAC may consider a systems problem to be a mitigating circumstance in a particular case. See letter from Jeffrey S. Norris, Manager, Regulatory Development, PCX, to Heather Seidel, Attorney, Market Regulation, Commission, dated December 4, 1997 ("Amendment No. 2").

⁴ Prior to the adoption of the pilot program, PCX Rule 5.37(a) provided that the Exchange's EAC evaluate all registered specialists on a quarterly

Commission approved a six-month extension of that pilot program.⁵ 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 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%.

Price Improvement

"Price Improvement" measures the number of trades involving market and marketable limit orders that improve the national best bid or offer ("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

basis and that each specialist receive an overall evaluation rating based on three criteria of specialist performance: (1) Specialist Evaluation Questionnaire Survey ("Questionnaire") (45% of overall score); (2) SCOREX Limit Order Acceptance Performance (10%); and (3) National Market System Quote Performance (45%). See PSE Rule 5.37 (July 1995).

The original pilot program modified Rule 5.37(a) by adding three new criteria of performance and eliminating one performance criterion. Prior to this proposed rule change, the pilot contained the following criteria: (1) Executions (50%) (itself consisting of four criteria: (a) Turnaround Time (15%); (b) Holding Orders Without Action (15%); (c) Trading Between the Quote (10%); and (d) Executions in Size Greater Than BBO (10%)); (2) Book Display Time (15%); and (3) Post-1 p.m. Parameters (10%). The pilot also eliminated the SCOREX Limit Order Acceptance Performance criterion. Further, the pilot added more questions to the Questionnaire, and reduces its weight from 45% to 15% of the overall score. Finally, the National Market System Quote Performance criterion (renamed Quote Performance under the pilot) was amended to include within it an additional submeasure for bettering the quote (each of the two submeasures under this criterion is accorded a weight of 5% of the overall score). For a more detailed description of the performance criteria utilized in the PCX's pilot program, see Securities Exchange Act Release No. 37770 (October 1, 1996), 61 FR 52820 (October 8, 1996) (File NO. SR-PSE-96-28). See also generally PCX Rule 5.37 (description of the standards and procedures applicable to the EAC's evaluation of specialists).

⁵ See Securities Exchange Act Release No. 38712 (June 3, 1997), 62 FR 17941 (July 8, 1997).

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 orders⁶ with an NBBO quote spread greater than $\frac{1}{8}$ 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 an program trade account types.⁷

⁶ According to the PCX, 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.

⁷ The PCX states that 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. 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

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

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. 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.

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

sensitive executions (i.e., buy minus, 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.

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. PCX states that 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:

Evaluation criterion	Passing score
Turnaround Time	12
Holding Orders Without Action	7.5
Trading Between the Quote	5
Executions in Size Greater Than NBBO	2
Specialist Evaluation Questionnaire Survey	5
Book Display Time	10.5
Equal or Better Quote Performance	1
Post 1 P.M. Parameters	3
Price Improvement	4

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 a 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 a 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 a 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 consider mitigating circumstances on a case-by-case basis. The restrictions will apply in all cases in which the specialist fails to meet the standards; any failure to impose the restrictions should not be routine and should only occur in exceptional circumstances which demonstrates that imposing the restrictions is not justified.

For example, the EAC may consider a systems problem to be a mitigating circumstance in a particular case.

II. Discussion

The Commission believes that specialists play a crucial role in providing stability, liquidity, and continuity to the trading of stocks. Among the obligations imposed upon specialists by the Exchange, and by the Act and the rules promulgated thereunder, is the maintenance of fair and orderly markets in their designated securities.⁸ To ensure that specialists fulfill these obligations, it is important that the Exchange conduct effective oversight of their performance. The PCX's specialist evaluation program is critical to this oversight.

In its order initially approving the specialist evaluation pilot program,⁹ the Commission asked the Exchange to monitor the effectiveness of the amended program. Specifically, the Commission requested information about the number of specialists who fell into the bottom 10% of all registered specialists on their respective trading floors in the overall program, whether they subsequently appeared before the EAC, and any restrictions placed upon, or further action taken against, such specialists. The Commission also requested information as to the number of specialists who appeared before the EAC as a result of scoring in the bottom 10% in any two out of four consecutive quarterly evaluations, whether any restrictions were imposed on such specialists, and the results of any formal proceedings that were initiated against them.

In May 1997, the PCX submitted to the Commission its monitoring report regarding its specialist evaluation pilot program. The report described the PCX's experience with the pilot program during the initial two quarters of its operation (*i.e.*, the fourth quarter of 1996 and the first quarter of 1997). In terms of the overall scope of the program, the Commission continues to believe that the objective measures, together with the floor broker questionnaire, should generate sufficiently detailed information to enable the Exchange to make accurate assessments of specialist performance. In this regard, the increased emphasis on objective criteria under the pilot has been useful in identifying how well

specialists carry out certain aspects (*i.e.*, timeliness of execution, price improvement, and market making quality) of their responsibilities as specialists.

In June 1997, the Commission approved an extension of the pilot to January 1, 1997.¹⁰ Since that time, the Exchange has begun (starting with the third quarter of 1997) to utilize the NBBO instead of the primary market quote in Trading Between the Quote, Book Display Time, and Quote Performance criteria, and the PCX is proposing to continue to utilize the NBBO for these criteria during the pilot extension. The Commission continues to believe that the NBBO is a more appropriate standard in this context in that it will enable the Exchange to gauge the performance of PCX specialists in comparison with their competitors not only in the primary market, but in the national market system as a whole.¹¹ Therefore, the Commission finds that the PCX's proposal is responsive to the Commission's request for such an amendment.

The Commission believes that the proposed overall passing score and the individual criterion passing scores are consistent with the Act. The Commission believes that minimum adequate performance thresholds are an important part of any specialist performance evaluation program because they allow the Exchange to identify specialists who are not operating at an acceptable level of performance, both overall and in individual objective criterion. The Commission has stated that an effective evaluation program should subject specialists who meet minimum performance levels on the overall program, but need help or guidance in improving their performance in a particular area, to review. While the PCX's current specialist evaluation program subjects those specialists falling into the bottom 10% of all specialists on his or her trading floor to review by the EAC, it did not set a minimum performance level on the overall program, or for the individual criterion. The proposed rule change rectifies this situation by imposing overall and individual criterion passing scores.

The Commission notes that the Exchange must apply certain restrictions on any specialist who fails the overall passing score and the

⁸ Rule 11b-1, 17 CFR 240.11b-1; PSE Rule 5.29(f).

⁹ For a description of the Commission's rationale for initially approving the PCX's adoption of its specialist evaluation pilot program, see Securities Exchange Act Release No. 37770, *supra* note 4. The discussion in the aforementioned order is incorporated by reference into this order.

¹⁰ See *supra* note 5.

¹¹ The Exchange's use of the primary market quote in these three measures did not allow for such comparisons to be made in instances where the primary market quote is not equal to the NBBO. See *Id.* at n.16.

individual criterion passing scores for certain specified time periods. In addition, the Commission notes that the Exchange has represented that the EAC will evaluate the effectiveness of the overall and individual criterion passing scores and will adjust them as necessary. Finally, the Commission emphasizes that the EAC will consider mitigating circumstances only on a case-by-case basis and that the restrictions will apply in all cases in which the specialist fails to meet the standards, unless exceptional circumstances demonstrate that imposing the restrictions is not justified. The Commission expects that any failure to impose the restrictions should not be routine and should only occur when the exceptional circumstances, such as a systems problem in a particular case, justify not imposing the restrictions.¹²

The Commission believes that replacing the "Bettering the Quote" criterion with Price Improvement, and lowering the Specialist Evaluation Questionnaire weighting to 10% and according Price Improvement a 10% weighting, is reasonable under the Act. The Commission notes that price improvement will measure the number of trades involving market and marketable limit orders that improve the NBBO;¹³ Bettering the Quote was originally measured against the primary market and is now measured against the NBBO. The Commission also notes that there is still a category for "Equal or Better Quote Performance." Finally, the Commission notes that Price Improvement provides an additional objective criterion to measure specialist performance.

The Commission believes that it is appropriate to extend the current pilot program for an additional year, until January 1, 1999. This period will allow the Exchange to respond to evaluate the effectiveness of the overall passing score and the individual criterion passing scores, and the specialist performance program as a whole. Moreover, the Commission expects the Exchange to conduct an ongoing examination of the parameter ranges and corresponding points allotted under each criterion to ensure that they continue to be set at appropriate levels.

The Commission therefore requests that the PCX submit by October 30, 1998

a proposed rule change pursuant to Rule 19b-4 to include any proposal by the PCX to extend the pilot beyond January 1, 1999.

In addition, the Commission requests that the PCX submit a report to the Commission, by October 30, 1998, describing its continuing experience with the pilot. At a minimum, this report should contain data, for the first, second and third quarters of 1998, on (1) the number of specialists who, as a result of failing the overall passing score in any one quarterly evaluation, appeared before the EAC, and the type of restrictions that were imposed on such specialists (*i.e.*, restriction on new allocations or acting as an alternate specialist), or any further action that was taken against such specialists; (2) the number of specialists who, as a result of failing the overall passing score in any three out of four quarters, appeared before the EAC, and the type of restrictions that were imposed on such specialists (*i.e.*, reallocation of new stocks), or any further action that was taken against such specialists; (3) the number of specialists who, as a result of failing any individual criterion passing score for two consecutive quarters, or three out of four consecutive quarters, four out of five consecutive quarters, and so on, appeared before the EAC, and the type of restrictions that were imposed on such specialists; (4) the number of specialists for whom formal proceedings were initiated, the results of such proceedings, including a list of any stocks reallocated from a particular unit; (5) the number of registered specialists who scored in the bottom 10% of all registered specialists on his or her trading floor in the overall program; (6) the number of specialists who, as a result of scoring in the bottom 10% in any one quarterly evaluation, appeared before the EAC, and the type of restrictions that were imposed on such specialists (*i.e.*, restrictions on new allocations or acting as an alternate specialist), or any further action that was taken against such specialists; (7) the number of specialists who, as a result of scoring in the bottom 10% in any two out of four consecutive quarterly evaluations, appeared before the EAC, whether any restrictions were imposed on such specialists, and whether formal proceedings were initiated against such specialists; and (8) any situation in which the restrictions were not imposed due to mitigating circumstances, what those circumstances were, and the reasoning as to why the restrictions were not imposed.

The Commission notes that the Exchange's pilot program only modifies

the performance criteria of PCX Rule 5.37(a). Consequently, the Commission expects the EAC to continue to evaluate the performance of specialists during the pilot period in accordance with the standards and procedures found in the PCX rules.¹⁴

For the reasons discussed above, the Commission finds that the PCX's proposal to extend its pilot program is consistent with the requirements of Sections 6(b) and 11 of the Act¹⁵ and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission finds that the proposed rule change is consistent with the Section 6(b)(5) requirement that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.¹⁶

Further, the Commission finds that the proposal is consistent with Section 11(b) of the Act¹⁷ and Rule 11b-1 thereunder which allow securities exchanges to promulgate rules relating to specialists in order to maintain fair and orderly markets and to remove impediments to and perfect the mechanism of a national market system.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. This will permit the pilot program to continue both on an uninterrupted basis and with the use of overall and individual criterion passing scores, and a new measure, Price Improvement. In addition, the rule

¹⁴ In this regard, all specialists falling within the bottom 10% of specialists on their respective floors in any review period are required to meet with the EAC. See also PCX Rule 5.37 (standards applicable to specialists falling into the bottom 10% in any two out of four review periods, including those pertaining to the initiation of formal reallocation proceedings). Moreover, PCX Rule 5.36(d), Commentary .03 requires that all specialists falling into the bottom 10% in a review period must be precluded from acting as alternate specialists until their ranking rises above the bottom 10%, unless the EAC determines otherwise. In addition, PCX Rule 5.37(b), Commentary .01 requires that all such specialists shall not be eligible for new allocations until their ranking rises above the bottom 10%. Consequently, the Commission expects that appropriate action in accordance with PCX rules will be taken with regard to those specialists falling into the bottom 10%. The Commission notes that the PCX stated its intention to file a rule change to PCX Rule 5.37 to reflect all of the aforementioned changes to its Specialist Evaluation Pilot Program.

¹⁵ 15 U.S.C. 78f(b) and 78k.

¹⁶ In approving this rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78k(b).

¹² See Amendment No. 2, *supra* note 3.

¹³ The NBBO quote spread at the time of the original order is received must be 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).

change that implemented the pilot program initially was published in the **Federal Register** for the full comment period, and no comments were received.¹⁸ The Commission also finds good cause for approving Amendment No. 2 prior to the thirtieth day after the date of publication of notice in the **Federal Register**. Amendment No. 2 strengthened the proposed rule change by clarifying that the EAC will consider mitigating circumstances only on a case-by-case basis, and will only apply them in exceptional circumstances which demonstrate that imposing the restrictions is not justified. Accordingly, the Commission believes good cause exists, consistent with the Act, to accelerate approval of the proposed rule change and of Amendment No. 2.

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2 to the rule proposal. 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 also will 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 January 21, 1998.

III. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2)¹⁹ that the proposed rule change, as amended, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁰

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97-33995 Filed 12-30-97; 8:45 am]

BILLING CODE 8010-01-M

¹⁸ See Securities Exchange Act Release 37770, *supra* note 4.

¹⁹ 19 U.S.C. 78s(b)(2).

²⁰ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39468; File No. SR-PHLX-97-39]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to Changes in Insider Trading and Securities Fraud Enforcement Act Rules

December 18, 1997.

I. Introduction

On August 18, 1997, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to include PHLX member organizations within the scope of Insider Trading and Securities Fraud Act ("ITSFEA") coverage and clarify the definition of "employee" to include indirectly compensated persons such as independent contractors.

The proposed rule change was published for comment in the **Federal Register** on October 9, 1997.³ No comments were received on the proposal. This order approves the proposal.

II. Description of the Proposal

Presently, PHLX is the designated examining authority ("DEA") for approximately eighteen firms that do not have a floor presence. Because PHLX Rule 761 and Floor Procedure Advice F-13 (collectively, "PHLX ITSFEA rules") which implement ITSFEA-related written supervisory procedures currently only cover PHLX floor units, members without a floor unit are exempt from the application of these rules. The Exchange is removing this exception. Accordingly, all PHLX members will be covered by the PHLX ITSFEA rules.

Additionally, the PHLX ITSFEA rules currently impose certain regulatory requirements upon "employees" of members. The rule, however, does not contain a definition of such term. PHLX proposes to add a commentary to these rules in order to interpret the term "employee" to include "every person who is compensated directly or indirectly by the member organization for the solicitation or handling of

business in securities, including those trading securities from the account of the member organization, whether such securities are those dealt in on the Exchange or those dealt over-the-counter." This change will now include persons as "employees" who might have previously been excluded based on the nature of their compensation arrangements.⁴

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. The Commission believes the proposal is consistent with the requirements of Section 6 of the Act in general and, in particular, with Section 6(b)(5) in that it is designed to promote just and equitable principles of trade and prevent fraudulent and manipulative acts and practices.⁵

The Commission finds that the proposal will further the goals of ITSFEA by extending to all PHLX members the requirements to maintain written supervisory procedures designed to prevent the misuse of material, non-public information by employees. The rules of other self-regulatory organizations currently extend ITSFEA-related requirements to all members.⁶

The Commission believes that the proposal will also further the goals of ITSFEA by defining the term "employees" to include "every person compensated directly or indirectly by the member organization for the solicitation or handling of business in securities, including those trading securities from the account of the member organization, whether such securities are those dealt in on the Exchange or those dealt over-the-counter." In particular, this proposed change appropriately expands coverage of Rule 761 and Floor Procedure Advice F-13 to include as employees those

⁴ The PHLX has represented that it currently interprets the term "employees" in Rule 761 to include persons such as partners, directors, officers and branch managers. The PHLX has also represented that the proposed commentary will not change the existing interpretation of the term "employee" except to expand the universe of persons defined as employees. Letter from Michele R. Weisbaum, Vice President and Associate General Counsel, PHLX, to Kevin Ehrlich, Attorney, Division of Market Regulation, dated December 18, 1997.

⁵ 15 U.S.C. 78f(b)(5).

⁶ See Chicago Stock Exchange Rule 5 and Interpretation .02; Cincinnati Stock Exchange Rule 5.1; Pacific Exchange Rule 2.6(e) and Commentary .03; Chicago Board Options Exchange Rule 4.18 and Commentary .02; Boston Stock Exchange Rule 37(a) and Commentary .03.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 39178 (October 1, 1997), 62 FR 52804.

individuals who are technically independent contractors, but carry out the same functions as persons employed directly by the member organization. Expanding the class of persons required to supply member firms with all trading accounts for which that person maintains a beneficial interest should help members to monitor the trading activities of those individuals that have a close nexus to the member's solicitation or handling of business in securities. The requirement should also make covered individuals aware of the prohibition against the misuse of material, nonpublic information. In addition, the Commission believes that requiring all covered persons to update the Exchange's "ITSFEA Account List" should assist Exchange and Commission review of those records and make any fraudulent acts easier to deter and detect.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁷ that the proposed rule change (SR-PHLX-97-39) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97-33991 Filed 12-30-97; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39481; File No. SR-Phlx-96-14]

Self-Regulatory Organizations; Notice of Filing of Amendment No. 2 to Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Universal Trading System's Morning Session

December 22, 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 April 29, 1996 the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change, and on July 26, 1996, submitted to the Commission Amendment No. 1 to the proposed rule change.¹ The original filing, as amended

by Amendment No. 1, was published for comment in Securities Exchange Act Release No. 37640 (September 4, 1996), 61 FR 47993 (September 11, 1996). No comment letters were received. On October 29, 1997, the Exchange submitted to the Commission Amendment No. 2 to the proposed rule change. The proposed rule change, as amended, is 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, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Rule 19b-4 under the Act,² proposes to implement a daily pre-opening order matching session ("Morning Session" or "Session") for the execution of large-sized stock orders on a volume weighted average price ("VWAPTM") basis. This amendment restates the original proposal and proposes to: (1) Clarify the system functions of the Exchange and the Universal Trading System ("System" or "UTSTM"); (2) delete references to over-the-counter ("OTC") securities; (3) provide for an equity trading floor UTS terminal and prohibit floor members from UTS trading in non-specialty issues; (4) update and detail matching priority provisions; (5) update and detail order types and order entry procedures; (6) clarify participation and subscriber access; (7) separate and elaborate "upon extraordinary circumstances" language; and (8) expand upon the liability provisions.

The Morning Session has been designed to provide investors with the means to execute large-sized stock orders anonymously and at fair market prices approximately 15 minutes prior to the opening of the "regular trading session" (*i.e.*, 9:30 A.M.-4:00 P.M.).³ The price of Morning Session transactions will be determined at approximately 4:15 P.M. on the same day. At that time, the Exchange shall assign the applicable VWAP and report each such trade to the appropriate reporting authority, the Consolidated Tape or other, as "VWAP" trades.

The receipt and matching of orders for the Morning Session will be handled electronically through the UTS. The UTS is a system which was devised for facilitating the operational aspects of the

Morning Session. The UTS was developed by Universal Trading Technologies Corporation ("UTTC") by agreement with the Exchange. This proposal relates only to the first product of the UTS, the VWAP Trading System ("VTSTM").⁴

Each of the approximately 2,700 equity securities currently available for trading on the Exchange, both listed and traded pursuant to Unlisted Trading Privileges ("UTP") (except OTC securities) will be eligible for the Morning Session. However, the Exchange will publish a list of securities trading on the UTS, periodically reflecting additions and deletions. Upon implementation of this proposal, a certain number of Phlx issues will be activated for UTS trading, as a phase-in of the System, and a list of these securities will be published.

The present proposal consists of the adoption of a new rule applicable solely to the Morning Session, Rule 237—UTS Morning Session ("Rule"). In addition, Phlx Rule 101 is proposed to be amended to add the Morning Session as an exception to regular trading hours.⁵

The Rule is organized as follows: an introductory paragraph, followed by paragraphs: (a) Explaining reporting; (b) defining the UTS; (c) governing who the participants are; (d) explaining order entry; (e) specifying order priority; (f) defining the VWAP; (g) governing short sales in the UTS; (h) concerning disputes; (i) containing provisions relating to limitation of liability; (j) pertaining to trading halts; and (k) governing extraordinary circumstances.

UTS trades will be subject to transaction and access fees as established in the Exchange's fee schedule.

The Universal Trading System

The UTS will operate as a separate system, linked to Exchange systems at the reporting stage. UTS access will be available to direct subscribers, by dial-up into the UTS system, utilizing software and a log-on procedure dependent upon whether the subscriber is accessing UTS through a personal computer or main-frame system. UTS access is also available through subscribers acting as brokers. Participation is described more fully below. Thus, UTS access may include various types of computer hardware, software and handheld devices.

⁴ VTS and UTS are trademarks of UTTC and VWAP is a trademark of the Dover Group.

⁵ The Exchange also proposes several minor amendments to Rule 101, including placing "A.M." and "P.M." in capital letters and adding a heading to each commentary.

⁷ 15 U.S.C. 78s(b)(2).

⁸ 17 CFR 200.30-3(a)(12).

¹ See Letter from Gerald D. O'Connell, Senior Vice President, Market Regulation and Trading, Operations, Phlx, to Jennifer Choi, Division of

Market Regulation, SEC, dated July 26, 1996 ("Amendment No. 1").

² 17 CFR 240.19b-4.

³ All times refer to Eastern Time (ET).

The System links off-floor and on-floor computer terminals to a communications base unit. The UTS base unit will: (i) Accept orders and commitments, (ii) match buyers with sellers, (iii) give execution reports to matched participants, (iv) calculate the back-up VWAP for each traded security, (v) report VWAP trades to the entering Participant, and (vi) create the necessary audit trail, recording order and commitment entry and execution of Morning Session orders. Other Exchange systems will calculate the official VWAP and report trades to the appropriate reporting authority.

Participation in the Morning Session may occur by way of a commitment from a "Committer" or an order from a "User" (collectively, "Participants"). Exchange members may participate as either Committers or Users, but may not participate as both Committer and User in the same security for the same account during the same Morning Session.

Commitments must be entered directly by UTS subscribers or through the UTS trading floor terminal at the Exchange. Committers can be either Phlx Floor Traders or Phlx Off-Floor Liquidity Providers who may commit (on a proprietary basis) to provide contra-side liquidity. UTS commitments may only be made by Exchange members, either Phlx Floor Traders or Phlx Off-Floor Liquidity Providers, who must register with the Exchange in a prescribed manner prior to acting in the capacity of a Committer. Phlx floor members qualify as Phlx Floor Traders if they are either the Phlx Specialist or Phlx Alternate Specialist in the particular stock that is the subject of the commitment. Phlx Off-Floor Liquidity Providers must be Phlx members and may only engage as Committers for their proprietary accounts. Committers will be able to choose which, if any, issues they wish to make commitments, but for each chosen issue must provide a minimum volume guarantee of 2,500 shares on each side of the market. Commitment sizes can vary on each side of the market, such as a commitment to buy 2,500 shares and sell 10,000 shares at the VWAP. Commitments may be restricted to execution against non-members only.

Commitments are only executable through the UTS. Commitments may be entered and modified in the UTS during the Order Entry Time Period and also during any other periods which the Exchange may make available for that purpose. For instance, in order to reflect the busy pre-opening time before 9:15 A.M., the Exchange may allow commitments to be entered or modified

during certain times the previous day, effective for the next Morning Session. In such an event, UTS trading still would occur only during the Morning Session; the extra time period merely provides additional time for the entry of commitments. Committers may make such contra-side liquidity commitments through the UTS as day or good-till-cancelled (GTC) commitments; GTC commitments remain in effect for each Morning Session until cancelled and must be established (and cancelled) through the enrollment process.⁶

Users are participants who enter orders, as opposed to commitments, into the UTS. UTS orders may only be placed for and by Users who are enrolled and activated for the UTS. Users may be either Phlx members or non-members. Users may enter orders for customer or proprietary (dealer or principal) accounts. Paragraph (c) of the Rule is proposed to be amended to reflect that Users may enter orders directly into UTS terminals as subscribers or through subscribing brokers. The participation method may affect matching priority, pursuant to paragraph (e) of the Rule. A UTS terminal may be available on the equity trading floor for the entry and reporting of UTS orders and commitments. Exchange floor members may participate as Users in their specialty issues only.

All UTS trades will be processed for clearing like any other Exchange equity floor trade. The Exchange and the Stock Clearing Corporation of Philadelphia ("SCCP") perform trade reconciliation and confirmation functions; once complete, the trades are forwarded to the National Securities Clearing Corporation ("NSCC") for clearance and settlement.⁷ For jurisdictional and compliance purposes, Phlx membership is also required for all UTS trades, as with all Phlx trades. Thus, all Committers and Users must provide both an executing and clearing account during the enrollment process.

All non-member UTS orders entered through a broker must be entered either through a Phlx member or through a non-member broker with the

⁶The enrollment process is the formal mechanism by which participants specify their contractual arrangements for using the UTS, specifying the information needed to establish UTS access. UTS activation is dependent upon completing the enrollment process and submitting the requisite agreements and forms. Enrollment parameters, including GTC commitments, may be modified through procedures established by the Exchange.

⁷UTS trades, as all Phlx trades, will require both a Phlx and SCCP member to be involved. See Securities Exchange Act Release No. 39223 (October 8, 1997) (SR-SCCP-97-04).

appropriate give-up and three-way agreements in place. UTS non-member orders may also be entered directly by subscribing non-members, who have both agreements with a Phlx member in place. In the three-way agreement between the Exchange, the Phlx member and the non-member User, the Phlx member must agree to be jointly and severally liable for actions of the non-member through the UTS and the non-member must agree to adhere to all applicable by-laws and rules of the Exchange. The three-way agreement is in addition to the clearing or "give-up" agreement. The give-up agreement is intended to ensure that a SCCP member, who must also be a Phlx member, has assumed responsibility for the order. Give-up agreements with non-members must be submitted in advance to the Exchange's Examinations Department, and must include a delineation of the credit limits for the respective customer.

All Users and Committers must provide proof of compliance officer review and approval of enrollment parameters prior to UTS activation.

UTS Order Entry

Only orders and commitments placed through UTS will be eligible for execution during the Morning Session; similarly, orders and commitments entered into the UTS are only eligible for execution through the UTS. Thus, UTS orders do not automatically migrate to the Exchange's regular equity trading session. UTS orders will only be accepted during the UTS order entry time period, 5:00 A.M. to 9:15:00 A.M., except that the Exchange may establish a different period respecting the UTS trading floor terminal. The proposed establishment of an equity trading floor terminal amends the original proposal and is intended to facilitate Floor Trader participation. The Phlx believes that trading floor real estate concerns⁸ may discourage direct subscription, such that the floor terminal would provide an alternate means for access. Unlike UTS commitments, all UTS orders will only be eligible for a UTS execution on the day the order has been placed. UTS orders and commitments may be cancelled until 9:15 A.M. Confirmation of order placement and cancellation occurs electronically through the UTS.

As discussed above, Morning Session trading interest may be entered into UTS in the form of either: (i) An order

⁸Phlx represents that physical space for additional screens or computers on the floor is extremely limited. Telephone conversation between Edith Hallahan, Director, Associate General Counsel, Phlx, and Mike Walinskas, Senior Special Counsel, Division of Market Regulation, SEC, on December 17, 1997.

to trade as a User; or (ii) as a commitment to provide contra-side liquidity to User orders. The minimum order size for individual User orders shall be 5,000 shares, while Committers will be permitted to commit in sizes of 2,500 or greater. In addition to these minimums, all orders and commitments must be in 500 share increments, including any "AON" or "MON" designations, as defined below. This amendment eliminates reference to round-lots, meaning 100 shares. Further, the Exchange's Floor Procedure Committee ("FPC") may determine whether different sizes should be established. This ability is intended to be responsive to adjustments based on market and participant need, which would be subject to prior written notice.

In placing orders and commitments on the System, Participants will be required to provide order/commitment description and account identification information necessary for UTS to establish the priority and eligibility of orders on the System. Specifically, UTS orders and commitments are to be placed with the following designations: (i) Buy/sell; (ii) volume; (iii) stock symbol; (iv) Participant status: Committer or User; (v) Committer account status: Off-Floor Liquidity Provider, Specialist or Alternative Specialist; (vi) User account status: member or non-member, and order type (basic, cross, facilitation, constraints, restrictions); (vii) clearing account number; (viii) trade account information; and (iv) subscriber identification number.

Order Types

The UTS order types in paragraph (i) of the Rule are being amended for better organization and definition within the Rule. Eligible order types for the Morning Session are divided into three categories: basic, facilitation and cross. Basic and facilitation orders can be unconstrained, meaning executable to the extent possible, or constrained. The following two constraints are proposed: All-or-none (AON), meaning execute all shares of the order or none at all; and Minimum-or-none (MON), meaning execute at least a specified number of shares or none at all. Basic orders can also be restricted, meaning executable against non-members only.

Facilitation orders, on the other hand, are two-sided orders with an identified Phlx member contra-side, who acts as a facilitator to that order, and is known as a "Guarantor." The Guarantor definition has also been added to paragraph (c) of the Rule, which delineates the categories of access to the UTS. The contra-side may be entered together

with or separate from the facilitation order; if the sizes do not match, the remainder is unexecuted. Facilitation orders can be submitted on behalf of Phlx members or non-members. There are three types of facilitation orders. The first type is an unconditional facilitation, which is to be executed against an identified Guarantor or not at all; as such, the order is a type of cross, involving a Phlx member Guarantor. The second type of facilitation order is a conditional facilitation order, which is executable against an identified Guarantor after attempting to be executed against non-members to the extent possible. For instance, User A may enter an order designating X as its conditional Guarantor, such that if no non-member orders are matched with this order, User A is matched with X, even if other Phlx members would have matched. Third, a last resort facilitation order is executable against an identified Guarantor only after attempting to execute against all other orders and commitments to the extent possible. Extending the previous example, the last resort Guarantor X would only match with User A after all other orders and commitments have had the opportunity to match, not just non-member orders. Facilitation orders cannot be restricted to non-members in general, because they contain a contra-side.

A cross order is a two-sided order, with both sides comprised of non-member interest, with instructions to match the identified buy-side with the identified sell-side. The two sides of a cross can be entered separately, with the contra-side identified. If the sizes do not match, the remainder is unexecuted.

Execution and Priority of Orders

Orders for the Morning Session will be matched at approximately 9:16 A.M. Trades executed through the UTS are printed and cleared as Phlx transactions, executed on the Exchange and processed through SCCP, as explained above. In matching VWAP orders for execution during the Morning Session, execution priority is determined in accordance with 23 matching steps, which appear below. Commitments are not matched with other Commitments.

Generally, User orders are afforded priority by account type, then by order size (largest first); and for orders of the same size and account type, on a chronological basis by time-of-entry. As outlined below, account types are based on status as a non-member or Phlx member, type of non-member account, constraints, and direct subscription versus broker access.

Similarly, commitments are prioritized, first, on the basis of sub-account types, meaning Phlx Off-Floor Liquidity Providers then Specialists and then Alternate Specialists; then, on the basis of commitment size (largest first); and among those commitments at the same size, priority rotates among Committers with the fewest aggregate UTS shares (in all securities) matched at that time. For example, among three 5,000 share specialist commitments in stock XYZ, priority would be afforded to A who has received 10,000 shares of stock XYZ so far, then B who has 15,000 shares of TTT, and lastly to C who has 3,000 shares of XYZ and 20,000 of TTT. In the previous version of this proposal, the matching was proposed to occur on a rotational basis among those of the same size and sub-account type.

An additional amendment to the original proposal is the incorporation of a Liquidity Rotation Parameter ("LRP"), also known as the "anti-bully" rule. Even though priority is generally based on size, the LRP provides that order an commitment participation will rotate in 25,000 share increments, to more fairly allocate order flow, as opposed to filling the largest first. The LRP operates within each matching step (after step 1) to match in 25,000 share increments, moving to the next order/commitment after 25,000 shares have been matched, and then returning to the remainder of that unfilled portion once all other orders/commitments have received their first 25,000 share match. For example, where there is one large buyer ("buyer 1") for 100,000 shares and three buyers of 10,000 shares of ABC ("buyers 2-4"), without this provision, a seller of 100,000 shares would match with the buyer 1 for all 100,000 shares, thereby excluding the other buyers. Instead, the LRP results in a match of 25,000 shares for buyer 1, 10,000 shares each for buyers 2-4 (sub-totaling 55,000), 25,000 shares more for buyer 1, with the remainder of 20,000 shares going to buyer 1 (as there are no other buyers with which to rotate liquidity); the LRP ensured that buyers 2-4 participated, while buyer 1 received 70,000 shares. The proposal would permit the FPC to establish a different size (than 25,000 shares) based on operational experience, practicality and demonstrated market need.

As a follow-up to these introductory paragraphs respecting the order matching principles of UTS, the specific matching steps to be conducted in each security are outlined below. First, the following two-sided orders are matched: non-member/non-member crosses, then non-member/member unconditional facilitation orders and then member/

member unconditional facilitation orders. Any partially unmatched orders due to excess size entered by one side remains unexecuted.

Second, non-member unconstrained orders (both basic and facilitation) are matched with each other. For example, a buy of 10,000 shares of XYZ would be matched with a sell of 10,000 shares of XYZ by non-members. Within this step 2, as within all matching steps, priority is determined based on size and time of entry. Although step 2 refers to non-member unconstrained orders, including facilitation orders, unconditional facilitation orders are not matched at this step, because they have already been matched in step 1. Non-member unconstrained orders for non-member broker-dealers are matched in step 6.

Third, any remaining non-member unconstrained orders are matched with non-member constrained (AON and MON) orders. Any such non-member constrained orders not matched with the unconstrained orders left over from step 1 are then matched with other non-member constrained orders. Non-member constrained orders for non-member broker-dealers are matched in step 6.

Fourth, any remaining non-member orders from steps 2 and 3 are matched with non-member institutions' orders participating through a broker. Brokers may be members or non-members as explained in the participation and access portions of this proposal. Such non-member institutions' orders are then matched with each other. Non-member institutions entering orders directly would have participated in steps 2 or 3 above, depending on whether the order is constrained; constraints are not relevant to determining priority in step 4 among institutions participating through a broker.

Fifth, any remaining non-member orders are matched with non-member non-institution orders participating through a broker. The remaining non-member orders filtering down through each step may include unmatched orders and partially unmatched orders from all prior steps. These remaining orders are matched with the new category of orders in each step first, before that category is matched against itself. Thus, after non-member non-institution orders participating through a broker are matched against the unmatched orders of non-member orders, such non-member non-institution orders are matched with each other. Non-member non-institution orders include non-member broker-dealer orders as well as non-member,

non-broker-dealer, non-institution orders, such as retail customer orders.

Sixth, any remaining non-member orders are matched with non-member broker-dealers subscribing directly. Non-member broker-dealer orders subscribing directly are then matched with each other. Instead of dealer activity, if the non-member broker-dealer is acting as a broker, then the order would be matched in steps 4 or 5, depending on who he or she is representing as a broker.

Seventh, the matching process is ended respecting non-member orders. Thus, any remaining non-member orders that are restricted to matching with non-members only are removed; these are unmatched, except as provided in step 23 below.

Eighth, any remaining non-member conditional facilitation orders are matched with their conditional Guarantors (facilitating members). These conditional orders were first subject to matching against other non-member orders in the prior steps, and are now eligible for matching against the identified Guarantor, who is a member.

Ninth, any remaining non-member orders are matched with member orders participating through brokers. Any unmatched member orders participating through brokers are then removed.

Tenth, any remaining non-member orders are matched with orders of off-floor members. Any unmatched off-floor members' orders are then removed.

Step 11 involves matching any remaining non-member orders with order of Phlx Floor Traders. Any unmatched Phlx Floor Traders' orders are then removed. This category includes one-sided orders (as opposed to commitments) of Specialists and Alternate Specialists, who are permitted to trade as a "dealer" in specialty issues.

Steps 12 through 14 introduce commitments into the matching process. In step 12, any remaining non-member orders are matched with commitments of Phlx Off-Floor Liquidity Providers. The remaining commitments of Phlx Off-Floor Liquidity Providers are then removed. In step 13, any remaining non-member orders are matched with commitments of Specialists; unmatched Specialist commitments are then removed. In step 14, any remaining non-member orders are matched with commitments of Alternate Specialists; unmatched Alternate Specialist commitments are then removed.

In step 15, any remaining non-member orders are matched with member facilitation orders (those with conditional or last resort Guarantors). The other type of facilitation order, an

unconditional facilitation, is already matched in step 1.

In step 16, non-member last resort facilitation orders are matched with their identified last resort Guarantors.

Step 17 represents the end of non-member matching. Any remaining non-member orders are unmatched, except as provided in step 23 below.

In step 18, Phlx member conditional facilitation orders are matched with their identified conditional Guarantor. Again, the unconditional facilitation orders have already been matched; the last resort facilitation orders are matched later in the process.

Step 19 involves extensive Phlx member matching. All remaining member orders are matched with each other, as long as they are not restricted to matching against non-members only. This includes the following types of Phlx member orders from steps 9-11 and 15 above: Phlx member orders participating through brokers, Phlx off-floor member orders, Phlx floor members' orders, and member last resort facilitation orders.

Step 20 involves matching Phlx member orders with commitments that have not been restricted to matching against non-member only. First, any remaining Phlx member orders are matched with commitments of Off-Floor Liquidity Providers, and then with commitments of Specialists and Alternate Specialists. Unmatched commitments are then removed.

In Step 21, Phlx member last resort facilitation orders are matched with their identified last resort Guarantor.

Step 22 signals the end of the whole matching "round" in a security. Any remaining Phlx member orders and commitments are unmatched, except as provided in step 23.

Step (23), the last step, involves performing matching rounds, which amends the original proposal. Specifically, if any unmatched orders remain, the largest unsatisfied constrained order is permanently removed, the matches after step 1 are unmatched and the matching process starts again; among unsatisfied orders of the same size, Phlx member orders would be removed before non-member orders, and among two Phlx members (or non-members), the latest in time is removed first. Additional matching rounds occur, each removing another unsatisfied constrained order, until no unsatisfied constrained orders remain. Matching rounds are intended to maximize the number of executions.

VWAP

The VWAP that the Exchange shall assign to each eligible security, which

shall be derived daily and publicly disseminated promptly following calculation at 4:15 P.M. for each security where a UTS match occurred that day, will be calculated on the basis of those transactions reported during the regular trading session to the appropriate reporting authority. Generally, consistent with Phlx Rule 111, all UTS matches create a binding contract. However, in the case where a transaction occurs in the Morning Session in a security which has not opened for trading by 3:00 P.M. on the primary market, the respective Morning Session transaction will be voided and a report to that effect will be sent immediately to all matched Participants.

In general, the VWAP for each eligible security shall be calculated by: (i) Utilizing all regular way trades that appear on the Consolidated Tape (including sold sales and late sales⁹) effected from the opening of the regular trading session and printed prior to 4:15 P.M. by the appropriate reporting authority,¹⁰ (ii) multiplying each respective reported price by the total number of shares traded at that price; (iii) adding together each of these calculated values, compiling an aggregate sum; and (iv) dividing the aggregate sum by the total number of reported shares used in item (i) in the security. The resulting VWAP will be reported in the form of a fraction, rounded to the nearest 1/256th.

Reporting

All UTS transactions will first be reported to the reporting authority at approximately 9:20 A.M. as a single volume print including all matches in all securities. The morning print for all UTS matches will occur by way of an administrative message over the Consolidated Tape reflecting total volume in Exchange listed securities. For example, that message would indicate that 3 million shares traded through the UTS at the VWAP. The morning print is intended to notify investors regarding pre-opening volume.

Participants, under normal circumstances, will also be notified of their levels of participation by 9:20 A.M. UTS transactions will be reported to the entering subscriber in the form of

automated reports reflecting the number of shares traded by the Participant (whether User or Committer) through the UTS in each issue.

Promptly following calculation of the final VWAP at approximately 4:20 P.M., trades are assigned that day's VWAP for that security and will, at that time, be reported trade-by-trade to the appropriate reporting authority. The Exchange will continuously calculate the VWAP throughout the trading day for each issue available for trading. The final VWAP will be available through the System to UTS subscribers who received Morning Session executions. Each Morning Session match, once a VWAP is assigned, constitutes a completed transaction for the purpose of reporting the trade to the appropriate reporting authority.

End-of-day prints will normally be reported promptly following calculation of the final VWAP at 4:15 P.M. and, unlike the morning print, the end-of-day prints will be printed on a trade-by-trade basis representing all matches that morning. Each print will reflect a matched trade and the corresponding VWAP. These trades will be reported to the Consolidated Tape with the sale condition "B" indicating average weighted pricing, which will distinguish VWAP trades from other transactions that may possibly be reported after the close (such as after-hours, crossing session, or late sales transactions). Thus, these trades will not impact the determination of the last sale price in a security. Because reporting is trade-by-trade, if no UTS trade occurred that day, the final VWAP will not be reported to the Consolidated Tape that day.

The UTS will not disseminate or disclose orders or commitments, including UTS bid/ask sizes, prior to the Morning Session match, nor UTS imbalances remaining after the Morning Session match, except to the entering Participant. The purpose of this anonymity is to safeguard against dissemination to any other participant or to the marketplace the existence of executed or unexecuted orders, which, in turn, could, if disseminated, influence the market after the opening of the regular trading day.

Other Provisions

Pursuant to paragraph (h) of the Rule, disputes respecting Morning Session participation, or eligibility of orders or participants, are to be resolved by the Exchange, in accordance with Phlx Rule 124.

The Exchange's liability respecting the UTS is limited pursuant to Phlx By-Law Article 12-11 and paragraph (i) of

the Rule. Thus, the Exchange is not liable for any damage arising from the use of the UTS. Specifically, this provision states that pursuant to By-Law Article 12-11, the Exchange shall not be liable for any damages, claims, losses or expenses caused by any errors, omissions or delays resulting from any act, condition or cause beyond the reasonable control of the Exchange, including but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction arising from the use of the UTS, the calculation of the VWAP or any and all other matters respecting the operation of the System or Morning Session.

With respect to trading halts, the Rule is not intended to limit the ability of the Exchange to otherwise halt or suspend trading in any stock traded through the UTS. Further, as stated in paragraph (k) of the Rule, a new provision respecting extraordinary market conditions, the Floor Procedure Committee may determine, due to extraordinary circumstances, to adjust or modify any of the times referenced by this Rule respecting the order entry period, order matching period or any aspect of the transaction reporting procedures. In addition to fast market conditions, for purposes of this paragraph, extraordinary circumstances also include systems malfunctions and other circumstances that limit the Exchange's ability to receive, disseminate or report UTS information in a timely and accurate manner.

Lastly, short sales are governed by paragraph (g) of the Rule, which states that Morning Session orders and commitments must be appropriately marked pursuant to Phlx Rule 455, but are exempt from the "tick test" short sale restrictions of Rule 455. Further, positions resulting from Morning Session transactions are effective for the purpose of determining long or short status, immediately upon notification to the participant of a UTS execution, notwithstanding that the VWAP has not yet been determined.

The specific text of the proposed rule change is available at the places described in item IV below.

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

⁹ A late sale is a transaction which is a correct last sale but is publicly disseminated later than is generally required. Generally, transactions are required to be publicly disseminated within 90 seconds after the execution. A sold sale designates a transaction appearing on the Consolidated Tape out of its proper sequence.

¹⁰ However, prints representing trades executed after regular trading hours (9:30 A.M. to 4:00 P.M., such as the Phlx's Post Primary Session ("PPS")) will not be utilized in the VWAP calculation after 4:02 P.M.

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

During the past ten years, listed equities trading volume has experience explosive growth, from 18 billion shares in 1982 to a projected 140 billion shares in 1997, representing a sevenfold increase in 15 years. A contributing factor to this volume surge is the increasing presence of institutional trading. The Exchange expects that over 11 million trades of 5,000 shares or more will be executed in the markets during this year.

Although institutional trading of block orders often consists of exchange member firms trading for their proprietary accounts, the vast majority of such trading is for the benefit of non-member accounts. The common thread among most of these non-member block orders is that the investment focus is long-term, rather than short-term. When the investment focus is long-term, intra-day price drops occurring when positions are purchased or sold are problematic "bumps" in the road. Many long-term investors prefer to avoid such drops, even though an opportunity to buy at the low or sell at the high may be lost. Smoothing over these bumps would be beneficial to long-term investors. In this vein, long-term investors often link the ability to secure fair prices to the ability to retain anonymity while "working" large orders.

On the other hand, member firms typically use intra-day volatility as an opportunity to trade in the short term. Such firms do so either as facilitator for their customer orders, arbitrageur or as registered floor traders. Many of these traders welcome the opportunities presented by additional volume and volatility. Thus, diverting such intra-day risks from long-term investors (who seek to avoid such risks) to proprietary traders (who seek to assume such risks) is an important benefit of the proposed Morning Session for the execution of large-sized securities on a VWAP basis.

By placing intra-day price risks on those most willing, and most suited, to accept such risks, the Morning Session will serve both institutional investors and proprietary traders. The advantages of the Morning Session will be available to all qualified market participants for

eligible sized orders. Institutions which will particularly benefit from the session include corporate pension funds, state and municipal pension funds, major money managers and mutual funds. In addition to offering fair pricing, the session should also be cost effective, as it will often replace the costs of working a VWAP or regular order over the course of a day or longer, with the ease of a single execution and single transaction charge.

In its role as a national securities exchange and trading venue for equity securities, the Phlx seeks to provide liquidity and a marketplace for all types of investors. In addition to its current market structure and products, the Exchange endeavors to provide new products and systems, thereby enhancing liquidity, while preserving full investor protection. The UTS adds an important dimension to these goals by way of the VTS, which offers institutional money managers, broker-dealers and investors the ability to receive large executions more efficiently, with less market impact. The VTS is intended to provide liquidity, complete anonymity, and end-to-end data security in an electronic environment. All VTS trades will be priced at the VWAP, which the Phlx believes is regarded industry-wide as providing a useful execution price measurement at a reasonable cost. Institutions have been receiving VWAP executions since 1985. The VTS is intended to standardize this pricing method so that investors can obtain "at market returns" and implement investment strategies utilizing the new standard VWAP.

The Phlx believes that the UTS is an innovative new automated securities trading system that complements the existing auction market. By providing an automated matching system with floor traders as well as off-floor traders serving as facilitators for executions on a VWAP basis, the UTS incorporates the principles of an auction market with the automation benefits of an electronic execution system. Thus, the Exchange believes that the UTS, as a new data processing and communication technique, creates the opportunity for more efficient and effective market operations, consistent with Section 11A(a)(1)(B) of the Act,¹¹ by providing increased execution alternatives to investors. By combining pricing in terms of a VWAP with the ability to access block-sized liquidity commitments, and by providing the ability to anonymously effect such block-sized orders prior to the opening

of the regular session, the Exchange's Morning Session should particularly accommodate institutional customer interests.

The Exchange proposes to adopt the Rule in order to establish and govern the UTS. In general, the UTS will accept orders and commitments of established minimum volumes (*i.e.*, 5,000 shares for orders and 2,500 shares for commitments), executing orders against other orders and commitments at the VWAP. The VWAP will be assigned to each matched trade and reported to the appropriate reporting authority, including trade-by-trade volume and the VWAP. Consistent with Rule 11Aa3-1 under the Act,¹² the Exchange will thereby provide for the collection and dissemination of transaction reports containing, among other things, the price of the security. The Exchange believes that the proposed reporting structure provides transparency to Morning Session executions, specifically identifying the total volume executed before the opening, first as a single print and, once the VWAP is calculated, trade-by-trade. The Exchange recognizes that within the meaning of Rule 11Ac1-1 under the Act,¹³ bids/offers will not be utilized in the UTS, because all orders are executable only at the VWAP, rendering bids/offers meaningless.¹⁴

Because the System's matching process should be complete prior the time of the opening of the Phlx market (and other equity markets) at 9:30 A.M., the Exchange believes that the issue of the integration of UTS orders into the auction market is not raised by the proposal. Specifically, the Exchange does not believe that the UTS raises market integration issues, such as the role of the Intermarket Trading System ("ITS") or integrating booked orders, because UTS matching would occur pre-opening, when the markets are not yet open for regular trading. Therefore, the Exchange concludes that the operation of the UTS is outside of the scope of the ITS Plan, which is based on access across various markets to continuous two-sided quotations.¹⁵ As a result, the

¹² 17 CFR 240.11Aa3-1

¹³ 17 CFR 240.11Ac1-1

¹⁴ Accordingly, the Exchange has requested exemptive relief from the requirements of Rule 11Ac1-1 under the Act. See Letter from Gerald D. O'Connell, First Vice President, Phlx, to Larry E. Bergmann, Assistant Director, Division of Market Regulation, SEC, dated February 28, 1996. In this letter, the Exchange has also requested interpretive relief regarding Rule 11A2-2(T) under the Act, 17 CFR 240.11A2-2(T) and exemptive relief from Section 10(a) of the Act, 15 U.S.C. § 78j(a). A revised letter, which reflects the changes made to the proposed rule change as a result of Amendment No. 2, will be submitted separately.

¹⁵ See ITS Plan, Section 6.

¹¹ 15 U.S.C. § 78k-1(a)(1)(B)

Exchange believes that UTS pre-opening matching does not implicate the intermarket price protection obligations of the ITS Plan, as no UTS price is calculated until the end of the trading day, nor does UTS order flow impact or create bids/offers for purposes of other market center quoting during the trading day.¹⁶

Further, the assignment of a final VWAP to Morning Session executions would occur after the close of trading. It is possible that an order on the Phlx specialist's limit order book may remain unexecuted at the end of a trading day at a price equal or better than the VWAP in that security, meaning UTS orders would be executed at that price. However, the Exchange does not believe that this presents a market fragmentation concern, because the booked order was never eligible for the VWAP or a UTS execution, as it was not entered as a UTS order; it may not have been eligible for a UTS execution due to size or account status. Further, that booked order was entered for execution at a specified limit price or better, not at the VWAP, which could have resulted in a different price. For these reasons, no expectation will be created for such orders to look to the UTS or VWAP execution price; orders entered for execution on the Phlx will continue to be governed by existing rules. Requiring that such regular Phlx non-UTS orders be protected in light of only better VWAP prices after the close is unfair¹⁷ and illogical, as these orders would then be executable after the close; not subject to the risk of a different VWAP; and in effect, guaranteed a price based on prints in a system for which the order was not eligible and in which it was never entered. In fact, this would disadvantage unexecuted UTS orders.

Further, the Exchange believes that UTS orders do not raise price priority issues, because all orders have been entered for execution at the VWAP. The UTS will execute orders based on the priority principles enumerated in the Rule, which, according to the Exchange, is consistent with Section 11 of the

Act¹⁸ and the rules thereunder, in that specialist activity will be consistent with Section 11(a)(1)(A) of the Act, members will generally yield priority to non-members pursuant to Section 11(a)(1)(G) of the Act, and Committers will fulfill the obligations of Section 11(b) of the Act. Phlx Off-Floor Liquidity Providers receive priority over Floor Traders in order to encourage commitments. Because Phlx Floor Traders' priority is last-in-line, no issue of Specialist trading ahead of customers in raised by the UTS. As amended, the Rule affords priority to orders by account type (meaning, except crosses, non-member before member, type of non-member account, constraints, and direct subscription versus broker access); then by order size (largest first); and for orders of the same size and account type, on a chronological basis by time of entry.

The UTS will operate as a facility of the Exchange within the meaning of Section 3(a)(2) of the Act,¹⁹ in that the UTS utilizes Phlx equipment and personnel, floor trader participation, and SCCP to process UTS trades. Thus, Morning Session trades will be appropriately regulated and reported as Exchange trades. The Phlx notes that this is similar to the regulatory treatment afforded to after-hours trading sessions on the Exchange as well as other exchanges.²⁰

As previously stated, the VWAP will be calculated on the basis of those transactions reported by the appropriate reporting authority for the respective security from the beginning of the regular trading session until 4:15 P.M. In the case where a transaction occurs in the Morning Session in a security which has not opened for trading that day for any reason in the primary market by 3:00 P.M., the respective Morning Session transaction will be voided and a report to that effect will be immediately sent. The Exchange believes that establishing a specific time frame by which a security must trade gives further assurance that the VWAP will consist of a representative sample of trades from which to derive a calculation. Additionally, this provision will also serve the important function of prompt notice that the Morning Session transaction will be voided if the primary market has not yet opened in a particular issue. Although written or electronic confirmation will follow, Participants should be aware that this

rare exception to the creation of a binding contract through the UTS may occur by observing that an issue failed to open on its primary market. The 3:00 P.M. cut-off provides an objective limitation on the VWAP calculation, which notifies the User that a representative VWAP cannot be calculated for that day. The Exchange has determined that the 3:00 P.M. provision is preferable to calculating a VWAP based on the previous day's pricing, because an important purpose of the VWAP is to incorporate and average that day's price movement.

With respect to trading halts, if a security opens for trading but is the subject of a halt and does not resume trading for the remainder of the day, the Morning Session transaction is based on the prints that occurred before the halt. The Exchange realizes that a security may only be open for a short time before it is halted; however, the Exchange believes that for the purposes of the UTS VWAP calculation, trading that occurs prior to a halt forms a reasonable basis for calculating a VWAP for that day, even if the security does not reopen that day. A significant amount of price discovery is involved in an opening print, such that it provides an appropriate VWAP measure, which is preferable to voiding that day's UTS trades. For these reasons, the Exchange has determined that even a few minutes of trading provides adequate pricing information, which is preferable to voiding UTS trades and consistent with the creation of a binding contract.

Nevertheless, the Exchange maintains that the Morning Session execution is an executed Exchange contract, with only the one unusual circumstances enumerated above. The Exchange notes that although utilizing the VWAP as a pricing mechanism is new to exchange trading, block trades as well as certain Nasdaq trades are currently reported as average weighted pricing trades.²¹

With respect to access to the System, as stated above, Participants may be either Users, who may enter orders, or Committers, who must be Exchange members. Because Users may be non-members of the Exchange, qualified non-member access to the UTS is proposed. The Exchange believes that the UTS provides adequate controls regarding limited non-member access to the System. For computer processing purposes, one control mechanism requires SCCP account information for UTS trades, just as for all Phlx equity trades. For disciplinary jurisdiction and compliance purposes, the second

²¹ Such trades are currently reported using the indicator "W."

¹⁶ The Exchange notes that, in comparison, the Optimark System, which would operate as a periodic call market and was recently approved by the Commission, does give rise to ITS Plan issues. See Securities Exchange Act Release No. 39086 (September 17, 1997), 62 FR 50036 (September 24, 1997) (File No. SR-PCX-97-18) (order granting approval to PCX Application of the OptiMark System).

¹⁷ In fact, if Phlx orders were guaranteed an execution related to the UTS VWAP, various market manipulation concerns could arise; for instance, buy orders in a surging stock could unfairly benefit from a VWAP that the buyer knows will be lower than the last sale in that security.

¹⁸ 15 U.S.C. § 78k.

¹⁹ 15 U.S.C. § 78c(a)(2).

²⁰ See, e.g., Securities Exchange Act Release No. 29237 (May 24, 1991) (File Nos. SR-NYSE-90-52 and SR-NYSE-90-53 establishing an off-hours trading facility).

control mechanism over non-member access to the UTS is the requirement of a three-way agreement. As described above, in the three-way agreement, the Phlx member must agree to be jointly and severally liable for actions of the non-member through the UTS; and the non-member must agree to adhere to all applicable by-laws and rules of the Exchange. This is intended to provide a jurisdictional basis for disciplinary action against such non-member, to the same degree as if the order were placed directly. The required agreement with the non-member provides that the Exchange has the right to terminate access to the UTS, without prior notice for any reasons, or no reason whatsoever. Because both a three-way and give-up agreement are required, termination of either agreement necessarily results in the Exchange's ability to terminate access to the UTS. In sum, the Exchange believes that these requirements ensure adequate controls over non-member access, including Exchange supervision of and jurisdiction over non-member Users. The Exchange notes that similar non-member access has been afforded to other exchange system.²⁰ Utilizing SCCP facilities and requiring Exchange agreements with non-members is intended to facilitate coordination with persons engaged in clearing and settling these transactions, consistent with Section 6(b)(5) of the Act.²³

Section 10(a) of the Act governs short sales in securities, while Rule 3b-3 under the Act²⁴ defines the term "short sale" as "any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller." Further, Rule 3b-3 provides that if a person has "purchased, or has entered into an unconditional contract, finding on both parties thereto, to purchase" a security, then that person shall be deemed to own that security.²⁵ Separately, the Exchange

has requested exemptive relief from the "tick test" of Section 10(a) of the Act.²⁶ Thus, pursuant to paragraph (g) of the Rule, Morning Session orders and commitments should not be subject to the tick test/short sale restrictions of Phlx Rule 455. Nevertheless, UTS orders must be marketed in accordance with that rule. Further, because a long position creates an irrevocable contract, a purchase during the Morning Session may be followed by sales during the regular trading session in that security, without such sales deemed to be short sales.

Lastly, the Exchange proposes to amend Phlx Rule 101 to adopt Commentary .03 reflecting the Morning Session and providing reference to the Rule. The Exchange also proposes minor changes to Rule 101 for clarity and correction. Specifically, "A.M." and "P.M." would appear in capital letters consistently throughout the rule, and there would be a heading for each commentary. The Exchange believes that these changes to Rule 101 should both correct and clarify its provisions.

For the reason stated above, the Phlx believes that the proposal to operate a Morning Session utilizing the UTS is consistent with the Act, and particularly with Sections 6, 11 and 11A thereof. Specifically, the proposal is consistent with Section 6(b)(5) of the Act, in that it is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, as well as to protect investors and the public interest, by providing an automated order entry and execution system for securities traded during the Morning Session, based on a comprehensive rule and extensive matching algorithm.

The Exchange anticipates that significant institutional volume could be attracted to the Phlx, which should, in turn, add liquidity to both the Morning Session as well as to the Phlx's regular trading session. The Exchange believes that the UTS provides an important new pricing mechanism for exchange trades the VWAP. Further, the Exchange believes that the Morning Session should provide a unique opportunity to electronically submit block-sized orders for automatic matching before the regular opening at 9:30 A.M. Thus, the UTS should perfect

the mechanism of a free and open market and a national market system. The proposal at hand employs specific procedures and safeguards designed to protect investors and the public interest, prevent fraudulent and manipulative acts and practices, and promote just and equitable principles of trade. These procedures include specific execution priority parameters, order entry specifications and Exchange surveillance procedures (separately submitted) designed to monitor UTS transactions. The Exchange also believes that because the Morning Session is limited to a once-per-day session and adequately provides for transparency, despite the requested limited exemptive relief, the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Phlx 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 amendment, 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

²² See Securities Exchange Act Release No. 35030 (November 30, 1994) (File No. SR-CHX-93-19) (order approving Chicago Match and, at n.70 therein, reference to the New York Stock Exchange's SuperDOT).

²³ 15 U.S.C. § 78f(b)(5).

²⁴ CFR 240.30b-3.

²⁵ The Exchange understands that proposed amendments to these provisions provide that if the ownership of a security is claimed by virtue of having entered into a contract to purchase it, the contract must involve a fixed, currently ascertainable amount of the security at a fixed, currently ascertainable price. Separately, the Exchange requested that an exemption for the Morning Session be incorporated into these proposed amendments. See letter from Gerald D. O'Connell, First Vice President, Phlx, to Larry E. Bergmann, Assistant Director, Division of Market Regulation, SEC, dated November 9, 1995.

²⁶ See *supra* note 14.

public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Phlx-96-14 and should be submitted by January 21, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁷

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97-33992 Filed 12-30-97; 8:45 am]

BILLING CODE 8010-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Thresholds for Implementation of Trade Agreements Act

AGENCY: Office of the United States Trade Representative.

ACTION: Adjustment of thresholds for implementation of Trade Agreements Act.

SUMMARY: Executive Order 12260 requires the U.S. Trade Representative to set the U.S. dollar thresholds for application of Title III of Trade Agreements Act of 1979 (19 U.S.C. 2511 et seq), which implements U.S. obligations under the World Trade Organization (WTO) Agreement on Government Procurement and Chapter 10 of the North American Free Trade Agreement (NAFTA). These obligations apply to procurements valued at or above specified U.S. dollar thresholds. The U.S. Trade Representative has determined that, effective January 1, 1998, the thresholds will be as follows:

1. WTO Agreement on Government Procurement

A. Central Government Entities Covered by the WTO Agreement on Government Procurement (as listed in United States Annex 1 of the Agreement):

- Procurements of goods and services—\$186,000
- Procurements of construction services—\$7,143,000

B. Sub-Central Government Entities Covered by the WTO Agreement on Government Procurement (as listed in United States Annex 2 of the Agreement):

—Procurement of goods and services—\$507,000

—Procurement of construction services—\$7,143,000

C. All Other Government Entities Covered by the WTO Agreement on Government Procurement (as listed in United States Annex 3 of the Agreement):

—Procurement of goods and services—\$571,000

—Procurement of construction services—\$7,143,000

2. Chapter 10 of the NAFTA

A. Federal Government Entities (as listed in the United States Schedule to Annex 1001.1a-1 of the NAFTA):

—Procurements of goods and services—\$51,450

—Procurements of construction services—\$6,688,500

B. Government Enterprises (as listed in the United States Schedule to Annex 1001.1a-2 of the NAFTA):

—Procurements of goods and services—\$257,250

—Procurement of construction services—\$8,232,000

FOR FURTHER INFORMATION CONTACT: Rebecca Reese, Office of WTO Affairs (202-395-3063), Office of the United States Trade Representative, 600 Seventeenth Street, NW, Washington, D.C. 20508.

Frederick L. Montgomery,

Chairman, Trade Policy Staff Committee.

[FR Doc. 97-34142 Filed 12-30-97; 8:45 am]

BILLING CODE 3190-01-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Reports, Forms and Recordkeeping Requirements Agency Information Collection Activity Under OMB Review

AGENCY: Office of the Secretary, DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Requests (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICRs describe the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the information collection entitled "Study of the First There, First Care National Campaign: An Intervention to Save Lives" (previously referred to as the

"Bystander Care Program") was published on February 3, 1997 [62 FR, page 5066-5067] and on information collection entitled "Development of Improved Driver Interview Procedures for Police Use at Checkpoints" was published on February 19, 1997 [62 FR 7494-7495].

DATES: Comments must be submitted on or before January 30, 1998.

FOR FURTHER INFORMATION CONTACT: Edward Kosek, NHTSA Information Collection Clearance Officer at (202) 366-2589.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration (NHTSA)

Title: Study of the First There, First Care National Campaign: An Intervention to Save Lives.

OMB No.: 2127-NEW.

Type of Request: Approval of a New Information Collection.

Affected Public: Individuals ages 16 and older living in households with telephones within a population of two rural sites.

Abstract: NHTSA will conduct a telephone survey as a major component of a two-site evaluation of its "First There, First Care National Campaign" Program. In accordance with the agency's mandate to reduce fatalities and economic loss resulting from motor vehicle crashes, this Program was established to encourage passerby to stop at rural crash sites, render life-saving assistance, and summon emergency medical services (EMS). The program is designed to raise public awareness of the importance of bystander care, and to teach the few basic skills necessary to recognize an emergency, start victims' breathing, stop victims' bleeding, and contact EMS. The data from the survey will be used to evaluate the extent to which the "First There, First Care" messages have reached the public in targeted areas, the extent to which these messages were successful in changing attitudes towards providing emergency care, and the extent to which the program improved knowledge needed to successfully provide emergency care.

Estimated Annual Burden Hours: 164 hours.

Estimated Number of Respondents: 640.

Need: The findings will be used to judge the efficacy of the "First There, First Care" Program. NHTSA will draw on this information when considering continuation, refinement, and expansion of the "First There, First Care" Program.

²⁷ 17 CFR 200.30-3(a)(12).

Title: Development of Improved Driver Interview Procedures for Police Use at Checkpoints.

OMB No.: 2127-NEW.

Type of Request: Approval of a New Information Collection.

Affected Public: Drivers who are stopped at two sobriety checkpoint operations in one community and who are asked to voluntarily provide an alcohol breath sample.

Abstract: The National Highway Traffic Safety Administration (NHTSA) plays a key role in the national effort to reduce alcohol related traffic injuries and deaths. One way the enforcement community has tried to combat this problem is by conducting sobriety checkpoints; however, there is evidence that many of the impaired drivers passing through these checkpoints are not detected by police. One component of this study is the observation by researchers of customary police interviewing practices at sobriety checkpoints. Behaviors and cues of interviewed drivers will be linked to their breath alcohol levels to develop more effective screening procedures. Breath samples will be obtained only from drivers who volunteer to participate in this study. Current data on the best ways to improve driver interviews by police at checkpoints do not exist.

Estimated Annual Burden Hours: 49 hours.

Estimated Number of Respondents: 2,000.

Need: The findings from researcher observations of checkpoint operations will help determine whether further development of an improved battery of police interview procedures is warranted. If the results are positive, a field test will be conducted as part of this study to determine whether the new procedures are an improvement over those customarily used by police to detect drivers at illegal BACs. Should the findings from the field test be successful, a police training package, containing the improved procedures, will be developed and disseminated to police agencies. Improved interview procedures will help police officers at checkpoints make more accurate decisions regarding which drivers should or should not be detained for further sobriety testing. This should increase the efficiency of checkpoint operations. Such improvements should also heighten the public's perception of being apprehended for drunk driving at sobriety checkpoints.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of

Management and Budget, 725-17th Street, NW, Washington, DC 20503, Attention DOT Desk Officer. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on December 23, 1997.

Vanester M. Williams,

Clearance Officer, United States Department of Transportation.

[FR Doc. 97-34136 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-62-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. OST-97-3286; Notice #13]

Safety of Marine Transportation in Puget Sound-Area Waters

AGENCY: Office of the Secretary, (DOT).
ACTION: Notice of meeting; request for comments.

SUMMARY: This notice provides notice of a public meeting to obtain views and comments from the public as to specific safety or pollution prevention measures for Puget Sound area waters that should be evaluated by the Department of Transportation (DOT).

DATES: The meeting will be held February 6, 1998, from 1 p.m. to 5 p.m. Written statements in addition to or in lieu of oral presentations are welcome and should reach the Office of the Secretary on or before March 2, 1998. Late comments will be considered to the extent possible. Comments that have been previously submitted to the Coast Guard under Dockets CGD-96-015, 96-044, and 97-003 will be considered and need not be resubmitted. These dockets relate to the Tug-of-Opportunity System Plan for the Olympic Coast National Marine Sanctuary and Strait of Juan de Fuca, Documentation and Marine Safety for an International Private Sector Tug-of-Opportunity System, and the Puget Sound Additional Hazards Study, respectively.

ADDRESSES: The meeting will be held in the Henry M. Jackson Federal Building,

Seattle, Washington. Written materials on Docket No. OST-97-3286, may be mailed or hand delivered to the U.S. Department of Transportation, Dockets, 400 Seventh Street SW., Washington, DC 20590, Room PL-401, between the Hours of 10 a.m. to 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Stephen M. Shapiro, Environmental Affairs Specialist, Office of Environment, Energy, and Safety (P-10), Room 9217, 400 Seventh Street SW., Washington, DC 20590. (202) 366-4866, fax (202) 366-7618.

SUPPLEMENTARY INFORMATION:

Background Information

On November 28, 1995, the President signed the Alaska Power Administration Asset Sale and Termination Act (Pub. L. 104-58), authorizing exports of Alaskan North Slope (ANS) crude oil when transported in U.S. flag tankers. Section 401 of the Act directed the Coast Guard to submit a plan to Congress on the most cost-effective means of implementing an international private sector tug-of-opportunity system (ITOS) to provide timely emergency response to a vessel in distress transiting the waters within the boundaries of the Olympic Coast Marine Sanctuary or the Strait of Juan de Fuca.

An ITOS plan was developed by a cross section of the marine transportation industry in the State of Washington and the Province of British Columbia, and is being implemented through the Marine Exchange of Puget Sound. DOT welcomes this private sector initiative to prevent marine casualties, and appreciates the substantial efforts that have been expended by all of the participants.

The Coast Guard submitted its report to Congress on January 31, 1997, and issued an addendum report to address pending ITOS issues on December 16, 1997. The addendum incorporates further information on the nature and effects of winds and currents that was provided by the National Oceanographic and Atmospheric Administration. Copies of the ITOS Report and Addendum may be obtained by contacting the Office of Response (G-MOR-1), US Coast Guard, 2100 Second Street S.W., Washington DC 20593-0001, (202) 267-0426.

On April 26, 1996, the White House issued the DOT Action Plan to Address Vessel and Environmental Safety on Puget Sound-Area Waters. In addition to emphasizing the development of the ITOS report, the Action Plan committed DOT review the overall marine safety regime in Puget Sound-area waters—to determine whether any hazard scenarios

warrant consideration of additional prevention or response measures.

To facilitate the Department's review, the Coast Guard commissioned a study by the Volpe National Transportation Systems Center to assess the relative risks of marine transportation in the waterways of Northwest Washington—including Puget Sound, the Strait of Juan de Fuca, passages around and through the San Juan Islands, and the offshore waters of the Olympic Coast National Marine Sanctuary. Copies of the Volpe Center's report are available from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, telephone (800) 553-6847, fax (703) 321-8547. The report may be ordered as document PB97-205488 and the technical appendices to the report as document PB97-205470. DOT appreciates the efforts of all participants in the Volpe study, which we believe provides a sound basis for the Department's review.

During spring 1998, DOT expects to announce its determinations regarding further DOT actions based on the ITOS and Volpe reports. These determinations will include the following:

1. Hazards that merit evaluation of additional mitigation measures.
2. The specific measures that will be evaluated.
3. An outline of how the evaluations will be accomplished.

Input on all of the above determinations is solicited. While input on specific measures should be based on the ITOS and Volpe studies, input need not be limited to measures that can or should be implemented by the Federal government. Since the evaluation process may vary for different types of measures, it would be helpful if input on how the evaluations should be accomplished were referenced to specific measures.

In proceeding with these determinations and any subsequent evaluations, the Department is sensitive to the need to properly involve other governments—including affected tribes—as well as businesses related to marine transportation, environmental advocacy organizations, and the general public. DOT is also sensitive to the need that the evaluation process be efficient and of minimal burden to participants.

The Department is holding a public meeting to provide the public and interested parties with an opportunity to be briefed on the ITOS and Volpe reports, meet with the senior Departmental officials who are working this issue, and provide oral input.

DOT would appreciate notice to Mr. Shapiro (see **FOR FURTHER INFORMATION CONTACT**) by January 26, 1998 by persons who intend to make a statement.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, please contact Mr. Shapiro (see **FOR FURTHER INFORMATION CONTACT**).

Dated: December 22, 1997.

John N. Lieber,

Acting Assistant Secretary for Transportation Policy.

[FR Doc. 97-34143 Filed 12-30-97; 8:45 am]

BILLING CODE 4810-25-U

DEPARTMENT OF TRANSPORTATION

Coast Guard

Cargo Securing Manual Requirements

AGENCY: Coast Guard, DOT.

ACTION: Notice of policy.

SUMMARY: The Coast Guard announces interim criteria for the approval of qualified organizations desiring authorization to serve as designated U.S. Cargo Securing Manual Approval Authorities for U.S. vessels. The Coast Guard also announces the availability of guidance on the contents of Cargo Securing Manuals required by 1994 amendments to the International Convention on the Safety of Life at Sea, 1974 (SOLAS 74). This criteria and guidance are available to the public in Navigational and Vessel Inspection Circular 10-97.

DATES: U.S. flag vessels must have on board a Cargo Security Manual by December 31, 1997.

FOR FURTHER INFORMATION CONTACT: LCDR Richard Booth (Navigation and Inspection Circular 10-97), Commandant (G-MOC), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001, telephone 202-267-6700. Mr. Robert Gauvin (Future CSM Regulation), Commandant (G-MSO) U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001, telephone 202-267-1053.

SUPPLEMENTARY INFORMATION:

Background and Purpose

U.S. cargo vessels 500 gross tons or greater that carry other than solid or liquid bulk cargoes, and are engaged on international voyages as described in 46 CFR 90.05-10, must have on board an

approved Cargo Securing Manual (CSM) to maintain compliance with their Cargo Ship Safety Equipment Certificates (CG-3347). Voluntary compliance is encouraged for owners of U.S. flag cargo vessels less than 500 gross tons engaged on international voyages. A CSM assists the vessel's master and crew with the proper use of onboard equipment designed to adequately stow and secure the vessel's cargo.

The 1994 amendments to Chapters VI/5.6 and VII/6.6 of the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74) mandated Administration approved CSM's. The International Maritime Organization's Maritime Safety Committee (MSC) Circular 745 of June 13, 1996, provided CSM preparation guidance. MSC Circular 745 encouraged member governments to bring the guidelines to the attention of all parties concerned, with the aim of having CSM's carried on board ships prepared appropriately and in a consistent manner, and to implement them as soon as possible but not later than December 31, 1997. The Coast Guard has publicized the SOLAS 74 requirements and the International Maritime Organization (IMO) Guidelines for CSM's in various marine safety newsletters. This notice further announces the availability of that guidance for those U.S. cargo ships required to have CSM's and those cargo vessels seeking voluntary compliance under the IMO guidelines. The notice also announces the availability of criteria for the approval of organizations seeking authorization to approve CSM's.

Under E.O. 12234 and 46 U.S.C. 3103, in October 1996, the Coast Guard delegated CSM approval authority to the American Bureau of Shipping (ABS) and the National Cargo Bureau, Inc. (NCB), respectively, for U.S. flagged cargo vessels. Other organizations that desire CSM approval authority, should review the approval criteria and make application for authorization under Navigation and Vessel Inspection Circular (NVIC) 10-97 entitled "Guidelines for CSM Approval." This NVIC also provides interim guidance for CSM submittal, review, approval, and appeal procedures for U.S. flagged cargo vessel owners and operators. The Coast Guard is initiating a project to put the NVIC 10-97 criteria into regulation. Until regulations on the authorization of organizations to approve Cargo Securing Manuals and the criteria for CSM content are issued, inspectors will explain to owners and operators of U.S. vessels that the U.S. Coast Guard will be looking for compliance with the SOLAS requirements for CSM's as set forth in NVIC 10-97, in order to ensure

compliance with 46 CFR 91.60-10 (Cargo Ship Safety Equipment Certificate). Until regulations are issued, ABS, NCB, and any other organization designated by the Coast Guard, will follow the procedures in NVIC 10-97. NVIC 10-97 is available on the World Wide Web at: <http://www.dot.gov/dotinfo/uscg/hq/g-m/gmhome.htm> in "Publications, Reports and Forms." Paper or CD-ROM copies will soon be available for a free through the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161, telephone 703-605-6000, or fax 703-321-8547.

Dated: December 23, 1997.

Joseph J. Angelo,

Director of Standards, Marine Safety and Environmental Protection.

[FR Doc. 97-34090 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[AC No. 183-35G CHG 1]

Proposed Changes to Advisory Circular on Airworthiness Designee Function Codes and Consolidated Directory for DMIR/DAR/ODAR/DAS/DOA AND SFAR NO. 36

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: This notice is proposing two changes to AC 183-35G. The proposed changes address revising the description of the DAR-F and ODAR-F Codes and Functions No. 08 and the DAR-T and ODAR-T Codes and Functions No. 23. These Codes and Functions are changed to address the new airworthiness approval identified in FAA Order 8130.21B.

DATES: Comments must be received on or before January 15, 1998.

ADDRESSES: Send all comments and requests for copies of the proposed AC to: Federal Aviation Administration; ATTN: Evangeline Raines, AFS-640, P.O. Box 25082, Oklahoma City, OK 73125.

FOR FURTHER INFORMATION CONTACT: John Rice, AFS-640, at the above address; telephone (405) 954-6484, (8:00 a.m. to 5:00 p.m. CST).

SUPPLEMENTARY INFORMATION: The Designee Standard Branch, AFS-640, has made changes to AC 183-35G, FAA DAR, DAS, DOA, AND SFAR PART 36 DIRECTORY, to address the new airworthiness approval identified in

FAA Order 8130.21B. The proposed changes address revised the description of the DAR-F and ODAR-F Codes and Functions No. 08 and the ODAR-T Codes and Functions No. 23.

08 Issue original standard airworthiness certificate for U.S. registered aircraft and original airworthiness approvals for engines, propellers, parts and appliances that conform to the approved design requirements and are in a condition for safe operation.

The new verbiage for DAR-T and ODAR-T Codes and function number will read:

23 Issue recurrent airworthiness certificate for U.S. registered aircraft, including Very Light Aircraft (VLA) and recurrent airworthiness approvals for engines, propellers, parts and appliances that conform to the approved design requirements and are in a condition for safe operation.

The FAA intends to revise and republish the advisory circular to seek public comment each time it is proposed to add or delete an authorized function. Additional areas of delegation will be selected and authorized by the Director of Airworthiness based on recommendations from the other FAA elements and the aviation community.

Issued in Washington, DC.

Bill M. Pickelsimer,

Assistant Manager, Regulatory Support Division.

[FR Doc. 97-34047 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA has determined that the minimum percentage rate for drug testing for the period January 1, 1998, through December 31, 1998, will remain at 25 percent of covered aviation employees for random drug testing and will decrease to 10 percent of covered aviation employees for random alcohol testing.

FOR FURTHER INFORMATION CONTACT: Ms. Patrice M. Kelly, Office of Aviation Medicine, Drug Abatement Division, Program Implementation and Special Projects Branch (AAM-810), Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267-8976.

SUPPLEMENTARY INFORMATION:

Administrator's Determination of 1998 Random Drug and Alcohol Testing Rates

In final rules published in the **Federal Register** on February 15, and December 2, 1994 (59 FR 7380 and 62218, respectively), the FAA announced that it will set future minimum annual percentage rates for random alcohol and drug testing for aviation industry employers according to the results which the employers experience conducting random alcohol and drug testing during each calendar year. The rules set forth the formula for calculating an annual aviation industry "violation rate" for random alcohol testing and an annual aviation industry "positive rate" for random drug testing. The "violation rate" for random alcohol tests means the number of covered employees found during random tests given under 14 CFR part 121, appendix J to have an alcohol concentration of 0.04 or greater plus the number of employees who refused a random alcohol test, divided by the total reported number of employees given random alcohol tests plus the total reported number of employees who refused a random test. The "positive rate" means the number of positive results for random drug tests conducted under 14 CFR part 121, appendix I plus the number of refusals to take random drug tests, divided by the total number of random drug tests plus the number of refusals to take random drug tests. The violation rate and the positive rate are calculated using information required to be submitted to the FAA by specified aviation industry employers as part of an FAA Management Information System (MIS) and form the basis for maintaining or adjusting the minimum annual percentage rates for random alcohol and drug testing as indicated in the following paragraphs.

When the annual percentage rate for random alcohol testing is 25 percent or more, the FAA Administrator may lower the rate to 10 percent if data received under the MIS reporting requirements for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

When the minimum annual percentage rate for random alcohol testing is 50 percent, the FAA Administrator may lower the rate to 25 percent if data received under the MIS reporting requirements for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

When the minimum annual percentage rate for random alcohol

testing is 10 percent, and the data received under the MIS reporting requirements for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent but less than 1.0 percent, the FAA Administrator must increase the minimum annual percentage rate for random alcohol testing to 25 percent.

When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the MIS reporting requirements for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the FAA Administrator must increase the minimum annual percentage rate for random alcohol testing to 50 percent.

When the minimum annual percentage rate for random drug testing is 50 percent, the FAA Administrator may lower the rate to 25 percent if data received under the MIS reporting requirements for two consecutive calendar years indicate that the positive rate is less than 1.0 percent.

When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the MIS reporting requirements for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent.

There is a one year lag in the adjustment in the minimum annual percentage rates for random drug and alcohol testing because MIS data for a given calendar year is not reported to the FAA until the following calendar year. For example, MIS data for 1996 is not reported to the FAA until March 15, 1997, and any rate adjustments resulting from the 1996 data are not effective until January 1, 1998, following publication by the FAA of a notice in the **Federal Register**.

The minimum annual percentage rate for random alcohol testing was 25 percent for calendar year 1996. In this notice, the FAA announces that it has determined that the violation rate for calendar year 1996 is less than one-half of one percent positive, at approximately 0.08 percent. The 1995 violation rate was also less than one-half of one percent. Since the violation rate is less than 0.5 percent for two consecutive calendar years, the minimum annual percentage rate for random alcohol testing for aviation industry employers for calendar year 1998 will be lowered to 10 percent.

The minimum annual percentage rate for random drug testing was also 25 percent in calendar year 1996.

Therefore, the FAA is also announcing that it has determined that the positive rate for calendar year 1996 is less than 1 percent, at approximately 0.71 percent, and that the minimum annual percentage rate for random drug testing for aviation industry employers for calendar year 1998 will remain at 25 percent.

Dated: December 23, 1997.

Jon L. Jordan,

Federal Air Surgeon.

[FR Doc. 97-33982 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Federal Transit Administration

Environmental Impact Statement: Pitkin, Eagle and Garfield Counties, CO

AGENCY: Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), DOT.

ACTION: Notice of intent and public scoping meetings.

SUMMARY: The FHWA and FTA are jointly issuing this notice to advise the public that an environmental impact statement/4(f) evaluation will be prepared for transportation improvements in Pitkin, Eagle and Garfield Counties, Colorado.

Five scoping meetings will be held from 7:00 pm to 9:00 pm at the following locations and dates as part of the preparation of the EIS/4(f) evaluation:

Tuesday, February 17, 1998: Rifle City Hall, 202 Railroad Avenue, Rifle, CO

Wednesday, February 18, 1998:

Carbondale Town Hall, 511 Colorado Avenue, Carbondale, CO

Thursday, February 19, 1998: Basalt High School, 150 Cottonwood Drive, Basalt, CO

Monday, February 23, 1998: Garfield County Courthouse, 109 8th Street, Glenwood Springs, CO

Tuesday, February 24, 1998: Aspen City Hall, 130 South Galena, Aspen, CO

A 45-day scoping period will begin on January 6, 1998 and conclude on March 2, 1998.

FOR FURTHER INFORMATION CONTACT:

Michael Kulbacki, FHWA Colorado Division, 555 Zang Street, Room 250; Lakewood, Colorado 80228, Telephone (303) 969-6730

Dave Beckhouse, FTA Region VIII, 216 16th Street, Suite 650; Denver, Colorado 80202, Telephone (303) 844-3242

Joe Tempel, Colorado Department of Transportation, 4201 East Arkansas,

Room 212; Denver, Colorado 80222, Telephone (303) 757-9771

SUPPLEMENTARY INFORMATION: The FHWA and FTA in cooperation with the Federal Railroad Administration (FRA), the Colorado Department of Transportation (CDOT) and the Roaring Fork Railroad Holding Authority (RFRHA) will prepare an environmental impact statement (EIS) and Section 4(f) evaluation on a proposal to make major transportation improvements in the Roaring Fork Valley from Glenwood Springs to the Aspen Airport, a distance of approximately 40 miles. The purpose of these improvements is to accommodate current and projected travel demands through the corridor. The proposed improvements will be identified in a Corridor Investment Study which will be combined with the EIS. At a minimum, the alternatives to be considered in the EIS/4(f) evaluation include the following:

(1) The No Build Alternative—This will include transportation improvements previously cleared.

(2) A Transportation System Management (TSM)—This will consist of low cost improvements to the existing transportation system to maximize its capacity and efficiency.

(3) Improved Bus Alternative—This will consist of adding additional buses to the existing bus system in the Roaring Fork Valley. HOV and Exclusive Bus Lane alternatives will be addressed.

(4) Multimodal Alternatives—These will consist of trail, rail and highway improvements. Various alignments, Station locations, technologies and access control plans (highway and rail) will be assessed along the rail corridor and SH82. Transportation Demand Management (TDM) elements will be incorporated into all of the Multimodal Alternatives to maximize the efficiency of the transportation system. Initial scoping meetings with local agencies and the general public will begin in January and be completed in March 1998. Letters will be sent to the appropriate federal, state and local agencies describing the proposed action and requesting comments. The general public will receive notices on location and time of the scoping meetings through newspaper advertisements and individual correspondence. These scoping meetings provide a forum for interaction between the public and government officials during the EIS/4(f) development. To ensure that a full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this

proposed action and the EIS/4(f) evaluation should be directed to the Colorado Department of Transportation at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Issued on: December 22, 1997.

Ronald A. Speral,

*Environmental/ROW Program Manager,
Colorado Division, Federal Highway
Administration, Lakewood, Colorado.*

Louis F. Mraz Jr.,

*Regional Administrator, Federal Transit
Administration, Region VIII, Denver,
Colorado.*

[FR Doc. 97-34043 Filed 12-30-97; 8:45 am]

BILLING CODE 4910-22-M; 4910-57-M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 32940 (Sub-No. 1)]

**Buffalo & Pittsburgh Railroad, Inc.;
Trackage Rights Exemption—Pittsburg
& Shawmut Railroad, Inc.**

Pittsburg & Shawmut Railroad, Inc. (PSR), a Class III rail carrier, has agreed to grant overhead trackage rights to Buffalo & Pittsburgh Railroad, Inc. (BPRR), a Class II rail carrier, over approximately 7.4 miles of rail line in the State of Pennsylvania on PSR's Laurel Subdivision between milepost 60.0, near Falls Creek, and milepost 67.0, near East Dubois, together with approximately 2,200 feet of connecting track between PSR's Laurel Subdivision and BPRR's Wharton Subdivision (at approximately mileposts 3.3 and 3.4) (collectively, the subject lines).¹

The purpose of the trackage rights is to allow BPRR to shift traffic from a portion of its Wharton subdivision that is in need of rehabilitation to the subject lines that are in better condition, and to allow BPRR to continue to serve its local customers in a safe and more efficient manner.

As a condition to this exemption, any employees affected by the trackage rights will be protected as required by 49 U.S.C. 11326(b), subject to the procedural interpretations of the analogous statutory provisions at 49 U.S.C. 10902 contained in the Board's

¹ The trackage rights agreement filed in STB Finance Docket No. 32940 (Sub-No. 1) will amend the trackage rights agreement between the parties, dated May 2, 1996, to include these additional rights.

decision in *Wisconsin Central Ltd.—Acquisition Exemption—Lines of Union Pacific Railroad Company*, STB Finance Docket No. 33116 (STB served Apr. 17, 1997) (*WCL Exemption*).

The transaction is scheduled to be consummated on or after December 22, 1997.²

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 32940 (Sub-No. 1) must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Eric M. Hockey, Esq., Gollatz, Griffin & Ewing, P.C., 213 W. Miner Street, P.O. Box 796, West Chester PA 19381-0796.

Decided: December 22, 1997.

By the Board, David M. Konschnick,
Director, Office of Proceedings.

Vernon A. Williams,
Secretary.

[FR Doc. 97-34021 Filed 12-30-97; 8:45 am]

BILLING CODE 4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB-312 (Sub-No. 2X)]

**South Carolina Central Railroad
Company, Inc., d/b/a Carolina
Piedmont Division—Abandonment
Exemption—in Greenville County, SC**

On December 12, 1997, South Carolina Central Railroad Company, Inc., d/b/a Carolina Piedmont Division (CPDR), filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon two segments of a line of railroad extending from: (1) railroad milepost AJK 585.34, in East Greenville, SC, to railroad milepost AJK 588.63 in Greenville, SC; and (2) railroad milepost 0.0 to railroad milepost 2.0 in Greenville, a total distance of 5.29 miles, in Greenville County, SC. The

² The notice to employees discussed in *WCL Exemption* and recently adopted as a requirement for certain transactions in *Acquisition of Rail Lines Under 49 U.S.C. 10901 and 10902—Advance Notice of Proposed Transactions*, STB Ex Parte No. 562 (STB served Sept. 9, 1997), does not apply to exempt trackage rights transactions.

line traverses U.S. Postal Service Zip Codes 29602 and 29607. CPDR has indicated that there are no stations on the line.

The line does not contain federally granted rights-of-way. Any documentation in CPDR's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by April 1, 1998.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a \$900 filing fee. See 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than January 20, 1998. Each trail use request must be accompanied by a \$150 filing fee. See 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB-312 (Sub-No. 2X) and must be sent to: (1) Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001; and (2) Karl Morell, Ball Janik LLP, 1455 F Street, N.W., Suite 225, Washington, DC 20005.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 565-1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 565-1545. [TDD for the hearing impaired is available at (202) 565-1695.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation.

Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The

deadline for submission of comments on the EA will generally be within 30 days of its service.

Decided: December 22, 1997.

By the Board, David M. Konschnik,
Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 97-33860 Filed 12-30-97; 8:45 am]

BILLING CODE 4915-00-P

DEPARTMENT OF THE TREASURY

International Trade Data System Project Office; Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3505(c)(2)(A)). Currently, the International Trade Data System Project Office within the Department of the Treasury is soliciting comments concerning the migration of the North American Trade Automation Prototype (NATAP) from a prototype to an operational pilot, and the pilot of the International Trade Prototype both of which will operate under the International Trade Data System (ITDS).

DATES: Written comments should be received on or before April 5, 1998. To be assured of consideration.

ADDRESSES: Direct all written comments to The Department of the Treasury, International Trade Data Systems Project Office, Attn: William Nolle, 1300 Pennsylvania Ave. NW., Suite 4000, Washington, DC 20229, Telephone (202) 216-2760.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the instructions should be directed to The Department of the Treasury, International Trade Data Systems Project Office, Attn.: William Nolle, 1300 Pennsylvania Ave. NW., Suite 4000, Washington, DC 20229, Telephone (202) 216-2760. Information concerning NATAP can also be obtained at the following Web Site: www.itds.treas.gov.

SUPPLEMENTARY INFORMATION:

Title: The International Trade Data System; North American Trade

Automation Prototype (NATAP), and the International Trade Prototype (ITP).

OMB Number: 1505-0162.

Abstract: After extensive consultation with the trade community in the three countries, the NAFTA Information Exchange and Automation Working Group developed the North American Trade Automation Prototype (NATAP). NATAP is a prototype developed by the U.S., Canada, and Mexico to experiment with standardized data, advanced automation, technologies, communications, and encryption designed to reduce costs and improve trade among the three NAFTA countries. This is mandated by Article 512 of the NAFTA. NATAP has been endorsed by the three governments and their trade communities as a limited six month test to be conducted at two US/Canada and four US/Mexico border locations. After the prototype period ending in May 1998, NATAP will stop; the governments and trade community will conduct joint and individual evaluations of the concepts experienced in NATAP and will move NATAP from a prototype to a pilot.

The intent of the International Trade Prototype (ITP) is nearly identical to that of NATAP, with some variations. ITP is an initiative with the United Kingdom Customs and Excise Administration. ITP employs similar data and technology as NATAP but extends this type of processing to the ocean (marine) and air environments. NATAP, on the other hand, was limited to land border truck and rail transactions. While the ITP is being done directly with the United Kingdom, it is being carefully examined by the European Economic Union (EEU).

These two operational pilots (NATAP and ITP) will be used as a proof of concept for many attributes for the International Trade Data System (ITDS) as defined in the National Performance Review (NPR) under initiative "IT 06" and as noted in the "Access America" NPR report "A09" in which the Vice President has designated NATAP to validate the International Trade Data System concept. In addition, NATAP incorporates encryption and privacy as noted in NPR initiative "IT10." NATAP and ITP are compatible as a proof of concept of the International Trade Data System and lead into other international trade initiatives such as international standardization of trade date being developed by the G-7 countries, and harmonization efforts underway with the Asian Pacific Economic Conference (APEC).

In addition to the international standardization aspects of United States international, the intent of the U.S.

Treasury, International Trade Data System Project Office is to demonstrate the integration of individual U.S. federal agency trade procedures into a comprehensive international trade process that includes the clearance and admissibility of goods, drivers/crew, and conveyances for purposes of enforcement, revenue, health and safety, etc.

Current Actions: The three governments have agreed to extend NATAP as a prototype for six additional months until May 15, 1998. At the end of this prototype period, the three governments have agreed to deploy NATAP as an operational pilot. Note that the distinction between a prototype and operational pilots is that under the prototype, participants were required to conduct trade in the prototype and duplicate the same transaction in the current system. As an operational pilot, the transaction processed under the pilot will constitute the bonafide declaration and release. It will not be necessary under the pilot to perform both processes to obtain release of goods.

Since we have gained much experience with NATAP in these advanced methods of processing, the International Trade Prototype effort with the United Kingdom will incorporate lessons learned from the NATAP and will move directly into the operation pilot phase.

This is a request to permit the United States Treasury Department along with the Federal agencies participating in the NATAP and ITP to allow the collection of data for these pilots for a three year period.

Volunteers have agreed to participate in NATAP and ITP in order to provide traders with the opportunity to experiment with these advanced technologies and procedures with minimal expense. Through their evaluation of NATAP and ITP, they will have input into future trade processes, requirements and the design, development, and deployment of the International Trade Data System.

Type of Review: Extension.

Affected Public: Importers, exporters, customs house brokers, carriers (truck and rail) who have volunteered to participate in NATAP and ITP.

Estimated Number of Respondents: There are approximately 120 U.S. participants. Estimated number of respondents is 120.

Estimated Time per Respondents: Each response will not exceed 3.5 minutes.

Estimated Total Annual Burden Hours: 0 (No additional burden hours required. Pilot removes the need for

parallel processing as stated in original notice of November 25, 1996. Pilot replaces burden hours for Customs document CF 3461-ALT 1515-0069.)

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) evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information and the prototype will 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 this information to be collected; (d) ways to minimize the burden of information on respondents, including the use of automated collection techniques or other forms of information technology; (e) estimates of capital start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Richard A. Kuzmack,

Deputy Director, International Trade Data System Project Office.

[FR Doc. 97-34039 Filed 12-30-97; 8:45 am]

BILLING CODE 4810-25-M

DEPARTMENT OF THE TREASURY

Submission to OMB for Review; Comment Request

December 16, 1997.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service (IRS)

OMB Number: 1545-1534.

Regulation Project Number: REG-252936-96 NPRM and Temporary.

Type of Review: Extension.

Title: Rewards for Information Relating to Violations of Internal Revenue Laws.

Description: The regulations relate to rewards for information that results in

the detection and punishment of violations of the Internal Revenue Laws.

Respondents: Individuals or households, Business or other for-profit, Not-for-profit institutions.

Estimated Number of Respondents: 10,000.

Estimated Burden Hours Per Respondent: 3 hours.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 30,000 hours.

Clearance Officer: Garrick Shear, (202) 622-3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW, Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt, (202) 395-7860, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 97-34024 Filed 12-30-97; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Submission to OMB for Review; Comment Request

December 22, 1997.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service (IRS)

OMB Number: 1545-1537.

Regulation Project Number: REG-253578-96 NPRM.

Type of Review: Extension.

Title: Health Insurance Portability for Group Health Plans (Temporary) Interim Rules for Health Insurance Portability for Group Health Plans.

Description: The regulations provide guidance for group health plans and the employers maintaining them regarding requirements imposed on plans relating to pre-existing condition exclusions, discrimination based on health status, and access to coverage.

Respondents: Business or other for-profit, Not-for-profit institutions, State, Local or Tribal Government.

Estimated Number of Respondents: 1,300,000.

Estimated Burden Hours Per Respondent: 27 minutes.

Estimated Total Reporting Burden: 591,561 hours.

Clearance Officer: Garrick Shear, (202) 622-3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW, Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt, (202) 395-7860, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 97-34025 Filed 12-30-97; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Submission to OMB for Review; Comment Request

December 22, 1997.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service (IRS)

OMB Number: 1545-1224.

Regulation Project Number: INTL-112-88 Final.

Type of Review: Extension.

Title: Allocation and Apportionment of Deduction for State Income Taxes.

Description: The reporting requirements affect those taxpayers claiming foreign tax credits and that elect to use an alternative method of allocating and apportioning deductions for state income taxes. This information will be used by the IRS to estimate the resources to be required in auditing income tax returns, and should facilitate the completion of audits.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 1,000.

Estimated Burden Hours Per Respondent: 1 hour.

Frequency of Response: Annually.

Estimated Total Reporting Burden: 1,000 hours.

OMB Number: 1545-1291.

Regulation Project Number: PS-78-91 Final.

Type of Review: Extension
Title: Procedure for Monitoring Compliance with Low-Income Housing Credit Requirements.

Description: The regulations require state allocation plans to provide a procedure for State and local housing credit agencies to monitor for compliance with the requirements of section 42 and report and noncompliance to the Internal Revenue Service.

Respondents: Business or other for-profit, Individuals or households, Not-for-profit institutions, State, Local or Tribal Government.

Estimated Number of Respondents/Recordkeepers: 5,000.

Estimated Burden Hours Per Respondent/Recordkeeper: 3 hours, 45 minutes.

Frequency of Response: Annually.
Estimated Total Reporting/Recordkeeping Burden: 18,750 hours.

OMB Number: 1545-1299.
Regulation Project Number: IA-54-90 Final.

Type of Review: Revision.
Title: Settlement Funds.
Description: The reporting requirements affect taxpayers that are qualified settlement funds; they will be required to file income tax returns, estimated tax returns, and withholding tax returns. The information will facilitate taxpayer examinations.

Respondents: Individuals or households, Business or other for-profit, Not-for-profit institutions, Farms, Federal Government, State, Local or Tribal Government.

Estimated Number of Respondents: 1,500.

Estimated Burden Hours Per Respondent: 2 hours, 22 minutes.

Frequency of Response: Annually.
Estimated Total Reporting Burden: 3,542 hours.

OMB Number: 1545-1448.
Regulation Project Number: EE-81-88 Final.

Type of Review: Extension.
Title: Deductions for Transfers of Property.

Description: These regulations concerns the Secretary's authority to require the filing of an information return under Code section 6041 and expand the requirement to furnish forms to certain corporate service providers.

Respondents: Individuals or households, Business or other for-profit, Not-for-profit institutions, Farms.

Estimated Number of Respondents: 1.
Estimated Burden Hours Per Respondent: 1 hour.

Frequency of Response: Annually.
Estimated Total Reporting Burden: 1 hour.

OMB Number: 1545-1452.
Regulation Project Number: FI-43-94 Final.

Type of Review: Extension.
Title: Regulation Under Section 1258 of the Internal Revenue Code of 1986; Netting Rule for Certain Conversion Transactions.

Description: Section 1258 recharacterizes capital gains from conversion transactions as ordinary income to the extent of the time value element. This regulation provides that certain gains and losses may be netted for purposes of determining the amount of gain recharacterized.

Respondents: Business or other for-profit, Not-for-profit institutions.
Estimated Number of Recordkeepers: 50,000.

Estimated Burden Hours Per Recordkeeper: 6 minutes.

Estimated Total Recordkeeping Burden: 5,000 hours.

OMB Number: 1545-1562.
Revenue Procedure Number: Revenue Procedure 97-48.

Type of Review: Extension.
Title: Automatic Relief for Late S Corporation Elections.

Description: The revenue procedure only applies to the following two situations:

(1) A corporation intends to be an S corporation, the corporation and its shareholders reported their income consistent with S corporation status for the taxable year the S corporation election should have been made and for every subsequent year, and the corporation did not receive notification from the Service regarding any problem with the S corporation status within 6 months of the date on which the Form 1120S for the first year was timely filed; and

(2) For periods prior to January 1, 1997, a corporation intends to be an S corporation; however, due to a late S corporation election the corporation was not permitted to be an A corporation for the first taxable year specified in the election (because late S corporation election relief was not available during this period), the corporation for all succeeding years, and all relevant taxable years for both the corporation and all of its shareholders are open.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 100.

Estimated Burden Hours Per Respondent: 1 hour.

Frequency of Response: Other (once).
Estimated Total Reporting Burden: 100 hours.

Clearance Officer: Garrick Shear, (202) 622-3869, Internal Revenue

Service, Room 5571, 1111 Constitution Avenue, NW, Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt, (202) 395-7860, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.
 [FR Doc. 97-34026 Filed 12-30-97; 8:45 am]
 BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

[Treasury Order Number 150-31]

Delegation—Limited Referral Authority for Advice in Undercover Operations and Approval of Consensual Monitoring Requests

December 19, 1997.

By virtue of the authority vested in the Secretary of the Treasury, including the authority vested by 31 U.S.C. 321(b) and sections 6103, 7801, 7802(a) and 7803(a) of the Internal Revenue Code of 1986, it is hereby ordered that:

1. The Commissioner of Internal Revenue is authorized to refer matters involving potential violations of law to the Department of Justice for the limited purpose of ensuring legal, ethical, and prosecutorial uniformity in the application of undercover techniques pursuant to a Memorandum of Understanding entitled "Internal Revenue Service, Undercover Review Committee" entered into by the Deputy Attorney General and the Commissioner in August 1995, or any successor memorandum. The Commissioner of Internal Revenue may redelegate this authority.

2. The Commissioner of Internal Revenue is authorized to refer requests for approval of consensual monitoring to the Department of Justice as provided in the Attorney General's Memorandum to Heads and Inspectors General of Executive Departments and Agencies entitled "Procedures for Lawful, Warrantless Interceptions of Verbal Communications" dated November 7, 1983, or any successor memorandum. The Commissioner of Internal Revenue may redelegate this authority.

3. The limited referral authority granted to the Commissioner of Internal Revenue by this Order shall terminate with respect to each matter so referred once the advice concerning undercover techniques is received or once approval for use of consensual monitoring is obtained.

4. This Order does not authorize the Commissioner of Internal Revenue to refer any matter, including matters

within the scope of paragraphs 1. and 2. above, to the Department of Justice for purposes of prosecution, grand jury investigation, or any action other than those defined in paragraphs 1. and 2; such authority shall remain with the Chief Counsel for the Internal Revenue Service in accordance with existing delegations.

Robert E. Rubin,

Secretary of the Treasury.

[FR Doc. 97-34089 Filed 12-30-97; 8:45 am]

BILLING CODE 4810-25-P

DEPARTMENT OF THE TREASURY

Fiscal Service

Renegotiation Board Interest Rate; Prompt Payment Interest Rate; Contract Disputes Act

AGENCY: Bureau of the Public Debt, Fiscal Service, Treasury.

ACTION: Notice.

SUMMARY: For the period beginning January 1, 1998 and ending on June 30, 1998 the prompt payment interest rate is 6.25% (6 1/4) per centum per annum.

ADDRESSES: Comments or inquiries may be mailed to Cynthia Winters, Team Leader, Debt Accounting Branch, Office of Public Debt Accounting, Bureau of the Public Debt, Parkersburg, West Virginia, 26106-1328. A copy of this Notice will be made available for downloading from the <http://www.publicdebt.treas.gov>.

DATES: This notice announces the interest rate applicable for the January 1, 1998 to June 30, 1998 period.

FOR FURTHER INFORMATION CONTACT: Stephanie Brown, Debt Accounting Branch Manager, Office of Public Debt Accounting, Bureau of the Public Debt, Parkersburg, West Virginia, 26106-1328, (304) 480-5171, Cynthia Winters, Team Leader, Debt Accounting Branch, Office of Public Debt Accounting, Bureau of the Public Debt, (304) 480-5174, or Elizabeth S. Gracia, Attorney-Adviser, Office of the Chief Counsel, Bureau of the Public Debt, (304) 480-5187.

SUPPLEMENTARY INFORMATION: Although the Renegotiation Board is no longer in existence, other Federal Agencies are required to use interest rates computed under the criteria established by the Renegotiation Act of 1971 Sec. 2, Pub.L. 92-41, 85 Stat. 97. For example, the Contract Disputes Act of 1978 Sec. 12, Pub.L. 95-563, 92 Stat. 2389 and the Prompt Payment Act of 1982 Sec. 2, Pub.L. 97-177, 96 Stat. 85 provide for the calculation of interest due on claims at a rate established by the Secretary of

the Treasury pursuant to 31 U.S.C. 3902(a).

Therefore, notice is hereby given that, pursuant to the above mentioned sections, the Secretary of the Treasury has determined that the rate of interest applicable for the purpose of said sections, for the period beginning January 1, 1998 and ending on June 30, 1998, is 6 1/4 per centum per annum.

Dated: December 23, 1997.

Donald V. Hammond,

Deputy Fiscal Assistant Secretary.

[FR Doc. 97-34049 Filed 12-24-97; 10:44 am]

BILLING CODE 4810-39-P

UNITED STATES INFORMATION AGENCY

College and University Affiliations Program (CUAP); Revised Request for Proposals (RFP)

This notice amends the RFP published on October 2, 1997, providing for assistance awards by the Office of Academic Programs of the United States Information Agency to support democratic institution-building and/or civic education. The RFP is amended to include Greece (Media Projects only) as eligible for proposed bilateral projects. The RFP's closing date remains January 16, 1998. Potential applicants should refer to the RFP published on October 2, 1997 for full details about applying for assistance awards under this RFP.

FOR FURTHER INFORMATION CONTACT: Office of Academic Programs; Advising, Teaching, and Specialized Programs Division; College and University Affiliations Program (CUAP), (ZE/ASU), Room 349, U.S. Information Agency, 301 4th Street, SW, Washington, DC 20547, phone: (202) 619-5289, fax: (202) 401-1433. Send a message via Internet to: affiliat@usia.gov to request a Solicitation Package. The Solicitation Package includes more detailed award criteria; all application forms; and guidelines for preparing proposals, including specific criteria for preparation of the proposal budget.

To Download a Solicitation Package via Internet: The entire Solicitation Package may be downloaded from USIA's website at <http://www.usia.gov/education/rfps>. Please read all information before downloading.

To Receive a Solicitation Package Via Fax On Demand: The entire Solicitation Package may be received via the Bureau's "Grants Information Fax on Demand System," which is accessed by calling 202/401-7616. Please request a "Catalog" of available documents and

order numbers when first entering the system.

Please specify "College and University Affiliations Program Officer" on all inquiries and correspondence. Prospective applicants should read the complete **Federal Register** announcement before addressing inquiries to the College and University Affiliations Program staff or submitting their proposals. Once the RFP deadline has passed, Agency staff may not discuss this competition in any way with applicants until the Bureau proposal review process has been completed.

Notice

The terms and conditions published in this RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. The Agency reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements.

Notification

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal USIA procedures.

Dated: December 28, 1997.

Robert L. Earle,

Deputy Associate Director for Educational and Cultural Affairs.

[FR Doc. 97-34028 Filed 12-30-97; 8:45 am]

BILLING CODE 8230-01-M

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0249]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs, is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to

publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on requirements relating to servicing delinquent guaranteed and insured home loans, loans sold, and portfolio loans.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 2, 1998.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Please refer to "OMB Control No. 2900-0249" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273-5079 or FAX (202) 275-5146.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104-13; 44 U.S.C., 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Loan Servicing Report, VA Form 26-6808.

OMB Control Number: 2900-0249.

Type of Review: Extension of a currently approved collection.

Abstract: Loan Service Representatives during the course of personal contacts with delinquent obligors complete VA Form 26-6808. The information documented on the form is necessary for VA to determine whether a loan default is insoluble or whether the obligor has reasonable prospects for curing the default and

maintaining the mortgage obligation in the future.

Affected Public: Individuals or households.

Estimated Annual Burden: 27,083 hours.

Estimated Average Burden Per Respondent: 25 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 65,000.

Dated: December 2, 1997.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 97-34127 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0096]

Proposed Information Collection

Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs, is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information necessary to request the cash surrender or a policy loan values on Government Life Insurance.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 2, 1998.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Please refer to "OMB Control No. 2900-0096" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273-5079 or FAX (202) 275-5146.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104-13; 44

U.S.C., 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Loan and Cash Surrender Values, VA Form 29-5772.

OMB Control Number: 2900-0096.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 29-5772 is used by the insured to request a loan or cash surrender value on his/her Government life insurance. VA uses the information to initiate the processing of the insured's request.

Affected Public: Individuals or households.

Estimated Annual Burden: 5,250 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 31,500.

Dated: December 2, 1997.

Donald L. Neilson,

Director Information Management Service.

[FR Doc. 97-34129 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0516]

Proposed Information Collection

Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs, is announcing an

opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed reinstatement of a previously approved collection for which approval has expired, and allow 60 days for public comment in response to the notice. This notice solicits comments on processing assumptions of VA guaranteed home loans.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 2, 1998.

ADDRESSES: Submit written comments on the collection of information to Anne V. DeSena, Veterans Benefits Administration (264), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Please refer to "OMB Control No. 2900-0516" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Anne V. DeSena at (202) 273-7375.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104-13; 44 U.S.C. 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Loan Guaranty: Processing Assumptions of VA Guaranteed Home Loans Under 38 U.S.C. 3714 (38 CFR 36.4209, 36.4232, 36.4252, 36.4275, 36.4303, 36.4308, and 36.4312).

OMB Control Number: 2900-0516.

Type of Review: Reinstatement, without change, of a previously approved collection for which approval has expired.

Abstract: As a result of Public Law 100-198, The Veterans' Home Loan

Program Improvements and Property Rehabilitation Act of 1987, all VA guaranteed loans for which a commitment was issued on or after March 1, 1988, certain holders (automatic lenders under 38 U.S.C. 3702(d)) are required to examine the creditworthiness of loan purchasers and, upon approval, to release obligors' liabilities to VA. Upon completion of this transfer, the holder or authorized agent is required to provide notice to VA regarding the status of the loan. If neither the holder nor its authorized agent is an automatic lender, this notice must include advice regarding the status of the loan, a copy of the purchase contract and a complete credit package developed by the holder for VA to use in conducting its own underwriting review of the proposed assumer. Without this notice regarding the loan purchaser the Government would be deprived of information regarding the status of loans for which it may be liable.

Parties assuming VA guaranteed loans committed to on or after March 1, 1988, must pay a fee of one-half of one percent of the loan balance to VA, through the loan holder, immediately following loan settlement. Title 38 U.S.C., 3714 additionally requires that loan holders must list the amount of this fee in every assumption statement provided and include a notice that the fee must be paid immediately following loan settlement. A similar funding fee of 1.25% of the loan balance is currently due from veterans on VA guaranteed loans. These moneys are deposited in VA Guaranty and Indemnity Fund for use by VA in the event the Department must pay on its liability for a guaranteed loan. Without collection of a similar fee of one-half of one percent of the loan balance from loan purchasers VA is failing to use every means available to reduce the need for special congressional appropriations and is collecting fees from veterans who are enjoying the benefits to which they are entitled while not collecting a similar fee from individuals assuming VA guaranteed loans.

Holdes are also required to provide warning clauses on all instruments evidencing a VA guaranteed loan committed to on or after March 1, 1988, alerting potential purchasers of the loan's restricted assumability. Without this language on loan documents the Government has no assurance that parties assuming VA guaranteed loans have record notice of this restricted assumability.

Affected Public: Businesses or other for-profit—Individuals or households.

Estimated Annual Burden: 31,625 hours.

Estimated Average Burden Per Respondent: 5 hours 45 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 5,500.

Dated: December 2, 1997.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 97-34131 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0300]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs, is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the application for assistance in acquiring special housing adaptations for disabled veterans.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 2, 1998.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Please refer to "OMB Control No. 2900-0300" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273-5079 or FAX (202) 275-5146.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104-13; 44 U.S.C., 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct

or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Application for Assistance in Acquiring Special Housing Adaptations, VA Form 26-4555d.

OMB Control Number: 2900-0300.

Type of Review: Extension of a currently approved collection.

Abstract: Grants are available to assist disabled veterans in making adaptations to their current residences or one which they intend to live in as long as the home is owned by the veteran or a member of the veteran's family. The veterans to apply for a grant use VA Form 26-4555d. The information is used by VA in approving or disapproving a veteran's grant application.

Affected Public: Individuals or households.

Estimated Annual Burden: 25 hours.

Estimated Average Burden Per

Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 75.

Dated: December 2, 1997.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 97-34132 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0188]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) is announcing an

opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine eligibility, prescribe, and authorize prosthetic devices; obtain repair estimates and allow for the direct purchase of prosthetic devices; and obtain follow-up information on loaned items.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 2, 1998.

ADDRESSES: Submit written comments on the collection of information to Ann Bickoff, Veterans Health Administration (161A1), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Please refer to "OMB Control No. 2900-0188" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Ann Bickoff at (202) 273-8310.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104-13; 44 U.S.C., 3501 " 3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) way to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Prescription, Authorization, Application, Procurement, Repair and Loan of Prosthetic Items.

Form Numbers:

a. VA Form 10-2421, Prosthetic Authorization for Items or Service.

b. VA Form 10-2520, Prosthetic Service Card Invoice.

c. VA Form 10-2914, Prescription and Authorization for Eyeglasses.

d. Form Letter 10-90, Request to Submit Estimate.

e. Form Letter 10-426, Loan Follow-up Letter.

f. VA Form 10-1394, Loan Follow-up Letter.

OMB Control Number: 2900-0188.

Type of Review: Extension of a currently approved collection.

Abstract:

a. VA Form 10-2421 is used for the direct procurement of new prosthetic appliances and/or services and standardizes the direct procurement authorization process. The form eliminates the need for separate purchase orders, expedites patient treatment and improves the delivery of prosthetic services. Without this form the delivery time for prosthetic appliances and services would be drastically increased.

b. VA Form 10-2520 is used by the commercial vendors, after completing repairs authorized for veterans, to request payment by VA. The use of the form standardizes repair/treatment invoices for prosthetic services rendered and standardizes the verification of these invoices. The veteran certifies that the repairs were necessary and satisfactory. This form is furnished to vendors upon request.

c. VA Form 10-2914 is used as a combination prescription, authorization and invoice. It allows veterans to purchase their eyeglasses directly. If the form is not used, the provisions of providing eyeglasses to eligible veterans may be delayed.

d. Form Letter 10-90 is issued to a contractor of the veteran's choice in order to solicit a price quote for a prosthetic device.

e. Form Letter 10-426 is used for the issuance of prosthetic devices that are loaned to eligible veterans. If the information is not collected or maintained, VA would have no information regarding equipment loaned to veterans; i.e., status, recovery, replacement and disposition.

f. VA Form 10-1394 is used to determine eligibility/entitlement and reimbursement of individual claims for automotive adaptive equipment.

Affected Public: Business or other for-profit—Individuals or households.

Estimated Total Annual Burden: 36,496 hours.

a. VA Form 10-2421—16,667 hours.

b. VA Form 10-2520—3,334 hours.

c. VA Form 10-2914—11,667 hours.

d. Form Letter 10-90—1,875 hours.

e. Form Letter 10-426—242 hours.

f. VA Form 10-1394—2,711 hours.

Estimated Average Burden Per

Respondent:

a. VA Form 10-2421—4 minutes.

- b. VA Form 10-2520—5 minutes.
- c. VA Form 10-2914—4 minutes.
- d. Form Letter 10-90—5 minutes.
- e. Form Letter 10-426—1 minute.
- f. VA Form 10-1394—15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents:
512,844.

- a. VA Form 10-2421—250,000.
- b. VA Form 10-2520—40,000.
- c. VA Form 10-2914—175,000.
- d. Form Letter 10-90—22,500.
- e. Form Letter 10-426—14,500.
- f. VA Form 10-1394—10,844.

Dated: December 2, 1997.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 97-34133 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0386]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 30, 1998.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Ron Taylor, Information Management Service (045A4), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 273-8015 or FAX (202) 273-5981. Please refer to "OMB Control No. 2900-0386."

SUPPLEMENTARY INFORMATION:

Title and Form Number: Interest Rate Reduction Refinancing Loan Worksheet, VA Form 26-8923.

OMB Control Number: 2900-0386.

Type of Review: Reinstatement, without change, of a previously

approved collection for which approval has expired.

Abstract: Lenders are required to submit VA Form 26-8923 when requesting guaranty on an interest rate reduction refinancing loan. VA loan examiners must assure that the requirements of the Deficit Reduction Act of 1984 and applicable VA regulations have been met before the issuance of guaranty. The form ensures that lenders correctly compute the funding fee and the maximum permissible loan amount for interest rate reduction refinancing loans.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on March 13, 1997 at page 11949.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 13,070 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 78,422.

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, Allison Eydt, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-4650. Please refer to "OMB Control No. 2900-0386" in any correspondence.

Dated: December 8, 1997.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 97-34126 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0523]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits

Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 30, 1998.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Ron Taylor, Information Management Service (045A4), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 273-8015 or FAX (202) 273-5981. Please refer to "OMB Control No. 2900-0523."

SUPPLEMENTARY INFORMATION:

Titles and Form Numbers: Loan Analysis, VA Form 26-6393.

OMB Control Number: 2900-0523.

Type of Review: Reinstatement, without change, of a previously approved collection for which approval has expired.

Abstract: The form is completed by representatives of lending institutions to determine the veteran-borrower's ability to qualify for a VA guaranteed loan. The information is used by the VA as evidence of the lender's adherence to VA credit standards.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 24, 1996 at page 55187.

Estimated Total Annual Burden: 120,000 hours.

Estimated Total Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Total Number of Respondents: 240,000.

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, Allison Eydt, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395-4650. Please refer to "OMB Control No. 2900-0523" in any correspondence.

Dated: December 9, 1997.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 97-34128 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0276]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 30, 1998.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Ron Taylor, Information Management Service (045A4), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 273-8015 or FAX (202) 273-5981. Please refer to "OMB Control No. 2900-0276."

SUPPLEMENTARY INFORMATION:

Title and Form Number: Manufactured Home Appraisal Report, VA Form 26-8712.

OMB Control Number: 2900-0276.

Type of Review: Reinstatement, without change, of a previously approved collection for which approval has expired.

Abstract: VA fee and staff appraisers use VA Form 26-8712 to establish the reasonable value of used manufactured homes. The reasonable value is then used: (1) to establish the maximum loan amount a veteran may obtain for the purchase of a used manufactured home unit; (2) to obtain information on the condition of the unit and its compliance with VA's minimum property requirements; and (3) in the event of foreclosure, to ascertain the value of the unit for resale purposes for use in computation of claims in applicable cases.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on March 13, 1997 at pages 11949-11950.

Affected Public: Business or other for-profit—Individuals or households.

Estimated Annual Burden: The number of actual burden is 360 hours. However, because the requirement for appraisal reports is a common practice in the housing industry, only 1 hour is being requested for reporting.

Estimated Average Burden Per Respondent: 90 minutes.

Frequency of Response: On occasion.
Estimated Number of Respondents: 240.

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, Allison Eydt, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-4650. Please refer to "OMB Control No. 2900-0276" in any correspondence.

Dated: December 9, 1997.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 97-34130 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS**Veterans' Advisory Committee on Environmental Hazards, Notice of Meeting**

The Department of Veterans Affairs (VA) gives notice under Pub. L. 92-463 that a meeting of the Veterans' Advisory Committee on Environmental Hazards will be held on Wednesday and Thursday, January 21-22, 1998, in room 230 of VA Central Office, 810 Vermont Avenue, NW, Washington, DC 20420. The meeting will convene at 9 a.m. and adjourn at 5 p.m. on both days.

The purpose of the meeting is to review information relating to the health effects of exposure to ionizing radiation. The major items on the agenda for both days will be discussions and analyses of medical and scientific papers concerning the health effects of exposure to ionizing radiation. On the basis of their analyses and discussions, the Committee may make recommendations to the Secretary concerning diseases that are the result of exposure to ionizing radiation. The agenda for the second day will include planning future Committee activities and assignment of tasks among the members.

The meeting is open to the public on both days according to the capacity of the room. Those who wish to attend should contact Judy Veres of the

Department of Veterans Affairs, Compensation and Pension Service, 810 Vermont Avenue, NW, Washington, DC 20420, prior to January 14, 1998. Miss Veres may also be reached at 202-273-7210.

Members of the public may submit written questions or prepared statements for review by the Advisory Committee in advance of the meeting. Submitted material must be received at least five (5) days prior to the meeting and should be sent to Mr. Thornberry's attention at the address given above. Those who submit material may be asked to clarify it prior to its consideration by the Advisory Committee.

Dated: December 23, 1997.

By Direction of the Secretary.

Heyward Bannister,

Committee Management Officer.

[FR Doc. 97-34124 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-M

DEPARTMENT OF VETERANS AFFAIRS**Veterans' Advisory Committee on Rehabilitation, Notice of Meeting**

The Department of Veterans Affairs gives notice that a meeting of the Veterans' Advisory Committee on Rehabilitation, authorized by 38 U.S.C., section 3121, will be held on January 13, 14 and 15, 1998, in Washington, DC. The committee will meet from 9 a.m. until 4:30 p.m. on January 13 and 14, in the First Floor Meeting Room of the Disabled American Veterans Washington Headquarters, 807 Maine Avenue, SW, Washington, DC 20024, and from 9 a.m. until 12 noon on January 15, 1998, in room 530 of the Department of Veterans Affairs Central Office, 810 Vermont Avenue, NW, Washington, DC 20420. The purpose of the meeting will be to review the administration of veterans' rehabilitation programs and to provide recommendations to the Secretary.

On January 13, the meeting will include discussions about the Vocational Rehabilitation Design Team Report, the Transmission Commission's activities as they relate to vocational rehabilitation. They will also receive updates from the Veterans Health Administration and Vocational Rehabilitation and Counseling Service. They will also discuss the memorandum of understanding between the Department of Labor and VA's Vocational Rehabilitation. On January 14, discussions will include REVERSE data base of vocational rehabilitation job ready candidates, beneficiary travel for

prosthetics service, priority for Chapter 31 clients to receive medical care, and the pilot program of rehabilitation outcome measurements. On January 15, the Committee will discuss recreation therapy, the new Vocational Rehabilitation Counselor position, and future meetings and agenda items.

The meeting will be open to the public. For those wishing to attend, please contact Dianna Murphy at (202) 273-7419. Interested persons may attend, appear before, or file statements with the Committee. Statements, if in written form, may be filed before the meeting. Oral statements will be heard at 9 a.m. on January 15, 1998.

Dated: December 19, 1997.

By Direction of the Secretary.

Heyward Bannister,

Committee Management Officer.

[FR Doc. 97-34123 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-M

DEPARTMENT OF VETERANS AFFAIRS

Scientific Review and Evaluation Board for Health Services Research and Development Service; Notice of Meeting

The Department of Veterans Affairs, Veterans Health Administration, gives notice under Pub. L. 92-463, that a meeting of the Scientific Review and Evaluation Board for Health Services Research and Development Service will be held at the Clarion Hotel, Bay View, 660 K Street, San Diego, CA, January 11, 7 p.m. until 9 p.m., and January 12 through January 13, 1998, from 7:30 a.m. until 5 p.m. each day. The purpose of the meeting is to review research and development applications concerned with the measurement and evaluation of health care systems and with testing new methods of health care delivery and management. Applications are reviewed for scientific and technical merit. Recommendations regarding their funding are prepared for the Chief Research and Development Officer (12).

This meeting will be open to the public at the start of the January 11 session for approximately one half-hour to cover administrative matters and to discuss the general status of the program. The closed portion of the meeting involves discussion, examination, reference to, and oral review of staff and consultant critiques of research protocols and similar documents. During this portion of the meeting, discussion and recommendations will deal with the qualifications of the personnel conducting the studies (the disclosure of

which would constitute a clearly unwarranted invasion of personal privacy), as well as research information (the premature disclosure of which would be likely to frustrate significantly implementation of proposed agency action regarding such research projects). As provided by the subsection 10(d) of Pub. L. 92-463, as amended by Pub. L. 94-409, closing portions of these meetings is in accordance with 5 U.S.C. 552b(c)(6) and (9)(B).

Due to the limited seating capacity of the room, those who plan to attend the open session should contact Mr. E. William Judy, MSHA, Review Program Manager (124F), Health Services Research and Development Service, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC, at least five days before the meeting. For further information, he can be reached at (202) 273-8254.

Dated: December 19, 1997.

By Direction of the Secretary.

Heyward Bannister,

Committee Management Officer.

[FR Doc. 97-34122 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-M

DEPARTMENT OF VETERANS AFFAIRS

Poverty Threshold

AGENCY: Department of Veterans Affairs.
ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) hereby gives notice of the weighted average poverty threshold established for 1996 for one person (unrelated individual) as established by the Bureau of the Census. The amount is \$7,995.

DATES: For VA determinations, the 1996 poverty threshold is effective September 29, 1997, the date on which it was established by the Bureau of the Census.
FOR FURTHER INFORMATION CONTACT: Paul Trowbridge, Consultant, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-7218.

SUPPLEMENTARY INFORMATION: We published a final rule amending 38 CFR 4.16(a) in the **Federal Register** of August 3, 1990, 55 Fed. Reg. 31,579. The amendment provided that marginal employment generally shall be deemed to exist when a veteran's earned annual income does not exceed the amount established by the Bureau of the Census as the poverty threshold for one person. The provisions of 38 CFR 4.16(a) use the poverty threshold as a standard in

defining marginal employment when considering total disability ratings for compensation based on unemployability of an individual. We stated we would publish subsequent poverty threshold figures notices in the **Federal Register**.

The Bureau of the Census recently published the weighted average poverty thresholds for 1996. The threshold for one person (unrelated individuals) is \$7,995.

Dated: December 22, 1997.

Hershel W. Gober,

Acting Secretary of Veterans Affairs.

[FR Doc. 97-34035 Filed 12-30-97; 8:45 am]

BILLING CODE 8320-01-M

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; Amendment of System of Records

AGENCY: Department of Veterans Affairs.
ACTION: Notice.

Notice is hereby given that the Department of Veterans Affairs (VA) is adding new routine uses to the system of records entitled "Personnel and Accounting Pay System—VA" (27VA047) as set forth in the **Federal Register** 40 FR 38095 (8/26/75) and amended in 48 FR 16372 (4/15/83), 50 FR 23009 (5/30/85), 51 FR 6858 (2/26/86), 51 FR 25968 (7/17/86), 55 FR 42534 (10/19/90), 56 FR 23952 (5/24/91), 58 FR 39088 (7/21/93), 58 FR 40852 (7/30/93), 60 FR 35448 (7/7/95), and 62 FR 41483 (8/1/97). This system of records contains information on current salaried VA employees.

Pursuant to Pub. L. 104-193, the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," VA is required to disclose data from 27VA047 to the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services for use in its Federal Parent Locator System (FPLS) and Federal Tax Offset System, DHHS/OCSE No. 09-90-0074. Information on this system was last published at 62 FR 41483, August 1, 1997.

FPLS is a computerized network through which States may request location information from Federal and State agencies to find non-custodial parents and/or their employers for purposes of establishing paternity and securing support. Effective October 1, 1997, the FPLS will be enlarged to include the National Directory of New Hires, a database containing information on employees commencing employment, quarterly wage data on

private and public sector employees, and information on unemployment compensation benefits. Effective October 1, 1998, the FPLS will be expanded to include a Federal Case Registry. The Federal Case Registry will contain abstracts on all participants involved in child support enforcement cases. When the Federal Case Registry is instituted, its files will be matched on an ongoing basis against the files in the National Directory of New Hires to determine if an employee is a participant in a child support case anywhere in the country. If the FPLS identifies a person as being a participant in a State child support case, that State will be notified of the participant's current employer. State requests to the FPLS for location information will also continue to be processed after October 1, 1998.

When individuals are hired by VA, we may disclose to the FPLS their names, social security numbers, home addresses, dates of birth, dates of hire, and information identifying us as the employer. We also may disclose to FPLS names, social security numbers, and quarterly earnings of each VA employee, within one month of the end of the quarterly reporting period.

In addition, names and social security numbers submitted by VA to the FPLS will also be disclosed by the Office of Child Support Enforcement to the Social Security Administration for verification to ensure that the social security number provided is correct. The data disclosed by VA to FPLS will also be disclosed by the Office of Child Support Enforcement to the Secretary of the Treasury for use in verifying claims for the advance payment of the earned income tax credit or to verify a claim for employment on a tax return.

We are proposing these routine uses in accordance with the Privacy Act (5 U.S.C. 552a(b)(3)). The Privacy Act permits the disclosure of information about individuals without their consent for a routine use where the information will be used for a purpose which is

compatible with the purpose for which the information was originally collected. The Office of Management and Budget (OMB) has indicated that a "compatible" use is a use which is necessary and proper. See OMB Guidelines, 51 FR 18982, 18985 (1986). Since the proposed uses of the data are required by Pub. L. 104-193, they are clearly necessary and proper uses, and therefore "compatible" uses which meet Privacy Act requirements.

An altered system of records report and a copy of the revised system notice have been sent to the House of Representatives Committee on Government Reform and Oversight, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) and guidelines issued by OMB (59 FR 37906, 37916-18 (7/25/94)).

Interested persons are invited to submit written comments, suggestions, or objections regarding the proposed changes to the system of records of the Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1154, Washington, DC 20420. All relevant material received before January 30, 1998. All written comments received will be available for public inspection at the above address in the Office of Regulations Management, Room 1158, between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday, except holidays.

If no public comment is received during the 30-day review period allowed for public comment, or unless otherwise published in the **Federal Register** by VA, the new routine uses are effective January 30, 1998.

Approved: December 22, 1997.

Hershel Gober,
Acting Secretary of Veterans Affairs.

NOTICE OF AMENDMENT TO SYSTEM OF RECORDS

In the system of records identified as 27VA047, "Personnel and Accounting

Pay System—VA," as set forth in the **Federal Register** 40 FR 38095 (8/26/75) and amended in 49 FR 16372 (4/15/83), 50 FR 23009 (5/30/85), 51 FR 6858 (2/26/86), 51 FR 25968 (7/17/86), 55 FR 42534 (10/19/90), 56 FR 23952 (5/24/91), 58 FR 39088 (7/21/93), 58 FR 40852 (7/30/93) 60 FR 35448 (7/7/95), and 62 FR 41483 (8/1/97), the system is revised as follows:

* * * * *

Routine uses of records maintained in the system, including categories of users and the purpose of such uses:

* * * * *

30. The names, social security numbers, home addresses, dates of birth, dates of hire, quarterly earnings, employer identifying information, and State of hire of employees may be disclosed to the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services Federal Parent Locator System (FPLS) for the purpose of locating individuals to establish paternity, establishing and modifying orders of child support, identifying sources of income, and for other child support enforcement actions as required by the Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Law, Pub. L. 104-193).

31. Information from this system of records may be released to the Social Security Administration for verifying social security numbers in connection with the operation of the Federal Parent Locator System (FPLS) by the Office of Child Support Enforcement.

32. Information from this system of records may be released to the Department of the Treasury for purposes of administering the Earned Income Tax Credit Program (Section 32, Internal Revenue Code of 1986) and verifying a claim with respect to employment in a tax return.

[FR Doc. 97-34125 Filed 12-30-97; 8:45 am]

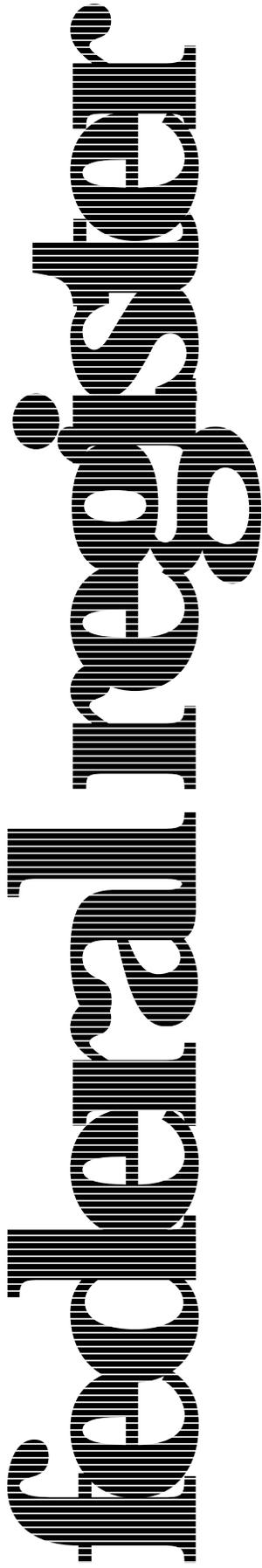
BILLING CODE 8320-01-M

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.

POSTAL SERVICE**39 CFR Part 954****Rules of Practice in Proceedings
Relative to the Denial, Suspension, or
Revocation of Second-Class Mail
Privileges***Correction*

In rule document 97-33480, beginning on page 66997, in the issue of Tuesday, December 23, 1997, in the third column, in the **EFFECTIVE DATE:** section, "December 23, 1998" should read "December 23, 1997".

BILLING CODE 1505-01-D



Wednesday
December 31, 1997

Part II

Reader Aids

Cumulative List of Public Laws
105th Congress, First Session

CUMULATIVE LIST OF PUBLIC LAWS

This is a Cumulative List of Public Laws for the 105th Congress, First Session. Other cumulative lists (1993-1996) are available online at <http://www.nara.gov/nara/fedreg/fedreg.html>. Comments may be addressed to the Director, Office of the Federal Register, Washington, DC 20408 or send e-mail to info@nara.fedreg.gov.

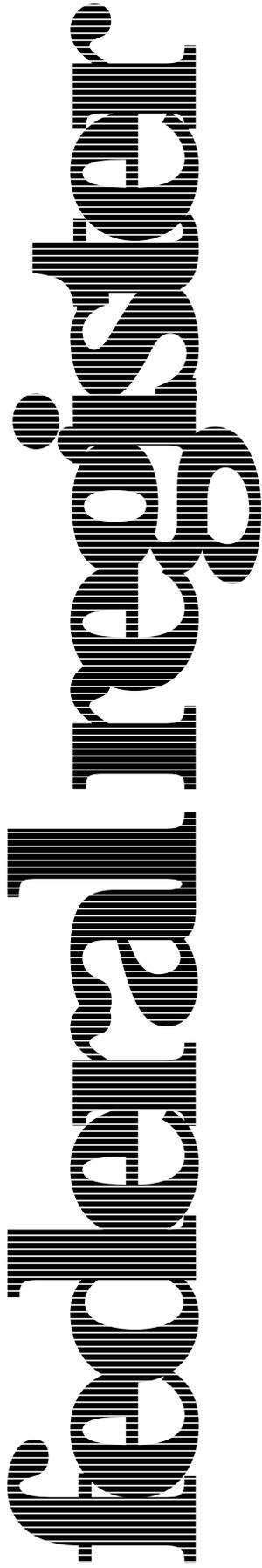
The List of Public Laws will resume when bills are enacted into public law during the second session of the One Hundred Fifth Congress, which convenes January 27, 1998. The text of laws may be ordered in individual pamphlet form (referred to as "slip laws") from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202-512-2470). The text will also be made available on the Internet from GPO Access at http://www.access.gpo.gov/su_docs. Some laws are not yet available online or for purchase.

Public Law	Title	Approved	111 Stat.
105-1	Making technical corrections to the Omnibus Consolidated Appropriations Act, 1997 (Public Law 104-208), and for other purposes.	Feb. 3, 1997	3
105-2	Airport and Airway Trust Fund Tax Reinstatement Act of 1997	Feb. 28, 1997	4
105-3	Approving the Presidential finding that the limitation on obligations imposed by section 518A(a) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, is having a negative impact on the proper functioning of the population planning program.	Feb. 28, 1997	9
105-4	To designate the facility of the United States Postal Service under construction at 7411 Barlite Boulevard in San Antonio, Texas, as the "Frank M. Tejada Post Office Building".	Mar. 3, 1997	10
105-5	Waiving certain provisions of the Trade Act of 1974 relating to the appointment of the United States Trade Representative.	Mar. 17, 1997	11
105-6	Victim Rights Clarification Act of 1997	Mar. 19, 1997	12
105-7	District of Columbia Inspector General Improvement Act of 1997	Mar. 25, 1997	14
105-8	To extend the effective date of the Investment Advisers Supervision Coordination Act	Mar. 31, 1997	15
105-9	Oroville-Tonasket Claim Settlement and Conveyance Act	Apr. 14, 1997	16
105-10	To designate the J. Phil Campbell, Senior, Natural Resource Conservation Center	Apr. 24, 1997	21
105-11	To make a technical correction to title 28, United States Code, relating to jurisdiction for lawsuits against terrorist states.	Apr. 25, 1997	22
105-12	Assisted Suicide Funding Restriction Act of 1997	Apr. 30, 1997	23
105-13	To extend the term of appointment of certain members of the Prospective Payment Assessment Commission and the Physician Payment Review Commission.	May 14, 1997	31
105-14	To authorize the President to award a gold medal on behalf of the Congress to Francis Albert "Frank" Sinatra in recognition of his outstanding and enduring contributions through his entertainment career and humanitarian activities, and for other purposes.	May 14, 1997	32
105-15	To amend title XVIII and XIX of the Social Security Act to permit a waiver of the prohibition of offering nurse aide training and competency evaluation programs in certain nursing facilities.	May 15, 1997	34
105-16	To authorize the President to award a gold medal on behalf of the Congress to Mother Teresa of Calcutta in recognition of her outstanding and enduring contributions through humanitarian and charitable activities, and for other purposes.	June 2, 1997	35
105-17	Individuals with Disabilities Education Act Amendments of 1997	June 4, 1997	37
105-18	1997 Emergency Supplemental Appropriations Act for Recovery from Natural Disasters, and for Overseas Peacekeeping Efforts, Including Those in Bosnia.	June 12, 1997	158
105-19	Volunteer Protection Act of 1997	June 18, 1997	218
105-20	Drug-Free Communities Act of 1997	June 27, 1997	224
105-21	To consent to certain amendments enacted by the Legislature of the State of Hawaii to the Hawaiian Homes Commission Act, 1920.	June 27, 1997	235
105-22	To extend certain privileges, exemptions, and immunities to Hong Kong Economic and Trade Offices.	June 27, 1997	236
105-23	To amend section 2118 of the Energy Policy Act of 1992 to extend the Electric and Magnetic Fields Research and Public Information Dissemination program.	July 3, 1997	237
105-24	Riegle-Neal Amendments Act of 1997	July 3, 1997	238
105-25	To amend the President John F. Kennedy Assassination Records Collection Act of 1992 to extend the authorization of the Assassination Records Review Board until September 30, 1998.	July 3, 1997	240
105-26	Charitable Donation Antitrust Immunity Act of 1997	July 3, 1997	241
105-27	To amend the Federal Property and Administrative Service Act of 1949 to authorize donation of Federal law enforcement canines that are no longer needed for official purposes to individuals with experience handling canines in the performance of law enforcement duties.	July 18, 1997	244
105-28	Department of Energy Standardization Act of 1997	July 18, 1997	245
105-29	To direct the Secretary of the Interior to design and construct a permanent addition to the Franklin Delano Roosevelt Memorial in Washington, D.C., and for other purposes.	July 24, 1997	246
105-30	To clarify that the protections of the Federal Tort Claims Act apply to the members and personnel of the National Gambling Impact Study Commission.	July 25, 1997	248
105-31	To waive temporarily the Medicaid enrollment composition rule for the Better Health Plan of Amherst, New York.	July 25, 1997	249
105-32	Waiving certain enrollment requirements with respect to two specified bills of the One Hundred Fifth Congress.	Aug. 1, 1997	250
105-33	Balanced Budget Act of 1997	Aug. 5, 1997	251
105-34	Taxpayer Relief Act of 1997	Aug. 5, 1997	788
105-35	Taxpayer Browsing Protection Act	Aug. 5, 1997	1104
105-36	National Geologic Mapping Reauthorization Act of 1997	Aug. 5, 1997	1107
105-37	New Mexico Statehood and Enabling Act Amendments of 1997	Aug. 7, 1997	1113
105-38	To amend the Immigration and Nationality Technical Corrections Act of 1994 to eliminate the special transition rule for issuance of a certificate of citizenship for certain children born outside the United States.	Aug. 8, 1997	1115
105-39	To direct the Secretary of the Interior to convey certain land to the City of Grants Pass, Oregon	Aug. 11, 1997	1116
105-40	Warner Canyon Ski Hill Land Exchange Act of 1997	Aug. 11, 1997	1117
105-41	Stamp Out Breast Cancer Act	Aug. 13, 1997	1119

Public Law	Title	Approved	111 Stat.
105-42	International Dolphin Conservation Program Act	Aug. 15, 1997	1122
105-43	Need-Based Educational Aid Antitrust Protection Act of 1997	Sept. 17, 1997	1140
105-44	To designate the reservoir created by Trinity Dam in the Central Valley project, California, as "Trinity Lake".	Sept. 30, 1997	1141
105-45	Military Construction Appropriations Act, 1998	Sept. 30, 1997	1142
105-46	Making continuing appropriations for the fiscal year 1998, and for other purposes.	Sept. 30, 1997	1153
105-47	To authorize appropriations for carrying out the Earthquake Hazards Reduction Act of 1977 for fiscal years 1998 and 1999, and for other purposes.	Oct. 1, 1997	1159
105-48	To provide permanent authority for the administration of au pair programs	Oct. 1, 1997	1165
105-49	To provide for the conveyance of a parcel of unused agricultural land in Dos Palos, California, to the Dos Palos Ag Boosters for use as a farm school.	Oct. 6, 1997	1166
105-50	To amend the Federal Property and Administrative Services Act of 1949 to authorize the transfer of surplus personal property to States for donation to nonprofit providers of necessities to impoverished families and individuals, and to authorize the transfer of surplus real property to States, political subdivisions and instrumentalities of States, and nonprofit organizations for providing housing or housing assistance for low-income individuals or families.	Oct. 6, 1997	1167
105-51	To authorize the President to award a gold medal on behalf of the Congress to Ecumenical Patriarch Bartholomew in recognition of his outstanding and enduring contributions toward religious understanding and peace, and for other purposes.	Oct. 6, 1997	1170
105-52	To designate the Federal building located at 601 Fourth Street, NW., in the District of Columbia, as the "Federal Bureau of Investigation, Washington Field Office Memorial Building", in honor of William H. Christian, Jr., Martha Dixon Martinez, Michael J. Miller, Anthony Palmisano, and Edwin R. Woodruffe.	Oct. 6, 1997	1172
105-53	To provide for the authorization of appropriations in each fiscal year for arbitration in United States district courts, and for other purposes.	Oct. 6, 1997	1173
105-54	To amend the Immigration and Nationality Act to extend the special immigrant religious worker program, to amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to extend the deadline for designation of an effective date for paperwork changes in the employer sanctions program, and to require the Secretary of State to waive or reduce the fee for application and issuance of a nonimmigrant visa for aliens coming to the United States for certain charitable purposes.	Oct. 6, 1997	1175
105-55	Legislative Branch Appropriations Act, 1998	Oct. 7, 1997	1177
105-56	Department of Defense Appropriations Act, 1998	Oct. 8, 1997	1203
105-57	National Wildlife Refuge System Improvement Act of 1997	Oct. 9, 1997	1252
105-58	Oklahoma City National Memorial Act of 1997	Oct. 9, 1997	1261
105-59	To provide for the release of the reversionary interest held by the United States in certain property located in the County of Iosco, Michigan.	Oct. 10, 1997	1268
105-60	Hood Bay Land Exchange Act of 1997	Oct. 10, 1997	1269
105-61	Treasury and General Government Appropriations Act, 1998	Oct. 10, 1997	1272
105-62	Energy and Water Development Appropriations Act, 1998	Oct. 13, 1997	1320
105-63	To designate the United States courthouse at 500 State Avenue in Kansas City, Kansas, as the "Robert J. Dole United States Courthouse".	Oct. 22, 1997	1342
105-64	Making further continuing appropriations for the fiscal year 1998, and for other purposes	Oct. 23, 1997	1343
105-65	Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998.	Oct. 27, 1997	1344
105-66	Department of Transportation and Related Agencies Appropriations Act, 1998	Oct. 27, 1997	1425
105-67	To confer status as an honorary veteran of the United States Armed Forces on Leslie Townes (Bob) Hope.	Oct. 30, 1997	1452
105-68	Making further continuing appropriations for the fiscal year 1998, and for other purposes	Nov. 7, 1997	1453
105-69	Making further continuing appropriations for the fiscal year 1998, and for other purposes	Nov. 9, 1997	1454
105-70	To designate the facility of the United States Postal Service located at 551 Kingstown Road in South Kingstown, Rhode Island, as the "David B. Champagne Post Office Building".	Nov. 10, 1997	1455
105-71	Making further continuing appropriations for the fiscal year 1998, and for other purposes	Nov. 10, 1997	1456
105-72	To amend title I of the Employee Retirement Income Security Act of 1974 to clarify treatment of investment managers under such title.	Nov. 10, 1997	1457
105-73	To amend the Immigration and Nationality Act to exempt internationally adopted children 10 years of age or younger from the immunization requirement in section 212(a)(1)(A)(ii) of such Act.	Nov. 12, 1997	1459
105-74	To require the Secretary of the Interior to exchange certain lands located in Hinsdale County, Colorado.	Nov. 12, 1997	1460
105-75	To provide for the expansion of the Eagles Nest Wilderness within the Arapaho National Forest and the White River National Forest, Colorado, to include land known as the Slate Creek Addition.	Nov. 12, 1997	1462
105-76	To provide for a boundary adjustment and land conveyance involving the Raggeds Wilderness, White River National Forest, Colorado, to correct the effects of earlier erroneous land surveys.	Nov. 12, 1997	1463
105-77	To transfer the Dillon Ranger District in the Arapaho National Forest to the White River National Forest in the State of Colorado.	Nov. 12, 1997	1465
105-78	Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998.	Nov. 13, 1997	1467
105-79	Hoopa Valley Reservation South Boundary Adjustment Act	Nov. 13, 1997	1527
105-80	To make technical amendments to certain provisions of title 17, United States Code	Nov. 13, 1997	1529
105-81	To require the Secretary of the Interior to conduct a study concerning grazing use and open space within and adjacent to Grand Teton National Park, Wyoming, and to extend temporarily certain grazing privileges.	Nov. 13, 1997	1537
105-82	Marjory Stoneman Douglas Wilderness and Ernest F. Coe Visitor Center Designation Act	Nov. 13, 1997	1540
105-83	Department of the Interior and Related Agencies Appropriations Act, 1998	Nov. 14, 1997	1543
105-84	Making further continuing appropriations for the fiscal year 1998, and for other purposes	Nov. 14, 1997	1628
105-85	National Defense Authorization Act for Fiscal Year 1998	Nov. 18, 1997	1629
105-86	Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1998.	Nov. 18, 1997	2079

Public Law	Title	Approved	111 Stat.
105-87	To designate the United States Post Office building located at 153 East 110th Street, New York, New York, as the "Oscar Garcia Rivera Post Office Building".	Nov. 19, 1997	2113
105-88	To designate the United States Post Office building located at 313 East Broadway in Glendale, California, as the "Carlos J. Moorehead Post Office Building".	Nov. 19, 1997	2114
105-89	Adoption and Safe Families Act of 1997	Nov. 19, 1997	2115
105-90	To designate the building in Indianapolis, Indiana, which houses the operations of the Indianapolis Main Post Office as the "Andrew Jacobs, Jr. Post Office Building".	Nov. 19, 1997	2137
105-91	To designate the facility of the United States Postal Service under construction at 150 West Margaret Drive in Terre Haute, Indiana, as the "John T. Myers Post Office Building".	Nov. 19, 1997	2138
105-92	Savings Are Vital to Everyone's Retirement Act of 1997	Nov. 19, 1997	2139
105-93	To designate the Federal building and United States courthouse located at 300 Northeast First Avenue in Miami, Florida, as the "David W. Dyer Federal Building and United States Courthouse".	Nov. 19, 1997	2146
105-94	To redesignate the United States courthouse located at 100 Franklin Street in Dublin, Georgia, as the "J. Roy Rowland United States Courthouse".	Nov. 19, 1997	2147
105-95	John F. Kennedy Center Parking Improvement Act of 1997	Nov. 19, 1997	2148
105-96	Asian Elephant Conservation Act of 1997	Nov. 19, 1997	2150
105-97	To designate the United States Post Office located at 150 North 3rd Street in Steubenville, Ohio, as the "Douglas Applegate Post Office".	Nov. 19, 1997	2154
105-98	Veterans' Compensation Rate Amendments of 1997	Nov. 19, 1997	2155
105-99	To designate the United States Post Office located at 450 North Centre Street in Pottsville, Pennsylvania, as the "Peter J. McCloskey Postal Facility".	Nov. 19, 1997	2159
105-100	Making appropriations for the government of the District of Columbia and other activities chargeable in whole or in part against the revenues of said District for the fiscal year ending September 30, 1998, and for other purposes.	Nov. 19, 1997	2160
105-101	Veterans' Cemetery Protection Act of 1997	Nov. 19, 1997	2202
105-102	To codify without substantive change laws related to transportation and to improve the United States Code.	Nov. 20, 1997	2204
105-103	To waive time limitations specified by law in order to allow the Medal of Honor to be awarded to Robert R. Ingram of Jacksonville, Florida, for acts of valor while a Navy Hospital Corpsman in the Republic of Vietnam during the Vietnam conflict.	Nov. 20, 1997	2218
105-104	Granting the consent of Congress to the Apalachicola-Chattahoochee-Flint River Basin Compact.	Nov. 20, 1997	2219
105-105	Granting the consent of Congress to the Alabama-Coosa-Tallapoosa River Basin Compact	Nov. 20, 1997	2233
105-106	To provide for the acquisition of the Plains Railroad Depot at the Jimmy Carter National Historic Site.	Nov. 20, 1997	2247
105-107	Intelligence Authorization Act for Fiscal Year 1998	Nov. 20, 1997	2248
105-108	United States Fire Administration Authorization Act for Fiscal Years 1998 and 1999	Nov. 20, 1997	2264
105-109	To permit the city of Cleveland, Ohio, to convey certain lands that the United States conveyed to the city.	Nov. 20, 1997	2268
105-110	To amend the Act incorporating the American Legion to make a technical correction	Nov. 20, 1997	2270
105-111	To amend title 38, United States Code, to allow revision of veterans benefits decisions based on clear and unmistakable error.	Nov. 21, 1997	2271
105-112	Law Enforcement Technology Advertisement Clarification Act of 1997	Nov. 21, 1997	2273
105-113	Census of Agriculture Act of 1997	Nov. 21, 1997	2274
105-114	Veterans' Benefits Act of 1997	Nov. 21, 1997	2277
105-115	Food and Drug Administration Modernization Act of 1997	Nov. 21, 1997	2296
105-116	To amend title 38, United States Code, to prohibit interment or memorialization in certain cemeteries of persons committing Federal or State capital crimes.	Nov. 21, 1997	2381
105-117	To amend the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 to prohibit an alien who is not lawfully present in the United States from receiving assistance under that Act.	Nov. 21, 1997	2384
105-118	Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998	Nov. 26, 1997	2386
105-119	Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998.	Nov. 26, 1997	2440
105-120	Waiving certain enrollment requirements with respect to certain specified bills of the One Hundred Fifth Congress.	Nov. 26, 1997	2527
105-121	Export-Import Bank Reauthorization Act of 1997	Nov. 26, 1997	2528
105-122	To designate the United States courthouse at 200 South Washington Street in Alexandria, Virginia, as the "Martin V. B. Bostetter, Jr. United States Courthouse".	Dec. 1, 1997	2532
105-123	To designate the Federal building courthouse at Public Square and Superior Avenue in Cleveland, Ohio, as the "Howard M. Metzbaum United States Courthouse".	Dec. 1, 1997	2533
105-124	50 States Commemorative Coin Program Act	Dec. 1, 1997	2534
105-125	To amend the Communications Act of 1934 to provide for the designation of common carriers not subject to the jurisdiction of a State commission as eligible telecommunications carriers.	Dec. 1, 1997	2540
105-126	To extend the authorization of use of official mail in the location and recovery of missing children, and for other purposes.	Dec. 1, 1997	2542
105-127	Hispanic Cultural Center Act of 1997	Dec. 1, 1997	2543
105-128	Museum and Library Services Technical and Conforming Amendments of 1997	Dec. 1, 1997	2548
105-129	To amend the National Defense Authorization Act for Fiscal Year 1998 to make certain technical corrections.	Dec. 1, 1997	2551
105-130	Surface Transportation Extension Act of 1997	Dec. 1, 1997	2552
105-131	To designate the United States Post Office building located at 1919 West Bennett Street in Springfield, Missouri, as the "John N. Griesemer Post Office Building".	Dec. 2, 1997	2562
105-132	Lower Brule Sioux Tribe Infrastructure Development Trust Fund Act	Dec. 2, 1997	2563
105-133	To provide for the establishment of not less than 2,500 Boys and Girls Clubs of America facilities by the year 2000.	Dec. 2, 1997	2568
105-134	Amtrak Reform and Accountability Act of 1997	Dec. 2, 1997	2570
105-135	Small Business Reauthorization Act of 1997	Dec. 2, 1997	2592
105-136	To amend the Immigration and Nationality Act to authorize appropriations for refugee and entrant assistance for fiscal years 1998 and 1999.	Dec. 2, 1997	2639
105-137	Aviation Insurance Reauthorization Act of 1997	Dec. 2, 1997	2640

Public Law	Title	Approved	111 Stat.
105-138	To provide for the design, construction, furnishing, and equipping of a Center for Historically Black Heritage within Florida A&M University.	Dec. 2, 1997	2642
105-139	To make technical corrections to the Nicaraguan Adjustment and Central American Relief Act	Dec. 2, 1997	2644
105-140	To provide for the convening of the Second Session of the One Hundred Fifth Congress	Dec. 2, 1997	2646
105-141	To require the Attorney General to establish a program in local prisons to identify, prior to arraignment, criminal aliens and aliens who are unlawfully present in the United States, and for other purposes.	Dec. 5, 1997	2647
105-142	To make clarifications to the Pilot Records Improvement Act of 1996, and for other purposes ..	Dec. 5, 1997	2650
105-143	Michigan Indian Land Claims Settlement Act	Dec. 15, 1997	2652
105-144	To authorize acquisition of certain real property for the Library of Congress, and for other purposes.	Dec. 15, 1997	2667
105-145	Granting the consent of Congress to the Chickasaw Trail Economic Development Compact	Dec. 15, 1997	2669
105-146	Atlantic Striped Bass Conservation Act Amendments of 1997	Dec. 16, 1997	2672
105-147	No Electronic Theft (NET) Act	Dec. 16, 1997	2678
105-148	To amend title 49, United States Code, to require the National Transportation Safety Board and individual foreign air carriers to address the needs of families of passengers involved in aircraft accidents involving foreign air carriers.	Dec. 16, 1997	2681
105-149	To amend the Federal charter for Group Hospitalization and Medical Services, Inc., and for other purposes.	Dec. 16, 1997	2684
105-150	To amend section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985, relating to customs user fees, to allow the use of such fees to provide for customs inspectional personnel in connection with the arrival of passengers in Florida, and for other purposes.	Dec. 16, 1997	2685
105-151	Granting the consent and approval of Congress for the State of Maryland, the Commonwealth of Virginia, and the District of Columbia to amend the Washington Metropolitan Area Transit Regulation Compact.	Dec. 16, 1997	2686
105-152	Army Reserve-National Guard Equity Reimbursement Act	Dec. 17, 1997	2688
105-153	Federal Advisory Committee Act Amendments of 1997	Dec. 17, 1997	2689



Wednesday
December 31, 1997

Part III

Department of Labor

Mine Safety and Health Administration

**Department of Health and
Human Services**

Centers for Disease Control and Prevention

Mine Shift Atmospheric Conditions;
Respirable Dust Sample; Notice
Coal Mine Respirable Dust Standard
Noncompliance Determinations; Notice
Proposed Information Collection Request
Submitted for Public Comment and
Recommendations; Single, Full-Shift
Respirable Dust Measurements; Notice

DEPARTMENT OF LABOR**Mine Safety and Health Administration****DEPARTMENT OF HEALTH AND HUMAN SERVICES****Centers for Disease Control and Prevention**

RIN 1219-AA82

Mine Shift Atmospheric Conditions; Respirable Dust Sample

AGENCIES: Mine Safety and Health Administration, Labor, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, HHS.

ACTION: Final notice of joint finding.

SUMMARY: This notice announces that the Secretary of Labor and the Secretary of Health and Human Services (the Secretaries) find, in accordance with sections 101 and 202(f)(2) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 811 and 842(f) respectively, that the average concentration of respirable dust to which each miner in the active workings of a coal mine is exposed can be accurately measured over a single shift. This notice should be read in conjunction with the notice published separately by the Mine Safety and Health Administration (MSHA) elsewhere in today's **Federal Register**. The Secretaries are rescinding the previous finding, which was proposed on July 17, 1971 and issued on February 23, 1972, by the Secretary of the Interior and the Secretary of Health, Education and Welfare.

EFFECTIVE DATE: This notice will be effective on March 2, 1998.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances; MSHA; 703-235-1910.

SUPPLEMENTARY INFORMATION: In accordance with section 202(f)(2) and section 101 of the Mine Act, this notice is published jointly by the Secretaries of the Departments of Labor, and Health and Human Services.

I. Introduction

For as long as miners have taken coal from the ground, the presence of respirable dust in coal mines has been a source of health problems for miners. Coal workers' pneumoconiosis, one of the most insidious of occupational diseases, is caused by deposits of coal mine dust in the lung and is known as "black lung disease." The disability that may result from these deposits can range from slightly impaired lung

function to significant decreases in lung function resulting in breathlessness, recurrent chest illness, and even heart failure. In addition, the disease may progress even after the miner is no longer exposed to coal mine dust.

The Federal Coal Mine Health and Safety Act of 1969 (Coal Act) established the first comprehensive dust standard for underground U.S. coal mines by setting a limit of 2.0 milligrams of respirable coal mine dust per cubic meter of air (mg/m³). The 2.0 mg/m³ standard sets a limit on the concentration of respirable coal mine dust permitted in the mine atmosphere during each shift to which each miner in the active workings of a mine is exposed. Congress was convinced that the only way each miner could be protected from black lung disease or other occupational dust disease was by limiting the amount of respirable dust allowed in the air that miners breathe.

The Coal Act was subsequently amended by the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.* The standard limiting respirable dust in the mine atmosphere to 2.0 mg/m³ was retained in the Mine Act, which also required that "each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air." Section 202(b)(2). (Other provisions in the Mine Act, sections 205 and 203(b)(2), provide for lowering the applicable standard when quartz is present and when miners with evidence of pneumoconiosis have elected to work in a low-dust work environment.)

Today, dust levels in underground U.S. coal mines are significantly lower than they were when the Coal Act was passed. Federal mine inspector sampling results during 1968-1969 show that the average dust concentration in the environment of a continuous miner operator was 7.7 mg/m³. Current sampling indicates that the average dust level for that occupation has been reduced by 83 percent to 1.3 mg/m³. Despite this progress, the Secretaries believe that occupational lung disease continues to present a serious health risk to coal miners. In November 1995, the National Institute for Occupational Safety and Health (NIOSH) issued a criteria document which concluded that coal miners in our country continue to be at risk for developing black lung disease.

The Secretary of Labor believes that miners' health can be further protected from the debilitating effects of black

lung disease by improving their workplace conditions through more effective assessment of respirable dust concentrations during individual, full shifts. On February 18, 1994, the Secretary of Labor and the Secretary of Health and Human Services published a notice in the **Federal Register** proposing to find that the average concentration of respirable dust to which each miner in the active workings of a coal mine is exposed can be accurately measured over a single shift in accordance with section 202(f)(2) of the Mine Act (56 FR 8357). Additionally, the Secretaries proposed to rescind the previous finding, which was proposed on July 17, 1971 (36 FR 13286) and issued on February 23, 1972 (37 FR 3833), by the Secretary of the Interior and the Secretary of Health, Education and Welfare.

II. General Discussion

The issues related to this finding are complex and highly technical. The Agencies have organized this final notice to allow interested persons to first consider pertinent introductory material on the Agencies' 1972 notice and its rescission, and a short overview of the NIOSH mission and assessment of this finding, as well as those aspects of MSHA's coal mine respirable dust program relevant to this finding. Following this introductory material is a discussion of the "measurement objective," or what the Secretaries intend to measure with a single, full-shift measurement, and the use of the NIOSH Accuracy Criterion for determining whether a single, full-shift measurement will "accurately represent" the full-shift atmospheric dust concentration. Next, the validity of the sampling process is addressed, including the performance of the approved sampler unit, sample collection procedures, and sample processing. The concept of measurement uncertainty is then addressed, and why sources of dust concentration variability and various other factors are not relevant to the finding. Finally, the notice explains how the total measurement uncertainty was quantified, and how the accuracy of a single, full-shift measurement was shown to meet the NIOSH Accuracy Criterion. Several Appendices, which contain relevant technical information, are attached and incorporated with this notice. The Agencies have additionally included references to the Appendices throughout this notice.

A. The 1971/1972 Joint Notice of Finding

In 1971 the Secretary of the Interior and the Secretary of Health, Education and Welfare proposed, and in 1972 issued, a joint finding under the Coal Act. The finding concluded that a single shift measurement would not, after applying valid statistical techniques, accurately represent the atmospheric conditions to which the miner is continuously exposed. For the reasons that follow, the Secretaries believe that the 1972 joint finding was incorrect.

Section 202(b)(2) of the Coal Act provided that "each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below [the applicable respirable dust standard]." In addition, the term "average concentration" was defined in section 202(f) of the Coal Act as follows:

* * * the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured during an 18 month period following the date of enactment of this Act, over a number of continuous production shifts to be determined by the Secretary of the Interior and the Secretary of Health, Education and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary of the Interior and the Secretary of Health, Education and Welfare find, in accordance with the provisions of section 101 of this Act, that such single shift measurements will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift.

Therefore, 18 months after the statute was enacted, the "average concentration" of respirable dust in coal mines was to be measured over a single shift only, unless the Secretaries found that doing so would not accurately represent mine atmospheric conditions during such shift. If the Secretaries found that a single shift measurement would not, after applying valid statistical techniques, accurately represent mine atmospheric conditions during such shift, then the interim practice of averaging measurements "over a number of continuous production shifts" was to continue.

On December 16, 1969, the U.S. Congress published a Conference Report in support of the new Coal Act. The Report refers to section 202(f) by noting that:

At the end of this 18 month period, it requires that the measurements be over one production shift only, unless the Secretar[ies]

* * * find, in accordance with the standard setting procedures of section 101, that single shift measurements will not accurately represent the atmospheric conditions during the measured shift to which the miner is continuously exposed [Conference Report, page 75].

This Report is inconsistent with the wording of the section 202(f), which seeks to apply a single, full-shift measurement to "accurately represent such atmospheric conditions during such shift." Section 202(f) does not mention continuous exposure. The Secretaries believe that the use of this phrase is confusing, and to the extent that any weight of interpretation can be given to the legislative history, that the Senate's Report of its bill provides a clearer interpretation of section 202(f) when read together with the statutory language. The Senate Committee noted in part that:

The committee * * * intends that the dust level not exceed the specified standard during any shift. It is the committee's intention that the average dust level at any job, for any miner in any active working place during each and every shift, shall be no greater than the standard.

Following passage of the Coal Act, the Bureau of Mines (MSHA's predecessor Agency within the Department of the Interior) expressed a preference for multi-shift sampling. Correspondence exchanged during that time period of 1969 to 1971 reflected concern over the technological feasibility of controlling dust levels to the limits established, and the potentially disruptive effects of mine closure orders because of noncompliance with the respirable dust limits. Both industry and government officials feared that basing noncompliance determinations on single, full-shift measurements would increase those problems. In June 1971, the then-Associate Solicitor for Mine Safety and Health at the Department of the Interior issued a legal interpretation of section 202(f), concluding that the average dust concentration was to be determined by measurements that accurately represent respirable dust in the mine atmosphere over time rather than during a shift. On July 17, 1971, the Secretaries of the Interior and of Health, Education and Welfare issued a proposed notice of finding under section 202(f) of the Coal Act. The finding concluded that, "a single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed" (36 FR 13286).

In February, 1972, the final finding was issued (37 FR 3833). It concluded that:

After careful consideration of all comments, suggestions, and objections, it is the conclusion of the Secretary of the Interior and the Secretary of Health, Education, and Welfare that a valid statistical technique was employed in the computer analysis of the data referred to in the proposed notice [footnote omitted] and that the data utilized was accurate and supported the proposed finding. Both Departments also intend periodically to review this finding as new technology develops and as new dust sampling data becomes available.

The Departments intend to revise part 70 of Title 30, Code of Federal Regulations, to improve dust measuring techniques in order to ascertain more precisely the dust exposure of miners. To complement the present system of averaging dust measurements, it is anticipated that the proposed revision would use a measurement over a single shift to determine compliance with respirable dust standards taking into account (1) the variation of dust and instrument conditions inherent in coal mining operations, (2) the quality control tolerance allowed in the manufacture of personal sampler capsules, and (3) the variation in weighing precision allowed in the Bureau of Mines laboratory in Pittsburgh.

The proposed finding, as set forth at 36 F.R. 13286, that a measurement of respirable dust over a single shift only, will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner under consideration is continuously exposed, is hereby adopted without change.

As explained in the 1971 proposed finding, the average concentration of all ten full-shift samples (from one occupation) submitted from each working section under the regulations in effect at the time (these were the "basic samples" referred to in the proposed notice of finding) was compared with the average concentration of the two most recently submitted samples, then to the three most recently submitted samples, then to the four most recently submitted samples, etc. In discussing the results of these comparisons the Secretaries stated that " * * * the average of the two most recently submitted samples of respirable dust was statistically equivalent to the average concentration of the current basic samples for each working section in only 9.6 percent of the comparisons."

The title of the 1971/1972 notice and the conclusion it reaches are clearly inconsistent. The title states that it is a "Notice of Finding That Single Shift Measurements of Respirable Dust Will Not Accurately Represent Atmospheric Conditions During Such Shift." However, the conclusion states that, " * * * a single shift measurement * * * will not, after

applying valid statistical techniques * * * accurately represent the atmospheric conditions to which the miner is *continuously* exposed" (emphasis added).

The Secretaries have determined that section 202(f) requires a determination of accuracy with respect to "atmospheric conditions during such shift," not "atmospheric conditions to which the miner is continuously exposed" (37 FR 3833). The statistical analysis referenced in the 1971/1972 proposed and final findings simply did not address the accuracy of a single, full-shift measurement in representing atmospheric conditions during the shift on which it was taken. For this and other reasons set forth in the notice, the Secretaries hereby rescind the 1972 joint final finding.

III. NIOSH Mission Statement and Assessment of the Joint Finding

The National Institute for Occupational Safety and Health (NIOSH) was created by Congress in the Occupational Safety and Health Act in 1970. The Act established NIOSH as part of the Department of Health and Human Services to identify the causes of work-related diseases and injuries, evaluate the hazards of new technologies, create new ways to control hazards to protect workers, and make recommendations for new occupational safety and health standards. Under section 501 of the Mine Act, Congress gave specific research responsibilities to NIOSH in the field of coal or other mine health. These responsibilities include the authority to conduct studies, research, experiments and demonstrations, in order "to develop new or improved means and methods of reducing concentrations of respirable dust in the mine atmosphere of active workings of the coal or other mine," and also "to develop techniques for the prevention and control of occupational diseases of miners * * *."

When the initial finding, issued under section 202(f) of the Coal Act, was published in 1972, both the Secretary of the Interior and the Secretary of Health, Education and Welfare (the predecessor to the Department of Health and Human Services) indicated that the finding would be reassessed as new technology was developed, or new data became available. The Secretary of Health and Human Services, through delegated authority to the National Institute for Occupational Safety and Health, has reconsidered the provisions of section 202(f) of the Mine Act, reviewed the current state of technology and other scientific advances since 1972, and has determined that the following

innovations and technological advancements are important factors in the reassessment of the 1971/1972 joint finding.

In 1977 NIOSH published its "Sampling Strategies Manual," which provided a framework for the statistical treatment of occupational exposure data [DHEW (NIOSH) Publication No. 77-173; Sec. 4.2.1]. Additionally, that year, NIOSH first published the NIOSH Accuracy Criterion, which was developed as a goal for methods to be used by OSHA for compliance determinations [DHEW (NIOSH) Publication No. 77-185; pp. 1-5]. In 1980, new mine health standards issued by the Secretary of Labor (30 CFR parts 70, 71, and 90) improved the quality of the sampling process by revising sampling, maintenance, and calibration procedures. Prior to 1984, filter capsules used in sampling were manually weighed by MSHA personnel using semi-micro balances, making precision weights to the nearest 0.1 mg (100 micrograms). In 1984, a fully-automated, robotic weighing system was introduced along with state-of-the-art electronic microbalances. In 1994, the balances were further upgraded, and in 1995 the weighing system was again improved, increasing weighing sensitivity to the microgram level. Also, in 1987, electronic flow-control sampling pump technology was introduced in the coal mine dust sampling program with the use of MSA FlowLite™ pumps.¹ These new pumps compensate for the changing filter flow-resistance that occurs due to dust deposited during the sampling period. The second generation of constant-flow sampling pumps was introduced in 1994, with the introduction of the MSA Escort ELF® pump. The automatic correction provided by these new pumps improves the stability of the sampler air flow rates and reduces the inaccuracies that were inherent in the 1970-1980s vintage sampling pumps. One further improvement was made in 1992 with the introduction of the new tamper-resistant filter cassettes. Because of these evolving improvements to the sampling process, a better understanding of statistical methods applied to method accuracy, and a reconsideration of the requirements of section 202(f) of the Mine Act, the Secretary of Health and Human Services has determined that the previous joint finding should be reevaluated.

¹ Reference to specific equipment, trade names or manufacturers does not imply endorsement by NIOSH or MSHA.

IV. MSHA Mission Statement and Overview of the Respirable Dust Program

With the enactment of the Mine Act, Congress recognized that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner." Congress further realized that there "is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." With these goals in mind, MSHA is given the responsibility to protect the health and safety of the Nation's coal and other miners by enforcing the provisions of the Mine Act.

A. The Coal Mine Respirable Dust Program

In 1970, federal regulations were issued by MSHA's predecessor agency that established a comprehensive coal mine operator dust sampling program, which required the environment of the occupation on a working section exposed to the highest respirable dust concentration to be sampled—the "high risk occupation" concept. All other occupations on the section were assumed to be protected if the high risk occupation was in compliance. Under this program, each operator was required to initially collect and submit ten valid respirable dust samples to determine the average dust concentration (across ten production shifts). If analysis showed the average dust concentration to be within the applicable dust standard, the operator was required to submit only five valid samples a month. If compliance continued to be demonstrated, the operator was required to take only five valid samples every other month. The initial, monthly, and bimonthly sampling cycles were referred to as the "original," "standard," and "alternative sampling" cycles, respectively. When the average dust concentration exceeded the standard, the operator reverted back to the standard sampling cycle.

In addition to sampling the high risk occupation at specified frequencies, each miner was sampled individually at different intervals. However, these early individual sample results were not used for enforcement but were provided to NIOSH for medical research purposes.

MSHA revised these regulations in April 1980 (45 FR 23990) to reduce the operator sampling burden, to simplify the sampling process, and to enhance

the overall quality of the sampling program. The result was to replace the various sampling cycles with a bimonthly sampling cycle and to eliminate the requirement that each miner be sampled. These are the regulations that currently govern the mine operator dust sampling program, and which continue to be based on the high risk occupation concept, now referred to as the "designated occupation" or "D.O." sampling concept.

It should be noted that the preamble to the final rule amending the regulations in April 1980 (45 FR 23997), explicitly refers to the use of single versus multiple samples as it applies to the operator respirable dust sampling program.

Compliance determinations will generally be based on the average concentration of respirable dust measured by five valid respirable dust samples taken by the operator during five consecutive shifts, or five shifts worked on consecutive days. Therefore, the sampling results upon which compliance determinations are made will more accurately represent the dust in the mine atmosphere than would the results of only a single sample taken on a single shift. In addition, MSHA believes the revised sampling and maintenance and calibration procedures prescribed by the final rule will significantly improve the accuracy of sampling results.

At the time of these amendments, MSHA examined section 202(b)(2) of the Coal Act, which was retained unchanged in the 1977 Mine Act. The Agency stated in the preamble to the final rule that:

Although single-shift respirable dust sampling would be most compatible with this single-shift standard, Congress recognized that variability in sampling results could render single-shift samples insufficient for compliance determinations. Consequently, Congress defined "average concentration" in section 202(f) of the 1969 Coal Act which is also retained in the 1977 Act.

MSHA believes that this interpretation merely recognized the two ways of measurement authorized in section 202(f), and expressed the preference on the part of MSHA in 1980 to retain multi-shift sampling in the operator sampling program. The phrase used in the preamble to the final rule reflects that MSHA understood that the 2.0 mg/m³ limit was a single-shift standard, which was not to be exceeded on a shift. The preamble referenced the continuous multi-shift sampling and single-shift sampling conducted by the Secretary of the Interior and the Secretary of Health, Education, and Welfare, and noted that in the 1971/1972 proposed and final findings,

It had been determined after applying valid statistical techniques, * * * that a single shift sample should not be relied upon for compliance determinations when the respirable dust concentration being measured was near 2.0 mg/m³. Accordingly, the [Secretaries] prescribed consecutive multi-shift samples to enforce the respirable dust standard.

The preamble provides no further explanation for the statement that single-shift samples should not be relied on when the respirable dust concentration being measured was near 2.0 mg/m³. Thus, the 1980 final rule, which reduced the number of samples that operators were required to take for compliance determinations, merely reiterated the rationale behind the 1971/1972 proposed and final findings concerning single-shift samples, and did not address the accuracy of a single, full-shift measurement.

MSHA continues to take an active role in sampling for respirable dust by conducting inspections annually at each surface and underground coal mine. During these inspections, MSHA inspectors collect samples on multiple occupations to determine compliance with the applicable standard, assess the effectiveness of the operator's dust control program, quantify the level of crystalline silica (quartz) in the work environment, and identify occupations other than the "D.O." which may be at risk and should be monitored by the mine operator.

Depending on the concentration of dust measured, an MSHA inspector may terminate sampling after the first day if levels are very low, or continue for up to five shifts or days before making a compliance or noncompliance determination. MSHA inspection procedures require inspectors to sample at least five occupations, if available, on each mechanized mining unit (MMU) on the first day of sampling. The operator is cited if the average of those measurements exceeds the applicable standard. However, if the average falls below the standard, but one or more of the measurements exceed it, additional samples are collected on the subsequent production shift or day. The results of the first and second day of sampling on all occupations are then averaged to determine if the applicable standard is exceeded. Additionally, when an inspector continues sampling after the first day because a previous measurement exceeds the standard, MSHA's procedures call for all measurements taken on a given occupation to be averaged individually for that occupation. If the average of measurements taken over more than one day on all occupations is equal to or less

than the applicable standard, but the average of measurements taken on any one occupation exceeds the value in a decision table developed by MSHA (based on the cumulative concentration for two or more samples exceeding 10.4 mg/m³, which is equivalent to a 5-measurement average exceeding 2.0 mg/m³), the operator is cited for exceeding the applicable standard.

B. The Spot Inspection Program (SIP)

In response to concerns about possible tampering with dust samples in 1991, MSHA convened the Coal Mine Respirable Dust Task Group (Task Group) to review the Agency's respirable dust program. As part of that review, MSHA developed a special respirable dust "spot inspection program" (SIP).

This program was designed to provide the Agency with information on the dust levels to which underground miners are typically exposed. Because of the large number of mines and MMUs (mechanized mining units) involved and the need to obtain data within a short time frame, respirable dust sampling during the SIP was limited to a single shift or day, a departure from MSHA's normal sampling procedures. The term "MMU" is defined in 30 CFR 70.2(h) to mean a unit of mining equipment, including hand loading equipment, used for the production of material. As a result, MSHA decided that if the average of multiple occupation measurements taken on an MMU during any one-day inspection did not exceed the applicable standard the inspector would review the result of each individual full-shift sample. If any individual full-shift measurement exceeded the applicable standard by an amount specified by MSHA, a citation would be issued for noncompliance, requiring the mine operator to take immediate corrective action to lower the average dust concentration in the mine atmosphere in order to protect miners.

During the SIP inspections, MSHA inspectors cited violations of the 2.0 mg/m³ standard if either the average of the five measurements taken on a single shift was greater than or equal to 2.1 mg/m³, or any single, full-shift measurement exceeded or equaled 2.5 mg/m³. Similar adjustments were made when the 2.0 mg/m³ standard was reduced due to the presence of quartz dust in the mine atmosphere.

The procedures issued by MSHA's Coal Mine Safety and Health Division during the SIP were similar to those used by the MSHA Metal/Nonmetal Mine Safety and Health Division and the Occupational Safety and Health Administration (OSHA) when

determining whether to cite based on a single, full-shift measurement. That practice provides for a margin of error reflecting an adjustment for uncertainty in the measurement process (i.e., sampling and analytical error). The margin of error thus allows citations to be issued only where there is a high level of confidence that the applicable standard has been exceeded.

Based on the data from the SIP inspections, the Task Group concluded that MSHA's practice of making noncompliance determinations solely on the average of multiple-sample results did not always result in citations in situations where miners were known to be overexposed to respirable coal mine dust. For example, if measurements obtained for five different occupations within the same MMU were 4.1, 1.0, 1.0, 2.5, and 1.4 mg/m³, the average concentration would be 2.0 mg/m³. Although the dust concentration for two occupations exceeds the applicable standard, under MSHA procedures no citation would have been issued nor any corrective action required to reduce dust levels to protect miners' health. Instead, MSHA policy required the inspector to return to the mine the next day that coal was being produced and resume sampling in order to decide if the mine was in compliance or not in compliance.

The Task Group also recognized that the results of the first full-shift samples taken by an inspector during a respirable dust inspection are likely to reflect higher dust concentrations than samples collected on subsequent shifts or days during the same inspection. MSHA's comparison of the average dust concentration of inspector samples taken on the same occupation on both the first and second day of a multiple-day sampling inspection showed that the average concentration of all samples taken on the first day of an inspection was almost twice as high as the average concentration of samples taken on the second day. MSHA recognized that sampling on successive days does not always result in measurements that are representative of everyday respirable dust exposures in the mine because mine operators can anticipate the continuation of inspector sampling and make adjustments in dust control parameters or production rates to lower dust levels during the subsequent sampling.

In response to these findings, in November 1991, MSHA decided to permanently adopt the single shift inspection policy initiated during the SIP.

C. The Keystone Decision

In 1991, three citations based on single, full-shift measurements were issued under the SIP to the Keystone Coal Mining Corporation. The violations were contested, and an administrative law judge from the Federal Mine Safety and Health Review Commission (Commission) vacated the citations. The decision was appealed by the Secretary of Labor to the Commission because the Secretary believed that the administrative law judge was in error in finding that rulemaking was required under section 202(f) of the Mine Act for the Secretary to use single, full-shift measurements for noncompliance determinations. In addition, the Secretary contended that the 1971/1972 finding pertained to operator sampling and that the SIP at issue involved only MSHA sampling. The Commission, which affirmed the decision of the administrative law judge, found that:

Title II [of the Mine Act] applies to both operator sampling and to MSHA actions to ensure compliance, including sampling by MSHA. Section 202(g) specifically provides for MSHA spot inspections. Nothing in § 202(f) or § 202(g) suggests that § 202(f) applies differently to MSHA sampling. Thus, the 1971 finding, issued for purposes of Title II, applies broadly to both MSHA and operator sampling of the mine atmosphere.

The Commission also held that the revised MSHA policy was in contravention of the 1971/1972 finding and could only be altered if the requirements of the Mine Act and the Administrative Procedure Act, 5 U.S.C. 550, were met.

V. Executive Order 12866 and Regulatory Impact Analysis

MSHA has designated this joint finding as a significant action; it has been reviewed by OMB under E.O. 12866. MSHA estimates that the total annual costs associated with the implementation of this finding will be \$707,950, of which \$446,125 will be incurred by underground coal mines and \$261,825, incurred by surface coal operations. MSHA projects that this finding will result in reductions of future cases of occupational lung disease and attendant cost savings. MSHA has prepared a separate regulatory impact analysis which is available to the public upon request.

VI. Procedural History of the Current Notices

As a result of the innovations and technological advancements described earlier, and the decision in *Keystone Coal v. Secretary of Labor*, 16 FMSHRC 6 (January 4, 1994), the Secretary of Labor and the Secretary of Health and

Human Services published a proposed joint notice in the **Federal Register** on February 18, 1994 (59 FR 8357), pursuant to sections 101 and 202(f)(2) of the Mine Act. The notice proposed to rescind the 1971/1972 proposed and final findings by the Secretaries of the Interior and Health, Education and Welfare, and find that a single, full-shift measurement will accurately represent the atmospheric conditions with regard to the respirable dust concentration during the shift on which it was taken.

Concurrently, MSHA published a separate notice in the **Federal Register** announcing its intention to use both single, full-shift respirable dust measurements and the average of multiple, full-shift respirable dust measurements for noncompliance determinations (59 FR 8356). That notice was published to inform the mining public of how the Agency intended to implement its new enforcement procedure utilizing single, full-shift samples, and to solicit public comment on the new procedure.

The comment period on the proposed joint finding was scheduled to close on April 19, 1994, but was extended to May 20, 1994, in response to requests from the mining community (59 FR 16958). Subsequently, public comments were received, including comments from both labor and industry.

On July 6, 1994, in response to requests from the mining community, a public hearing was held on both notices in Morgantown, West Virginia (59 FR 29348). Also, in response to additional requests from the mining community, a second hearing was held on July 19, 1994, in Salt Lake City, Utah. To allow for the submission of post-hearing comments, the record was held open until August 5, 1994.

The hearings on the proposed joint notice were conducted by a joint MSHA/NIOSH panel. Presenters at the Morgantown hearing included international and local representatives of the United Mine Workers of America (UMWA), several mine operators, and a panel presentation from the American Mining Congress (AMC) and the National Coal Association (NCA). Presenters at the Salt Lake City hearing included the Utah Mining Association, several mine operators, and another joint AMC/NCA panel. The joint MSHA/NIOSH panel received prepared remarks from the presenters and asked questions as well. The joint agency panel also responded to questions from the presenters.

To ensure that all issues raised were fully considered, MSHA and NIOSH conducted a thorough review of existing data, engaged in an extensive literature

search, sought an independent analysis of the scientific validity of single, full-shift measurements, and conducted additional testing. These efforts resulted in the collection of a significant amount of information, which was made a part of the public record on September 9, 1994 (59 FR 50007). To allow interested parties the opportunity to review and comment on the supplemental material, the Agencies extended the comment period from September 30 to November 30, 1994.

After the close of the comment period, the Agencies reviewed all of the comments, data and other information submitted into the record. Some of the commenters raised questions regarding the accuracy of single, full-shift measurements and challenged the Agencies' estimate of measurement imprecision inherent in sample collection and analysis. While reviewing these issues, the Agencies concluded that the term "accurately represent" as used in section 202(f) needed to be defined because of the issues which commenters raised. In response, the Agencies reopened the record on March 12, 1996, to provide a criterion for "accuracy", to supply new data and statistical analytical analyses on the precision of coal mine respirable dust measurements obtained using approved sampling equipment, and to allow the public to review and submit comments on the supplemental information (61 FR 10012). In addition, the March 12 notice identified certain refinements in MSHA's measurement process as applied to inspector samples. These modifications, currently in place, involve the measurement of both pre- and post-exposure filter weights to the nearest microgram on a scale calibrated using the established procedure in MSHA's laboratory, and discontinuing the practice of truncating the recorded weights used in calculating the dust concentration (that is, MSHA no longer ignores digits representing hundredths and thousandths of a milligram).

The new comment period was scheduled to close on April 11, 1996, but was extended until June 10, 1996, in response to requests from the mining community. Additionally, on April 11, 1996, the Agencies announced their intention to conduct a second public hearing on the content of the March 12 notice (61 FR 16123). On May 10, 1996, a public hearing conducted by a joint MSHA/NIOSH panel was held in Washington, DC. One scheduled presenter, representing the UMWA, appeared at this hearing.

Some commenters expressed concern for the procedures used by the Agencies in making a new finding, asserting that

MSHA and NIOSH were not complying with the rulemaking provisions of the Mine Act. These commenters contended that the rescission of the final finding and implementation by MSHA of single, full-shift sampling can only be effectuated through notice and comment rulemaking. These commenters argue that because MSHA failed to appeal the *Keystone* case, MSHA was bound by the Commission decision in that case which mandated notice and comment rulemaking to rescind the prior finding and authorize use of single samples by the Agency.

MSHA and NIOSH have considered these comments, but believe that the process they have chosen to follow is consistent with the requirement of section 202(f) of the Mine Act, which provides that a finding shall be made "in accordance with the provisions of section 101" of the Mine Act. Section 101 contains the procedural requirements for promulgation of mandatory health and safety standards, including provision for notice and comment. All interested parties were given ample opportunity for notice and comment at every stage of consideration of the proposed joint finding. The Agencies are not developing, promulgating, or revising a mandatory health standard in this notice, nor is the 2.0 mg/m³ respirable dust standard being revised. Moreover, the Agencies have made a finding that the average concentration of respirable dust in the mine atmosphere to which each miner in the active workings of a coal mine is exposed during a shift can be accurately measured with a single, full-shift sample. This is a scientific finding contemplated by section 202(f) of the Mine Act. While one commenter asserted that the Secretaries were not following proper notice and comment procedures in section 101 [e.g., sections 101(a)(1) through (9)], the only example given by the commenter is the fact that the notice was published in the "Notice" section, rather than the "Proposed Rules" or "Rules and Regulations" section of the **Federal Register**. Because this is not a mandatory safety and health standard, there is no need for the Secretaries to publish the finding as a proposed rule, or to address feasibility, for example, which would be required under section 101(a)(6)(A) when a mandatory safety or health standard is promulgated. The Secretaries have properly complied with all the procedural elements of section 101 which apply to this notice.

Some commenters referenced section 101(a)(9) of the Mine Act, 30 U.S.C. 811(a)(9), which provides that no mandatory standard shall reduce the

protection afforded miners by an existing standard under the Mine Act. As stated previously, this scientific finding does not constitute rulemaking and is not a promulgation of a mandatory health standard. Rather, it is a "finding" under the Mine Act, established in the same manner as the initial finding, in 1972, the effect of which is to increase health protection for miners by allowing single, full-shift measurements to be used to determine average concentrations during a single work shift instead of continuing to rely solely on averaging the results of several days of sampling or sampling across various occupations on the same shift.

In MSHA's notice published on February 18, 1994 (59 FR 8356), the Agency specifically noted that any change to the substantive procedure for mine operator respirable dust sampling governed by MSHA regulations would require rulemaking by MSHA.

VII. Issues Regarding Accuracy of a Single, Full-Shift Measurement

Some commenters questioned the accuracy of single, full-shift measurements, and challenged the Secretaries' assessment of measurement accuracy. Some commenters questioned the Secretaries' interpretation of section 202(b) of the Mine Act, while others agreed with the interpretation. The following issues were generally raised: the measurement objective as defined by the Mine Act; the definition of the term "accurately represent", as used in section 202(f); the validity of the sampling process; measurement uncertainty and dust concentration variability; and the accuracy of a single, full-shift measurement.

A. Measurement Objective

Some comments reflected a general misunderstanding of what the Secretaries intend to measure with a single, full-shift measurement, i.e., the measurement objective. For example, some commenters asserted that the dust concentration that should be measured is dust concentration averaged over a period greater than a single shift. Some commenters noted that dust concentrations can vary during a shift and that dust concentration is not uniform throughout a miner's work area. In order to clarify the intent of the Secretaries, the explanation that follows describes the elements of the measurement objective and how the measurement objective relates to the requirements of section 202(f).

To evaluate the accuracy of a dust sampling method it is necessary to specify the airborne dust to be measured, the time period to which the

measurement applies, and the area represented by the measurement. Once specified, these items can be combined into a measurement objective. The measurement objective represents the goal of the sampling and analytical method to be utilized.

1. The Airborne Dust to be Measured

Section 202(f) of the Mine Act states that "average concentration" means " * * * a determination [i.e., measurement] which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed." Later in section 202(f), the phrase "atmospheric conditions" is used to refer to the concentration of respirable dust. Therefore, the airborne dust to be measured is respirable dust. Section 202(e) defines respirable dust as the dust measured by an approved sampler unit.

2. Time Period to Which the Measurement Applies

Section 202(b)(2) provides that each mine operator " * * * shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner * * * is exposed" at or below the applicable standard. In section 202(f) "average concentration" is defined as an atmospheric condition measured "over a single shift only, unless * * * such single shift measurement will not, after applying valid statistical techniques, accurately represent such atmospheric conditions during such shift." For the purpose of this notice, the Secretaries have determined that "atmospheric conditions" mean the fluctuating concentration of respirable coal mine dust during a single shift. These are the atmospheric conditions to which a sampler unit is exposed. Therefore, the present finding pertains only to the accuracy in representing the average of the fluctuating dust concentration over a single shift.

3. Area Represented by the Measurement

The Mine Act gives the Secretary of Labor the discretion to determine the area to be represented by respirable dust measurements collected over a single shift. As articulated by the United States Court of Appeals for the 10th Circuit in *American Mining Congress (AMC) versus Marshall*, 671 F.2d 1251 (1982), the Secretary of Labor may place the sampler unit in any area or location " * * * reasonably calculated to prevent excessive exposure to respirable dust."

Because the Secretary of Labor intends to prevent excessive exposure by limiting dust concentration at every location in the active workings, the area represented by any respirable dust measurement must be the sampling location.

Some commenters identified the dust concentration to be estimated as either the mean dust concentration over some period greater than an individual shift, the mean dust concentration over some spatially distributed region of the mine, or a "grand mean" consisting of some combination of the above. These comments were based on the false premise that the measurement objective in section 202(f) is something other than the average atmospheric conditions during a single shift at the sampling location. It is true that these mean quantities described by some commenters cannot be accurately estimated using a single, full-shift measurement, but the Secretaries make no claim of doing so, nor are they required to make such considerations.

Some commenters argued that Congress intended that the measurement objective be a long-term average. Specifically, some commenters stated that because coal dust exposure is related to chronic health effects, the exposure limit should be applied to dust concentrations averaged over a miner's lifetime. These commenters identified the measurement objective as being the dust concentration averaged over a long, but unspecified, term and argued that a single, full-shift measurement cannot accurately estimate this long-term average.

If the objective of section 202(b) were to estimate dust concentration averaged over a lifetime of exposure, then the Secretaries would agree that a single, full-shift sample, or even multiple samples collected during a single inspection, would not provide the basis for an accurate measurement. Section 202(b) of the Mine Act, however, does not mention long-term averaging, rather it explicitly requires that the average dust concentration be continuously maintained at or below the applicable standard during *each shift* (emphasis added). Furthermore, in *Consolidation Coal Company versus Secretary of Labor* 8 FMSHRC 890, (1986), aff'd 824 F.2d 1071, (D.C. Cir. 1987), the Commission found that each episode of a miner's overexposure to respirable dust significantly and substantially contributes to the health hazard of contracting chronic bronchitis or coal workers' pneumoconiosis, diseases of a fairly serious nature.

Some commenters submitted evidence that dust concentrations can

vary significantly near the mining face, and that these variations may extend into areas where miners are located. That is, the average dust concentration over a full shift is not identical at every point within a miner's work area. These commenters submitted several bodies of data purporting to show significant discrepancies between simultaneous dust concentration measurements collected within a relatively small distance of one another. Several commenters maintained that the measurement objective is to accurately measure the average concentration within some arbitrary sphere about the head of the miner, and that multiple measurements within this sphere are necessary to obtain an accurate measurement. The Secretaries recognize that dust concentrations in the mine environment can vary from location to location, even within a small area near a miner. As mentioned earlier, the Mine Act does not specify the area that the measurement is supposed to represent, and the sampler unit may therefore be placed in any location reasonably calculated to prevent excessive exposure to respirable dust.

Several commenters suggested that the measurement objective should be a miner's "true exposure" or what the miner actually inhales. The Secretaries do not intend to use a single, full-shift measurement to estimate any miner's "true exposure," because no sampling device can exactly duplicate the particle inhalation and deposition characteristics of a miner at any work rate (these characteristics change with work rate), let alone at the various work rates occurring over the course of a shift. Section 202(a) of the Mine Act, however, refers to "the amount of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed" measured " * * * at such locations * * *" as prescribed by the Secretary of Labor. It is sufficient for the purposes of the Mine Act that the sampler unit accurately represent the amount of respirable dust at such locations only.

Accordingly, the Secretaries define the measurement objective to be the accurate determination of the average atmospheric conditions, or concentration of respirable dust, at a sampling location over a single shift.

B. Accuracy Criterion

A "single shift measurement" means the calculated dust concentration resulting from a valid single, full-shift sample of respirable coal mine dust. In reviewing the various issues raised by commenters, the Agencies found that the term "accurately represent," as used

in section 202(f) in connection with a single shift measurement, was not defined in the Mine Act. Therefore, in their March 12, 1996 notice, the Secretaries proposed to apply an accuracy criterion developed and adopted by NIOSH in judging whether a single, full-shift measurement will "accurately represent" the full-shift atmospheric dust concentration. This criterion requires that measurements come within 25 percent of the corresponding true dust concentration at least 95 percent of the time [1].

One commenter opposed the application of the NIOSH Accuracy Criterion since it ignores environmental variability. For reasons explained above, the Secretaries have restricted the measurement objective to an individual shift and sampling location. Therefore, environmental variability beyond what occurs at the sampling location on a single shift is not relevant to assessing measurement accuracy.

For over 20 years, the NIOSH Accuracy Criterion has been used by NIOSH and others in the occupational health professions to validate sampling and analytical methods. This accuracy criterion was devised as a goal for the development and acceptance of sampling and analytical methods capable of generating reliable exposure data for contaminants at or near the Occupational Safety and Health Administration's (OSHA) permissible exposure limits.

OSHA has frequently employed a version of the NIOSH Accuracy Criterion when issuing new or revised single substance standards. For example, OSHA's benzene standard provides: "[m]onitoring shall be accurate, to a confidence level of 95 percent, to within plus or minus 25 percent for airborne concentrations of benzene" (29 CFR 1910.1028(e)(6)). Similar wording can be found in the OSHA standards for vinyl chloride (29 CFR 1917), arsenic (29 CFR 1918), lead (29 CFR 1925), 1,2-dibromo-3-chloropropane (29 CFR 1044), acrylonitrile (29 CFR 1045), ethylene oxide (29 CFR 1047), and formaldehyde (29 CFR 1048). Note that for vinyl chloride and acrylonitrile, the accuracy criteria for the method is ± 35 percent at 95 percent confidence at the permissible exposure limit.

Some commenters contended that the NIOSH Accuracy Criterion does not conform with international standards recently adopted by the European Committee for Standardization (CEN) [2]. Contrary to these assertions, the NIOSH Accuracy Criterion not only conforms to the CEN criterion but is, in fact, more stringent. The CEN criterion

requires that 95 percent of the measurements fall within ± 30 percent of the true concentration, compared to ± 25 percent under the NIOSH criterion. Consequently, any sampling and analytical method that meets the NIOSH Accuracy Criterion will also meet the CEN criterion.

The NIOSH Accuracy Criterion is relevant and widely recognized and accepted in the occupational health professions. Further, commenters proposed no alternative criteria for accuracy. Accordingly, for purposes of section 202(f) of the Mine Act, the Secretaries consider a single, full-shift measurement to "accurately represent" atmospheric conditions at the sampling location, if the sampling and analytical method used meets the NIOSH Accuracy Criterion.

Several commenters suggested that method accuracy should be determined under actual mining conditions rather than in a laboratory or in a controlled environment. Although the NIOSH Accuracy Criterion does not require field testing, it recognizes that field testing "does provide further test of the method." However, in order to avoid confusing real differences in dust concentration with measurement errors when testing is done in the field, "precautions may have to be taken to ensure that all samplers are exposed to the same concentrations" [1]. Similarly, the CEN criterion for method accuracy specifies that "testing of a procedure shall be carried out under laboratory conditions." To determine, so far as possible, the accuracy of its sampling and analytical method under actual mining conditions, MSHA conducted 22 field tests in an underground coal mine. To provide a valid basis for assessing accuracy, 16 sampler units were exposed to the same dust concentration during each field test using a specially designed portable chamber. The data from these field experiments were used by NIOSH in its "direct approach" to determining whether or not MSHA's method meets the long-established NIOSH Accuracy Criterion. (See section VII.E.2. of this notice).

In response to the March 12, 1996 notice, a commenter claimed that the supplementary information and analyses introduced into the public record by that notice addressed the precision of a single, full-shift measurement rather than its accuracy. According to this commenter, by focusing on precision, important sources of systematic error had been overlooked. The Secretaries agree with the comment that precision is not the same thing as accuracy. The accuracy of a measurement depends on both

precision and bias [1,3]. Precision refers to consistency or repeatability of results, while bias refers to a systematic error that is present in every measurement. Since the NIOSH Accuracy Criterion requires that measurements consistently fall within a specified percentage of the true concentration, the criterion covers both precision and uncorrectable bias.

Since the amount of dust present on a filter capsule used by an MSHA inspector is measured by subtracting the pre-exposure weight from the post-exposure weight determined in the same laboratory, any bias in the weighing process attributable to the laboratory is mathematically canceled out by subtraction. Furthermore, as will be discussed later, a control (i.e., unexposed) filter capsule will be pre- and post-weighed along with the exposed filter capsules. The weight gain of the exposed capsule will be adjusted by the weight gain or loss of the control filter capsule. Therefore, any bias that may be associated with day-to-day changes in laboratory conditions or introduced during storage and handling of the filter capsules is also mathematically canceled out. Moreover, the concentration of respirable dust is effectively defined by section 202(e) of the Mine Act and the implementing regulations in 30 CFR parts 70, 71, and 90 to be whatever is measured with an approved sampler unit after multiplication by the MRE-equivalent conversion factor prescribed by the Secretary of Labor. Therefore, the Secretaries have concluded that the improved sampling and analytical method is statistically unbiased. This means that such measurements contain no systematic error. It should also be noted that since any systematic error would be present in all measurements, measurement bias cannot be reduced by making multiple measurements. Other comments regarding measurement bias are addressed in Appendix A.

For unbiased sampling and analytical methods, a standard statistic—called the *coefficient of variation* (CV)—is used to determine if the method meets the NIOSH Accuracy Criterion. The CV, which is expressed as either a fraction (e.g., 0.05) or a percentage (e.g., 5 percent), quantifies measurement accuracy for an unbiased method. An unbiased method meets the NIOSH Accuracy Criterion if the "true" CV is no more than 0.128 (12.8 percent). However, since it is not possible to determine the true CV with 100-percent confidence, the NIOSH Accuracy Criterion contains the additional requirement that there be 95-percent confidence that measurements by the method will come within 25 percent of

the true concentration 95 percent of the time. Stated in mathematically equivalent terms, an unbiased method meets the NIOSH Accuracy Criterion if there is 95-percent confidence that the true CV is less than or equal to 0.128 (12.8 percent).

C. Validity of the Sampling Process

A single, full-shift measurement of respirable coal mine dust is obtained with an approved sampler unit, which is either worn or carried by the miner directly to and from the sampling location and is operated portal to portal. The unit remains operational during the entire shift or for eight hours, whichever time is less. A portable, battery-powered pump draws dust-laden mine air at a flow rate of 2 liters per minute (L/min) through a 10-mm nylon cyclone, a particle-size selector that removes non-respirable particles from the airstream. Non-respirable particles are particles that tend to be removed from the airstream by the nose and upper respiratory airways. These particles fall to the bottom of the cyclone body called the "grit pot," while smaller, respirable particles (of the size that would normally enter into the lungs) pass through the cyclone, directly into the inlet of the filter cassette. This airstream is directed through the pre-weighed filter leaving the particles deposited on the filter surface. The collection filter is enclosed in an aluminum capsule to prevent leakage of sample air around the filter and the loss of any dust dislodged due to impact. The filter capsule is sealed in a protective plastic enclosure, called a cassette, to prevent contamination. After completion of sampling, the filter cassette is sent to MSHA's Respirable Dust Processing Laboratory in Pittsburgh, Pennsylvania, where it is weighed again to determine the weight gain in milligrams, which is the amount of dust collected on the filter. The concentration of respirable dust, expressed as milligrams per cubic meter (mg/m^3) of air, is determined by dividing the weight gain by the volume of mine air passing through the filter and then multiplying this quantity by a conversion factor (discussed below in Appendix A) prescribed by the Secretary.

Some comments generally addressed the quality and reliability of the equipment used for sampling. Specific concerns were expressed about the quality of filter cassettes and the reliability, due to their age and condition, of sampling pumps used by MSHA inspectors. Other commenters questioned the effect of sampling and work practices on the validity of a sample.

The validity of the sampling process is an important aspect of maintaining accurate measurements. Since passage of the Coal Act, there has been an ongoing effort by MSHA and NIOSH to improve the accuracy and reliability of the entire sampling process. In 1980, MSHA issued new regulations revising sampling, maintenance and calibration procedures in 30 CFR parts 70, 71, and 90. These regulatory provisions were designed to minimize human and mechanical error and ensure that samples collected with approved sampler units in the prescribed manner would accurately represent the full-shift, average atmospheric dust concentration at the location of the sampler unit. These provisions require: (1) Certification of competence of all individuals involved in the sampling process and in maintaining the sampling equipment; (2) calibration of each sampler unit at least every 200 hours; (3) examination, testing, and maintenance of units before each sampling shift to ensure that the units are in proper working order; and (4) checking of sampler units during sampling to ensure that they are operating properly and at the proper flow rate. In addition, significant changes, such as robotic weighing using electronic balances were made in 1984, 1994, and 1995 that improved the reliability of sample weighings at MSHA's Respirable Dust Processing Laboratory. These changes are discussed below in section C.3.

All of these efforts improved the accuracy and reliability of the sampling process since the time of the 1971/1972 proposed and final findings. A discussion follows concerning the three elements which constitute the sampling process: sampler unit performance, collection procedures, and sample processing.

1. Sampler Unit Performance

In accordance with the provisions of section 202(e) of the Mine Act, NIOSH administers a comprehensive certification process under 30 CFR part 74 to approve dust sampler units for use in coal mines. To be approved for use, a sampler unit must meet stringent technical and performance requirements governing the quantity of respirable dust collected and flow rate consistency over an 8-hour period when operated at the prescribed flow rate. NIOSH also conducts annual performance audits of approved sampler units purchased on the open market to determine if the units are being manufactured in accordance with the specifications upon which the approval was issued.

The system of technical and quality assurance checks currently in place is designed to prevent a defective sampler unit from being manufactured and made commercially available to the mining industry or to MSHA. In the event these checks identify a potential problem with the manufacturing process, the system requires immediate action to identify and correct the problem.

In 1992, NIOSH approved the use of new tamper-resistant filter cassettes with features that enhanced the integrity of the sample collected. A backflush valve was incorporated into the outlet of the cassette, preventing reverse airflow through the filter cassette, and an internal flow diverter was added to the filter capsule, reducing the possibility of dust dislodged from the filter surface falling out of the capsule inlet.

Several commenters questioned the quality of the filter cassettes used in the sampling program, expressing concern about whether the cassettes always meet MSHA specifications. These concerns primarily involve filter-to-foil distance and floppiness of the filters, which are manufacturing characteristics not related to part 74 performance requirements. The Secretaries believe that such characteristics have no effect on the accuracy of a single, full-shift measurement because, unlike the part 74 requirements, they would not affect the amount of dust deposition.

Commenters also questioned the condition of sampling pumps used by MSHA inspectors, stating that many of the pumps are 10 to 20 years old and are not maintained as well as they could be. They claimed that the age and condition of these pumps call into question not only whether the sampling equipment could meet part 74 requirements if tested, but also the accuracy of the measurement.

This concern is unwarranted. In 1995, MSHA replaced all pumps in use by inspectors with new constant-flow pumps that incorporate the latest technology in pump design. These pumps provide more consistent flow throughout the sampling period. In addition to using new pumps, MSHA inspectors are required to make a minimum of two flow rate checks to ensure that the sampler unit is operating properly. The sample is voided if the proper flow rate was not being maintained during the final check at the conclusion of the sampling shift. Units found not meeting the requirements of part 74 are immediately repaired, adjusted, or removed from service. Nevertheless, MSHA recognizes that as these pumps age, deterioration of the performance of older pumps could become a concern. However, there is no

evidence that the age of the equipment affects its operational performance if the equipment is maintained as prescribed by 30 CFR parts 70, 71, and 90.

Some commenters suggested that the accuracy of a dust sample may be compromised when a miner is operating equipment, due to vibration from the machinery. The potential effect of vibration on the accuracy of a respirable dust measurement was recognized by NIOSH in 1981. An investigation, supported by NIOSH, was conducted by the Los Alamos National Laboratory which found that vibration has an insignificant effect on sampler performance [4].

2. Sample Collection Procedures

MSHA regulations at 30 CFR parts 70, 71, and 90 prescribe the manner in which mine operators are to take respirable dust samples. The collection procedures are designed to ensure that the samples accurately represent the amount of respirable dust in the mine atmosphere to which miners are exposed on the shift sampled. Samples taken in accordance with these procedures are considered to be valid.

Several commenters questioned the effects of sampling and work practices on the validity of a sample. Instances were cited where the sampling unit was accidentally dropped, with the potential for the sample to become contaminated. Commenters also pointed out that work activities requiring crawling, duck walking, bending, or kneeling could cause the sampling hose to snag. Such activities could also cause the sampling head assembly to be impacted or torn off a person's garment, possibly contaminating the sample. These commenters stated that sampler units are sometimes treated harshly while being worn by miners, mishandled when being transferred from one miner to another, or handled casually at the end of a work shift.

These commenters maintained that it is impossible for MSHA inspectors or mine operators to continuously observe collection of a sample in order to ensure its validity, and that, for this reason, the reliability and accuracy of the sampling equipment, when used under actual mining conditions, is not the same as when tested and certified in a laboratory. Averaging multiple samples would, according to these commenters, provide some "leeway" in the system, by reducing the impact of an aberrant sample.

While MSHA and NIOSH agree that it is not possible to continuously observe the collection of each sample, MSHA inspectors are normally in the general vicinity of the sampling location, and

therefore have knowledge of the specific conditions under which samples are taken. In addition, MSHA inspectors are instructed to ask miners wearing the sampler units whether anything that could affect the validity of the sample had occurred during the shift.

Other commenters expressed concern that, if special dust control measures are in effect during sampling, a single, full-shift measurement may fail to represent atmospheric conditions during shifts when samples are not collected. The Secretaries believe that this concern is beyond the scope of this notice, which, as described in the discussion of measurement objective, deals solely with the accuracy of a measurement in representing atmospheric conditions on the shift being sampled. One commenter recommended that MSHA, NIOSH, or the Bureau of Mines (now a part of NIOSH) should evaluate the need for standardizing the MSHA respirable dust sampling procedures. In fact, the procedures for respirable dust sampling are already standardized under the revised 1980 MSHA regulations codified at 30 CFR parts 70, 71 and 90.

MSHA inspectors will also begin using control filter capsules to eliminate any bias that may be associated with day-to-day changes in laboratory conditions or introduced during storage and handling of the filter capsules. A control filter capsule is an unexposed filter capsule that was pre-weighed on the same day as the filter capsules used during a sampling inspection. These control filter capsules will be carried by the inspector, but will remain plugged and not be exposed to the mine environment.

3. Sample Processing

Sample processing consists of weighing the filter capsules, recording the weight gains, and examining certain samples in order to verify their validity. Sample processing also includes electronic transmission of the results to MSHA's computer center where dust concentrations are computed. The results are then distributed to MSHA enforcement personnel and to mine operators.

(a) *Weighing and recording procedures.* One commenter cited a personal experience in which anomalies were noted in the pre-exposed weights recorded by the dust cassette manufacturer. The commenter was concerned that such anomalies indicated poor quality control in the manufacturer's weighing process, implying that this would cause a significant number of single, full-shift measurements to be inaccurate.

The procedures and analytical equipment used by MSHA to process respirable coal mine dust samples have improved since 1970. From 1970 to 1984, samples were manually weighed using semimicro balances. In 1984, the process was automated with a state-of-the-art robotic system and electronic balances, which increased the precision of sample weight determinations. Weighing precision was further improved in 1994, when both the robotic system and balance were upgraded.

The full benefit of the 1994 improvements of the weighing system for inspector samples was, however, not fully attained until mid-1995, when MSHA implemented two modifications to its procedures for processing inspector samples. One modification involved measuring both the pre- and post-exposed weights to the nearest microgram (0.001 mg) on a balance calibrated using the established procedure within MSHA's laboratory. Prior to mid-1995, filter capsules had been weighed in the manufacturer's laboratory before sampling, and then in MSHA's laboratory after sampling. MSHA is now pre-weighing all such filter capsules in its own laboratory, which will significantly reduce the potential for anomalous pre-exposed weights of filter capsules used by inspectors. To maintain the integrity of these pre-exposed weights, eight percent of all capsules are systematically weighed a second time. If a significant deviation is found, the balance is recalibrated and all filter capsules with questionable weights are reweighed.

The other modification was to discontinue the practice of truncating the recorded weights used in calculating dust concentration. This means that MSHA no longer ignores digits representing hundredths and thousandths of a milligram when processing inspector samples. These modifications improved the overall accuracy of the measurement process.

To eliminate the potential for any bias that may be associated with day-to-day changes in laboratory conditions or introduced during storage and handling of the filter capsules, MSHA will use control filter capsules in its enforcement program. Any change in weight of the control filter capsule will be subtracted from the change in weight of the exposed filter capsule.

(b) *Sample validity checks.* All respirable dust samples collected and submitted as required by 30 CFR parts 70, 71, and 90 are considered valid unless a questionable appearance of the filter capsule or other special circumstances are noted that would

cause MSHA to examine the sample further. Several commenters expressed concern about the potential contamination of samples with "oversize particles." Such contamination, according to one commenter, can result in aberrational weight gains. These commenters noted that current procedures do not systematically ensure that samples collected by MSHA contain no oversize particles. It was recommended that MSHA analyze, for the presence of oversize particles, any dust sample that exceeds the applicable dust standard. Also suggested for such an analysis was any sample with a weight gain significantly different from other samples taken in the same area.

Standard laboratory procedures, involving visual, and microscopic examination as necessary, are used to verify the validity of samples. Samples weighing 1.4 milligrams (mg) or more are examined visually and microscopically, as necessary, for abnormalities such as the presence of large dust particles (which can occur from agglomeration of smaller particles), abnormal discoloration, abnormal dust deposition pattern on the filter, or any apparent contamination by materials other than respirable coal mine dust. Also examined are samples weighing 0.1 mg or less for insufficient dust particle count. Similar checks are also performed in direct response to specific inspector or operator concerns noted on the dust data card to which each sample is attached.

The commenters' concerns about the contamination of samples with oversize particles are based on the assumption that all oversize particles, defined as dust particles greater than 10 micrometers in size, are not respirable and therefore should be totally excluded from any sample taken with an approved sampler unit. In fact, it has long been known that particles greater than 10 micrometers in size can be inhaled, and that some of these particles can reach the alveoli of the lungs [5]. According to the British National Coal Board, "particles as large as 20 microns (i.e. micrometers) mean diameter may be deposited, although most "lung dust" lies in the range below 10 microns diameter" [6]. Furthermore, it is known that, due to the irregular shapes of dust particles, the respirable dust collected by the MRE instrument (the dust sampler used by the British Medical Research Establishment in the epidemiological studies on which the U.S. coal dust standard was based) may include some dust particles as large as 20 micrometers [6]. Moreover, MSHA studies have shown that nearly all

samples taken with approved sampler units, even when operated in the prescribed manner, contain some oversize particles [7]. Since section 202(e) of the Mine Act defines concentration of respirable dust to be that measured by an approved sampler unit, and because the approved sampler unit will collect some oversize particles, the Secretaries do not consider a sample to be "contaminated" because it contains some oversize particles.

The Secretaries recognize that there are occasions when oversize particles can properly be considered a contaminant. For example, an excessive number of such particles could be introduced into the filter capsule if the sampling head assembly is accidentally or deliberately turned upside down or "dumped" (possibly causing some of the contents of the cyclone grit pot to be drawn into the filter capsule), if the pump malfunctions, or if the entire sampler unit is dropped. When MSHA has reason to believe that such contamination has occurred, the suspect sample is examined to verify its validity.

Contrary to the assertions of some commenters, checking for oversize particles is not standard industrial hygiene practice. Nevertheless, MSHA checks any dust sample suspected of containing an excessive number of oversize particles. MSHA's laboratory procedures require any sample exhibiting an excessive weight gain (over 6 mg) or showing evidence of being "dumped" to be examined for the presence of an excessive number of oversize particles. Samples identified by an inspector or mine operator as possibly contaminated are also examined. If this examination indicates that the sample contains an excessive number of oversize particles according to MSHA's established criteria, then that sample is considered to be invalid, and is voided and not used. In fiscal year 1996, only 83 samples or 0.4 percent of the 20,331 inspector samples processed were found to contain an excessive number of oversize particles and thus were not used.

While rough handling of the sampler unit or an accidental mishap could conceivably cause a sample weighing less than 6 mg to become contaminated, as claimed by some commenters, studies show that short-term accidental inclinations of the cyclone will not affect respirable mass measurements made with currently approved sampler units [8]. Sampler units currently used are built to withstand the rigors of the mine environment, and are therefore less susceptible to contamination than suggested by some commenters. In any

event, the Secretaries believe that the validity checks currently in place, as discussed above, will detect such samples.

D. Measurement Uncertainty and Dust Concentration Variability

Overall variability in measurements collected on different shifts and sampling locations results from the combination of errors associated with the measurement of a particular dust concentration and variability in dust concentration. Variability in dust concentration refers to the differing atmospheric conditions experienced on different shifts or at different sampling locations. Measurement uncertainty, on the other hand, refers to the differing measurement results that could arise, at a given sampling location on a given shift, because of potential sampling and analytical errors.

Numerous commenters identified sources of measurement uncertainty and dust concentration variability that they believed should be considered when determining whether or not a measurement accurately represents such atmospheric conditions. Because the measurement objective is to accurately represent the average dust concentration at the sampling location over a single shift, it does not take into consideration dust concentration variability between shifts or locations. Sources of dust concentration variability will not be considered by the Secretaries in determining whether a measurement is accurate. Consequently, the Secretaries have concluded that the only sources of variability relevant to establishing accuracy of a single, full-shift measurement for purposes of section 202(f) of the Mine Act are those related to sampling and analytical error.

1. Sources of Measurement Uncertainty

Filter capsules are weighed prior to sampling. After a single, full-shift sample is collected, the filter capsule is weighed a second time, and the weight gain (g) is obtained by subtracting the pre-exposure weight from the post-exposure weight, which will then be adjusted for the weight gain or loss observed in the control filter capsule. A measurement (x) of the atmospheric condition sampled is then calculated by Equation 1:

$$x = \frac{1.38 \cdot g}{v} \quad (1)$$

where: x is the single, full-shift dust concentration measurement (mg/m³);

1.38 is a constant MRE-equivalent conversion factor;

g is the observed weight gain (mg) after adjustment for the control filter capsule;

v is the estimated total volume of air pumped through the filter during a typical full shift.

The Secretaries recognize that random variability, inherent in any measurement process, may cause x to deviate either above or below the true dust concentration. The difference between x and the true dust concentration is the measurement error, which may be either positive or negative. Measurement uncertainty arises from a combination of potential errors in the process of collecting a sample and potential errors in the process of analyzing the sample. These potential errors introduce a degree of uncertainty when x is used to represent the true dust concentration.

The statistical measure used by the Secretaries to quantify uncertainty in a single, full-shift measurement is the total *sampling and analytical coefficient of variation*, or CV_{total} . CV_{total} quantifies the magnitude of probable sampling and analytical errors and is expressed as

either a fraction (e.g., 0.05) or as a percentage (e.g., 5 percent) of the true concentration. For example, if a single, full-shift measurement (x) is collected in a mine atmosphere with true dust concentration equal to 1.5 mg/m³, and the standard deviation of potential sampling and analytical errors associated with x is equal to 0.075 mg/m³, the uncertainty associated with x would be expressed by the ratio of the standard deviation to the true dust concentration: $CV_{total} = 0.075/1.5 = 5$ percent.

Based on a review of the scientific literature, the Secretaries in their March 12, 1996 notice, identified three sources of uncertainty in a single, full-shift measurement, which together make up CV_{total} :

(1) CV_{weight} —variability attributable to weighing errors or handling associated with exposed and control filter capsules. This covers any variability in the process of weighing the exposed or control filter capsules prior to sampling (pre-weighing), assembling the exposed and control filter cassettes, transporting the filter cassettes to and from the mine,

and weighing the exposed and control filter capsules after sampling (post-weighing).

(2) CV_{pump} —variability in the total volume of air pumped through the filter capsule. This covers variability associated with calibration of the pump rotameter,² variability in adjustment of the flow rate at the beginning of the shift, and variation in the flow rate during sampling. It should be noted that variation in flow rate during sampling was identified as a separate component of variability in MSHA's February 18, 1994, notice. Here, it is included within CV_{pump} .

(3) $CV_{sampler}$ —variability in the fraction of dust trapped on the filter. This is attributable to physical differences among cyclones. This component was introduced in the material submitted into the record in September 1994.

These three components of measurement uncertainty can be combined to form an indirect estimate of CV_{total} by means of the standard propagation of errors formula:

$$CV_{total} = \sqrt{CV_{weight}^2 + CV_{pump}^2 + CV_{sampler}^2} \quad (2)$$

These three components are discussed in greater detail, along with responses to specific comments, in Appendix B.

2. Sources of Dust Concentration Variability

Numerous commenters also raised issues related to sources of dust concentration variability. Some of these commenters maintain that the Secretaries should include in CV_{total} additional components representing the effects of shift-to-shift variability and variability related to location (spatial variability). These comments reflect a misunderstanding of the measurement objective as intended by the Mine Act (see section VII.A. of this notice).

Exposure variability due to job, location, shift, production level, effectiveness of engineering controls, and work practices will be different from mine to mine, and is under the control of the mine operator. The sampler unit is not intended to account for these factors.

(a) *Spatial variability*. Several commenters stated that CV_{total} should account for spatial variability, or the

differences in concentration related to location. The Secretaries agree that dust concentrations vary between locations in a coal mine, even within a relatively small area. However, real variations in concentration between locations, while sometimes substantial, do not contribute to measurement error. As stated earlier, the measurement objective is to accurately measure average atmospheric conditions, or concentration of respirable dust, at a sampling location over a single shift.

(b) *Shift-to-shift variability*. Several commenters stated that CV_{total} should take into account the differences or variations in dust concentration that occur shift to shift. Although the Secretaries agree that dust concentrations vary from shift to shift, the measurement objective is to measure average atmospheric conditions on the specific shift sampled. This result is consistent with the Mine Act, which requires that concentrations of respirable mine dust be maintained at or below the applicable standard during each shift.

3. Other Factors Considered

(a) *Proportion of oversize particles*. Several commenters expressed concern that respirable dust cyclones are handled in a rough manner in normal use and occasionally turned upside down. According to one commenter, this type of handling would cause more large particles to be deposited on the filter in the mine environment than when used in the laboratory. This commenter knew of no data that could be used to evaluate the error associated with such occurrences and recommended that a study be commissioned to measure the proportion of non-respirable particles on the filters after they are weighed to MSHA standards.

After considering this recommendation, the Secretaries have concluded that the available evidence shows that short-term inclinations of the cyclone, as might frequently occur during sampling, will not affect respirable dust measurements made with approved sampler units [8]. The weight of the sampler head assembly makes it extremely unlikely that a

²The rotameter consists of a weight or "float" which is free to move up and down within a vertical tapered tube which is larger at the top than the bottom. Air being drawn through the filter cassette passes through the rotameter, suspending

the "float" within the tube. The pump is "calibrated" by drawing air through a calibration device (usually what is known as a bubble meter) at the desired flow rate and marking the position of the float on the tube. The processes of marking the

position on the tube (laboratory calibration) and adjusting the pump speed in the field so that the float is positioned at the mark are both subject to error.

sampler unit could be turned upside down in normal use. Furthermore, with a field study of the type recommended, variability in the field measurements due to normal handling would be confounded with variability due to real differences in atmospheric conditions. Therefore, the Secretaries believe that such a study would not be useful in establishing variability in measurements due to differences in handling of the sampler unit.

(b) *Anomalous events.* Several commenters asserted that unpredictable, infrequent events, such as a "face blowout" on a longwall (a violent expulsion of coal together with large quantities of coal dust and/or methane gas) or high winds at a surface mine, can cause rapid loading of a filter capsule and thereby distort a measurement to show an excessive dust concentration based on a single, full-shift sample when, they argue, the dust standard had not been exceeded. In fact, if such an occurrence were to cause a measurement above the applicable standard, the dust standard would in fact be violated. No evidence was presented to demonstrate that short-term high exposures can overload a dust sampling filter or cause the sampling device to malfunction. Nor was evidence presented to demonstrate that miners are not also exposed to the same high dust concentrations as the sampler unit when such events occur. The Secretaries conclude that such events are results of the dynamic and ever-changing mine environment—an environment to which the miner is exposed. The sampler unit is designed to measure the atmospheric condition at a specific sampling location over a full shift. If such events occur, the sampler unit will accurately record the atmospheric condition to which it is exposed.

(c) *Conversion factor used in the dust concentration calculation.* Several commenters questioned the 1.38 MRE-conversion factor used in Equation 1. This factor is used to convert a measurement obtained with the type of dust sampler unit currently approved for use in coal mines to an equivalent concentration as measured with an MRE gravimetric dust sampler. The term "MRE instrument" is defined in 30 CFR § 70.2(I). The conversion factor is necessary because the coal mine dust standard was derived from British data collected with an MRE instrument, which collects a larger fraction of coal mine dust than does the approved dust sampling unit [9]. The 1.38 constant has been established by the Secretaries as applying to the currently approved dust

sampler unit described in 30 CFR part 74.

Some commenters contended that variability involved in the data analysis used in establishing the conversion factor should be taken into account in determining CV_{total} . This suggestion demonstrates a misunderstanding of the difference between measurement imprecision and measurement bias. The 1.38 factor applies to every sampler unit currently approved under part 74. Since the same conversion factor is applied to every measurement, any error in the value used would cause a measurement bias but would have no effect on measurement imprecision. Since Congress defined respirable dust in section 202(e) of the Mine Act as whatever is collected by a currently approved sampler unit, a measurement incorporating the 1.38 factor is unbiased by definition. Further discussion is provided in Appendix A on why use of the 1.38 factor does not introduce a bias. Appendix A also addresses comments relating to other aspects of the 1.38 conversion factor; comments regarding the fact that MSHA's sampler unit does not conform to other definitions of respirable dust; and questions concerning the effect of static charge on sampler unit performance.

(d) *Reduced dust standards.* One commenter pointed out that in estimating CV_{total} , MSHA and NIOSH did not take into account any potential errors associated with silica analysis. The commenter argued that since silica analysis is used to establish reduced dust standards, MSHA and NIOSH had failed to demonstrate "accuracy for all samples 'across the range of possible reduced dust standards.'"

This commenter confuses the accuracy of a respirable dust concentration measurement with the accuracy of the procedure used to establish a reduced dust standard. MSHA has a separate program in which silica analysis is used to set the applicable respirable coal mine dust standard, in accordance with section 205 of the Mine Act, when the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz. As shown by Equation 1, no silica analysis is used in a single, full-shift measurement of the respirable dust concentration. Therefore, the Secretaries do not agree with the comment that CV_{total} should include a component representing potential errors in silica analysis.

(e) *Dusty clothing.* Several commenters pointed out that local factors such as dusty clothing could cause concentrations in the immediate vicinity of the sampler unit to be

unrepresentative of a larger area. Dust from a miner's clothing nevertheless represents a potential hazard to the miner. No evidence was presented to demonstrate that miners are not also exposed to dust originating from dusty clothing.

E. Accuracy of a Single, Full-Shift Measurement

1. Quantification of Measurement Uncertainty

Several commenters argued that MSHA underestimated CV_{total} in its February 18, 1994 notice and suggested alternative estimates ranging from 16 to 50 percent. These commenters cited several published studies and submitted five sets of data in support of these higher estimates. Statistical analyses of the data were also submitted.

MSHA and NIOSH reviewed all of the studies referenced by the commenters. The review showed that all of the estimates of measurement variability were from studies carried out prior to improvements mandated by the 1980 MSHA revisions to dust sampling regulations, discussed earlier in "Validity of the Sampling Process." For example, the General Accounting Office (GAO)³ and the National Bureau of Standards (NBS, now the National Institute of Standards and Technology) studies were conducted in 1975. The National Academy of Sciences report, which analyzed the same data as the NBS and GAO reports, was issued in 1980. The review further showed that the measurement variability quantified in these studies included effects of spatial variability—a component of variability the Secretaries deliberately exclude when determining the accuracy of a sampling and analytical method as discussed in section D.2.(a).

Additionally, since past studies frequently relied on combining estimates of variability components obtained from different bodies of data, some of them also suffered from methodological problems related to combining individual sources of uncertainty. For example, in 1984, a NIOSH study identified several conceptual errors in earlier studies that had led to double- or even triple-counting of some variability components [10].

Although all the data and analyses submitted by commenters included effects of spatial variability, one of these data sets, consisting of paired sample results, contained sufficient information to indicate that weighing imprecision

³ Many of the recommendations in the GAO report were later adopted and implemented by MSHA.

was less than what MSHA had assumed in its February 18, 1994 notice. However, without an independent estimate of spatial variability applicable to these samples, it is not mathematically possible to utilize this data set to estimate variability attributable to the sampler unit or the volume of air sampled. A second data set consisted only of differences in dust concentration between paired samples, making it impossible to use it even for evaluating weighing imprecision. The remaining three data sets included effects of shift-to-shift variability, which, like spatial variability, is not relevant to the measurement objective. Therefore, none of these data could be used to estimate overall measurement imprecision. Further details are provided in Appendix C.

One of the commenters particularly questioned the value MSHA used in its February 18, 1994 notice to represent variability in initially setting the pump flow rate. In response to this commenter's suggestion, MSHA conducted a study to verify the magnitude of this variability component. This study simulated flow rate adjustment under realistic operating conditions by including a number of persons checking and adjusting initial flow rate under various working situations [11]. Results showed the coefficient of variation associated with the initial flow rate adjustment to be 3 ± 0.5 percent, which is less than the 5-percent value used by MSHA in the February 1994 notice. In addition, based on a review of published results, the Secretaries have concluded that the component of uncertainty associated with the combined effects of variability in flow rate during sampling and potential errors in calibration is actually less than 3 percent. As explained in Appendix B, these two sources of uncertainty can be combined to estimate CV_{pump} . After reviewing the available data and the comments submitted, the Secretaries have concluded that the best estimate of CV_{pump} is 4.2 percent. Additional details regarding CV_{pump} , along with the Secretaries' responses to comments, are presented in Appendix B.

Intersampler variability, represented by CV_{sampler} , accounts for uncertainty due to physical differences from sampler to sampler. Most of the commenters ignored this source of uncertainty. As explained in Appendix B, the Secretaries have adopted a 5-percent estimate of CV_{sampler} .

To address commenters' concerns that the Agencies had underestimated CV_{total} , MSHA conducted a field study to directly estimate the overall

measurement precision attainable when dust samples are collected with currently approved sampler units and analyzed using state-of-the-art analytical techniques. The study involved simultaneous field measurements of the same coal mine dust cloud using sampling pumps incorporating constant flow technology. Using a specially designed portable dust chamber, 22 tests were conducted at various locations in an underground coal mine. Each test consisted of collecting 16 dust samples simultaneously and at the same location. No adjustments in the flow rate were made beyond what would routinely have been done by an MSHA inspector.

Prior to the field study, two modifications to MSHA's sampling and analytical method had been considered by MSHA and NIOSH: (1) Measuring both the pre-and post-exposure weights to the nearest microgram (μg) on a balance calibrated using the established procedure within MSHA's Respirable Dust Processing Laboratory; and (2) discontinuing the practice of truncating the recorded weights used in calculating the dust concentration. These modifications were incorporated into the design of the field study.

One commenter characterized the field study as being "woefully incomplete" because it was conducted "in a tightly controlled environment * * * not subject to normal environmental variation." While it is true that the samples within each test were not subject to normal environmental variability, this was because the experiment was deliberately designed to avoid confounding spatial variability in dust concentration with measurement error. However, pumps were handled and flow rates were checked in the same manner as during routine sampling. Furthermore, the sampler units were disassembled and reassembled in the normal manner to remove and replace dust cassettes.

Commenters also questioned the value that MSHA used in the February 1994 notice to represent uncertainty due to potential weighing errors. In September 1994, MSHA submitted into the record an analysis based on replicated weighings for 300 unexposed filter capsules, each of which was weighed once by the cassette manufacturer and twice in MSHA's laboratory [12]. An estimate of weighing imprecision derived from this analysis was used by NIOSH in its September 20, 1995 assessment of MSHA's sampling and analytical procedure (discussed in more detail later).

In the March 12, 1996 joint notice, MSHA described the results of an

investigation into repeated weighings of the same capsules made over a 218-day period using MSHA's automatic weighing system. It was noted that after approximately 30 days, filter capsules left exposed and unprotected gained a small amount of weight—an average of $0.8 \mu\text{g}$ (micrograms) per day. Neither NIOSH nor MSHA considered this a problem, since all dust samples are analyzed within 24 hours of receipt and are not left exposed and unprotected. However, more recent data collected to quantify weighing variability between the MSA and MSHA laboratories showed that filter capsules tend to gain a small amount of weight even when stored in plastic cassettes [13]. To check this result, 75 unexposed filter cassettes that had been distributed to MSHA's district offices were recalled and the filter capsules were reweighed. On average, the weight gain was about $40 \mu\text{g}$ over a time period of roughly 150 days. Statistical analyses of these data performed by MSHA and NIOSH confirmed the previous result [13,14]. While the cause has not been established, it is hypothesized that at least some of the observed weight gain may be the result of outgassing from the plastic cassette onto the filter capsule. If uncorrected, any systematic change in weight not due to coal mine dust would introduce a bias in dust concentration measurements.

One commenter had previously stated that the Secretaries were addressing only precision, thereby implying that potential biases were being ignored. To eliminate the potential for any bias due to a spurious gain or loss of filter capsule weight, MSHA will use control filter capsules in its enforcement program. Any change in weight observed for the control filter capsule will be subtracted from the measured change in weight of the exposed filter capsule. Each control filter capsule will be pre-weighed with the other filter capsules, will be stored and transported with the other capsules, and will be on the inspector's person during the day of sampling. This modification to MSHA's inspector sampling and analytical procedure will assure an unbiased estimate of the true weight gain [14].

2. Verification of Method Accuracy

With its field study, MSHA exceeded the usual requirements for determining the accuracy of a sampling and analytical method, as described by NIOSH [1] and the European Community [2]. Both of these require only a laboratory determination of method accuracy. NIOSH's independent analysis of the study data determined, with 95-percent confidence, that the

true CV_{total} for MSHA's sampling and analytical method is less than the target maximum value of 12.8 percent for concentrations ranging from 0.2 mg/m³ to greater than 2 mg/m³ [3]. In other words, NIOSH demonstrated that, with two recommended modifications, MSHA's sampling and analytical method for collecting and processing single, full-shift samples would meet the NIOSH Accuracy Criterion at dust concentrations greater than or equal to 0.2 mg/m³.

NIOSH also applied an indirect approach for assessing the accuracy of MSHA's sampling and analytical method. The indirect approach involved combining independently derived estimates, previously placed into the public record, of intra-laboratory weighing imprecision, pump-related variability, and variability associated with physical differences between individual sampler units. This indirect approach also indicated that MSHA's sampling and analytical method meets the NIOSH Accuracy Criterion at concentrations greater than or equal to 0.2 mg/m³, thereby corroborating the analysis of MSHA's field data.

These NIOSH analyses predate MSHA's more recent data indicating a correctable weight gain bias (discussed above). As explained in Appendices A and B, the use of control filter capsules will eliminate this bias but also affect the precision of a single, full-shift measurement. Consequently, NIOSH reassessed the accuracy of MSHA's sampling and analytical method, taking into account the effect of using a control filter capsule on the measurement process [14]. After accounting for the effects of control filter capsules on both bias and precision, NIOSH concluded, based on both its direct and indirect approaches, that a single, full-shift measurement will meet the NIOSH Accuracy Criterion at dust concentrations greater than or equal to 0.3 mg/m³.

One commenter claimed that the Secretaries "have not addressed the 'accuracy' of a single sample collected from an environment where the concentration is unknown". The purpose of any measurement process is to produce an estimate of an unknown quantity. Since the Secretaries have concluded that MSHA's sampling and analytical method for inspectors meets the NIOSH Accuracy Criterion for true concentrations ranging from 0.3 mg/m³ to greater than 2 mg/m³, it is possible to calculate the range of measurements for which the Accuracy Criterion applies. Since CV_{total} increases at the lower concentrations, it is important to determine the lowest measurement at

which the NIOSH Accuracy Criterion is met. If the true concentration exactly equaled the lowest concentration at which MSHA's sampling and analytical method meets the Accuracy Criterion (i.e., 0.3 mg/m³), no more than 5% of single, full-shift measurements would be expected to exceed 0.36 mg/m³ [14]. Conversely, if a measurement equals or exceeds 0.36 mg/m³, it can be inferred, with at least 95% confidence, that the true dust concentration equals or exceeds 0.3 mg/m³ [14]. Consequently, the Secretaries conclude that MSHA's improved sampling and analytical method satisfies the NIOSH Accuracy Criterion whenever a single, full-shift measurement is at or above 0.36 mg/m³.

As a result of the prior analyses, MSHA's existing inspector sample processing procedures were changed to reflect the modifications that were incorporated into MSHA's field study. MSHA is now pre- and post-weighing inspector samples in the same laboratory, and reporting the pre- and post-exposure weights of inspector samples to the nearest microgram (μ g). As a result of NIOSH's latest analysis, MSHA will now require its inspectors to use control filter capsules during sampling. In addition, MSHA is now using only constant-flow control pumps in the inspector sampling program. MSHA believes that exclusive use of constant-flow pumps, as in the field study, further enhances the quality of the Agency's sampling program.

The Secretaries recognize that future technological improvements in MSHA's sampling and analytical method may reduce CV_{total} below its current value. Also, as additional data are accumulated, updated estimates of CV_{total} may become available. However, so long as the method remains unbiased and CV_{total} remains below 12.8 percent, at a 95-percent confidence level, the sampling and analytical method will continue to meet the NIOSH Accuracy Criterion, and the present finding will continue to be valid.

VIII. Finding

The Secretaries have concluded that sufficient data exist for determining the uncertainty associated with a single, full-shift measurement; rigorous requirements are in place, as specified by 30 CFR parts 70, 71, and 90, to ensure the validity of a respirable coal mine dust sample; and valid statistical techniques were used to determine that MSHA's improved dust sampling and analytical method meets the NIOSH Accuracy Criterion. For these reasons the Secretaries find that a single, full-shift measurement at or above 0.36 mg/m³ will accurately represent

atmospheric conditions to which a miner is exposed during such shift. Therefore, pursuant to section 202(f) and in accordance with section 101 of the Mine Act, the 1972 joint notice of finding is hereby rescinded.

Appendix A—Why Individual Measurements are Unbiased

The accuracy of a measurement depends on both precision and bias [1,3]. Precision refers to consistency or repeatability of results, and bias refers to an error that is equally present in every measurement. Since the amount of dust present on a filter capsule is measured, for MSHA inspector samples, by subtracting the pre-exposure weight from the post-exposure weight observed in the same laboratory, any bias in the weighing process attributable to the laboratory is mathematically canceled out by subtraction. A control filter capsule will be pre- and post-weighted along with the exposed filter capsules. The weight gain of each exposed capsule will be adjusted by subtracting the weight gain or loss of the control filter capsule. Consequently, any bias introduced during storage and handling of the filter capsules is also mathematically canceled out. Therefore, since respirable dust is defined by section 202(e) of the Mine Act to be whatever is measured by an approved sampler unit, the Secretaries have concluded that a single, full-shift measurement made with an approved sampler unit provides an unbiased representation of average dust concentration for the shift and sampling location sampled. Some commenters, however, suggested that MSHA's sampling and analytical method is subject to systematic errors that would have the same effect on all measurements. These comments are addressed in this appendix.

I. The Value of the MRE Conversion Factor

The current U.S. coal mine dust standard is based on studies of British coal miners. In these studies, full-shift dust measurements were made using a sampler employing four horizontal plates which removed the large-sized particles by gravitational settlement (simulating the action of the nose and throat) and collecting on a pre-weighed filter those particles which are normally deposited in the lungs [6]. This instrument, known as the Mining Research Establishment (MRE) sampler, was designed to collect airborne dust according to a collection efficiency curve, developed by the British Medical Research Council (BMRC) to approximate the deposition of inhaled

particles in the lung. Because the MRE instrument was large and cumbersome, other samplers using a 10-mm nylon cyclone were developed for taking samples of respirable dust in U.S. coal mines. However, these cyclone-based samplers collected less dust than the MRE instrument. Therefore, a factor was derived (1.38) to convert measurements obtained with the cyclone-based samplers to measurements obtained with the MRE instrument.

Two commenters noted that the 1.38 conversion factor was derived from a comparison of MRE measurements to measurements obtained using pumps made by two manufacturers [Mine Safety Appliances Co. (MSA) and Unico]. These commenters noted that there was some variability in these comparisons that MSHA and NIOSH did not consider in estimating CV_{total} , and noted that MSHA and NIOSH should therefore make allowances for any error or uncertainty in the conversion factor. It was also noted that the report deriving the conversion factor showed that MSA pumps more closely approximated MRE concentrations than Unico pumps, indicating that the 1.38 conversion factor (derived empirically using both types of pumps) may systematically overestimate the MRE-equivalent dust concentration for MSA samplers specifically. This commenter argued that such potential bias in the conversion factor should be addressed in order to account for the possibility of a systematic error in the conversion.

The study referred by these commenters involved collecting side-by-side samples using MRE and cyclone-based samplers [9]. The data showed that multiplying the cyclone sample concentrations by a constant factor of 1.38 gave values in reasonable agreement with MRE measurements. Consequently, a conversion factor of 1.38 was adopted for use with approved sampler units equipped with the 10-mm nylon cyclone.

Variability in the operating characteristics of individual sampler units is expressed by $CV_{sampler}$. In response to the comment on potential bias, MSHA and NIOSH reviewed the original report recommending the 1.38 MRE conversion factor. This report contained both an empirical determination, using side-by-side comparison data collected in underground coal mines, and a theoretical determination of the conversion factor. Two sets of field data were collected: one set was collected by mine inspectors who visited 200 coal mines across the U.S.; the other set was collected by investigators from MSHA's Pittsburgh laboratory at 24 coal mines.

Linear regression was used to analyze both sets of data, with the slope of the regression line representing the conversion factor. The theoretical determination suggested that the conversion factor should be close to a value of 1.35. Analysis of the district mine inspector data resulted in a conversion factor of 1.38, while analysis of the laboratory investigator data suggested a greater conversion factor of 1.45.

Because the conversion factor derived from the inspector data came closer to the theoretical value, the former U.S. Bureau of Mines' Pittsburgh Technical Support Center (in the Department of Interior) recommended that 1.38 be the value adopted for any approved sampler unit operating at 2.0 L/min and equipped with a 10-mm nylon cyclone. This recommendation was subsequently accepted. The 1.38 conversion factor was not, as implied by the commenters, meant to represent the average value to be used with two different types of sampler unit, one of which is no longer in use. Instead, based largely on the theoretical value, it was meant to represent the appropriate value to be used with any approved sampler unit operating at 2.0 L/min and equipped with a 10-mm nylon cyclone. No data or analyses were submitted to suggest that this conversion factor, which has been accepted and used for over twenty years, should be any other value.

II. Conforming to the ACGIH and ISO Standard

One commenter implied that the respirable dust cyclone specifications used by MSHA result in a different particle collection efficiency curve than that specified by the American Conference of Governmental Industrial Hygienists (ACGIH) and the International Organization for Standardization (ISO) for a respirable dust sampler. Other commenters questioned whether the 2.0 L/min flow rate used by MSHA was appropriate, since a NIOSH study recommended using a 1.7 L/min flow rate when conforming to the recently adopted ACGIH/ISO specifications for collecting respirable particulate mass.

It is true that MSHA's respirable dust cyclone specifications result in a different particle size distribution than that specified by ACGIH and ISO. However, this fact has no bearing on the conversion to a respirable dust concentration as measured by an MRE sampler, which is the basis of the respirable dust standard. The 1.38 factor used to obtain an MRE-equivalent concentration was derived for a cyclone flow rate of 2.0 L/min. If a flow rate of

1.7 L/min were used, then this would correspond to some other factor for converting to an MRE-equivalent dust concentration. Therefore, the particle size distribution obtained at 2.0 L/min governs the relationship derived between an approved respirable coal mine dust sampler and an MRE sampler. The appropriate dust fraction (i.e., the fraction corresponding to the 1.38 conversion factor) is sampled so long as the specified 2.0 L/min flow rate is maintained.

III. Effects of Other Variables

The effects of any other variables on the sampled dust fraction are covered by the 1.38 conversion factor, so long as these effects were present in the data from which the conversion factor was obtained. For example, one commenter expressed concern that nylon cyclones are subject to performance variations due to static charging phenomena. Any systematic effect of static charging on the performance characteristics of the nylon cyclone is implicitly accounted for in the conversion factor, because the same static charging effect would have been present when the comparative measurements were obtained for deriving the relationship between an approved sampler unit and an MRE instrument. Random effects of static charging, i.e., effects that vary from sample to sample, are included in CV_{total} .

Appendix B—Components of CV_{total}

I. Weighing Uncertainty

(a) Derivation of CV_{weight}

The weight of a dust sample is determined by weighing each filter capsule before and after exposure and then determining the weight gain by subtraction. This weight gain is adjusted by subtracting any change in weight observed for the unexposed, control filter capsule. This practice eliminates potential biases due to any possible outgassing of the plastic cassette or other time-related factors but introduces two additional weighings. The weighing process is designed to control potential effects of temperature, humidity, and contamination. However, because the initial and final weighings of both the exposed and the control filter capsules are each still subject to random error, there is some degree of uncertainty in the computed weight of dust collected on the filter.

For both the control and the exposed filter capsule, the error in the weight-gain measurement results from combining two independent weighing errors. For example, suppose that the true pre- and post-exposure weights of

a filter capsule are $W_1=392.275$ mg and $W_2=392.684$ mg, respectively. The true weight gain (G) would then be:

$$G=W_2 - W_1=0.409 \text{ mg.}$$

If, due to weighing errors, pre- and post-exposure weights were measured at $w_1=392.282$ mg and $w_2=392.679$ mg, respectively, then the measured weight gain (g) would be:

$$g=w_2 - w_1=0.397 \text{ mg.}$$

The error (e) in this particular weight-gain measurement, resulting from the combination of a 7 µg error in w_1 and a -5 µg error in w_2 , would then be:

$$e=g - G=(w_2 - w_1) - (W_2 - W_1)=(w_2 - W_2) - (w_1 - W_1) = -5 - 7 = -12 \text{ µg.}^4$$

Imprecision in the true weight gain is expressed by σ_e , the standard deviation of e. When a weight-gain measurement (g) is converted to an MRE-equivalent concentration (in units of mg/m³) based on a 480-minute sample at 2.0 L/min, both the actual weight gain (G) and the weight-gain error (e) are multiplied by the same factor:

$$\frac{1.38}{480 \text{ min} \cdot \frac{2 \text{ liters}}{\text{min}} \cdot \frac{1 \text{ m}^3}{1000 \text{ liters}}} = \frac{1.438}{\text{m}^3}$$

Therefore, the standard deviation of the propagated weighing error component in a single, full-shift

measurement ($x=g/1.438/\text{m}^3$) is $1.438\sigma_e$ mg/m³, assuming no adjustment for weight change in the control filter capsule.

Since a control filter capsule will be used to eliminate potential bias, the weight gain measured for the exposed filter (g) will be adjusted by subtracting the change in weight (which may be positive or negative) observed for the control filter capsule (g'). Therefore, the adjusted measurement of dust concentration is

$$x' = (g - g') \cdot 1.438/\text{m}^3.$$

Any change in weight observed for the control filter capsule is subject to the same measurement imprecision due to random weighing errors, represented by σ_e , as the weight gain measurement for an exposed filter. In addition to the weight-gain error for the exposed filter whose measured weight gain is g, x' will also contain a weight-gain error contributed by the measured change in weight of the control filter capsule (g'). Using a standard propagation-of-errors formula, the imprecision in $g-g'$ is represented by

$$\sqrt{\sigma_e^2 + \sigma_e^2} = \sqrt{2\sigma_e^2} = \sigma_e \sqrt{2}.$$

Therefore, the standard deviation of the propagated weighing error

component in the *adjusted* measurement is $1.438\sigma_e\sqrt{2}$ mg/m³.

To form an estimate of CV_{weight} when control filter capsules are used, the estimated value of $1.438\sigma_e$ is multiplied by $\sqrt{2}$ and expressed as a percentage of the true dust concentration being measured (X):

$$CV_{\text{weight}} = \frac{1.438 \cdot \sigma_e \sqrt{2}}{X} \cdot 100\% \quad (3)$$

Since σ_e is essentially constant with respect to dust concentration, CV_{weight} decreases as the dust concentration increases.

(b) Values Expressing Weight-Gain Uncertainty

Table 1 summarizes six different values of σ_e that have been mentioned during the proceedings related to this notice and two additional values for σ_e derived in this appendix from data introduced during these proceedings. A ninth value for σ_e is derived from newly acquired data being placed into the record along with this notice [14]. The nine values listed in Table 1 are not inconsistent, but as explained below, represent estimates of weight-gain imprecision during different historical periods or under different sample processing procedures.

TABLE 1.—STANDARD DEVIATION OF ERROR IN WEIGHT GAIN

DESCRIPTION	Reference	σ_e (µg)
MSHA's historical estimate of upper bound	59 FR 8356, [15]	97.4
1981 Measurement Assurance Estimate (older technology, truncation of weights)	[16,17]	81
Experiment on 300 unexposed, tamper-resistant filter capsules (pre- and post-weighing in different labs; no truncation).	[12]	29
Inspector samples processed between late 1992 and mid 1995 (truncation of weights; pre- and post-exposure weighing in different labs; adjusted for differences between labs).	Appendix B	51.7
NMA Data (obtained from samples collected by Skyline Coal, Inc.)	Appendix C	76
Value used in NIOSH "indirect approach" (pre- and post-exposure weighing on same day and in the same lab; derived from Kogut [12]).	61 FR 10012, [12]	5.8
MSHA Field Study	[18,3]	9.1
1996 Measurement Assurance Estimate	61 FR 10012, [19]	6.5
1997 field data (75 unexposed capsules)	[14]	8.2

In MSHA's February 1994 notice, $1.438\sigma_e$ (identified as "variability associated with the pre- and post-weighing of the filter capsule") was presented as 0.14 mg/m³, or 7 percent of 2.0 mg/m³, as described in Kogut [15]. It follows that the value of σ_e implicitly assumed in MSHA's February 1994 notice (obtained by dividing 0.14 by 1.438) was 0.0974 mg (97.4 µg). Seven percent of 2.0 mg/m³ had been used by

MSHA from the inception of its dust enforcement program to represent an upper bound on weighing imprecision in a dust concentration measurement.

After publication of the February 1994 notice, several other candidate values for σ_e were placed into the public record. In 1981, based on data collected to implement a measurement assurance program in MSHA's weighing laboratory, σ_e was estimated using a

method developed by the NBS to be 0.0807 mg (80.7 µg) [16]. The published NBS estimate reflected weighing technology in place at the time the article was published (1981), as well as the practice (no longer in effect for MSHA inspector samples) of truncating both the pre- and post-exposure weights

⁴Prior to mid-1995 there were two additional sources of uncertainty in the weight gain recorded for MSHA inspector samples. First, filter capsules were routinely weighed in different laboratories

before and after exposure, subjecting them to interlaboratory variability. Second, the pre- and post-exposure weights were both truncated down to the nearest exact multiple of 0.1 mg, below the

weight actually measured, prior to recording weight gain and calculating dust concentration.

down to an exact multiple of 0.1 mg. This estimate was used to calculate CV_{weight} by Bartley [17], in September 1994.

Some commenters misread or misunderstood the published NBS estimate. One of these commenters claimed that "the only published report of the weighing error in MSHA's laboratory * * * was 0.16 mg of variation, which would convert to a concentration of 0.20 mg/m³ compared to the 0.14 mg/m³ * * * MSHA and NIOSH used." This is incorrect, since the standard deviation of weight-gain errors (including the effect of truncation) is actually identified as 0.0807 mg in the Appendix to Parobeck *et al.* [16]. The 0.16-mg figure quoted by the commenter is presented in that paper as defining a 2-tailed 95-percent confidence limit, for use in establishing process control limits. It is derived by multiplying σ_e by 2.0. As explained above, the published value of $\sigma_e = 0.0807$ mg is multiplied by 1.438 to propagate an MRE-equivalent concentration error of 0.116 mg/m³. Contrary to the commenters' assertion, this is less—not more—than the quantity (0.14 mg/m³) assumed in the February 1994 notice.

In September 1994, a more recent analysis was placed into the public record, based on repeated weighings of 300 unexposed filter capsules, each of which was weighed once in the MSA laboratory and twice in MSHA's laboratory using current equipment [12]. Based on this analysis, σ_e was estimated to be 29 μg for pre- and post-weighings on different days at different laboratories, or 5.8 μg for pre- and post-weighings on the same day within MSHA's laboratory. The 5.8- μg value was used as part of the NIOSH "indirect approach" in its 1995 accuracy assessment [3]. Neither of these two estimates, however, reflects the effects of truncation or of a mean difference of about 12 μg discovered between weighings in the two laboratories. Combining these two additional effects with the 29- μg estimate results in an adjusted estimate of $\sigma_e = 51.7$ μg for weighings made in different laboratories and truncated to a multiple of 0.1 mg. MSHA and NIOSH regard this 51.7- μg value to be the best available estimate of σ_e for inspector samples processed between late 1992, when the current style of (tamper-resistant) cassette was introduced, and mid-1995, when the most recent changes in inspector sample processing were implemented.

Some commenters suggested that the estimates of σ_e , placed into the record in September 1994, did not adequately account for potential errors in the

weighing process as it existed at that time. One of these commenters asserted that truncation error was an additional source of uncertainty that had not been accounted for. As explained above, however, σ_e accounts for uncertainty deriving from both the pre- and post-exposure weighings. Both the 80.7- μg NBS estimate and the 97.4- μg value assumed in the February 1994 notice included the effects of truncating weight measurements to 0.1 mg. Truncation effects are also included in the 51.7- μg estimate.

Some commenters expressed special concern over the accuracy of pre-exposure filter capsule weights as measured by MSA. One commenter expressed "grave concern" with regard to the 12- μg systematic difference in weights found between MSA and MSHA weighings of the same unexposed capsules, as described in MSHA's 1994 analysis [12]. These concerns are moot, at least with respect to MSHA's inspector sampling program, since all inspector samples are now pre- and post-weighed at MSHA's laboratory. Furthermore, any potential bias resulting from differences in laboratory conditions on the days of pre- and post-exposure weighings should be eliminated by the use of control filter capsules. However, contrary to this commenter's interpretation, the analysis submitted to the record in September 1994 resulted in a substantially lower estimate of σ_e than that assumed in the February 1994 notice—even after adjustment for the 12- μg systematic difference observed between weighing laboratories. The 51.7- μg estimate discussed above includes this adjustment.

MSHA and NIOSH also analyzed data submitted by the NMA in connection with these proceedings. An important result of that analysis, described in Appendix C, was an estimate of σ_e equal to 76 $\mu\text{g} \pm 15$ μg .⁵ This estimate is not significantly different, statistically, from either the 97.4- μg value assumed in the February 1994 notice, the 80.7- μg NBS estimate, or the 51.7- μg value estimated for samples collected between late 1992 and mid-1995. Since the NMA data were obtained from samples collected by Skyline Coal, Inc., prior to 1995, the Secretaries believe these data confirm the 51.7- μg value of σ_e applicable to the Skyline samples. The estimate of σ_e obtained from the Skyline data is, however, significantly greater than the value estimated for weight-gain

⁵ To construct a 90-percent confidence interval for σ_e , based on the Skyline data, the 15- μg "standard error of the estimate" must be multiplied by a confidence coefficient of 1.64.

measurements under MSHA's current inspection program. This is explained by the fact that when the Skyline samples were collected, all samples were weighed in different laboratories before and after sampling, and the weights were truncated to 0.1 mg. before calculating the weight gain.

Truncation of weights, and also the practice of pre- and post-weighing samples in different laboratories, were discontinued for inspector samples in mid-1995. Under MSHA's revised procedures for processing inspector samples, filter capsules are weighed both before and after sampling in MSHA's laboratory. Furthermore, the results recorded and used in calculating dust concentrations are expressed to the nearest μg . Therefore, the 5.8- μg estimate of σ_e described above, applying to pre- and post-exposure weighings in the same laboratory using current equipment and no truncation, was used by NIOSH to calculate CV_{weight} as part of the NIOSH "indirect" evaluation of CV_{total} , placed into the public record on March 12, 1996.

Based on the results of MSHA's 1995 field study, σ_e was estimated to be 9.12 μg [18]. In this study, the filter capsules were used to collect respirable coal mine dust samples in an underground mine between pre- and post-exposure weighings in MSHA's laboratory, potentially subjecting them to unknown sources of variability in weight gain not covered by the laboratory estimates. Substituting the estimated value of $\sigma_e = 9.12$ μg into Equation 3 results in a corresponding estimate of CV_{weight} that declines as the sampled dust concentration increases—ranging from 9.3 percent at dust concentrations of 0.2 mg/m³ to less than one percent at concentrations greater than 2.0 mg/m³. This estimate of CV_{weight} applies to the procedure utilizing control filter capsules.

An updated estimate of $\sigma_e = 6.5$ μg was also calculated using the published NBS procedure for filter capsules processed with the current equipment and procedures for inspector samples. This estimate, derived from weighing the same group of 55 unexposed filter capsules 139 times over a 218-day period, was described in material placed into the public record on March 12, 1996 [19]. The 6.5 μg estimate applies to filter capsules pre- and post-weighed robotically on different days within MSHA's laboratory, but it does not reflect any potential effects of removing the capsule from the laboratory and exposing it in the field between weighings.

The estimate of imprecision in measured weight gain derived from the

MSHA's 1995 field study discussed earlier (9.1 μg), falls only slightly above the 6.5 μg laboratory estimate. This suggests that the process of handling and actually exposing the filter capsule in a mine environment does not add appreciably to the imprecision in measured weight gain.

In February 1997, 75 unexposed filter capsules that had been pre-weighed in MSHA's laboratory and distributed to MSHA district offices were recalled and reweighed [13]. After adjusting for variability attributable to the date of initial weighing (i.e., variability that would be eliminated by use of a control filter capsule), these data provide an estimate of σ_e equal to 8.2 μg [14]. This estimate, which is based on weighings separated by a span of about four to five months, corroborates the 9.1 μg estimate obtained from MSHA's 1995 field study.

(c) Negative Weight-Gain Measurements

Some commenters pointed out that MSHA routinely voids samples when the measured pre-exposure weight of a filter capsule is greater than the measured post-exposure weight. According to these commenters, such occurrences reflect an unacceptable degree of inaccuracy in weight-gain measurements. One commenter asserted that such cases are "of particular significance when only one sample is relied upon." This commenter attributed such occurrences solely to errors in the capsule pre-weight and implied that they should not be expected to occur under MSHA's quality assurance program. It was, therefore, implied that negative weight-gain measurements are not consistent with the degree of uncertainty being attributed to weighing error.

Prior to implementation of the 1995 processing modifications, a significant fraction of samples with less than 0.1 mg of true weight gain (i.e., $G < 0.10$ mg) could be expected to exhibit negative weight gains (i.e., $g \leq -0.1$ mg). Contrary to the commenter's implication, however, negative weight-gain measurements do not arise exclusively from positive pre-exposure weighing errors (i.e., $w_1 > W_1$). They can also arise, with equal likelihood, from negative post-exposure weighing errors (i.e., $w_2 < W_2$).

What is required for a negative weight gain ($w_2 < w_1$) is that $e < -G$. Since the true weight gain (G) is always greater than or equal to zero, this means that a negative weight gain is observed when e is sufficiently negative. Under standard assumptions of normally distributed errors, σ_e fully accounts for the probability of such occurrences. Naturally, this probability becomes

smaller as G increases and also as σ_e decreases.

The occasional negative weight-gain measurements that have been observed are consistent with values of estimated for previous processing procedures. Table 2 contains the probability of a negative weight-gain measurement for true weight gains (G) ranging from 0.0 mg to 0.08 mg, assuming $\sigma_e = 51.7$ μg and the previous practice of truncation, which has now been discontinued for inspector samples. Since the purpose here is to evaluate the probability of negative weight gains under MSHA's previous processing procedures, it is also assumed that no control filter capsules are used to adjust weight gains.

TABLE 2.—PROBABILITY OF NEGATIVE WEIGHT-GAIN MEASUREMENT, ASSUMING TRUNCATION AND $\sigma_e=51.7$ μg

True weight gain $G=W_2 - W_1$ (mg)	Estimated probability of negative measurement, %
0.00	12.9
.01	8.4
.02	5.1
.03	2.8
.04	1.5
.05	0.7
.06	.4
.07	.2
.08	.1

NOTE: Tabled probabilities (in percent) were obtained from a simulation of 35,000 weight-gain measurements at each value of G , assuming normally distributed weighing errors and the now discontinued practice of measurement truncation.

One commenter suggested the use of a test based on the frequency of negative weight-gain measurements to check the magnitude of the MSHA/NIOSH estimate of CV_{total} . As proposed by the commenter, the test of CV_{total} would consist of comparing the observed proportion of samples voided due to a negative recorded weight gain to the proportion expected, given CV_{total} equal to the MSHA/NIOSH estimate. If the observed proportion were to exceed the expected proportion, then this would constitute evidence that CV_{total} was being underestimated.

The commenter miscalculated the expected proportion, because he mischaracterized the MSHA/NIOSH estimate of CV_{total} as constant over the continuum of dust concentrations. The MSHA/NIOSH estimate of CV_{total} increases as dust concentrations decrease. This would cause a higher proportion of negative results than what the commenter projected under the MSHA/NIOSH estimate, regardless of

what statistical distribution of dust concentrations is assumed.

The commenter's projection also neglected to take into account the effects of truncating pre- and post-exposure weights to multiples of 0.1 mg. Although this practice has now been discontinued for MSHA inspector samples, it is a factor in the available historical data.

In principle, if the statistical distribution of true dust concentrations were known, the expected proportion of samples voided for negative weight gain could be recalculated to reflect both a variable CV_{total} and, when applicable, truncation of recorded weights. However, under the commenter's proposal, deriving the expected proportion of negative measurements would involve not only CV_{total} , but also an estimate of the distribution of true dust concentrations. Such an estimate would rely on the tenuous assumption that a mixture of dust concentrations in different environments is closely approximated by a lognormal distribution far into the lower tail—i.e., even at concentrations extremely near zero. Furthermore, valid estimation of the lognormal parameters, applicable to dust concentrations near zero, would be complicated by measurement errors, especially those resulting in negative or zero values. Depending on the data used, truncation effects could also confound the analysis.

Before truncation was discontinued, negative weight-gain measurements were caused by various combinations of pre- and post-exposure weighing and truncation error. Since truncation, and especially interlaboratory variability, have now been removed as sources of error in weight-gain measurements for inspector samples, negative weight-gain measurements are expected to occur less frequently than in the past.

(d) Comparing weight gains obtained from paired samples

Some commenters maintained that "although there may be slight differences between how the samples are dried," differences between the weight gain observed in MSHA samples and simultaneous samples collected nearby (and processed at an independent laboratory) indicated a greater degree of weighing uncertainty than what was being assumed. In response to the Secretaries' request for any available data supporting this position, results from paired dust samples were provided by two coal companies.

In comparing measurements obtained from paired samples, there are several important considerations that some

commenters did not take into account. First, if two different sampler units are exposed to identical atmospheres for the same period of time, the difference between weight-gain measurements g_1 and g_2 arises, in part, from two independent weight-gain measurement errors, e_1 and e_2 . If uncertainty due to each of these errors is represented by σ_e , then the difference between g_1 and g_2 has uncertainty due to weighing error equal to $\sigma_e\sqrt{2}$. Consequently, weight gains measured in the same laboratory, on the same day, for different filter capsules exposed to identical atmospheres can be expected to differ by an amount whose standard deviation is $1.41\sigma_e$.

Furthermore, if the two exposed capsules are processed at different laboratories, the difference in weight gains contains an additional error term arising from differences between laboratories. Evidence was presented that this term (σ_σ in the notation of [12]) is far more significant than the intra-lab, intra-day weighing error in MSHA's laboratory. Moreover, the additional uncertainty introduced by use of a third laboratory also depends on unknown weighing imprecision within that laboratory, which may differ from that maintained by MSHA's measurement assurance process. (See Appendix C for analysis of paired sample data submitted by NMA).

However, the most important consideration in comparing weight gains from two different samples is that under real mining conditions, the atmospheres sampled may not be identical—even if the sampler units are located near one another. Differences in atmospheric dust concentrations over relatively small distances have been documented [20]. Such differences would be expected to produce corresponding differences in weight gain that are unrelated to the accuracy of a single, full-shift measurement as defined by the measurement objective explained earlier in this notice.

II. Pump Variability

The component of uncertainty due to variability in the pump, represented by CV_{pump} , consists of potential errors associated with calibration of the pump rotameter, variation in flow rate during sampling, and (for those pumps with rotameters) variability in the initial adjustment of flow rate when sampling is begun. The Secretaries believe that CV_{pump} adequately accounts for all uncertainty identified by commenters as being associated with the volume of air sampled.

In deriving the Values Table published in MSHA's February 1994

notice, MSHA used a value of 5 percent to represent uncertainty associated with initial adjustment of flow rate at the beginning of the shift and another value of 5 percent to represent flow rate variability. The 5-percent value for variability in initial flow rate adjustment was estimated from a laboratory experiment conducted by MSHA in the early 1970s, while the value for flow rate variability was based on the allowable flow rate tolerance specified in 30 CFR part 74. This part requires that the flow rate of all sampling systems not vary by more than ± 5 percent over a full shift with no more than two adjustments. MSHA did not include a separate component of variability for pump rotameter calibration because it was already included in the 5-percent value used to represent flow rate variability.

Based on a review of published results [10], the Secretaries concluded that the component of uncertainty associated with the combined effects of variability in flow rate during sampling and potential errors in calibration is less than 3 percent. Therefore, as proposed in the March 12, 1996 notice, the Secretaries are now estimating uncertainty due to variability in flow rate to be 3 percent.

Because MSHA could not provide the experimental data supporting the 5-percent value used to represent uncertainty associated with the initial adjustment of flow rate, one commenter recommended that MSHA conduct a new experiment. In response to that request, MSHA conducted a study to establish the variability associated with the initial flow rate adjustment. The study, placed into the public record on September 9, 1994, attempted to emulate realistic operating conditions by including a variety of sampling personnel making adjustments under various conditions. Results showed the coefficient of variation associated with the initial adjustment to be 3 ± 0.5 percent [11]. The Secretaries consider this study to provide the best available estimate for uncertainty associated with the initial adjustment of a sampler unit's flow rate. Therefore, as proposed in the March 12, 1996 notice, the Secretaries are now estimating uncertainty due to variability in the initial adjustment to be 3 percent.

One commenter expressed concern regarding how representative MSHA's study on initial flow rate adjustment was of actual sampling conditions. The Secretaries consider the conditions under which the study was conducted to have adequately mimicked conditions under which the flow rate of a coal mine dust sampling system is adjusted. This

was more rigorous than the original study, from which MSHA estimated the 5-percent value assumed in the February 12, 1994 notice. The tests were conducted in an underground mine, using both experienced and inexperienced persons to make the adjustments. Also, the only illumination was supplied by cap lamps worn by the person making the adjustments. Tests were conducted for adjustments made in three different physical positions: standing, kneeling and prone. Inspection personnel participating in the study provided guidance as to the methods typically used by inspection personnel in adjusting pumps. In fact, environmental conditions under which the test was conducted were generally more severe than those normally encountered by inspection personnel, since initial adjustment of the pumps normally occurs on the surface just before the work shift begins.

The same commenter also questioned why only the variability associated with initial adjustment of the flow rate was estimated and not the variability associated with subsequent adjustments during the shift. This is because the variability associated with the subsequent flow rate adjustments of an approved sampler unit is already included in the 3-percent value estimated for variability in flow rate over the duration of the shift.

Since variability in the initial flow rate adjustment is independent of calibration of the pump rotameter and variability in flow rate during sampling, these two sources of uncertainty can be combined through the standard propagation of errors formula:

$$CV_{\text{pump}} = \sqrt{(3\%)^2 + (3\%)^2} = 4.2\%$$

This estimate accords well with a more recent finding based on 186 measurements in an underground mine, using constant flow-control pumps [18]. That study estimated $CV_{\text{pump}} = 4.0$ percent and concluded that CV_{pump} was unlikely to exceed 4.4 percent.

Three commenters stated that there are reports of sampling pumps being calibrated and used at altitudes differing by as much as 3000 feet and that, for many pumps, this could result in more than a 3-percent change in flow rate per 1000 feet of altitude. MSHA recognized this as a potential problem as early as 1975. As a result, MSHA conducted a study to ascertain the effect of altitude on coal mine dust sampler calibration [21]. The study showed that both pump performance and rotameter calibration were affected by changes in altitude but that an approved MSA sampling system, calibrated and adjusted at an altitude of

800 feet to a flow rate of 2.0 L/min, would meet the requirement of 30 CFR 74.3(11) when sampling at an altitude of 10,000 feet, even if no adjustment were made to the pump. The study also provided equations for adjusting the calibration mark on the pump rotameter so that, when sampling at an altitude different from the one at which the rotameter was calibrated, the appropriate flow rate would be obtained. These procedures are used by MSHA inspectors in instances where the sampling altitude is significantly different from the altitude where the sampling system is calibrated.

Some commenters questioned the ability of the older MSA Model G pumps to meet the same flow rate specifications as new pumps. MSHA has discontinued the use of these older pumps in its sampling program and will be using only flow-control pumps. More recent MSHA studies show that these pumps continue to meet the flow rate requirement of 30 CFR 74.3(11) at altitudes up to 10,000 feet [22]. As a result, the flow-control pumps currently used by inspectors can be calibrated at one altitude and used at another altitude with no additional adjustments made to the pumps. Furthermore, all sampler units used to measure respirable dust concentrations in coal mine environments are required to be approved in accordance with the regulatory requirements of 30 CFR part 74, which require flow rate consistency to be within ± 0.1 L/min of the 2.0 L/min flow rate.⁶ MSHA's experience over the past 20 years has demonstrated that flow rate consistency of older sampling systems will continue to meet the requirements specified in part 74, provided the systems are regularly calibrated and maintained in approved condition. To ensure that sampling systems continue to meet the specification of part 74, MSHA's policy requires calibration and maintenance by specially trained personnel in accordance with MSHA Informational Report No. 1121 (revised).

III. Intersampler Variability

Intersampler variability, represented by CV_{sampler} , accounts for uncertainty due to physical variations from sampler to sampler. Most of the commenters ignored this source of uncertainty. One commenter, however, stated that 10-mm

nylon cyclones are subject to performance variations due to static charging phenomena (discussed in Appendix A).

Intersampler variability was investigated by Bowman *et al.* [10], Bartley *et al.* [17], and Kogut *et al.* [18]. Bowman *et al.* designed a precision experiment to determine the contribution to CV_{total} from differences between individual coal mine dust sampler units. Based on their experiment, they reported $CV_{\text{sampler}} = 1.6$ percent, which included variation in both the 10-mm nylon cyclone and the MSA Model G pump. They concluded that this low degree of component variability indicates there is excellent uniformity in the mechanical components of dust sampler units. Bartley, from his experimental investigation of eight 10-mm nylon cyclones, estimated CV_{sampler} to be no more than 5 percent for aerosols with a size distribution typical of those found in coal mine environments. Based on an analysis involving 32 different sampler units, Kogut *et al.* found that CV_{sampler} was unlikely to exceed 3.1 percent. Unlike Bartley's study, however, this analysis relied on new cyclones, which might be expected to exhibit less variability than older, heavily used cyclones. Therefore, NIOSH used the more conservative estimate of 5 percent, with an upper 95-percent confidence limit of 9 percent, in its "indirect approach" for estimating CV_{total} and evaluating method accuracy [3].

Appendix C—Data Submitted by Commenters

During the public hearings, several commenters indicated they had data showing that MSHA and NIOSH had underestimated the overall magnitude of uncertainty associated with a single, full-shift measurement. These data and accompanying analyses were submitted to the record and evaluated by MSHA and NIOSH. Some of the data sets consisted of paired samples, where two approved sampler units were placed nearby one another and operated for a full shift. One of the resulting samples was analyzed in MSHA's laboratory and the other by an independent laboratory. These data were represented as showing that single, full-shift measurements cannot accurately be used to estimate dust concentrations. Other data sets submitted consisted of unpaired measurements collected from miners at intervals over varying spans of time. These data sets were represented as showing that exposures vary widely between shifts and between occupations.

I. Paired Sample Data Submitted by the NMA

The American Mining Congress and National Coal Association [AMC and NCA have since merged into the National Mining Association, (NMA)] submitted at the request of MSHA and NIOSH a data set consisting of 381 pairs of exposure measurements. These measurements had been obtained from the "designated occupations" on two longwall and six continuous mining sections belonging to Skyline Coal, Inc. Two sampling units were placed on each participating miner and operated for the full shift. After sampling, one sample cassette was sent to MSHA for analysis while the other was analyzed at a private laboratory. All samples were reported to be "portal to portal" samples as required by MSHA regulations. Using these data, the NMA estimated an overall CV of 16 percent. Based on this 16-percent estimate, the NMA suggested that MSHA had underestimated measurement uncertainty in its February 1994 notice by 60 percent at dust concentrations of 2.0 mg/m³.

The NMA estimate of 16 percent for overall CV includes not only sampling and analytical error, but also variability arising from two additional sources: (1) Spatial variability between the locations where the two samples were collected; and (2) interlaboratory variability introduced by the fact that a third laboratory was involved in weighing exposed filter capsules.

Since the two dust samples within each pair submitted were not collected at precisely the same location, differences observed between paired samples in the Skyline data are partly due to spatial variability. The Secretaries fully recognize and acknowledge that, as suggested by the Skyline data, spatial variability in mine dust concentrations can exist, even within a relatively small area such as the so-called breathing zone of a miner. Consistent with general industrial hygiene practice, however, the Secretaries do not consider such variability relevant to the accuracy of an individual dust concentration measurement.

The NMA expressed sampling and analytical error as a single percentage relative to the average of all dust concentrations that happened to be observed in the data analyzed. Contrary to the NMA analysis, sampling and analytical error cannot be expressed as a constant percentage of the true dust concentration. Because σ_e is constant with respect to dust concentration, CV_{weight} declines with increasing dust concentration, as explained in

⁶Section 74.3(13) requires that flow rate in an approved sampler unit deviate from 2.0 L/min by no more than 5 percent over an 8-hour period, with no more than 2 readjustments after the initial setting. However, this is a maximum deviation, and the uncertainty associated with pump flow rate, as quantified by its coefficient of variation, is 3 percent.

Appendix B. The value of CV_{total} assumed by MSHA and NIOSH for the period when the Skyline samples were collected is approximately 7.5 percent when the true dust concentration (μ) is 2.0 mg/m^3 and approximately 16.2 percent when $\mu = 0.5 \text{ mg/m}^3$. This is based on applying Equations 2 and 3 to $\sigma_e = 51.7 \text{ } \mu\text{g}$, $CV_{pump} = 4.2$ percent, and $CV_{sampler} = 5$ percent.

Even if the effects of spatial variability and the third laboratory are ignored, and the overall CV is interpreted as an average over the range of concentrations encountered, the 16-percent value reported by the NMA makes no allowance for the paired covariance structure of the data. Therefore, MSHA and NIOSH consider the 16-percent value to be erroneous, even under NMA's assumptions.

MSHA and NIOSH re-analyzed the Skyline data in order to check whether these data were consistent with the value of σ_e (i.e., $51.7 \text{ } \mu\text{g}$) estimated for the time when the Skyline samples were collected. To distinguish the NMA interpretation of sampling and analytical error (including spatial variability) from the Secretaries' interpretation (excluding spatial variability), SAE will denote sampling and analytical error according to the Secretaries' interpretation, and SAE* will denote sampling and analytical error according to the NMA interpretation. If $CV_{spatial}$ denotes the component of SAE* attributable to spatial variability for each measurement, it follows that $SAE^* = (CV^2_{total} + CV^2_{spatial})^{1/2}$.

To estimate SAE* as a function of dust concentration from the data provided, a least-squares regression analysis was performed on the square of the difference between natural logarithms of dust concentrations x_1 and x_2 observed within each pair. Let μ^* denote the true mean dust concentration, not only over the full shift sampled, but also over the two locations sampled. The expected value ($E\{\bullet\}$) of each squared difference forms the ordinate of the regression line at each value of the abscissa $(1/\mu^*)^2$:

$$\begin{aligned} E\{(\text{Ln}(X_1) - \text{Ln}(X_2))^2\} &\approx 2(SAE^*)^2 \\ &= 2(CV^2_{total} + CV^2_{spatial}) \\ &= 2[CV^2_{pump} + CV^2_{sampler} + CV^2_{weight} + CV^2_{spatial}] \\ &= 2(CV^2_{pump} + CV^2_{sampler} + CV^2_{spatial}) + \\ &2(1.438\sigma_e/\mu^*)^2 \\ &= a_0 + a_1(1/\mu^*)^2 \end{aligned}$$

Since no control filter capsules were used in processing the Skyline dust samples, CV_{weight} does not, in this analysis, contain the $\sqrt{2}$ factor shown in Equation 3 of Appendix B. The intercept of the regression line is $a_0 = 2(CV^2_{pump} + CV^2_{sampler} + CV^2_{spatial})$,

and the slope is $a_1 = 2(1.438\sigma_e)^2$. To carry out the regression analysis, μ^* was approximated by $(x_1 + x_2)/2$. Regression estimates of the parameters a_0 and a_1 were used to generate corresponding estimates of σ_e and $CV^2_{spatial}$.

The least squares estimate of σ_e obtained from this analysis is $76.0 \text{ } \mu\text{g}$, with standard error of $\pm 15 \text{ } \mu\text{g}$. This is not significantly different, statistically, from the $51.7\text{-}\mu\text{g}$ value estimated for the time period when the Skyline samples were collected. Assuming $CV_{pump} = 4.2$ percent and $CV_{sampler} = 5$ percent, the value of $CV_{spatial}$ obtained from the least squares estimate of a_0 is 19.7 percent, with standard error of ± 2.9 percent.

II. Paired Sample Data Submitted by Mountain Coal Company

Mountain Coal Company submitted a data set consisting of the difference (expressed in mg/m^3) between paired samples collected from miners over roughly a one-year period. Two sampler units were placed on each participating miner (presumably one on each collar or shoulder) and operated for roughly a full shift. One sample cassette was sent to MSHA for analysis (post-weighing) while the other was analyzed at a private laboratory.

Mountain Coal Company provided only the differences between measurements within each pair and not the concentration measurements themselves. Since CV_{total} varies with dust concentration, and the dust concentrations were not provided, it was impossible to form a valid estimate of measurement variability from these data, or to determine what part of the observed differences could be attributed to weighing error and what part to spatial variability or variability attributable to operation of the pump and physical differences between sampler units.

III. Exposure Data Submitted by Jim Walter Resources, Inc.

Jim Walter Resources, Inc. submitted a data set consisting of exposure measurements collected from all miners working on two longwall sections. Measurements were collected from each miner on five consecutive days. This procedure was repeated during five sampling cycles over a two-year period. During each sample cycle the five measurements for each miner were averaged and compared to the respirable dust standard. According to Jim Walter Resources, Inc., the sampling plan "eliminates the effect of the variability of the environment and minimizes the error due to the coefficient of variation of the pump because *all miners* [original emphasis] are sampled for five shifts,"

and these data "show the variability of the sample pump and of the worker's exposure to respirable dust."

In its submission, Jim Walter Resources, Inc. apparently assumed that the quantity being measured is average dust concentration across a number of shifts, rather than average dust concentration averaged over a single shift at the sampling location. The Secretaries agree that dust concentrations do vary from shift to shift and from job to job, as these data illustrate. This variability, however, is largely under the control of the mine operator and should not be considered when evaluating the accuracy of a single, full-shift measurement.

VII. Exposure Data Submitted by the NMA

The NMA submitted data consisting of recently collected and historical measurements collected from the designated occupations (continuous miner operator for continuous mining sections and either the headgate or tailgate shearer operator for longwall mining sections) for three continuous mining sections and five longwall mining sections. According to the NMA analysis, there is a 17-percent probability that these mines would be cited, even though the long-term average is less than the respirable dust standard.

The NMA failed to recognize that the quantity being measured is dust concentration averaged over a single shift at the sampling location. The Secretaries agree that exposures do vary from shift to shift, as these data illustrate. This variability, however, is largely under the control of the mine operator and should not be considered when evaluating the accuracy of a single, full-shift measurement.

VIII. Sequential Exposure Data Submitted by Jim Walter Resources, Inc.

Jim Walter Resources, Inc. submitted data collected from several longwall faces. For each longwall, seven dust samples were collected, using sampler units placed on the longwall face at least 48" from the tailgate at the MSHA 061 designated location. Pumps were successively turned off in one hour increments, resulting in samples covering progressively longer time periods over the course of the shift, from one to eight hours. This was repeated on a number of days at each longwall.

Many of the samples showed either the same or less weight gain than the previous sample (collected over a shorter time period) within a sequence. In the cover letter and written comments accompanying these data, it was claimed that the weight gains

observed for samples within each sequence should progressively increase, irrespective of variations in air flow and production levels, and that the patterns observed exemplify "the variability of sample results with today's equipment and weighing techniques."

MSHA and NIOSH have concluded that these data cannot be used to estimate or otherwise evaluate measurement accuracy for the following reasons: First, a highly sensitive and accurate sampling device would be expected to produce variable results when exposed to even slightly different environments. Since the samples within each sequence of seven were not collected at exactly the same point, they are subject to spatial variability in dust concentration. It is well known that dust concentrations can vary even within small areas along a longwall face.

Therefore, variability in sample results is attributable not only to measurement errors but also to variations in dust concentration due to spatial variability.

Second, even on a production shift, variations in air flow and production levels over the course of the shift can result in periods within the shift during which the true dust concentration to which a sampler is exposed is low or near zero. If a sampler unit is exposed to a relatively low dust concentration during the final hour in which it is exposed, any difference between that sample and the previous sample will tend to be dominated by spatial variability. In such cases the increase in weight accumulated during the final hour would be statistically insignificant as compared to variability in dust concentration at different locations. Without detailed knowledge of the airflow and production levels as they varied over each shift, it is impossible to determine how many cases of this type would be expected. However, approximately one-half of such samples would be expected to exhibit less weight gain than the previous sample.

Further, because sample weights were truncated to 0.1 mg at the time these data were collected, and because expected weight gains of less than 0.1 mg are not uncommon over a one-hour period, there would be no apparent increase in recorded weight gain in many cases where the two sample results actually differed by a positive amount. Therefore, some unknown number of cases showing no difference in successive weight gains are attributable to truncation effects. Truncation has now been discontinued for samples collected under MSHA's inspection program.

Finally, as has been shown in Appendix B, a certain percentage of negative weight-gain measurements at low dust concentrations is consistent with the weighing imprecision experienced at the time these samples were collected. However, since these data were not collected in a controlled environment, it is impossible to determine what that percentage should be. Because the weight gain for each sample is determined as the difference between two weighings, comparison of weight gains between two samples involves a total of four independent weighing errors. Therefore, variability attributable purely to weighing error in the difference between weight gains in two successive samples is greater (by a factor equal to $\sqrt{2}$) than variability due to weighing error in a single sample. Furthermore samples collected over less than a full shift are subject to more variability due to random fluctuations in pump air flow and cyclone performance than samples collected over a full shift. Both of these considerations increase the likelihood that a sample will exhibit less weight gain than its predecessor, as compared to the likelihood of recording a negative weight gain for a single, full-shift sample.

References

- Kennedy, E.R., T.J. Fischbach, R. Song, P.M. Eller, and S.A. Shulman. *Guidelines for Air Sampling and Analytical Method Development and Evaluation*. U.S. Department of Health and Human Services, Public Health Service, National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication No. 95-117.
- European Standard No. EN 482: *Workplace atmospheres—General requirements for the performance of procedures for the measurement of chemical agents*. European Committee for Standardization (CEN), 1994.
- Wagner, G.R. Letter of October 13, 1995, from Gregory R. Wagner, M.D., National Institute for Occupational Safety and Health, to Ronald J. Schell, Chief, Division of Health, Coal Mine Safety and Health, Mine Safety and Health Administration.
- Gray, D.C. and M.I. Tillery. *Cyclone vibration effects*. Am Ind Hyg Assoc J, 42(9):685-688, 1981.
- Lippmann, M. and R.E. Albert. *The Effect of Particle Size on the Regional Deposition of Inhaled Aerosols in the Human Respiratory Tract*. Am Ind Hyg Assoc J, 30:257-275, 1969.
- Goddard, B., K. Bower, and D. Mitchell. *Control of Harmful Dust in Coal Mines*. National Coal Board, 6-12, 1973.
- Tomb, T.F. Memorandum of August 31, 1981, from Thomas F. Tomb, Chief, Dust Division, Pittsburgh Health Technology Center, MSHA, to William Sutherland, Chief, Division of Health, Coal Mine Safety and Health, MSHA, Subject: *Evaluation of Criterion Used to Select Respirable Coal Mine Dust Samples for Examination for Oversize Particles*.
- Treatftis, H.N. and T.F. Tomb. *Effect of Orientation on Cyclone Penetration Characteristics*. Am Ind Hyg Assoc J, 35(10):598-602, 1974.
- Tomb, T.F., H.N. Treatftis, R.L. Mundell, and P.S. Parobeck. *Comparison of Respirable Dust Concentrations Measured With MRE and Modified Personal Gravimetric Sampling Equipment*. BuMines RI 7772, 1973.
- Bowman, J.D., G.M. Breuer, S.A. Shulman, and D.L. Bartley. *Precision of Coal Mine Dust Sampling*. U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, National Institute for Occupational Safety and Health, NTIS No. PB-85-220-721, 1984.
- Tomb, T.F. Memorandum of September 1, 1994, from Thomas F. Tomb, Chief, Dust Division, Pittsburgh Safety and Health Technology Center, MSHA, to Ronald J. Schell, Chief, Division of Health, Coal Mine Safety and Health, MSHA, Subject: *Determination of the Precision of Setting the Rotameter Ball to a Calibration Mark on Personal Respirable Dust Sampling Pumps*.
- Kogut, J. Letter of May 12, 1994, from Jon Kogut, MSHA, to David Bartley, Division of Physical Sciences and Engineering, NIOSH.
- Parobeck, P., J. Kogut, T. Tomb, and L. Raymond. *Investigation of Weighing Variability Between MSHA and MSA Laboratories*. Internal MSHA Report 1997.
- Wagner, G.R. Letter of May 28, 1997, from Gregory R. Wagner, M.D., Acting Associate Director for Mining, National Institute for Occupational Safety and Health, to Ronald J. Schell, Chief, Division of Health, Coal Mine Safety and Health, MSHA.
- Kogut, J. Memorandum of September 6, 1994, from Jon Kogut, Mathematical Statistician, Denver Safety and Health Technology Center, MSHA, to Ronald J. Schell, Chief, Division of Health, Coal Mine Safety and Health, MSHA, Subject: *Coal Mine Respirable Dust Standard Noncompliance Determinations*.
- Parobeck, P., T. Tomb, H. Ku, and J. Cameron. *Measurement Assurance Program for Weighings of Respirable Coal Mine Dust Samples*. J Qual Tech, 13(3):157-165, 1981.
- Barley, D.L. Letter of September 7, 1994, from David L. Bartley, Research Physicist, Division of Physical Sciences and Engineering, NIOSH, to Ronald J. Schell, Chief, Division of Health, Coal Mine Safety and Health, MSHA.
- Kogut, J., T.F. Tomb, P.S. Parobeck, A.J. Gero, and K.L. Suppers. *Measurement Precision With the Coal Mine Dust Personal Sampler*. Internal MSHA Report, 1995.
- Tomb, T.F. Memorandum of February 16, 1996, from Thomas F. Tomb, Chief, Dust Division, Pittsburgh Safety and Health Technology Center, MSHA, to Ronald J. Schell, Chief, Division of Health, Coal Mine Safety and Health, MSHA, Subject: *Investigation to Determine the Precision of MSHA's Automatic Weighing System for Weighing Respirable Coal Mine Dust Samples*.
- Kissell, F.N. and R.A. Jankowski. *Fixed-Point and Personal Sampling of Respirable Dust for Coal Mine Face Workers*. Paper in

Proceedings of the 6th US Mine Ventilation Symposium. Society of Mining, Metallurgy, and Exploration, Inc (SME), Littleton, CO, 281-186, 1993.

21. Treaftis, H.N., T.F. Tomb, and H.F. Carden. *Effect of altitude on personal respirable dust sampler calibration*. Am Ind Hyg Assoc J, 37(3):133-138, 1976.

22. Gero, A.J., P.S. Parobeck, K.L. Suppers, B.P. Apel, and J.D. Jolson. *The Effect of Altitude, Sample Port Inlet Loading, and Temperature on the Volumetric Flow Rate of the MSA Escort Elf® Constant Flow Rate Pump*. Pres. at Second International Conference on the Health of Miners, Pittsburgh, PA, November 11-13, 1995.

Dated: December 19, 1997.

J. Davitt McAteer,

Assistant Secretary for Mine Safety and Health.

Dated: December 19, 1997.

Linda A. Rosentock,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 97-33934 Filed 12-30-97; 8:45 am]

BILLING CODE 4160-18-P 4510-43-P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Coal Mine Respirable Dust Standard Noncompliance Determinations

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice; final policy.

SUMMARY: This notice announces the Mine Safety and Health Administration's (MSHA) final policy concerning the use of single, full-shift respirable dust measurements to determine noncompliance and issue citations, based on samples collected by MSHA, when the applicable respirable dust standard is exceeded. This notice should be read in conjunction with the notice published elsewhere in today's **Federal Register** jointly by the Department of Labor and the Department of Health and Human Services.

EFFECTIVE DATE: This policy is effective March 2, 1998.

FOR FURTHER INFORMATION CONTACT: Ronald Schell, Chief, Division of Health, Coal Mine Safety and Health; MSHA; 703-235-1358.

SUPPLEMENTARY INFORMATION:

I. About This Notice

This notice provides information about MSHA's new enforcement policy for the use of single, full-shift respirable dust measurements obtained by inspectors to determine noncompliance with the respirable dust standard (applicable standard) under the MSHA

coal mine respirable dust program. A question and answer format has been used to explain the background for the enforcement policy, the reasons for the policy change, and the specific elements of the new policy. In addition, several appendices are attached to and incorporated with this final notice which address technical issues concerning the new enforcement policy.

II. Background Information

A. How Has MSHA Sampled Coal Mines for Noncompliance in the Past?

Prior to October 1975, noncompliance determinations were based on the average of full-shift measurements collected from individual occupations on multiple shifts. MSHA interprets a full shift for underground coal mines to mean the entire shift worked or 8 hours in duration or whichever time period is less (30 CFR 70.201(b)). The need to reduce the Agency's administrative burden attributable to inspector sampling prompted MSHA to revise its underground health inspection procedures and redirect the Agency's enforcement resources away from sampling and toward assessing the effectiveness of mine operators' respirable dust control programs.

Since October 1975, MSHA has determined noncompliance with the applicable standard based on the average of measurements obtained for different occupations during the same shift of a mechanized mining unit (MMU), or on the average of measurements obtained for the same occupation on successive days. The term MMU is defined in 30 CFR 70.2(h) to mean a unit of mining equipment, including hand loading equipment, used for the production of material. MSHA inspectors routinely sample multiple occupations to determine compliance with the applicable standard, assess the effectiveness of mine operators' dust control programs, determine whether excessive levels of quartz dust are present, and verify the designation of the "high risk occupation" (now referred to as the "designated occupation" or "D.O."—the occupation on a working section exposed to the highest respirable dust concentration) to be sampled by mine operators.

Under the sampling procedures in place between 1975 and 1991, MSHA inspectors would collect full-shift measurements from the working environment of the "D.O." and four other occupations, if available, on the first day of sampling each MMU. The mine operator was cited if the average of all measurements obtained during the

same shift exceeded the applicable standard by at least 0.1 milligram of respirable dust per cubic meter of air (mg/m³). If one or more measurements exceeded the applicable standard but the average did not, the Agency's practice was to continue sampling for up to four additional production shifts or days. If the inspector continued sampling after the first day because a previous measurement exceeded the applicable standard, noncompliance determinations were based on either the average of all measurements taken or on the average of measurements taken on any one occupation. Thus, if the average of measurements taken over more than one day on all occupations was less than or equal to the applicable standard, but the average of measurements taken on any one occupation exceeded the value set by MSHA (based on the cumulative concentration for two or more measurements exceeding 10.4 mg/m³, which is equivalent to a 5-measurement average exceeding 2.0 mg/m³), the operator was cited for exceeding the applicable standard.

In some instances, MSHA inspectors sampled for a maximum of five production shifts or days before making a noncompliance determination. However, most citations issued prior to 1991 were based on the average of multiple measurements on different occupations collected during a single shift. To illustrate, MSHA conducted a computer simulation using data from 3,600 MMU inspections conducted between October 1989 and June 1991. This simulation showed that a total of 293 MMUs would have met the criteria to be found in noncompliance with the applicable standard based solely on the average of multiple measurements. Two hundred forty-two of those noncompliance determinations, or 83 percent, met the citation criteria based on sampling results from the first day of MSHA sampling, rather than from multi-day sampling. Only 51 MMUs, or 17 percent, were citable based on the average of measurements collected over multiple shifts or days. These statistics clearly show that the citation criteria were met based not only on the average of measurements taken during several shifts, but also on the average of multiple measurements obtained during the same shift.

B. Why Did MSHA Establish the Coal Mine Respirable Dust Task Group and Initiate the Spot Inspection Program?

In 1991 concerns were raised about the adequacy of MSHA's program to control respirable coal mine dust in underground coal mines. In response to these issues, MSHA established the Coal

Mine Respirable Dust Task Group (Task Group) to comprehensively evaluate the effectiveness of the Agency's respirable dust program.

The Task Group was directed to consider all aspects of the current program, including the role of the individual miner in the sampling program; the feasibility of MSHA conducting all sampling; and the development of new and improved monitoring technology, including technology to continuously monitor the mine environment. Among the issues addressed by the Task Group was the actual dust concentration to which miners are exposed. As a result, the Agency initiated a special respirable dust "spot inspection program" (SIP), designed to provide the Agency with more accurate information on the dust levels to which miners were exposed, through sampling, in the underground coal mine environment.

C. How Was Sampling Accomplished During the SIP?

Because of the large number of mines and MMUs involved and the need to obtain data within a short time frame, sampling during the SIP was limited to a single shift or day, a departure from MSHA's normal sampling procedures. As a result, the Agency determined that if the average of multiple occupation measurements taken on an MMU during any one-day inspection did not exceed the applicable standard, the inspector would review the result of each sample individually. If any individual measurement exceeded the applicable standard by an amount specified by MSHA, a citation would be issued for noncompliance, requiring the mine operator to take immediate corrective action to lower the average dust concentration.

The sampling practice under the SIP was similar to the practice of the Metal/Nonmetal Health Division of MSHA, and the Occupational Safety and Health Administration (OSHA), which use a single, full-shift measurement for noncompliance determinations, and provides for a margin of error to account for uncertainty in the measurement process (sampling and analytical error). This resulted in the issuance of citations using a single, full-shift measurement only when there was a high level of confidence that the applicable standard was actually exceeded.

Thus, during the SIP inspections, MSHA inspectors cited violations of the current 2.0 mg/m³ standard if either the average of five measurements taken on a single shift was greater than or equal to 2.1 mg/m³, or any single, full-shift measurement was greater than or equal

to 2.5 mg/m³. Similar adjustments were made when the 2.0 mg/m³ standard was reduced due to the presence of quartz (crystalline silica) dust in the mine environment.

D. What Did the SIP Show About MSHA's Sampling Policy?

MSHA's review of the SIP inspections showed that 28 percent of 718 MMUs sampled exceeded the applicable standard and would have been citable based on a single, full-shift measurement, but only 12 percent would have been citable using the average of all measurements for the MMU.

Based on the data from the SIP inspections, the Task Group concluded that the Agency practice of determining noncompliance based solely on the average of multiple measurements did not always reveal situations in which miners were overexposed. For example, if the measurements obtained for five different occupations within the same MMU were 4.1, 1.0, 1.0, 2.5, and 1.4 mg/m³, the average concentration would be 2.0 mg/m³ and no enforcement action would be taken, even though the dust measurements for two of these occupations significantly exceeded the applicable standard. While such individual measurements were not cited prior to the SIP, they would clearly demonstrate that some miners were overexposed. MSHA policy prior to the SIP however, required the inspector to return to the mine on the next production day and resume sampling, rather than issue a citation at the time the overexposures were discovered.

E. Why Did MSHA Decide To Permanently Adopt the SIP Procedures?

The SIP inspections revealed instances of overexposure that were masked by the averaging of results across different occupations. This showed that miners would not be adequately protected if noncompliance determinations were based solely on the average of multiple measurements. The process of averaging dilutes a high measurement made at one location with lower measurements made elsewhere. Similarly, averaging a number of full-shift measurements can obscure cases of overexposure.

Additionally, the Task Group recognized that the initial full-shift samples collected by an inspector are likely to show higher dust concentrations than succeeding samples collected on subsequent shifts during the same inspection. MSHA's data showed that the average concentration of all samples taken on the same occupation on the first day of an

inspection was almost twice as high as the average concentration of those taken on the second day. MSHA recognized that sampling on successive days after an inspector first appears could result in measurements that are not representative of dust conditions to which miners are typically exposed. Unrepresentative measurements would arise if mine operators anticipated the continuation of inspector sampling and made adjustments in dust control parameters or production rates to reduce dust levels during the subsequent monitoring. None of this is specifically prohibited by MSHA regulations. As a result of these findings, which indicated that miners were at risk of being overexposed, MSHA decided to permanently adopt use of the single, full-shift measurement inspection policy initiated during the SIP. These procedures were used by MSHA until the issuance of the decision by the Federal Mine Safety and Health Review Commission in the case of *Keystone Coal v. Sec. of Labor*, 16 FMSHRC 6 (Jan. 4, 1994). Since that decision, MSHA has reverted to its previous practice of basing noncompliance determinations on the average of multiple, full-shift measurements. (Please see the notice of joint finding by the Secretary of Labor and the Secretary of Health and Human Services (HHS) published elsewhere in today's **Federal Register** for an explanation of this decision.)

III. Why MSHA Is Revising Its Enforcement Policy

A. What Has Changed To Warrant Revising the Existing Enforcement Policy?

During the public hearings held on the proposed joint finding that a single, full-shift sample is an accurate measurement, during the public meetings held on this enforcement policy notice, and in other comments submitted to the Agency, several commenters questioned why the current program should be altered. The commenters asserted that MSHA's practice of issuing citations based on the average of multiple measurements has been in effect since the 1970s, that technology and equipment associated with sampling remain essentially the same, and that substantial progress had been made in lowering respirable dust levels at U.S. coal mines.

As stated in the final notice of joint finding published elsewhere in today's **Federal Register**, significant improvements have in fact been made in the dust sampling process. Although MSHA agrees that progress has been

made in reducing average dust concentrations, the SIP inspections clearly showed instances of excessive dust concentrations that would have been masked by the procedure of averaging measurements. Specifically, of the 718 SIP MMUs with valid single, full-shift measurements, 203 MMUs had at least one single, full-shift measurement that was citable, while only 88 MMUs met or exceeded the citation threshold based on the average of multiple measurements. This clearly shows that under the procedure of averaging measurements miners would be at risk of being overexposed and MSHA would be unable to require operators to take corrective actions to protect them.

MSHA believes that a single, full-shift measurement is more likely to detect excessive dust concentrations and thus protect miners than a measurement average across multiple occupations on a single shift or across multiple shifts for a single occupation. MSHA's computer simulation which analyzed data from over 3600 MMU inspections conducted between October 1989 and June 1991, showed that 814 MMUs had citable overexposures based on individual samples, but only 298 of these overexposures were citable on the average of measurements made within the MMU. Subsequent to the SIP, between January 1992 and December 1993, MSHA continued making noncompliance determinations on a single, full-shift measurement, and 74 percent or 488 of the 658 MMUs cited by inspectors as having overexposures were found to be out of compliance based on a single, full-shift measurement, requiring mine operators to take appropriate corrective action. This experience clearly demonstrates that citing on a single, full-shift measurement, as opposed to citing on the average of measurements taken over multiple shifts, impacts miners directly, because it requires mine operators to take more prompt corrective action once an overexposure has been identified. This reduces the risk to miners of continued exposure to dust concentrations above the applicable standard on subsequent shifts.

Furthermore, both NIOSH, in its recently issued criteria document, and the Secretary of Labor's Advisory Committee on the Elimination of Pneumoconiosis Among Coal Mine Workers recommended the use of single, full-shift measurements for determining compliance. According to the Committee report, issued in October 1996, the MSHA practice of not issuing citations based on single, full-shift samples "is not protective of miner

health, moreover, it is inconsistent with the stated intent of the Coal Act and the Mine Act, which require that exposure be at or below the exposure limit for each shift."

B. Why Will MSHA No Longer Rely On Averaged Measurements of Dust Concentrations To Determine Noncompliance?

MSHA's current enforcement strategy does not provide the optimal level of possible health protection. Basing noncompliance determinations on the average of different occupational measurements dilutes a measurement of high dust exposure with a lower measurement made at a different occupational location. Likewise, averaging measurements obtained for the same occupation over different shifts does not ensure that the concentration of respirable dust is maintained at or below the applicable standard during each shift. Section 202(b)(2) of the Mine Act clearly requires that dust concentrations be maintained at or below the applicable standard "* * * during each shift to which each miner in the active workings" is exposed.

Some commenters proposed that MSHA continue to average at least five separate measurements prior to making a noncompliance determination. They stated that abandoning this practice would reduce the accuracy of noncompliance determinations. Specifically, these commenters maintain that the average of dust measurements obtained at the same occupational location on different shifts more accurately represents dust exposure to a miner than a single, full-shift measurement. These commenters favored the retention of existing MSHA policy on the grounds that not averaging measurement results would reduce accuracy to unacceptable levels. Other commenters agreed with MSHA that the averaging of multiple samples dilutes measurements of dust concentration and masks specific instances of overexposure. Some of these commenters stated that averaging distorts not only the estimate of dust concentration applicable to individual shifts, but also biases the estimate of exposure levels over a longer term. According to these commenters, this is because dust control measures and work practices affecting dust concentrations are frequently modified in response to the presence of an MSHA inspector over more than a single shift. These commenters argued that the presence of the MSHA inspector causes the mine operator to be more attentive to dust control than normal.

Section 202(b) of the Mine Act requires each mine operator to "continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner is exposed" at or below the applicable standard. The greater the variation in mining conditions from shift to shift, the less likely it is that a multi-shift average will reflect the average dust concentration on any individual shift. For example, during one shift, production may be high and dust concentrations may also be correspondingly high. However, the next shift may experience lower production levels because of equipment breakdowns or because of unusual mining conditions. In addition, when a mine operator knows that the MSHA inspector is present, more attention may be given to ensuring that dust control measures operate effectively, and this may also affect the concentrations of respirable coal mine dust found on that shift. Because of such factors, multi-shift averaging does not improve the accuracy of a noncompliance determination for the sampled shift. Therefore, MSHA is discontinuing its policy of relying on averaged dust concentrations. A more technical discussion of how averaging measurements affects accuracy is given in Appendix A.

C. Why Has MSHA Decided To Base Noncompliance Determinations Solely on a Single, Full-Shift Measurement?

One commenter suggested that the new enforcement strategy proposed in MSHA's February 1994 notice, involving noncompliance determinations based on either a single sample or on the average of multiple samples, placed operators in "double jeopardy" of being cited—that is, it provided for two separate evaluations of whether the applicable standard has been exceeded. This commenter pointed out that this enforcement strategy would reduce the confidence level at which a noncompliance determination could be made.

Under the MSHA policy proposed in the February 1994 notice, measurements made by an MSHA inspector for different occupational locations would have been averaged together, not in order to estimate a hypothetical average concentration, but rather to ascertain whether dust concentration was excessive at any of the sampled locations. If the average of measurements across sampling locations exceeded the applicable standard, then at least one of the sampling locations would almost certainly have been out of compliance on the sampled shift.

Therefore, the commenter was correct in asserting that noncompliance at each sampling location would have been evaluated twice: once using the single measurement specific to that location; and, if that test did not result in a citation, once again using the average of all available measurements.

MSHA had determined that this strategy was necessary to provide the level of health protection to miners required by the Mine Act, and included this strategy in the proposed policy notice to protect against cases of evident noncompliance that would otherwise go uncited. For example, if five occupational measurements of 2.08, 2.28, 2.31, 2.25, and 2.17 mg/m³ were obtained for an MMU on a 2.0 mg/m³ standard, no enforcement action would be taken if noncompliance is determined solely based on a single, full-shift measurement because no individual measurement meets or exceeds the Citation Threshold Value (CTV), defined in section IV.B. of this notice. On the other hand, averaging the measurements results in an average concentration of 2.22 mg/m³, indicating, with high confidence, that the applicable standard was exceeded.

Although MSHA originally proposed using a combination of both strategies for determining noncompliance, various bodies of data show that such hypothetical occurrences are extremely improbable in practice. For example, MSHA's computer simulation discussed earlier in this notice showed that, between October 1, 1989, and June 30, 1991, 298 MMUs would have been found in noncompliance with the applicable standard based on averaging multiple measurements. All 298 MMUs would also have been found in noncompliance using the single, full-shift measurement citation criteria. According to the data from the SIP, only one noncompliance determination would have been missed if all averaging had been discontinued. Similarly, analysis of more recent inspector sampling data for 1995 indicates that miners' health will not be compromised by discontinuing all measurement averaging. In fact, only one additional case of noncompliance would have been identified using averaging in addition to citing on a single, full-shift measurement. Therefore, MSHA will not continue to use this combination of strategies.

As explained in the final notice of joint finding published elsewhere in today's **Federal Register**, MSHA's improved sampling and analytical method performs in accordance with the NIOSH Accuracy Criterion whenever a single, full-shift measurement is at or

above 0.36 mg/m³. The Agency believes that, in accordance with section 202(f) of the Mine Act, this enables MSHA to base noncompliance determinations on a single, full-shift measurement whenever that measurement is at or above 0.36 mg/m³.

IV. The New Enforcement Policy

A. What Is MSHA's New Enforcement Policy?

MSHA will continue its current dust sampling program as it relates to where and how many samples an inspector collects during a sampling shift. Specifically, MSHA will continue to collect multiple occupational samples for each MMU. The criterion for making noncompliance determinations has been revised and, under the new enforcement policy, MSHA will use a control filter capsule to adjust the resulting weight gain obtained on each exposed filter capsule. Noncompliance determinations will be based solely on the results of individual, full-shift samples, and MSHA will issue a citation whenever noncompliance is demonstrated at a high confidence level. The Agency will no longer rely on multi-locational or multi-shift averaging of measurements to determine noncompliance.

The process by which a violation of the applicable standard will be abated by a mine operator will also remain unchanged. MSHA will consider a violation to be abated when samples collected in accordance with 30 CFR 70.201(d) demonstrate that the average dust concentration in the working environment of the cited occupation is at or below the applicable standard.

When a measurement exceeds the applicable standard but is less than the CTV, noncompliance is not demonstrated at a sufficiently high confidence level to warrant a citation. However, MSHA will consider whether to target the MMU or environment for additional dust sampling. See Appendix B for further discussion of why MSHA believes that such measurements indicate probable overexposure.

B. When Will MSHA Issue a Citation for a Violation of the Applicable Standard?

MSHA will issue a citation for noncompliance when a single, full-shift measurement demonstrates, at a high level of confidence, that the applicable standard has been exceeded. Although MSHA will continue to collect multiple occupational samples for each MMU, the Agency will generally issue only one citation for exceeding the applicable standard on a single shift on any one MMU. However, additional citations may be issued when excessive dust

concentrations are detected for occupations exposed to different dust generating sources.

To ensure that citations are issued only when there is a high level of confidence that the applicable standard has been exceeded, MSHA has developed the Citation Threshold Values (CTV) below. Each CTV listed is calculated so that citations are issued only when the single, full-shift measurement demonstrates noncompliance with at least 95 percent confidence. Citing in accordance with the CTV table does not constitute a raising of the applicable standard. Instead, it reflects the need for MSHA to ensure a sufficiently high level of confidence in its noncompliance determinations. Mine operators are still required to implement appropriate controls that will maintain the average concentration of respirable dust at or below the applicable standard on all shifts.

CITATION THRESHOLD VALUES (CTV) FOR CITING VIOLATIONS BASED ON SINGLE, FULL-SHIFT MEASUREMENTS

Applicable standard (mg/m ³)	CTV (mg/m ³)
2.0	2.33
1.9	2.22
1.8	2.11
1.7	2.00
1.6	1.90
1.5	1.79
1.4	1.68
1.3	1.58
1.2	1.47
1.1	1.36
1.0	1.26
0.9	1.15
0.8	1.05
0.7	0.94
0.6	0.84
0.5	0.74
0.4	0.64
0.3	0.53
0.2	0.43

C. How Will the CTV Table Be Applied?

Each single, full-shift measurement used to determine noncompliance will be the MRE-equivalent dust concentration as calculated and recorded under MSHA's dust data processing system. Every valid measurement will be compared with the CTV corresponding to the applicable standard in effect. If any measurement meets or exceeds that value, a citation will be issued. However, no more than one citation will be issued based on single, full-shift measurements from the same MMU, unless separate citations are warranted for occupations exposed to different dust generating sources.

Therefore, when single, full-shift measurements from two or more occupations show dust concentrations in violation of the applicable standard, as illustrated in the examples below, the inspector will determine the dust generation sources and require the operator to sample the environment of the occupation most affected by these sources which is consistent with current practice. In most cases, this will be the working environment of the "D.O." However, if noncompliance is indicated based on measurements from two or more occupations on the same MMU which are exposed to the same dust generating sources, and which do not involve the "D.O.," the occupation with the highest dust concentration will be identified in the citation as the affected working environment. In any case, when an inspector issues a citation for violation of the applicable standard under the new policy, the citation narrative will identify the specific environment or occupation to be sampled by the operator, as well as any other occupation(s) that exceeded the CTV.

Several commenters requested that the application of the CTV table be clarified. The following examples illustrate how inspectors will apply the CTV table and make noncompliance determinations. Suppose that a measurement of 2.41 mg/m³ is obtained for the "D.O.," and measurements of 2.34, 1.54, and 1.26 mg/m³, are obtained for three other occupations exposed to the same dust generating sources as the "D.O." during a single shift on an MMU required to comply with an applicable standard of 2.0 mg/m³. Because at least one of the measurements exceeds the 2.33-mg/m³ CTV (the citation value when the applicable standard is 2.0 mg/m³), a citation will be issued for exceeding the applicable standard on the shift sampled. Even though two individual measurements (2.41 and 2.34 mg/m³) exceeded the CTV, one of which is on the "D.O.," only one citation will be issued, specifying the "D.O." as the affected working environment because all occupations were exposed to the same dust generating sources.

Suppose now that in the previous example the 2.34-mg/m³ measurement was obtained for a roof bolter, and the MMU was ventilated using a double-split ventilation system. This means that the roof bolter, working on a separate split of air from that of the continuous miner, is exposed to a different dust generating source than the "D.O." and, therefore, may not be adequately protected by dust controls implemented for the "D.O." Consequently, two citations would be issued.

As another example, consider an MMU with measurements of 2.14, 1.92, 1.82, 1.25, and 1.12 mg/m³. Although none of these measurements meet the CTV, there is reason to believe that the MMU is out of compliance, since one of the measurements exceeds the applicable standard. However, because there is a small chance that the measurement exceeded the applicable standard because of measurement error, a citation would not be issued. As discussed elsewhere in this notice, additional samples would be necessary to verify the adequacy of the control measures under current operating conditions. Therefore, MSHA would select this MMU for additional sampling. As discussed in Appendix B, even if the first measurement were 1.90 mg/m³ instead of 2.14 mg/m³, because of measurement error this would not demonstrate that the mine atmosphere sampled was in compliance. To confirm that control measures are adequate, MSHA would need to take additional samples.

D. What Is the Potential for a Citation To Be Issued Due To Measurement Error?

Some commenters expressed concern that noncompliance determinations based on single, full-shift measurements would result in an unacceptable number of erroneous citations due to measurement error. These commenters expected that MSHA's new enforcement policy would result in numerous erroneous citations.

Based on the analysis in Appendix C, MSHA has concluded that, because of the large "margin of error" separating each CTV from the corresponding applicable standard, use of the CTV table provides ample protection against erroneous citations. For exceptionally well-controlled environments (e.g., Case 2 of Appendix C), the probability that any given citation is erroneous will be substantially less than 5 percent. This probability is even smaller in environments which are not well controlled (e.g., Case 3 of Appendix C). Therefore, any citation issued in accordance with the CTV table will be much more likely the result of excessive dust concentration rather than measurement error.

E. What Will Happen When the Evidence Is Insufficient To Warrant a Citation?

If the appropriate CTV is not met or exceeded, MSHA will not issue a citation. As discussed earlier, this does not mean that the sampled environment is necessarily in compliance. Although in certain cases there may be

insufficient evidence to demonstrate noncompliance, the measurement may nonetheless indicate a possible overexposure. MSHA intends to focus on cases of measurements above the applicable standard but below the CTV, with special emphasis being directed to working environments required to comply with applicable standards below 2.0 mg/m³.

If follow-up measurements do not warrant a citation but suggest that the dust control measures in use may be inadequate, MSHA may initiate a thorough review of the dust control parameters stipulated in the mine operator's approved ventilation or respirable dust control plan to determine whether the parameters should be upgraded.

V. Consequences of the Use of the CTVs in Conjunction With the Joint MSHA/NIOSH Finding

A. What is the Impact of MSHA's New Enforcement Strategy As Applied Under the MSHA/NIOSH Joint Finding?

The Agency believes that the application of the CTVs in conjunction with the MSHA/NIOSH joint notice of finding published elsewhere in today's **Federal Register** to single, full-shift samples collected by MSHA inspectors provides for more efficient detection of noncompliance by identifying and requiring abatement of individual instances of overexposure which meet the CTVs. While this issue is more appropriately addressed in the MSHA/NIOSH joint notice, the rationale for this conclusion bears repeating here.

The Mine Act is clear in its intent that no miner should be exposed to respirable coal mine dust in excess of the applicable standard on any shift. The effect of the joint finding and the new enforcement strategy set forth here creates incentives for mine operators to control dust exposure on a continuing basis to minimize the chance of being found in noncompliance during any MSHA sampling inspection. To prevent the possibility of any inspector single, full-shift measurement exceeding the CTV and resulting in a violation, mine operators will be more likely to keep dust concentrations at or below the applicable standard, thereby providing better protection to miners from overexposures. This becomes evident upon closer examination of the inspector sampling data from the period when noncompliance determinations were based on single, full-shift measurements.

MSHA reviewed inspector MMU sampling results for FY 1992, the first full year during which noncompliance

determinations were based on single, full-shift measurements, and FY 1993, the last year that the Agency issued citations based on single, full-shift measurements. This review showed a decline in the number of "D.O." and nondesignated occupation samples exceeding 2.0 mg/m³, from 16 percent and 10 percent in FY 1992 to 13 percent and 7 percent, respectively, in FY 1993, suggesting that operators were better able to maintain dust concentrations below the applicable standard. MSHA also conducted a computer simulation using these data which showed that one of every four MMU sampling days in FY 1992 would have been found in noncompliance based on a single, full-shift measurement, compared to one in five MMU sampling days in FY 1993.

Under the previous enforcement strategy, which utilized averaging, inspectors cited violations of the applicable standard on the average of multiple measurements taken on a single shift or on different shifts or days. Consequently, dust concentrations could be excessive for some occupations or work locations, but corrective action would not be required so long as the average of the measurements did not exceed the applicable standard. For example, averaging occupational measurements of 3.2, 2.4, 1.5, 1.3 and 1.0 mg/m³ results in an average concentration of 1.8 mg/m³ for the sampled MMU where the applicable standard is 2.0 mg/m³. Despite the fact that two of the measurements demonstrate noncompliance with a high degree of confidence, corrective action would not have been required because the average concentration was below the applicable standard.

As described in this notice and in conjunction with the MSHA/NIOSH joint notice, under the new enforcement policy, whenever an individual measurement indicates noncompliance (with a high level of confidence), the mine operator will be required to take corrective action to lower the concentration of respirable dust to comply with the applicable standard.

Some commenters expressed concern that MSHA would fail to cite some instances of noncompliance because of the high level of confidence required for a citation. MSHA believes that the new enforcement strategy as applied in conjunction with the finding of the MSHA/NIOSH joint notice will reduce the chances of failing to cite cases of noncompliance as compared to the previous policy of measurement averaging, while at the same time ensuring that noncompliance is cited only when there is a high degree of confidence that the applicable standard

has been exceeded. According to the inspector sampling inspections conducted in 1995, only 132 MMUs were found to be in violation of the applicable standard and cited under the previous enforcement policy of measurement averaging, compared to 545 MMUs that would have been citable under the new enforcement policy in conjunction with the joint notice of finding using single, full-shift measurements. This clearly demonstrates that the new enforcement policy, in conjunction with the joint notice, will not compromise miners' health but would, instead, have identified 413 additional instances of overexposure that would have gone unaddressed under the previous policy of measurement averaging.

Some commenters proposed that miners would be even more protected if noncompliance was cited whenever any single, full-shift measurement exceeded the applicable standard by any amount. That is, it was recommended that MSHA not make any allowance for potential measurement errors. MSHA has considered this recommendation but has not adopted it in the final policy because it could result in citations being issued where compliance with the applicable standard is more likely than not. If the mine environment is sufficiently well controlled, it is more likely that a particular measurement exceeds the applicable standard, but not the CTV, due to measurement error rather than due to excessive dust concentration. Furthermore, the rationale used by these commenters to justify their proposed citation criterion breaks down when, as in the case of multiple samples taken during a given shift in the same MMU, more than one measurement is made for a single noncompliance determination. Appendix D addresses technical details relating to this issue.

Some commenters stated that MSHA's new citation criteria implemented in conjunction with the joint notice will not improve respirable dust levels in the environment, but will simply result in MSHA issuing more citations to mine operators. In these commenters view, this will foster a continuation of the adversarial relationship that developed between mine operators and MSHA over allegations of widespread tampering with respirable dust samples.

MSHA firmly believes that basing noncompliance determinations on a single, full-shift measurement will improve working conditions for miners because it will cause mine operators to either implement and maintain more effective dust controls to minimize the chance of being found in

noncompliance by an MSHA inspector, or take corrective action sooner to lower dust concentrations that are shown, with high confidence, to be in excess of the applicable standard. The effect of this new enforcement policy in conjunction with the MSHA/NIOSH joint notice will be remedial in nature because it will address instances of overexposure that are not addressed under the current policy of measurement averaging. For example, between January 1992 and December 1993, MSHA continued the practice established under the SIP of making noncompliance determinations based on single, full-shift measurements which demonstrated, with high confidence, that the applicable standard was exceeded, and on the average of multiple measurements. During this period, MSHA inspectors issued a total of 658 citations at MMUs. The majority of these citations (488) were issued based on the result of a single, full-shift measurement. Under the existing enforcement policy, such individual instances of noncompliance would not be cited and corrected, but instead would be factored into an average that could be at or below the applicable standard, resulting in no violation and no corrective action taken by the mine operator.

Some commenters also contended that the joint notice of finding, and this notice of policy, are solely for the administrative convenience of MSHA's mine inspectors. The commenters stated that allowing inspectors to make noncompliance determinations on the basis of a single, full-shift measurement will eliminate the need for inspectors to sample on successive days, as is sometimes required under existing policy.

MSHA recognizes that there are administrative advantages related to the adoption of this new enforcement policy and the joint notice of finding. By eliminating the need to sample on subsequent days, the Agency will be able to utilize its resources more efficiently. That is, inspectors will not be required to return to a mine to conduct additional dust sampling, but the Agency will be able to redirect its resources to other safety and health concerns. This result is consistent with the Mine Act's objective of protecting miner safety and health. While administrative convenience may be a side benefit of this new enforcement policy in conjunction with the MSHA/NIOSH joint notice, the primary reason for implementing it is to achieve the intent of Congress that no miner shall be exposed to dust concentrations above the applicable standard on any shift.

B. What is the Impact of the New Policy on Ventilation Plans?

A number of commenters expressed concern that issuing citations on the result of a single, full-shift measurement will cause MSHA to require carefully developed ventilation plans to be modified needlessly as part of the abatement process. These commenters view such frequent revisions as costly, disruptive and unnecessary. They contend that such revisions, if required, would be made on the basis of incomplete or invalid information, and that they would not necessarily decrease a miner's dust exposure. Some commenters believed that some inspectors would mandate specific changes without realistically evaluating their effectiveness, while other inspectors would not allow operators to make their own adjustments to the plans, or provide an opportunity for them to evaluate the changes in a rational manner.

When a citation is issued based on a single measurement, this can indicate that the control measures in use may no longer be adequate to maintain the environment within the applicable standard. MSHA will consequently review the adequacy of the ventilation plan under the current operating conditions, and will consider the results of operator bimonthly sampling as well as operator compliance with the approved ventilation plan parameters. Under this approach MSHA would require plan revisions only after an examination of all factors has demonstrated that changes are necessary to protect miner health. This enforcement strategy should minimize unnecessary changes to plans that have been determined to provide adequate controls.

MSHA believes that the primary focus of the federal dust program is to minimize miners' overexposures to respirable dust through the application of appropriate environmental controls, which are stipulated in the operator's approved mine ventilation plan. After these controls are evaluated and shown to be effective under typical mining conditions, if properly maintained, they should provide reasonable assurance that no miner will be overexposed. Therefore, one of the objectives of MSHA's dust sampling is to verify that the controls stipulated in ventilation plans continue to adequately control dust concentrations under existing operating conditions. In conjunction with these sampling and other inspections an inspector checks and measures the dust control parameters early in the shift to determine whether

the approved ventilation plan is being followed. A mine operator's failure to follow the parameters stipulated in the plan will result in the issuance of a citation, which requires immediate corrective action to abate the violation. The type of corrective actions taken to abate plan violations can vary from unplugging clogged water sprays to increasing the amount of ventilating air delivered to the MMU. However, mere correction of these deficiencies to ensure that the "status quo" of the plan is being maintained may not always be effective in controlling miners' exposure to respirable dust. The required plan parameters may no longer be effective in maintaining compliance, and may need to be upgraded. The determination of how the plan should be revised is complicated by the fact that, generally, most approved plans do not incorporate all the control measures that were in place when MSHA sampled. Consequently, most plan revisions have simply incorporated into the plan only those dust controls that were in use when MSHA sampled, rather than requiring significant upgrading of the plan. As an example, an MSHA inspector might require an increase in the water pressure stipulated in the plan from 75 pounds per square inch (psi) to 125 psi to reflect the 125 psi that the MSHA inspector actually measured. If, instead, the operator was required to significantly increase the quantity of air being delivered to the MMU, this would be considered a major upgrade. MSHA recognizes that a determination of noncompliance should not automatically necessitate the revision of a plan. Instead, it should result in a thorough review of the plan's continued adequacy.

When an operator of an underground mine is cited for excessive dust, 30 CFR 70.201(d) requires the operator to "take corrective action to lower the concentration of respirable dust to within the permissible concentration." When the citation is based on MSHA samples, the inspector may request that the operator describe what type of corrective action will be taken. The inspector then determines if the corrective action is appropriate. If it is not appropriate in the specific situation, the inspector may either suggest or require other corrective action or control measures. Operators are provided with the opportunity to make adjustments to their dust controls and to evaluate their effectiveness in a rational manner during the time for abatement set by the inspector, which is based on the complexity of the problem, availability of controls, and the types of changes the

operator intends to make. This abatement time may be extended by the inspector based on the operator's performance in reducing the dust concentration in the affected area of the mine. Typically, the operator then demonstrates, through sampling, that the underlying condition or conditions causing the violation have been corrected. Failure to take corrective action prior to sampling that shows continuing noncompliance may lead to the issuance of a withdrawal order. However, this occurs infrequently.

C. Will the New Enforcement Policy Increase Citations on Individual Shifts, Even if the So-Called "Average Concentration Over the Longer Term" Meets the Standard?

Some commenters claimed that even when the average dust concentration is well below the applicable standard, normal variability from shift to shift results in a substantial fraction of shifts for which the dust standard is exceeded. According to these commenters, a determination of noncompliance is warranted only if the average dust concentration to which a miner is exposed exceeds the standard over a period of time greater than a single shift, such as a bimonthly sampling period, a year, or a miner's working lifetime. Therefore, they consider it "unfair" to cite operators for exceeding the applicable standard on individual shifts, so long as the average over the longer term meets the applicable standard. For example, based on historical sampling data provided by one commenter, the commenter concluded that, "* * * there is at least a 1 in 6 or 17% probability that any single sample can show potential overexposure when one does not exist." These commenters contend that use of the CTV to determine noncompliance, based on one sample collected on a single shift, will substantially increase the frequency of "unfair" citations, compared to existing MSHA policy.

MSHA believes that such comments reflect a misunderstanding of both the requirements of the Mine Act and MSHA's longstanding policy with respect to single, full-shift noncompliance determinations. It should be recognized that MSHA has been basing noncompliance determinations on the average of multiple occupation measurements obtained on the same shift since 1975. In addition, some of the commenters confused the average dust concentration over the course of an individual shift with the average dust concentration over some longer term. The joint notice of finding issued by the Secretaries of

Labor and HHS addresses this issue. Since the Mine Act requires that dust concentration be kept continuously at or below the applicable standard on every shift, it is appropriate to cite noncompliance when any single, full-shift measurement at a particular location demonstrates, with high confidence, that the applicable standard has been exceeded on an individual shift.

Section 201(b) of the Mine Act mandates that MSHA ensure "to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations * * * to permit each miner the opportunity to work underground during the entire period of his adult life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such a period." Since neither past nor future exposure levels can be assumed for any miner, MSHA's enforcement strategy must be to limit the exposure on every shift as intended by the Mine Act.

D. Will There Be Any Changes in Operator Bimonthly Sampling?

Several commenters were unclear about the impact of the joint MSHA/NIOSH finding and this policy on operator sampling for compliance and for abatement of violations. One commenter suggested that 30 CFR 70.207(a) be revised to allow the operator to submit one single, full-shift sample, instead of five samples every bimonthly period as currently required. Another commenter suggested that MSHA assume responsibility for dust sampling from the mine operators.

MSHA has previously noted that the change in its enforcement policy announced through this final notice affects only how it will determine noncompliance based on measurements obtained by MSHA inspectors. There will be no change in how MSHA evaluates operator-collected respirable dust samples for compliance. Under the regulations currently in effect, the Agency will continue to average operator samples taken on multiple shifts or days to make noncompliance determinations. MSHA is committed to revising procedures with respect to operator-collected respirable dust samples through the rulemaking process for consistency with this final finding.

Several commenters expressed concerns about the credibility of the operator sampling program because of alleged operator tampering with respirable dust samples and alleged operator manipulation of mine

conditions during dust sampling periods. As a result, these commenters felt that mine operators should no longer have responsibility for sampling because their sampling results are unreliable. Another commenter expressed support for the Agency to compel coal mine operators to comply with existing dust standards. Another commenter voiced concern that a mine operator could be wrongly cited due to the loss or mishandling of a single, full-shift sample by MSHA, and claimed that such occurrences had happened in the past. Some commenters believe that if noncompliance can be determined based on a single, full-shift sample, an operator should be allowed to abate a citation with a single, full-shift sample, particularly if the operator has recently demonstrated compliance through bimonthly samples. Another commenter questioned the impact of the proposed program on the operator's program, specifically, whether MSHA would require each of the abatement samples to meet the single, full-shift sample citation threshold values, in addition to meeting the dust standard based on the average of five abatement samples.

Issues concerning operator sampling are not germane to this enforcement policy notice, which concerns only the use of samples collected by MSHA inspectors. The changes set forth in this final notice only address how MSHA will determine noncompliance when sampling is conducted by federal mine inspectors. There is no change in how MSHA evaluates either operator-collected bimonthly samples or samples taken to abate a dust citation. MSHA is committed to revising any procedures with respect to the operator program through the rulemaking process for consistency with this final finding.

Concerning the credibility of the operator sampling program, MSHA recognizes that there have been instances of abuse under the current operator sampling program. The Task Group found that the majority of operators do not engage in such conduct. MSHA will continue to monitor the operator sampling program, increase the frequency of inspector sampling, and target problem mines for additional inspections, as appropriate.

MSHA processes over 80,000 samples annually and it is not unrealistic to expect some samples to be either lost in the mail or accidentally misplaced. MSHA's experience of processing more than 7 million dust samples since 1970 indicates that this occurs infrequently. In the event a sample is lost, the mine operator is afforded ample opportunity to submit a replacement sample. If a citation is issued due to the operator's

failure to submit the required number of samples, the affected operator can present evidence that the required number of samples had been submitted and request that MSHA vacate the citation.

E. How Can MSHA Base a Noncompliance Determination on a Single, Full-Shift Sample, When Five Samples Are Required in Operator Bimonthly Sampling?

Once a finding has been made that a single, full-shift measurement will accurately represent atmospheric conditions to which a miner is exposed during such shift, MSHA is bound by the terms of the Mine Act to make noncompliance determinations based on single, full-shift measurements. No regulatory action is required to implement this change in MSHA's dust sampling program. On the other hand, the present regulatory scheme for operator sampling was developed based on noncompliance determinations being made by averaging the results of multiple samples over five successive shifts or days. In order for MSHA to incorporate the single, full-shift sample concept into the operator sampling program, the Agency must revise the operator sampling regulations through notice and comment rulemaking.

F. Do the New Citation Criteria Have any Impact on Permissible Exposure Limits?

Some commenters contended that a policy of citing in accordance with the CTV table, rather than citing whenever a measurement exceeds the applicable standard, effectively increases the allowable dust concentration limit. Other commenters stated that the enforcement of the applicable standard as a limit on each shift, rather than as a limit on the average concentration over some longer time period, effectively reduces the standard.

Citing in accordance with the stated CTV neither increases nor decreases the dust standard. Operators are required to maintain compliance with the applicable standard at all times. MSHA's citing of noncompliance only when there is high confidence that the applicable standard has been exceeded does not increase the permissible concentration limit. Again, mine operators must maintain compliance with the applicable standard. MSHA requires that dust controls maintain dust concentrations at or below the applicable standard on all shifts, not merely at or below the CTV. It is also MSHA's intent under this new enforcement policy that if a measurement exceeds the applicable

standard by an amount insufficient to warrant citation—that is, the level does not meet or exceed the CTV—MSHA will target that mine or area for additional sampling to ensure that dust controls are adequate.

Those commenters who stated that applying the applicable standard to each shift will effectively reduce the respirable dust standard overlooked the fact that, since 1975, MSHA has taken enforcement action based on average of measurements obtained for different occupations during a single shift. This new enforcement policy does not change MSHA's interpretation of section 202(b) of the Mine Act that dust concentrations be maintained at or below the applicable standard on each shift. The new enforcement policy merely reflects a change in the technical criteria used to cite violations of the applicable dust standard.

Appendix A—The Effects of Averaging Dust Concentration Measurements

MSHA's measurement objective in collecting a dust sample is to determine the average dust concentration at the sampling location on the shift sampled. As discussed in the joint notice of finding published elsewhere in today's **Federal Register**, a single, full-shift measurement can accurately represent the average full-shift dust concentration being measured. Nevertheless, because of sampling and analytical errors inherent in even the most accurate measurement process, the true value of the average dust concentration on the sampled shift can never be known with complete certainty. However accurate the representation, a measurement can provide only an estimate of the true dust concentration. Some commenters contended that MSHA should not rely on single samples for making noncompliance determinations, because an average of results from multiple samples would estimate the true dust concentration more accurately than any single measurement.

Contrary to the views expressed by these commenters, averaging a number of measurements does not necessarily improve the accuracy of an estimation procedure. Consider, for example, an archer aiming at targets mounted at random and possibly overlapping positions on a long partition. Each arrow might be aimed at a different target. Suppose that an observer, on the opposite side of the partition from the archer, cannot see the targets but must estimate the position of each bull's eye by locating protruding arrowheads.

Each protruding arrowhead provides a measurement of where some bull's eye is located. If two arrowheads are found

on opposite ends of the partition, averaging the positions of these two arrowheads would not be a good way of determining where any real target is located. To estimate the location of an actual target, it would generally be preferable to use the position of a single arrow. The average would represent nothing more than a "phantom" target somewhere near the center, where the archer probably did not aim on either shot and where no target may even exist.

The archery example can be extended to illustrate conditions under which averaging dust concentration measurements does or does not improve accuracy. If each arrowhead is taken to represent a full-shift dust sample, then the true average dust concentration at the sampling location on a given shift can be identified with the location of the bull's eye at which the corresponding arrow was aimed. The *accuracy* of a measurement refers to how closely the measurement can be expected to come to the quantity being measured. Statistically, accuracy is the combination of two distinct concepts: *precision*, which pertains to the consistency or variability of replicated measurements of exactly the same quantity; and *bias*, which pertains to the average amount by which these replicated measurements deviate from the quantity being measured. Bias and precision are equally important components of measurement accuracy.

To illustrate, arrows aimed at the same target might consistently hit a sector on the lower right side of the bull's eye. The protruding arrowheads would provide more or less precise measurements of where the bull's eye was located, depending on how tightly they were clustered; but they would all be biased to the lower right. On the other hand, the arrows might be distributed randomly around the center of the bull's eye, and hence unbiased, but spread far out all over the target. The protruding arrowheads would then provide unbiased but relatively imprecise measurements.

More complicated situations can easily be envisioned. Arrows aimed at a second target would provide biased measurements relative to the first target. Alternatively, if the archer always aims at the same target, the first shot in a given session might tend to hit near the center, with successive shots tending to fall off further and further to the lower right as the archer's arm tires; or shots might progressively improve, as the archer adjusts aim in response to prior results.

Averaging reduces the effects of random errors in the archer's aim,

thereby increasing precision in the estimation procedure. If the archer always aims at the same target and is equally adept on every shot (i.e., if the arrowheads are all randomly and identically distributed around a fixed point), then averaging improves the estimate's precision without introducing any bias. Averaging in such cases provides a more accurate method of estimating the bull's eye location than reliance on any single arrowhead. If, however, the archer intentionally or unintentionally switches targets, or if the archer's aim progressively deteriorates, then averaging can introduce or increase bias in the estimate. If the gain in precision outweighs this increase in bias, then averaging several independent measurements may still improve accuracy. However, averaging can also introduce a bias large enough to offset or even surpass the improvement in precision. In such cases, the average position of several arrowheads can be expected to locate the bull's eye *less* accurately than the position of a single arrowhead.

I. Multi-Localational Averaging

Some commenters opposed MSHA's use of a single, full-shift measurement for enforcement purposes, claiming that determinations based on such measurements would be less accurate than those made under MSHA's existing enforcement policy of averaging multiple measurements taken on an MMU. There are two distinctly different types of multi-localational measurement averages that could theoretically be compiled on a given shift: (1) the average might combine measurements taken for different occupational locations and (2) the average might combine measurements all taken for the same occupational location. For MMUs, the averages used in MSHA's sampling program usually involve measurements taken for different occupational locations on the same shift. These are averages of the first type. MSHA's sampling program has never utilized averages of the second type. Therefore, those commenters who claimed that reliance on a single, full-shift measurement would reduce the accuracy of noncompliance determinations, as compared to MSHA's existing enforcement policy, are implicitly claiming that accuracy is increased by averaging across different occupational locations.

Averaging measurements obtained from different occupational locations on an MMU is like averaging together the positions of arrows aimed at different targets. The average of such

measurements is an artificial, mathematical construct that does not correspond to the dust concentration for any actual occupational location. Therefore, this type of averaging introduces a bias proportional to the degree of variability in actual dust concentration at the various locations averaged.

The gain in precision that results from averaging measurements taken at different locations outweighs this bias only if variability from location to location is smaller than variability in measurement error. However, commenters opposed to MSHA's use of single, full-shift measurements for enforcement purposes argued that this is not generally the case and even submitted data and statistical analyses in support of this position. Commenters in favor of noncompliance determinations based on a single, full-shift measurement agreed that variability in dust concentration is extensive for different occupational locations and argued that MSHA's existing policy of measurement averaging is not sufficiently protective of miners working at the dustiest locations.

Since an average of the first type combines measurement from the dustiest location with measurements from less dusty locations, it must always fall below the best available estimate of dust concentration at the dustiest location. In effect, averaging across different occupational locations dilutes the dust concentration observed for the most highly exposed occupations or dustiest work positions. Therefore, such averaging results in a systematic bias against detecting excessive dust concentrations for those miners at greatest risk of overexposure.

A somewhat better case can be made for the second type of multi-locational averaging, which combines measurements obtained on the same shift from a single occupational location. As some commenters pointed out, however, there is ample evidence that spatial variability in dust concentration, even within relatively small areas, is frequently much larger than variability due to measurement error. Therefore, the same kind of bias introduced by averaging across occupational locations would also arise, but on a lesser scale, if the average measurement within a relatively small radius were used to represent dust concentration at every point in the atmosphere to which a miner is exposed. A miner is potentially exposed to the atmospheric conditions at any valid sampling location. Consistent with the Mine Act and implementing

regulations, MSHA's enforcement strategy is to limit atmospheric dust concentration wherever miners normally work or travel. Therefore, the more spatial variability in dust concentration there is within the work environment, the less appropriate it is to use measurement averaging to enforce the applicable standard by averaging measurements obtained at different sampling locations.

Some of the comments implied that instead of measuring average dust concentration at a specific sampling location, MSHA's objective should be to estimate the average dust concentration throughout a miner's "breathing zone" or other area near a miner. If estimating average dust concentration throughout some zone were really the objective of MSHA's enforcement strategy, then averaging measurements made at random points within the zone would improve precision of the estimate without introducing a bias. This type of averaging, however, has never been employed in either the MSHA or operator dust sampling programs. MSHA's current policy of averaging measurements obtained from different zones does not address spatial variability in the area immediately surrounding a sampler unit. Therefore, even if averaging measurements from within a zone were somehow beneficial, this would not demonstrate that MSHA's existing enforcement policy is more reliable than the new policy of basing noncompliance on a single, full-shift measurement.

Furthermore, if MSHA's objective were really to estimate average dust concentration throughout some specified zone on a given shift, then it would be necessary to obtain far more than five simultaneous measurements within the zone. This is not only because of potentially large local differences in dust concentration. In order to use such measurements for enforcement purposes, variability in dust concentration within the sampled area would have to be estimated along with the average dust concentration itself. As some commenters correctly pointed out, doing this in a statistically valid way would generally require at least twenty to thirty measurements. One of these commenters also pointed out that such an estimate, based on even this many measurements in the same zone, could be regarded as accurate only under certain questionable assumptions about the distribution of dust concentrations. This commenter calculated that hundreds of measurements would be required in order to avoid these tenuous assumptions. Clearly, this shows that

the objective of estimating average dust concentration throughout a zone is not consistent with any viable enforcement strategy to limit dust concentration on each shift in the highly heterogeneous and dynamic mining environment. The large number of measurements required to accurately characterize dust concentration over even a small area merely demonstrates why it is not feasible to base enforcement decisions on estimated atmospheric conditions beyond the sampling location.

MSHA recognizes that a single, full-shift measurement will not provide an accurate estimate of average dust concentration anywhere beyond the sampling location. The Mine Act, however, does not require MSHA to estimate average dust concentration at locations that are not sampled or to estimate dust concentration averaged over any zone or region of the mine, and doing so is not part of MSHA's enforcement program. Instead, MSHA's enforcement strategy is to ensure that a miner will not be exposed to excessive dust wherever he/she normally works or travels. This is accomplished by maintaining the average dust concentration at each valid sampling location at or below the applicable standard during each shift.

II. Multi-Shift Averaging

Some commenters maintained that in order to reduce the risk of erroneous noncompliance determinations, MSHA should average measurements obtained from the same occupation on different shifts. These commenters contended that the average of measurements from several shifts represents the average dust concentration to which a miner is exposed more accurately than a single, full-shift measurement. Other commenters, who favored noncompliance determinations based on single, full-shift measurements, claimed that conditions are sometimes manipulated so as to produce unusually low dust concentrations on some of the sampled shifts. These commenters suggested that, due to these unrepresentative shifts, multi-shift averaging can yield unrealistically low estimates of the dust concentration to which a miner is typically exposed. Some of these commenters also argued that the Mine Act requires the dust concentration to be regulated on each shift, and that multi-shift averaging is inherently misleading in detecting excessive dust concentration on an individual shift.

Those advocating multi-shift averaging generally assumed that a noncompliance determination involves estimating a miner's average dust

exposure over a period longer than an individual shift. This assumption is flawed because section 202(b) of the Mine Act specifies that each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift at or below the applicable standard. Some of those advocating multi-shift averaging, however, suggested that MSHA should average measurements obtained on different shifts even if the quantity of interest is dust concentration on an individual shift. These commenters argued that averaging smooths out the effects of measurement errors, and that therefore the average over several shifts would represent dust concentration on each shift more accurately than the corresponding individual, full-shift measurement.

The Secretary recognizes that there are circumstances, not experienced in mining environments, under which averaging across shifts could improve the accuracy of an estimate for an individual shift. Just as averaging the positions of arrows aimed at nearly coinciding targets might better locate the bull's eye than the position of any individual arrow, the gain in precision obtained by averaging dust concentrations observed on different shifts could, under analogous circumstances, outweigh the bias introduced by using the average to estimate dust concentration for an individual shift. This would be the case, however, only if variability in dust concentration among shifts were small compared to variability due to measurement imprecision. It would do no good to average the location of arrows aimed at different targets unless the targets were at nearly identical locations.

To the contrary, several commenters pointed out that variability in dust concentration from shift to shift tends to be much larger than variability due to measurement error and introduced evidence in support of this observation. Measurements on different shifts are like arrows aimed at widely divergent targets. The more that conditions vary, for any reason, from shift to shift, the more bias is introduced by using a multi-shift average to represent dust concentration for any individual shift. Under these circumstances, any improvement in precision to be gained by simply averaging results is small compared to the bias introduced by such averaging. Therefore, the Secretary has concluded that MSHA's existing practice of averaging measurements collected on different shifts does not improve accuracy in estimating dust concentration to which a miner is

exposed on any individual shift. To paraphrase one commenter, averaging Monday's exposure measurement with Tuesday's does not improve the estimate of Monday's average dust concentration.

Some commenters argued that since the risk of pneumoconiosis depends on cumulative exposure, MSHA's objective should be to estimate the dust concentration to which a miner is typically exposed and to identify cases of excessive dust concentration over a longer term than a single shift. Other commenters claimed that a multi-shift average does not provide a good estimate of either typical dust concentrations or exposures over the longer term. These commenters claimed that different shifts are not equally representative of the usual atmospheric conditions to which miners are exposed, implying that the average of measurements made on different shifts of a multi-day MSHA inspection tends to systematically underestimate typical dust concentrations.

The Secretary interprets section 202(b) of the Mine Act as requiring that dust concentrations be kept at or below the applicable standard on each and every shift. Nevertheless, the Secretary recognizes that, under certain conditions, the average of measurements from multiple shifts can be a better estimate of "typical" atmospheric conditions than a single measurement. This applies, however, only if the sampled shifts comprise a random or representative selection of shifts from whatever longer term may be under consideration. As shown below, evidence to the contrary exists, supporting those commenters who maintained that measurements collected over several days of a multi-day MSHA inspections do not meet this requirement. Therefore, the Secretary has concluded that averaging such measurements is likely to be misleading even for the purpose of estimating dust concentrations to which miners are typically exposed.

Whether the objective is to measure average dust concentration on an individual shift or to estimate dust concentration typical of a longer term, the arguments presented for averaging across shifts all depend on the assumption that every shift sampled during an MSHA inspection provides an unbiased representation of dust exposure over the time period of interest.¹ To check this assumption,

¹ Technically, the assumption is that dust concentrations on all shifts sampled are independently and identically distributed around the quantity being estimated.

MSHA performed a statistical analysis of multi-shift MSHA inspections carried out prior to the SIP. This analysis, placed into the record in September 1994, examined the pattern of dust concentrations measured over the course of these multi-shift inspections and compared results from the final shift with results from a subsequent single-shift sampling inspection [1].

The analysis found that dust concentrations measured on different shifts of the same MSHA inspection were not randomly distributed. The later samples tended to show significantly lower results than earlier samples, indicating that dust concentrations on later shifts of a single inspection may decline in response to the presence of an inspector. Furthermore, the analysis provided evidence that the reduction in dust concentration tends to be reversed after the inspection is terminated. These two results led to the conclusion that averaging dust concentrations measured on different shifts of a multi-day MSHA inspection introduces a bias toward unrealistically low dust concentrations.

One commenter questioned the validity of this analysis, stating that "there is absolutely no basis in the * * * report for the assertion that the trend is reversed after the inspection is terminated." This commenter apparently overlooked Table 3 of the report. That table shows a statistically significant reversal at those mine entities included in the analysis that were subsequently inspected under MSHA's SIP. Dust concentrations measured at these mine entities had declined significantly between the first and last days of the multi-shift inspection. It was primarily to address the commenter's implication that these reductions reflected permanent "adjustments in dust control measures" that the analysis included a comparison with the subsequent SIP inspection. An increase, representing a reversal of the previous trend, was observed on the single shift of the subsequent inspection, relative to the dust concentration measured on the final shift of the previous multi-shift inspection. This reversal was found to be "statistically significant at a confidence level of more than 99.99 percent."

The same commenter also stated that MSHA "* * * fails to address the systematic [selection] bias of the study. MSHA only does multiple day sampling when the initial results are higher, but not out of compliance." It is true that in order to be selected for revisitation, a mine entity must have shown relatively high concentrations on the first shift—though not, in the case of an MMU, so

high as to warrant a citation on first shift. Since no experimental data were available on mine entities randomly selected to receive multi-shift inspections, the only cases in which patterns over the course of a multi-shift inspection could be examined were cases selected for multi-shift inspection under these criteria.

Although the impact of the selection criteria was not explicitly addressed, it was recognized that entities selected for multi-day inspections do not constitute a random selection of mine entities. This recognition motivated, in part, the report's comparison of the final shift measurement to the dust concentration measured during a subsequent single-shift inspection. The magnitude of the average reversal indicates that most of the reduction observed over the course of the multi-shift inspection cannot be attributed to the selection criteria. Furthermore, it was not only mine entities with relatively low dust concentration measurements that were left out of the study group. Mine entities with the highest dust concentration measurements were immediately cited based on the average of measurements taken and excluded from the group subjected to multi-shift dust inspections. Therefore, the effect on the analysis of selecting mine entities with relatively high initial dust concentration measurements was largely offset by the effect of excluding those entities with even higher initial measurements. In any event, the magnitude of the average reduction between first and last shifts of a multi-shift inspection was significantly greater than what can be explained by selection for revisitation due to measurement error on the first shift sampled.

The assumption that multiple shifts sampled during a single MSHA inspection are equally representative is clearly violated if, as some commenters alleged, operating conditions are deliberately altered after the first shift in response to the continued presence of an MSHA inspector and then changed back after the inspector leaves. However, if samples are collected on successive or otherwise systematically determined shifts or days, the assumption can also be violated by changes arising as part of the normal mining cycle. As one commenter pointed out, multi-shift averaging within a single MSHA inspection potentially introduces biases typical of "campaign sampling," in which observations of a dynamic process are clustered together over a relatively narrow time span. In order to construct an unbiased, multi-shift average for each phase of mining activity, it would be

necessary to collect samples from several shifts operating under essentially the same conditions. Alternatively, to construct an unbiased, multi-shift estimate of dust concentration over a longer term, it would be necessary to collect samples from randomly selected shifts over a period great enough to reflect the full range of changing conditions. Neither requirement is met by multi-shift MSHA inspections because (1) the mine environment is dynamic and no two shifts are alike and (2) MSHA inspectors are not there long enough to observe every condition in their inspection.

Based on the analysis presented by Kogut [1] and also on public comments received in response to the February 18 and June 6, 1994, notices, the Secretary has concluded that it should not be assumed that multiple shifts sampled during a single MSHA inspection are equally representative of atmospheric conditions to which a miner is typically exposed. This conclusion undercuts the rationale for multi-shift averaging within a single MSHA inspection, regardless of whether the objective is to estimate dust concentration for the individual shifts sampled as it is for MSHA inspector sampling or for typical shifts over a longer term as implied by some commenters. Measurements collected by MSHA on consecutive days or shifts of the same inspection do not comprise a random or otherwise representative sample from any larger population of shifts that would properly represent a long-term exposure or a particular phase of the mining cycle. Therefore, there is no basis for assuming that multi-shift averaging improves accuracy or reduces the risk of an erroneous enforcement determination.

Appendix B—Citation Threshold Values (CTV)

I. Interpretation of the CTV Table

Each CTV was calculated to ensure that, if the CTV is met or exceeded, noncompliance with the applicable standard can be inferred with at least 95-percent confidence. It is assumed that whatever dust standard happens to be in effect at the sampling location is binding, and that a citation is warranted whenever there is sufficient evidence that an established standard has been exceeded. The CTV table does not depend on how the applicable standard was established, or on any measurement uncertainties in the process of setting the applicable standard.

Some commenters argued that in order to construct a valid table of CTVs, MSHA would have to take into account the statistical distribution of dust

concentrations over many shifts and locations. One commenter suggested that stochastic properties of the dust concentrations, which describe variability over time in probabilistic terms, should also be taken into account. MSHA, however, intends to use single, full-shift measurements only in determining noncompliance with the applicable standard on a particular shift and at the sampling location consistent with the measurement objective described in the MSHA and NIOSH joint finding published elsewhere in today's **Federal Register**. This is analogous to using a single measurement to identify individual suitcases that are unacceptable because they weigh more than five pounds. The efficacy of using a single measurement to identify unacceptable suitcases depends on the accuracy of the scale and the skill of the weigher. It does not depend on the statistical distribution of weights among suitcases or on any stochastic properties of the suitcase production process. These considerations would be relevant to estimating average weight for all suitcases produced, but they have nothing whatsoever to do with determining the weight of an individual suitcase using a sufficiently accurate scale. Averaging the weights of several suitcases would be entirely inappropriate and extremely misleading, since the object is to identify individual suitcases weighing more than five pounds. Although the measured weight of an individual suitcase is liable to contain some error (so the decision might be uncertain for a suitcase weighing five pounds and one ounce), a suitcase weighing seven or eight pounds could be rejected with high confidence on the first weighing. Additional weighings (of the same suitcase) would be required only for those suitcases whose initial measurement was very close to five pounds.

The CTV table provides criteria for testing a tentative, or presumptive, hypothesis that the true full-shift average dust concentration did not exceed the applicable standard (S) at each of the individual locations sampled during a particular shift. For purposes of this test, the mine atmosphere at each such location is presumed to be in compliance unless the corresponding full-shift measurement provides sufficient evidence to the contrary. The "true full-shift average" does *not* refer, in this context, to an average across different occupations, locations, or shifts. Instead, it refers entirely to the dust

concentration at the specific location of the sampler unit, averaged over the course of the particular shift during which the measurement was obtained. The CTV table is *not* designed to estimate or test the average dust concentration across occupational locations, or within any zone or mine area, or in the air actually inhaled by any particular miner.

Some commenters questioned why more than one sample might be required, if the first sample collected does not exceed the CTV. One of these commenters argued that in such case, "compliance has already been established at a 95% confidence level based on the first single shift sample." This line of argument confuses confidence in issuing a citation with confidence of compliance. It also shows a basic misunderstanding of how the citation criteria relate to the requirement of continuous compliance under section 202(b) of the Mine Act.

The CTV table ensures that noncompliance is cited only when there is a 95-percent level of confidence that the applicable standard has actually been exceeded. If a single measurement does not meet the criterion for citation, this does not necessarily imply probable compliance with the dust standard—let alone compliance at a 95-percent confidence level. For example, a single, full-shift measurement of 2.14 mg/m³ would not, according to the CTV table, indicate noncompliance with sufficient confidence to warrant a citation if $S = 2.0$ mg/m³. This does not imply that the mine atmosphere was in compliance on the shift and at the location sampled. On the contrary, unless contradictory evidence were available, this measurement would indicate that the MMU was probably *out* of compliance. However, because there is a small chance that the measurement exceeded the standard only because of measurement error, a citation would not be issued. Additional measurements would be necessary to verify the apparent lack of adequate control measures. Similarly, a single, full-shift measurement of 1.92 mg/m³ would not warrant citation; but, because of possible measurement error, neither would it warrant concluding that the mine atmosphere sampled was in compliance. To confirm that control measures are adequate, it would be necessary to obtain additional measurements.

Furthermore, even if a single, full-shift measurement were to demonstrate, at a high confidence level, that the mine atmosphere was in compliance at the sampling location on a given shift, additional measurements would be

required to demonstrate compliance on each shift. For example, if $S = 2.0$ mg/m³, then a valid measurement of 1.65 mg/m³ would demonstrate compliance on the particular shift and at the particular location sampled. It would not, however, demonstrate compliance on other shifts or at other locations.

II. Derivation of the CTV Table

Some commenters requested an explanation of the statistical theory underlying the CTV table. To understand how the CTVs are derived and justified, it is first necessary to distinguish between variability due to measurement error and variability due to actual differences in dust concentration. The variability observed among individual measurements obtained at different locations (or at different times) combines both: dust concentration measurements vary partly because of measurement error and partly because of genuine differences in the dust concentration being measured. This distinction, between measurement error and variation in the true dust concentration, can more easily be explained by first carefully defining some notational abbreviations.

One or more dust samples are collected in the same MMU or other mine area on a particular shift. Since it is necessary to distinguish between different samples in the same MMU, let X_i represent the MRE-equivalent dust concentration measurement obtained from the i^{th} sample. The quantity being measured is the true, full-shift average dust concentration at the i^{th} sampling location and is denoted by μ_i . Because of potential measurement errors, μ_i can never be known with complete certainty. A "sample," "measurement," or "observation" always refers to an instance of X_i rather than μ_i .

The overall measurement error associated with an individual measurement is nothing more than the difference between the measurement (X_i) and the quantity being measured (μ_i). Therefore, this error can be represented as

$$\varepsilon_i = X_i - \mu_i.$$

Equivalently, any measurement can be regarded as the true concentration in the atmosphere sampled, with a measurement error added on:

$$X_i = \mu_i + \varepsilon_i.$$

For two different measurements (X_1 and X_2), it follows that X_1 may differ from X_2 not only because of the combined effects of ε_1 and ε_2 , but also because μ_1 differs from μ_2 .

The probability distribution of X_i around μ_i depends only on the probability distribution of ε_i and should

not be confused with the statistical distribution of μ_i itself, which arises from spatial and/or temporal variability in dust concentration. This variability [i.e., among μ_i for different values of I] is not associated with inadequacies of the measurement system, but real variation in exposures due to the fact that contaminant generation rates vary greatly in time and contaminants are heterogeneously distributed in workplace air.

Since noncompliance determinations are made relative to individual sampling locations on individual shifts, derivation of the CTV table requires no assumptions or inferences about the spatial or temporal pattern of atmospheric dust concentrations—i.e., the statistical distribution of μ_i . MSHA is not evaluating dust concentrations averaged across the various sampler locations. Therefore, the degree and pattern of variability observed among different measurements obtained during an MSHA inspection are not used in establishing any CTV. Instead, the CTV for each applicable standard (S) is based entirely on the distribution of measurement errors (ε_i) expected for the maximum dust concentration in compliance with that standard—i.e., a concentration equal to S itself.

If control filters are used to eliminate potential biases, then each ε_i arises from a combination of four weighing errors (pre- and post-exposure for both the control and exposed filter capsule) and a continuous summation of instantaneous measurement errors accumulated over the course of an eight-hour sample. Since the eight-hour period can be subdivided into an arbitrarily large number of sub-intervals, and some fraction of ε_i is associated with each sub-interval, ε_i can be represented as comprising the sum of an arbitrarily large number of sub-interval errors. By the Central Limit Theorem, such a summation tends to be normally distributed, regardless of the distribution of subinterval errors. This does not depend on the distribution of μ_i , which is generally represented as being lognormal.

Furthermore, each measurement made by an MSHA inspector is based on the difference between pre- and post-exposure weights of a dust sample, as determined in the same laboratory, and adjusted by the weight gain or loss of the control filter capsule. Any systematic error or bias in the weighing process attributable to the laboratory is mathematically canceled out by subtraction. Furthermore, any bias that may be associated with day-to-day changes in laboratory conditions or introduced during storage and handling

of the filter capsules is also mathematically canceled out. Elimination of the sources of systematic errors identified above, together with the fact that the concentration of respirable dust is defined by section 202(e) of the Mine Act to mean the average concentration of respirable dust measured by an approved sampler unit, implies that the measurements are unbiased. This means that ϵ_i is equally likely to be positive or negative and, on average, equal to zero.

Therefore, each ϵ_i is assumed to be normally distributed, with a mean value of zero and a degree of variability represented by its standard deviation

$$\sigma_i = \mu_i \cdot CV_{\text{total}}$$

Since $X_i = \mu_i + \epsilon_i$, it follows that for a given value of μ_i , X_i is normally distributed with expected value equal to μ_i and standard deviation equal to σ_i . CV_{total} , described in the MSHA and NIOSH joint finding published elsewhere in today's **Federal Register**, is the *coefficient of variation* in measurements corresponding to a given value of μ_i . CV_{total} relates entirely to variability due to measurement errors

and not at all to variability in actual dust concentrations.

MSHA's procedure for citing noncompliance based on the CTV table consists of formally testing a presumption of compliance at every location sampled. Compliance with the applicable standard at the i^{th} sampling location is expressed by the relation $\mu_i \leq S$. $\text{Max}\{\mu_i\}$ denotes the maximum dust concentration, among all of the sampling locations within an MMU. Therefore, if $\text{Max}\{\mu_i\} \leq S$, none of the sampler units in the MMU were exposed to excessive dust concentration. Since the burden of proof is on MSHA to demonstrate noncompliance, the hypothesis being tested (called the *null hypothesis*, or H_0) is that the concentration at every location sampled is *in* compliance with the applicable standard. Equivalently, for an MMU the null hypothesis (H_0) is that $\text{max}\{\mu_i\} \leq S$. In other areas, where only one, full-shift measurement is made, the null hypothesis is simply that $\mu_i \leq S$.

The test consists of evaluating the likelihood of measurements obtained during an MSHA inspection, under the

assumption that H_0 is true. Since $X_i = \mu_i + \epsilon_i$, X_i (or $\text{max}\{X_i\}$ in the case of an MMU) can exceed S even under that assumption. However, based on the normal distribution of measurement errors, it is possible to calculate the probability that a measurement error would be large enough to fully account for the measurement's exceeding the standard. The greater the amount by which X_i exceeds S , the less likely it is that this would be due to measurement error alone. If, under H_0 , this probability is less than five percent, then H_0 can be rejected at a 95-percent confidence level and a citation is warranted. For an MMU, rejecting H_0 (and therefore issuing a citation) is equivalent to determining that $\mu_i > S$ for at least one value of I .

Each CTV listed was calculated to ensure that citations will be issued at a confidence level of at least 95 percent. As described in MSHA's February 1994 notice and explained further by Kogut [2], the tabled CTV corresponding to each S was calculated on the assumption that, at each sampling location:

$$CV_{\text{total}} \leq CV_{\text{CTV}} = \sqrt{\left(\frac{0.14 \text{ mg/m}^3}{\mu_i \text{ mg/m}^3} \cdot 100\%\right)^2 + (5\%)^2 + (5\%)^2}$$

The MSHA and NIOSH joint finding establishes that for valid measurements made with an approved sampler unit, CV_{total} is in fact less than CV_{CTV} at all dust concentrations (μ_i).

The situation in which measurement error is most likely to cause an erroneous noncompliance determination is the hypothetical case of $\mu_i = S$ for either a single, full-shift measurement or for all of the measurements made in the same MMU. In that borderline situation—i.e., the worst case consistent with H_0 —the standard deviation is identical for all measurement errors. Therefore, the value of s used in constructing the CTV table is the product of S and CV_{CTV} evaluated for a dust concentration equal to S :

$$\sigma = S \cdot \sqrt{\left(\frac{0.14}{S}\right)^2 + (.05)^2 + (.05)^2}$$

Assuming a normal distribution of measurement errors as explained above, it follows that the probability a single measurement would equal or exceed the critical value

$$c = S + 1.64 \cdot \sigma$$

is five percent under H_0 when $CV_{\text{total}} = CV_{\text{CTV}}$. The tabled CTV corresponding to S is derived by simply raising the critical value c up to the next exact multiple of 0.01 mg/m³.

For example, at a dust concentration (μ_i) just meeting the applicable standard of $S = 2 \text{ mg/m}^3$, CV_{CTV} is 9.95 percent. Therefore, the calculated value of c is 2.326 and the CTV is 2.33 mg/m³. Any valid single, full-shift measurement at or above this CTV is unlikely to be this large simply because of measurement error. Therefore, any such measurement warrants a noncompliance citation.

The probability that a measurement exceeds the CTV is even smaller if $\mu_i > S$ for any I . Furthermore, to the extent that CV_{total} is actually less than CV_{CTV} , σ is actually less than $S \cdot CV_{\text{CTV}}$. This results in an even lower probability that the critical value would be exceeded under the null hypothesis. Consequently, if any single, full-shift measurement equals or exceeds c , then H_0 can be rejected at confidence level of at least 95-percent. Since rejection of H_0 implies that $\mu_i \leq S$ for at least one value of I , this warrants a noncompliance citation.

It should be noted that when each of several measurements is separately

compared to the CTV table, the probability that at least one ϵ_i will be large enough to force $X_i \geq \text{CTV}$ when $\mu_i \leq S$ is greater than the probability when only a single comparison is made. For example (still assuming $S = 2 \text{ mg/m}^3$), if CV_{total} is actually 6.6%, then the standard deviation of ϵ_i is 6.6% of 2.0 mg/m³, or 0.132 mg/m³, when $\mu_i = S$. Using properties of the normal distribution, the probability that any single measurement would exceed the CTV in this borderline situation is calculated to be 0.0062. However, the probability that at least one of five such measurements results in a citation is $1 - (0.9938)^5 = 3.1$ percent. Therefore, the confidence level at which a citation can be issued, based on the maximum of five measurements made in the same MMU on a given shift, is 97%.

The constant 1.64 used in calculating the CTV is a *1-tailed 95-percent confidence coefficient* and is derived from the standard normal probability distribution. At least one commenter expressed confusion about whether the CTV table is based on a 1-tailed or a 2-tailed confidence coefficient. This commenter claimed that MSHA's use of a confidence coefficient equal to 1.64

“clearly establishes a 90% confidence level” rather than 95%. The commenter apparently confused the CTV for rejecting a 1-tailed hypothesis ($\mu_i \leq S$) with the pair of critical values for rejecting a 2-tailed hypothesis ($\mu_i = S$) and inferring that μ_i simply differs from S in either direction. The criterion for rejecting the latter hypothesis would be a measurement either sufficiently above the applicable standard or sufficiently below it. In testing for a difference of arbitrary direction, 1.64 would indeed yield a pair of 90-percent confidence limits, with a 5-percent chance of erring on either side. The purpose of the CTV table, however, is to provide criteria for determining that the true dust concentration strictly exceeds the applicable standard. Since such a determination can occur only when a single, full-shift measurement is sufficiently high, there is exactly zero probability of erroneously citing noncompliance when a measurement falls below the lower confidence limit. Consequently, the total probability of erroneously citing noncompliance equals the probability that a standard normal random variable exceeds 1.64, which is 5 percent.

One commenter alluded to testimony in the *Keystone* case (*Keystone v. Secretary of Labor*, 16 FMSHRC 6 (Jan. 4, 1994)), suggesting that application of the CTV to a single measurement involves an invalid comparison of two distributions or comparison of two means. Contrary to much of the testimony presented in that case, a determination of noncompliance using the CTV table is based on the decision procedure described above. It does not involve any comparison of probability distributions or means. Nor does it involve any statistical distribution of dust concentrations. It involves only the comparison of an individual full-shift measurement to the applicable standard. There is only one probability distribution involved in this comparison: namely, the distribution of random measurement errors by which each full-shift measurement deviates from the true dust concentration to which the sampler unit is exposed.

Some commenters apparently misunderstood the effect of potential weighing errors on the formula for calculating the CTV corresponding to different applicable standards. Weight gain is estimated from the difference between two weighings of an exposed filter capsule, adjusted by subtracting the difference between two weighings of a control filter capsule. Since weight gains are small compared to the total weight of capsules being weighed, any dependence of weighing error on the

magnitude of the mass being weighed is canceled in the process of calculating the difference. Since the standard deviation of the error in weight gain is, therefore, essentially constant, the ratio of that standard deviation to the dust concentration being measured decreases with increasing dust concentration. This causes CV_{CTV} to decrease as the dust concentration increases. As explained above, the CTV corresponding to S is calculated using the value of CV_{CTV} for dust concentrations exactly equal to S . Consequently, the CTV corresponding to a standard of 2.0 mg/m³ is based on a smaller value of CV_{CTV} than the CTV corresponding to a standard of 0.2 mg/m³.

One commenter implied that use of the CTV table relies on an assumption that CV_{total} declines at concentrations greater than 2.0 mg/m³ (or S in general). As explained previously, the CTV corresponding to different applicable standards is designed to test the null hypothesis that S is not exceeded. For each applicable standard, entries are based on the probability distribution of observations expected under that presumption. Consequently, the magnitude of CV_{total} assumed in establishing or applying any CTV does not decrease below the value of CV_{total} calculated for a concentration of 2.0 mg/m³, since that is the maximum applicable standard being tested. Because the probability of wrongly citing noncompliance is zero when S is exceeded, measurement uncertainty at concentrations greater than S is not relevant to noncompliance determinations. (It would, however, be relevant to inferring compliance at a specified confidence level—i.e., to a test of the alternative hypothesis that S is not exceeded.)

III. Validity of the CTV table

Some commenters questioned the validity of the CTV table and challenged the formula used to calculate each CTV listed. Some objected to the use of a normal distribution and claimed that a lognormal distribution or nonparametric assumptions would be more appropriate. Other commenters objected specifically to the use of a confidence coefficient based on a standard normal probability distribution, rather than a t -distribution. The validity of using \sqrt{n} , rather than $\sqrt{(n-1)}$, in the formula used to calculate citation threshold values in MSHA's February 1994 notice, was also questioned. At least one commenter contended that the formula used to generate the CTV table is not valid for use with only one measurement.

Such comments would have some validity if the CTV table were intended

to test or estimate average concentration over some spatially distributed region of a mine or some period greater than the single shift during which each measurement is taken. In either case, it might be necessary and appropriate to estimate variation in concentration directly from the measurement samples obtained. Such an estimate could conceivably be used in establishing a site-specific threshold value for citation. This would, indeed, require a theoretical minimum of two samples, or far more for valid practical applications. Estimating variability from the samples collected would also require additional assumptions or nonparametric methods to reflect the pattern of variation in dust concentration between locations or shifts.

The objections raised, however, apply to a very different task from the one for which the CTV table is designed. As explained previously, the CTV table is not meant to test dust concentration averaged over any period greater than the shift during which measurements were taken. Nor is it meant to test dust concentration averaged across different occupational locations or throughout any spatially distributed region of the mine. Instead, the CTV table provides criteria for determining noncompliance at individual sampling locations on individual shifts. Neither the spatial nor temporal distribution of the dust concentrations is germane to the intended citation criteria. Although several measurements may be taken during a single inspection, MSHA regards each of these measurements as relating to the dust concentration uniquely associated on a given shift with a separate sampling location. Each such dust concentration (μ_i) is the average for the atmosphere at the sampling location, accumulated over the course of the single, full shift sampled. Since the enforcement objective is to determine whether $\mu_i > S$ for any individual I , it is not necessary to estimate or assume anything about the degree to which μ_i varies from location to location or from shift to shift. Nor is it necessary to assume anything about the spatial or temporal statistical distribution of μ_i . No such assumptions are built into the CTV table. A normal distribution is imputed only to ϵ_i , the difference between X_i and μ_i . Since the mean across various μ_i is not being estimated or tested, it is not necessary to estimate variability among the μ_i from measurements taken during the inspection. MSHA emphatically agrees with those commenters who stressed the impossibility of doing so with a single measurement.

Those commenters who objected to MSHA's use of a normal distribution, claiming that a lognormal distribution or nonparametric assumptions would be more appropriate, apparently confused the distribution of dust concentrations over time and between locations with the distribution of errors that arise when measuring dust concentration at a specific time and location. In other words, they confused the distribution of μ_i with the distribution of ϵ_i . The concerns about non-normality stem from confusion about what quantity is being estimated.

MSHA does not dispute the fact that lognormal or nonparametric methods are often appropriate for modeling variability in occupational dust concentrations. MSHA, however, is explicitly not claiming to estimate any quantity beyond the average dust concentration at a particular sampling location on a single shift. MSHA does not claim that dust concentrations are normally distributed from shift to shift, from occupation to occupation, or from location to location; nor is any such assumption built into the CTV table. Since the object is not to estimate average concentration over a range of different locations or shifts, the statistical distribution of μ_i is irrelevant, and application of lognormal or nonparametric techniques in constructing citation criteria is both unnecessary and inappropriate.

In constructing the CTV table, MSHA used a normal probability distribution solely to represent a potential measurement error, ϵ_i . This measurement error causes a measurement X_i to deviate from μ_i , the actual dust concentration at a specific time and place. As distinguished from the statistical distribution of dust concentrations, it is generally accepted that the distribution of measurement errors around a given concentration is *normal* [3]. This was explicitly acknowledged by members of the industry panel in their Morgantown testimony.

Similarly, criticism directed against MSHA's use of a confidence coefficient derived from the standard normal distribution instead of the t-distribution arises from a basic misunderstanding of what is or is not being estimated in the decision procedure. Contrary to the remark of one commenter, use of the t-distribution is not justified as a "compromise" between normal-theoretic and nonparametric assumptions. The t-distribution arises in statistical theory when a normally distributed random variable is divided by an estimate of its standard deviation. Typically it is

applied to situations in which the mean and standard deviation are estimated from the same normally distributed data, consisting of fewer than about thirty or forty random data points. If the estimate of standard deviation is based on more data, then the confidence coefficient derived from the t-distribution is approximately equal to the corresponding value derived from the standard normal distribution. Use of the t-distribution is appropriate, for example, when a group of normally distributed observations is "standardized" by subtracting the group mean from each observation and dividing the result by the group standard deviation.

Those commenters advocating a confidence coefficient based on the t-distribution failed to recognize that CV_{CTV} was not derived from the measurements that MSHA inspectors will use to test for compliance with S. Use of the t-distribution is *not* appropriate when an independently known or stipulated standard deviation is used in comparing observations to a standard [3]. The standard deviation of measurement errors used in constructing the CTV table is derived from prior knowledge, rather than estimated from a few measurements taken during an inspection. Experimental analysis has shown that CV_{total} is less than CV_{CTV} . So long as this is true, use of a confidence coefficient derived from the standard normal distribution is entirely appropriate.

Contrary to the claims of some commenters, there is no valid basis for including a so-called $[n/(n-1)]^{1/2}$ "correction factor" in the formula for establishing a CTV. (The "n" in this expression would refer to the number of measurements, if a noncompliance determination were based on the average of several measurements.) The theory behind such a factor does not apply when, as in the case of the CTV table, a predetermined or maximum tolerated variability in measurement error is used in comparing observations to a standard [3]. It would apply only if variability in measurements observed during each inspection were somehow used to construct a CTV specific to that inspection. The variability observed among multiple samples collected during an MSHA inspection has little to do with the accuracy of an individual measurement and is not used at all in constructing the CTV table.

Although no explicit reason was given for the claim by some commenters that the formula used to generate the CTV table is not valid for use with a single measurement, this would follow if

either: (1) the appropriate basis for the confidence coefficient were a t-distribution rather than a standard normal distribution; or (2) it were necessary to multiply the CTV by $[n/(n-1)]^{1/2}$, where n is the number of measurements on which a noncompliance determination is based. In the former case, the standard normal distribution would not adequately approximate the t-distribution; and in the latter case, $n = 1$ would cause the so-called correction factor, and hence the CTV, to be mathematically indeterminate for determinations based on a single sample. It has already been explained, however, that neither of these considerations are applicable to the CTV table.

Some commenters stated that a single measurement cannot accurately be used to detect excessive dust concentrations, even if the noncompliance determination applies only to a specific shift and location. These commenters implied that due to random, temporary fluctuations in dust concentration, a single measurement is inherently unstable and misleading. Such arguments fail to differentiate a full-shift sample from a "grab sample," which is typically a sample collected over only a few minutes or seconds and used to estimate average conditions over an entire shift. In contrast to a grab sample, each full-shift dust sample is collected continuously over the full period to which the measurement applies. An 8-hour dust sample consists of 480 1-minute grab samples, or an arbitrarily large number of even shorter grab samples. A full-shift dust sample can be viewed as measuring average concentration over the entire shift by averaging together all of these shorter subsamples. Although short-term fluctuations in dust concentration, as well as random changes in flow rate and collection efficiency, may cause many of the subsamples to poorly represent average concentration over the entire shift, random short-term aberrations tend to cancel one another when the subsamples are combined. Therefore, a full-shift dust sample does not suffer from lack of sample size.

Appendix C—Risk of Erroneous Enforcement Determinations

I. What Constitutes Compliance or Noncompliance?

To simplify the following discussion, let μ denote the average dust concentration to which a sampler unit is exposed on a given shift, let S denote the applicable standard, and let X denote a valid, full-shift measurement of μ . Also, let c be the CTV in the table

corresponding to S so that a citation is issued when $X \geq c$. Section 202(b)(2) of the Mine Act requires that the average dust concentration during each shift be maintained at or below the applicable standard wherever miners normally work or travel. This means that, on any given shift, the average dust concentration (μ) at any valid sampling location must not exceed the applicable standard (S).

Since the CTVs listed always exceed S it can happen that a full-shift measurement (X) falls between S and c . In such instances, MSHA will not issue a citation. This does not, however, imply that MSHA considers the mine atmosphere sampled to have been in compliance with the Mine Act or that cases of marginal noncompliance are tolerable. MSHA's use of the CTVs is not motivated by any tacit acceptance of marginal noncompliance. Rather, it is motivated by the necessity to avoid unsustainable violations. When X falls between S and c , this provides some evidence that $\mu > S$; but the evidence is insufficient to warrant a citation.

Although $\mu > S$ constitutes a violation, X greater than S but less than the CTV does not provide compelling evidence that $\mu > S$. This is because, in a sufficiently well-controlled mining environment, X is more likely to slightly exceed S due to measurement error than due to $\mu > S$. In fact, as demonstrated in Appendix D, citing when $X > S$ but $X < c$ could result in citations when the probability of compliance ($\mu \leq S$) on the shift and location sampled is greater than 50 percent. Use of the CTV table is necessary in order to avoid citing in such cases.

There are two sorts of conclusions that might be drawn from the results of a single MSHA inspection: those relating to the individual shift sampled and those relating to some longer time period, such as the full interval between MSHA inspections. Therefore, in evaluating the probability of erroneous enforcement determinations, it is essential to distinguish between (1) compliance or noncompliance with the applicable standard on the shift sampled and (2) compliance or noncompliance with the full requirement of the Mine Act as it applies to every shift over a longer term, such as the period between MSHA inspections.

If $\mu > S$ on some proportion of shifts, say $P < 1$, then the mine does not comply with the applicable standard on some individual shifts and, therefore, does not comply with the Mine Act over the longer term. At the same time, the mine is in compliance with the applicable standard (at the location

sampled) on a complementary proportion, equal to $1 - P$, of individual shifts. If an MSHA inspection happens to fall on one of those shifts that is out of compliance, then a correct determination with respect to the individual shift would also be correct with respect to the longer term. If, on the other hand, the MSHA inspection happens to fall on a shift that is in compliance, then it would be a mistake to assume compliance on subsequent shifts and vice versa. Although MSHA interprets the Mine Act as requiring $\mu \leq S$ on each shift and at each sampling location to which miners in the active workings are exposed, the immediate objective of an MSHA dust inspection can only be to determine compliance or noncompliance for the shift and location sampled. Therefore, MSHA does not consider a compliance or noncompliance determination to be erroneous if it is correct with respect to the individual shift and location but incorrect with respect to other shifts or locations.

II. Uncertainty in the Standard-Setting Process

In response to the March 12, 1996 MSHA/NIOSH **Federal Register** notice, a commenter claimed that a noncompliance determination based on a single, full-shift measurement could be erroneous if the applicable standard was improperly established due to measurement errors associated with silica analysis. It was, therefore, suggested that uncertainty in the standard-setting process should be factored into the risk of erroneous enforcement decisions. MSHA agrees that, like any measurement process, the sampling and analytical method used to quantify the silica content of a respirable dust sample in order to set the applicable standard is subject to potential measurement errors. Therefore, MSHA uses an analytical procedure that meets the requirement of a NIOSH Class B analytical method. Applicable standards are set based on results of silica analysis using the most up-to-date laboratory equipment.

The Secretary, however, considers the accuracy of the standard-setting process to be a separate issue from the accuracy of noncompliance determinations based on a single-full-shift measurement, once the applicable standard has been set. The present notice relates only to the enforcement of the applicable standard in effect at time of the sampling inspection. Therefore, the following discussion treats any applicable standard in effect at the time of sampling as binding and evaluates the

risk of erroneous determinations relative to that standard.

III. Measurement Uncertainty and Dust Concentration Variability

Variability in dust concentration refers to the differing values of μ on different shifts or at different locations. For a given value of μ , measurement uncertainty refers to the differing measurement results that could arise because of different potential measurement errors. If $\mu > S$, measurement error can cause an erroneous citation. Similarly, if $\mu > S$, then measurement error can cause an erroneous failure to cite.

The "margin of error" separating each CTV from the corresponding applicable standard does not eliminate the possibility of erroneous enforcement determinations due to uncertainty in the measurement process. A determination based on comparing X to the CTV could be erroneous in either of two ways with respect to the individual shift sampled: (1) the comparison could erroneously indicate noncompliance on the shift (i.e., $X \geq c$ but $\mu \leq S$) or (2) the comparison could erroneously fail to indicate noncompliance on the shift (i.e., $X < c$ but $\mu > S$). The margin of error built into the CTV table reduces the probability of erroneous citations but increases the probability of erroneous failures to cite.

MSHA recognizes that in determining how large the margin of error should be, there is a tradeoff between the probabilities of these two mistakes—i.e., if the chance of erroneously failing to cite is reduced, then the chance of erroneously citing is increased, and vice versa. MSHA has constructed the CTV table so as to ensure that citations will be issued only when they can be issued at a high level of confidence. As will be shown below, doing this provides assurance that for any given citation, μ is more likely than not to actually exceed S . In contrast, if there were no margin of error, citations more likely than not to be erroneous could occasionally be issued. Examples of this are given in Appendix D.

In the discussion below, the risk of erroneous citations and erroneous failures to cite is quantified for noncompliance determinations based on the CTV table. To illustrate points in the theoretical discussion, three different mining environments will be used as examples. These environments exemplify different degrees of dust concentration variability and dust control effectiveness. The first example (Case 1) is based on historical mine data provided by commenters in connection with these proceedings. The second and third examples (Case 2 and Case 3) are

hypothetical and are designed to reflect extremely well-controlled and poorly controlled mining environments, respectively. In these three examples, it

will be assumed that μ is lognormally distributed from shift to shift. This is a standard assumption for airborne contaminants in an occupational setting

[3]. The three cases considered are characterized as follows:

Case	Dust concentration (mg/m ³)				
	Arith- metic mean, E{ μ }	Arith- metic stand- ard devel- op- ment, SD{ μ }	Geo- metric mean	Geo- metric stand- ard devel- op- ment	Prb { $\mu > S$ } (per- cent)
1	1.66	0.70	1.53	1.50	25.4
2	1.20	0.24	1.18	1.22	0.4
3	2.20	1.32	1.89	1.74	45.8

In addition to the variability in dust concentrations described by the arithmetic and geometric standard deviations of μ , full-shift measurements contain a degree of uncertainty

described by CV_{total} , the coefficient of variation for measurements of the same dust concentration. In calculating the probability of erroneous determinations for the three example cases, it will also

be assumed that the applicable standard is $S = 2.0 \text{ mg/m}^3$ and that the coefficient of variation in full-shift measurements taken at a given value of μ is:

$$CV_{total} = \sqrt{\left(\frac{1.38 \cdot \frac{1000 \text{ Liters/m}^3 \cdot \sigma_e \sqrt{2}}{2 \text{ Liters/min} \cdot 480 \text{ min}}}{\mu} \right)^2 + (CV_{pump})^2 + (CV_{sampler})^2}$$

Where $\sigma_e = 9.12 \mu\text{g}$ is the standard deviation of error in weight gain, as determined from MSHA's 1995 field investigation of measurement precision [4]; 1.38 is the MRE-equivalent conversion factor for measurements made with an approved sampler unit; the first quantity being squared is CV_{weight} ; $CV_{pump} = 4.2\%$ and $CV_{sampler} = 5\%$, as explained in Appendix B.II of the joint MSHA and NIOSH notice of finding published elsewhere in today's **Federal Register**.

It should be noted that the "total" in CV_{total} refers to total measurement uncertainty and is not meant to include the effects of variability in dust concentration.

Because it employs a higher value for $CV_{sampler}$ (reflecting variability amongst used rather than new 10-mm nylon cyclones), this composite estimate of CV_{total} is slightly greater and perhaps slightly more realistic than that obtained directly from MSHA's 1995 field investigation. It declines from 11.3% at dust concentrations of 0.2 mg/m^3 to no more than 6.6% at concentrations of 2.0 mg/m^3 or greater. At all dust concentrations within this range, it falls well below the 12.8% maximum value permitted for a method meeting the NIOSH Accuracy Criterion [5]. It is also smaller than the value, CV_{CTV} , used to

construct the CTV table. As explained in Appendix B, this ensures that any citation issued will be warranted at a confidence level of at least 95 percent.

To simplify the discussion below on risk of erroneous citations and erroneous failures to cite, it is necessary to introduce some additional notation and to focus on just one measurement collected during each inspection.² This could be the "D.O." sample in a MMU, or the measurement collected for a designated area. Let $\epsilon = X - \mu$ represent the measurement error in a valid measurement. For reasons explained in Appendix B, ϵ is assumed to be normally distributed with zero mean and standard deviation equal to $\sigma = \mu \cdot CV_{total}$. Consequently, X is normally distributed with mean equal to μ and standard deviation equal to σ . This normal distribution of X around μ reflects uncertainty in the measurement of a given dust concentration. On any given shift, the probability distribution of X is determined by the value of μ for that shift and sampling location. Therefore, the probability of citation on

a given shift is conditional on μ and is denoted by $\text{Prb}\{X \geq c \mid \mu\}$.³

Since μ varies from shift to shift, variability in dust concentration is represented by the probability distribution of μ . Let $E\{\mu\}$ denote the expected (i.e., arithmetic mean) dust concentration over some longer term of interest, such as the interval between MSHA inspections; and let $SD\{\mu\}$ denote the standard deviation of μ over the same period. Although the value of μ on any individual shift is unknown, $\text{Prb}\{X \geq c\}$ can be calculated using the probability distribution of μ . In particular, if the probability is known that μ fulfills a specified condition, such as $\mu \leq S$ or $\mu > S$, then $\text{Prb}\{X \geq c\} = \text{Prb}\{X \geq c \mid \mu \leq S\} \cdot \text{Prb}\{\mu \leq S\} + \text{Prb}\{X \geq c \mid \mu > S\} \cdot \text{Prb}\{\mu > S\}$.

Over a sufficiently long term, with respect to any particular sampling location, $\text{Prb}\{\mu > S\}$ and $\text{Prb}\{\mu \leq S\}$ can be identified, respectively, with the proportion of noncompliant shifts, P , and the proportion of compliant shifts, $1 - P$. P is sometimes called the

² Appendix D addresses cases in which a noncompliance determination is based on the maximum of several measurements.

³ A vertical bar is used to denote conditional probability. $\text{Prb}\{A \mid B\}$ denotes the conditional probability of event A, given the occurrence of event B. For any events A and B, $\text{Prb}\{A \mid B\} = \frac{\text{Prb}\{A \text{ and } B\}}{\text{Prb}\{B\}} = \frac{\text{Prb}\{A\} \cdot \text{Prb}\{B\}}{\text{Prb}\{B\}}$

noncompliance fraction and more or less defines the likelihood that the applicable standard is or is not exceeded on the particular shift inspected.⁴

If the statistical distribution of μ can be adequately represented by a

probability density function, denoted $f(\mu)$, then $\text{Prb}\{\mu > S\}$ and $\text{Prb}\{\mu \leq S\}$ can also be calculated by integrating $f(\mu)$ over the desired range. The probability that μ falls in any interval, say between a and b , is given by:

$$\text{Prb}\{a < \mu \leq b\} = \int_a^b f(\mu) d\mu$$

It follows that:

$$\text{Prb}\{X > c | a < \mu \leq b\} = \frac{\int_a^b \text{Prb}\{X > c | \mu\} \cdot f(\mu) d\mu}{\int_a^b f(\mu) d\mu}$$

IV. Risk of Erroneous Citation

Some commenters argued that a citation for noncompliance is warranted only if the average dust concentration to which a miner is exposed exceeds the applicable standard over a period of time greater than a single shift, such as a bimonthly sampling period, a year, or a miner's lifetime. Therefore, these commenters called it "unfair" to cite individual shifts on which the applicable standard is exceeded, so long as the average over this longer term meets the applicable standard. For example, based on the historical sampling data provided by a commenter and employed here as Case 1, one commenter concluded that " * * * there is at least a 1 in 6 or 17% probability that any single sample can show potential overexposure [using the CTV table] when one does not exist." Further, these commenters maintained that basing citations on a single, full-shift measurement would substantially increase the frequency of unfair citations, compared to existing MSHA policy.

Using the notation introduced above, these commenters have confused μ with $E(\mu)$ and confounded the noncompliance fraction P with the probability of erroneous citation. For example, the 17-percent figure mentioned above includes all cases in which $X \geq c$, regardless of whether $\mu > S$ on the shift sampled. In the discussion accompanying the data, commenters argue that since $E(\mu)$ is approximately 1.66 mg/m³, or less than 1.85 mg/m³ at a high confidence level, " * * * [cases of $X \geq c$] show potential overexposure when one does not exist." This statement depends on the unwarranted assumption that miners exposed to these conditions have been exposed to similarly distributed dust concentrations in the past and that they will be exposed to similarly distributed

concentrations in the future. These commenters' own analysis indicates that the dust concentration has not been kept below the standard on each shift. Therefore, a citation is warranted under the Mine Act.

To more fully explore what is going on in Case 1, suppose, as these commenters suggest, that dust concentrations over the period observed are lognormally distributed from shift to shift, with $E\{\mu\} = 1.66$ mg/m³ and a geometric standard deviation of about 1.5 mg/m³. Under this assumption, $\mu > 2.0$ mg/m³ on more than 25 percent of all shifts, and $\mu > 2.33$ mg/m³ on 15 percent. These percentages pertain to actual dust concentrations and have nothing to do with measurement error or accuracy of an individual measurement. Therefore, a 2.0 mg/m³ dust standard would be violated on 25 percent of all production shifts. The applicable standard would be violated by an amount greater than 0.33 mg/m³ on 15 percent. Since 2.33 is the CTV for a single measurement, this 15 percent actually represents shifts sufficiently far out of compliance that they would probably be cited if inspected. Nevertheless, the commenters' analysis includes such shifts in the 17 percent claimed as cases subject to erroneous or unfair citation.

The expected value of the noncompliance fraction (P) in Case 1 is 25 percent. Therefore, close to 25 percent of all single shift measurements made under the conditions of Case 1 would be expected to exceed the standard. Only 17 percent of the single full-shift measurements taken, however, exceeded the CTV and would have warranted citations. Using the estimate of CV_{total} described above, 15 percent of all single shift measurements would be expected to do so. Therefore, contrary to the commenters' conclusion, Case 1 does not demonstrate a high probability

of erroneously identifying overexposures. Instead, it illustrates an effect of the high confidence level required for citation: the margin of error built into the CTV reduces the probability of citing whatever shift happens to be selected for inspection from about 25 percent to 15 percent. Although the applicable standard is violated on 25 percent of the shifts, there is only a 15 percent chance that any particular measurement meets the citation criterion.

To correctly and unambiguously quantify the risk of "unfair" citations, it is necessary to identify three distinct ways of interpreting the risk of erroneous noncompliance determinations. This risk can be defined alternatively as:

- (1) the probability of citing when the mine atmosphere sampled is actually in compliance, $\text{Prb}\{X \geq c | \mu \leq S\}$;
- (2) the probability that the mine atmosphere on a shift randomly selected for inspection is in compliance but is nevertheless cited, $\text{Prb}\{\mu \leq S \text{ and } X \geq c\}$; or
- (3) the probability that a given citation is erroneous, $\text{Prb}\{\mu \leq S | X \geq c\}$.

These three different probabilities apply to three different base populations. Although the different interpretations of risk give rise to quantitatively different probabilities, the expected total number of erroneous citations, denoted N_{α} , remains constant if each probability is multiplied by the size of the population to which it applies. To obtain N_{α} , the first probability must be multiplied by the number of valid measurements made when $\mu \leq S$, the second by the total number of valid measurements, and the third by the total number of citations issued—i.e., valid measurements for which $X \geq c$.

The CTV table limits the probability of erroneously citing defined by the first

⁴P defines this likelihood exactly only if shifts are randomly selected for MSHA inspection and

there is no adjustment of conditions in response to the inspection.

two interpretations to a maximum of less than five percent. However, in a well-controlled mining environment, where citations are rarely warranted, the third probability can be larger than the first two. Since the burden of proof rests with MSHA to demonstrate noncompliance, it is essential that α° be kept well below 50 percent. As will be shown by example, the use of the CTV table accomplishes this goal.

Each of the three different probabilities related to erroneous noncompliance determinations will now be explained in detail. Calculations for all examples are performed under the assumptions (1) that μ is lognormally distributed and (2) that ϵ is normally distributed with mean equal to zero and standard deviation equal to $\mu \cdot CV_{\text{total}}$.

$$1. \alpha = \text{Prb}\{X \leq c | \mu \leq S\}$$

The first risk to be considered is the probability of citing noncompliance when the mine atmosphere sampled is actually in compliance. This probability represents the proportion of those measurements made when $\mu \leq S$ that result in $X \geq c$. In other words, $\alpha = \text{Prb}\{X \geq c | \mu \leq S\}$ is the probability that, due to measurement error, a citation is issued under the condition that $\mu \leq S$. This is the probability associated with what is commonly designated Type I error for testing the null hypothesis: $\mu \leq S$ on the shift sampled.

Essentially, α is the expected (i.e., mean) probability of citation over all those shifts sampled that are at or below the applicable standard. The relative frequency distribution of μ over those shifts is described by its probability density function, $f(\mu)$. Therefore, α can be calculated as follows:

$$a = \int_0^S \frac{\text{Prb}\{X \geq c | \mu\}}{1 - P} f(\mu) d\mu$$

If μ did not vary, then α would be directly related to the confidence level at which the null hypothesis could be rejected when $X \geq c$. That confidence level, which applies to citations issued in accordance with the CTV table, is defined as the minimum possible value of $1 - \text{Prb}\{X \geq c | \mu\}$, subject to the restriction that $\mu \leq S$. There is a subtle but extremely important distinction between this and $1 - a$. Among all those shifts on which $\mu \leq S$, $\text{Prb}\{X \geq c | \mu\}$ is maximized when $\mu = S$. Therefore, the minimum possible value of $1 - \alpha$, arises when $\mu = S$ on every shift. The resulting confidence level for concluding $\mu > S$ when $X \geq c$ is equal to $1 - \text{Prb}\{X \geq c | \mu = S\}$. For the value of CV_{total} described above (i.e., 6.6% when $\mu = S = 2.0 \text{ mg/m}^3$), this

works out to a confidence level of 0.99, or 99%.

Although MSHA interprets the Mine Act as requiring $\mu \leq S$ on each shift at any location to which a miner in the active workings is exposed, citations for noncompliance are intended to apply only to the shift and location sampled. Therefore, MSHA makes no assumption regarding the relative frequency distribution of μ from shift to shift. This is consistent with the concept of defining the confidence level according to the scenario most susceptible to an erroneous determination under the null hypothesis. However, the resulting confidence level for citing when $X \geq c$ really applies only to the hypothetical case most susceptible to erroneous citation.

In reality, so long as μ falls below S on some shifts, α will be smaller than 0.01. The further μ falls below the applicable standard, and the more shifts on which this occurs, the less likely it becomes that measurement error alone (ϵ) will be great enough to cause $X \geq c$ on a shift randomly selected for inspection. For example, if $S = 2.0 \text{ mg/m}^3$, then $c = 2.33 \text{ mg/m}^3$.

Therefore, if $\mu = 1.8 \text{ mg/m}^3$, a citation would be issued only if $\epsilon \geq c - \mu$. An $\epsilon \geq 0.53 \text{ mg/m}^3$ (resulting in $X \geq 2.33 \text{ mg/m}^3$) amounts to a measurement error greater than 29 percent of the true dust concentration. If the sample is valid, then the probability of such an occurrence (given that $CV_{\text{total}} = 6.6\%$ at $\mu = 1.8 \text{ mg/m}^3$) is less than 4 per million. This illustrates the general point that $\text{Prb}\{X \geq c | \mu\}$ can be far less than 0.01 when $\mu < S$.

Since $\text{Prb}\{X \geq c | \mu \leq S\}$ is smaller the further μ falls below S , $\text{Prb}\{X \geq c | \mu \leq S\}$ depends on the probability distribution of μ . This probability distribution is expressed by the relative frequency with which μ assumes each possible dust concentration at or below S . If μ falls substantially below the applicable standard on many shifts, then many of the corresponding values of $\text{Prb}\{X \geq c | \mu\}$ averaged into the calculation of α should be much smaller than 0.01, as shown by the foregoing example. Consequently, in a mining environment where the dust concentration is usually well below the applicable standard, α can reasonably be expected to fall substantially below its maximum possible value.

The number of erroneous citations expected (N_{α}), is obtained by first multiplying the total number of production shifts during the period of interest by the expected proportion of these shifts for which $\mu \leq S$. This proportion is $1 - P$. The result is the number of production shifts expected to

be in compliance at the sampling location. This must then be multiplied by α to calculate N_{α} .

In Case 1, which is based on real sampling data (submitted by commenters), $E\{\mu\}$ is 1.66 mg/m^3 and $SD\{\mu\}$ is 0.70 mg/m^3 . As mentioned earlier, P is expected to be 0.25 in this case. This distribution results in a negligible probability of citing when the mine atmosphere sampled is in compliance: $\alpha = 0.00012$. If 10,000 production shifts are sampled in this type of environment, 7500 of these would be expected to be in compliance at the sampling location. Approximately one of these 7500 samples (i.e., $7500 \cdot \alpha$) would be erroneously cited.

In Case 2, which is meant to represent a more controlled mining environment, less than one percent of the shifts are expected to exceed the standard: $P = 0.0037$. Furthermore, μ can be expected to fall below the geometric mean of 1.18 mg/m^3 on about half of the shifts. Therefore, α is even smaller than in the first case: $\alpha = 0.0000079$. Out of 10,000 sampled shifts, 9963 would be expected to be in compliance. Since $9963 \cdot \alpha$ is less than 0.1, it is unlikely that any of these shifts would be cited erroneously.

Case 3 is meant to represent a poorly controlled mining environment, in which $E\{\mu\}$ exceeds the applicable standard and the coefficient of variation in shift-to-shift dust concentrations is a relatively high 60% (i.e., $1.32 \div 2.20$). The geometric mean, however, falls slightly below the applicable standard, so μ is expected to fall below the applicable standard on more than 50% of the shifts. The noncompliance fraction is expected to be $P = 0.46$. Also, because of the high shift-to-shift variability, μ is not very close to its geometric mean on most shifts, and a fairly large percentage of shifts can be expected to experience μ well below the standard. The probability of citing when the mine atmosphere is in compliance is: $\alpha = 0.00015$. If 10,000 of shifts in this environment are sampled, then 5400 of these shifts would be expected to comply with the applicable standard at the sampling location. As in Case 1, an erroneous citation would be expected on about one of these shifts.

$$2. \alpha^* = \text{Prb}\{\mu \leq S \text{ and } X \leq c\}$$

The probability of erroneous citation can also be defined unconditionally. The second way of interpreting this risk represents the proportion of all measurements expected to result in an erroneous citation. Let $\alpha^* = \text{Prb}\{\mu \leq S \text{ and } X \leq c\}$ be the probability that a shift and/or mine atmosphere randomly selected for inspection is in compliance but, because of measurement error, is

nevertheless cited. For an erroneous citation to occur, two events must take place: first, the atmosphere sampled must be in compliance ($\mu \leq S$); second, a measurement error must occur of sufficient magnitude that a citation is issued ($X > c$). The probability that a randomly selected shift will be in compliance is $\text{Prb}\{\mu \leq S\} = 1 - P$. The probability of citation, given compliance on the sampled shift, has already been quantified above as $\text{Prb}\{X \geq c | \mu \leq S\} = \alpha$. The probability that both events occur is the product of these two probabilities—i.e.,

$$\text{Prb}\{\mu \leq S \text{ and } X \geq c\} = \text{Prb}\{\mu \leq S\} \cdot \text{Prb}\{X \geq c | \mu \leq S\}$$

Therefore, $\alpha^* = (1 - P) \cdot \alpha$.

If the applicable standard is exceeded on all shifts, it is exceeded on the shift sampled, so there is no chance of erroneously citing that shift: i.e., $P = 1$, so $\alpha^* = (1 - 1)\alpha = 0$. At the opposite limit, if the applicable standard is never exceeded, then $P = 0$ and $\alpha^* = \alpha$. Between these two extremes, α^* decreases as the noncompliance fraction

P increases, so that α^* is always less than α . To get the number of erroneous citations, α^* is simply multiplied by the number of shifts sampled. This always gives an identical result for N_{α} as that obtained from multiplying the number of compliant shifts by α .

In Case 1, $P = 0.25$. Therefore, the probability of erroneously citing a randomly selected shift is $\alpha^* = 0.75 \cdot \alpha = 0.00009$, or about nine in 100,000. If 10,000 shifts are sampled, then 10,000 $\cdot \alpha^*$ gives the same number of erroneous citations as α multiplied by the 7500 compliant shifts expected in this case.

In the relatively well-controlled environment exemplified by Case 2, dust concentrations on most shifts generally fall well below the standard. Only occasional excursions approaching or (rarely) exceeding the standard occur, so P is near zero. Therefore, α^* is only slightly smaller than α . Since $P = 0.0037$, $\alpha^* = 0.9963 \cdot \alpha$. In this environment, the chance of erroneously citing a randomly selected shift is less than one in 100,000.

In Case 3, the noncompliance fraction is much greater: $P = 46\%$. Therefore, α^* is substantially smaller than α . In this environment the probability of erroneously citing a randomly selected shift is $\alpha^* = 0.00008$, or about eight in 100,000.

$$3. \alpha^{\circ} = \text{Prb}\{\mu \leq S | X \geq c\}$$

Finally, the risk of an erroneous citation can be interpreted as the probability, given a measurement of sufficient magnitude to warrant citation ($X \geq c$), that the dust concentration measured actually complies with the standard ($\mu \leq S$). Let $\alpha^{\circ} = \text{Prb}\{\mu \leq S | X \geq c\}$ denote this probability, which represents the expected proportion of all citations issued because of measurement error. If any particular citation, based on a valid single, full-shift measurement, is selected for scrutiny, then α° is the probability that this citation is erroneous. Using the definition of conditional probability:

$$\begin{aligned} \alpha^{\circ} &= \frac{\text{Prb}\{\mu \leq S | X \geq c\}}{\text{Prb}\{X \geq c\}} \\ &= \frac{\text{Prb}\{\mu \leq S \text{ and } X \geq c\}}{\text{Prb}\{X \geq c\}} \\ &= \frac{a^*}{\text{Prb}\{X \geq c \text{ and } \mu \leq S\} + \text{Prb}\{X \geq c \text{ and } \mu > S\}} \\ &= \frac{a^*}{a^* + \text{Prb}\{X \geq c | \mu > S\} \cdot \text{Prb}\{\mu > S\}} \\ &= \frac{a^*}{a^* + P \cdot \text{Prb}\{X \geq c | \mu > S\}} \end{aligned}$$

$\text{Prb}\{X \geq c | \mu > S\}$ represents the power of the citation criterion to identify cases of noncompliance when they actually

occur. This probability is calculated as follows:

$$\text{Prb}\{X \geq c | \mu > S\} = \int_s^{\infty} \frac{\text{Prb}\{X \geq c | \mu\}}{P} f(\mu) d\mu$$

When the distribution of dust concentrations is such that the

applicable standard is rarely exceeded (i.e., when P is near zero), the

denominator in the expression for α° namely

$$\text{Prb}\{X \geq c\} = a^* + P \cdot \text{Prb}\{X \geq c | \mu > S\},$$

is only slightly greater than the numerator, α^* . This implies that α° is not constrained to be smaller than α or α^* . Since this situation arises in environments where the applicable standard is rarely exceeded, such citations will not often be issued. However, when one is issued, the

probability that it is erroneous can exceed α . For example, in the relatively well-controlled environment exemplified by Case 2, α^* is 0.0000788, P is 0.00370, and $\text{Prb}\{X \geq c | \mu > S\} = 0.133$. Therefore, in this example, $\alpha^{\circ} = 0.0158$, or about 1.6 percent. That is to say, 1.6 percent of the

citations issued under these circumstances will be erroneous. This is considerably greater than α , which was earlier shown to equal only 0.00079 percent. However the expected proportion of measurements resulting in citation, given by $\text{Prb}\{X \geq c\}$, is only 0.000498, or 0.050%. Therefore, out of

10,000 shifts sampled, it is expected that only five would be cited. Since on average only 1.6% of these five citations would be erroneous, it is unlikely that the 10,000 samples would result in any erroneous citations.

Case 2 represents an environment in which the noncompliance fraction is less than one percent. In contrast, the noncompliance fraction in Case 3 is nearly 50%: $P = 0.458$. For this case, $\alpha = 0.000147$, $\alpha^* = 0.0000799$, and $\alpha^\circ = 0.000227$. The calculated value of $\text{Prb}\{X \geq c\}$ is 0.3513, so approximately 35 percent of all measurements would result in citation. Only about 0.027% of these citations, however, would be erroneous. Therefore, out of 10,000 shifts sampled in such an environment, 3513 citations could be expected; and only about one of these citations ($3513\alpha^\circ$) would be expected to be erroneous.

In Case 2, the probability (α°) that a given citation is erroneous is relatively high (though low enough to sustain a citation), but the probability of citing noncompliance in such an environment is very low. In Case 3, the probability of citation is more than 700 times higher, but α° is commensurately lower than in Case 2. Comparison of Cases 2 and 3 illustrates the general principle: as the noncompliance fraction P increases, the probability of citation increases but the probability that a given citation is erroneous decreases.

It is important to note that even in the well-controlled environment of Case 2, the probability that a given citation is erroneous (α°) remains substantially below five percent and far below 50 percent. Although environments even more well controlled could give rise to somewhat greater values of α° , the probability of citing in such environments would be even smaller than the probability in Case 2. If a citation is issued because $X > c$, then the probability that $\mu > S$ is simply $1 - \alpha^\circ$. This shows that in any particular instance where a citation based on a single, full-shift measurement is reasonably likely to be issued according to the CTV table, there would be compelling evidence that $\mu > S$.

V. Risk of Erroneous Failure to Cite

Use of the CTV implies that citations will be issued only when they can be issued with high confidence that the applicable standard has actually been exceeded on the shift sampled. On the other hand, failure to meet or exceed the CTV does not in itself imply compliance at a similarly high confidence level—even on the shift sampled, let alone continuously over any longer term. Because of limited resources, MSHA

inspections are relatively infrequent and serve only to identify instances in which the rest of the dust control program has been ineffective. They cannot be relied upon to ensure continuous compliance.

It should be remembered, however, that MSHA does not rely exclusively on sampling by inspectors to ensure compliance. The MSHA inspection is only one element of the Agency's comprehensive health protection program, which includes mandatory implementation and maintenance by operators of effective dust control methods to control dust levels where miners normally work or travel. It also provides for periodic evaluation by mine operators of the quality of mine air and of the effectiveness of the operator's dust control system through operator bimonthly sampling. If they are not detected during an MSHA inspection, poorly controlled environments, which are out of compliance with the dust standard in a substantial fraction of instances, are likely to be detected during some other phase of the MSHA's enforcement program.

It should also be remembered that MSHA's new enforcement policy eliminates an important source of sampling bias due to averaging, as explained in Appendix A. Under the existing policy, measurements made at the dustiest occupational locations or during the dustiest shifts sampled are diluted by averaging them with measurements made under less dusty conditions. As shown by the SIP data, this practice has frequently caused failures to cite clear cases of excessive dust concentration.

$$1. \beta = \text{Prb}\{X < c | \mu > S\}$$

The complement of *power*, the probability of detecting cases of noncompliance when they occur, is the probability of erroneously failing to detect such cases. Let $\beta = \text{Prb}\{X < c | \mu > S\}$ be the probability that a citation will not be issued when the true dust concentration being measured exceeds the standard. This is the probability of what is commonly called Type II error for testing the null hypothesis that $\mu \leq S$. Since $\beta = 1 - \text{Prb}\{X \geq c | \mu > S\}$, the power of the citation criterion, formulated earlier as $\text{Prb}\{X \geq c | \mu > S\}$, can be used to calculate β . The expected number of erroneous failures to cite, N_β is obtained by multiplying β by the number of shifts for which $\mu > S$.

It is true that due to the high confidence level required for citation, β is greater than it would be if a citation were issued whenever $X > S$. In fact, setting the CTV to any value greater than S results in $\text{Prb}\{X < c | \mu\}$ potentially

greater than 50 percent when a single dust concentration exceeding the standard is being measured. For example, if $\mu = 2.12 \text{ mg/m}^3$ and $S = 2.0 \text{ mg/m}^3$, then the CTV is $c = 2.33 \text{ mg/m}^3$. Since the probability distribution for X is centered on μ , any individual measurement is more likely to fall below the CTV than to exceed it. The probability of erroneously failing to cite in this instance, based only on a single measurement, would be $\text{Prb}\{X < 2.33 | \mu = 2.12\} = 93 \text{ percent}$.

Citing in accordance with the CTV table does not, however, necessarily result in $\beta > 50\%$. When more than one measurement is made during a single shift in the same general area of a mine, such as in the same MMU, the dust concentrations are correlated. This increases the chances that if μ exceeds the standard at one of the sampled locations, at least one of the measurements will meet the citation criteria. More importantly for the present discussion, however, the value of β depends on the distribution of μ even when only a single measurement is considered on each shift.

This is because the magnitude of β depends on the average magnitude of $\text{Prb}\{X < c | \mu\}$ over all those instances in which $\mu > S$. Although $\text{Prb}\{X < c | \mu\}$ exceeds 50 percent when $\mu > c$, it does not exceed 50 percent when $\mu > c$. Poorly controlled environments are likely to experience a significant number of shifts during which μ exceeds not only S but also the CTV. If these shifts "outweigh" those shifts on which $S < \mu \leq c$, then this will result in $\mu < 50 \text{ percent}$.

On those shifts for which $\mu > S$, $\text{Prb}\{X < c | \mu\}$ exceeds 50% only when μ falls between S and c . In contrast, the range of potential values of $\mu > c$ is essentially unlimited, and $\text{Prb}\{X < c | \mu\}$ approaches zero as μ increases. Therefore, μ is less than 50% whenever the distribution of μ is such that $\text{Prb}\{\mu > c\} \mu \text{Prb}\{S < \mu \leq c\}$. In a poorly controlled environment, μ is more likely to exceed the CTV than to fall into the relatively narrow interval between S and the CTV.

For example, in Case 1 the probability that μ exceeds $c = 2.33$ is 14.9 percent, whereas the probability that μ falls between S and c is only $P - 14.9 = 10.5$ percent. Therefore, in this environment, the probability of erroneously failing to cite an instance of $\mu > S$ works out to be somewhat less than 50 percent: $\beta = 1 - \text{Prb}\{X \geq c | \mu > S\} = 0.404$, or 40.4%.

For worse offenders, β is considerably smaller. In Case 3, $\text{Prb}\{\mu > c\} = 35.2\%$, whereas $\text{Prb}\{S < \mu \leq c\}$ is 10.6%. In this case, even though dust concentrations below the applicable standard are

expected on a majority of shifts (as indicated by the geometric mean), B is calculated to be only 23.3%. Stated another way, if MSHA were to select 10,000 shifts in this environment, an expected 4580 of those shifts would be out of compliance. It is expected that on 76.7% of those 4580 shifts a single measurement would be sufficiently large to warrant citation.

There are inherent tradeoffs, not only between β and α , but also between β and the probability that a given citation is erroneous, $\alpha^\circ = \text{Prb}\{\mu \leq S | X \geq c\}$. Decreasing the CTV in order to reduce forces both α and α° to increase. Even if α remains below 50 percent, the effect on α° can be so great as to render some citations clearly unsustainable. In particular, setting the CTV at or near S could result in citations more likely than not to be erroneous. Circumstances in which this can occur are discussed in Appendix D. Use of the CTV, on the other hand, ensures that any given citation based on $X \geq c$ is more likely than not to represent a case of actual noncompliance (i.e., $\mu > S$).

Failure to issue a citation based on a single, full-shift measurement collected during an MSHA inspection does not imply failure to detect and correct a noncompliant condition in the context of MSHA's entire enforcement program. Those commenters expressing concern over the potential magnitude of β have largely ignored other means MSHA uses to protect miners from excessive dust concentrations relative to the longer term. As stated earlier in this notice, MSHA's health protection program provides for the implementation and maintenance by mine operators of effective methods to control dust concentrations where miners normally work or travel, as well as for periodic evaluation of the quality of mine air to which miners may be exposed and the effectiveness of the operator's dust control program through operator bimonthly sampling. Furthermore, MSHA intends to continue its long-standing practice of collecting additional measurements when the standard is exceeded by an amount insufficient to warrant citation at a high confidence level.

VI. Summary and Conclusions

Use of the CTV table is based on MSHA's need for sufficient evidence to issue a citation and show, by a preponderance of the evidence, that a violation occurred. The burden rests with MSHA to show that the applicable standard has in fact been violated on the particular shift cited. Accordingly, the CTV table is designed so that the risk of erroneously not citing is subordinated to the risk of erroneously issuing a citation. However, the probability of erroneously failing to cite a case of noncompliance at a given sampling location is less than 50 percent when the applicable standard is exceeded on a significant proportion of shifts at that location.

Three cases were used to illustrate the risk of erroneous enforcement determinations over a broad range of environmental conditions. The results calculated for each of the three cases considered are summarized in the following table.

Case	Probability (percent)						Average number of erroneous determinations (per 10,000 sampled shifts)	
	Prb{XS>}	Prb{X≥c}	α	α^*	α°	β	N_α	N_β
	1	25.51	15.14	0.0121	0.00903	0.060	40.4	0.9	1,026
2	0.53	0.05	.000791	.000788	1.581	86.7	.1	32
3	45.69	35.17	.0147	.00799	0.0227	23.3	.8	1,067

Based on this analysis, it can be concluded that application of the CTV table provides ample protection against erroneous citations. The probability (α) of issuing a citation when the mine atmosphere sampled is actually in compliance is constrained to fall below a maximum of five percent. This maximum defines the 95-percent confidence level claimed for any citation issued. The expected proportion (α^*) of all valid samples resulting in an erroneous citation is constrained not to exceed α . In practice, both α and α^* are expected to fall far below five percent in a broad range of mining environments.

Furthermore, even in an exceptionally well-controlled environment, where μ is very unlikely to exceed the applicable standard on any particular shift, the probability (α°) that a given citation is erroneous will also fall substantially below five percent. If a measurement exceeds the CTV, the probability that the standard has actually been exceeded is $(1-\alpha^\circ)$. Therefore, any citation issued in accordance with the CTV table will be based on clear and compelling

evidence that the standard has been exceeded on the particular shift sampled.

Although it is increased by the margin of error built into the CTV table, the probability (β) of erroneously failing to cite noncompliance using a single measurement is expected to be significantly less than 50 percent in mining environments where $\mu > S$ on a substantial percentage of shifts. For the example considered of a poorly controlled mining environment (Case 3), β was calculated to be about 23 percent. This means that on any given shift for which $\mu > S$, there would be a 77-percent chance that X would exceed the CTV, thereby warranting a citation. Despite the high confidence level required for single-sample citations, β is considerably less than 50 percent even in the better-controlled environment exemplified by Case 1. Although citing whenever $X > S$ would increase the probability of detecting conditions of excessive dust concentration, Appendix D shows that doing so instead of using the CTV table could result in citations

under conditions of probable compliance. As shown by the small values of α^* in the table above, use of the CTV table makes it very unlikely that this would happen.

Moreover, poorly controlled environments are likely to be detected and cited during some other phase of MSHA's enforcement program even if they are not immediately cited on a particular MSHA sampling inspection. Regardless of the value of β , it can safely be concluded that the risk of failing to detect excessive dust is lower under MSHA's new enforcement policy than under existing procedures, in which measurements of high dust concentration are diluted by averaging.

Appendix D—Consequences of Eliminating the Margin of Error

Several commenters objected to the emphasis placed on avoiding erroneous citations and took issue with MSHA's intention to cite noncompliance only when indicated at a high confidence level. These commenters proposed that it is unfair to limit citations to cases in

which a measurement (X) meets or exceeds some critical value ϵ greater than the applicable standard (S). They argued that such an approach unfairly exposes miners to a far higher probability of wrongly failing to cite than the maximum probability specified for wrongly citing. Their recommendation was to divide the burden equally between proving noncompliance and ensuring compliance. They maintained that if X exceeds S by an arbitrarily small amount, noncompliance is more likely than compliance and that under such circumstances a citation should be issued.

Using notation explained in Appendix C, $X = \mu + \epsilon$, where ϵ is a random, normally distributed measurement error whose standard deviation is $\sigma = \mu \cdot CV_{\text{total}}$. CV_{total} is given by the formula presented in Appendix C. A citation based on a single, full-shift measurement applies specifically to the shift and location sampled, and hence to a distinct value of μ . For the citation to be upheld, the preponderance of

evidence must indicate that $\mu > S$ at one or more of the sampling locations on the cited shift.

Those commenters who maintained that a citation should be issued whenever $X > S$ all assumed (1) that a citation could withstand legal challenge so long as noncompliance is more likely than compliance, even if the probability of compliance is nearly 50 percent; and (2) that if $X > S$, then noncompliance is more likely than compliance. Aside from the question of the legal validity of the first assumption (which equates preponderance of evidence with any probability greater than 50 percent), the second assumption is not always true. Specifically, the second assumption fails to hold in relatively well-controlled environments or in cases where more than one measurement is used to check for noncompliance. Commenters making this assumption confused $\text{Prb}\{X > S | \mu \leq S\}$ with $\text{Prb}\{\mu \leq S | X > S\}$ and also failed to consider citations based on the maximum of several measurements.

I. Well-controlled Environments

In a relatively well-controlled environment, where μ is generally below the applicable standard, the probability that $X > S$ due to a large value of ϵ can exceed the probability that $X > S$ due to $\mu > S$. If $X < c$ and sampling records indicate that the environment is relatively well-controlled, the preponderance of evidence may support $\mu \leq S$ on the particular shift sampled.

For example, suppose a citation is based on a single, full-shift measurement that barely exceeds $S = 2.0 \text{ mg/m}^3$, but dust sampling records for the environment indicate a pattern of dust concentrations resembling Case 2 in Appendix C. That is to say, the statistical distribution of μ is lognormal, with arithmetic mean and standard deviation of 1.2 mg/m^3 and 0.24 mg/m^3 , respectively. As in Appendix C, let $f(\mu)$ denote the lognormal probability density function. Then the probability that $\mu \leq S$, given a single full-shift measurement that falls between S and c, is:

$$\begin{aligned} \text{Prb}\{\mu \leq S | S < X \leq c\} &= \frac{\text{Prb}\{S < X \leq c \text{ and } \mu \leq S\}}{\text{Prb}\{S < X \leq c\}} \\ &= \frac{\int_0^S \text{Prb}\{S < X \leq c | \mu\} f(\mu) d\mu}{\int_0^c \text{Prb}\{S < X \leq c | \mu\} f(\mu) d\mu} \\ &= \frac{0.00252}{0.00481} \\ &= 0.52\% \end{aligned}$$

In other words, when X falls between S and c in this environment, there is a 52-percent chance that the standard has not actually been exceeded. It is more likely that $X > S$ due to a large measurement error than because μ itself has exceeded the applicable standard. It would be unreasonable to cite noncompliance in such situations. By citing when and only when $X \geq c$, the probability that $\mu \leq S$ is reduced to $\alpha = 1.5\%$, as shown for Case 2 in Appendix C.

II. Multiple Samples

Proponents of citing whenever $X > S$ based their argument on a premise of symmetry: since potential measurement errors (ϵ) are symmetrically distributed around μ , they assumed that citing when $X = S$ would result in equal probabilities of erroneously citing and

erroneously failing to cite. From this, they argued that if $X > S$ by an arbitrarily small amount, the probability of erroneously failing to cite would exceed the probability of erroneously citing.

The symmetry argument for citing whenever $X > S$ fails to hold if, on a single inspection, more than one measurement is compared to the standard. In MSHA's dust inspection program, several measurements are routinely made on the same shift, within the same MMU. MSHA intends to use each of these measurements individually to determine noncompliance at the MMU. However, as described in the notice to which this Appendix is attached, no more than one citation will be issued based on single, full-shift measurements from the same MMU. The commenters advocating issuance of a citation whenever $X > S$ all

endorsed such single-sample determinations. Since any of several measurements could warrant a citation against the MMU, the citation will be based, in most cases, on the maximum measurement taken in the MMU during the shift. If each of several measurements is compared directly to the applicable standard, then the symmetry assumed for citing whenever $X > S$ breaks down. The mistake of wrongly citing occurs when any one of the measurements exceeds the applicable standard because of a sufficiently large measurement error, but the mistake of wrongly failing to cite occurs only when each and every measurement is at or below the standard. Each additional measurement reduces the probability of erroneously failing to cite while increasing the probability of erroneously citing.

A few examples will be used to demonstrate how the premise of symmetric error probabilities breaks down when more than a single measurement is taken. These examples demonstrate that noncompliance determinations made by comparing so few as two measurements directly to the S can result in citations issued at a confidence level substantially below 50 percent.

Using I to index different valid measurements for the same MMU, let $\max\{X_i\}$ denote the maximum measurement, and let $\max\{\mu_i\}$ denote the maximum true dust concentration. Note that due to potential measurement errors, the maximum dust concentration does not necessarily correspond to the maximum measurement. For example, $\max\{X_i\}$ might be X_3 even though $\max\{\mu_i\}=\mu_2$. Since the object is to

examine the consequences of citing whenever any of several measurements exceeds S by any amount, it will be assumed in these examples that the citation criterion is $\max\{X_i\}>S$ rather than $\max\{X_i\}>c$.

As in Appendix C, let α be the probability of citing under conditions of compliance, and let β be the probability of erroneously failing to cite. Then:

$$\alpha = \text{Prb}\{\max\{X_i\} > S | \max\{\mu_i\} \leq S\} \text{ and } \beta = \text{Prb}\{\max\{X_i\} \leq S | \max\{\mu_i\} > S\}.$$

For simplicity, suppose $S=2.0 \text{ mg/m}^3$. The following quantities will be used in the calculations:

$\mu \text{ (mg/m}^3\text{)}$	$CV_{\text{total}} \text{ (percent)}$	$\sigma=\mu \cdot CV_{\text{total}} \text{ (mg}^1\text{/m}^3\text{)}$	$\text{Prb}\{X>2.0 | \mu\} \text{ (percent)}$	$\text{Prb}\{X\leq 2.0 | \mu\} \text{ (percent)}$
1.90	6.602	0.1254	21.3	78.7
1.99	6.596	0.1385	47.1	52.9
2.00	6.595	0.1319	50.0	50.0
2.01	6.595	0.1326	53.0	47.0

If exactly one measurement is taken and $\mu=1.99 \text{ mg/m}^3$, then $\sigma=0.1385 \text{ mg/m}^3$. Using the standard normal probability distribution for ϵ/σ ,

$$\begin{aligned} \alpha &= \text{Prb}\{X > 2.0 | \mu = 1.99\} \\ &= \text{Prb}\left\{\frac{X-1.99}{0.1385} > \frac{2.0-1.99}{0.1385}\right\} \\ &= \text{Prb}\left\{\frac{\epsilon}{\sigma} > 0.0722\right\} \\ &= 47.1\%. \end{aligned}$$

On the other hand, if $\mu=2.01 \text{ mg/m}^3$, then $\sigma=.1319 \text{ mg/m}^3$; so

$$\begin{aligned} \beta &= \text{Prb}\{X \leq 2.0 | \mu = 2.01\} \\ &= \text{Prb}\left\{\frac{X-2.01}{0.1326} \leq \frac{2.0-2.01}{0.1326}\right\} \\ &= \text{Prb}\left\{\frac{\epsilon}{\sigma} \leq -0.0754\right\} \\ &= 47.0\%. \end{aligned}$$

It is this approximate equality of α and β , for values of μ symmetrically falling below or above $S=2.0 \text{ mg/m}^3$ that motivates the premise of symmetric error probabilities.

Suppose now that two measurements are taken, and a citation is issued if either X_1 or X_2 exceeds $S=2.0$. Suppose further that $\mu_1=1.99$ and $\mu_2=1.90$. Then:

$$\begin{aligned} \alpha &= \text{Prb}\{\max\{X_i\} > S | \mu_1 = 1.99 \text{ and } \mu_2 = 1.90\} \\ &= 1 - \text{Prb}\{X_1 \leq 2.0 | \mu_1 = 1.99\} \cdot \text{Prb}\{X_2 \leq 2.0 | \mu_2 = 1.90\} \\ &= 1 - (0.531) \cdot (0.789) \\ &= 58\%. \end{aligned}$$

Since a citation is justified if $\mu_i > S$ for any I, the greatest probability of

wrongly not citing in a comparable case of noncompliance is obtained when

$\mu_1=2.01$ and μ_2 is held at 1.90. In that case:

$$\begin{aligned} \beta &= \text{Prb}\{\max\{X_i\} \leq S | \mu_1 = 2.01 \text{ and } \mu_2 = 1.90\} \\ &= \text{Prb}\{X_1 \leq 2.0 | \mu_1 = 2.01\} \cdot \text{Prb}\{X_2 \leq 2.0 | \mu_2 = 1.90\} \\ &= (0.470) \cdot (0.787) \\ &= 37\%. \end{aligned}$$

This example illustrates the point that α can exceed β by a substantial amount when as few as two measurements are directly compared to the applicable standard. If μ_2 were actually 1.99, then the discrepancy would be even greater: $\alpha=72\%$ and $\beta=25\%$. Notice,

furthermore, that in both cases, α would be greater than 50%. The confidence level at which a citation is issued depends on the maximum possible value of α . Therefore, when one measurement out of two marginally exceeds S, the confidence level at which

a citation can be issued is less than 28% (i.e., $100\% - 72\%$). Such a citation would be difficult to defend if challenged.

If five measurements are made, as is routinely done during MSHA inspections of an MMU, then citing

whenever $\max\{X_i\} > S$ is even less defensible. The confidence level for a citation based on the maximum of five measurements is defined by the value of α when $\mu_i = S$ for all five values of i . Under these circumstances, the probability that at least one of the five measurements would exceed the applicable standard is:

$$\begin{aligned}\alpha &= \text{Prb}\{\max\{X_i\} > S \mid \mu_i = S \text{ for all } i\} \\ &= 1 - (0.5)^5 \\ &= 97\%.\end{aligned}$$

Therefore, the confidence level at which a citation could be issued is only 3%. At the same time, the probability that none of the five measurements will exceed S is $\beta = (0.5)^5 = 3\%$, so the probability that a citation would be issued is 97%.

III. Conclusion

MSHA, along with other federal agencies, recognizes that in issuing citations, the burden rests with the Agency to show that a violation of the applicable standard occurred. Use of the CTV table will severely limit the risk of an erroneous citation, even when the true dust concentration being measured is exactly equal to or slightly below the applicable standard. If a single measurement falls between S and the CTV, then the measurement does not necessarily provide sufficient evidence of $\mu > S$ to support a citation. Consequently, MSHA cannot justify issuing a citation whenever a measurement exceeds the applicable standard by an arbitrarily small amount. Although citing whenever $X > S$ would result in a smaller probability (β) of erroneously failing to cite, and hence in a greater level of protection for the miner, doing so would result in citations that may not withstand legal challenge. However, as stated earlier in the notice, if the measurement exceeds the applicable standard but not the CTV, MSHA intends to target environments for additional sampling to confirm that dust control measures in use are adequate. These follow-up inspections, in conjunction with operator dust sampling and MSHA monitoring of operator compliance with approved dust control parameters, should further help to protect miners from excessive dust concentration.

References

1. Kogut, J. Memorandum of September 6, 1994, from Jon Kogut, Mathematical Statistician, Denver Safety and Health Technology Center, MSHA, to Ronald J. Schell, Chief, Division of Health, Coal Mine Safety and Health, MSHA, Subject: *Multi-day*

MSHA Sampling of Respirable Coal Mine Dust.

2. Kogut, J. Memorandum of September 6, 1994, from Jon Kogut, Mathematical Statistician, Denver Safety and Health Technology Center, MSHA, to Ronald J. Schell, Chief, Division of Health, Coal Mine Safety and Health, MSHA, Subject: *Coal Mine Respirable Dust Standard Noncompliance Determinations.*

3. Leidel N.A. and K.A. Busch. *Statistical Design and Data Analysis Requirements*. Patty's Industrial Hygiene and Toxicology, Third Edition, Vol. 3, Part A, Chapter 10, 1994.

4. Kogut, J., T.F. Tomb, P.S. Parobeck, A.J. Gero, and K.L. Suppers. *Measurement Precision With the Coal Mine Dust Personal Sampler*. Internal MSHA Report, 1995.

5. Kennedy, E.R., T.J. Fischbach, R. Song, P.M. Eller, and S.A. Shulman. *Guidelines for Air Sampling and Analytical Method Development and Evaluation*. U.S. Department of Health and Human Services, Public Health Service, National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication No. 95-117.

Dated: December 19, 1997.

J. Davitt McAteer,

Assistant Secretary for Mine Safety and Health.

[FR Doc. 97-33937 Filed 12-30-97; 8:45 am]

BILLING CODE 4510-43-P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Single, Full-Shift Respirable Dust Measurements

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the proposed information collections related to single, full-shift respirable dust measurements.

MSHA is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

DATES: Submit comments on or before March 2, 1998.

ADDRESSES: Send comments to Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, 4015 Wilson Boulevard, Room 627, Arlington, VA 22203-1984. Commenters are encouraged to send their comments on a computer disk, or via E-mail to psilvey@msha.gov, along with an original printed copy. Ms. Silvey can be reached at (703) 235-1910 (voice) or (703) 235-5551 (facsimile).

FOR FURTHER INFORMATION CONTACT: George M. Fesak, Director, Office of Program Evaluation and Information Resources, U.S. Department of Labor, Mine Safety and Health Administration, Room 715, 4015 Wilson Boulevard, Arlington, VA 22203-1984. Mr. Fesak can be reached at gfesak@msha.gov (Internet E-mail), (703) 235-8378 (voice), or (703) 235-1563 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Today, the Secretary of Labor and the Secretary of Health and Human Services published a joint notice in the **Federal Register** finding that the average concentration of respirable dust to which each miner in the active workings of a coal mine is exposed can be measured accurately over a single shift in accordance with section 202(f)(2) of the Mine Act.

Implementation of the final finding is expected to better protect miners from

overexposure to respirable coal mine dust and its related health hazards. It is also expected to initially increase the number of citations issued by MSHA inspectors for noncompliance with the applicable respirable dust standard. However, based on previous experience, MSHA anticipates that this increase will level off in future years. Since a citation for noncompliance with the applicable dust standard triggers several regulatory requirements on mine operators that have paperwork implications, the final finding is expected to have the effect of increasing the paperwork burden on mine operators.

Under 30 CFR 70.201(d), 71.201(d), and 90.201(d), a mine operator who receives a citation for a violation of the applicable dust standard is required to take corrective action and then sample the affected mechanized mining unit (MMU), designated area (DA), designated work position (DWP), non-designated work position (NDWP), or part 90 miner until five valid respirable dust samples are collected. Under 30 CFR 70.209, 71.209, and 90.209, persons who are certified to collect respirable dust samples are required to complete dust data cards that are submitted with these samples.

Sections 71.300 and 90.300 require a coal mine operator to submit to MSHA for approval a written respirable dust control plan within 15 calendar days after the termination date of a citation for violation of 30 CFR 71.100, 71.101, 90.100 or 90.101. This plan provides a detailed description of the specific respirable dust control measures used to abate the violation of the respirable dust standard and how each control measure

will continue to be used by the operator to control dust levels and ensure compliance with the applicable standard.

Section 71.301(d) requires the respirable dust control plan to be posted on the mine bulletin board to inform interested persons at the mine of the types and locations of dust control measures that are required to be employed and maintained. However, 30 CFR 90.301(d) prohibits posting of the dust control plan for part 90 miners and, instead, requires a copy be provided to the affected part 90 miner.

A citation for a violation of the applicable standard can also form the basis for requiring an underground coal mine operator to revise the mine ventilation plan under 30 CFR 75.370. The mine ventilation plan is required to specify the respirable dust control measures to be used where coal is being cut, mined, drilled for blasting, or loaded; at dust generating sources in designated areas; and at underground dumps, crushers, transfer points, and haulageways.

Section 75.370(a)(3) requires the mine operator to notify the representative of miners at least 5 days prior to submission of a mine ventilation plan and any revision to such plan. If requested, the mine operator is required to provide a copy to the representative of miners at the time of notification. In the event of a situation requiring immediate action on a plan revision, notice of the revision and, if requested, a copy of the revision shall be given to the representative of miners by the operator at the time of submission. A copy of any proposed revision

submitted for approval shall be made available for inspection by the representative of miners and a copy of any proposed revision submitted for approval shall be posted on the mine bulletin board at the time of submittal, where it shall remain until it is approved, withdrawn, or denied.

Section 75.370(e) requires that, prior to implementing a ventilation plan revision, the mine operator must instruct all persons affected by the revision in its provisions.

Section 75.370(f) requires that the approved ventilation plan and any revisions shall be provided upon request to the representative of miners by the operator following notification of approval, made available for inspection by the representative of miners, and posted on the mine bulletin board within 1 working day following notification of approval. The approved plan and its revisions shall remain posted on the bulletin board for the period of time that they are in effect.

II. Current Actions

Implementation of the final finding will better protect miners from overexposure to respirable coal mine dust and its related health hazards. It is also expected to initially increase the paperwork burden on mine operators.

Type of Review: New.

Agency: Mine Safety and Health Administration.

Recordkeeping: Indefinite.

Title: Single, Full-Shift Respirable Dust Measurements.

Affected Public: Business or other for-profit institutions.

Estimated Burden Hours:

Cite/reference	Total respondents	Frequency	Total responses	Average time per response (hours)	Hour burden
70.209	338	On occasion	1,900	0.00	0
71.209	76	On occasion	405	0.00	0
90.209	3	On occasion	15	.....	.....
71.300	81	On occasion	81	3.17	257
71.301(d)	81	On occasion	81	0.17	14
75.370 and 75.370(a)(3)	63	On occasion	63	3.33	210
75.370(e)	63	On occasion	63	0.17	11
75.370(f)	63	On occasion	63	0.25	16
90.300	3	On occasion	3	3.17	10
90.301(d)	3	On occasion	3	0.33	1
Totals	611	.....	2,677	0.19	519

Total Hour Burden Cost: \$20,082.
Total Burden Cost (capital/startup): \$0.

Total Burden Cost (operating/maintaining): \$116,230.

Comments submitted in response to this notice will be summarized and/or

included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

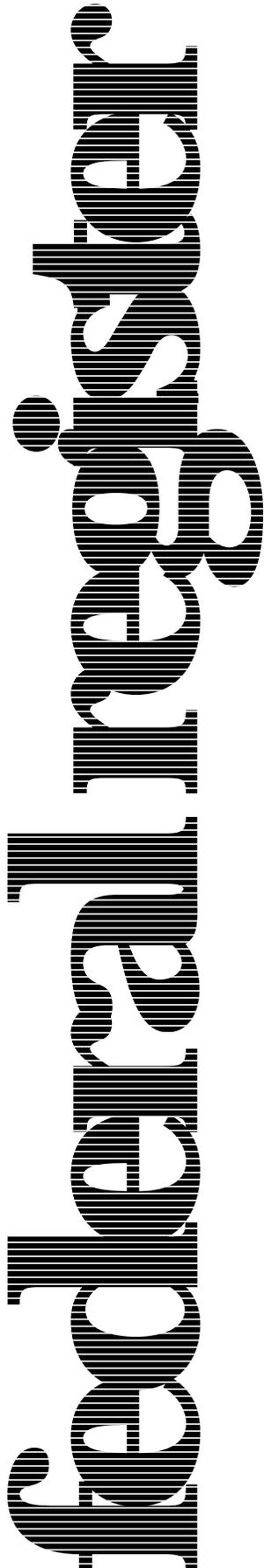
Dated: December 19, 1997.

George M. Fesak,

Director, Program Evaluation and Information Resources.

[FR Doc. 97-33936 Filed 12-30-97; 8:45 am]

BILLING CODE 4510-43-P



Wednesday
December 31, 1997

Part IV

**Federal Reserve
System**

12 CFR Parts 211 and 265
International Banking Operations; Rules
Regarding Delegation of Authority;
Proposed Rule

FEDERAL RESERVE SYSTEM**12 CFR Parts 211 and 265**

[Regulation K; Docket No. R-0994]

International Banking Operations; Rules Regarding Delegation of Authority**AGENCY:** Board of Governors of the Federal Reserve System.**ACTION:** Notice of proposed rulemaking.

SUMMARY: Consistent with section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (the Regulatory Improvement Act) and the International Banking Act of 1978 (the IBA), the Board has reviewed Regulation K, which governs international banking operations, and is proposing for comment a number of changes to Subparts A, B and C of Regulation K.

Subpart A of Regulation K governs the foreign investments and activities of all member banks (national banks as well as state member banks), Edge and agreement corporations, and bank holding companies. The proposed amendments would streamline foreign branching procedures for U.S. banking organizations, authorize expanded activities in foreign branches of U.S. banks, and implement recent statutory changes authorizing a bank to invest up to 20 percent of capital in surplus in Edge corporations. Changes also are proposed to the provisions governing permissible foreign activities of U.S. banking organizations, including securities activities, and investments by U.S. banking organizations under the general consent procedures and portfolio investments authority.

Subpart B of Regulation K (Foreign Banking Organizations) governs the U.S. activities of foreign banking organizations. The proposed amendments include revisions aimed at streamlining the applications procedures applicable to foreign banks seeking to expand operations in the United States, changes to provisions regarding the qualification of certain foreign banking organizations for exemption from the nonbanking prohibitions of the section 4 of the Bank Holding Company Act (the BHC Act), and implementation of provisions of the Reigle-Neal Interstate Banking and Branching Efficiency Act of 1994 (the Interstate Act) that affect foreign banks.

In addition, there are proposed a number of technical and clarifying amendments for Subparts A and B, as well as Subpart C, which deals with export trading companies, and certain

amendments to the Board's Rules Regarding Delegation of Authority.

DATES: Comments must be received by March 14, 1998.

ADDRESSES: Comments, which should refer to Docket No. R-0994, may be mailed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC. 20551. Comments addressed to Mr. Wiles also may be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, NW. Comments received will be available for inspection in Room MP-500 of the Martin Building between 9:00 a.m. and 5:00 p.m. weekdays, except as provided in § 261.14 of the Board's Rules Regarding the Availability of Information, 12 CFR 261.14.

FOR FURTHER INFORMATION CONTACT: Kathleen M. O'Day, Associate General Counsel (202/452-3786); Sandra L. Richardson, Managing Senior Counsel (202/452-6406), or Jon Stoloff, Senior Attorney (202/452-3269), regarding Subpart A; Ann Misback, Managing Senior Counsel (202/452-3788), or Janet Crossen, Senior Attorney (202/452-3281), regarding Subparts B or C, Legal Division; or Michael G. Martinson, Associate Director (202/452-2798), or Betsy Cross, Assistant Director (202/452-2574), Division of Banking Supervision and Regulation. For the users of Telecommunications Device for the Deaf (TDD) *only*, please contact Diane Jenkins (202/452-3544).

SUPPLEMENTARY INFORMATION:**Subpart A: International Operations of U.S. Banking Organizations Expansion of Permissible Foreign Activities****Statutory Framework**

The proposed amendments to Regulation K, which are in part the result of the Board's review of its regulations under section 303 of the Regulatory Improvement Act, seek to eliminate unnecessary regulatory burden, increase transparency, and streamline the approval process for U.S. banking organizations seeking to expand their operations abroad and foreign banks seeking to establish or expand operations in the United States. The Federal Reserve Act, as amended by the IBA, also requires the Board to review and revise its regulations issued under section 25A of the Federal Reserve Act (the Edge Act) at least once every five years to ensure that the purposes of the

Edge Act are being served in light of prevailing economic conditions and banking practices. The provisions of Subpart A, which govern the operations of Edge corporations, also were reviewed with this statutory mandate in mind.¹

Edge corporations are international banking and financial vehicles through which U.S. banking organizations offer international banking or other foreign financial services and through which they compete with similar foreign-owned institutions in the United States and abroad. The purposes of the Edge Act, which amended the Federal Reserve Act in 1919, include enabling U.S. banking organizations to compete effectively with foreign-owned institutions; providing the means to finance international trade, especially U.S. exports; fostering the participation of regional and smaller U.S. banks in providing international banking and financing services to U.S. business and agriculture; and stimulating competition in the provision of international banking and financing services throughout the United States. Congress, in enacting this legislation, recognized that U.S. banks needed vehicles that could exercise wider financial powers abroad than were permitted domestically in order to be competitive internationally and to serve the international needs of U.S. firms. At the same time, the Edge Act places limits on U.S. banks' exposure to these broader foreign activities, by limiting the amount that U.S. banks may invest in Edge corporations, establishing a number of statutory safety and soundness constraints, and granting the Board wide discretion in determining what activities should be permissible for such entities. In exercising its authority in this area, the Board is required by the IBA to implement the objectives of the Edge Act consistent with supervisory standards relating to the safety and soundness of U.S. banking organizations.

As a result of the current review, the Board has not identified any changes that appear to be necessary with regard to the provisions relating to the activities of Edge corporations in the United States. Nevertheless, comment is sought on any changes to the permissible U.S. activities of Edge corporations that are considered necessary or appropriate to fulfill the purposes of the Edge Act.

¹ The Board last revised Subpart A in December 1995, at which time the general consent investment authority for strongly-capitalized and well-managed U.S. banking organizations was expanded significantly. A comprehensive review of Regulation K in its entirety was completed in 1991.

The Board, however, has determined that a number of the provisions relating to foreign activities of U.S. banking organizations could be revised. The Board proposes revisions to Subpart A that would: (1) Expand permissible government bond trading by foreign branches of member banks; (2) streamline procedures for establishment of foreign branches by U.S. banking organizations; (3) expand permissible foreign activities of U.S. banking organizations, including securities activities; (4) expand general consent and portfolio investment authority for U.S. banking organizations; (5) amend the debt/equity swaps authority to reflect changes in circumstances of eligible countries; (6) implement the new statutory provision allowing member banks to invest, with the Board's approval, up to 20 percent of capital and surplus in the stock of Edge and agreement corporations; and (7) include additional technical and clarifying amendments. Each of these proposed changes is discussed below.

Expansion of Government Bond Trading by Foreign Branches

Section 25 of the Federal Reserve Act permits the Board to authorize foreign branches of member banks to conduct abroad activities that are not permitted domestically. However, the statute states that the Board shall not "except to such limited extent as the Board may deem necessary with respect to securities issued by any 'foreign state' * * * authorize a foreign branch to engage or participate, directly or indirectly, in the business of underwriting, selling, or distributing securities."

Given the statutory language, the Board, to date, has only permitted foreign branches to underwrite and sell securities of the government of the country in which the branch was located. This was determined to be appropriate on the basis that it is often necessary in the ordinary course of banking business for a branch to participate in the selling of the bonds of the host country.

In recent years, U.S. banking organizations have become more active in trading and underwriting foreign government securities. Increasingly, such business, where possible, is being conducted in the foreign branches of U.S. banks. Rather than distributing the securities through their various branches, centralizing trading for all or for certain groups of countries in a single branch can be desirable to facilitate management and funding of this business. For example, a banking organization might wish to centralize

government securities trading for all countries in the European Union in one European branch.

For these reasons, the Board proposes that banks be permitted to underwrite and deal through their foreign branches in obligations of governments other than the host government, provided that the obligations are of investment grade and the business is otherwise subject to sound banking practices and prudential regulations. The Board considers the requirement that the obligations must be investment grade would limit cross-border transfer risk to the bank because trading of government securities giving rise to such risk would be required to be conducted either directly through a local branch that is funded locally or through a subsidiary instead of through the bank.

The Board believes that permitting branches to underwrite and sell securities of governments other than the host government on this basis is consistent with sound risk management and general business practices, as well as with the Board's statutory authority. The Board also proposes to retain the existing authority of foreign branches of member banks to underwrite and deal in host government bonds regardless of whether they are investment grade.

The Board seeks comment on these proposals, as well as on what ratings should be considered to be investment grade for these purposes.

Foreign Branching

The Board's responsibilities as home country supervisor under the *Minimum Standards for the Supervision of International Banking Groups and their Cross-border Establishments* issued by the Basle Committee on Banking Supervision (the Minimum Standards) call for its specific authorization of a U.S. banking organization's outward expansion. Outward expansion for these purposes means the initial establishment of a banking presence in a country by the bank or any affiliate.

Regulation K currently requires the specific consent of the Board for the establishment of branches by a member bank, an Edge or agreement corporation, or a foreign bank subsidiary in its first two foreign countries. The Board believes that 30 days' prior notice before establishment of those initial foreign branches would be sufficient and would be consistent with the Minimum Standards. The Board considers that 30 days' prior notice also should be required consistent with the Minimum Standards if the initial banking presence abroad is in the form of a subsidiary bank; such notice would be required

even if the amount to be invested were below the general consent limits.

Under Regulation K at present, no prior Board approval is required for a banking entity to establish additional branches in any foreign country where it already operates one or more branches. However, a banking entity must give the Board prior notice before establishing a branch in a foreign country where it has no branches even though a banking entity affiliate operates a branch in that country.

The Board proposes that Regulation K be liberalized such that if any of the member bank, its Edge or agreement corporation subsidiaries, or a foreign bank subsidiary (whether a subsidiary of the bank or of the bank holding company) already has a branch in a particular foreign country, a banking affiliate would be able to branch there without prior notice to the Board. After-the-fact notice, however, would still be required.

The Board also proposes that the 45 days' prior notice currently required in order to branch into additional countries where there is no affiliated banking presence (after the organization has branches engaged in banking in two foreign countries) should be reduced to 12 business days. In taking this approach, the foreign branching experience of the entire banking organization would be taken into account in determining whether the banking entity would be subject to the 30 day or 12 day prior notice procedure. Where a U.S. banking organization as a whole already operates foreign branches of banking entities in two countries, any banking affiliate would be able to open a branch in a country where such organization has no banking presence pursuant to the 12 days' prior notice procedure.

Finally, currently under Regulation K, nonbanking subsidiaries held pursuant to Regulation K may branch into any country in which any affiliate has a branch without prior notice, but a 45-day prior notice must be submitted to establish a branch in a country where no affiliate has a presence. The Board proposes permitting nonbanking subsidiaries held pursuant to Regulation K to establish foreign branches without prior review, subject only to an after-the-fact notice requirement.

The Board seeks comment on these proposed changes, including in particular whether the proposed modified notice periods would sufficiently accommodate foreign expansion plans.

Permissible Activities of Foreign Subsidiaries of U.S. Banking Organizations

One aspect of bank regulation to which the Federal Reserve subscribes is the fostering of a level competitive playing field for financial intermediaries. Thus, in the United States, the Board has advocated that expansion by banking organizations into nonbanking activities should generally occur through the bank holding company and not the bank. Banks in the United States benefit from the implicit support of the national government and its sovereign credit rating through federal deposit insurance, Federal Reserve discount window access, and final riskless settlement of payment system transactions. Extension of this system would make the existing playing field in the United States unlevel for nonbank competitors and create unnecessary distortions in competition.

The same principle applies to American banks abroad. Other nations have chosen to allow their banks to engage in a broad array of financial activities, especially investment banking activities, thereby extending to these banks the implicit support of their governments. In those markets, U.S. banks would be at a disadvantage if unable to offer their customers an equivalent range of key services with the convenience and efficiency of their local bank competitors. Indeed, in many of these markets, banks are the only significant providers of capital markets services. Independent securities firms are not generally substantial competitors in these markets, both for historical reasons and because they may be unable to compete effectively with banks that have the explicit and implicit support of their governments.

Congress has recognized the existence of the different competitive environments faced by U.S. banks operating abroad and has legislated specifically to deal with it. Under the Edge Act, the Board has been granted broad authority to permit Edge corporations, which may be owned by U.S. banks, to engage in a wider range of activities outside the United States than has been permitted to U.S. banks domestically, consistent with safety and soundness standards. As noted, the purposes of the Edge Act include enabling U.S. banking organizations to compete effectively with foreign-owned institutions. Congress, in enacting this legislation, recognized that U.S. banks needed vehicles that could exercise broader financial powers abroad in order to be able to be competitive internationally and to serve the needs of

U.S. firms. Congress granted the Board similar broad discretion to allow bank holding companies to engage in activities outside the United States.

In exercising its statutory authority, the Board has sought to balance the need for U.S. banks to be competitive abroad with the public interest in assuring the safety and soundness of the banks, protecting the deposit insurance fund, and limiting the extension of the federal safety net. In proposing these revisions to Regulation K, the Board has sought to give U.S. banks appropriate expansion of those activities, such as investment banking, in which the competitive need is the greatest. Liberalization in relation to other activities, such as venture capital investments and insurance activities, has been proposed only in relation to subsidiaries of the bank holding company. These latter activities appear to be able to be conducted competitively outside the bank chain of ownership.

Securities Activities

Current Restrictions on Securities Activities

Foreign subsidiaries of U.S. banking organizations have been permitted broad authority to underwrite and deal in debt securities for over 25 years, subject to the provision that the securities must be included with loans for purposes of compliance with the parent bank's lending limit. No separate dollar limits have been placed on underwriting and dealing in debt securities.

Since 1979, Regulation K also has authorized foreign subsidiaries of both U.S. banks and bank holding companies to underwrite and deal in equity securities outside the United States, subject to certain limitations and restrictions. These activities were determined to be permissible, within the applicable limits, on two bases. First, it became clear that it was necessary for U.S. banking organizations to be able to engage in these activities abroad, if they were to compete successfully with foreign banks in the provision of services to foreign customers. Indeed, for some time, virtually all the major foreign competitors of U.S. banking organizations have been foreign banks that conduct equity securities activities either directly in the bank or in a subsidiary of the bank. Thus, consistent with the purposes underlying the Edge Act and the BHC Act, there is clear statutory authority for U.S. banking organizations to engage in these activities through subsidiaries abroad. Second, in any event, the provisions of

the Glass-Steagall Act do not apply extra-territorially to the operations of foreign subsidiaries of U.S. banking organizations.

While equity underwriting and dealing have been permissible activities for U.S. banking organizations' foreign subsidiaries for some time, as noted above, the level of such activity is subject to limits under Regulation K. Prudential restrictions *currently* applied to equity securities underwriting and dealing activities under Regulation K include the following.

Underwriting limits—Through a foreign subsidiary, an investor² may underwrite equity securities in amounts up to the lesser of \$60 million or 25 percent of its tier 1 capital. These limits do not include amounts covered by binding commitments from sub-underwriters or other purchasers. If the underwriting is done in a subsidiary of the member bank, the amount of the uncovered underwriting must be included in computing the bank's single borrower lending limit with respect to the issuer.

Dealing limits—Through a foreign subsidiary, an investor may hold a dealing position in the equity securities of any one issuer in amounts up to the lesser of \$30 million or 10 percent of its tier 1 capital. An investor must include any shares of a company held in an affiliate's dealing account in determining compliance with any percentage limits placed on ownership of that company.

Aggregate limit—There is an aggregate limit on the total amount of equity securities that may be held in investment and dealing accounts, aggregating all shares held by subsidiaries: for a bank holding company, the limit is 25 percent of tier 1 capital; for an Edge corporation,³ the limit is 100 percent of the Edge's tier 1 capital.⁴

Prior review—Banking organizations must submit to a review of their foreign securities operations prior to engaging in foreign equity securities activities to the extent of these limits. They may also seek Board approval for higher underwriting limits, subject to certain conditions.

² An investor for these purposes means an Edge corporation, agreement corporation, bank holding company, member bank and any foreign bank owned directly by a member bank.

³ Any foreign bank directly owned by a U.S. bank is treated as an Edge corporation for purposes of its limits.

⁴ Investments in companies must be added to any shares of such companies held in the dealing account for purposes of this limit.

Proposed Revisions

Determination of Applicable Limits

Although, as discussed above, the limits on underwriting and dealing in equity securities in Regulation K are expressed both in terms of percentages of tier 1 capital of the investor and absolute dollar limits, as a practical matter it has been the dollar limits that have constrained the ability of U.S. banking organizations to engage in these activities through their foreign subsidiaries and, consequently, have impeded their efforts to compete with foreign banks abroad. In order to reduce further these constraints on competition, the Board proposes to replace the dollar limits for underwriting or dealing activity with limits based solely on percentages of the investor's tier 1 capital for well-capitalized and well-managed organizations.

The Board considers that, if a banking organization is well-capitalized and well-managed, tying the underwriting or dealing limits solely to capital levels would have the benefit of more closely linking the limits to the ability of the company to support the activity. It would also provide U.S. banking organizations with greater flexibility in responding to changing market conditions, because the amount of capital devoted to an activity is, after meeting regulatory constraints, determined by the firm.⁵

Accordingly, the Board proposes to amend Regulation K in relation to those banking organizations that are well-capitalized and well-managed by removing the existing dollar limits applicable to equity securities activities, and instead providing that such activities would be limited to percentages of the investor's tier 1 capital. For well-capitalized and well-managed organizations, the Board proposes applicable limits to be determined as follows.⁶ In relation to securities activities of subsidiaries of bank holding companies, their limits would be determined by reference to percentages of the tier 1 capital of the holding company. The Board proposes, however, that limits applicable to such activities undertaken by subsidiaries of Edge and agreement corporations, as

⁵ Arguably, this flexibility could be enhanced further if foreign subsidiaries of U.S. banking organizations were permitted to exceed the individual and aggregate limits, subject to a requirement that the amount in excess of the limits be deducted from capital and, after such deduction, the institution would continue to be well-capitalized.

⁶ The Board proposes that existing dollar limits would be retained for companies that are not well-capitalized and well-managed.

well as foreign banks that may be direct subsidiaries of member banks, would be determined by reference, at least in the first instance, to the tier 1 capital of the parent bank.

In the Board's view, tying applicable limits to the capital of the parent bank is particularly important for subsidiaries of Edge corporations. As previously noted, Congress has limited a member bank's investment in Edge and agreement corporations to 20 percent of the bank's capital.⁷ However, partly for tax reasons, Edge corporations historically have tended to retain their earnings rather than dividending them to the parent bank. In some cases due to such retained earnings, the capital of a bank's Edge and agreement corporations may be in excess of 20 percent of the parent bank's consolidated capital, even though its investment in the Edge subject to the above-referenced statutory limit is below 20 percent.

In these circumstances, the Board considers that the capital of an Edge corporation that is in excess of 20 percent of the parent bank's consolidated capital, when retained earnings are counted, should be excluded for purposes of determining applicable limits for activities of the Edge and its subsidiaries. The Board proposes to accomplish this by setting limits for Edge corporations tied both to percentages of the Edge's and parent bank's capital, respectively.⁸ Limits tied to the parent bank's capital would be 20 percent of the limits otherwise applicable to Edge corporations. The lower limit would be the binding limit. For example, if a limit proposed for a given activity of an Edge corporation is 10 percent of capital but the Edge's capital is in excess of 20 percent of the bank's total capital, the binding limit for the Edge would be two percent of the parent bank's tier 1 capital. For those U.S. banks that do not have significant levels of retained earnings at the Edge, the binding limit more than likely would be the separate limit tied to the Edge's capital.

The Board considers that this approach would be consistent with the intent underlying the provisions of the

⁷ The Edge Act prohibited member banks from investing more than 10 percent of their capital and surplus in the capital stock of Edge and agreement corporations. In September 1996, Congress amended this limit to permit investments in excess of 10 percent of capital and surplus with the specific approval of the Board, provided the amount invested shall not exceed 20 percent of capital and surplus of the bank.

⁸ As noted above, Regulation K currently treats any foreign bank owned directly by a member bank as an Edge corporation for purposes of its limits. The Board proposes that this treatment would be continued under the revised Regulation K limits.

Edge Act limiting the total amount of capital a bank may invest in Edge corporations. This approach effectively would place a cap on the percentage of total bank capital that could be placed at risk through activities or investments not otherwise permitted to the bank directly, regardless of the capital level of the Edge corporation. This approach also would remove any regulatory incentive to retain earnings at the Edge because any regulatory benefit from such retained earnings, in terms of expanded limits on activities abroad, would be denied.

The Board proposes that all limits applicable to well-capitalized and well-managed Edge corporations under the amended Regulation K would proceed on this basis. Comment is requested on these proposals and whether any other approach might achieve similar objectives.

Equity Underwriting

The \$60 million limit on underwriting equity securities significantly impedes the ability of U.S. banking organizations to compete for this business in foreign markets, where securities underwriting is increasingly a service offered by local banks. At the same time, the risks associated with the activity suggest that such a stringent limit is not required for safety and soundness purposes for well-capitalized and well-managed banking organizations. While initial underwriting commitments may involve large sums, in most cases by the time the underwriting goes to market, large portions of the exposure have been passed on sub-underwriters or presold. Thus, in most cases, the initial underwriting commitment overstates the risk being assumed.

The Board proposes to remove the absolute dollar limits on underwriting exposure for well-capitalized and well-managed banking organizations, but retain a limit based on a percentage of the investor's capital. More specifically, limits for underwriting exposure to a single company would be established at 15 percent of the bank holding company's tier 1 capital for its subsidiaries and, for subsidiaries of Edge corporations, the lesser of three percent of tier 1 capital of the bank or 15 percent of the tier 1 capital of the Edge.

These limits on underwriting exposure to a single company would be applied on an aggregate basis. A bank holding company's limit would include all underwriting exposure to one issuer by all of the holding company's direct and indirect subsidiaries, including exposures held through its bank subsidiaries. The bank's and Edge's

limits would include all exposures held by their respective subsidiaries. The Board proposes, however, that this expanded underwriting authority would be available to U.S. banking organizations only if each of the bank holding company, bank and Edge or agreement corporation qualify as well-capitalized and well-managed.⁹

For organizations that fail to meet the well-capitalized and well-managed criteria, the Board proposes that the existing dollar limits (*i.e.*, \$60 million) on commitments by an investor and its affiliates for the shares of an organization would be retained.

The Board proposes that, in order to engage in such activities, all banking organizations would be required to implement internal systems and controls adequate to ensure proper risk management. Controls would have to be in place to assure that underwriting positions do not result in violations of limits on securities held in the trading account or exceed the parent bank's lending limits when the underwriting positions are combined with other credit exposures. Sanctions (such as temporary suspension of underwriting authority) may be imposed for violations of such limits.

Dealing in Equity Securities

The Board also proposes for comment liberalization of dealing activities for well-capitalized and well-managed banking organizations. As with underwriting limits, the proposed dealing limits would be based on percentages of capital of the organization and, thus, on the ability of the organization to accommodate risk. This change would permit U.S. banking organizations to compete more effectively with foreign banks in providing equity dealing and underwriting services to customers abroad, where such activities are generally permissible to banking organizations. Nevertheless, in the Board's view, dealing activities appear to present somewhat greater risk of loss than underwriting, which suggests somewhat more restrictive limits are needed for dealing activities relative to underwriting activities.

For well-capitalized and well-managed organizations, the Board, therefore, proposes to remove the current dollar limits and revise the existing percentage of capital limits as follows. First, in order to provide

⁹The Board proposes that what, if any, action should be taken in relation to banking organizations' limits and dealing positions if they cease to be well-capitalized and well-managed would be addressed on a case-by-case basis through supervisory action.

diversification in the trading account, the Board proposes a limit on holdings of any one stock in the trading account of 10 percent of the tier 1 capital of the bank holding company for its subsidiaries and, for subsidiaries of an Edge corporation, the lesser of two percent of the bank's tier 1 capital or 10 percent of the Edge's tier 1 capital.

Second, the Board proposes an aggregate limit applicable to all holdings of equities in the trading accounts of all direct and indirect subsidiaries authorized pursuant to Subpart A.¹⁰ Without such an aggregate ceiling, the Board is concerned that a banking organization could have excessive exposure to movements in equity markets. The Board proposes aggregate limits of 50 percent of the bank holding company's tier 1 capital for its subsidiaries and, in the case of an Edge's subsidiaries, the lesser of 10 percent of the tier 1 capital of the bank or 50 percent of the Edge's tier 1 capital.

The Board proposes that the limits on equity trading and dealing would apply to net positions across legal vehicles held, directly or indirectly, by the regulated entity to which the limit is applicable (that is, the bank holding company, the bank or the Edge corporation).¹¹ Long equity positions in a single stock could be netted against short positions in the same stock and against derivatives referenced to the same stock.¹² For purposes of the aggregate limits, all physical and derivative long positions could be netted against physical and derivative short positions. It is further proposed that, for purposes of measuring compliance with these investment limits, banks would be permitted to use internal models to calculate the value of derivative positions used to offset exposures and net dealing positions in individual stocks, as well as the value of total net equity holdings in the trading account.¹³ The Board considers that the adequacy of such models is subject to review during the exam process, and proposes that no special review would be required for their use

¹⁰As at present, shares held as an investment pursuant to Subpart A also would be included in calculating the applicable aggregate limits.

¹¹Currently these limits are normally applied on a gross basis.

¹²The Board also proposes that a basket of stocks, specifically segregated by the banking organization as an offset to a position in a stock index derivative product, as computed by the bank's internal model, may be netted as a whole against the stock index.

¹³Currently, the use of internal models in computing net positions in stocks is subject to prior Board review and the limitation that any position in a security shall not be deemed to have been reduced through netting by more than 75 percent.

in connection with the proposed limits on securities activities.¹⁴

For organizations that fail to satisfy the well-capitalized and well-managed criteria, the Board proposes to retain the existing dollar limit on individual shares held in the trading account (*i.e.*, \$30 million), which would be calculated in the same manner as at present. With regard to an aggregate limit on shares held in the trading account, the Board considers that a reasonable limit for all equity positions of such organizations, aggregating all positions and investments held pursuant to Subpart A, would be 25 percent of the holding company's capital for its subsidiaries and, for subsidiaries of Edges and any foreign bank held directly by a member bank, the lesser of 5 percent of the bank's tier 1 capital or 25 percent of the Edge's tier 1 capital. These limits would be half of those applicable to organizations that are well-capitalized and well-managed as proposed above.

These proposed percentage limits may appear lower than the existing limits (which are 25 percent of tier 1 for subsidiaries of bank holding companies and 100 percent of tier 1 for any other investor). In this regard, however, the Board also proposes that an organizations' aggregate position in stocks also could be calculated on the net basis described above in determining compliance with these limits, rather than on the gross basis presently required by Regulation K. This netting authority in most cases would allow organizations to continue to conduct their current levels of activities, even under the proposed new limits. In these circumstances, the Board considers that the aggregate limits should be reduced. In particular, the Board is concerned that permitting an organization that is not well capitalized or well managed to maintain what would be essentially an open exposure to the stock markets in excess of 25 percent of the tier 1 capital of the holding company or the Edge or five percent of the tier 1 capital of the bank simply would not be consistent with safety and soundness considerations.

The Board seeks comment generally on the proposed limits and netting authority. Commenters' views in particular are solicited on whether:

- The revised limits, when taken together with the netting authority, would enable U.S. banking organizations to compete with foreign banks in these activities abroad;
- Appropriate distinctions have been drawn, in terms of dealing authority,

¹⁴The Board also seeks comment on allowing netting of underwriting exposures.

- between organizations that are well-capitalized and those that are not;
- The proposed netting authority should be available to organizations that are not well-capitalized or well-managed;
 - Even with the proposed netting authority, the reduction in percentage limits for organizations that are not well-capitalized or well-managed would give rise to a need for grandfathering of, *e.g.*, existing portfolio investments;
 - It would be appropriate to include underwriting commitments in the aggregate limits for dealing activities and portfolio investments; and
 - Provision should be made for higher dealing limits for banking organizations on a case-by-case basis.

For organizations that are not well capitalized and well managed, the Board proposes to retain the existing dollar limits applicable to underwriting and dealing positions (that is, \$60 million on and \$30 million, respectively), without regard to limits on percentage of capital. As noted, it is generally the dollar limits that currently constrain organizations in their ability to conduct these activities. This is because, at present, only the largest banking organizations are engaged in these activities. The Board notes, however, that in the future a relatively small organization may seek to enter these lines of business and, for it, exposures of \$30 or \$60 million may be large relative to its capital. The Board seeks comments on whether, in addition to dollar limits, limits based on percentage of capital also should be adopted for organizations that are not well capitalized and well managed in order to address the relative exposure of such organizations to these activities.

Additional Option

The Board also seeks comment on whether, instead of imposing the limits discussed above in relation to equity underwriting and dealing activities by subsidiaries of well-capitalized and well-managed bank holding companies, it would be appropriate to lift all limits on these activities for such entities except for the limits on individual stocks held in the trading account discussed above (*i.e.*, 10 percent of the holding company's tier 1 capital). The Board considers that, at a minimum, this limit should be imposed on holding companies in order to assure diversification in individual stock holdings. Under this alternative, banking organizations also would be required to implement internal systems and controls adequate to ensure proper risk management and that underwriting

positions do not result in violations of limits on investments in any one company.

Authority to Engage in Equity Securities Activity

Board approval currently is required to engage in underwriting and dealing in equity securities pursuant to Regulation K. Because of the increased supervisory focus on risk management procedures, the Board seeks comment on whether banking organizations that are well capitalized and well managed should be allowed to engage in the expanded equity securities activities without seeking prior Board approval provided that they already have experience in equity securities activities under either Regulation K or Regulation Y.

As discussed above, the Board proposes that other banking organizations would be authorized to take positions in individual stocks only to the extent currently permissible (*i.e.*, subject to the existing dollar limitations on equity underwriting and dealing). In view of these lower limits, the Board proposes that these banking organizations would not be required to obtain prior Board approval to engage in equity securities activities to this limited extent, provided that these organizations satisfy minimum capital and managerial criteria.

Venture Capital Activities Through Portfolio Investments

Current Restrictions

Regulation K currently allows U.S. banking organizations to make portfolio investments, that is, limited, noncontrolling investments in foreign commercial and industrial companies. This authority is intended to enhance the competitiveness of U.S. banking organizations by increasing the range of financial services they may provide abroad. Many foreign financial institutions, including foreign banks, engage in venture capital activities, at times in connection with the provision of other financial services to the company.

At present, in order for a portfolio investment to be a permissible investment, an investor must hold less than 20 percent of the voting stock of the company, and no more than 40 percent of the company's total equity. Additionally, bank holding companies are subject to an aggregate limit on such investments in non-financial firms of 25 percent of tier 1 capital, and Edge corporations are subject to an aggregate

limit of 100 percent of tier 1 capital.¹⁵ These limits are designed to ensure that U.S. banking organizations do not control commercial and industrial companies and that their overall risk exposure to nonfinancial investments is limited.

As a practical matter, however, venture capital, or portfolio, investments presently are made almost exclusively under general consent procedures and consequently also have been subject to a dollar limit of \$25 million in a single company (the same limit currently applied to most other investments for purposes of general consent). Such investments are generally made in companies engaged in activities unrelated to banking or finance. The \$25 million limit has had the effect of focusing banking organizations primarily on the small company end of the venture capital business.

Proposed Investment Limits

The Board believes that removing the practical constraint of the dollar limit on such investments by keying the limits solely to a percentage of the investor's tier 1 capital may be appropriate for well-capitalized and well-managed bank holding companies. The Board proposes to limit any liberalization in this area to subsidiaries of holding companies because it is concerned that, in view of the risk of loss inherent in venture capital investments and their low liquidity, these activities may be more appropriately conducted outside the bank ownership chain. In proposing this approach, the Board is aware that, even in the existing regulatory environment, much of the current venture capital activity abroad is conducted through subsidiaries of the holding company. Thus, there appear to be no major operational or competitive considerations that would weigh in favor of expanding the authority of Edge subsidiaries to engage in this activity. However, if appropriate diversification and aggregate limits were established, the Board considers that some expansion of the ability of holding company subsidiaries to engage in this activity, using shareholder funds, would not present undue risks to the affiliated U.S. bank and would enhance the ability of U.S. banking organizations to compete in the provision of banking and financial services abroad.

¹⁵ In determining compliance with both the individual and aggregate limits, shares in such companies held in the dealing or trading account by the investor and any of its affiliates must be included.

For these reasons, the Board proposes to establish limits for portfolio investments made by subsidiaries of well-capitalized and well-managed bank holding companies of 2 percent of the holding company's tier 1 capital for an individual investment (in order to assure diversification of these potentially volatile and illiquid investments), and an aggregate limit of 25 percent of the holding company's tier 1 capital for all such investments. In determining compliance with the individual limit, shares in such companies held in the trading account by the investor and any of its affiliates would be included.

For all other investors (*i.e.*, Edge corporation and foreign bank subsidiaries of member banks, and subsidiaries of bank holding companies that are adequately capitalized but fail to meet the well-capitalized and well-managed standards), the Board proposes limits on investments in any one organization of \$25 million; larger investments would continue to be eligible for approval on a case-by-case basis. An aggregate limit on such investments, when taken together with other positions in equity securities held in the dealing account, also would be imposed consistent with the aggregate dealing limits discussed above, namely, 25 percent of tier 1 capital for subsidiaries of holding companies and, for Edge or foreign bank subsidiaries, the lesser of 5 percent of the parent bank's tier 1 capital or 25 percent of the Edge's tier 1 capital.

The Board seeks comment on these proposals, including regarding the relative risk of portfolio investments and whether there is a need for competitive reasons for foreign subsidiaries of banks also to have expanded authority in relation to such investments.

Limits on Voting Shares in Target Company

At present, portfolio investments are limited to less than 20 percent of a company's voting shares. At the time this limit was adopted by the Board, the equity method of accounting was used for investments of 20 percent or more of a company's voting shares and the cost method of accounting was used for investments under this level. Venture capital investments, however, now may be reported at fair value irrespective of the percentage of ownership, with changes in fair value recognized in income and correspondingly in tier 1 capital. In light of these developments, the Board considers that the current limit of less than 20 percent of voting shares has lost its original purpose.

In these circumstances, the Board proposes permitting investors to make noncontrolling venture capital investments in up to 24.9 percent of a company's voting shares in recognition of this fact. The proposed limit on voting shares would be set at less than 25 percent in order to provide further assurance of the noncontrolling nature of the investment. The Board is concerned that at levels above 25 percent of voting shares, both other investors and foreign authorities may view the bank holding company as a controlling investor, with implicit responsibilities to support the company or with liability for industrial accidents. As at present, these investments also would be permissible only if the investor in fact does not control the company in which the investment is made. Thus, the investor may not control a majority of the board of directors or have a disproportionate representation on the board; it may not have a management contract with the company or exercise veto power over its actions; nor may the investor use other means to control the operations of the company.

"Incidental" Activities in the United States

As a result of limitations in the Federal Reserve Act and the BHC Act, U.S. banking organizations are prohibited from investing in more than 5 percent of the voting shares of foreign companies that engage in impermissible activities in the United States other than those activities that are an incident to their international or foreign business.¹⁶ The Board previously has taken the view that such permissible incidental activities in the United States are limited to those activities that the Board has determined are permissible for Edge corporations to conduct in the United States.¹⁷

However, as noted above, companies in which portfolio investments are made generally are engaged in industrial or commercial activities, which are not permissible activities for Edge corporations. Consequently, under Regulation K at present, if a portfolio investment company decides to engage in activities in the United States, the U.S. banking organization is forced to sell the portfolio investment even if

market considerations would not warrant selling the shares at that time. This is despite the fact that the U.S. banking organization, by reason of the mandatory noncontrolling nature of portfolio investments, is unlikely to be in a position to influence any decision regarding entry into the U.S. market. The Board is aware that, with the increasing globalization of economies around the world, this situation may become more common in the future.

The Board considers that these changes in circumstance may warrant a limited change in the interpretation of what constitutes activities in the United States that are "incidental" to international or foreign activities in order to provide some relief for U.S. banking organizations making portfolio investments abroad. Given the minority nature of the portfolio investments and the significant changes in international markets, the Board considers that, consistent with the Federal Reserve Act and the BHC Act, portfolio investment companies that derive no more than 10 percent of their total revenue in the United States may be considered to be engaged only in business that is an incident to their international or foreign business and therefore may be held for an appropriate investment period consistent with the nature of venture capital activities. In reaching this view, the Board has taken into account the particular nature of portfolio investments. Most portfolio investments are venture capital investments that are intended to be sold after a period of time. They are not intended to be permanent holdings of the banking organization. In addition, the preponderance of the value of the portfolio investment is derived from its foreign business.

The Board seeks comment on this proposed change. The Board also seeks comment regarding what an appropriate period for divestiture would be for investments that exceed the proposed U.S. revenue limits, as well as whether a time limit should be placed on the period for holding these types of portfolio investments in view of their supposedly medium-term nature.

Insurance Activities

Regulation K currently permits bank holding companies to own foreign companies that underwrite and reinsure life and related types of insurance outside the United States. The Board requests comment on whether the reinsuring by a foreign subsidiary of a bank holding company of annuities or life insurance policies sold to U.S. persons is an activity that should be considered to fall within this authority.

¹⁶In particular, the FRA prohibits investments in companies engaging in "the general business of buying or selling goods, wares, merchandise or commodities in the United States." 12 U.S.C. section 615. Section 4(c)(13) investments under the BHC Act are limited only by a requirement that the company do "no business in the United States except as incident to its international or foreign business."

¹⁷See 12 CFR 211.4(e).

This issue has been raised recently by several bank holding companies. Under one proposal, an offshore insurance subsidiary, which has no U.S. office, would reinsure certain annuities sold in the United States to U.S. residents. These annuities would be underwritten by a U.S. insurance company unaffiliated with the bank holding company, and sold by various insurance agencies, including those affiliated with the bank holding company. The U.S. insurance company would cede a portion of the portfolio of annuities sold to the bank holding company's customers to the insurance company's foreign affiliate and the offshore insurance subsidiary of the bank holding company would enter into a retrocession agreement with that foreign company to reinsure no more than 50 percent of the portfolio of annuities sold to the bank holding company's customers. The offshore insurance subsidiary of the bank holding company would not have any contact with the annuity purchasers and would assume no liability to them. Moreover, the offshore insurance subsidiary would have no reinsurance liability to the U.S. insurance company, but only to the foreign affiliate of the U.S. insurance company.

The Board does not consider that an offshore insurance subsidiary of a bank holding company under Regulation K may sell policies directly into the United States. It appears, however, that the relevant statutes could permit a bank holding company, through its Regulation K subsidiary, to reinsure all or a portion of the risk of policies or annuities sold in the United States by U.S. affiliates of the bank holding company or unrelated parties. A question is presented, however, regarding whether the fact that the reinsurance takes place offshore is sufficient evidence that the activity is conducted outside the United States. On this view, any U.S. aspects of the activity would be considered merely an incident to the permissible offshore reinsurance activity. Alternatively, the fact that the risk to be reinsured is in the United States could cause the activity to be considered located in the United States, particularly given the significant involvement of the bank holding company's U.S. affiliates. In view of what appears to be increasing interest in this activity, the Board requests comment on these matters.

Debt/Equity Swaps

Regulation K currently permits banking organizations to swap certain developing country debt for equity interests in companies of any type. The

debt/equity swap authority was established in 1987. Under this authority, the Board granted its general consent for investors to invest up to one percent of their tier 1 capital in up to 40 percent of the shares, including voting shares, of private sector companies in eligible countries. These foreign investment provisions are more liberal than provided elsewhere in Regulation K. Eligible countries were defined as countries that have rescheduled their debt since 1980, or any country the Board deemed to be eligible.¹⁸

The debt/equity swap authority was viewed by the Board at that time as adding to the menu of options available to banking organizations for managing large amounts of sovereign developing country debt that was nonperforming and illiquid.¹⁹ In considering ways in which banking organizations could deal with these debt problems, the Board adopted an approach analogous to foreclosure on debts previously contracted ("DPC") by private parties and extended the DPC concept to permit an exchange of sovereign debt for any equity assets, private or public, in the country. Such an investment had to be held through the bank holding company, unless the Board specifically permitted it to be held through the bank or a bank subsidiary.

There is now a well developed secondary market in developing country debt. The vast bulk of developing country problem debt has been repackaged in the form of long-term Brady bonds, mostly denominated in U.S. dollars and fully collateralized as to principal by U.S. government bonds. Many banking organizations actively trade these instruments in the secondary market.

Due to the development of the secondary markets for emerging market debt, U.S. banks now have the same options with regard to many of these assets as they have with other bank assets—namely, they can hold the asset with a view toward collecting at maturity or sell the asset for cash to invest in other bank eligible assets. Indeed, the sovereign debt of most of the historically "eligible countries" is no longer illiquid, and those eligible countries that account for the vast share of rescheduled debt have largely regularized their relations with commercial banks.

¹⁸ Fifty-one countries reached debt relief agreements with commercial banks during the period January 1980–December 1995.

¹⁹ The only significant alternatives at that time were establishing provisions for the bad debts or writing the debts off and accepting the losses.

Accordingly, the Board proposes that the term "eligible country" be redefined so that only countries with currently impaired sovereign debt (*i.e.*, debt for which an allocated transfer risk reserve would be required under the International Lending Supervision Act and for which there is no liquid market) would be eligible for investments through debt/equity swaps under Regulation K. This proposal would redirect this special authority to the asset quality problem it was originally intended to help resolve. In connection with this change, the Board also proposes that existing holdings of such investments would be grandfathered, subject to the existing time period for divestiture of such investments (*i.e.*, generally 10 years from the date of acquisition).

Comment is requested regarding these proposed changes. The Board also seeks comment on whether, alternatively, this exception to the limitations on investments by banking organizations in non-financial fitness is no longer needed and should be deleted in its entirety.

Streamlining Application Procedures

General Consent Limits

While existing Regulation K procedures have proved effective in maintaining the safety and soundness of U.S. banks' international operations, they have become increasingly complex over the years. For example, under prior notice procedures, the Board has reviewed all foreign investments made by banking organizations above a de minimis level as a principal mechanism for overseeing the safety and soundness of the investing organization. In view of relatively recent shift in emphasis to supervision based upon risk management capabilities, the Board believes that prior review of relatively small investments is no longer useful as a fundamental supervisory tool, especially where the investor is well capitalized and well managed. Accordingly, the Board proposes that only significant investments, as determined solely on the basis of the investor's capital, would be subject to prior review by the Board, provided that the investors are well capitalized²⁰ and

²⁰ A bank holding company is considered well capitalized if, on a consolidated basis, it maintains total and tier 1 risk-based capital ratios of at least 10 percent and 6 percent, respectively. Further, the bank holding company may not be subject to any written agreement, order, capital directive, or prompt corrective action directive. In the case of an insured depository institution, well capitalized means that the institution maintains at least the capital levels required to be well capitalized under

well managed.²¹ The proposed changes to the general consent procedures attempt to balance safety and soundness considerations with the objective of enhancing the ability of U.S. banking organizations to compete with foreign banks overseas.

Limits on Investments in One Company

Historically, all general consent investments under Regulation K were subject to absolute dollar limits. Currently, the general consent limit for most investments is \$25 million. However, as a result of amendments to

Regulation K implemented in December 1995, certain investments by strongly capitalized and well-managed banks are subject to Board review only to the extent they exceed a percentage of the investor's capital.

The Board proposes expanding upon this approach by eliminating the absolute dollar limits on foreign investments permissible under general consent authority for well-capitalized and well-managed investors (with the exception of those on venture capital investments made by the bank). Under

the proposal, general consent limits for all investors (bank holding companies, banks, and Edge corporations) would be based solely on a percentage of their tier 1 capital.²²

The limits on individual investments made under general consent authority would vary according to the investor (bank holding company, bank, or Edge corporation) and the type of entity in which the investment is made. For well-capitalized and well-managed investors, the Board proposes the following percentage limits.

GENERAL CONSENT LIMITS ON INVESTMENT IN A SUBSIDIARY

Bank holding company subsidiaries	10 percent of tier 1 capital of the bank holding company.
Bank subsidiaries	The lesser of 2 percent of tier 1 capital of the bank or 10 percent of tier 1 capital of the bank subsidiary.

GENERAL CONSENT LIMITS ON INVESTMENT IN A JOINT VENTURE

Bank holding company subsidiaries	5 percent of tier 1 capital of the bank holding company.
Bank subsidiaries	The lesser of 1 percent of tier 1 capital of the Bank or 5 percent of tier 1 capital of the Bank subsidiary.

The proposed limits are intended to reflect the risk involved in the type of investment. A higher percentage of capital would be permitted in the case of an investment in a subsidiary as opposed to an investment in a joint venture because the latter is considered to carry a greater risk of loss. Thus, with joint ventures, investors acquire less than full control, and the record on such investments has shown that they experience a higher rate of loss. As a result, most U.S. banks do not now make sizeable joint venture investments. In light of these considerations, the Board believes that lower general consent limits may be appropriate for joint venture investments.

For investors that fail to meet the well-capitalized or well-managed standards, the Board proposes the following limits. Individual investments under general consent authority would be limited to the lesser of \$25 million or 5 percent of tier 1 capital in the case of an investor that is a bank holding company, or 1 percent of tier 1 capital

if the investor is a member bank. Limits on individual investments for an Edge corporation would be \$25 million or the lesser of 1 percent of the parent bank's tier 1 capital or 5 percent of the Edge's tier 1 capital. The Board proposes, however, that authority would be delegated to the Director of Banking Supervision and Regulation to approve higher investment limits on a case-by-case basis or as part of an investment program as described above.

The Board seeks comment on these proposed limits, as well as whether general consent limits should be established for investments in joint ventures that are lower than the limits on investments in subsidiaries. The Board notes that these limits reflect only the investments that may be made under general consent authority; larger investments may continue to be made with 30 days' prior notice.

Aggregate Limits

The above limits are intended to address the fact that individual foreign investments above a certain size may be

a source of potential concern, and therefore prior review of such investments should be required. In addition, the Board is also concerned with any rapid increase in an organization's foreign investments overall, made without prior review. Accordingly, it is proposed that when the cumulative investments made under general consent reach a certain amount over a given period, new or additional investments would become subject to prior review. Investments by all affiliates of a bank holding company would be taken into account in determining compliance of the holding company with the aggregate limits; investments of subsidiaries of a bank or of an Edge, respectively, would be aggregated in determining compliance with their limits. Under the proposed liberalized general consent procedures, the new aggregate limit for all investments during any 12-month period for investors meeting the well-capitalized and well-managed tests would be:

Bank holding companies	20 percent of tier 1 capital.
------------------------------	-------------------------------

the capital adequacy regulations or guidelines applicable to the institution that have been adopted under section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o). The Board proposes that an Edge or agreement corporation would be considered well capitalized if it maintains total and tier 1 capital ratios of 10 and 6 percent, respectively.

²¹ A bank holding company or insured depository institution is considered well managed if, at its most recent inspection or examination or subsequent

review, the holding company or institution received at least a satisfactory composite rating and at least a satisfactory rating for management and for compliance, if such a rating is given. Under the standards adopted by the Board in connection with the December 1995 expansion of general consent authority in Regulation K, an Edge or agreement corporation will be considered to be well managed for these purposes if it has received a composite rating of 1 or 2 at its most recent examination or

review and it is not subject to any supervisory enforcement action.

²² If the Edge corporation were making the investment, then the Edge corporation, the member bank, and the bank holding company would be required to meet the well-capitalized and well-managed tests. If the member bank were making the investment, then the bank and the bank holding company would be required to meet the tests.

Bank subsidiaries The lesser of 10 percent of tier 1 capital of the bank or 50 percent of the bank subsidiary's tier 1 capital.

The Board considers that, because the bank would have the exposure on a consolidated basis for investments by either the bank or the Edge, these investments should have a combined aggregate limit. However, the Board proposes that this limit could be waived, in whole or in part by the Director of the Division of Banking Supervision and Regulation, under delegated authority, based upon a review of the financial strength of the investor and its investment strategy and business plans.

For bank holding companies, banks or Edge corporations that are adequately capitalized but do not meet the well-capitalized and well-managed standards, the Board proposes that the aggregate limits on all investments made under authority of general consent in any 12-month period would be half that applicable to well-capitalized and well-managed organizations (*i.e.*, 10 percent of tier 1 capital for bank holding companies, 5 percent of tier 1 capital for banks, and, for Edge corporations, the lesser of 5 percent of the parent bank's tier 1 capital or 10 percent of the Edge's tier 1 capital).

Application of Limits to the Edge Corporation

The Board notes that an argument can be made that, in cases where the investment is made by the Edge corporation, the well-capitalized and well-managed tests should be based on a review of the parent bank, not the Edge corporation. In considering these proposals, the Board believes that the well-capitalized and well-managed tests for the Edge corporation itself should be retained as one of the bases for determining limits applicable to general consent investments. This approach would help to ensure the safety and soundness of the Edge corporation in its own right and is consistent with the statutory (and supervisory) rationale underlying Edge corporations. As discussed above, Congress limited the amount of capital that banks could invest in Edge corporations, which in turn could invest in activities otherwise prohibited to banks that were perceived to be higher risk. Congress also subjected Edge corporations to regulation and examination by the Federal Reserve. For these reasons, the Board considers that Edge corporations should themselves be operating satisfactorily and not be a source of potential weakness to the U.S. parent bank. The Board therefore is proposing

limits that are tied to the condition of the Edge. The Board seeks comment on this approach generally.

Preclearance of Investment Program

The Board proposes to establish a procedure that would permit U.S. banking organizations to obtain preclearance of an investment program even though one or more of the investments would be in excess of the individual or aggregate general consent investment limits and would be made over a period of time longer than one year. The Board believes such a procedure would be useful to banking organizations that may wish to engage in a specific investment program with respect to an individual company, a market segment, a region, or worldwide. Providing a preclearance mechanism would serve to ensure that the regulatory process would not impede the organization's ability to pursue its business plans.

For example, an organization that is well managed and well capitalized might contemplate bidding on a large privatization that would require the organization to commit in advance to making an investment in excess of the general consent limit if selected. Obtaining preclearance would enable the organization to make such a commitment. The Board proposes that the preclearance authority would be delegated to the Director of the Division of Banking Supervision and Regulation.

Comment is requested on whether such a preclearance program would be useful to U.S. banking organizations and whether it should be available to all banking organizations.

Authorization to Invest More Than Ten Percent of a Bank's Capital in its Edge and Agreement Corporation Subsidiaries

Prior to September 30, 1996, section 25A of the Federal Reserve Act prohibited member banks from investing more than 10 percent of capital and surplus in the stock of Edge and agreement corporation subsidiaries. With the enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 on September 30, 1996, member banks may now invest, with the Board's prior approval, up to 20 percent of capital and surplus in the stock of such subsidiaries.

The Board may not approve the investment of more than 10 percent of capital and surplus in the stock of Edge and agreement corporation subsidiaries

unless the Board determines that the investment of an additional amount by the bank would not be unsafe or unsound. As discussed above, due to the accumulation of retained earnings in Edge corporations, some U.S. banking organizations now have over 20 percent of the member bank's consolidated capital resident in Edge corporation subsidiaries.

Accordingly, the Board proposes to implement the new statutory provision by adding to Regulation K an application requirement to obtain the Board's approval of an increase in invested capital in the stock of Edge and agreement corporations above 10 percent of the parent bank's capital, as well as a general description of the types of considerations that would be taken into account in reaching a decision on such an application. Criteria that the Board considers would be appropriate to take into account would include: the composition of the assets of the bank's Edge and agreement corporations; the total capital invested by the bank in its Edge and agreement corporations when combined with retained earnings of the Edge and agreement corporations, as a percentage of the bank's capital; whether the bank, bank holding company, and Edge and agreement corporations are well capitalized and well managed; and whether the bank is adequately capitalized after deconsolidating and deducting the aggregate investment in and assets of all Edge or agreement corporations and all foreign bank subsidiaries.

The Board seeks comment on whether the above criteria are appropriate in determining whether investments of up to 20 percent of the parent bank's capital and surplus in Edge and agreement corporation subsidiaries would not be unsafe or unsound.

Additionally, the Board seeks comment on whether only the well-capitalized and well-managed criteria should apply where the total Edge and agreement corporation capital (including retained earnings) on a pro forma basis would not exceed 20 percent of the bank's capital.

Other Revisions to Subpart A

Harmonization of Regulation K With Other Regulatory Changes

As a result of the substantial liberalizations made in the recent revisions to other Board regulations, particularly Regulation Y, certain activities on the laundry list of

permissible activities in Regulation K are now more restrictive than those authorized domestically. As noted above, Regulation K traditionally has permitted U.S. banking organizations to conduct a wider range of financial activities abroad than may be permitted domestically in order to compete more effectively abroad. Accordingly, in addition to the expanded activities discussed above, the Board proposes removing certain restrictions on the laundry list of permissible activities to reflect recent liberalizations in other regulations.

Leasing Activities

Regulation K currently requires that leasing activities conducted under authority of Regulation K serve as the functional equivalent of an extension of credit to the lessee. The Regulation Y revisions removed that limitation with respect to high residual value leasing. Accordingly, Regulation K would be interpreted consistent with this authority.

Swaps Activities

The Regulation K proposal would also remove the requirement that commodity-related swaps must provide an option for cash settlement that must be exercised upon settlement. Regulation Y now authorizes investment as principal in commodity derivatives where the contract either: (i) Requires cash settlement, or (ii) allows for assignment, termination or offset prior to expiration and reasonable efforts are made to avoid delivery. The Regulation K restriction would be relaxed to the same extent.

Data Processing

No changes are proposed to the provision authorizing data processing. The Board notes, however, that this authority extends only to the processing of information and does not authorize general manufacture of hardware for such services.

Loans to Officers at Foreign Branches

Regulation K currently places certain restrictions on mortgage loans to officers of foreign branches. However, the Board has liberalized its Regulation O, which governs loans to executive officers, such that the provisions in Regulation K now are more restrictive. The more restrictive provision in Regulation K would be eliminated.

Changes With Respect to Edge and Agreement Corporations

The Board proposes adding provisions to Regulation K that would outline procedures under which Edge

and agreement corporations could be liquidated on a voluntary basis.

Liquidation Procedures

The Board is proposing to provide procedures for the liquidation of Edge corporations and to clarify certain matters regarding the appointment of receivers for Edge corporations. Under paragraph 17 of the Edge Act (12 U.S.C. 623), an Edge corporation may go into voluntary liquidation by a vote of its shareholders owning two-thirds of its stock. Staff proposes to add a new § 211.13 to Regulation K that would provide for 45 day's prior notice to the Board of an Edge corporation's intent to dissolve. This notice would create greater certainty as to the date that the Edge corporation would cease business and permit the Board to take any necessary supervisory actions. Under paragraph 18 of the Edge Act (12 U.S.C. 624), the Board is authorized to appoint a receiver for an Edge corporation if it determines that the corporation is insolvent. The proposal would specify the grounds for determining that an Edge corporation is insolvent and clarify the powers of the receiver.

Additional Areas of Liberalization

The Board believes there are other areas that should be liberalized in order to reduce regulatory burden and enable U.S. banking organizations to compete more effectively with foreign banks.

Authorizing Foreign Branches of Operating Subsidiaries of Member Banks

The Board proposes clarifying that a member bank may establish foreign branches through its operating subsidiaries with the Board's approval, provided that the foreign branches of the operating subsidiary would engage only in activities that are permissible directly for the member bank parent.²³

The Board has previously approved the establishment of foreign branches by an operating subsidiary of a member bank. The Board determined that the ability of an operating subsidiary to establish foreign branches is incidental to the member bank's authority to establish such branches, subject to the condition stated above. Accordingly, this proposed addition would codify the Board's determination and allow other member banks to establish foreign branches of operating subsidiaries on the same basis as outlined above.

²³ The establishment of foreign branches of operating subsidiaries would be subject to the prior notice and general consent provisions of Regulation K.

FCM Activities

Regulation K currently states that investors must seek prior Board approval for futures commission merchant (FCM) activities conducted on any exchange or clearing house that requires members to guarantee or otherwise contract to cover losses suffered by other members (a mutual exchange). This requirement has been eliminated for subsidiaries of bank holding companies, due to the revision of Regulation Y. The Board also seeks comment on whether to eliminate the requirement for prior notice where: (i) the activity is conducted through a separately incorporated subsidiary of the bank;²⁴ and (ii) the parent bank does not provide a guarantee or otherwise become liable to the exchange or clearing house for an amount in excess of the applicable general consent limits.²⁵ The Board believes that in these circumstances the potential exposure of the parent bank to a mutual exchange or clearing house would be sufficiently limited, such that prior approval would no longer be necessary. Eliminating the requirement for prior review of these activities would reduce the prior notice and application requirements associated with FCM activities.

Additional Delegation of Authority

The Board proposes delegating additional authority to the Director of the Division of Banking Supervision and Regulation in order to decrease processing periods in appropriate circumstances. Under the proposal, authority would be delegated in the areas of: (1) Indicating no objection to the establishment of foreign branches by prior notice; (2) authorizing a banking organization to exceed its aggregate general consent investment limits based upon the financial and managerial strength of the organization and the soundness of its investment strategy and future plans; and (3) allowing organizations that are not well-capitalized and well-managed to invest under a reduced general consent limit in appropriate circumstances.

Subpart B: Foreign Banking Organizations

Subpart B of Regulation K governs the U.S. activities of foreign banking

²⁴ If the investment is made through an Edge corporation, the investment in the subsidiary would be limited to no more than 2 percent of the parent bank's tier 1 capital.

²⁵ This proposal is generally consistent with the FCM requirements under Regulation Y, except that it would place a limit on the amount of exposure to the exchange or clearing house, tied to the bank's tier 1 capital.

organizations. It implements the IBA and provisions of the BHC Act that affect foreign banks.

This proposed revision of Subpart B seeks to eliminate unnecessary regulatory burden, increase transparency, and streamline the application/notice process for foreign banks operating in the United States based on the Board's recent experience with foreign bank applications. In addition, the proposal implements certain application related provisions of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (the 1996 Act).

If adopted, the proposal would liberalize the standards under which certain foreign banking organizations qualify for exemptions from the nonbanking prohibitions of section 4 of the BHC Act. Comment is also being requested on a change in the scope of an existing exemption that would better conform the exemption to the policy of national treatment.

The proposal also implements several provisions of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (the Interstate Act) that affect foreign banks. Finally, several technical changes to various other provisions in Subpart B are being proposed.

Streamlining the Regulatory Process

The Board is required to approve the establishment by foreign banks of branches, agencies, commercial lending companies, and representative offices in the United States. This authority is contained in the Foreign Bank Supervision Enhancement Act of 1991 (FBSEA), which amended the IBA, and was intended to close perceived gaps in the supervision and regulation of foreign banks. Prior to FBSEA, there was no federal approval required for the establishment of most types of direct U.S. offices of foreign banks nor were uniform standards applicable to these offices.

In the six years since the enactment of FBSEA, the Board has gained substantial experience with the issues presented by applications by foreign banks to establish direct offices. The proposed revisions would streamline the applications process based on experience gained over this period. In addition, the proposal implements new discretionary authority and time limits contained in the 1996 Act.

Adoption of Single Supervision Standard for Approval of Representative Offices

Under FBSEA, in order to approve an application by a foreign bank to establish a branch, agency, or

commercial lending company, the Board generally is required to determine, among other things, that the applicant bank, and any parent bank, are subject to comprehensive supervision or regulation on a consolidated basis by their home country authorities (the consolidated comprehensive supervision or CCS determination²⁶). A lesser supervision standard, however, applies under FBSEA to representative office applications. While the Board is required to "take into account" home country supervision in evaluating an application by a foreign bank to establish a representative office, a CCS determination is not required to approve such an application. The law simply requires the Board to consider the extent to which applicant bank is subject to CCS. A lesser standard applies because representative offices do not conduct a banking business, such as taking deposits or making loans, and therefore present less risk to U.S. customers and markets than do branches or agencies.

Regulation K currently restates the statutory "take into account" standard but does not define a minimum supervision standard that a foreign bank must meet in order to establish a representative office. Instead, the Board has developed standards in the context of specific cases. To date, the Board has used two different supervision standards in approving applications by foreign banks to establish representative offices.²⁷ Under the first standard, the Board has permitted a foreign bank to establish a representative office able to exercise all powers available under applicable law and regulation on the basis of a finding that the home country supervisors exercise a significant degree of supervision over the bank.²⁸ The second standard is more flexible. In cases in which a foreign bank has committed to limit the scope of activities of its proposed representative office to those posing only the most minimal risk to U.S. customers and markets (such as by agreeing not to solicit deposits from retail customers or possibly any customers), the Board has approved the establishment of the office on the basis of a finding that the foreign

bank is subject to a supervisory framework that is consistent with approval of the application, taking into account the limited activities of the proposed office and the operating record of the bank.²⁹

Based on experience in dealing with representative office applications, the Board believes that the existence of two standards can be confusing and is unnecessary, particularly in light of the generally minimal risk presented to U.S. customers or markets by representative offices. Consequently, the Board is proposing that § 211.24(d)(2) of Regulation K be amended to establish only one flexible standard. Under the proposal, assuming all other factors were consistent with approval, the Board could approve an application to establish a representative office if it were able to make a finding that the applicant bank was subject to a supervisory framework that is consistent with the activities of the proposed office, taking into account the nature of such activities and the operating record of the applicant.

The record necessary to support the required finding would depend on the nature of the activities the applicant proposed to conduct in the representative office. Approval of a representative office that could conduct all permissible activities would require a record demonstrating that the applicable supervisory framework was consistent with level of risk presented by such activities. If the proposal is adopted, the Board expects that most applicants would be able to conduct all permissible activities. In those instances in which the Board had particular concerns regarding the consistency of the applicant's home country supervision with the proposed activities of the office, however, the applicant could commit to restrict the activities. A less comprehensive record would be required where the applicant has committed to limit the activities of the office to those posing minimal risk to U.S. customers.

The Board intends that the publishing of a single flexible standard will, in most cases, simplify the application process. The Board requests comment on the elimination of the significant degree of supervision standard and adoption of the proposed single standard.

Reduced Filing Requirements for the Establishment of U.S. Offices

A major thrust of the proposed revisions is reduction of burden in the

²⁶ As discussed later in the summary, the 1996 Act amended FBSEA to allow the Board, under certain conditions, to approve an application if the bank is *not* subject to CCS.

²⁷ Wherever the record submitted by an applicant in a representative office case is sufficient to support a CCS finding, the Board generally has done so. See, e.g., *Caisse Nationale de Credit Agricole*, 81 Fed. Res. Bull. 1055 (1995). The two representative office standards have been applied in those cases where the record is not sufficient to support a CCS finding.

²⁸ See, e.g., *Citizens National Bank*, 79 Fed. Res. Bull. 805 (1993).

²⁹ See, e.g., *Prinstroybank of Russia*, 82 Fed. Res. Bull. 599 (1996).

application process by streamlining existing application procedures for the establishment of new U.S. offices of foreign banks. Under the current Subpart B, the establishment by a foreign bank of a U.S. branch, agency, commercial lending company subsidiary, or representative office generally requires the Board's specific approval. Once the Board has approved the establishment of a foreign bank's first office under the standards set out in FBSEA, additional offices with the same or lesser powers may be approved by the Reserve Banks under delegated authority.³⁰ Prior notice and general consent procedures are currently available for the establishment of certain kinds of representative offices. The Board is now proposing that additional types of applications be processed under prior notice and general consent procedures.

Prior Notice Available After First CCS Determination

The proposal would amend § 211.24(a) to provide that any foreign bank which the Board has determined to be subject to CCS in a prior application under FBSEA may establish additional branches, agencies, commercial lending company subsidiaries, and representative offices pursuant to a 45 day prior notice procedure. This time frame would allow for review of whether any material changes had occurred with respect to home country supervision, a determination of whether the bank continues to meet capital requirements, and a review of any other relevant factors. If this proposal is adopted, the current delegation to the Reserve Banks for such applications would be deleted as no longer necessary. This procedure would also be available even if the CCS determination had been made in connection with an application for an office with lesser powers than the office the foreign bank seeks to establish.

Prior Notice Available for Representative Offices Established by Foreign Banks Subject to the BHC Act or Previously Approved to Establish a Representative Office Under FBSEA

Many foreign banks have a U.S. banking presence and therefore are subject to the provisions of the BHC Act, but have not received a CCS determination under FBSEA. The proposal also seeks to reduce the burden on such banks applying to establish representative offices. If a foreign bank is subject to the provisions of the BHC Act through ownership of a bank or

commercial lending company or operation of a branch or agency, it is already subject to supervision and oversight through the Board's Foreign Banking Organization (FBO) program. Through the FBO program, the Board gains knowledge of the bank, its policies and procedures, and a general view on home country supervision. In these instances, the Board believes that an expedited procedure may be adopted for the establishment of representative offices by these banks, even where the foreign bank had not previously been reviewed under the standards of FBSEA.

In addition, the proposal would permit the establishment by prior notice of additional representative offices by any foreign bank not subject to the BHC Act but previously approved by the Board to establish a representative office, regardless of the type of supervision finding made by the Board in the prior case. Such applications are currently delegated to the Reserve Banks. The Board sees no reason to continue to require full application from such banks. The Board is proposing that § 211.24(a) be amended to permit banks in these two categories to use the 45-day prior notice procedure for opening a representative office, rather than requiring them to use the application procedure.

New General Consent Authority

The proposal would permit the establishment by general consent of a representative office by a foreign bank that is both subject to the BHC Act and has been previously determined by the Board to be subject to CCS. Establishment of a representative office by such a foreign bank is currently subject to the prior notice procedure. The proposal is based on an assessment that a foreign bank that is subject to supervision under the FBO program and has been judged subject to CCS should generally qualify to establish a representative office.

Finally, the Board is proposing that a foreign bank that is subject to the BHC Act could establish a regional administrative office by general consent, whether or not the Board had determined the bank to be subject to CCS. Regional administrative offices currently can be established using the prior notice procedure.

Suspension of Prior Notice and General Consent Procedures

The proposal also provides that the Board, upon notice, may modify or suspend the prior notice and general consent procedures described above for any foreign bank. For example, modification or suspension of these

procedures might be appropriate if the composite rating of the foreign bank's combined U.S. operations was less than satisfactory³¹ or if the foreign bank were subject to supervisory action. In general, the Board envisions that these procedures would be available for the establishment of offices by foreign banks only where the establishment does not present material issues.

These proposals should reduce the burden and delay associated with the establishment of new U.S. offices by certain categories of foreign banks without compromising the Board's ability to make the determinations necessary in connection with the establishment of such offices.

After-the-Fact Approvals

In implementing FBSEA in 1993, the Board recognized that it would be impractical to require prior approval for the establishment of foreign bank offices acquired in certain types of overseas transactions, such as a merger of two foreign banks, and provided for an after-the-fact approval in such cases. The regulation currently requires the foreign banks involved to commit to file an application to retain the acquired U.S. office as soon as possible after the occurrence of such transactions.

Since the enactment of FBSEA, a number of applicants using the after-the-fact procedure have chosen to wind down and close acquired offices or consolidate them with existing offices, in each case within a reasonable time frame. In most instances, no regulatory purpose was served by requiring the filing of an application. The regulation currently does not address this possibility. The proposal would amend the rules to contemplate both after-the-fact applications to retain, as well as decisions to wind-down and close, U.S. offices acquired in a transaction eligible for the after-the-fact approval process. Where the foreign bank chooses to close the acquired U.S. office, the Board could impose appropriate conditions on the U.S. operations until the winding-down is completed.

Implementation of the 1996 Act

As noted above, FBSEA generally requires the Board to determine that a foreign bank applicant is subject to CCS in order to approve the establishment of a branch, agency, or commercial lending company. The 1996 Act gave the Board discretion to approve the establishment of such offices by a foreign bank where the application record is insufficient to support a finding that the bank is

³⁰ See 12 CFR 265.11(d)(11).

³¹ See 12 CFR 225.2(s) (definition of "well-managed" foreign banking organization).

subject to CCS, provided the Board finds that the home country supervisor is actively working to establish arrangements for the consolidated supervision of the bank, and all other factors are consistent with approval. This discretion gives the Board flexibility to approve applications on an exceptional basis where the home country authorities are making progress in upgrading the bank supervisory regime but the record may not yet be sufficient to support a full CCS finding. The Board has stated that this authority should be viewed as a limited exception to the general requirement relating to CCS.³² The statutory standards are included in the proposed revision.

The proposal also would incorporate into Regulation K the statutory time limits in the 1996 Act for Board action on applications for branches, agencies, and commercial lending companies. The 1996 Act provided that the Board must act on such an application within 180 days of its receipt. The time period may be extended once for an additional 180 days, provided notice of the extension and the reasons for it are provided to the applicant and the licensing authority; the applicant may also waive the time periods. Although the regulation will reflect these statutory time periods, the Board proposes to maintain existing internal time schedules that would require faster processing where possible.

New Discretionary Factor

In light of the increasing attention being paid to the problem of money laundering, the Board currently requests that foreign banks applying to establish U.S. offices provide information on the measures taken to prevent the bank from being used to launder money, the legal regime to prevent money laundering in the home country, and the extent of the home country's participation in multilateral efforts to combat money laundering. The Board considers this information in reaching its decision on applications. In light of this practice, the proposed revision includes as a new discretionary standard for the establishment of U.S. offices by foreign banks that the Board may consider the adequacy of measures for the prevention of money laundering.

³² The Board first exercised its discretion under the 1996 Act when it approved an application by a Korean bank to establish a state-licensed branch in New York City. See *Housing & Commercial Bank*, 83 Fed. Res. Bull. 935 (1997).

Qualifications of Foreign Banks for Nonbank Exemptions

Changes to the QFBO Test

Regulation K implements statutory exemptions from the BHC Act for certain activities of foreign banks. These exemptions are available to qualifying foreign banking organizations (QFBOs) and are found in sections 2(h) and 4(c)(9) of the BHC Act. Section 2(h) allows a foreign company principally engaged in banking business outside the United States to own foreign affiliates that engage in impermissible nonfinancial activities in the United States, subject to certain requirements. These include that the foreign affiliate must derive most of its business from outside the United States and it may engage in the United States only in the same lines of business it conducts outside the United States. Section 4(c)(9) allows the Board to grant foreign companies an exemption from the nonbank activity restrictions of the BHC Act where the exemption would not be substantially at variance with the BHC Act and would be in the public interest. Under this exemption, the Board has exempted, among other things, all foreign activities of QFBOs from the nonbanking prohibitions of the BHC Act.

In order to qualify as a QFBO, a foreign banking organization must demonstrate that more than half of its business is banking and more than half of its banking business is outside the United States. Banking business is defined to include the activities permissible for a U.S. banking organization to conduct, directly or indirectly, outside of the United States.³³ Under the current regulations, however, such activities can be counted as banking business for the purposes of the QFBO test only if they are conducted in the foreign bank ownership chain; that is, by the foreign bank or a subsidiary of the foreign bank. Activities conducted by a parent holding company or sister affiliate do not count toward qualification.

³³ These activities include, in addition to traditional banking activities, underwriting various types of insurance (credit life, life, annuity, pension fund-related, and other types of insurance where the associated risks are actuarially predictable); underwriting, distributing, and dealing in debt and equity securities outside the United States; providing data processing, investment advisory, and management consulting services; and organizing, sponsoring, and managing a mutual fund.

Removal of the Banking Chain Requirement From One Prong of the QFBO Test

In connection with the 1991 revisions to Regulation K, a number of commenters suggested that the Board eliminate the requirement that banking activities be conducted in the bank ownership chain. The Board did not adopt this suggestion in 1991 because it was concerned that to do so could have allowed a foreign financial conglomerate with no substantial commercial bank to conduct full-scope banking operations in the United States. The Board determined that the intent of the BHC Act was to grant exemptions only to those foreign organizations that were substantially engaged in commercial banking.

The Board has reconsidered the QFBO test in light of this background and believes that the test can be liberalized without extending the BHC Act exemptions to foreign firms that are not engaged substantially in commercial banking. As noted above, the QFBO test has two prongs: first, more than half of the organization's activities must be banking, and second, more than half its banking business must be outside the United States. Under the proposed revision, the requirement that all activities must be conducted under the bank ownership chain to count as "banking" would be eliminated from the first prong. By eliminating the banking chain requirement for this prong of the test, a foreign banking organization that has substantial life insurance activities outside of the banking chain would be able to count such activities toward meeting this prong of the QFBO test. The Board understands that, in at least some recent instances where foreign banking organizations failed the current QFBO test, these organizations would have been able to pass the test under the proposed re-formulation.

The banking chain requirement has not been eliminated, however, for purposes of determining whether a foreign banking organization's banking operations outside of the United States are larger than those in the United States. Eliminating the banking chain requirement for this part of the test would enable a foreign organization engaged primarily in certain financial activities, such as life insurance, outside of the United States to meet the QFBO test even if its U.S. commercial banking operations were larger than the commercial banking operations of its foreign bank or banks. The exemptions under sections 2(h) and 4(c)(9) of the BHC Act, which this section of

Regulation K implements, are intended to limit the extraterritorial effect of the BHC Act on foreign banks and to prevent foreign financial companies that own U.S. banks from obtaining competitive advantages. Accordingly, the proposal retains the banking chain requirement for this prong of the QFBO test. The Board believes that this approach would give appropriate flexibility to foreign banking organizations that operate under different economic and regulatory environments while still addressing the intent of the BHC Act to give exemptions only to true foreign banks that conduct more banking business outside the United States than in the United States.

Request for Comments With Respect to the Expansion of the Activities That May be Counted as Banking

The QFBO test in Regulation K permits foreign banking organizations to count only those assets, revenues, or net income related to activities which are permissible for a U.S. banking organization to conduct outside of the United States. Under the current test, a predominantly financial organization that engages to a significant extent in activities not permissible for a U.S. bank abroad—for example, property and casualty insurance—could fail to meet the QFBO test.

In formulating the QFBO test, the Board has sought to balance the potentially competing goals of avoiding the extraterritorial application of U.S. law on the one hand and ensuring competitive equality with U.S. banking organizations on the other. In this regard, the Board does not intend the QFBO exemptions to permit foreign commercial and industrial firms to conduct a commercial banking business in the United States. This view, however, is not necessarily inconsistent with granting the QFBO exemptions to a foreign banking organization that is engaged to a significant extent in financial activities not permissible for a U.S. bank abroad. For this reason, the Board is requesting comment with respect to whether and how to expand the list of activities that would be considered banking for purposes of the QFBO test.

Comment is requested on both of these proposals and on any other issues arising under the QFBO rules.

Applications for Special Determination of Eligibility for QFBO Treatment

Regulation K permits a foreign banking organization that ceases to qualify as a QFBO to request a special determination of eligibility. The

proposal would permit a foreign banking organization that has applied for a specific determination of eligibility to continue to conduct its business as if it were a QFBO, except with respect to making investments in U.S. companies under section 2(h) of the BHC Act for which Board consent would be required. The proposal reflects the approach taken in a prior case considered by the Board.

Comment Requested on Limiting the Ability of Foreign Banks to Conduct Unregulated Activities Abroad Through U.S. Companies in the Interests of National Treatment

Regulation K currently exempts from the BHC Act any activity conducted by a QFBO outside the United States. There appears to be a growing trend by foreign banks under this exemption toward using U.S. companies operating under section 4(c)(8) of the BHC Act to hold foreign subsidiaries that such foreign banks regard as unrestricted in their activities.

Under the BHC Act, a U.S. bank holding company may own foreign subsidiaries only under the authority of Regulation K, which sets limits on the activities that can be conducted in such subsidiaries. In the past, in response to inquiries, Board staff has provided advice that the activities of foreign subsidiaries of section 4(c)(8) companies owned by foreign banking organizations should be operated subject to these same limitations. Nonetheless, it appears that some foreign banking organizations have interpreted the general exemption in Regulation K for all non-U.S. activities of foreign banking organizations as also extending to the foreign subsidiaries of section 4(c)(8) companies. The question is raised of whether this provides an unfair competitive advantage to foreign banks in using and marketing the name and operations of the regulated U.S. company.

Given the fact that the foreign activities of a QFBO are exempt under Regulation K, the Board recognizes the ability to own a foreign subsidiary through a section 4(c)(8) company may not be viewed as a material competitive advantage for foreign banks. Even if the ownership of impermissible foreign subsidiaries through section 4(c)(8) companies were to be prohibited, a foreign bank could comply simply by moving the ownership from the U.S. company to a true foreign subsidiary.

The purpose of the exemption in Regulation K, however, was to permit foreign banking organizations to conduct their non-U.S. activities outside the scope of U.S. regulation because

there was no U.S. interest served by regulating such activities. The Board, however, does have a regulatory interest in section 4(c)(8) companies. The exemption was not intended to allow U.S. companies regulated under section 4(c)(8) of the BHC Act and owned by foreign banking organizations to engage in unrestricted foreign activities. Accordingly, the Board is requesting comment on limiting the availability of the exemption in Regulation K to activities conducted by true foreign subsidiaries of foreign banks, and preventing the use of such exemption by foreign-owned but U.S.-regulated companies such as those operating under section 4(c)(8).

Implementation of New Interstate Rules

In addition to application procedures and rules on nonbanking activities, Regulation K implements the restrictions on interstate operations of foreign banks provided in the IBA and the BHC Act. The Interstate Act amended the IBA and the BHC Act to remove geographic restrictions on interstate acquisitions of banks by foreign banks, permitted foreign banks to branch interstate by merger and de novo on the same basis as domestic banks with the same home state as the foreign bank, and modified the definition of a foreign bank's home state for purposes of interstate branching. The Interstate Act became fully effective in June 1997.

In May 1996, the Board published a final rule to implement certain of the changes made by the Interstate Act. The rule required certain foreign banks to select a home state for the first time, or have a home state designated by the Board, removed obsolete provisions of Regulation K that restricted the ability of a foreign bank to effect major bank mergers through U.S. subsidiary banks located outside the foreign bank's home state, and deleted certain other obsolete rules governing home state selection.

This proposal would implement and interpret certain other changes made by the Interstate Act. The proposal would permit foreign banks to make additional changes in home state under certain circumstances and clarify the extent to which a foreign bank changing its home state is required to conform its existing network of bank subsidiaries and banking offices. In addition, the proposal sets forth the additional standards for approval of applications by foreign banks to establish interstate branches. It also would clarify that the "upgrade" of agencies and limited branches to full branches requires Board approval and that the Board will approve such upgrades (absent a merger

transaction) only if the host state has enacted laws permitting de novo interstate branching. Finally, the proposal deletes the Board's home state attribution rule, which provides that a foreign bank (or other company) and all other foreign banks which it controls must have the same home state.

Changes of Home State

In 1980, the Board allowed foreign banks a single change of home state as a compromise between the need for comparable treatment with domestic banks and Congress' intent, in adopting the IBA, that foreign banks be allowed some flexibility to change home state. The basic framework for interstate banking, however, has changed substantially since 1980, when domestic banks generally could not branch interstate and rarely, if ever, could change home states. Domestic and foreign banks may now branch into other states either de novo or by merger in certain circumstances; interstate branching by merger between banks is now possible in all states other than Montana and Texas, and de novo interstate branching is permitted in 13 states. As a result, many domestic banks with interstate branches now have significant opportunities to change home state, although these opportunities are not available to all banks under all circumstances.

In light of these changes, the proposal gives foreign banks additional opportunities to change home state in a way that affords comparable treatment to foreign and domestic banks. The proposal would retain the ability of foreign banks under current rules to change their home state once by filing a notice with the Board. Changes made by foreign banks prior to the entry into effect of the proposed amendments would count toward this one-time limit. The proposal would also establish a new procedure for foreign banks to change home state an unlimited number of times, by applying for the prior approval of the Board for each such change. A foreign bank applying to change its home state under the new procedure would be required to show that a domestic bank with the same home state would be able to make the same change.

The new procedure advances the policy of national treatment underlying the IBA by allowing foreign banks to take advantage of changes in laws concerning interstate branching in order to change home state, when and to the extent those laws make it possible for domestic banks to change home state as well. The new procedure also seeks to prevent foreign banks from gaining an

unfair competitive advantage over domestic banks by changing home state in circumstances where a domestic bank would be unable to do so. Although the Interstate Act made it possible for domestic banks to change home state in some cases, there are other cases where such changes in home state may be difficult or impossible. Accordingly, the new procedure would allow foreign banks to change home state only in cases where a domestic bank could effect the same change.

The Board would have discretion to grant the request of a foreign bank to change home state under the new proposed procedure. In evaluating these applications, the Board would consider whether the proposed change of home state would be consistent with competitive equity between foreign and domestic banks. Relevant factors in this regard include the degree to which a national or state bank would be able to make the same change of home state while retaining its existing operations outside the new home state.

Changes in home state would generally have no impact on which Reserve Bank will supervise the operations of a foreign bank nor on which Reserve Bank will receive a foreign bank's reports and applications.

Conforming U.S. Operations Upon Change in Home State

Regulation K currently requires a foreign bank that changes its home state to conform its banking operations outside the new home state to what would have been permissible at the time of the bank's original home state selection. The requirement, adopted in 1980, implemented section 5 of the IBA which sought to prevent foreign banks from using a home state change to acquire and maintain subsidiary banks or branches in more than one state in circumstances where a domestic bank or bank holding company would be unable to do so.

The Interstate Act liberalized the rules on interstate branches and eliminated the geographic restrictions on the purchases of banks by domestic bank holding companies and foreign banks under the BHC Act and the IBA. Consequently, the Board is proposing that the provisions on conforming operations upon a foreign bank's change of home state be revised to reflect changes made by the Interstate Act. For example, with respect to subsidiary banks, a foreign bank would no longer be required to divest a subsidiary bank outside its new home state; the Interstate Act authorizes interstate acquisitions of bank subsidiaries.

With respect to conforming branches outside the foreign bank's new home state, the proposed amendment would reflect the liberalized interstate branching rules applicable to foreign and domestic banks as a result of the Interstate Act. A foreign bank changing its home state would be permitted to retain all branches which the foreign bank could establish (under current law) if it already had its new home state. This relaxation is appropriate given that domestic, as well as foreign banks, now have significant opportunities to establish and retain interstate branches.

The proposal would not change the current rule which allows a foreign bank to retain branches grandfathered under the IBA, and limited branches (that is, branches that "limit" their deposit-taking to only those deposits that an Edge corporation may accept).

Additional Standards for Interstate Offices

The proposal also contains the additional standards required by the Interstate Act for approval by the Board of the establishment by a foreign bank of branches located outside of the bank's home state. These standards are designed to insure that foreign banks seeking to establish interstate branches meet requirements comparable to those imposed on domestic banks seeking to operate interstate.

Upgrading of Agencies and Limited Branches to Full Branches

Section 5 of the IBA, as amended by the Interstate Act, allows a foreign bank to establish full branches outside its home state only if a domestic bank with the same home state could establish branches in the same host state under the Interstate Act. The Interstate Act allows interstate branching by merger with an existing bank or branch (the merger provisions) or through de novo branching (the de novo provisions). The merger provisions further distinguish between interstate mergers of entire banks and interstate acquisition of individual branches.

Some foreign bank trade groups have argued that a foreign bank with interstate offices, including agencies and limited branches, should be permitted to convert such agencies and limited branches outside the home state into full-service branches. The argument is based on the fact that domestic banking organizations can consolidate their existing interstate subsidiary banks and establish interstate branches through the merger provisions. Accordingly, the argument goes, in order to provide national treatment, foreign banks should be able to

“consolidate” their own existing interstate operations into full-service branches.

The Board has several concerns with this argument. In an interstate merger of bank subsidiaries, different legal entities are merged into one; operations are retained as branches of the surviving bank. In the case of a foreign bank’s interstate network of offices, each office is already part of one legal entity; there is no merger. Moreover, in an interstate merger transaction, all existing subsidiary banks would generally have full deposit-taking authority; the merger does not increase the ability of the merged entities to take deposits. In the case of foreign banks, however, many of the interstate offices do not have full deposit powers³⁴ and granting the request would allow foreign banks substantially to increase their deposit powers. Finally, unlike foreign banks, domestic banks did not have the opportunity to establish agencies and limited branches outside their home states prior to enactment of the Interstate Act. One possible issue is whether the existing networks of such interstate offices of foreign banks, established at a time when such interstate offices were unavailable to domestic banks, would give foreign banks an unfair advantage over domestic banks if the Board decides that such offices can be upgraded to full branches under the merger provisions.³⁵

On balance, the Board believes it should approve upgrades of agencies and limited branches to full branches only if the host state permits *de novo* interstate branching. Comment is being requested on whether foreign banks wishing to upgrade their out-of-home-state offices should be permitted to do so only if a domestic bank with the same home state as the foreign bank could open a *de novo* branch, or whether there are other circumstances in which a foreign bank should be permitted to upgrade its offices.

In connection with this issue, the Board is proposing a change in the current definition of “change in status” in Regulation K. Regulation K requires the prior approval of the Board under the FBSEA for any “change in the status” of a U.S. office. The current

definition of change in status in Regulation K does not expressly include upgrades from limited to full branches because foreign banks generally were unable to effect such upgrades without changing home state until the Interstate Act gave foreign banks the ability to establish full branches on an interstate basis.

As discussed above, upgrading a limited branch of a foreign bank to a full branch implicates policy concerns similar to those raised by changes in the status of an office requiring prior Board approval under FBSEA. Thus, the Board proposes to expand the definition of “change in status” to include upgrades from a limited branch to a full branch, such that prior approval of the Board under FBSEA would be necessary for such upgrades. Where a foreign bank proposes to upgrade a limited branch to a full branch outside its home state, the prior approval of the Board under the interstate branching provisions of section 5 of the IBA also would be required as a result of this rule change.

Home State Attribution Rule Deleted

Regulation K currently provides that a foreign banking organization and all its affiliates are entitled to only one home state. This would be true even if the foreign banking organization owned several different foreign banks with operations in the United States.

At the time the rule was adopted, domestic banks generally could not branch into states other than the ones in which they were located, nor could bank holding companies generally acquire banks outside their home state. In that context, the Regulation K provision was structured to prevent affiliated groups of foreign banks from gaining an unfair advantage over domestic banks by having each of the affiliated foreign banks select a different home state. Having done so, the foreign banks would be able to open and operate branches in more than one state. The rule sought to prevent this by stating that a foreign banking organization and any foreign bank that it controls would be entitled to only one home state.

The Interstate Act has substantially changed the rules on interstate expansion since this provision was originally adopted. Under current law, a bank holding company may own many banks in different states; each of these banks is entitled to its own home state regardless of the home states of its affiliates. Consequently, the Board proposes that Regulation K be amended to eliminate the requirement that a foreign bank and all its affiliates are entitled to only one home state. The

proposal would preserve national treatment for foreign banks and would not put U.S. banking organizations at any competitive disadvantage.³⁶

The Board requests comment on the specific proposals with respect to the Interstate Act as well as any other comments on appropriate or desirable changes.

Additional Matters

Temporary Additional Office Location

From time to time over the past six years, the Board has received requests from foreign banks that desire to have an additional temporary location, usually as an interim measure before moving into new office space that can accommodate the entire staff of the branch or agency. These requests typically occur when the office is expanding into new areas or otherwise adding staff. The Board is proposing that prior approval under FBSEA would not be required where a foreign bank temporarily, for a period not to exceed 12 months, relocates part of the staff of a branch or agency pending movement of the entire office to a new location as long as there is not direct public access with respect to any branch or agency function. Any foreign bank taking advantage of this authority would be required to advise the Board prior to the relocation, make certain commitments, and provide periodic information, as requested.

Changes to Definition Section

The revision makes certain technical changes in the definition section of Subpart B, including in the definitions of “appropriate Federal Reserve Bank,” “foreign banking organization,” and “regional administrative office.”

Conforming Changes to Termination Provisions

The Board proposes to amend the provisions of Subpart B dealing with termination of a U.S. office of a foreign bank to add as a grounds for termination a finding that the home country supervisor of a foreign bank is not making demonstrable progress in establishing arrangements for the comprehensive supervision or

³⁴ Limited branches may take only Edge-type deposits; agencies may accept only foreign-source deposits.

³⁵ It could be argued that the ability of foreign banks to maintain agency, limited branch, and representative office networks outside their home states since 1978 gave foreign banks a slight competitive advantage, and that foreign banks wishing to upgrade their out-of-home-state offices should be allowed to do so only if a domestic bank could open a *de novo* branch under the Interstate Act.

³⁶ Section 5 of the IBA provides that a foreign bank may not establish a branch “directly or indirectly” outside its home state. Staff does not believe that this provision affects the ability of several foreign bank affiliates to maintain different home states. Rather, in light of Congress’s intent to provide foreign banks with national treatment in interstate expansion, staff believes this prohibition on “indirect” establishment of branches refers to preventing one foreign bank from acting as the branch of another foreign bank, without the latter having met the requirements of the IBA, including section 5.

regulation of such foreign bank on a consolidated basis.

Permissible U.S. Securities Activities for Foreign Banking Organization

Subpart B currently provides that a foreign banking organization may not own or control shares of a foreign company that directly underwrites, sells or distributes, or that owns or controls more than five percent of the shares of a company that underwrites, sells or distributes, securities in the United States, except to the extent permitted bank holding companies. The current five percent limitation is intended to limit any competitive advantage the foreign banking organization might have by virtue of owning a larger interest in an impermissible U.S. securities company then is permitted to a U.S. bank holding company. Based on recent experience, the Board is proposing that the five percent limit be raised to ten percent. In the Board's view, a less than ten percent ownership interest would not generally permit the foreign banking organization to exert a significant influence over a securities company in order to gain a competitive advantage over U.S. bank holding companies.

New Delegations

Staff is proposing adding several new delegations related to Subpart B of Regulation K to the Board's delegation rules. The following authority would be delegated to the Director of the Division of Banking Supervision and Regulation:

- Together with the appropriate Federal Reserve Bank, authority to waive or suspend the prior notice period in connection with the establishment of any particular new foreign bank office in the United States or to require that an application be filed in lieu of a prior notice;
- Authority to suspend a particular foreign banking organization's ability to establish additional offices by general consent or prior notice would also be delegated to the Director of the Division of Banking Supervision and Regulation.
- Authority to determine that the temporary operation by a foreign bank of a second location of an existing office does not constitute the establishment of a new office.

The following authority would be delegated to the General Counsel.

- Authority not to require an application in the event of a merger or acquisition transaction involving two foreign banks that would otherwise qualify for after-the-fact approval where the foreign bank in question commits promptly to wind down the acquired U.S. operations; and

- Authority to approve routine requests for exemptive authority under section 4(c)(9) of the BHC Act.

Reduction of Reporting Requirements

Foreign banking organizations currently are required to report certain acquisitions of shares in companies engaged in activities in the United States on a quarterly basis. The Board is proposing that such reports be required only on an annual basis.

Subpart C: Export Trading Companies

Subpart C of the Regulation K sets out the rules governing investments and participation in export trading companies (ETCs) by bank holding companies and other eligible investors.

ETCs are companies in which bank holding companies and certain other eligible investors may invest for the purpose of promoting U.S. exports. Currently, an eligible investor must give the Board 60 days prior written notice of an investment of any amount in an ETC. To ease regulatory burden, the Board is proposing a general consent procedure whereby an eligible investor that is well capitalized and well managed may invest in an ETC without submitting prior notice. An eligible investor that makes such an investment would have to provide certain information to the Board in a post-investment notice. The terms well capitalized and well managed would have the same meanings as in the Board's Regulation Y.

The Board is also proposing that eligible investors be able, under general-consent authority, to reinvest an amount equal to dividends received from the ETC in the prior year and to acquire an ETC from an affiliate at net asset value. Both provisions are based on the general-consent provisions of subpart A.

The proposed revision of subpart C would also move all defined terms into a new definitions section; remove an obsolete provision relating to the calculation of an ETC's revenues; and make certain minor, technical amendments.

Request for Comment

The Board seeks comment on all of these proposals, including any changes not noted above but that are set forth in the draft regulations.

Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an initial regulatory flexibility analysis with any notice of proposed rulemaking. A description of the reasons why the action by the agency is being considered and a statement of the objectives of, and

the legal basis for, the proposed rule are contained in the supplementary information above. The overall effect of the proposed rule would be to reduce regulatory burden. The rule should not have a significant economic impact on a substantial number of small business entities consistent with the spirit and purpose of the Regulatory Flexibility Act.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulation (5 CFR 1320, app. A.1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, an information collection unless the Board displays a currently valid OMB control number. The Board's OMB control numbers for the collections revised by this proposal are 7100-0107 (the International Applications and Prior Notifications under Subparts A and C of Regulation K; FR K-1), 7100-0110 (the Notification Required Pursuant to Section 211.23(h) of Regulation K on Acquisitions by Foreign Banking Organizations; FR 4002), and 7100-0284 (the International Applications and Prior Notifications under Subpart B of Regulation K; FR K-2).

The collections of information that are proposed to be revised by this rulemaking are authorized by sections 25 and 25A of the Federal Reserve Act (12 U.S.C. 601-604a, 611-631), sections 4(c)(13), 4(c)(14), and 5(c) of the BHC Act (12 U.S.C. 1843(c)(13), 1843(c)(14), 1844(c)), and sections 7, 8(a), and 10 of the IBA (12 U.S.C. 3105, 3106(a), 3107). These information collections are required to evidence compliance with the requirements of Regulation K. The respondents are for-profit financial institutions, including small businesses.

The current estimated annual burden for the 7100-0107 is 440 hours. The proposed rule would result in an estimated 25 percent reduction in the number of applications filed. The proposal would permit well-capitalized and well-managed U.S. banking organizations making investments pursuant to general consent authority to file an abbreviated post-investment notice with the Board. This notice would take the place of the requirements relating to prior notice or application to the Board that would be required under existing Regulation K procedures before any such investment could be made. The current estimated annual burden for the 7100-0110 is 80

hours. It is estimated that the proposed rule would reduce the burden by 50 percent due to a decrease in the frequency of reports to be filed for certain foreign banking organizations. The current estimated annual burden for the 7100-0284 is 1,000 hours. It is estimated that the proposed rule would reduce the burden by 10 percent due to a decrease in the average number of hours required to complete an application. The Board estimates there would be no cost burden in addition to the annual hour burden.

For the 7100-0107 and the 7100-0284, the applying organization has the opportunity to request confidentiality for information that it believes will qualify for an exemption under the Freedom of Information Act (5 U.S.C. 552(b)). For the 7100-0110, the information may be deemed confidential if the respondent requests confidential treatment and is able to demonstrate the need for confidentiality under one or more of the exemptions provided by FOIA (5 U.S.C. 552(b)).

Comments are invited on: a. whether the proposed revised collections of information are necessary for the proper performance of the Federal Reserve's functions, including whether the information has practical utility; b. the accuracy of the Federal Reserve's estimate of the burden of the proposed revised information collections, including the cost of compliance; c. ways to enhance the quality, utility, and clarity of the information to be collected; and d. ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collections of information should be sent to Mary M. McLaughlin, Chief, Financial Reports Section, Division of Research and Statistics, Mail Stop 97, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments to be sent to the Office of Management and Budget, Paperwork Reduction Project (7100-00107, 7100-0110, or 7100-0284), Washington, DC 20503.

List of Subjects

12 CFR Part 211

Exports, Federal Reserve System, Foreign banking, Holding companies, Investments, Reporting and recordkeeping requirements.

12 CFR Part 265

Authority delegations (Government agencies), Banks, banking, Federal Reserve System.

For the reasons set out in the preamble, the Board of Governors proposes to amend 12 CFR parts 211 and 265 as set forth below:

PART 211—INTERNATIONAL BANKING OPERATIONS (REGULATION K)

1. The authority citation for part 211 continues to read as follows:

Authority: 12 U.S.C. 221 *et seq.*, 1818, 1835a, 1841 *et seq.*, 3101 *et seq.*, 3109 *et seq.*

2. Subparts A, B, and C (consisting of §§ 211.1 through 211.34) are revised to read as follows:

Subpart A—International Operations of U.S. Banking Organizations

Sec.

- 211.1 Authority, purpose, and scope.
- 211.2 Definitions.
- 211.3 Foreign branches of U.S. banking organizations.
- 211.4 Permissible investments and activities of foreign branches of member banks.
- 211.5 Edge and agreement corporations.
- 211.6 Permissible activities of Edge and agreement corporations in the United States.
- 211.7 Investments and activities abroad.
- 211.8 Investment procedures.
- 211.9 Permissible activities abroad.
- 211.10 Lending limits and capital requirements.
- 211.11 Supervision and reporting.
- 211.12 Reports of crimes and suspected crimes.
- 211.13 Liquidation of Edge and agreement corporations.

Subpart B—Foreign Banking Organizations

- 211.20 Authority, purpose, and scope.
- 211.21 Definitions.
- 211.22 Interstate banking operations of foreign banking organizations.
- 211.23 Nonbanking activities of foreign banking organizations.
- 211.24 Approval of offices of foreign banks; procedures for applications; standards for approval; representative office activities and standards for approval; preservation of existing authority.
- 211.25 Termination of offices of foreign banks.
- 211.26 Examination of offices and affiliates of foreign banks.
- 211.27 Disclosure of supervisory information to foreign supervisors.
- 211.28 Provisions applicable to branches and agencies: limitation on loans to one borrower.
- 211.29 Applications by state branches and state agencies to conduct activities not permissible for federal branches.
- 211.30 Criteria for evaluating U.S. operations of foreign banks not subject to consolidated supervision.

Subpart C—Export Trading Companies

- 211.31 Authority, purpose, and scope.
- 211.32 Definitions.
- 211.33 Investments and extensions of credit.

211.34 Procedures for filing and processing notices.

Subpart A—International Operations of U.S. Banking Organizations

§ 211.1 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued by the Board of Governors of the Federal Reserve System (Board) under the authority of the Federal Reserve Act (FRA) (12 U.S.C. 221 *et seq.*); the Bank Holding Company Act of 1956 (BHC Act) (12 U.S.C. 1841 *et seq.*); and the International Banking Act of 1978 (IBA) (12 U.S.C. 3101 *et seq.*).

(b) *Purpose.* This subpart sets out rules governing the international and foreign activities of U.S. banking organizations, including procedures for establishing foreign branches and Edge and agreement corporations to engage in international banking, and for investments in foreign organizations.

(c) *Scope.* This subpart applies to:

- (1) Corporations organized under section 25A of the FRA (12 U.S.C. 611-631) (Edge corporations);
- (2) Corporations having an agreement or undertaking with the Board under section 25 of the FRA (12 U.S.C. 601-604a), (agreement corporations);
- (3) Member banks with respect to their foreign branches and investments in foreign banks under section 25 of the FRA (12 U.S.C. 601-604a);¹ and
- (4) Bank holding companies with respect to the exemption from the nonbanking prohibitions of the BHC Act afforded by section 4(c)(13) of that act (12 U.S.C. 1843(c)(13)).

§ 211.2 Definitions.

Unless otherwise specified, for the purposes of this subpart:

(a) An *affiliate* of an organization means:

- (1) Any entity of which the organization is a direct or indirect subsidiary; or
- (2) Any direct or indirect subsidiary of the organization or such entity.

(b) *Capital Adequacy Guidelines* means the "Capital Adequacy Guidelines for State Member Banks: Risk-Based Measure" (12 CFR part 208, app. A) and the "Capital Adequacy Guidelines for Bank Holding Companies: Risk-Based Measure" (12 CFR part 225, app. A).

(c) *Capital and surplus* means, unless otherwise provided in this part:

- (1) Tier 1 and tier 2 capital included in an organization's risk-based capital

¹ Section 25 of the FRA (12 U.S.C. 601-604a), which refers to national banking associations, also applies to state member banks of the Federal Reserve System by virtue of section 9 of the FRA (12 U.S.C. 321).

(under the Capital Adequacy Guidelines); and

(2) The balance of allowance for loan and lease losses not included in an organization's tier 2 capital for calculation of risk-based capital, based on the organization's most recent consolidated Report of Condition and Income.

(d) *Directly or indirectly*, when used in reference to activities or investments of an organization, means activities or investments of the organization or of any subsidiary of the organization.

(e) *Eligible country* means any country:

(1) For which an allocated transfer risk reserve is required pursuant to § 211.43 and that has restructured its sovereign debt held by foreign creditors; and

(2) Any other country that the Board deems to be eligible.

(f) An Edge corporation is *engaged in banking* if it is ordinarily engaged in the business of accepting deposits in the United States from nonaffiliated persons.

(g) *Engaged in business or engaged in activities* in the United States means maintaining and operating an office (other than a representative office) or subsidiary in the United States.

(h) *Equity* means an ownership interest in an organization, whether through:

(1) Voting or nonvoting shares;

(2) General or limited partnership interests;

(3) Any other form of interest conferring ownership rights, including warrants, debt, or any other interests that are convertible into shares or other ownership rights in the organization; or

(4) Loans that provide rights to participate in the profits of an organization, unless the investor receives a determination that such loans should not be considered equity in the circumstances of the particular investment.

(i) *Foreign or foreign country* refers to one or more foreign nations, and includes the overseas territories, dependencies, and insular possessions of those nations and of the United States, and the Commonwealth of Puerto Rico.

(j) *Foreign bank* means an organization that:

(1) Is organized under the laws of a foreign country;

(2) Engages in the business of banking;

(3) Is recognized as a bank by the bank supervisory or monetary authority of the country of its organization or principal banking operations;

(4) Receives deposits to a substantial extent in the regular course of its business; and

(5) Has the power to accept demand deposits.

(k) *Foreign branch* means an office of an organization (other than a representative office) that is located outside the country where the organization is legally established, at which a banking or financing business is conducted.

(l) *Foreign person* means an office or establishment located outside the United States, or an individual residing outside the United States.

(m) *Investment* means:

(1) The ownership or control of equity;

(2) Binding commitments to acquire equity;

(3) Contributions to the capital and surplus of an organization; or

(4) The holding of an organization's subordinated debt when the investor and the investor's affiliates hold more than 5 percent of the equity of the organization.

(n) *Investor* means an Edge corporation, agreement corporation, bank holding company, or member bank.

(o) *Joint venture* means an organization that has 25 percent or more of its voting shares held directly or indirectly by the investor or by an affiliate of the investor, but which is not a subsidiary of the investor.

(p) *Loans and extensions of credit* means all direct and indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds.

(q) *Organization* means a corporation, government, partnership, association, or any other entity.

(r) *Person* means an individual or an organization.

(s) *Portfolio investment* means an investment in an organization other than a subsidiary or joint venture.

(t) *Representative office* means an office that:

(1) Engages solely in representational and administrative functions (such as soliciting new business or acting as liaison between the organization's head office and customers in the United States); and

(2) Does not have authority to make any business decision (other than decisions relating to its premises or personnel) for the account of the organization it represents, including contracting for any deposit or deposit-like liability on behalf of the organization.

(u) *Subsidiary* means an organization that has more than 50 percent of its

voting shares held directly or indirectly, or that is otherwise controlled or capable of being controlled, by the investor or an affiliate of the investor under any authority. Among other circumstances, an investor is considered to control an organization if:

(1) The investor or an affiliate is a general partner of the organization; or

(2) If the investor and its affiliates directly or indirectly own or control more than 50 percent of the equity of the organization.

(v) *Tier 1 capital* has the same meaning as provided under the Capital Adequacy Guidelines.

(w) *Well capitalized* means:

(1) In relation to a parent member or insured bank, that the standards set out in § 208.33(b)(1) of Regulation H (12 CFR 208.33(b)(1)) are satisfied;

(2) In relation to a bank holding company, that the standards set out in § 225.2(r)(1) of Regulation Y (12 CFR 225.2(r)(1)) are satisfied; and

(3) In relation to an Edge or agreement corporation, that it has tier 1 and total risk-based capital ratios of 6.0 and 10.0 percent, respectively, or greater.

(x) *Well managed* means that the Edge or agreement corporation, any parent insured bank, and the bank holding company have received a composite rating of 1 or 2 at their most recent examination or review and are not subject to any supervisory enforcement action.

§ 211.3 Foreign branches of U.S. banking organizations.

(a) *General*.—(1) *Definition of banking organization*. For purposes of this section, a *banking organization* is defined as a member bank and its affiliates.

(2) A banking organization is considered to be operating a branch in a foreign country if it has an affiliate that is a member bank, Edge or agreement corporation, or foreign bank that operates an office (other than a representative office) in that country.

(3) For purposes of this subpart, a foreign office of an operating subsidiary of a member bank shall be treated as a foreign branch of the member bank and may engage only in activities permissible for a branch of a member bank.

(4) At any time upon notice, the Board may modify or suspend branching authority conferred by this section with respect to any banking organization.

(b)(1) *Establishment of foreign branches*. (i) Foreign branches may be established by any member bank having capital and surplus of \$1,000,000 or more, an Edge corporation, an agreement corporation, any subsidiary

the shares of which are held directly by the member bank, or any other subsidiary held pursuant to this subpart.

(ii) The Board grants its general consent under section 25 of the FRA (12 U.S.C. 601–604a) for a member bank to establish a branch in the Commonwealth of Puerto Rico and the overseas territories, dependencies, and insular possessions of the United States.

(2) *Prior notice.* Unless otherwise provided in this section, the establishment of a foreign branch requires 30 days' prior written notice to the Board.

(3) *Branching into additional foreign countries.* After giving the Board 12 days' prior written notice, a banking organization that operates branches in two or more foreign countries may establish a branch in an additional foreign country.

(4) *Additional branches within a foreign country.* No prior notice is required to establish additional branches in any foreign country where the banking organization operates one or more branches.

(5) *Branching by nonbanking organizations.* No prior notice is required for an organization that is not an Edge or agreement corporation, member bank, or foreign bank to establish branches within a foreign country or in additional foreign countries.

(6) *Expiration of branching authority.* Authority to establish branches, when granted following prior written notice to the Board, shall expire one year from the earliest date on which the authority could have been exercised, unless extended by the Board.

(7) *Reporting.* Any banking organization that opens, closes, or relocates a branch shall report such change in a manner prescribed by the Board.

(8) *Reserves of foreign branches of member banks.* Member banks shall maintain reserves against foreign branch deposits when required by Regulation D (12 CFR part 204).

§ 211.4 Permissible investments and activities of foreign branches of member banks.

In addition to its general banking powers, and to the extent consistent with its charter, a foreign branch of a member bank may engage in the following activities, so far as usual in connection with the business of banking in the country where it transacts business:

(a) *Guarantees.* Guarantee debts, or otherwise agree to make payments on the occurrence of readily ascertainable

events,² if the guarantee or agreement specifies a maximum monetary liability; but, except to the extent that the member bank is fully secured, it may not have liabilities outstanding for any person on account of such guarantees or agreements which, when aggregated with other unsecured obligations of the same person, exceed the limit contained in section 5200(a)(1) of the Revised Statutes (12 U.S.C. 84) for loans and extensions of credit;

(b) *Government obligations.* (1) Underwrite, distribute, buy, sell, and hold obligations of:

(i) The national government of any country rated as investment grade by at least two established international rating agencies;

(ii) An agency or instrumentality of such national government where supported by the taxing authority, guarantee, or full faith and credit of that government; and

(iii) The national government and the political subdivisions of the country in which the branch is located;

(2) No member bank, under authority of this paragraph (b), may hold or be under commitment with respect to, such obligations for its own account in relation to any one country in an amount exceeding the greater of:

(i) 10 percent of its tier 1 capital; or

(ii) 10 percent of the total deposits of the bank's branches in that country on the preceding year-end call report date (or the date of acquisition of the branch, in the case of a branch that has not been so reported);

(c) *Other investments.* (1) Invest in:

(i) The securities of the central bank, clearinghouses, governmental entities other than those authorized under paragraph (b)(1) of this section, and government-sponsored development banks of the country in which the foreign branch is located;

(ii) Other debt securities eligible to meet local reserve or similar requirements; and

(iii) Shares of automated electronic-payments networks, professional societies, schools, and the like necessary to the business of the branch.

(2) The total investments of a bank's branches in a country under this paragraph (c) (exclusive of securities held as required by the law of that country or as authorized under section 5136 of the Revised Statutes (12 U.S.C. 24, Seventh) may not exceed 1 percent of the total deposits of the bank's branches in that country on the

² *Readily ascertainable events* include, but are not limited to, nonpayment of taxes, rentals, customs duties, or costs of transport and loss or nonconformance of shipping documents.

preceding year-end call report date (or on the date of acquisition of the branch, in the case of a branch that has not so reported);

(d) *Real estate loans.* Take liens or other encumbrances on foreign real estate in connection with its extensions of credit, whether or not of first priority and whether or not the real estate has been improved;

(e) *Insurance.* Act as insurance agent or broker;

(f) *Employee benefits program.* Pay to an employee of the branch, as part of an employee benefits program, a greater rate of interest than that paid to other depositors of the branch;

(g) *Repurchase agreements.* Engage in repurchase agreements involving securities and commodities that are the functional equivalents of extensions of credit;

(h) *Investment in subsidiaries.* With the Board's prior approval, acquire all of the shares of a company (except where local law requires other investors to hold directors' qualifying shares or similar types of instruments) that engages solely in activities:

(1) In which the member bank is permitted to engage; or

(2) That are incidental to the activities of the foreign branch; and

(i) *Other activities.* With the Board's prior approval, engage in other activities that the Board determines are usual in connection with the transaction of the business of banking in the places where the member bank's branches transact business.

§ 211.5 Edge and agreement corporations.

(a) *Organization.* (1) *Board authority.* The Board shall have the authority to approve:

(i) The establishment of Edge corporations; and

(ii) Investments in Edge and agreement corporations.

(2) *Permit.* A proposed Edge corporation shall become a body corporate when the Board issues a permit approving its proposed name, articles of association, and organization certificate.

(3) *Name.* The name shall include *international*, *foreign*, *overseas*, or a similar word, but may not resemble the name of another organization to an extent that might mislead or deceive the public.

(4) *Federal Register notice.* The Board shall publish in the **Federal Register** notice of any proposal to organize an Edge corporation and shall give interested persons an opportunity to express their views on the proposal.

(5) *Factors considered by Board.* The factors considered by the Board in

acting on a proposal to organize an Edge corporation include:

- (i) The financial condition and history of the applicant;
- (ii) The general character of its management;
- (iii) The convenience and needs of the community to be served with respect to international banking and financing services; and
- (iv) The effects of the proposal on competition.

(6) *Authority to commence business.* After the Board issues a permit, the Edge corporation may elect officers and otherwise complete its organization, invest in obligations of the U.S. government, and maintain deposits with depository institutions, but it may not exercise any other powers until at least 25 percent of the authorized capital stock specified in the articles of association has been paid in cash, and each shareholder has paid in cash at least 25 percent of that shareholder's stock subscription.

(7) *Expiration of unexercised authority.* Unexercised authority to commence business as an Edge corporation shall expire one year after issuance of the permit, unless the Board extends the period.

(8) *Amendments to articles of association.* No amendment to the articles of association shall become effective until approved by the Board.

(9) *Shareholders' meeting.* An Edge corporation shall provide in its bylaws that:

(i) A shareholders' meeting shall be convened at the request of the Board within five days after the Board gives notice of the request to the Edge corporation;

(ii) Any shareholder or group of shareholders that owns or controls 25 percent or more of the shares of the Edge corporation shall attend such a meeting in person or by proxy; and

(iii) Failure by a shareholder or authorized representative to attend such meeting in person or by proxy may result in removal or barring of such shareholder or representative from further participation in the management or affairs of the Edge corporation.

(b) *Nature and ownership of shares—*
(1) *Shares.* Shares of stock in an Edge corporation may not include no-par-value shares and shall be issued and transferred only on its books and in compliance with section 25A of the FRA (12 U.S.C. 611 *et seq.*) and this subpart.

(2) *Contents of share certificates.* The share certificates of an Edge corporation shall:

(i) Name and describe each class of shares, indicating its character and any

unusual attributes, such as preferred status or lack of voting rights; and

(ii) Conspicuously set forth the substance of:

(A) Any limitations upon the rights of ownership and transfer of shares imposed by section 25A of the FRA (12 U.S.C. 611 *et seq.*); and

(B) Any rules that the Edge corporation prescribes in its bylaws to ensure compliance with this paragraph (b).

(3) *Change in status of shareholder.* Any change in status of a shareholder that causes a violation of section 25A of the FRA (12 U.S.C. 611 *et seq.*) shall be reported to the Board as soon as possible, and the Edge corporation shall take such action as the Board may direct.

(c) *Ownership of Edge corporations by foreign institutions—*(1) *Prior Board approval.* One or more foreign or foreign-controlled domestic institutions referred to in section 25A(11) of the FRA (12 U.S.C. 619) may apply for the Board's prior approval to acquire directly or indirectly a majority of the shares of the capital stock of an Edge corporation.

(2) *Conditions and requirements.* Such an institution shall:

(i) Provide the Board information related to its financial condition and activities and such other information as the Board may require;

(ii) Ensure that any transaction by an Edge corporation with an affiliate³ is on substantially the same terms, including interest rates and collateral, as those prevailing at the same time for comparable transactions by the Edge corporation with nonaffiliated persons, and does not involve more than the normal risk of repayment or present other unfavorable features;

(iii) Ensure that the Edge corporation will not provide funding on a continual or substantial basis to any affiliate or office of the foreign institution through transactions that would be inconsistent with the international and foreign business purposes for which Edge corporations are organized; and

(iv) Invest no more than 10 percent of the institution's capital and surplus in the aggregate amount of stock held in all Edge and agreement corporations (or, with the Board's prior approval, up to 20 percent of the investor's capital and surplus).

(3) *Foreign institutions not subject to the BHC Act.* In the case of a foreign institution not subject to section 4 of the

³ For purposes of this paragraph (c)(2)(ii), *affiliate* means any organization that would be an affiliate under section 23A of the FRA (12 U.S.C. 371c) if the Edge corporation were a member bank.

BHC Act (12 U.S.C. 1843), that institution shall:

(i) Comply with any conditions that the Board may impose that are necessary to prevent undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices in the United States; and

(ii) Give the Board 30 days' prior written notice before engaging in any nonbanking activity in the United States, or making any initial or additional investments in another organization, that would require prior Board approval or notice by an organization subject to section 4 of the BHC Act (12 U.S.C. 1843); in connection with such notice, the Board may impose conditions necessary to prevent adverse effects that may result from such activity or investment.

(d) *Change in control.* —(1) *Prior notice.* (i) Any person shall give the Board 60 days' prior written notice before acquiring, directly or indirectly, 25 percent or more of the voting shares, or otherwise acquiring control, of an Edge corporation.

(ii) The Board may extend the 60-day period for an additional 30 days by notifying the acquiring party.

(iii) A notice under this paragraph (d) need not be filed where a change in control is effected through a transaction requiring the Board's approval under section 3 of the BHC Act (12 U.S.C. 1842).

(2) *Board review.* In reviewing a notice filed under this paragraph (d), the Board shall consider the factors set forth in paragraph (a)(5) of this section, and may disapprove a notice or impose any conditions that it finds necessary to assure the safe and sound operation of the Edge corporation, to assure the international character of its operation, and to prevent adverse effects, such as decreased or unfair competition, conflicts of interest, or undue concentration of resources.

(e) *Domestic branches.* —(1) *Prior notice.* (i) An Edge corporation may establish branches in the United States 30 days after the Edge corporation has given notice to its Reserve Bank, unless the Edge corporation is notified to the contrary within that time.

(ii) The notice to the Reserve Bank shall include a copy of the notice of the proposal published in a newspaper of general circulation in the communities to be served by the branch.

(iii) The newspaper notice may appear no earlier than 90 calendar days prior to submission of notice of the proposal to the Reserve Bank. The newspaper notice shall provide an opportunity for the public to give

written comment on the proposal to the appropriate Federal Reserve Bank for at least 30 days after the date of publication.

(2) *Factors considered by Board.* The factors considered in acting upon a proposal to establish a branch are enumerated in paragraph (a)(5) of this section.

(3) *Expiration of authority.* Authority to establish a branch under prior notice shall expire one year from the earliest date on which that authority could have been exercised, unless the Board extends the period.

(f) *Agreement corporations.* —(1) *General.* With the prior approval of the Board, a member bank or bank holding company may invest in a federally or state-chartered corporation that has entered into an agreement or undertaking with the Board that it will not exercise any power that is impermissible for an Edge corporation under this subpart.

(2) *Factors considered by Board.* The factors considered in acting upon a proposal to establish an agreement corporation are enumerated in paragraph (a)(5) of this section.

(g) *Reserve requirements and interest rate limitations.* The deposits of an Edge or agreement corporation are subject to Regulations D and Q (12 CFR parts 204 and 217) in the same manner and to the same extent as if the Edge or agreement corporation were a member bank.

(h) *Liquid funds.* Funds of an Edge or agreement corporation that are not currently employed in its international or foreign business, if held or invested in the United States, shall be in the form of:

(1) Cash;

(2) Deposits with depository institutions, as described in Regulation D (12 CFR part 204), and other Edge and agreement corporations;

(3) Money-market instruments (including repurchase agreements with respect to such instruments), such as banker's acceptances, federal funds sold, and commercial paper; and

(4) Short- or long-term obligations of, or fully guaranteed by, federal, state, and local governments and their instrumentalities.

§ 211.6 Permissible activities of Edge and agreement corporations in the United States.

Activities incidental to international or foreign business. An Edge corporation may engage, directly or indirectly, in activities in the United States that are permitted by section 25A(6) of the FRA (12 U.S.C. 615) and are incidental to international or foreign business, and in such other activities as the Board

determines are incidental to international or foreign business. The following activities will ordinarily be considered incidental to an Edge corporation's international or foreign business:

(a) *Deposits from foreign governments and foreign persons.* An Edge corporation may receive in the United States transaction accounts, savings, and time deposits (including issuing negotiable certificates of deposits) from foreign governments and their agencies and instrumentalities, and from foreign persons.

(b) *Deposits from other persons.* An Edge corporation may receive from any other person in the United States transaction accounts, savings, and time deposits (including issuing negotiable certificates of deposit) if such deposits:

(1) Are to be transmitted abroad;

(2) Consist of funds to be used for payment of obligations to the Edge corporation or collateral securing such obligations;

(3) Consist of the proceeds of collections abroad that are to be used to pay for exported or imported goods or for other costs of exporting or importing or that are to be periodically transferred to the depositor's account at another financial institution;

(4) Consist of the proceeds of extensions of credit by the Edge corporation;

(5) Represent compensation to the Edge corporation for extensions of credit or services to the customer;

(6) Are received from Edge or agreement corporations, foreign banks, and other depository institutions (as described in Regulation D (12 CFR part 204)); or

(7) Are received from an organization that by its charter, license, or enabling law is limited to business that is of an international character, including foreign sales corporations, as defined in 26 U.S.C. 922; transportation organizations engaged exclusively in the international transportation of passengers or in the movement of goods, wares, commodities, or merchandise in international or foreign commerce; and export trading companies established under subpart C of this part.

(c) *Borrowings.* An Edge corporation may:

(1) Borrow from offices of other Edge and agreement corporations, foreign banks, and depository institutions (as described in Regulation D (12 CFR part 204));

(2) Issue obligations to the United States or any of its agencies or instrumentalities;

(3) Incur indebtedness from a transfer of direct obligations of, or obligations

that are fully guaranteed as to principal and interest by, the United States or any agency or instrumentality thereof that the Edge corporation is obligated to repurchase; and

(4) Issue long-term subordinated debt that does not qualify as a *deposit* under Regulation D (12 CFR part 204).

(d) *Credit activities.* An Edge corporation may:

(1) Finance the following:

(i) Contracts, projects, or activities performed substantially abroad;

(ii) The importation into or exportation from the United States of goods, whether direct or through brokers or other intermediaries;

(iii) The domestic shipment or temporary storage of goods being imported or exported (or accumulated for export); and

(iv) The assembly or repackaging of goods imported or to be exported;

(2) Finance the costs of production of goods and services for which export orders have been received or which are identifiable as being directly for export;

(3) Assume or acquire participations in extensions of credit, or acquire obligations arising from transactions the Edge corporation could have financed including acquisition of obligations of foreign governments;

(4) Guarantee debts, or otherwise agree to make payments on the occurrence of readily ascertainable events (including, but not limited to, events such as nonpayment of taxes, rentals, customs duties, or cost of transport and loss or nonconformance of shipping documents), so long as the guarantee or agreement specifies the maximum monetary liability thereunder and is related to a type of transaction described in paragraphs (d)(1) and (2) of this section; and

(5) Provide credit and other banking services for domestic and foreign purposes to foreign governments and their agencies and instrumentalities; foreign persons; and organizations of the type described in paragraph (b)(7) of this section.

(e) *Payments and collections.* An Edge corporation may receive checks, bills, drafts, acceptances, notes, bonds, coupons, and other instruments for collection abroad, and collect such instruments in the United States for a customer abroad; and may transmit and receive wire transfers of funds and securities for depositors.

(f) *Foreign exchange.* An Edge corporation may engage in foreign exchange activities.

(g) *Fiduciary and investment advisory activities.* An Edge corporation may:

(1) Hold securities in safekeeping for, or buy and sell securities upon the order

and for the account and risk of, a person, provided such services for U.S. persons are with respect to foreign securities only;

(2) Act as paying agent for securities issued by foreign governments or other entities organized under foreign law;

(3) Act as trustee, registrar, conversion agent, or paying agent with respect to any class of securities issued to finance foreign activities and distributed solely outside the United States;

(4) Make private placements of participations in its investments and extensions of credit; however, except to the extent permissible for member banks under section 5136 of the Revised Statutes (12 U.S.C. 24(Seventh)), no Edge corporation may otherwise engage in the business of underwriting, distributing, or buying or selling securities in the United States;

(5) Act as investment or financial adviser by providing portfolio investment advice and portfolio management with respect to securities, other financial instruments, real-property interests and other investment assets,⁴ and by providing advice on mergers and acquisitions, provided such services for U.S. persons are with respect to foreign assets only; and

(6) Provide general economic information and advice, general economic statistical forecasting services, and industry studies, provided such services for U.S. persons shall be with respect to foreign economies and industries only.

(h) *Banking services for employees.* Provide banking services, including deposit services, to the officers and employees of the Edge corporation and its affiliates; however, extensions of credit to such persons shall be subject to the restrictions of Regulation O (12 CFR part 215) as if the Edge corporation were a member bank.

(i) *Other activities.* With the Board's prior approval, engage in other activities in the United States that the Board determines are incidental to the international or foreign business of Edge corporations.

§ 211.7 Investments and activities abroad.

(a) *General policy.* Activities abroad, whether conducted directly or indirectly, shall be confined to activities of a banking or financial nature and those that are necessary to carry on such activities. In doing so, investors⁵ shall

⁴ For purposes of this section, management of an investment portfolio does not include operational management of real property, or industrial or commercial assets.

⁵ For purposes of this section and §§ 211.8 and 211.9, a direct subsidiary of a member bank is deemed to be an investor.

at all times act in accordance with high standards of banking or financial prudence, having due regard for diversification of risks, suitable liquidity, and adequacy of capital. Subject to these considerations and the other provisions of this section, it is the Board's policy to allow activities abroad to be organized and operated as best meets corporate policies.

(b) *Direct investments by member banks.* A member bank's direct investments under section 25 of the FRA (12 U.S.C. 601 *et seq.*) shall be limited to:

(1) Foreign banks;

(2) Domestic or foreign organizations formed for the sole purpose of holding shares of a foreign bank;

(3) Foreign organizations formed for the sole purpose of performing nominee, fiduciary, or other banking services incidental to the activities of a foreign branch or foreign bank affiliate of the member bank; and

(4) Subsidiaries established pursuant to § 211.4(h).

(c) *Eligible investments.* Subject to the limitations set out in paragraphs (b) and (d) of this section, an investor may directly or indirectly:

(1) *Investment in subsidiary.* Invest in a subsidiary that engages solely in activities listed in § 211.9, or in such other activities as the Board has determined in the circumstances of a particular case are permissible; provided that, in the case of an acquisition of a going concern, existing activities that are not otherwise permissible for a subsidiary may account for not more than 5 percent of either the consolidated assets or revenues of the acquired organization;

(2) *Investment in joint venture.* Invest in a joint venture, provided that, unless otherwise permitted by the Board, not more than 10 percent of the joint venture's consolidated assets or revenues are attributable to activities not listed in § 211.9; and

(3) *Portfolio investments.* Make portfolio investments in an organization, provided that:

(i) *Individual limits.* The total direct and indirect portfolio investments by the investor and its affiliates in an organization engaged in activities that are not permissible for joint ventures do not exceed:

(A) 40 percent of the total equity of the organization, when combined with shares in the organization held in trading or dealing accounts pursuant to § 211.9(a)(15), and shares in the organization held under any other authority; and

(B) Where the investor is a well capitalized and well managed bank

holding company, 2 percent of the investor's tier 1 capital in any one organization; or

(C) For any other investor, amounts permissible under § 211.8(c)(2);

(ii) *Aggregate limits.* The total direct and indirect portfolio investments by the investor and its affiliates in all organizations engaged in activities that are not permissible for joint ventures (when combined with shares held under any authority other than § 211.9(a)(15))⁶ shall not exceed:

(A) 25 percent of the investor's tier 1 capital, where the investor is a bank holding company; or

(B) For any other investor, the lesser of 5 percent of the member bank's tier 1 capital or 25 percent of the investor's capital;

(iii) *Loans and extensions of credit.* Any loans and extensions of credit made by an investor or its affiliates to the organization are on substantially the same terms, including interest rates and collateral, as those prevailing at the same time for comparable transactions between the investor or its affiliates and nonaffiliated persons; and

(iv) *Protecting shareholder rights.* Nothing in this paragraph (c)(3) shall prohibit an investor from otherwise exercising rights it may have as shareholder to protect the value of its investment.

(d) *Investment limit.* In calculating the amount that may be invested in any organization under this section and §§ 211.8 and 211.9, there shall be included any unpaid amount for which the investor is liable and any investments in the same organization held by affiliates under any authority.

(e) *Divestiture.* An investor shall dispose of an investment promptly (unless the Board authorizes retention) if:

(1) The organization invested in:

(i) Engages in impermissible activities to an extent not permitted under paragraph (c) of this section; or

(ii) Engages directly or indirectly in other business in the United States that is not permitted to an Edge corporation in the United States, provided that an investor may:

(A) Retain portfolio investments in companies that derive no more than 10 percent of their total revenue from activities in the United States; and

(B) Hold up to 5 percent of the shares of a foreign company that engages directly or indirectly in business in the United States that is not permitted to an Edge corporation; or

⁶ For investors that are not well capitalized and well managed, shares held in trading or dealing accounts pursuant to § 211.9(a)(15) shall be included in calculating these limits.

(2) After notice and opportunity for hearing, the investor is advised by the Board that such investment is inappropriate under the FRA, the BHC Act, or this subpart.

(f) *Debts previously contracted.* Shares or other ownership interests acquired to prevent a loss upon a debt previously contracted in good faith are not subject to the limitations or procedures of this section, provided that such interests shall be disposed of promptly but in no event later than two years after their acquisition, unless the Board authorizes retention for a longer period.

(g) *Investments made through debt-for-equity conversions—(1) Permissible investments.* A bank holding company may make investments through the conversion of sovereign- or private-debt obligations of an eligible country, either through direct exchange of the debt obligations for the investment, or by a payment for the debt in local currency, the proceeds of which, including an additional cash investment not exceeding in the aggregate more than 10 percent of the fair value of the debt obligations being converted as part of such investment, are used to purchase the following investments:

(i) *Public-sector companies.* A bank holding company may acquire up to and including 100 percent of the shares of (or other ownership interests in) any foreign company located in an eligible country, if the shares are acquired from the government of the eligible country or from its agencies or instrumentalities.

(ii) *Private-sector companies.* A bank holding company may acquire up to and including 40 percent of the shares, including voting shares, of (or other ownership interests in) any other foreign company located in an eligible country subject to the following conditions:

(A) A bank holding company may acquire more than 25 percent of the voting shares of the foreign company only if another shareholder or group of shareholders unaffiliated with the bank holding company holds a larger block of voting shares of the company;

(B) The bank holding company and its affiliates may not lend or otherwise extend credit to the foreign company in amounts greater than 50 percent of the total loans and extensions of credit to the foreign company; and

(C) The bank holding company's representation on the board of directors or on management committees of the foreign company may be no more than proportional to its shareholding in the foreign company.

(2) *Investments by bank subsidiary of bank holding company.* Upon application, the Board may permit an

indirect investment to be made pursuant to this paragraph (g) through an insured bank subsidiary of the bank holding company, where the bank holding company demonstrates that such ownership is consistent with the purposes of the FRA. In granting its consent, the Board may impose such conditions as it deems necessary or appropriate to prevent adverse effects, including prohibiting loans from the bank to the company in which the investment is made.

(3) *Divestiture—(i) Time limits for divestiture.* A bank holding company shall divest the shares of, or other ownership interests in, any company acquired pursuant to this paragraph (g) within the longer of:

(A) Ten years from the date of acquisition of the investment, except that the Board may extend such period if, in the Board's judgment, such an extension would not be detrimental to the public interest; or

(B) Two years from the date on which the bank holding company is permitted to repatriate in full the investment in the foreign company.

(ii) *Maximum retention period.* Notwithstanding the provisions of paragraph (g)(3)(i) of this section:

(A) Divestiture shall occur within 15 years of the date of acquisition of the shares of, or other ownership interests in, any company acquired pursuant to this paragraph (g); and

(B) A bank holding company may retain such shares or ownership interests if such retention is otherwise permissible at the time required for divestiture.

(iii) *Report to Board.* The bank holding company shall report to the Board on its plans for divesting an investment made under this paragraph (g) two years prior to the final date for divestiture, in a manner to be prescribed by the Board.

(iv) *Other conditions requiring divestiture.* All investments made pursuant to this paragraph (g) are subject to paragraph (e) of this section requiring prompt divestiture (unless the Board upon application authorizes retention), if the company invested in engages in impermissible business in the United States that exceeds in the aggregate 10 percent of the company's consolidated assets or revenues calculated on an annual basis; provided that such company may not engage in activities in the United States that consist of banking or financial operations (as defined in § 211.23(f)(5)(iii)(B)), or types of activities permitted by regulation or order under section 4(c)(8) of the BHC Act (12 U.S.C. 1843(c)(8)), except under

regulations of the Board or with the prior approval of the Board.

(4) *Investment procedures.* —(i) *General consent.* Subject to the other limitations of this paragraph (g), the Board grants its general consent for investments made under this paragraph (g) if the total amount invested does not exceed the greater of \$25 million or 1 percent of the tier 1 capital of the investor.

(ii) All other investments shall be made in accordance with the procedures of § 211.8(f) and (g), requiring prior notice or specific consent.

(5) *Conditions.* —(i) *Name.* Any company acquired pursuant to this paragraph (g) shall not bear a name similar to the name of the acquiring bank holding company or any of its affiliates.

(ii) *Confidentiality.* Neither the bank holding company nor its affiliates shall provide to any company acquired pursuant to this paragraph (g) any confidential business information or other information concerning customers that are engaged in the same or related lines of business as the company.

§ 211.8 Investment procedures.

(a) *General provisions.*⁷ Direct and indirect investments shall be made in accordance with the general-consent, limited general-consent, prior-notice, or specific-consent procedures contained in this section.

(1) *Minimum capital adequacy standards.* Except as the Board may otherwise determine, in order for an investor to make investments pursuant to the procedures set out in this section, the investor, the bank holding company, and the member bank shall be in compliance with applicable minimum standards for capital adequacy set out in the Capital Adequacy Guidelines; provided that, if the investor is an Edge or agreement corporation, the minimum capital required is total and tier 1 capital ratios of 8 percent and 4 percent, respectively.

(2) *Composite rating.* Except as the Board may otherwise determine, in order for an investor to make investments under the general-consent or limited general-consent procedures of paragraphs (b) and (c) of this section, the investor and any parent insured bank must have received a composite rating of at least 2 at the most recent examination.

⁷When necessary, the provisions of this section relating to general consent and prior notice constitute the Board's approval under section 25A(Eighth) of the FRA (12 U.S.C. 616) for investments in excess of the limitations therein based on capital and surplus.

(3) *Board's authority to modify or suspend procedures.* The Board, at any time upon notice, may modify or suspend the procedures contained in this section with respect to any investor or with respect to the acquisition of shares of organizations engaged in particular kinds of activities.

(4) *Long-range investment plan.* Any investor may submit to the Board for its specific consent a long-range investment plan. Any plan so approved shall be subject to the other procedures of this section only to the extent determined necessary by the Board to assure safety and soundness of the operations of the investor and its affiliates.

(5) *Prior specific consent for initial investment.* An investor shall apply for and receive the prior specific consent of the Board for its initial investment under this subpart in its first subsidiary or joint venture, unless an affiliate previously has received approval to make such an investment.

(6) *Expiration of investment authority.* Authority to make investments granted under prior-notice or specific-consent procedures shall expire one year from the earliest date on which the authority could have been exercised, unless the Board determines a longer period shall apply.

(7) *Conditional approval.* The Board may impose such conditions on authority granted by it under this section as it deems necessary, and may require termination of any activities conducted under authority of this subpart if an investor is unable to provide information on its activities or those of its affiliates that the Board deems necessary to determine and enforce compliance with U.S. banking laws.

(b) *General consent.* The Board grants its general consent for a well capitalized and well managed investor to make investments, subject to the following:

(1) *Well capitalized and well managed investor.* In order to qualify for making investments under authority of this paragraph (b), both before and immediately after the proposed investment, the investor, any parent insured bank, and any parent bank holding company shall be well capitalized and well managed.

(2) *Investment in subsidiaries.* In the case of an investment in a subsidiary, the total amount invested in such subsidiary (in one transaction or a series of transactions) does not exceed:

(i) 10 percent of the investor's tier 1 capital, where the investor is a bank holding company; or

(ii) 2 percent of the investor's tier 1 capital, where the investor is a member bank; or

(iii) For any other investor, the lesser of 2 percent of the tier 1 capital of any parent insured bank or 10 percent of the investor's tier 1 capital.

(3) *Investment in joint ventures.* In the case of an investment in a joint venture, the total amount invested in such joint venture (in one transaction or a series of transactions) does not exceed:

(i) 5 percent of the investor's tier 1 capital, where the investor is a bank holding company; or

(ii) 1 percent of the investor's tier 1 capital, where the investor is a member bank; or

(iii) The lesser of 1 percent of the tier 1 capital of any parent insured bank or 5 percent of the investor's tier 1 capital, for any other investor.

(4) *Portfolio investments.* A bank holding company may make portfolio investments conforming to the limits set out in § 211.7(c)(3).

(5) *Aggregate investment limits.*—(i) *Investment limits.* All investments made, directly or indirectly, during the previous 12-month period under authority of this section, when aggregated with the proposed investment, shall not exceed:

(A) In the case of a bank holding company, 20 percent of the investor's tier 1 capital;

(B) In the case of a member bank, 10 percent of the investor's tier 1 capital; or

(C) In the case of any other investor, the lesser of 10 percent of the tier 1 capital of any parent insured bank or 50 percent of the tier 1 capital of the investor.

(ii) *Downstream investments.* In determining compliance with the aggregate limits set out in this paragraph (b), an investment by an investor in a subsidiary shall be counted only once, notwithstanding that such subsidiary may, within 12 months of the date of making the investment, downstream all or any part of such investment to another subsidiary.

(6) *Aggregating shares held in dealing accounts.* In determining compliance with the limits set out in this paragraph (b), an investor shall combine the value of all shares of an organization held in trading or dealing accounts under § 211.9(a)(15) with investments in the same organization.

(c) *Limited general consent.* The Board grants its general consent for an investor that is not well capitalized and well managed to make:

(1) *Individual limit for investment in subsidiary or joint venture.* Any investment in a subsidiary or joint venture, if the total amount invested (in one transaction or in a series of

transactions) does not exceed the lesser of \$25 million or:

(i) 5 percent of the investor's tier 1 capital, where the investor is a bank holding company;

(ii) 1 percent of the investor's tier 1 capital, where the investor is a member bank; or

(iii) The lesser of 1 percent of any parent insured bank's tier 1 capital or 5 percent of the investor's tier 1 capital, for any other investor.

(2) *Individual limit for portfolio investment.* The Board grants its general consent for any investor not eligible to make portfolio investments under § 211.7(c)(3)(i)(B) to make such investments subject to the limits set out in paragraph (c)(1) of this section.

(3) *Aggregate limit.* The amount of general-consent investments made by any investor subject to this section during the previous 12-month period, when aggregated with the proposed investment, shall not exceed:

(i) 10 percent of the investor's tier 1 capital, where the investor is a bank holding company;

(ii) 5 percent of the investor's tier 1 capital, where the investor is a member bank; and

(iii) The lesser of 5 percent of any parent insured bank's capital or 25 percent of the investor's capital, for any other investor.

(d) *Other eligible investments under general consent.* In addition to the authority granted under paragraphs (b) and (c) of this section, the Board grants its general consent for any investor to make the following investments:

(1) *Investment in organization equal to cash dividends.* Any investment in an organization in an amount equal to cash dividends received from that organization during the preceding 12 calendar months; and

(2) *Investment acquired from affiliate.* Any investment that is acquired from an affiliate at net asset value or through a contribution of shares.

(e) *Investments ineligible for general consent.* The following investments may not be made under authority of paragraphs (b) and (c) of this section:

(1) Investment in a general partnership or unlimited liability company; and

(2) Investment in a foreign bank if:

(i) After the investment, the foreign bank would be an affiliate of a member bank; and

(ii) The foreign bank is located in a country in which the member bank and its affiliates have no existing banking presence.

(f) *Notices relating to general-consent investments.* Notice of investments made pursuant to general-consent

authority under this section shall be provided to the Board by the end of the month following the month in which any such investment is made. The investor shall provide the Board with the following information relating to the investment:

(1) If the investment is in a joint venture, the respective responsibilities of the parties to the joint venture; and

(2) Where the investment is made in an organization that incurred a loss in the last year, a description of the reasons for the loss and the steps taken to address the problem.

(g) *Prior notice.* An investment that does not qualify for general consent under paragraph (b), (c), or (d) of this section may be made after the investor has given the Board 30 days' prior written notice, such notice period to commence at the time the notice is received, provided that:

(1) The Board may waive the 30-day period if it finds the full period is not required for consideration of the proposed investment, or that immediate action is required by the circumstances presented; and

(2) The Board may suspend the 30-day period or act on the investment under the Board's specific-consent procedures.

(h) *Specific consent.* Any investment that does not qualify for either the general-consent or the prior-notice procedure may not be consummated without the specific consent of the Board.

§ 211.9 Permissible activities abroad.

(a) *Activities usual in connection with banking.* The Board has determined that the following activities are usual in connection with the transaction of banking or other financial operations abroad:

(1) Commercial and other banking activities;

(2) Financing, including commercial financing, consumer financing, mortgage banking, and factoring;

(3) Leasing real or personal property, or acting as agent, broker, or advisor in leasing real or personal property, if the lease serves as the functional equivalent of an extension of credit to the lessee of the property;

(4) Acting as fiduciary;

(5) Underwriting credit life insurance and credit accident and health insurance;

(6) Performing services for other direct or indirect operations of a U.S. banking organization, including representative functions, sale of long-term debt, name-saving, holding assets acquired to prevent loss on a debt previously contracted in good faith, and

other activities that are permissible domestically for a bank holding company under sections 4(a)(2)(A) and 4(c)(1)(C) of the BHC Act (12 U.S.C. 1843(a)(2)(A), (c)(1)(C));

(7) Holding the premises of a branch of an Edge corporation or member bank or the premises of a direct or indirect subsidiary, or holding or leasing the residence of an officer or employee of a branch or subsidiary;

(8) Providing investment, financial, or economic advisory services;

(9) General insurance agency and brokerage;

(10) Data processing;

(11) Organizing, sponsoring, and managing a mutual fund, if the fund's shares are not sold or distributed in the United States or to U.S. residents and the fund does not exercise managerial control over the firms in which it invests;

(12) Performing management consulting services, if such services, when rendered with respect to the U.S. market, shall be restricted to the initial entry;

(13) Underwriting, distributing, and dealing in debt securities outside the United States;

(14) Underwriting and distributing equity securities outside the United States as follows:

(i) An investor that is well capitalized and well managed may underwrite equity securities, provided that commitments by an investor and its affiliates for the shares of a single organization do not, in the aggregate, exceed:

(A) 15 percent of the bank holding company's tier 1 capital, where the investor is a subsidiary of a bank holding company (but not a subsidiary of an insured bank); or

(B) The lesser of 3 percent of any parent insured bank's tier 1 capital or 15 percent of the investor's tier 1 capital, for any other investor; and

(ii) An investor that is not well capitalized and well managed may underwrite equity securities, provided that commitments by the investor and its affiliates for the shares of an organization do not, in the aggregate, exceed \$60 million; and

(iii) For purposes of determining compliance with the limitations of this paragraph (a)(14), the investor may subtract portions of an underwriting that are covered by binding commitments obtained by the investor or its affiliates from sub-underwriters or other purchasers;

(15) Dealing in equity securities outside the United States as follows:

(i) *Well capitalized and well managed investor.* An investor that is well

capitalized and well managed may deal in the shares of an organization, subject to the following:

(A) *Limit on shares of a single issuer.*

Shares of an organization held in all trading or dealing accounts by the investor and its affiliates, when combined with all other equity interests in the organization held under any authority and shares held pursuant to § 211.7(c)(3), do not, in the aggregate, exceed:

(1) 10 percent of the bank holding company's tier 1 capital, where the investor is a subsidiary of a bank holding company (but not a subsidiary of an insured bank); or

(2) The lesser of 2 percent of any parent insured bank's tier 1 capital or 10 percent of the tier 1 capital of the investor, for any other investor; and

(B) *Aggregate dealing limit.* Shares of all organizations held in all dealing or trading accounts under this subpart by an investor and its affiliates, when combined with all other equity interests in such organizations held under any other authority and shares held pursuant to § 211.7(c)(3), may not exceed:

(1) 50 percent of the bank holding company's tier 1 capital, where the investor is a subsidiary of a bank holding company (but not a subsidiary of an insured bank); or

(2) The lesser of 10 percent of any parent insured bank's tier 1 capital or 50 percent of the tier 1 capital of the investor, for any other investor.

(ii) *Other investors.* An investor that is not well capitalized and well managed may deal in the shares of an organization, subject to the following:

(A) *Limit on shares of a single issuer.*

Shares of an organization held in all trading or dealing accounts by the investor and its affiliates, when combined with all other equity interests in the organization held under any authority and shares held pursuant to § 211.7(c)(3), do not, in the aggregate, exceed \$30 million for any investor; and

(B) *Aggregate dealing limit.* Shares of all organizations held in all dealing or trading accounts under this subpart by an investor and its affiliates, when combined with all other equity interests in such organizations held under any other authority and shares held pursuant to § 211.7(c)(3), may not exceed:

(1) 25 percent of the bank holding company's tier 1 capital, where the investor is a subsidiary of a bank holding company (but not a subsidiary of an insured bank); or

(2) The lesser of 5 percent of any parent insured bank's tier 1 capital or 25

percent of the tier 1 capital of the investor, for any other investor.

(iii) *Determining compliance with limits.* (A) *Netting.* (1) For purposes of determining compliance with the limitations of this paragraph (a)(15), the investor may use an internal hedging model that nets long and short positions in the same security, and offsets positions in a security by futures, forwards, options, and similar instruments referenced to the same security; and

(2) For purposes of determining compliance with the aggregate dealing limits of paragraphs (a)(15)(i)(B) and (a)(15)(ii)(B) of this section, the investor may use an internal hedging model that offsets its long positions in equity securities by futures, forwards, options, and similar instruments, on a portfolio basis;

(B) *Underwriting commitments.* Any shares acquired pursuant to an underwriting commitment for up to 90 days after the payment date for such underwriting shall not be subject to the percentage limitations of paragraphs (a)(15)(i) and (ii) of this section or the investment provisions of §§ 211.7 and 211.8.

(iv) *Authority to deal in shares of U.S. organization.* The authority to deal in shares under paragraphs (a)(15)(i) and (ii) of this section includes the authority to deal in the shares of a U.S. organization:

(A) With respect to foreign persons only; and

(B) Subject to the limitations on owning or controlling shares of a company in section 4 of the BHC Act (12 U.S.C. 1843) and Regulation Y (12 CFR part 225).

(v) *Report to senior management.* Any shares held in trading or dealing accounts for longer than 90 days shall be reported to the senior management of the investor;

(16) Operating a travel agency, but only in connection with financial services offered abroad by the investor or others;

(17) Underwriting life, annuity, pension fund-related, and other types of insurance, where the associated risks have been previously determined by the Board to be actuarially predictable, provided that:

(i) Investments in, and loans and extensions of credit (other than loans and extensions of credit fully secured in accordance with the requirements of section 23A of the FRA (12 U.S.C. 371c), or with such other standards as the Board may require) to, the company by the investor or its affiliates are deducted from the capital of the investor;

(ii) 50 percent of such capital deduction shall be from tier 1 capital; and

(iii) Activities conducted directly or indirectly by a subsidiary of a U.S. insured bank are excluded from the authority of this paragraph (a)(17), unless authorized by the Board;

(18) Providing futures commission merchant services (including clearing without executing and executing without clearing) for nonaffiliated persons with respect to futures and options on futures contracts for financial and nonfinancial commodities, provided that prior notice under § 211.8(g) shall be provided to the Board before any subsidiaries of a member bank operating pursuant to this subpart may join a mutual exchange or clearinghouse, unless the potential liability of the investor to the exchange, clearinghouse, or other members of the exchange, as the case may be, is legally limited by the rules of the exchange or clearinghouse to an amount that does not exceed applicable general-consent limits under § 211.8;

(19) Acting as principal or agent in commodity-swap transactions in relation to:

(i) Swaps on a cash-settled basis for any commodity, provided that the investor's portfolio of swaps contracts is hedged in a manner consistent with safe and sound banking practices; and

(ii) Contracts that require physical delivery of a commodity, provided that such contracts are entered into solely for the purpose of hedging the investor's position in the underlying commodity or derivative contracts based on the commodity.

(b) *Regulation Y activities.* An investor may engage in activities that the Board has determined in § 225.25(b) of Regulation Y (12 CFR 225.25(b)) are closely related to banking under section 4(c)(8) of the BHC Act (12 U.S.C. 1843(c)(8)).

(c) *Specific approval.* With the Board's specific approval, an investor may engage in other activities that the Board determines are usual in connection with the transaction of the business of banking or other financial operations abroad and are consistent with the FRA or the BHC Act.

§ 211.10 Lending limits and capital requirements.

(a) *Acceptances of Edge corporations.*—(1) *Limitations.* An Edge corporation shall be and remain fully secured for acceptances of the types described in section 13(7) of the FRA (12 U.S.C. 372), as follows:

(i) All acceptances outstanding in excess of 200 percent of its tier 1 capital; and

(ii) All acceptances outstanding for any one person in excess of 10 percent of its tier 1 capital.

(2) *Exceptions.* These limitations do not apply if the excess represents the international shipment of goods, and the Edge corporation is:

(i) Fully covered by primary obligations to reimburse it that are guaranteed by banks or bankers; or

(ii) Covered by participation agreements from other banks, as described in 12 CFR 250.165.

(b) *Loans and extensions of credit to one person.* (1) *Loans and extensions of credit defined.* Loans and extensions of credit has the meaning set forth in § 211.2(p)⁸ and, for purposes of this paragraph (b), also include:

(i) Acceptances outstanding that are not of the types described in section 13(7) of the FRA (12 U.S.C. 372);

(ii) Any liability of the lender to advance funds to or on behalf of a person pursuant to a guarantee, standby letter of credit, or similar agreements;

(iii) Investments in the securities of another organization, except where the organization is a subsidiary; and

(iv) Any underwriting commitments to an issuer of securities, where no binding commitments have been secured from subunderwriters or other purchasers.

(2) *Limitations.* Except as the Board may otherwise specify:

(i) The total loans and extensions of credit outstanding to any person by an Edge corporation engaged in banking, and its direct or indirect subsidiaries, may not exceed 15 percent of the Edge corporation's tier 1 capital;⁹ and

(ii) The total loans and extensions of credit to any person by a foreign bank or Edge corporation subsidiary of a member bank, and by majority-owned subsidiaries of a foreign bank or Edge corporation, when combined with the total loans and extensions of credit to the same person by the member bank and its majority-owned subsidiaries, may not exceed the member bank's

⁸ In the case of a foreign government, these include loans and extensions of credit to the foreign government's departments or agencies deriving their current funds principally from general tax revenues. In the case of a partnership or firm, these include loans and extensions of credit to its members and, in the case of a corporation, these include loans and extensions of credit to the corporation's affiliates, where the affiliate incurs the liability for the benefit of the corporation.

⁹ For purposes of this paragraph (b), subsidiary includes subsidiaries controlled by the Edge corporation, but does not include companies otherwise controlled by affiliates of the Edge corporation.

limitation on loans and extensions of credit to one person.

(3) *Exceptions.* The limitations of paragraph (b)(2) of this section do not apply to:

- (i) Deposits with banks and federal funds sold;
- (ii) Bills or drafts drawn in good faith against actual goods and on which two or more unrelated parties are liable;
- (iii) Any banker's acceptance, of the kind described in section 13(7) of the FRA (12 U.S.C. 372), that is issued and outstanding;
- (iv) Obligations to the extent secured by cash collateral or by bonds, notes, certificates of indebtedness, or Treasury bills of the United States;
- (v) Loans and extensions of credit that are covered by bona fide participation agreements; and
- (vi) Obligations to the extent supported by the full faith and credit of the following:

(A) The United States or any of its departments, agencies, establishments, or wholly owned corporations (including obligations, to the extent insured against foreign political and credit risks by the Export-Import Bank of the United States or the Foreign Credit Insurance Association), the International Bank for Reconstruction and Development, the International Finance Corporation, the International Development Association, the Inter-American Development Bank, the African Development Bank, the Asian Development Bank; or the European Bank for Reconstruction and Development;

(B) Any organization, if at least 25 percent of such an obligation or of the total credit is also supported by the full faith and credit of, or participated in by, any institution designated in paragraph (b)(3)(vi)(A) of this section in such manner that default to the lender would necessarily include default to that entity. The total loans and extensions of credit under this paragraph (b)(3)(vi)(B) to any person shall at no time exceed 100 percent of the tier 1 capital of the Edge corporation.

(c) *Capitalization.* (1) An Edge corporation shall at all times be capitalized in an amount that is adequate in relation to the scope and character of its activities.

(2) In the case of an Edge corporation engaged in banking, the minimum ratio of qualifying total capital to risk-weighted assets, as determined under the Capital Adequacy Guidelines, shall not be less than 10 percent, of which at least 50 percent shall consist of tier 1 capital; provided that for purposes of this paragraph (c), no limitation shall apply on the inclusion of subordinated

debt that qualifies as tier 2 capital under the Capital Adequacy Guidelines.

§ 211.11 Supervision and reporting.

(a) *Supervision*—(1) *Foreign branches and subsidiaries.* U.S. banking organizations conducting international operations under this subpart shall supervise and administer their foreign branches and subsidiaries in such a manner as to ensure that their operations conform to high standards of banking and financial prudence.

(i) Effective systems of records, controls, and reports shall be maintained to keep management informed of their activities and condition.

(ii) Such systems shall provide, in particular, information on risk assets, exposure to market risk, liquidity management, operations, internal controls, legal and operational risk, and conformance to management policies.

(iii) Reports on risk assets shall be sufficient to permit an appraisal of credit quality and assessment of exposure to loss, and, for this purpose, provide full information on the condition of material borrowers.

(iv) Reports on operations and controls shall include internal and external audits of the branch or subsidiary.

(2) *Joint ventures.* Investors shall maintain sufficient information with respect to joint ventures to keep informed of their activities and condition. Such information shall include audits and other reports on financial performance, risk exposure, management policies, operations, and controls. Complete information shall be maintained on all transactions with the joint venture by the investor and its affiliates.

(3) *Availability of reports and information to examiners.* The reports specified in paragraphs (a) (1) and (2) of this section and any other information deemed necessary to determine compliance with U.S. banking law shall be made available to examiners of the appropriate bank supervisory agencies.

(b) *Examinations.* Examiners appointed by the Board shall examine each Edge corporation once a year. An Edge corporation shall make available to examiners information sufficient to assess its condition and operations and the condition and activities of any organization whose shares it holds.

(c) *Reports*—(1) *Reports of condition.* Each Edge corporation shall make reports of condition to the Board at such times and in such form as the Board may prescribe. The Board may require that statements of condition or other

reports be published or made available for public inspection.

(2) *Foreign operations.* Edge and agreement corporations, member banks, and bank holding companies shall file such reports on their foreign operations as the Board may require.

(3) *Acquisition or disposition of shares.* Member banks, Edge and agreement corporations, and bank holding companies shall report, in a manner prescribed by the Board, any acquisition or disposition of shares.

(d) *Filing and processing procedures.* (1) Unless otherwise directed by the Board, applications, notices, and reports required by this part shall be filed with the Federal Reserve Bank of the District in which the parent bank or bank holding company is located or, if none, the Reserve Bank of the District in which the applying or reporting institution is located. Instructions and forms for applications, notices, and reports are available from the Reserve Banks.

(2) The Board shall act on an application under this subpart within 60 calendar days after the Reserve Bank has received the application, unless the Board notifies the investor that the 60-day period is being extended and states the reasons for the extension.

§ 211.12 Reports of crimes and suspected crimes.

An Edge or agreement corporation, or any branch or subsidiary thereof, shall file a suspicious-activity report in accordance with the provisions of § 208.62 of Regulation H (12 CFR 208.62).

§ 211.13 Liquidation of Edge and agreement corporations.

(a) *Voluntary dissolution*—(1) *Prior notice.* An Edge or agreement corporation desiring voluntarily to discontinue normal business and dissolve, shall provide the Board with 45 days' prior written notice of its intent to do so.

(2) *Waiver of notice period.* The Board may waive the 45-day period if it finds that immediate action is required by the circumstances presented.

(b) *Involuntary dissolution*—(1) *Grounds for determining insolvency.* The Board may appoint a receiver for an Edge corporation if the Board determines that:

- (i) The corporation's assets are less than the corporation's obligations;
- (ii) The corporation has been unable, or is likely to be unable, to pay the corporation's obligations as they fall due in the normal course of business;
- (iii) The corporation has incurred, or is likely to incur, losses that will deplete

all or substantially all of the corporation's capital, and there is no reasonable prospect for recapitalization; or

(iv) The corporation is otherwise insolvent.

(2) *Powers of receiver.* A receiver appointed by the Board for an Edge corporation shall have the same rights, privileges, powers, and authority with respect to the corporation and the corporation's assets as a receiver of a national bank may exercise with respect to a national bank and its assets, provided that the assets of the corporation subject to the laws of a foreign country shall be dealt with in accordance with the terms of such laws.

Subpart B—Foreign Banking Organizations

§ 211.20 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued by the Board of Governors of the Federal Reserve System (Board) under the authority of the Bank Holding Company Act of 1956 (BHC Act) (12 U.S.C. 1841 *et seq.*) and the International Banking Act of 1978 (IBA) (12 U.S.C. 3101 *et seq.*).

(b) *Purpose and scope.* This subpart is in furtherance of the purposes of the BHC Act and the IBA. It applies to foreign banks and foreign banking organizations with respect to:

(1) The limitations on interstate banking under section 5 of the IBA (12 U.S.C. 3103);

(2) The exemptions from the nonbanking prohibitions of the BHC Act and the IBA afforded by sections 2(h) and 4(c)(9) of the BHC Act (12 U.S.C. 1841(h), 1843(c)(9));

(3) Board approval of the establishment of an office of a foreign bank in the United States under sections 7(d) and 10(a) of the IBA (12 U.S.C. 3105(d), 3107(a));

(4) The termination by the Board of a foreign bank's representative office, state branch, state agency, or commercial lending company subsidiary under sections 7(e) and 10(b) of the IBA (12 U.S.C. 3105(e), 3107(b)), and the transmission of a recommendation to the Comptroller to terminate a federal branch or federal agency under section 7(e)(5) of the IBA (12 U.S.C. 3105(e)(5));

(5) The examination of an office or affiliate of a foreign bank in the United States as provided in sections 7(c) and 10(c) of the IBA (12 U.S.C. 3105(c), 3107(c));

(6) The disclosure of supervisory information to a foreign supervisor under section 15 of the IBA (12 U.S.C. 3109);

(7) The limitations on loans to one borrower by state branches and state agencies of a foreign bank under section 7(h)(2) of the IBA (12 U.S.C. 3105(h)(2));

(8) The limitation of a state branch and a state agency to conducting only activities that are permissible for a federal branch under section 7(h)(1) of the IBA (12 U.S.C. 3105(h)(1)); and

(9) The deposit insurance requirement for retail deposit taking by a foreign bank under section 6 of the IBA (12 U.S.C. 3104).

(c) *Additional requirements.*

Compliance by a foreign bank with the requirements of this subpart and the laws administered and enforced by the Board does not relieve the foreign bank of responsibility to comply with the laws and regulations administered by the licensing authority.

§ 211.21 Definitions.

The definitions contained in §§ 211.1 and 211.2 apply to this subpart, except as a term is otherwise defined in this section:

(a) *Affiliate* of a foreign bank or of a parent of a foreign bank means any company that controls, is controlled by, or is under common control with, the foreign bank or the parent of the foreign bank.

(b) *Agency* means any place of business of a foreign bank, located in any state, at which credit balances are maintained, checks are paid, money is lent, or, to the extent not prohibited by state or federal law, deposits are accepted from a person or entity that is not a citizen or resident of the United States. Obligations shall not be considered credit balances unless they are:

(1) Incidental to, or arise out of the exercise of, other lawful banking powers;

(2) To serve a specific purpose;

(3) Not solicited from the general public;

(4) Not used to pay routine operating expenses in the United States such as salaries, rent, or taxes;

(5) Withdrawn within a reasonable period of time after the specific purpose for which they were placed has been accomplished; and

(6) Drawn upon in a manner reasonable in relation to the size and nature of the account.

(c)(1) *Appropriate Federal Reserve Bank* means, unless the Board designates a different Federal Reserve Bank:

(i) For a foreign banking organization, the Reserve Bank assigned to the foreign banking organization in § 225.3(b)(2) of Regulation Y (12 CFR 225.3(b)(2));

(ii) For a foreign bank that is not a foreign banking organization and

proposes to establish an office, an Edge corporation, or an agreement corporation, the Reserve Bank of the Federal Reserve District in which the foreign bank proposes to establish such office or corporation; and

(iii) In all other cases, the Reserve Bank designated by the Board.

(2) The appropriate Federal Reserve Bank need not be the Federal Reserve Bank of the Federal Reserve District in which the foreign bank's home state is located.

(d) *Banking subsidiary*, with respect to a specified foreign bank, means a bank that is a subsidiary as the terms *bank* and *subsidiary* are defined in section 2 of the BHC Act (12 U.S.C. 1841).

(e) *Branch* means any place of business of a foreign bank, located in any state, at which deposits are received, and that is not an agency, as that term is defined in paragraph (b) of this section.

(f) *Change the status of an office* means to convert a representative office into a branch or agency, or an agency or limited branch into a branch, but does not include renewal of the license of an existing office.

(g) *Commercial lending company* means any organization, other than a bank or an organization operating under section 25 of the Federal Reserve Act (FRA) (12 U.S.C. 601–604a), organized under the laws of any state, that maintains credit balances permissible for an agency, and engages in the business of making commercial loans. *Commercial lending company* includes any company chartered under article XII of the banking law of the State of New York.

(h) *Comptroller* means the Office of the Comptroller of the Currency.

(i) *Control* has the same meaning as in section 2(a) of the BHC Act (12 U.S.C. 1841(a)), and the terms *controlled* and *controlling* shall be construed consistently with the term *control*.

(j) *Domestic branch* means any place of business of a foreign bank, located in any state, that may accept domestic deposits and deposits that are incidental to or for the purpose of carrying out transactions in foreign countries.

(k) A foreign bank *engages directly in the business of banking outside the United States* if the foreign bank engages directly in banking activities usual in connection with the business of banking in the countries where it is organized or operating.

(l) To *establish* means:

(1) To open and conduct business through an office;

(2) To acquire directly, through merger, consolidation, or similar transaction with another foreign bank,

the operations of an office that is open and conducting business;

(3) To acquire an office through the acquisition of a foreign bank subsidiary that will cease to operate in the same corporate form following the acquisition;

(4) To change the status of an office; or

(5) To relocate an office from one state to another.

(m) *Federal agency, federal branch, state agency, and state branch* have the same meanings as in section 1 of the IBA (12 U.S.C. 3101).

(n) *Foreign bank* means an organization that is organized under the laws of a foreign country and that engages directly in the business of banking outside the United States. The term *foreign bank* does not include a central bank of a foreign country that does not engage or seek to engage in a commercial banking business in the United States through an office.

(o) *Foreign banking organization* means a foreign bank, as defined in section 1(b)(7) of the IBA (12 U.S.C. 3101(7)), that:

(1) Operates a branch, agency, or commercial lending company subsidiary in the United States;

(2) Controls a bank in the United States;

(3) Controls an Edge corporation acquired after March 5, 1987; or

(4) Controls any company of which the foreign bank or its affiliate is a subsidiary.

(p) *Home country*, with respect to a foreign bank, means the country in which the foreign bank is chartered or incorporated.

(q) *Home country supervisor*, with respect to a foreign bank, means the governmental entity or entities in the foreign bank's home country with responsibility for the supervision and regulation of the foreign bank.

(r) *Licensing authority* means:

(1) The relevant state supervisor, with respect to an application to establish a state branch, state agency, commercial lending company, or representative office of a foreign bank; or

(2) The Comptroller, with respect to an application to establish a federal branch or federal agency.

(s) *Limited branch* means a branch of a foreign bank that enters into an agreement with the Board to limit its liabilities to those that would be permissible for an Edge corporation.

(t) *Office or office of a foreign bank* means any branch, agency, representative office, or commercial lending company subsidiary of a foreign bank in the United States.

(u) *A parent* of a foreign bank means a company of which the foreign bank is

a subsidiary. An *immediate parent* of a foreign bank is a company of which the foreign bank is a direct subsidiary. An *ultimate parent* of a foreign bank is a parent of the foreign bank that is not the subsidiary of any other company.

(v) *Regional administrative office* means a representative office that:

(1) Is established by a foreign bank that operates two or more branches, agencies, commercial lending companies, or banks in the United States;

(2) Is located in the same city as one or more of the foreign bank's branches, agencies, commercial lending companies, or banks in the United States;

(3) Manages, supervises, or coordinates the operations of the foreign bank or its affiliates, if any, in a particular geographic area that includes the United States or a region thereof, including by exercising credit approval authority in that area pursuant to written standards, credit policies, and procedures established by the foreign bank; and

(4) Does not solicit business from actual or potential customers of the foreign bank or its affiliates.

(w) *Relevant state supervisor* means the state entity that is authorized to supervise and regulate a state branch, state agency, commercial lending company, or representative office.

(x) *Representative office* means any place of business of a foreign bank, located in any state, that is not a branch, agency, or subsidiary of the foreign bank.

(y) *State* means any state of the United States or the District of Columbia.

(z) *Subsidiary* means any organization that:

(1) Has 25 percent or more of its voting shares directly or indirectly owned, controlled, or held with the power to vote by a company, including a foreign bank or foreign banking organization; and

(2) Is otherwise controlled, or capable of being controlled, by a foreign bank or foreign banking organization.

§ 211.22 Interstate banking operations of foreign banking organizations.

(a) *Determination of home state.* (1) A foreign bank that, as of December 10, 1997, had declared a home state or had a home state determined pursuant to the law and regulations in effect prior to that date shall have that state as its home state.

(2) A foreign bank that has any branches, agencies, commercial lending company subsidiaries, or subsidiary banks in one state, and has no such offices or subsidiaries in any other

states, shall have as its home state the state in which such offices or subsidiaries are located.

(b) *Change of home state*—(1) *Prior notice.* A foreign bank may change its home state once, if it files 30 days' prior notice of the proposed change with the Board.

(2) *Application to change home state.*

(i) A foreign bank, in addition to changing its home state by filing prior notice under paragraph (b)(1) of this section, may apply to the Board to change its home state, upon showing that a national bank or state-chartered bank with the same home state as the foreign bank would be permitted to change its home state to the new home state proposed by the foreign bank.

(ii) A foreign bank may apply to the Board for such permission one or more times.

(iii) In determining whether to grant the request of a foreign bank to change its home state, the Board shall consider whether the proposed change is consistent with competitive equity between foreign and domestic banks.

(3) *Effect of change in home state.* The home state of a foreign bank and any change in its home state by a foreign bank shall not affect which Federal Reserve Bank or Reserve Banks supervise the operations of the foreign bank, and shall not affect the obligation of the foreign bank to file required reports and applications with the appropriate Federal Reserve Bank.

(4) *Conforming branches to new home state.* Upon any change in home state by a foreign bank under paragraph (b)(1) or (b)(2) of this section, the domestic branches of the foreign bank established in reliance on any previous home state of the foreign bank shall be conformed to those which a foreign bank with the new home state could permissibly establish as of the date of such change.

(c) *Prohibition against interstate deposit production offices.* A covered interstate branch of a foreign bank may not be used as a deposit production office in accordance with the provisions in § 208.28 of Regulation H (12 CFR 208.28).

§ 211.23 Nonbanking activities of foreign banking organizations.

(a) [Reserved]

(b) *Qualifying foreign banking organizations.* Unless specifically made eligible for the exemptions by the Board, a foreign banking organization shall qualify for the exemptions afforded by this section only if, disregarding its United States banking, more than half of its worldwide business is banking; and more than half of its banking business

is outside the United States.¹⁰ In order to qualify, a foreign banking organization shall:

(1) Meet at least two of the following requirements:

(i) Banking assets held outside the United States exceed total worldwide nonbanking assets;

(ii) Revenues derived from the business of banking outside the United States exceed total revenues derived from its worldwide nonbanking business; or

(iii) Net income derived from the business of banking outside the United States exceeds total net income derived from its worldwide nonbanking business; and

(2) Meet at least two of the following requirements:

(i) Banking assets held outside the United States exceed banking assets held in the United States;

(ii) Revenues derived from the business of banking outside the United States exceed revenues derived from the business of banking in the United States; or

(iii) Net income derived from the business of banking outside the United States exceeds net income derived from the business of banking in the United States.

(c) *Determining assets, revenues, and net income.* (1)(i) For purposes of paragraph (b) of this section, the total assets, revenues, and net income of an organization may be determined on a consolidated or combined basis.

(ii) The foreign banking organization shall include assets, revenues, and net income of companies in which it owns 50 percent or more of the voting shares when determining total assets, revenues, and net income.

(iii) The foreign banking organization may include assets, revenues, and net income of companies in which it owns 25 percent or more of the voting shares, if all such companies within the organization are included.

(2) Assets devoted to, or revenues or net income derived from, activities listed in § 211.9(a) shall be considered banking assets, or revenues or net income derived from the banking business, when conducted within the foreign banking organization for purposes of paragraph (b)(1) of this section, and when conducted within the

foreign banking organization by a foreign bank or its subsidiaries for purposes of paragraph (b)(2) of this section.

(d) *Loss of eligibility for exemptions—*

(1) *Failure to meet qualifying test.* A foreign banking organization that qualified under paragraph (b) of this section shall cease to be eligible for the exemptions of this section if it fails to meet the requirements of paragraph (b) of this section for two consecutive years, as reflected in its annual reports (FR Y-7) filed with the Board.

(2)(i) *Continuing activities and investments.* A foreign banking organization that ceases to be eligible for the exemptions of this section may continue to engage in activities or retain investments commenced or acquired prior to the end of the first fiscal year for which its annual report reflects nonconformance with paragraph (b) of this section.

(ii) *Termination or divestiture.* Activities commenced or investments made after that date shall be terminated or divested within three months of the filing of the second annual report, or at such time as the Board may determine upon request by the foreign banking organization to extend the period, unless the Board grants consent to continue the activity or retain the investment under paragraph (e) of this section.

(3) *Request for specific determination of eligibility.* (i) A foreign banking organization that ceases to qualify under paragraph (b) of this section, or an affiliate of such foreign banking organization, that requests a specific determination of eligibility under paragraph (e) of this section may, prior to the Board's determination on eligibility, continue to engage in activities and make investments under the provisions of paragraphs (f) (1), (2), (3), and (4) of this section.

(ii) The Board may grant consent for the foreign banking organization or its affiliate to make investments under paragraph (f)(5) of this section.

(e) *Specific determination of eligibility for nonqualifying foreign banking organizations—*(1) *Application.* (i) A foreign banking organization that does not qualify under paragraph (b) of this section for the exemptions afforded by this section, or that has lost its eligibility for the exemptions under paragraph (d) of this section, may apply to the Board for a specific determination of eligibility for the exemptions.

(ii) A foreign banking organization may apply for a specific determination prior to the time it ceases to be eligible for the exemptions afforded by this section.

(2) *Factors considered by Board.* In determining whether eligibility for the exemptions would be consistent with the purposes of the BHC Act and in the public interest, the Board shall consider:

(i) The history and the financial and managerial resources of the foreign banking organization;

(ii) The amount of its business in the United States;

(iii) The amount, type, and location of its nonbanking activities, including whether such activities may be conducted by U.S. banks or bank holding companies;

(iv) Whether eligibility of the foreign banking organization would result in undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices; and

(v) The extent to which the foreign banking organization is subject to comprehensive supervision or regulation on a consolidated basis.

(3) *Conditions and limitations.* The Board may impose any conditions and limitations on a determination of eligibility, including requirements to cease activities or dispose of investments.

(4) *Eligibility not granted.* Determinations of eligibility generally would not be granted where:

(i) A majority of the business of the foreign banking organization derives from commercial or industrial activities; or

(ii) The U.S. banking business of the organization is larger than the non-U.S. banking business conducted directly by the foreign bank or banks of the organization.

(f) *Permissible activities and investments.* A foreign banking organization that qualifies under paragraph (b) of this section may:

(1) Engage in activities of any kind outside the United States;

(2) Engage directly in activities in the United States that are incidental to its activities outside the United States;

(3) Own or control voting shares of any company that is not engaged, directly or indirectly, in any activities in the United States, other than those that are incidental to the international or foreign business of such company;

(4) Own or control voting shares of any company in a fiduciary capacity under circumstances that would entitle such shareholding to an exemption under section 4(c)(4) of the BHC Act (12 U.S.C. 1843(c)(4)) if the shares were held or acquired by a bank;

(5) Own or control voting shares of a foreign company that is engaged directly or indirectly in business in the United States other than that which is

¹⁰ None of the assets, revenues, or net income, whether held or derived directly or indirectly, of a subsidiary bank, branch, agency, commercial lending company, or other company engaged in the business of banking in the United States (including any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands) shall be considered held or derived from the business of banking "outside the United States".

incidental to its international or foreign business, subject to the following limitations:

(i) More than 50 percent of the foreign company's consolidated assets shall be located, and consolidated revenues derived from, outside the United States; provided that, if the foreign company fails to meet the requirements of this paragraph (f)(5)(i) for two consecutive years (as reflected in annual reports (FR Y-7) filed with the Board by the foreign banking organization), the foreign company shall be divested or its activities terminated within one year of the filing of the second consecutive annual report that reflects nonconformance with the requirements of this paragraph (f)(5)(i), unless the Board grants consent to retain the investment under paragraph (g) of this section;

(ii) The foreign company shall not directly underwrite, sell, or distribute, nor own or control more than 10 percent of the voting shares of a company that underwrites, sells, or distributes securities in the United States, except to the extent permitted bank holding companies;

(iii) If the foreign company is a subsidiary of the foreign banking organization, the foreign company must be, or must control, an operating company, and its direct or indirect activities in the United States shall be subject to the following limitations:

(A) The foreign company's activities in the United States shall be the same kind of activities, or related to the activities, engaged in directly or indirectly by the foreign company abroad, as measured by the "establishment" categories of the Standard Industrial Classification (SIC). An activity in the United States shall be considered related to an activity outside the United States if it consists of supply, distribution, or sales in furtherance of the activity;

(B) The foreign company may engage in activities in the United States that consist of banking, securities, insurance, or other financial operations, or types of activities permitted by regulation or order under section 4(c)(8) of the BHC Act (12 U.S.C. 1843(c)(8)), only under regulations of the Board or with the prior approval of the Board, subject of the following:

(1) Activities within Division H (Finance, Insurance, and Real Estate) of the SIC shall be considered banking or financial operations for this purpose, with the exception of acting as operators of nonresidential buildings (SIC 6512), operators of apartment buildings (SIC 6513), operators of dwellings other than apartment buildings (SIC 6514), and

operators of residential mobile home sites (SIC 6515); and operating title abstract offices (SIC 6541); and

(2) The following activities shall be considered financial activities and may be engaged in only with the approval of the Board under paragraph (g) of this section: credit reporting services (SIC 7323); computer and data processing services (SIC 7371, 7372, 7373, 7374, 7375, 7376, 7377, 7378, and 7379); armored car services (SIC 7381); management consulting (SIC 8732, 8741, 8742, and 8748); certain rental and leasing activities (SIC 4741, 7352, 7353, 7359, 7513, 7514, 7515, and 7519); accounting, auditing, and bookkeeping services (SIC 8721); courier services (SIC 4215 and 4513); and arrangement of passenger transportation (SIC 4724, 4725, and 4729).

(g) *Exemptions under section 4(c)(9) of the BHC Act.* A foreign banking organization that is of the opinion that other activities or investments may, in particular circumstances, meet the conditions for an exemption under section 4(c)(9) of the BHC Act (12 U.S.C. 1843(c)(9)) may apply to the Board for such a determination by submitting to the appropriate Federal Reserve Bank a letter setting forth the basis for that opinion.

(h) *Reports.* (1) The foreign banking organization shall inform the Board through the organization's appropriate Federal Reserve Bank, within 30 days after the close of each calendar year, of all shares of companies engaged, directly or indirectly, in activities in the United States that were acquired during the calendar year under the authority of this section.

(2) The foreign banking organization also shall report any direct activities in the United States commenced during each calendar quarter by a foreign subsidiary of the foreign banking organization. This information shall (unless previously furnished) include a brief description of the nature and scope of each company's business in the United States, including the 4-digit SIC numbers of the activities in which the company engages. Such information shall also include the 4-digit SIC numbers of the immediate parent of any U.S. company acquired, together with a statement of total assets and revenues of the immediate parent.

(i) *Availability of information.* If any information required under this section is unknown and not reasonably available to the foreign banking organization (either because obtaining it would involve unreasonable effort or expense, or because it rests exclusively within the knowledge of a company that

is not controlled by the organization) the organization shall:

(1) Give such information on the subject as it possesses or can reasonably acquire, together with the sources thereof; and

(2) Include a statement showing that unreasonable effort or expense would be involved, or indicating that the company whose shares were acquired is not controlled by the organization, and stating the result of a request for information.

§ 211.24 Approval of offices of foreign banks; procedures for applications; standards for approval; representative office activities and standards for approval; preservation of existing authority.

(a) *Board approval of offices of foreign banks—(1) Prior Board approval of branches, agencies, commercial lending companies, or representative offices of foreign banks.* (i) Except as otherwise provided in paragraphs (a)(2) and (a)(3) of this section, a foreign bank shall obtain the approval of the Board before it:

(A) Establishes a branch, agency, commercial lending company subsidiary, or representative office in the United States; or

(B) Acquires ownership or control of a commercial lending company subsidiary.

(2) *Prior notice for certain offices.* (i) After providing 45 days' prior written notice to the Board, a foreign bank may establish:

(A) An additional office (other than a domestic branch) outside the home state of the foreign bank, provided that the Board has previously determined the foreign bank to be subject to comprehensive supervision or regulation on a consolidated basis by its home country supervisor (*comprehensive consolidated supervision* or *CCS*); or

(B) A representative office, if:

(1) The Board has not yet determined the foreign bank to be subject to CCS, but the foreign bank is subject to the BHC Act, either directly or through section 8(a) of the IBA (12 U.S.C. 3106(a));

(2) The Board previously has approved, by order, an application by the foreign bank to establish a representative office.

(ii) The Board may waive the 45-day notice period if it finds that immediate action is required by the circumstances presented. The notice period shall commence at the time the notice is received by the appropriate Federal Reserve Bank. The Board may suspend the period or require Board approval prior to the establishment of such office

if the notification raises significant policy or supervisory concerns.

(3) *General consent for certain representative offices.* (i) The Board grants its general consent for a foreign bank that is subject to the BHC Act, either directly or through section 8(a) of the IBA (12 U.S.C. 3106(a)), to establish:

(A) A representative office, but only if the Board has previously determined that the foreign bank proposing to establish a representative office is subject to CCS;

(B) A regional administrative office; or

(C) An office that solely engages in limited administrative functions (such as separately maintaining back-office support systems) that:

(1) Are clearly defined;

(2) Are performed in connection with the U.S. banking activities of the foreign bank; and

(3) Do not involve contact or liaison with customers or potential customers, beyond incidental contact with existing customers relating to administrative matters (such as verification or correction of account information).

(ii) A foreign bank must notify the Board in writing within 30 days of establishing an office under the general-consent provisions in this paragraph (a)(3).

(4) *Suspension of general-consent or prior-notice procedures.* The Board may, at any time, upon notice, modify or suspend the prior-notice and general-consent procedures in paragraphs (a)(2) and (3) of this section for any foreign bank with respect to the establishment by such foreign bank of any U.S. office of such foreign bank.

(5) *Temporary offices.* The Board may, in its discretion, determine that a foreign bank that is well managed as defined in § 225.2(s) of Regulation Y (12 CFR 225.2(s)) has not established an office if the foreign bank temporarily operates, for a period not to exceed 12 months, a second location in the same city of an existing branch or agency due to an expansion of the permissible activities of such existing office or an increase in personnel of such office that cannot be accommodated in the physical space of the existing office. The foreign bank must provide reasonable advance notice of its intent temporarily to utilize a second location and commit, in writing, to operate only a single location for the office at the end of the 12-month period.

(6) *After-the-fact Board approval.* Where a foreign bank proposes to establish an office in the United States through the acquisition of, or merger or consolidation with, another foreign bank with an office in the United States, the Board may, in its discretion, allow

the acquisition, merger, or consolidation to proceed before an application to establish the office has been filed or acted upon under this section if:

(i) The foreign bank or banks resulting from the acquisition, merger, or consolidation, will not directly or indirectly own or control more than 5 percent of any class of the voting securities of, or control, a U.S. bank;

(ii) The Board is given reasonable advance notice of the proposed acquisition, merger, or consolidation; and

(iii) Prior to consummation of the acquisition, merger, or consolidation, each foreign bank, as appropriate, commits in writing either:

(A) To comply with the procedures for an application under this section within a reasonable period of time; to engage in no new business, or otherwise to expand its U.S. activities until the disposition of the application; and to abide by the Board's decision on the application, including, if necessary, a decision to terminate the activities of any such U.S. office, as the Board or the Comptroller may require; or

(B) Promptly to wind-down and close the office, the establishment of which would have required an application under this section; and to engage in no new business or otherwise to expand its U.S. activities prior to the closure of such office.

(7) *Notice of change in ownership or control or conversion of existing office or establishment of representative office under general-consent authority.* A foreign bank with a U.S. office shall notify the Board in writing within 10 days of the occurrence of any of the following events:

(i) A change in the foreign bank's ownership or control, where the foreign bank is acquired or controlled by another foreign bank or company and the acquired foreign bank with a U.S. office continues to operate in the same corporate form as prior to the change in ownership or control;

(ii) The conversion of a branch to an agency or representative office; an agency to a representative office; or a branch or agency from a federal to a state license, or a state to a federal license; or

(iii) The establishment of a representative office under general-consent authority.

(8) *Transactions subject to approval under Regulation Y.* Subpart B of Regulation Y (12 CFR 225.11–225.17) governs the acquisition by a foreign banking organization of direct or indirect ownership or control of any voting securities of a bank or bank holding company in the United States if

the acquisition results in the foreign banking organization's ownership or control of more than 5 percent of any class of voting securities of a U.S. bank or bank holding company, including through acquisition of a foreign bank or foreign banking organization that owns or controls more than 5 percent of any class of the voting securities of a U.S. bank or bank holding company.

(b) *Procedures for application—(1) Filing application.* An application for the Board's approval pursuant to this section shall be filed in the manner prescribed by the Board.

(2) *Publication requirement—(i) Newspaper notice.* Except with respect to a proposed transaction where more extensive notice is required by statute or as otherwise provided in paragraphs (b)(2)(ii) and (iii) of this section, an applicant or notificant under this section shall publish a notice in a newspaper of general circulation in the community in which the applicant or notificant proposes to engage in business.

(ii) *Contents of notice.* The newspaper notice shall:

(A) State that an application or notice is being filed as of the date of the newspaper notice; and

(B) Provide the name of the applicant or notificant, the subject matter of the application or notice, the place where comments should be sent, and the date by which comments are due, pursuant to paragraph (b)(3) of this section.

(iii) *Copy of notice with application.* The applicant or notificant shall furnish with its application or notice to the Board a copy of the newspaper notice, the date of its publication, and the name and address of the newspaper in which it was published.

(iv) *Exception.* The Board may modify the publication requirement of paragraphs (b)(2)(i) and (ii) of this section in appropriate circumstances.

(v) *Federal branch or federal agency.* In the case of an application or notice to establish a federal branch or federal agency, compliance with the publication procedures of the Comptroller shall satisfy the publication requirement of this section. Comments regarding the application or notice should be sent to the Board and the Comptroller.

(3) *Written comments.* (i) Within 30 days after publication, as required in paragraph (b)(2) of this section, any person may submit to the Board written comments and data on an application or notice.

(ii) The Board may extend the 30-day comment period if the Board determines that additional relevant information is likely to be provided by interested

persons, or if other extenuating circumstances exist.

(4) *Board action on application*—(i) *Time limits.* (A) The Board shall act on an application from a foreign bank to establish a branch, agency, or commercial lending company subsidiary within 180 calendar days after the receipt of the application.

(B) The Board may extend for an additional 180 calendar days the period within which to take final action, after providing notice of and reasons for the extension to the applicant and the licensing authority.

(C) The time periods set forth in this paragraph (b)(4)(i) may be waived by the applicant.

(ii) *Additional information.* The Board may request any information in addition to that supplied in the application when the Board believes that the information is necessary for its decision, and may deny an application if it does not receive the information requested from the applicant or its home country supervisor in sufficient time to permit adequate evaluation of the information within the time periods set forth in paragraph (b)(4)(i) of this section.

(5) *Coordination with other regulators.* Upon receipt of an application by a foreign bank under this section, the Board shall promptly notify, consult with, and consider the views of the licensing authority.

(c) *Standards for approval of U.S. offices of foreign banks*—(1) *Mandatory standards*—(i) *General.* As specified in section 7(d) of the IBA (12 U.S.C. 3105(d)), the Board may not approve an application to establish a branch or an agency, or to establish or acquire ownership or control of a commercial lending company, unless it determines that:

(A) Each of the foreign bank and any parent foreign bank engages directly in the business of banking outside the United States and, except as provided in paragraph (c)(1)(iii) of this section, is subject to comprehensive supervision or regulation on a consolidated basis by its home country supervisor; and

(B) The foreign bank has furnished to the Board the information that the Board requires in order to assess the application adequately.

(ii) *Basis for determining comprehensive consolidated supervision.* In determining whether a foreign bank and any parent foreign bank is subject to CCS, the Board shall determine whether the foreign bank is supervised or regulated in such a manner that its home country supervisor receives sufficient information on the worldwide operations of the foreign bank

(including the relationships of the bank to any affiliate) to assess the foreign bank's overall financial condition and compliance with law and regulation. In making such a determination, the Board shall assess, among other factors, the extent to which the home country supervisor:

(A) Ensures that the foreign bank has adequate procedures for monitoring and controlling its activities worldwide;

(B) Obtains information on the condition of the foreign bank and its subsidiaries and offices outside the home country through regular reports of examination, audit reports, or otherwise;

(C) Obtains information on the dealings and relationship between the foreign bank and its affiliates, both foreign and domestic;

(D) Receives from the foreign bank financial reports that are consolidated on a worldwide basis, or comparable information that permits analysis of the foreign bank's financial condition on a worldwide, consolidated basis;

(E) Evaluates prudential standards, such as capital adequacy and risk asset exposure, on a worldwide basis.

(iii) *Determination of comprehensive consolidated supervision not required in certain circumstances.* (A) If the Board is unable to find, under paragraph (c)(1)(i) of this section, that a foreign bank is subject to comprehensive consolidated supervision, the Board may, nevertheless, approve an application by the foreign bank if:

(1) The home country supervisor is actively working to establish arrangements for the consolidated supervision of such bank; and

(2) All other factors are consistent with approval.

(B) In deciding whether to use its discretion under this paragraph (c)(1)(iii), the Board also shall consider whether the foreign bank has adopted and implemented procedures to combat money laundering. The Board also may take into account whether the home country supervisor is developing a legal regime to address money laundering or is participating in multilateral efforts to combat money laundering. In approving an application under this paragraph (c)(1)(iii), the Board, after requesting and taking into consideration the views of the licensing authority, may impose any conditions or restrictions relating to the activities or business operations of the proposed branch, agency, or commercial lending company subsidiary, including restrictions on sources of funding. The Board shall coordinate with the licensing authority in the implementation of such conditions or restrictions.

(2) *Additional mandatory standards for certain interstate applications.* As specified in section 5(a)(3) of the IBA (12 U.S.C. 3103(a)(3)), the Board may not approve an application by a foreign bank to establish a branch, other than a limited branch, outside the home state of the foreign bank under section 5(a)(1) or (2) of the IBA (12 U.S.C. 3103(a)(1), (2)) unless the Board:

(i) Determines that the foreign bank's financial resources, including the capital level of the bank, are equivalent to those required for a domestic bank to be approved for branching under section 5155 of the Revised Statutes (12 U.S.C. 36) and section 44 of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1831u);

(ii) Consults with the Department of the Treasury regarding capital equivalency;

(iii) Applies the standards specified in section 7(d) of the IBA (12 U.S.C. 3105(d)) and this paragraph (c);

(iv) Applies the same requirements and conditions to which an application by a domestic bank for an interstate merger is subject under section 44(b)(1), (3), and (4) of the FDIA (12 U.S.C. 1831u(b)(1), (3), (4)); and

(v) In the case of an application to establish a branch through a change in status of an agency or limited branch, the establishment and operation of the branch would be permitted:

(A) In the case of a federal branch, under section 5155 of the Revised Statutes (12 U.S.C. 36(g)) (relating to de novo branching), if the foreign bank were a national bank whose home state (as defined in section 5155 of the Revised Statutes (12 U.S.C. 36(g))) is the same state as the home state of the foreign bank; or

(B) In the case of a state branch, under section 18(d)(4) of the FDIA (12 U.S.C. 1828(d)(4)) (relating to de novo branching), if the foreign bank were a state-chartered bank whose home state (as defined in section 18(d)(4) of the FDIA (12 U.S.C. 1828(d)(4))) is the same state as the home state of the foreign bank.

(3) *Discretionary standards.* In acting on any application under this subpart, the Board may take into account:

(i) *Consent of home country supervisor.* Whether the home country supervisor of the foreign bank has consented to the proposed establishment of the branch, agency, or commercial lending company subsidiary;

(ii) *Financial resources.* The financial resources of the foreign bank (including the foreign bank's capital position, projected capital position, profitability, level of indebtedness, and future

prospects) and the condition of any U.S. office of the foreign bank;

(iii) *Managerial resources.* The managerial resources of the foreign bank, including the competence, experience, and integrity of the officers and directors; the integrity of its principal shareholders; management's experience and capacity to engage in international banking; and the record of the foreign bank and its management of complying with laws and regulations, and of fulfilling any commitments to, and any conditions imposed by, the Board in connection with any prior application;

(iv) *Sharing information with supervisors.* Whether the foreign bank's home country supervisor and the home country supervisor of any parent of the foreign bank share material information regarding the operations of the foreign bank with other supervisory authorities;

(v) *Assurances to Board.* (A) Whether the foreign bank has provided the Board with adequate assurances that information will be made available to the Board on the operations or activities of the foreign bank and any of its affiliates that the Board deems necessary to determine and enforce compliance with the IBA, the BHC Act, and other applicable federal banking statutes.

(B) These assurances shall include a statement from the foreign bank describing the laws that would restrict the foreign bank or any of its parents from providing information to the Board;

(vi) *Measures for prevention of money laundering.* Whether the foreign bank has adopted and implemented procedures to combat money laundering, whether there is a legal regime in place in the home country to address money laundering, and whether the home country is participating in multilateral efforts to combat money laundering; and

(vii) *Compliance with U.S. law.* Whether the foreign bank and its U.S. affiliates are in compliance with applicable U.S. law, and whether the applicant has established adequate controls and procedures in each of its offices to ensure continuing compliance with U.S. law, including controls directed to detection of money laundering and other unsafe or unsound banking practices.

(4) *Additional discretionary factors.* The Board may consider the needs of the community and the history of operation of the foreign bank and its relative size in its home country, provided that the size of the foreign bank is not the sole factor in determining whether an office of a foreign bank should be approved.

(5) *Board conditions on approval.* The Board may impose any conditions on its approval as it deems necessary, including a condition which may permit future termination by the Board of any activities or, in the case of a federal branch or a federal agency, by the Comptroller, based on the inability of the foreign bank to provide information on its activities or those of its affiliates that the Board deems necessary to determine and enforce compliance with U.S. banking laws.

(d) *Representative offices—(1) Permissible activities.* A representative office may engage in:

(i) *Representational and administrative functions.* Representational and administrative functions in connection with the banking activities of the foreign bank, which may include soliciting new business for the foreign bank; conducting research; acting as liaison between the foreign bank's head office and customers in the United States; performing any of the activities described in 12 CFR 250.141; or performing back-office functions; but shall not include contracting for any deposit or deposit-like liability, lending money, or engaging in any other banking activity for the foreign bank; and

(ii) *Other functions.* Other functions for or on behalf of the foreign bank or its affiliates, such as operating as a regional administrative office of the foreign bank, but only to the extent that these other functions are not banking activities and are not prohibited by applicable federal or state law, or by ruling or order of the Board.

(2) *Standards for approval of representative offices.* As specified in section 10(a)(2) of the IBA (12 U.S.C. 3107(a)(2)), in acting on the application of a foreign bank to establish a representative office, the Board shall take into account, to the extent it deems appropriate, the standards for approval set out in paragraph (c) of this section. The standard regarding supervision by the foreign bank's home country supervisor (as set out in paragraph (c)(1)(i)(A) of this section) will be met, in the case of a representative office application, if the Board makes a finding that the applicant bank is subject to a supervisory framework that is consistent with the activities of the proposed representative office, taking into account the nature of such activities and the operating record of the applicant.

(3) *Special-purpose foreign government-owned banks.* A foreign government owned organization engaged in banking activities in its

home country that are not commercial in nature may apply to the Board for a determination that the organization is not a foreign bank for purposes of this section. A written request setting forth the basis for such a determination may be submitted to the Reserve Bank of the District in which the foreign organization's representative office is located in the United States, or to the Board, in the case of a proposed establishment of a representative office. The Board shall review and act upon each request on a case-by-case basis.

(4) *Additional requirements.* The Board may impose any additional requirements that it determines to be necessary to carry out the purposes of the IBA.

(e) *Preservation of existing authority.* Nothing in this subpart shall be construed to relieve any foreign bank or foreign banking organization from any otherwise applicable requirement of federal or state law, including any applicable licensing requirement.

(f) *Reports of crimes and suspected crimes.* Except for a federal branch or a federal agency or a state branch that is insured by the Federal Deposit Insurance Corporation (FDIC), a branch, agency, or representative office of a foreign bank operating in the United States shall file a suspicious activity report in accordance with the provisions of § 208.20 of Regulation H (12 CFR 208.20).

§ 211.25 Termination of offices of foreign banks.

(a) *Grounds for termination—(1) General.* Under sections 7(e) and 10(b) of the IBA (12 U.S.C. 3105(d), 3107(b)), the Board may order a foreign bank to terminate the activities of its representative office, state branch, state agency, or commercial lending company subsidiary if the Board finds that:

(i) The foreign bank is not subject to comprehensive consolidated supervision in accordance with § 211.24(c)(1), and the home country supervisor is not making demonstrable progress in establishing arrangements for the consolidated supervision of the foreign bank; or

(ii) Both of the following criteria are met:

(A) There is reasonable cause to believe that the foreign bank, or any of its affiliates, has committed a violation of law or engaged in an unsafe or unsound banking practice in the United States; and

(B) As a result of such violation or practice, the continued operation of the foreign bank's representative office, state branch, state agency, or commercial lending company

subsidiary would not be consistent with the public interest, or with the purposes of the IBA, the BHC Act, or the FDIA.

(2) *Additional ground.* The Board also may enforce any condition imposed in connection with an order issued under § 211.24.

(b) *Factor.* In making its findings under this section, the Board may take into account the needs of the community, the history of operation of the foreign bank, and its relative size in its home country, provided that the size of the foreign bank shall not be the sole determining factor in a decision to terminate an office.

(c) *Consultation with relevant state supervisor.* Except in the case of termination pursuant to the expedited procedure in paragraph (d)(3) of this section, the Board shall request and consider the views of the relevant state supervisor before issuing an order terminating the activities of a state branch, state agency, representative office, or commercial lending company subsidiary under this section.

(d) *Termination procedures.—(1) Notice and hearing.* Except as otherwise provided in paragraph (d)(3) of this section, an order issued under paragraph (a)(1) of this section shall be issued only after notice to the relevant state supervisor and the foreign bank and after an opportunity for a hearing.

(2) *Procedures for hearing.* Hearings under this section shall be conducted pursuant to the Board's Rules of Practice for Hearings (12 CFR part 263).

(3) *Expedited procedure.* The Board may act without providing an opportunity for a hearing, if it determines that expeditious action is necessary in order to protect the public interest. When the Board finds that it is necessary to act without providing an opportunity for a hearing, the Board, solely in its discretion, may:

(i) Provide the foreign bank that is the subject of the termination order with notice of the intended termination order;

(ii) Grant the foreign bank an opportunity to present a written submission opposing issuance of the order; or

(iii) Take any other action designed to provide the foreign bank with notice and an opportunity to present its views concerning the order.

(e) *Termination of federal branch or federal agency.* The Board may transmit to the Comptroller a recommendation that the license of a federal branch or federal agency be terminated if the Board has reasonable cause to believe that the foreign bank or any affiliate of the foreign bank has engaged in conduct for which the activities of a state branch

or state agency may be terminated pursuant to this section.

(f) *Voluntary termination.* A foreign bank shall notify the Board at least 30 days prior to terminating the activities of any office. Notice pursuant to this paragraph (f) is in addition to, and does not satisfy, any other federal or state requirements relating to the termination of an office or the requirement for prior notice of the closing of a branch, pursuant to section 39 of the FDIA (12 U.S.C. 1831p).

§ 211.26 Examination of offices and affiliates of foreign banks.

(a) *Conduct of examinations—(1) Examination of branches, agencies, commercial lending companies, and affiliates.* The Board may examine:

(i) Any branch or agency of a foreign bank;

(ii) Any commercial lending company or bank controlled by one or more foreign banks, or one or more foreign companies that control a foreign bank; and

(iii) Any other office or affiliate of a foreign bank conducting business in any state.

(2) *Examination of representative offices.* The Board may examine any representative office in the manner and with the frequency it deems appropriate.

(b) *Coordination of examinations.* To the extent possible, the Board shall coordinate its examinations of the U.S. offices and U.S. affiliates of a foreign bank with the licensing authority and, in the case of an insured branch, the FDIC, including through simultaneous examinations of the U.S. offices and U.S. affiliates of a foreign bank.

(c) *Annual on-site examinations.* Unless otherwise specified, each branch, agency, or commercial lending company subsidiary of a foreign bank shall be examined on-site at least once during each 12-month period (beginning on the date the most recent examination of the office ended) by:

(1) The Board;

(2) The FDIC, if the branch of the foreign bank accepts or maintains insured deposits;

(3) The Comptroller, in the case of a federal branch or federal agency; or

(4) The relevant state supervisor, in the case of a state branch or state agency.

§ 211.27 Disclosure of supervisory information to foreign supervisors.

(a) *Disclosure by Board.* The Board may disclose information obtained in the course of exercising its supervisory or examination authority to a foreign bank regulatory or supervisory

authority, if the Board determines that disclosure is appropriate for bank supervisory or regulatory purposes and will not prejudice the interests of the United States.

(b) *Confidentiality.* Before making any disclosure of information pursuant to paragraph (a) of this section, the Board shall obtain, to the extent necessary, the agreement of the foreign bank regulatory or supervisory authority to maintain the confidentiality of such information to the extent possible under applicable law.

§ 211.28 Provisions applicable to branches and agencies: limitation on loans to one borrower.

(a) *Limitation on loans to one borrower.* Except as provided in paragraph (b) of this section, the total loans and extensions of credit by all the state branches and state agencies of a foreign bank outstanding to a single borrower at one time shall be aggregated with the total loans and extensions of credit by all federal branches and federal agencies of the same foreign bank outstanding to such borrower at the time; and shall be subject to the limitations and other provisions of section 5200 of the Revised Statutes (12 U.S.C. 84), and the regulations promulgated thereunder, in the same manner that extensions of credit by a federal branch or federal agency are subject to section 4(b) of the IBA (12 U.S.C. 3102(b)) as if such state branches and state agencies were federal branches and federal agencies.

(b) *Preexisting loans and extensions of credit.* Any loans or extensions of credit to a single borrower that were originated prior to December 19, 1991, by a state branch or state agency of the same foreign bank and that, when aggregated with loans and extensions of credit by all other branches and agencies of the foreign bank, exceed the limits set forth in paragraph (a) of this section, may be brought into compliance with such limitations through routine repayment, provided that any new loans or extensions of credit (including renewals of existing unfunded credit lines, or extensions of the maturities of existing loans) to the same borrower shall comply with the limits set forth in paragraph (a) of this section.

§ 211.29 Applications by state branches and state agencies to conduct activities not permissible for federal branches.

(a) *Scope.* A state branch or state agency shall file with the Board a prior written application for permission to engage in or continue to engage in any type of activity that:

(1) Is not permissible for a federal branch, pursuant to statute, regulation,

official bulletin or circular, or order or interpretation issued in writing by the Comptroller; or

(2) Is rendered impermissible due to a subsequent change in statute, regulation, official bulletin or circular, written order or interpretation, or decision of a court of competent jurisdiction.

(b) *Exceptions.* No application shall be required by a state branch or state agency to conduct any activity that is otherwise permissible under applicable state and federal law or regulation and that:

(1) Has been determined by the FDIC, pursuant to 12 CFR 362.4(c)(3)(i)-(c)(3)(ii)(A), not to present a significant risk to the affected deposit insurance fund;

(2) Is permissible for a federal branch, but the Comptroller imposes a quantitative limitation on the conduct of such activity by the federal branch;

(3) Is conducted as agent rather than as principal, provided that the activity is one that could be conducted by a state-chartered bank headquartered in the same state in which the branch or agency is licensed; or

(4) Any other activity that the Board has determined may be conducted by any state branch or state agency of a foreign bank without further application to the Board.

(c) *Contents of application.* An application submitted pursuant to paragraph (a) of this section shall be in letter form and shall contain the following information:

(1) A brief description of the activity, including the manner in which it will be conducted, and an estimate of the expected dollar volume associated with the activity;

(2) An analysis of the impact of the proposed activity on the condition of the U.S. operations of the foreign bank in general, and of the branch or agency in particular, including a copy, if available, of any feasibility study, management plan, financial projections, business plan, or similar document concerning the conduct of the activity;

(3) A resolution by the applicant's board of directors or, if a resolution is not required pursuant to the applicant's organizational documents, evidence of approval by senior management, authorizing the conduct of such activity and the filing of this application;

(4) If the activity is to be conducted by a state branch insured by the FDIC, statements by the applicant:

(i) Of whether or not it is in compliance with 12 CFR 346.19 (Pledge of Assets) and 12 CFR 346.20 (Asset Maintenance);

(ii) That it has complied with all requirements of the FDIC concerning an application to conduct the activity and the status of the application, including a copy of the FDIC's disposition of such application, if available; and

(iii) Explaining why the activity will pose no significant risk to the deposit insurance fund; and

(5) Any other information that the Reserve Bank deems appropriate.

(d) *Factors considered in determination.* (1) The Board shall consider the following factors in determining whether a proposed activity is consistent with sound banking practice:

(i) The types of risks, if any, the activity poses to the U.S. operations of the foreign banking organization in general, and the branch or agency in particular;

(ii) If the activity poses any such risks, the magnitude of each risk; and

(iii) If a risk is not de minimis, the actual or proposed procedures to control and minimize the risk.

(2) Each of the factors set forth in paragraph (d)(1) of this section shall be evaluated in light of the financial condition of the foreign bank in general and the branch or agency in particular and the volume of the activity.

(e) *Application procedures.*

Applications pursuant to this section shall be filed with the appropriate Federal Reserve Bank. An application shall not be deemed complete until it contains all the information requested by the Reserve Bank and has been accepted. Approval of such an application may be conditioned on the applicant's agreement to conduct the activity subject to specific conditions or limitations.

(f) *Divestiture or cessation.* (1) If an application for permission to continue to conduct an activity is not approved by the Board or, if applicable, the FDIC, the applicant shall submit a detailed written plan of divestiture or cessation of the activity to the appropriate Federal Reserve Bank within 60 days of the disapproval.

(i) The divestiture or cessation plan shall describe in detail the manner in which the applicant will divest itself of or cease the activity, and shall include a projected timetable describing how long the divestiture or cessation is expected to take.

(ii) Divestiture or cessation shall be complete within one year from the date of the disapproval, or within such shorter period of time as the Board shall direct.

(2) If a foreign bank operating a state branch or state agency chooses not to apply to the Board for permission to

continue to conduct an activity that is not permissible for a federal branch, or which is rendered impermissible due to a subsequent change in statute, regulation, official bulletin or circular, written order or interpretation, or decision of a court of competent jurisdiction, the foreign bank shall submit a written plan of divestiture or cessation, in conformance with paragraph (f)(1) of this section within 60 days of the effective date of this part or of such change or decision.

§ 211.30 Criteria for evaluating U.S. operations of foreign banks not subject to consolidated supervision.

(a) *Development and publication of criteria.* Pursuant to the Foreign Bank Supervision Enhancement Act, Pub. L. 102-242, 105 Stat. 2286 (1991), the Board shall develop and publish criteria to be used in evaluating the operations of any foreign bank in the United States that the Board has determined is not subject to comprehensive consolidated supervision.

(b) *Criteria considered by Board.* Following a determination by the Board that, having taken into account the standards set forth in § 211.24(c)(1), a foreign bank is not subject to CCS, the Board shall consider the following criteria in determining whether the foreign bank's U.S. operations should be permitted to continue and, if so, whether any supervisory constraints should be placed upon the bank in connection with those operations:

(1) The proportion of the foreign bank's total assets and total liabilities that are located or booked in its home country, as well as the distribution and location of its assets and liabilities that are located or booked elsewhere;

(2) The extent to which the operations and assets of the foreign bank and any affiliates are subject to supervision by its home country supervisor;

(3) Whether the home country supervisor of such foreign bank is actively working to establish arrangements for comprehensive consolidated supervision of the bank, and whether demonstrable progress is being made;

(4) Whether the foreign bank has effective and reliable systems of internal controls and management information and reporting, which enable its management properly to oversee its worldwide operations;

(5) Whether the foreign bank's home country supervisor has any objection to the bank continuing to operate in the United States;

(6) Whether the foreign bank's home country supervisor and the home country supervisor of any parent of the

foreign bank share material information regarding the operations of the foreign bank with other supervisory authorities;

(7) The relationship of the U.S. operations to the other operations of the foreign bank, including whether the foreign bank maintains funds in its U.S. offices that are in excess of amounts due to its U.S. offices from the foreign bank's non-U.S. offices;

(8) The soundness of the foreign bank's overall financial condition;

(9) The managerial resources of the foreign bank, including the competence, experience, and integrity of the officers and directors, and the integrity of its principal shareholders;

(10) The scope and frequency of external audits of the foreign bank;

(11) The operating record of the foreign bank generally and its role in the banking system in its home country;

(12) The foreign bank's record of compliance with relevant laws, as well as the adequacy of its anti-money-laundering controls and procedures, in respect of its worldwide operations;

(13) The operating record of the U.S. offices of the foreign bank;

(14) The views and recommendations of the Comptroller or the relevant state supervisors in those states in which the foreign bank has operations, as appropriate;

(15) Whether the foreign bank, if requested, has provided the Board with adequate assurances that such information will be made available on the operations or activities of the foreign bank and any of its affiliates as the Board deems necessary to determine and enforce compliance with the IBA, the BHC Act, and other U.S. banking statutes; and

(16) Any other information relevant to the safety and soundness of the U.S. operations of the foreign bank.

(c) *Restrictions on U.S. operations.*—

(1) *Terms of agreement.* Any foreign bank that the Board determines is not subject to CCS may be required to enter into an agreement to conduct its U.S. operations subject to such restrictions as the Board, having considered the criteria set forth in paragraph (b) of this section, determines to be appropriate in order to ensure the safety and soundness of its U.S. operations.

(2) *Failure to enter into or comply with agreement.* A foreign bank that is required by the Board to enter into an agreement pursuant to paragraph (c)(1) of this section and either fails to do so, or fails to comply with the terms of such agreement, may be subject to:

(i) Enforcement action, in order to ensure safe and sound banking operations, under 12 U.S.C. 1818; or

(ii) Termination or a recommendation for termination of its U.S. operations, under § 211.25 (a) and (e) and section (7)(e) of the IBA (12 U.S.C. 3105(e)).

Subpart C—Export Trading Companies

§ 211.31 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued by the Board of Governors of the Federal Reserve System (Board) under the authority of the Bank Holding Company Act of 1956 (BHC Act) (12 U.S.C. 1841 *et seq.*), the Bank Export Services Act (title II, Pub. L. 97-290, 96 Stat. 1235 (1982)) (BESA), and the Export Trading Company Act Amendments of 1988 (title III, Pub. L. 100-418, 102 Stat. 1384 (1988)) (ETC Act Amendments).

(b) *Purpose and scope.* This subpart is in furtherance of the purposes of the BHC Act, the BESA, and the ETC Act Amendments, the latter two statutes being designed to increase U.S. exports by encouraging investments and participation in export trading companies by bank holding companies and the specified investors. The provisions of this subpart apply to eligible investors as defined in this subpart.

§ 211.32 Definitions.

The definitions in §§ 211.1 and 211.2 apply to this subpart, subject to the following:

(a) *Appropriate Federal Reserve Bank* has the same meaning as in § 211.21(c).

(b) *Bank* has the same meaning as in section 2(c) of the BHC Act (12 U.S.C. 1841(c)).

(c) *Company* has the same meaning as in section 2(b) of the BHC Act (12 U.S.C. 1841(b)).

(d) *Eligible investors* means:

(1) Bank holding companies, as defined in section 2(a) of the BHC Act (12 U.S.C. 1841(a));

(2) Edge and agreement corporations that are subsidiaries of bank holding companies but are not subsidiaries of banks;

(3) Banker's banks, as described in section 4(c)(14)(F)(iii) of the BHC Act (12 U.S.C. 1843(c)(14)(F)(iii)); and

(4) Foreign banking organizations, as defined in § 211.21(o).

(e) *Export trading company* means a company that is exclusively engaged in activities related to international trade and, by engaging in one or more export trade services, derives:

(1) At least one-third of its revenues in each consecutive four-year period from the export of, or from facilitating the export of, goods and services produced in the United States by persons other than the export trading company or its subsidiaries; and

(2) More revenues in each four-year period from export activities as described in paragraph (e)(1) of this section than it derives from the import, or facilitating the import, into the United States of goods or services produced outside the United States. The four-year period within which to calculate revenues derived from its activities under this section shall be deemed to have commenced with the first fiscal year after the respective export trading company has been in operation for two years.

(f) *Revenues* shall include net sales revenues from exporting, importing, or third-party trade in goods by the export trading company for its own account and gross revenues derived from all other activities of the export trading company.

(g) *Subsidiary* has the same meaning as in section 2(d) of the BHC Act (12 U.S.C. 1841(d)).

(h) *Well capitalized* has the same meaning as in § 225.2(r) of Regulation Y (12 CFR 225.2(r)).

(i) *Well managed* has the same meaning as in § 225.2(s) of Regulation Y (12 CFR 225.2(s)).

§ 211.33 Investments and extensions of credit.

(a) *Amount of investments.* In accordance with the procedures of § 211.34, an eligible investor may invest no more than 5 percent of its consolidated capital and surplus in one or more export trading companies, except that an Edge or agreement corporation not engaged in banking may invest as much as 25 percent of its consolidated capital and surplus but no more than 5 percent of the consolidated capital and surplus of its parent bank holding company.

(b) *Extensions of credit*—(1) *Amount.* An eligible investor in an export trading company or companies may extend credit directly or indirectly to the export trading company or companies in a total amount that at no time exceeds 10 percent of the investor's consolidated capital and surplus.

(2) *Terms.* (i) An eligible investor in an export trading company may not extend credit directly or indirectly to the export trading company or any of its customers or to any other investor holding 10 percent or more of the shares of the export trading company on terms more favorable than those afforded similar borrowers in similar circumstances, and such extensions of credit shall not involve more than the normal risk of repayment or present other unfavorable features.

(ii) For the purposes of this section, an investor in an export trading

company includes any affiliate of the investor.

(3) *Collateral requirements.* Covered transactions between a bank and an affiliated export trading company in which a bank holding company has invested pursuant to this subpart are subject to the collateral requirements of section 23A of the Federal Reserve Act (12 U.S.C. 371c), except where a bank issues a letter of credit or advances funds to an affiliated export trading company solely to finance the purchase of goods for which:

- (i) The export trading company has a bona fide contract for the subsequent sale of the goods; and
- (ii) The bank has a security interest in the goods or in the proceeds from their sale at least equal in value to the letter of credit or the advance.

§ 211.34 Procedures for filing and processing notices.

(a) *General policy.* Direct and indirect investments by eligible investors in export trading companies shall be made in accordance with the general consent or prior notice procedures contained in this section. The Board may at any time, upon notice, modify or suspend the general-consent procedures with respect to any eligible investor.

(b) *General consent—(1) Eligibility for general consent.* Subject to the other limitations of this subpart, the Board grants its general consent for any investment an export trading company:

- (i) If the eligible investor is well capitalized and well managed;
- (ii) In an amount equal to cash dividends received from that export trading company during the preceding 12 calendar months; or
- (iii) That is acquired from an affiliate at net asset value or through a contribution of shares.

(2) *Post-investment notice.* By the end of the month following the month in which the investment is made, the investor shall provide the Board with the following information:

- (i) The amount of the investment and the source of the funds with which the investment was made; and
- (ii) In the case of an initial investment, a description of the activities in which the export trading company proposes to engage and projections for the export trading company for the first year following the investment.

(c) *Filing notice—(1) Prior notice.* An eligible investor shall give the Board 60 days' prior written notice of any investment in an export trading company that does not qualify under the general consent procedure.

(2) *Notice of change of activities.* (i) An eligible investor shall give the Board

60 days' prior written notice of changes in the activities of an export trading company that is a subsidiary of the investor if the export trading company expands its activities beyond those described in the initial notice to include:

- (A) Taking title to goods where the export trading company does not have a firm order for the sale of those goods;
- (B) Product research and design;
- (C) Product modification; or
- (D) Activities not specifically covered by the list of activities contained in section 4(c)(14)(F)(ii) of the BHC Act (12 U.S.C. 1843(c)(14)(F)(ii)).

(ii) Such an expansion of activities shall be regarded as a proposed investment under this subpart.

(d) *Time period for Board action.* (1) A proposed investment that has not been disapproved by the Board may be made 60 days after the appropriate Federal Reserve Bank accepts the notice for processing. A proposed investment may be made before the expiration of the 60-day period if the Board notifies the investor in writing of its intention not to disapprove the investment.

(2) The Board may extend the 60-day period for an additional 30 days if the Board determines that the investor has not furnished all necessary information or that any material information furnished is substantially inaccurate. The Board may disapprove an investment if the necessary information is provided within a time insufficient to allow the Board reasonably to consider the information received.

(3) Within three days of a decision to disapprove an investment, the Board shall notify the investor in writing and state the reasons for the disapproval.

(e) *Time period for investment.* An investment in an export trading company that has not been disapproved shall be made within one year from the date of the notice not to disapprove, unless the time period is extended by the Board or by the appropriate Federal Reserve Bank.

PART 265—RULES REGARDING DELEGATION OF AUTHORITY

1. The authority citation for part 265 would continue to read as follows:

Authority: 12 U.S.C. 248 (i) and (k).

2. Paragraph (f) of § 265.6 would be revised to read as follows:

§ 265.6 Functions delegated to General Counsel.

(f) *International banking—(1) After-the-fact applications.* With the concurrence of the Board's Director of the Division of Banking Supervision and

Regulation, to grant a request by a foreign bank to establish a branch, agency, commercial lending company, or representative office through certain acquisitions, mergers, consolidations, or similar transactions, in conjunction with which:

(i) The foreign bank would be required to file an after-the-fact application for the Board's approval under § 211.24(a)(6) of Regulation K (12 CFR 211.24(a)(6)); or

(ii) The General Counsel may waive the requirement for an after-the-fact application if:

(A) The surviving foreign bank commits to wind down the U.S. operations of the acquired foreign bank; and

(B) The merger or consolidation raises no significant policy or supervisory issues.

(2) To modify the requirement that a foreign bank that has submitted an application or notice to establish a branch, agency, commercial lending company, or representative office pursuant to § 211.24(a)(6) of Regulation K (12 CFR 211.24(a)(6)) shall publish notice of the application or notice in a newspaper of general circulation in the community in which the applicant or notificand proposes to engage in business, as provided in § 211.24(b)(2) of Regulation K (12 CFR 211.24(b)(2)).

(3) With the concurrence of the Board's Director of the Division of Banking Supervision and Regulation, to grant a request for an exemption under section 4(c)(9) of the Bank Holding Company Act (12 U.S.C. 1843(c)(9)), provided that the request raises no significant policy or supervisory issues that the Board has not already considered.

* * * * *
3. Section 265.7 would be amended as follows:

- a. Paragraph (d)(4) would be revised; and
- b. New paragraphs (d)(9), (d)(10), and (d)(11) would be added.

The revision and additions would read as follows:

§ 265.7 Functions delegated to Director of Division of Banking Supervision and Regulation.

* * * * *

(d) * * * * *
(4) *Authority under general-consent and prior-notice procedures.* (i) With regard to a prior notice to establish a branch in a foreign country under § 211.3 of Regulation K (12 CFR 211.3):

- (A) To waive the notice period;
- (B) To suspend the notice period;
- (C) To determine not to object to the notice; or

(D) To require the notificant to file an application for the Board's specific consent.

(ii) With regard to a prior notice to make an investment under § 211.8(g) of Regulation K (12 CFR 211.8(g)):

- (A) To waive the notice period;
- (B) To suspend the notice period; or
- (C) To require the notificant to file an application for the Board's specific consent.

(iii) With regard to a prior notice of a foreign bank to establish certain U.S. offices under § 211.24(a)(2)(i) of Regulation K (12 CFR 211.24(a)(2)(i)):

- (A) To waive the notice period;
- (B) To suspend the notice period; or
- (C) To require the notificant to file an application for the Board's specific consent.

(iv) To suspend the ability:

(A) Of a foreign banking organization to establish an office under the prior-notice procedures in § 211.24(a)(2)(i) of Regulation K (12 CFR 211.24(a)(2)(i)) or the general-consent procedures in § 211.24(a)(3) of Regulation K (12 CFR 211.24(a)(3));

(B) Of a U.S. banking organization to establish a foreign branch under the prior-notice or general-consent procedures in § 211.3(b) of Regulation K (12 CFR 211.3(b));

(C) Of an investor to make investments under the general-consent or prior-notice procedures in § 211.8 of Regulation K (12 CFR 211.8); and

(D) Of an eligible investor to make an investment in an export trading company under the general-consent procedures in § 211.34(b) of Regulation K (12 CFR 211.34(b)).

* * * * *

(9) *Allowing use of general-consent procedures.* To allow an investor that is not well capitalized and well managed to make investments under the general-consent procedures in § 211.8 or 211.34(b) of Regulation K (12 CFR 211.8 or 211.34(b)), provided that:

- (i) The investor has implemented measures to become well capitalized and well managed;
- (ii) Granting such authority raises no significant policy or supervisory concerns; and
- (iii) Authority granted by the Director under this paragraph (d)(9) expires after one year, but may be renewed.

(10) *Exceeding general-consent investment limits.* To allow an investor to exceed the general-consent investment limits under § 211.8 of Regulation K (12 CFR 211.8), provided that:

- (i) The investor demonstrates adequate financial and managerial strength;
- (ii) The investor's investment strategy is not unsafe or unsound;
- (iii) Granting such authority raises no significant policy or supervisory concerns; and
- (iv) Authority granted by the Director under this paragraph (d)(10) expires after one year, but may be renewed.

(11) *Approval of temporary U.S. offices.* To allow a foreign bank to operate a temporary office in the United States, pursuant to § 211.24 of Regulation K (12 CFR 211.24), provided that:

- (i) There is no direct public access to such office, with respect to any branch or agency function; and

(ii) The proposal raises no significant policy or supervisory issues.

* * * * *

4. Section 265.11 would be amended as follows:

- a. Paragraph (d)(8) would be revised; and
- b. Paragraph (d)(11) would be removed.

The revision would read as follows:

§ 265.11 Functions delegated to Federal Reserve Banks.

* * * * *

(d) * * *

(8) *Authority under prior-notice procedures.* (i) With regard to a prior notice to make an investment under § 211.8(g) of Regulation K (12 CFR 211.8(g)):

- (A) To suspend the notice period; or
- (B) To require the notificant to file an application for the Board's specific consent.

(ii) With regard to a prior notice of a foreign bank to establish certain U.S. offices under § 211.24(a)(2)(i) of Regulation K (12 CFR 211.24(a)(2)(i)):

- (A) To suspend the notice period; or
- (B) To require that the foreign bank file an application for the Board's specific consent.

* * * * *

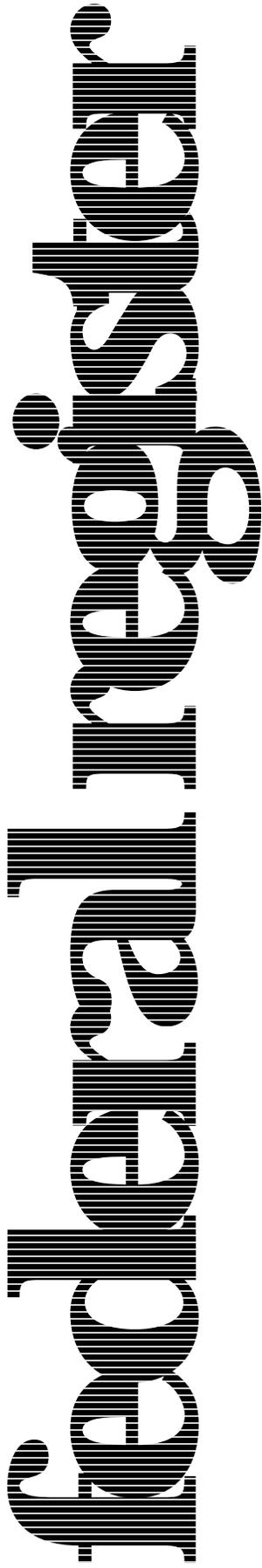
By order of the Board of Governors of the Federal Reserve System, December 17, 1997.

William W. Wiles,

Secretary of the Board.

[FR Doc. 97-33411 Filed 12-30-97; 8:45 am]

BILLING CODE 6210-01-P



Wednesday
December 31, 1997

Part V

**Department of the
Interior**

Bureau of Reclamation

**Proposed Rule Making for Offstream
Storage of Colorado River Water and
Interstate Redemption of Storage Credits
in the Lower Division States; Notice**

DEPARTMENT OF THE INTERIOR**Bureau of Reclamation****Proposed Rule Making for Offstream Storage of Colorado River Water and Interstate Redemption of Storage Credits in the Lower Division States**

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability of draft programmatic environmental assessment (DPEA).

SUMMARY: Pursuant to the National Environmental Policy Act of 1969 (as amended), the Bureau of Reclamation (Reclamation) has prepared a DPEA on proposed rule making for offstream storage of Colorado River water and interstate redemption or use of storage credits in the lower Division States. The proposed rule is intended to encourage further cooperation among the Lower Division States in resolving common water resource problems and demands. The proposed rule would establish a procedural framework under which authorized entities in the Lower Division States could store offstream certain Colorado River water, develop storage credits associated with that water, and use those credits within the Lower Division.

ADDRESSES: For copies of the DPEA, write to either (1) Mr. James Green, LC-

2506, Environmental Compliance and Realty Group, Resource Management Office (Mead Bldg), Lower Colorado Regional Office, Bureau of Reclamation, P.O. Box 61470, Boulder City, NV 89006-1470; or (2) Bureau of Reclamation, Lower Colorado Regional Liaison, 1849 C St. NW, Washington, DC 20240, telephone (202) 208-6269.

FOR FURTHER INFORMATION CONTACT: Mr. James Green at (702) 293-8519.

SUPPLEMENTARY INFORMATION: The DPEA describes the present status of river operations in the Lower Colorado River Basin and analyzes potential impacts associated with the implementation of the proposed rule. A programmatic approach has been adopted because many of the details of specific interstate agreements under the proposed rule cannot be ascertained at this time. Such agreements would be subject to approval by the Secretary of the Interior (Secretary). Appropriate environmental compliance documentation will be prepared on a case-by-case basis prior to the Secretary's approval of an interstate agreement. The public comment period for the proposed rule and the DPEA will run concurrently. Comments will be accepted through March 2, 1998. If you wish to comment, you may submit your comments by any one of several methods. You may mail or hand-deliver comments to Mr. James Green at the address noted in **ADDRESSES** above. You

may also comment via the Internet at bjohnson@lc.usbr.gov. If you comment via the Internet at this address please submit comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include "attn: AC1006-AA40" and your name and return address in your Internet message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at (702) 293-8411. Upon request, Reclamation will hold informational meetings on the DPEA in January or February 1998. Reclamation will accept requests for informational meetings until 4:00 p.m. Pacific time on January 30, 1998. If Reclamation receives a request to hold an informational meeting(s), Reclamation will notify interested parties of the time and location of the meeting(s).

The DPEA has been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA) as amended, and (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500-1508).

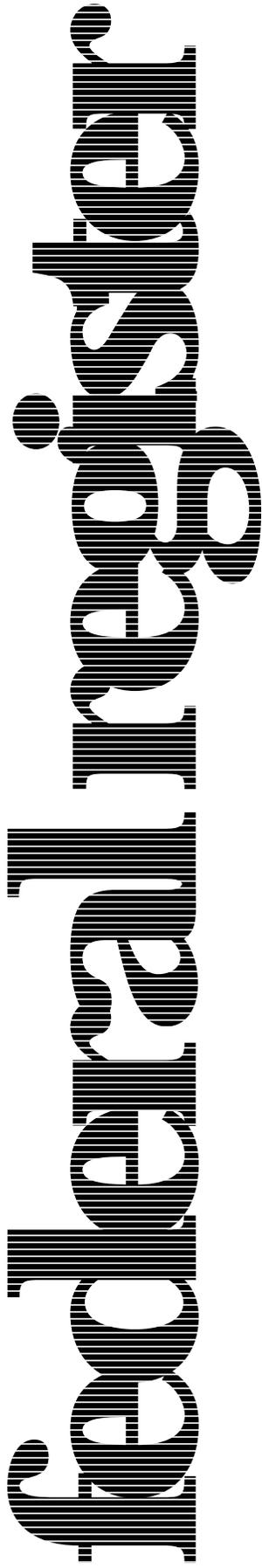
Dated: December 22, 1997.

R. Steven Richardson,

Director, Policy and External Affairs.

[FR Doc. 97-33989 Filed 12-30-97; 8:45 am]

BILLING CODE 4310-94-M



Wednesday
December 31, 1997

Part VI

Department of Labor

Mine Safety and Health Administration

**30 CFR Parts 56, 57, 62, 70, and 71
Health Standards for Occupational Noise
Exposure; Proposed Rule**

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56, 57, 62, 70, and 71

RIN 1219-AA53

Health Standards for Occupational Noise Exposure

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Supplemental proposed rule; close of comment period; notice of public hearing; close of record.

SUMMARY: This proposed rule would supplement MSHA's proposed rule for occupational noise exposure in coal mines and in metal and nonmetal mines, which was published on December 17, 1996, by adding a new provision addressing the right of miners and miners' representatives to observe required operator monitoring under the proposed noise exposure standards. MSHA is also announcing the close of the comment period, notice of public hearing, and close of the rulemaking record.

DATES: Written comments must be received on or before February 17, 1998. Written comments on the information collection requirements must be received on or before March 2, 1998.

MSHA will hold a public hearing. The hearing will be held on January 21, 1998. The hearing will begin at 9:00 a.m. All requests to make oral presentations for the record should be submitted at least 5 days prior to the hearing date. A written request is not required for an opportunity to speak. The record for the rulemaking will close on January 30, 1998 to allow for the submission of post-hearing comments.

ADDRESSES: Comments on this supplemental proposed rule must be clearly identified as such and may be transmitted by electronic mail to noise@msha.gov; by fax to MSHA, Office of Standards, Regulations, and Variances, 703-235-5551; or by mail to MSHA, Office of Standards, Regulations, and Variances, 4015

Wilson Boulevard, Room 631, Arlington, VA 22203. Interested persons are encouraged to supplement written comments with computer files or disks; please contact the Agency with any format questions.

Written comments on the information collection requirements may be submitted directly to the Office of Information and Regulatory Affairs, Attention: Desk Officer for MSHA, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW., Room 10235, Washington, DC 20503.

The hearing will be held at the following location: Department of Labor, Frances Perkins Building, C-5515 Seminar Room 3, 200 Constitution Avenue NW., Washington, DC 20210. Send requests to make oral presentations to MSHA, Office of Standards, Regulations, and Variances, 4015 Wilson Boulevard, Room 631, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director; MSHA, Office of Standards, Regulations, and Variances; 703-235-1910.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This supplemental proposed rule would require mine operators to provide affected miners and miners' representatives with an opportunity to observe operator monitoring required under § 62.120(f) of MSHA's proposed rule for occupational noise exposure in coal and metal and nonmetal mines, published December 17, 1996 (61 FR 66348). It also would require mine operators to inform miners and miners' representatives of the dates and times of planned operator noise monitoring so that miners and miners' representatives would have an opportunity to exercise the right to observe monitoring. This collection of information is subject to review by OMB under the Paperwork Reduction Act of 1995 (PRA 95).

Description: MSHA estimates that each mine operator would notify miners and miners' representatives of planned noise monitoring in one of three ways:

oral notification, posted notice, or individually distributed written notices. The Agency estimates that 45 percent of mine operators would notify miners orally, 35 percent would notify miners via posted notices, and 20 percent would notify miners by distributing individual written notices.

The Agency estimates that it would take a supervisor, earning \$36 per hour at a metal/nonmetal mine or \$42 per hour at a coal mine, about 2 minutes (0.033 hour) to notify miners and miners' representatives orally of monitoring activities and that it would take a supervisor approximately 6 minutes (0.10 hour) to instruct a clerical worker to prepare a written notice or a posted notification. A clerical worker would take about 5 minutes (0.08 hour) to prepare a notice. Metal/nonmetal miners earn \$23 per hour on average and coal miner wages average \$26 per hour. A clerical worker earns about \$16 per hour.

Description of Respondents: The respondents are mine operators. MSHA estimates that this provision would annually affect 7,241 metal/nonmetal mines and 2,146 coal mines.

Information Collection Burden: MSHA estimates that, in addition to the information collection burden of the comprehensive proposed noise rule, the supplemental proposed rule on observation of monitoring would increase the mining industry's information collection burden by approximately \$166,915. For this supplemental proposed rule, the total estimated annual information collection burden for metal and nonmetal mines is about 4,624 hours at an estimated annual cost of about \$103,355 which consists entirely of labor and photocopying costs. The total estimated annual information collection burden for coal mines is about 2,740 hours at an estimated annual cost of about \$63,560 in labor and photocopying costs.

The following chart summarizes MSHA's estimates for metal and nonmetal mines and for coal mines.

§ 62.120(g)	Number of respondents	Average hours per response	Number of responses	Number of responses per respondent	Annual costs for materials	Total hours per regulation
Oral Notice						
Metal/Nonmetal	3,258	0.033	49,950	1	\$0	1,756
Coal	966	0.033	34,060	1	0	1,156
Individual Notices						
Metal/Nonmetal	1,449	0.08	22,200	1	0.25	1,920
Coal	429	0.08	15,138	1	0.25	1,254

§ 62.120(g)	Number of respondents	Average hours per response	Number of responses	Number of re-sponses per respondent	Annual costs for materials	Total hours per regulation
Posted Notices						
Metal/Nonmetal	2,534	0.08	2,534	3/sm; 6/lg	0.25	948
Coal	751	0.08	751	3/sm; 6/lg	0.25	330
Total	9,387	.....	124,633	.....	.....	7,364

Note: MSHA has prepared a detailed description of the burden calculation in Appendix A.

Under section 3507(o) of PRA 95, the Agency has submitted a copy of this proposed rule to OMB for its review and approval of these information collections. Interested persons are requested to send comments regarding these burden estimates or any other aspect of these proposed information collection provisions, including suggestions for reducing these burdens, (1) directly to the Office of Information and Regulatory Affairs, Attention: Desk Officer for MSHA; OMB, New Executive Office Building, 725 17th Street NW., Room 10235; Washington, DC 20503, and (2) to Patricia W. Silvey, Director; Office of Standards, Regulations, and Variances, MSHA; 4015 Wilson Boulevard, Room 631; Arlington, VA 22203.

II. Introduction and Rulemaking Background

On December 17, 1996, MSHA published in the **Federal Register** a proposed rule to revise the Agency's existing health standards for exposure to occupational noise (61 FR 66348). The proposal would retain the current permissible exposure level of 90 dBA and would establish a new 8-hour time-weighted average of 85 dBA as an action level. Emphasis would be placed on the use of feasible engineering and administrative control measures, audiometric examinations, training, and properly fitted hearing protection.

The comment period for the proposed rule closed on April 21, 1997. MSHA received and reviewed comments from various sectors of the mining community, including mine operators, industry trade associations, organized labor, health associations, colleges and universities, and equipment manufacturers. The Agency began a series of public hearings on the proposed rule on May 6, 1997.

In the December 17, 1996 proposal, § 62.120(f) would require operators to establish a system of monitoring which effectively evaluates each miner's noise exposure. In response to this proposed provision, some commenters were concerned about the need to include requirements providing miners and

their representatives with the right to observe monitoring. These commenters prompted MSHA to reconsider its responsibilities under the Federal Mine Safety and Health Act of 1977 (Mine Act). Section 103(c) of the Mine Act requires, among other things, that when the Secretary issues regulations requiring operator monitoring, "[s]uch regulations shall provide miners or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof." As a result of this review, MSHA is supplementing its proposed noise standard to include the requirement of observation of monitoring for miners and their representatives.

MSHA believes that miners who observe the monitoring of their exposures will be aided in their understanding of the nature and extent of the noise hazard. The supplemental proposed rule would result in improved miner protection because involvement in the process of monitoring should increase the miner's awareness of noise exposure levels in their workplace.

III. Discussion and Summary of Proposed Rule

This proposed rule would supplement MSHA's proposed noise standard by including a new provision at § 62.120(g), *Observation of Monitoring*, which would require that mine operators provide both affected miners and their representatives with an opportunity to observe any monitoring required under the proposed noise rule. This provision would implement Section 103(c) of the Mine Act. Consistent with the underlying purposes of the Mine Act, MSHA broadly interprets the opportunity for observation of monitoring to extend to both miners and their representatives.

The proposed comprehensive noise standard would require mine operators to institute feasible engineering and administrative controls to prevent or reduce miner overexposures to noise. Therefore, MSHA intends for miners and miners' representatives to have an opportunity to observe personal and

area operator monitoring conducted for the purposes of evaluating the need for and effectiveness of these control measures.

In addition, the proposal would require mine operators to inform affected miners and miners' representatives of the dates and times they intend to conduct required monitoring relating to this section. MSHA believes that it is important for miners and miners' representatives to have advance knowledge of operator monitoring so that they may exercise the opportunity to observe the monitoring. Furthermore, the proposed supplemental rule does not specify a required method of notification. Under the proposal, the operator may use any method of notification including oral, written, or posting, which effectively informs miners and their representatives.

MSHA views operator monitoring to be an important component in the mine operator's overall noise protection program. The primary purpose of operator monitoring is protection of the miners. Monitoring provides operators with an awareness of the noise exposure levels to which miners are exposed. In addition, it informs operators of their obligations to reduce noise levels, as applicable under the proposal, to ensure protection of the miners.

IV. Executive Order 12866 and the Regulatory Flexibility Act

Executive Order 12866 requires that regulatory agencies assess both the costs and benefits of proposed regulations. MSHA has determined that this proposed supplemental rule, together with the comprehensive proposed noise rule, does not meet the criteria of a significant regulatory action and, therefore, has not prepared a separate analysis of costs and benefits. The analysis contained in this preamble meets MSHA's responsibilities under E.O. 12866 and the Regulatory Flexibility Act.

Executive Order 12866

MSHA estimates that this supplemental proposed rule would result in an additional annual cost

increase of \$844,665 (bringing the total costs of the comprehensive proposed rule, including this supplemental proposal, to slightly less than \$9.2 million annually). The supplemental proposed rule would result in improved miner protection under the proposed comprehensive noise standard by increasing the miner's awareness of noise exposure levels in their workplace.

Observation of Monitoring

The proposed rule would require mine operators to permit affected miners and miners' representatives to observe the operator's monitoring conducted to determine the noise exposures of miners. MSHA anticipates that approximately 25 percent of mines performing monitoring under the proposal would have a non-duty miner and miner's representative exercising the right to observe these activities. For the remainder of mines, MSHA expects that miners and miner's representatives would either forego their observation rights, have an off-duty miner observe,

or have an off-duty miners' representative observe. For the latter category of miners and their representatives, MSHA assumes that there are no costs associated with lost production.

MSHA estimates that about 7,241 metal/nonmetal mine operators (6,218 small; 1,023 large) and 2,145 coal mine operators (1,255 small; 890 large) would perform exposure evaluations sufficient to determine the noise doses of miners. The scope of observation could include activities such as calibrating equipment, placing equipment, actual sampling, and recording results. The Agency anticipates that the time required for observation of monitoring would take about 2 hours at small mines and about 5 hours at large mines annually. Included in these estimates are 0.25 hour per miner to hook up the dosimeter at the beginning of the work day and to read the dosimeter at the end of the day. The Agency notes that it is using an annual basis for the sole purpose of this cost analysis and that this should not be confused with the

frequency in which operator monitoring would have to be performed at a particular mine site to establish an effective system of monitoring under proposed § 62.120(f).

For the purpose of this analysis, MSHA estimates that the cost to the mine operator for a miner's observation of monitoring is the cost of lost production. Production from metal/nonmetal mines was valued at about \$38 billion and the production from coal mines was valued at about \$20 billion in 1995. Based on the preliminary employee' hours reported to MSHA for metal/nonmetal mines and coal mines for 1996, MSHA estimates the value of production per hour, as an industry-wide average, to be slightly less than \$112 per hour for a metal/nonmetal miner and about \$107 per hour for a coal miner. MSHA estimates that lost production resulting from miners observing the operator's noise monitoring activities would cost the mining industry about \$677,750 annually. This cost is attributable as shown in the following table.

Mine type		Value of lost production
SM M/NM	6,218 mines * 25% * 2 hr/mine * \$111.90/hr	\$347,940
LG M/NM	1,023 mines * 25% * 5 hr/mine * \$111.90/hr	\$143,110
SM Coal	1,255 mines * 25% * 2 hr/mine * \$107.30/hr	\$67,330
LG Coal	890 mines * 25% * 5 hr/mine * \$107.30/hr	\$119,370

Notification of Miners and Miners' Representatives of Operator Monitoring

MSHA would require that mine operators notify affected miners and miners' representatives of plans to conduct noise monitoring so that the miners and miners' representatives would have the opportunity to exercise the right to observe. For purposes of this

cost analysis, MSHA presumes that 45 percent of those mine operators who plan to conduct noise monitoring would inform miners and miners' representatives orally, for example, during a daily meeting; 35 percent of those mine operators would inform miners by posting a notice; and 20 percent of those mine operators would inform miners by distributing a written

notice to each affected miner. These estimates do not address other effective means of notifying miners and their representatives.

MSHA estimates that notifying miners of planned operator noise monitoring activities would cost the mining industry about \$167,415 annually. This cost is attributable as shown in the following table.

Notification costs	SM M/NM	LG M/NM	SM coal	LG coal	Total
Oral Notice	\$15,380	\$26,400	\$4,265	\$26,295	\$72,340
Individually Distributed Notices	15,280	23,900	3,815	21,150	64,145
Posted Notice	17,820	4,575	3,860	4,175	30,430
Totals	48,480	54,875	11,940	51,620	166,915

The following provides a detailed description of these cost calculations. MSHA examined the costs by mine size and by type of mining operation (coal or metal/nonmetal).

Oral Notices

MSHA estimates that about 3,258 metal/nonmetal mine operators (2,798

small; 460 large) and 966 coal mine operators (565 small; 401 large) would notify miners and miners' representatives of planned operator noise monitoring activities orally once a year. Small metal/nonmetal mines would inform about 15,885 miners; large metal and nonmetal mines would inform about 34,065 miners; small coal

mines would inform about 4,059 miners; and large coal mines would inform about 30,001 miners. MSHA estimates that it takes a supervisor about 2 minutes (0.033 hour) to orally notify miners during a daily meeting. The following table shows the cost calculations for oral notice.

Mine type	Miners' labor cost	Supervisor's labor cost	Total
SM M/NM	15,885 miners * 0.033 hr * \$23/hr	2,798 mines * 0.033 hr * \$36/hr	\$15,380
LG M/NM	34,065 miners * 0.033 hr * \$23/hr	460 mines * 0.033 hr * \$36/hr	26,400
SM Coal	4,059 miners * 0.033 hr * \$26/hr	565 mines * 0.033 hr * \$42/hr	4,265
LG Coal	30,001 miners * 0.033 hr * \$26/hr	401 mines * 0.033 hr * \$42/hr	26,295

Written Notices

For the metal/nonmetal industry, MSHA estimates that 1,449 mine operators (1,244 small; 205 large) would prepare notices informing 22,200 miners of their right to observe operator monitoring (7,060 for small mines;

15,140 for large mines). In addition, MSHA estimates that 429 coal mine operators (251 small; 178 large) would notify about 15,138 miners (1,804 for small mines; 13,334 for large mines). MSHA estimates an average of 0.08 hour of clerical time to be spent per miner for

a notice to be prepared and distributed, \$0.25 per miner for photocopying, and 0.1 hour of supervisory time per mine to be spent giving instructions to a clerical worker. The following table shows the cost calculations for written notices.

	Miners' labor cost	Supervisor's labor cost	Total
SM M/NM	7,060 miners * (\$0.25/copy + 0.08 hr * \$16/hr)	1,244 mines * (0.10 hr * \$36/hr)	\$15,280
LG M/NM	15,140 miners * (\$0.25/copy + 0.08 hr * \$16/hr)	205 mines * (0.10 hr * \$36/hr)	23,900
SM Coal	1,804 miners * (\$0.25/copy + 0.08 hr * \$16/hr)	251 mines * (0.10 hr * \$42/hr)	3,815
LG Coal	13,334 miners * (\$0.25/copy + 0.08 hr * \$16/hr)	178 mines * (0.10 hr * \$42/hr)	21,150

Posted Notices

For the metal/nonmetal industry, MSHA estimates that 2,534 mine operators (2,176 small; 358 large) would post written notices. For coal mines, 439 small mines and 312 large mines would

post written notices. MSHA estimates an average of 0.08 hour of clerical time to be used to have the notice prepared and posted, \$0.25 per notice for photocopying, and 0.1 hour of supervisory time per mine to be spent

giving instructions to a clerical worker. A small mine would post about 3 notices and a large mine would post approximately 6 notices throughout the mine property. The following table shows the cost calculations for posting.

	Clerical labor cost	Supervisor's labor cost	Total
SM M/NM	3 posting sites/sm mine * 2,176 mines * (\$0.25/copy + 0.08 hr * \$16/hr).	2,176 mines * (0.10 hr * \$36/hr)	\$17,820
LG M/NM	6 posting sites/lg mine * 358 mines * (\$0.25/copy + 0.08 hr * \$16/hr).	358 mines * (0.10 hr * \$36/hr)	4,575
SM Coal	3 posting sites/sm mine * 439 mines * (\$0.25/copy + 0.08 hr * \$16/hr).	439 mines * (0.10 hr * \$42/hr)	3,860
LG Coal	6 posting sites/lg mine * 312 mines (\$0.25/copy + 0.08 hr * \$16/hr).	312 mines * (0.10 hr * \$42/hr)	4,175

V. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act (SBREFA)

The Regulatory Flexibility Act (RFA) requires regulatory agencies to consider a rule's impact on small entities. Under the SBREFA amendments to the RFA, MSHA must use the Small Business Administration (SBA) definition for a small mine of 500 or fewer employees or, after consultation with the SBA Office of Advocacy, establish an alternative definition for the mining industry by publishing that definition in the **Federal Register** for notice and comment. MSHA traditionally has considered small mines to be those with fewer than 20 employees. For the purposes of the RFA and this certification, MSHA has analyzed the impact of the proposed rule on all mines with fewer than 500 employees, as well as on those with fewer than 20 employees.

The Agency has provided a copy of this proposed rule and regulatory flexibility certification statement to the SBA Office of Advocacy. In addition, MSHA will mail a copy of the proposed rule, including the preamble and regulatory flexibility certification statement, to all mine operators and miners' representatives.

Regulatory Flexibility Certification

In accordance with § 605 of the RFA, MSHA certifies that this proposed supplemental rule together with the comprehensive proposed noise rule would not have a significant economic impact on a substantial number of small entities. No small governmental jurisdictions or nonprofit organizations are affected.

Under the SBREFA amendments to the RFA, MSHA must include a factual basis in the proposed rule for this certification. The Agency also must publish the regulatory flexibility certification in the **Federal Register**,

along with its factual basis, followed by an opportunity for comment by the public.

Factual Basis for Certification

The Agency has used a quantitative approach in concluding that the supplemental proposed rule does not have a significant impact on a substantial number of small entities. The Agency performed its analysis separately for two groups of mines: the coal mining sector as a whole, and the metal and nonmetal mining sectors as a whole. Based on a review of available sources of public data on the mining industry, the Agency believes that a quantitative analysis of the impacts on various mining subsectors (i.e., beyond the 4-digit SIC level) may not be feasible. The Agency requests comments, however, on whether there are special circumstances that warrant separate quantification of the impact of this proposal on any mining subsector, and information on how it might readily

obtain the data necessary to conduct such a quantitative analysis. The Agency is fully cognizant of the diversity of mining operations in each sector, and has applied that knowledge as it developed the proposal.

As reflected in the certification, MSHA analyzed the costs of this proposal for small and large mines using both the traditional Agency definition of a small mine and, as required by the

RFA, SBA's definition. The Agency compared the costs of the proposal for small mines in each sector to the revenues for each sector for every size category analyzed. In each case, the results indicated that the costs as a percent of revenue are substantially less than 1 percent.

MSHA estimates that this supplemental proposed rule would result in an additional annual cost

increase of \$844,665 (bringing the total costs of the comprehensive proposed rule, including this supplemental proposal, to approximately \$9.2 million annually).

The following table summarizes the results of the analysis of the supplemental proposed rule for all mines and for those which employ fewer than 20 miners.

Provision	Small mines (<20 miners)	Large mines (>=20 miners)	Total annual cost
Metal/Nonmetal			
Observation	\$347,940	\$143,110	\$491,050
Notification	48,480	54,875	103,355
Coal			
Observation	67,330	119,370	186,700
Notification	11,940	51,620	63,560
All Mines			
	475,690	368,975	844,665

The following table summarizes the results of the Agency's analysis of the

supplemental proposed rule's costs and effects on revenue.

SMALL MINES: COSTS COMPARED TO REVENUES

	No. of mines affected (> 85 dBA)	Estimated annual costs	Estimated revenue (millions)	Estimated cost per small mine	Cost as % of revenue
Coal Mines					
Small <20	1,255	\$79,270	\$855	\$63	0.009
Large >=20	891	170,990	19,094	192	0.000
Small <500	2,136	249,210	19,117	117	0.001
Large >=500	9	1,050	831	117	0.000
All Coal Mines	2,146	250,260	20,000	117	0.001
M/NM Mines					
Small <20	6,218	396,920	11,929	64	0.003
Large > 20	1,023	197,985	26,071	194	0.001
Small < 500	7,222	593,344	32,134	82	0.002
Large > 500	19	1,561	5,866	82	0.000
All M/NM Mines	7,241	594,905	38,000	82	0.001

In determining revenues for coal mines, MSHA multiplied coal production data (in tons) for mines in specific size categories (reported to MSHA quarterly) by the average price per ton (from the Department of Energy, Energy Information Administration, *Annual Energy Review 1995*). For metal and nonmetal mines, the Agency estimated revenues for specific mine size categories as the proportionate share of these mines' contributions to the Gross National Product (from the Department of Interior, formerly known

as the Bureau of Mines, *Mineral Commodities Summaries 1996*).

VI. Unfunded Mandates Reform Act of 1995

MSHA has determined that, for purposes of § 202 of the Unfunded Mandates Reform Act of 1995, this supplemental proposal, together with the comprehensive proposed noise rule, does not include any Federal mandate that may result in increased expenditures by state, local, or tribal governments in the aggregate of more than \$100 million, or increased

expenditures by the private sector of more than \$100 million. Moreover, the Agency has determined that for purposes of § 203 of that Act, this supplemental proposal together with the comprehensive proposed noise rule does not significantly or uniquely affect small governments.

List of Subjects in 30 CFR Part 62

Mine safety and health, Noise.

Dated: December 19, 1997.

Authority: 30 U.S.C. 811, 813.

opportunity to observe exposure monitoring required by this section. Mine operators must give prior notice to affected miners and their representatives of the date and time of intended monitoring.

J. Davitt McAteer,
Assistant Secretary for Mine Safety and Health.

2. A new paragraph § 62.120(g) is added to part 62 as proposed to be added to the Code of Federal Regulations at 61 FR 66465, December 17, 1996, to read as follows:

Note: The following appendix will not appear in the Code of Federal Regulations.

It is proposed to amend Chapter I of Title 30 of the Code of Federal Regulations as follows:

§ 62.120 Limitations on noise exposure.
* * * * *

PART 62—OCCUPATIONAL NOISE EXPOSURE

(g) *Observation of monitoring.* The mine operator shall provide affected miners and their representatives with an

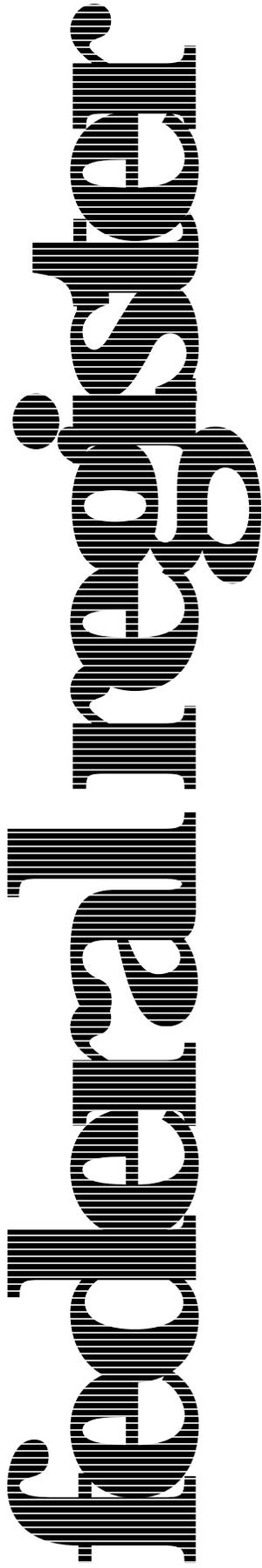
1. The authority citation for part 62 would read as follows:

NON-MANDATORY APPENDIX A—PAPERWORK BURDEN CALCULATIONS FOR NOTIFICATION

Mine type	Miners' labor	Supervisor's labor	Total hours
Oral Notices			
SM M/NM	15,885 miners * 0.033 hr	2,798 mines * 0.033 hr	617
LG M/NM	34,065 miners * 0.033 hr	460 mines * 0.033 hr	1,139
SM Coal	4,059 miners * 0.033 hr	565 mines * 0.033 hr	153
LG Coal	30,001 miners * 0.033 hr	401 mines * 0.033 hr	1,003
Written Notices			
SM M/NM	7,060 miners * 0.08 hr	1,244 mines * 0.10 hr	688
LG M/NM	15,140 miners * 0.08 hr	205 mines * 0.10 hr	1,232
SM Coal	1,804 miners * 0.08 hr	251 mines * 0.10 hr	169
LG Coal	13,334 miners * 0.08 hr	178 mines * 0.10 hr	1,085
Posted Notices			
SM M/NM	3 posting sites/sm mine * 2,176 mines * 0.08 hr	2,176 mines * 0.10 hr	740
LG M/NM	6 posting sites/lg mine * 358 mines * 0.08 hr	358 mines * 0.10 hr	208
SM Coal	3 posting sites/sm mine * 439 mines * 0.08 hr	439 mines * 0.10 hr	149
LG Coal	6 posting sites/lg mine * 312 mines * 0.08 hr	312 mines * 0.10 hr	181

[FR Doc. 97-33935 Filed 12-30-97; 8:45 am]

BILLING CODE 4510-43-P



Wednesday
December 31, 1997

Part VII

**Department of The
Treasury**

**Department of
Justice**

31 CFR Chapter IX and Parts 900, 901,
902, 903, and 904
Federal Claims Collection Standards;
Proposed Rule

DEPARTMENT OF THE TREASURY**DEPARTMENT OF JUSTICE****31 CFR Chapter IX and Parts 900, 901, 902, 903, and 904**

[A.G. Order No. 2135-97]

RIN 1510-AA57 and 1105-AA31

Federal Claims Collection Standards**AGENCIES:** Department of the Treasury; Department of Justice.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This document proposes to revise the Federal Claims Collection Standards issued by the Department of Justice and the General Accounting Office on March 9, 1984. The proposed revisions clarify and simplify Federal debt collection standards contained in the Federal Claims Collection Standards and reflect changes to Federal debt collection procedures under the Debt Collection Improvement Act of 1996 and the General Accounting Office Act of 1996.

DATES: Comments must be received on or before March 2, 1998.

ADDRESSES: All comments should be addressed to Gerry Isenberg, Financial Program Specialist, Debt Management Services, Financial Management Service, Department of the Treasury, 401 14th Street S.W., Room 151, Washington, D.C. 20227; or John W. Showalter, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, P.O. Box 875, Ben Franklin Station, Washington, D.C. 20044. A copy of this proposed rule is being made available for downloading from the Financial Management Service web site at the following address: <http://www.fms.treas.gov>.

FOR FURTHER INFORMATION CONTACT: Gerry Isenberg, Financial Program Specialist, Financial Management Service, Department of the Treasury, at (202) 874-6660; Ronda L. Kent or Ellen Neubauer, Senior Attorneys, Financial Management Service, Department of the Treasury, at (202) 874-6680; or John W. Showalter, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, at (202) 307-0244.

SUPPLEMENTARY INFORMATION: The Federal Claims Collection Standards (FCCS) are being revised for two primary reasons: (1) to clarify and simplify the Federal debt collection standards contained in the FCCS; and (2) to reflect changes to Federal debt collection procedures under the Debt

Collection Improvement Act of 1996 (DCIA), Pub. L. 104-134, 110 Stat. 1321, 1358 (Apr. 26, 1996), as part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996.

Some of the changes made to clarify and simplify the FCCS were suggested by Federal officials in numerous Government agencies in the five years prior to the enactment of the DCIA. We appreciate their substantial efforts toward this revision. The revised FCCS provide agencies with greater latitude to adopt agency specific regulations considering the legal and policy requirements applicable to the various types of Federal debt and maximize the effectiveness of Federal debt collection procedures.

The DCIA is the most significant legislation for the administrative collection of Federal debt since the Debt Collection Act of 1982, Pub. L. 97-365, 96 Stat. 1749 (Oct. 25, 1982). The revised FCCS conform with relevant statutory changes to Federal debt collection procedures under the DCIA. The DCIA authorizes the issuance of rules concerning new debt collection procedures, including centralized administrative offset, the transfer or referral of delinquent debt to Treasury or Treasury-designated debt collection centers for collection (cross-servicing), administrative wage garnishment, and publication of debtor information. Additional rules concerning these new debt collection procedures will be issued separately in accordance with the DCIA.

While this revision of the FCCS is being issued as a proposed rule, readers are reminded that most of the provisions of the DCIA became effective upon enactment on April 26, 1996. Publication of this proposed rule does not delay the effective date of the DCIA, nor does it postpone the duty of Federal agencies to comply with the provisions of the DCIA.

The Secretary of the Treasury has been added as a co-promulgator of the FCCS in accordance with section 31001(g)(1)(C) of the DCIA. The Comptroller General has been removed as a co-promulgator in accordance with section 115(g) of the General Accounting Office Act of 1996 (GAO Act), Pub. L. 104-316, 110 Stat. 3826 (Oct. 19, 1996). The Department of the Treasury and the Department of Justice are establishing a new joint chapter IX in Title 31 of the Code of Federal Regulations. The Department of the Treasury and the Department of Justice will publish the revised FCCS as a joint rule in this new chapter. The current FCCS are found at 4 CFR parts 101-105.

Discussion of Major Changes

The revised FCCS contain numerous changes and amendments throughout the rule. Major changes contained in these revised FCCS are highlighted below. The various provisions of the FCCS that have been redrafted for clarity but that do not substantively change debt collection procedures are not discussed here. A detailed section-by-section analysis comparing the revised FCCS to the current FCCS is available at the addresses noted above. Readers are encouraged to read the revised FCCS carefully to assure knowledge and understanding of all the changes and not rely solely on the changes highlighted in this discussion.

The following major changes to the FCCS have been incorporated into these revised FCCS:

1. The Comptroller General was removed as a co-promulgator of the FCCS. The revised FCCS will be published in parts 900-904 of chapter IX of Title 31 of the Code of Federal Regulations because the Secretary of the Treasury was added as a co-promulgator of the FCCS. See 4 CFR 101.1.

2. The revised FCCS reflect the elimination of the Comptroller General's role in Federal debt collection.

3. The revised FCCS provide agencies with greater latitude to streamline and customize debt collection procedures to accommodate agency specific requirements or unique circumstances.

4. The revised FCCS reflect the requirement that agencies use government-wide debt collection contracts (with certain exceptions) for referrals to private collection contractors.

5. The revised FCCS contain a new requirement that agencies and debtors exchange mutual releases of non-tax liabilities, in all appropriate instances, when a claim is compromised.

6. The revised FCCS reflect the increase in the principal claim amount, from \$20,000 to \$100,000, that agencies are authorized to compromise or to suspend or terminate collection activity thereon, without concurrence by the Department of Justice. In addition, the minimum amount of a claim that may be referred to the Department of Justice is increased from \$600 to \$2,500. The circumstances under which the Department of Justice will litigate when the claim amount does not meet the minimum threshold have not been changed.

7. The revised FCCS reflect several new debt collection procedures under the DCIA, including, but not limited to:

(a) transfer or referral of delinquent debt to the Department of the Treasury

or Treasury-designated debt collection centers for collection, known as "cross-servicing;"

(b) mandatory, centralized administrative offset by disbursing officials;

(c) mandatory credit bureau reporting; and

(d) mandatory prohibition against extending Federal financial assistance in the form of a loan or loan guarantee to delinquent debtors.

The Department of the Treasury and the Department of Justice have determined that this regulation is not a significant regulatory action as defined in Executive Order 12866 and accordingly this regulation has not been reviewed by the Office of Management and Budget. It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation either (1) results in greater flexibility for Federal agencies to streamline their own debt collection regulations, or (2) reflects the statutory language contained in the DCIA. Accordingly, a Regulatory Flexibility Analysis is not required.

This regulation will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this regulation does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

This regulation will not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

List of Subjects

31 CFR Part 900

Antitrust, Claims, Fraud, Taxes.

31 CFR Part 901

Administrative practice and procedure, Claims, Federal Employees, Penalties, Privacy.

31 CFR Part 902

Claims.

31 CFR Part 903

Claims.

31 CFR Part 904

Claims.

For the reasons set out in the preamble, chapter IX, consisting of parts 900 through 904, is proposed to be established in title 31 of the Code of Federal Regulations to read as follows:

CHAPTER IX—FEDERAL CLAIMS COLLECTION STANDARDS

(DEPARTMENT OF THE TREASURY—DEPARTMENT OF JUSTICE)

Part

- 900 Scope of standards
- 901 Standards for the administrative collection of claims
- 902 Standards for the compromise of claims
- 903 Standards for suspending or terminating collection activity
- 904 Referrals to the Department of Justice

PART 900—SCOPE OF STANDARDS

Sec.

- 900.1 Prescription of standards.
- 900.2 Definitions and construction.
- 900.3 Antitrust, fraud, and tax and interagency claims excluded.
- 900.4 Compromise, waiver, or disposition under other statutes not precluded.
- 900.5 Form of payment.
- 900.6 Subdivision of claims not authorized.
- 900.7 Required administrative proceedings.
- 900.8 No private rights created.

Authority: 31 U.S.C. 3711.

§ 900.1 Prescription of standards.

(a) The Secretary of the Treasury and the Attorney General of the United States are issuing the regulations in parts 900–904 of this chapter under 31 U.S.C. 3711(d)(2). The regulations in this chapter prescribe standards for Federal agency use in the administrative collection, offset, compromise, and the suspension or termination of collection activity for civil claims for money, funds, or property, as defined by 31 U.S.C. 3701(b), unless specific agency statutes or regulations apply to such activities or, as provided for by Title 11 of the United States Code, when the claims involve bankruptcy. Federal agencies include agencies of the executive, legislative, and judicial branches of the Government, including Government corporations. These regulations in this chapter also prescribe standards for referring claims to the Department of Justice for litigation. Additional guidance is contained in the Office of Management and Budget's Circular A-129 (Revised) "Policies for Federal Credit Programs and Non-Tax Receivables," the Department of the Treasury's "Managing Federal Receivables," and other publications concerning debt collection and debt management. These publications are

available from the Debt Management Services, Financial Management Service, Department of the Treasury, 401 14th Street S.W., Room 151, Washington, D.C. 20227.

(b) Additional rules governing disbursing official administrative offset and the transfer of delinquent debt to the Department of the Treasury or Treasury-designated debt collection centers for collection (cross-servicing) under the Debt Collection Improvement Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1358 (Apr. 26, 1996), are issued in separate regulations by the Department of the Treasury. Rules governing the use of certain debt collection tools created under the Debt Collection Improvement Act of 1996, such as administrative wage garnishment and dissemination of information regarding delinquent debtors, also are issued in separate regulations by the Department of the Treasury.

(c) Agencies are not limited to the remedies contained in parts 900–904 of this chapter and are encouraged to use all authorized remedies, including alternative dispute resolution and arbitration, to collect civil claims, to the extent that such remedies are not inconsistent with the Federal Claims Collection Act, as amended, Pub. L. 89-508, 80 Stat. 308 (July 19, 1966), the Debt Collection Act of 1982, Pub. L. 97-365, 96 Stat. 1749 (Oct. 25, 1982), the Debt Collection Improvement Act of 1996, or other relevant statutes. These regulations in this chapter are not intended to impair agencies' common law rights to collect claims.

§ 900.2 Definitions and construction.

(a) For the purposes of the standards in this chapter, the terms "claim" and "debt" are synonymous and interchangeable. They refer to an amount of money, funds, or property that has been determined by an agency official to be due the United States from any person, organization, or entity, except another Federal agency. For the purposes of administrative offset under 31 U.S.C. 3716, the terms "claim" and "debt" include an amount of money, funds, or property owed by a person to a State (including past-due support being enforced by a State), the District of Columbia, American Samoa, Guam, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, or the Commonwealth of Puerto Rico.

(b) A claim is "delinquent" if it has not been paid by the date specified in the agency's initial written demand for payment or applicable agreement or instrument (including a post-delinquency payment agreement),

unless other satisfactory payment arrangements have been made.

(c) In parts 900–904 of this chapter, words in the plural form shall include the singular and vice versa, and words signifying the masculine gender shall include the feminine and vice versa. The terms “includes” and “including” do not exclude matters not listed but do include matters that are in the same general class.

(d) Recoupment is a special method for adjusting claims arising under the same transaction or occurrence. For example, obligations arising under the same contract are generally subject to recoupment.

(e) For purposes of the standards in this chapter, unless otherwise stated, “Secretary” means the Secretary of the Treasury or the Secretary’s delegate.

§ 900.3 Antitrust, fraud, and tax and interagency claims excluded.

(a) The standards in parts 900–904 of this chapter relating to compromise, suspension, and termination of collection activity do not apply to any claim based in whole or in part on conduct in violation of the antitrust laws or to any claim involving fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any party having an interest in the claim. Only the Department of Justice has the authority to compromise, suspend, or terminate collection activity on such claims. The standards in parts 900–904 of this chapter relating to the administrative collection of claims do apply, but only to the extent authorized by the Department of Justice in a particular case. Upon identification of a claim based in whole or in part on conduct in violation of the antitrust laws or any claim involving fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any party having an interest in the claim, agencies shall promptly refer the case to the Department of Justice for action. At its discretion, the Department of Justice may return the claim to the forwarding agency for further handling in accordance with the standards in parts 900–904 of this chapter.

(b) Parts 900–904 of this chapter do not cover tax claims.

(c) Parts 900–904 of this chapter do not apply to claims between Federal agencies. Federal agencies should attempt to resolve interagency claims by negotiation in accordance with Executive Order 12146 (3 CFR, 1980 Comp., pp. 409–412).

§ 900.4 Compromise, waiver, or disposition under other statutes not precluded.

Nothing in parts 900–904 of this chapter precludes agency disposition of any claim under statutes and implementing regulations other than subchapter II of chapter 37 of Title 31 of the United States Code (Claims of the United States Government) and these standards. See, e.g., the Federal Medical Care Recovery Act, Pub. L. 87–693, 76 Stat. 593 (Sept. 25, 1962) (codified at 42 U.S.C. 2651 *et seq.*), and applicable regulations, 28 CFR part 43. In such cases, the laws and regulations that are specifically applicable to claims collection activities of a particular agency generally take precedence over parts 900–904 of this chapter.

§ 900.5 Form of payment.

Claims may be paid in the form of money or, when a contractual basis exists, the Government may demand the return of specific property or the performance of specific services.

§ 900.6 Subdivision of claims not authorized.

Claims may not be subdivided to avoid the monetary ceiling established by 31 U.S.C. 3711(a)(2). A debtor’s liability arising from a particular transaction or contract shall be considered a single claim in determining whether the claim is one of less than \$100,000 (excluding interest, penalties, or administrative costs) or such higher amount as the Attorney General shall from time to time prescribe for purposes of compromise or suspension or termination of collection activity.

§ 900.7 Required administrative proceedings.

Agencies are not required to omit, foreclose, or duplicate administrative proceedings required by contract or other laws or regulations.

§ 900.8 No private rights created.

The standards in this chapter do not create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person, nor shall the failure of an agency to comply with any of the provisions of parts 900–904 of this chapter be available to any debtor as a defense.

PART 901—STANDARDS FOR THE ADMINISTRATIVE COLLECTION OF CLAIMS

Sec.

- 901.1 Aggressive agency collection activity.
- 901.2 Demand for payment.

- 901.3 Collection by administrative offset.
 - 901.4 Administrative offset against amounts payable from Civil Service Retirement and Disability Fund and the Federal Employee Retirement System.
 - 901.5 Reporting claims.
 - 901.6 Contracting for debt collection agencies and to locate and recover unclaimed assets.
 - 901.7 Suspension or revocation of eligibility for loans and loan guaranties, licenses, permits, or privileges.
 - 901.8 Liquidation of collateral.
 - 901.9 Collection in installments.
 - 901.10 Interest, penalties, and administrative costs.
 - 901.11 Analysis of costs.
 - 901.12 Use and disclosure of mailing addresses.
 - 901.13 Exemptions.
- Authority:** 31 U.S.C. 3701, 3711, 3716, 3717, 3718, and 3720B.

§ 901.1 Aggressive agency collection activity.

(a) Federal agencies shall aggressively collect all claims arising out of activities of, or referred or transferred for collection services to, that agency. Collection activities shall be undertaken promptly with follow-up action taken as necessary depending upon the circumstances. Nothing contained in parts 900–904 of this chapter requires the Department of Justice, the Department of the Treasury, or other Treasury-designated debt collection center, to duplicate collection activities previously undertaken by other agencies or to perform collection activities that other agencies should have undertaken.

(b) Claims referred or transferred shall be serviced, collected, or compromised, or the collection action will be suspended or terminated, in accordance with the statutory requirements and authorities otherwise applicable to the collection of such claims.

(c) Agencies shall cooperate with one another in their debt collection activities.

(d) Agencies should consider referring claims that are less than 180 days delinquent to “debt collection centers” of the Federal Government to accomplish efficient, cost effective debt collection. The Department of the Treasury is a debt collection center, is authorized to designate other debt collection centers within the Federal Government based on the debt collection centers’ performance in collecting delinquent claims owed to the Government, and may withdraw such designations. Referrals to debt collection centers shall be at the discretion of, and for a time period acceptable to, the Secretary. Referrals may be for servicing, collection, compromise, suspension, or termination of collection action.

(e) Agencies shall transfer to the Secretary any claim that has been delinquent for a period of 180 days or more so that the Secretary may take appropriate action to collect the claim or terminate collection action. This requirement does not apply to any claim that:

- (1) Is in litigation or foreclosure;
 - (2) Will be disposed of under an approved asset sale program;
 - (3) Has been referred to a private collection contractor for a period of time acceptable to the Secretary;
 - (4) Is at a debt collection center for a period of time acceptable to the Secretary (see paragraph (d) of this section);
 - (5) Will be collected under internal offset procedures within three years after the debt first became delinquent; or
 - (6) To other classes of claims for which the Secretary has determined that an exemption from this requirement is in the best interest of the Government. Agencies may request that the Secretary exempt specific classes of claims.
- (f) Agencies operating debt collection centers are authorized to charge a fee for services rendered regarding referred or transferred claims. The fee may be paid out of amounts collected and may be added on the claim as an administrative cost (see § 901.10).

§ 901.2 Demand for payment.

(a) Written demand as described in paragraph (b) of this section shall be made promptly upon a debtor of the United States in terms that inform the debtor of the consequences of failing to cooperate with the agency to resolve the claim. The specific content, timing, and number of demand letters shall depend upon the type and amount of the claim and the debtor's response, if any, to the agency's letters or calls. Generally, one demand letter should suffice. In determining the timing of the demand letter or letters, agencies should give due regard to the need to refer claims promptly to the Department of Justice for litigation, in accordance with § 904.1 of this chapter or otherwise. When necessary to protect the Government's interest (for example, to prevent the running of a statute of limitations), written demand may be preceded by other appropriate actions under parts 900–904 of this chapter, including immediate referral for litigation.

(b) Demand letters shall inform the debtor of:

- (1) The basis for the indebtedness and the rights, if any, the debtor may have to seek review within the agency;
- (2) The applicable standards for imposing any interest, penalties, or administrative costs;

(3) The date by which payment should be made to avoid late charges and enforced collection, which generally should not be more than 30 days from the date that the demand letter is mailed or hand-delivered; and

(4) The name, address, and phone number of a contact person or office within the agency.

(c) Agencies should exercise care to ensure that demand letters are mailed or hand-delivered on the same day that they are dated. There is no prescribed format for demand letters. Agencies should utilize demand letters and procedures that will lead to the earliest practicable determination of whether the claim can be resolved administratively or must be referred for litigation.

(d) Agencies should include in demand letters such items as the agency's willingness to discuss alternative methods of payment; its policies with respect to the use of credit bureaus, debt collection centers, and collection agencies; the agency's remedies to enforce payment of the claim (including assessment of interest, administrative costs and penalties, administrative garnishment, the use of collection agencies, Federal salary offset, tax refund offset, administrative offset, and litigation); the requirement that any debt delinquent for more than 180 days be transferred to the Department of the Treasury for collection; and, depending on applicable statutory authority, the debtor's entitlement to consideration of a waiver.

(e) Agencies should respond promptly to communications from debtors, within 30 days whenever feasible, and should advise debtors who dispute claims to furnish available evidence to support their contentions.

(f) Prior to the initiation of the demand process or at any time during or after completion of the demand process, if an agency determines to pursue or is required to pursue offset, the procedures applicable to offset should be followed (see § 901.3). The availability of funds or money for debt satisfaction by offset and the agency's determination to pursue collection by offset shall release the agency from the necessity of further compliance with paragraphs (a), (b), (c), and (d) of this section.

(g) Prior to referring a claim for litigation, agencies should advise each person determined to be liable for the claim that, unless the claim can be collected administratively, litigation may be initiated. This notification should comply with Executive Order 12988 and may be given as part of a

demand letter under paragraph (b) of this section or in a separate document. Litigation counsel for the Government should be advised that this notice has been given.

(h) When an agency learns that a bankruptcy petition has been filed with respect to a debtor, before proceeding with further collection action, the agency should immediately seek legal advice from its agency counsel concerning the impact of the Bankruptcy Code on any pending or contemplated collection activities. Unless the agency determines that the automatic stay imposed at the time of filing pursuant to 11 U.S.C. 362 has been lifted or is no longer in effect, in most cases collection activity against the debtor should stop immediately.

(1) After seeking legal advice, a proof of claim should be filed in most cases with the bankruptcy court or the Trustee. Agencies should refer to the provisions of 11 U.S.C. 106 relating to the consequences on sovereign immunity of filing a proof of claim.

(2) If the agency is a secured creditor, it may seek relief from the automatic stay regarding its security, subject to the provisions and requirements of 11 U.S.C. 362.

(3) Offset is stayed in most cases by the automatic stay. However, agencies should seek legal advice from their agency counsel to determine whether their payments to the debtor and payments of other agencies available for offset may be frozen by the agency until relief from the automatic stay can be obtained from the bankruptcy court. Agencies also should seek legal advice from their agency counsel to determine whether recoupment is available.

§ 901.3 Collection by administrative offset.

(a) *In general.* Two types of administrative offset exist under this section: Administrative offset by non-disbursing officials and administrative offset by disbursing officials. The standards contained in paragraph (a) apply to both types of administrative offset. The standards contained in paragraph (b) of this section apply solely to non-disbursing official offset, and the standards contained in paragraph (c) of this section apply solely to disbursing official offset. Collection by administrative offset shall be undertaken in accordance with §§ 901.3 and 901.4 and implementing regulations established by each agency on all claims where such collection is determined to be feasible and not otherwise prohibited.

(1) Agencies shall prescribe regulations for the exercise of administrative offset consistent with

this section or adopt this section without change by cross-reference.

(2) For purposes of this section, the term "administrative offset" has the meaning provided in 31 U.S.C. 3701(a)(1).

(3) This section applies to administrative offsets undertaken by agencies pursuant to 31 U.S.C. 3716 against funds or money payable to, or held for, a debtor. It does not apply to:

(i) Claims arising under the Social Security Act, except as provided in 42 U.S.C. 404;

(ii) Payments made under the Social Security Act, except as provided for in 31 U.S.C. 3716(c);

(iii) Claims arising under or payments made under the Internal Revenue Code or the tariff laws of the United States;

(iv) Offsets against Federal salaries, to the extent these standards are inconsistent with regulations published to implement such offsets under 5 U.S.C. 5514;

(v) Offsets under 31 U.S.C. 3728 against a judgment obtained by a debtor against the United States;

(vi) Offsets or recoupments under common law, State law, or Federal statutes specifically prohibiting offsets or recoupments of particular types of claims; or

(vii) Offsets in the course of judicial proceedings, including bankruptcy.

(4) Unless otherwise provided for by contract or law, claims or payments that are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority.

(5) Agency regulations for offsets pursuant to 31 U.S.C. 3716 shall provide also that, except as is provided in paragraph (b)(2) of this section, offsets may be initiated only after the debtor has received:

(i) Written notice of the type and amount of the claim and that the agency intends to use administrative offset to collect the claim;

(ii) An opportunity to inspect and copy agency records related to the claim;

(iii) An opportunity for a hearing or review within the agency of the determination of indebtedness; and

(iv) An opportunity to make a written agreement to repay the claim.

(6) When an agency previously has given a debtor any of the required notice and review opportunities with respect to a particular claim, the agency need not give notice and review opportunities duplicating those previously given before initiating administrative offset with respect to that claim.

(7) (i) For purposes of this section, whenever an agency is required to

afford a debtor a hearing or review within the agency, the agency shall provide the debtor with a reasonable opportunity for an oral hearing when:

(A) An applicable statute authorizes or requires the agency to consider waiver of the indebtedness involved, the debtor requests waiver of the indebtedness, and the waiver determination turns on an issue of credibility or veracity; or

(B) The debtor requests reconsideration of the claim and the agency determines that the question of the indebtedness cannot be resolved by review of the documentary evidence, for example, when the validity of the claim turns on the issue of credibility or veracity.

(ii) Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary-type hearing, although the agency should carefully document all significant matters discussed at the hearing.

(iii) This section does not require an oral hearing with respect to debt collection systems in which a determination of indebtedness or waiver rarely involves issues of credibility or veracity and the agency has determined that review of the written record is ordinarily an adequate means to correct prior mistakes.

(iv) In those cases when an oral hearing is not required by this section, an agency shall nevertheless accord the debtor a "paper hearing," that is, a determination of the request for waiver or reconsideration based upon a review of the written record.

(8) Unless otherwise provided by law, agencies may not initiate administrative offset to collect a claim under 31 U.S.C. 3716 more than 10 years after the Government's right to collect the claim first accrued, unless facts material to the Government's right to collect the claim were not known and could not reasonably have been known by the official or officials of the Government who were charged with the responsibility to discover and collect such claims.

(b) *Administrative offset by non-disbursing officials.* Generally, administrative offsets by non-disbursing officials are offsets that an agency conducts internally or in cooperation with the agency certifying or authorizing payments to the debtor. Disbursing agencies also are authorized to conduct offsets in accordance with this paragraph on a case-by-case basis.

(1) The creditor agency is responsible for determining, in its discretion on a case-by-case basis, whether collection by administrative offset under this subsection is feasible. Creditor agencies

should consider whether administrative offset may be accomplished practically and legally and whether offset furthers and protects the Government's interests. In appropriate circumstances, such as when a debtor is unable to pay the full amount that could be collected by offset (see § 902.2(b) of this chapter), the agency may consider the debtor's financial condition and is not required to use offset in every instance in which there is an available source of funds or money. Agencies also may consider whether offset would tend to interfere substantially with, or defeat the purposes of, the program authorizing the payments against which offset is contemplated. For example, under a grant program in which payments are made in advance of the grantee's performance, offset may be inappropriate. This concept generally does not apply, however, when payment is in the form of reimbursement.

(2) Agency regulations may provide for the omission of the procedures set forth in paragraph (a)(5) of this section when:

(i) The offset is in the nature of a recoupment;

(ii) The claim arises under a contract as set forth in *Cecile Industries, Inc. v. Cheney*, 995 F.2d 1052 (Fed. Cir. 1993); or

(iii) The agency first learns of the existence of the amount owed by the debtor when there is insufficient time before payment would be made to the debtor to allow for prior notice and an opportunity for review. When prior notice and an opportunity for review are omitted, the agency shall give the debtor such notice and an opportunity for review as soon as practicable and shall promptly refund any money ultimately found not to have been owed to the Government.

(3) Agencies shall comply with requests from other agencies to collect claims owed to the United States by administrative offset, unless the offset would not be in the best interests of the Government with respect to the program of the agency conducting the offset as determined by the head of the agency, or would be otherwise contrary to law. Appropriate use should be made of the cooperative efforts of other agencies in effecting collection by administrative offset.

(4) Agency regulations shall provide that the agency making a payment against which administrative offset is sought should not make the requested offset until it has been provided with a written certification by the creditor agency that the debtor owes the claim in the amount specified and that the creditor agency has fully complied with

its regulations concerning administrative offset.

(5) When collecting multiple claims by administrative offset, agencies should apply the recovered amounts to those claims in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, particularly the applicable statutes of limitation.

(c) *Administrative offset by disbursing officials.* Disbursing officials of the Department of the Treasury, the Department of Defense, the United States Postal Service, other Government corporations, and disbursing officials of the United States designated by the Secretary are required to conduct administrative offset to collect claims that agencies have certified to the Secretary for collection by administrative offset. Agencies shall certify claims to the Secretary and the Secretary shall share information concerning delinquent claims with the aforesaid disbursing officials so that offsets may occur government-wide. If an agency has not certified a specific claim to the Secretary, an agency still may collect the claim by administrative offset in accordance with paragraph (b) of this section by contacting the payment certifying agency or the disbursing agency directly.

(1) Certification of claims to the Secretary shall be in a form acceptable to the Secretary and shall include, at a minimum:

(i) A statement that the claim(s) is past due and legally enforceable; and
(ii) A statement that the agency certifying the claim has complied with all the due process requirements enumerated in 31 U.S.C. 3716(a) and the agency's regulations.

(2) Federal agencies that are owed past due, legally enforceable claims over 180 days delinquent shall certify those claims to the Secretary for collection through the disbursing official offset program. In addition to claims that, by law, may not be collected by administrative offset, the Secretary may exempt any claim or class of claims from this requirement if the Secretary determines exemption is in the best interest of the United States.

(3) Payments that are prohibited by law from being offset are exempt from offset by disbursing officials. Means-tested benefit payments shall be exempted from offset by the Secretary at the request of the head of the agency administering the means-tested benefit program. For the purposes of this section, "means-tested benefit payments" are payments made to an individual under a program where

eligibility is based on a determination that the income, assets, and/or resources of the beneficiary are inadequate to provide the beneficiary with an adequate standard of living without program assistance. The Secretary may exempt other classes of payments upon the written request of the head of the payment certifying or authorizing agency. Such requests may be granted if the Secretary determines that exemption is in the best interests of the Government. For example, offsets that would tend to interfere substantially with, or defeat the purposes of, the payment agency's program may qualify for an exemption.

(4) Benefit payments made under the Social Security Act (42 U.S.C. 301 *et seq.*), part B of the Black Lung Benefits Act (30 U.S.C. 921 *et seq.*), and any law administered by the Railroad Retirement Board (other than tier 2 benefits) may be offset only in accordance with Department of the Treasury regulations, issued in consultation with the Social Security Administration, the Railroad Retirement Board, and the Office of Management and Budget.

(5) The disbursing official shall notify the debtor/payee in writing that an offset has occurred. The notice shall include a description of the payment from which the offset was taken, the amount of offset that was taken, the identity of the creditor agency requesting the offset, and a contact point within the creditor agency who will respond to questions regarding the offset.

(6) If more than one claim is owed by a debtor, funds or money collected by offset shall be applied to the claims in an order that is in the best interests of the United States as determined by the Secretary.

(7) In accordance with 31 U.S.C. 3716(f), the Secretary may waive the provisions in the Computer Matching and Privacy Protection Act of 1988 concerning matching agreements and post-match notification and verification (5 U.S.C. 552a(o) and (p)) for administrative offset under paragraph (c) of this section upon receipt of a certification from a creditor agency that the due process requirements enumerated in 31 U.S.C. 3716(a) have been met. The certification of a claim in accordance with paragraph (c)(1) of this section will satisfy this requirement. If such a waiver is granted, only the Data Integrity Board of the Department of the Treasury is required to oversee any matching activities, in accordance with 31 U.S.C. 3716(g).

(8) Under 31 U.S.C. 3716(h), the Secretary may enter into reciprocal agreements with states for Federal

disbursing officials to collect state debts through offset of Federal payments and for state disbursing officials to collect Federal debts through offset of state payments. States shall have regulations or procedures concerning offsets consistent with those contained in these standards. This section shall not apply to claims or payments that are not subject to offset by Federal law. The Secretary may exempt additional claims and/or payments from these reciprocal agreements if the Secretary determines such exemptions are in the best interest of the Federal Government.

(d) In bankruptcy cases, agencies should seek legal advice from their agency counsel concerning the impact of the Bankruptcy Code, particularly 11 U.S.C. 106, 362, and 553, on pending or contemplated collections by offset.

§ 901.4 Administrative offset against amounts payable from Civil Service Retirement and Disability Fund and the Federal Employee Retirement System.

(a) For claims that have not been certified to the Secretary for administrative offset by disbursing officials, unless otherwise prohibited by law, agencies may request that moneys that are due and payable to a debtor from the Civil Service Retirement and Disability Fund (CSRDF) or the Federal Employee Retirement System (FERS) be administratively offset, in amounts authorized under 5 CFR 831.1807, to collect claims owed to the United States by the debtor. Because disbursing officials of the Department of the Treasury are authorized to offset these payments under § 901.3, requests under this section should be limited to those instances in which offset cannot be accomplished by certification to the Secretary. Requests under this section shall be made to appropriate officials of the Office of Personnel Management (OPM) in accordance with such regulations as are prescribed by the Director of that office at 5 CFR 831.1801–831.1808.

(b) Agencies that decide to request administrative offset under paragraph (a) of this section should make the request as soon as practical after completion of the applicable procedures. Unless the debtor has filed for a refund, there is no specific time period for filing an offset request (see 5 CFR 831.1805), other than the 10-year limitation period described in § 901.3(a)(6). The filing of the request for offset within the 10-year period shall satisfy any requirement that offset be initiated prior to expiration of the statute of limitations. The OPM shall retain the claim for future recovery and make the collection when the debtor

applies for a refund or benefits from the retirement fund. The OPM shall notify the agency if it does not have an application for a refund or benefits from the debtor so that the agency may continue to attempt recovery using other collection mechanisms. The agency shall notify the OPM if it collects the claim using alternative means and wishes to modify or terminate its offset request.

(c) If the offset request has been pending for a year or more when the debtor files an application for a refund or benefits, the OPM shall contact the agency to determine if the claim is still due and the current balance of the claim. If the claim is still due, the agency shall allow the debtor to offer a satisfactory repayment plan in lieu of the offset, upon establishing that changes in the debtor's financial condition would render the offset unjust (see § 901.9 and § 902.2(b) of this chapter).

(d) This section does not authorize the OPM or the Merit Systems Protection Board to review the merits of the requesting agency's determination with respect to the amount and validity of the claim, its determination as to waiver under an applicable statute, or its determination whether to provide a hearing. The Merit Systems Protection Board or any other review panel is not precluded from providing hearing officials, on a reimbursable basis, to other Federal agencies where hearing officials are required by law.

(e) In bankruptcy cases, agencies should seek legal advice from their agency counsel concerning the impact of the Bankruptcy Code, particularly 11 U.S.C. 106, 362 and 553, on pending or contemplated collections by offset.

§ 901.5 Reporting claims.

(a) Agencies shall develop and implement procedures for reporting delinquent claims to credit bureaus and other automated databases. Agencies also may develop procedures to report non-delinquent claims to credit bureaus.

(1) In developing procedures for reporting claims to credit bureaus, agencies shall comply with the Bankruptcy Code and the Privacy Act of 1974, 5 U.S.C. 552a, as amended. Credit bureaus are not subject to the Privacy Act.

(2) Agency procedures for reporting consumer claims to credit bureaus shall be consistent with the due process and other requirements contained in 31 U.S.C. 3711(e). When an agency has given a debtor any of the required notice and review opportunities with respect to a particular claim, the agency need not give notice and review opportunities

duplicating those previously given before reporting that consumer claim to credit bureaus.

(b) Agencies should report delinquent claims to the Department of Housing and Urban Development's Credit Alert Interactive Voice Response System (CAIVRS). For information about participating in the CAIVRS program, agencies should contact the Director of Information Resources Management Policy and Management Division, Office of Information Technology, Department of Housing and Urban Development, 451 7th Street, S.W., Washington, DC 20410.

§ 901.6 Contracting for debt collection agencies and to locate and recover unclaimed assets.

(a) Agencies may contract with collection agencies to recover delinquent claims provided that:

(1) Agencies retain the authority to resolve disputes, compromise claims, suspend or terminate collection activity, and refer claims for litigation;

(2) The collection agency is not allowed to offer the debtor, as an incentive for payment, the opportunity to pay the claim less the collection agency's fee unless the agency has granted such authority prior to the offer;

(3) The collection agency is subject to the Privacy Act of 1974 to the extent specified in 5 U.S.C. 552a(m) and to applicable Federal and state laws and regulations pertaining to debt collection practices, including but not limited to the Fair Debt Collection Practices Act, 15 U.S.C. 1692; and

(4) The collection agency is required to account for all amounts collected.

(b) Except for those agencies specifically exempted by procurement statutes or with collection contracts in effect prior to the award of the government-wide contracts, agencies shall use government-wide debt collection contracts to obtain debt collection services provided by collection agencies.

(c) Agencies may fund collection agency contracts on a fixed-fee basis, that is, by providing for payment of a fixed fee determined without regard to the amount actually collected under the contract, provided that the payment of the fee under this type of contract shall be charged to available agency appropriations or funds.

(d) Unless prohibited by statute, agencies may fund collection agency contracts on a contingent-fee basis, that is, by including a provision in the contract permitting the collection agency to deduct a fee, consistent with prevailing commercial practice, based

on a percentage of the amount collected under the contract.

(e) Agencies also may enter into contracts for locating and recovering unclaimed assets of the United States. Agencies must establish procedures that are acceptable to the Secretary before entering into contracts to recover assets of the United States held by a state government or a financial institution.

§ 901.7 Suspension or revocation of eligibility for loans and loan guaranties, licenses, permits, or privileges.

(a) Unless waived by the head of the agency, agencies are not permitted to extend financial assistance in the form of a loan, loan guarantee, or loan insurance to any person delinquent on a non-tax claim owed to a Federal agency. This prohibition does not apply to disaster loans. The authority to waive the application of this section may be delegated to the Chief Financial Officer and redelegated only to the Deputy Chief Financial Officer of the agency. Agencies may extend credit after the delinquency has been resolved. The Secretary may exempt classes of claims from this prohibition and shall prescribe standards defining when a "delinquency" is "resolved" for purposes of this prohibition.

(b) In non-bankruptcy cases, agencies seeking the collection of statutory penalties, forfeitures, or other types of claims should give serious consideration to the suspension or revocation of licenses, permits, or other privileges for any inexcusable or willful failure of a debtor to pay such a claim in accordance with the agency's regulations or governing procedures. The debtor should be advised in the agency's written demand for payment of the agency's ability to suspend or revoke licenses, permits, or privileges. Any agency making, guaranteeing, insuring, acquiring, or participating in loans should give consideration to suspending or disqualifying any lender, contractor, or broker from doing further business with it or engaging in programs sponsored by it if such a debtor fails to pay its claims to the Government within a reasonable time or if such debtor has been suspended, debarred, or disqualified from participation in a program or activity by another Federal agency. The failure of any surety to honor its obligations in accordance with 31 U.S.C. 9305 should be reported to the Department of the Treasury. The Department of the Treasury shall forward to all interested agencies notification that a surety's certificate of authority to do business with the Government has been revoked or forfeited by the Department.

(c) The suspension or revocation of licenses, permits, or privileges should also extend to Federal programs or activities that are administered by the states on behalf of the Federal Government, to the extent that they affect the Government's ability to collect money or funds owed by debtors. Therefore, states that manage Federal activities, pursuant to approval from the agencies, should ensure that appropriate steps are taken to safeguard against issuing licenses, permits, or privileges to debtors who fail to pay their claims to the Government.

(d) In bankruptcy cases, before advising the debtor of an agency's intention to suspend or revoke licenses, permits, or privileges, agencies should seek legal advice from their agency counsel concerning the impact of the Bankruptcy Code, particularly 11 U.S.C. 362 and 525, which may restrict such action by the Government.

§ 901.8 Liquidation of collateral.

(a) Agencies should liquidate security or collateral and apply the proceeds to the applicable claim(s) due through the exercise of a power of sale in the security instrument or a nonjudicial foreclosure if debtors fail to pay the claim(s) within a reasonable time after demand and such action is in the Government's best interest. Collection from other sources, including liquidation of security or collateral, is not a prerequisite to requiring payment by a surety, insurer, or guarantor unless such action is expressly required by statute or contract.

(b) When an agency learns that a bankruptcy petition has been filed with respect to a debtor, the agency should seek legal advice from their agency counsel concerning the impact of the Bankruptcy Code, including, but not limited to, 11 U.S.C. 362, to determine applicability of the automatic stay and the procedures for obtaining relief from such stay prior to proceeding under paragraph (a) of this section.

§ 901.9 Collection in installments.

(a) Whenever feasible, agencies shall collect the total amount of a claim in one lump sum regardless of the collection mechanism being used. If a debtor is financially unable to pay a claim in one lump sum, agencies may accept payment in regular installments. Agencies should obtain financial statements from debtors who represent that they are unable to pay in one lump sum and independently verify such representations whenever possible (see § 902.2(g) of this chapter). Agencies that agree to accept payments in regular installments should obtain a legally

enforceable written agreement from the debtor that specifies all of the terms of the arrangement and that contains a provision accelerating the claim in the event of default.

(b) The size and frequency of installment payments should bear a reasonable relation to the size of the claim and the debtor's ability to pay. If possible, the installment payments should be sufficient in size and frequency to liquidate the Government's claim in three years or less.

(c) Security for deferred payments should be obtained in appropriate cases. Agencies may accept installment payments notwithstanding the refusal of the debtor to execute a written agreement or to give security, at the agency's option.

§ 901.10 Interest, penalties, and administrative costs.

(a) Except as provided in paragraphs (g), (h), and (i) of this section, agencies shall charge interest, penalties, and administrative costs on claims owed to the United States pursuant to 31 U.S.C. 3717. An agency shall mail or hand-deliver a written notice to the debtor, at the debtor's most recent address available to the agency, explaining the agency's requirements concerning these charges except where these requirements are included in a contractual or repayment agreement. These charges shall continue to accrue until the claim is paid in full or otherwise resolved through compromise, termination, or waiver of the charges.

(b) Agencies shall charge interest on claims owed the United States as follows:

(1) Interest shall accrue from the date of delinquency when all circumstances have occurred to give rise to the claim or as otherwise provided by law.

(2) Unless otherwise established in a contract, repayment agreement, or by statute, the rate of interest charged shall be the rate established annually by the Secretary in accordance with 31 U.S.C. 3717. Pursuant to 31 U.S.C. 3717, an agency may charge a higher rate of interest if it reasonably determines that a higher rate is necessary to protect the rights of the United States. The agency should document the reasons for its determination that the higher rate is necessary.

(3) The rate of interest, as initially charged, shall remain fixed for the duration of the indebtedness. When a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement, the agency may require payment of interest at a new rate that reflects the current value of funds to the

Treasury at the time the new agreement is executed. Interest shall not be compounded, that is, interest shall not be charged on interest, penalties, or administrative costs required by this section. If, however, a debtor defaults on a previous repayment agreement, charges that accrued but were not collected under the defaulted agreement shall be added to the principal to be paid under the new repayment agreement.

(c) Agencies shall assess administrative costs incurred for processing and handling delinquent claims. The calculation of administrative costs should be based on actual costs incurred or upon estimated costs as determined by the assessing agency.

(d) Unless otherwise established in a contract, repayment agreement, or by statute, agencies shall charge a penalty, pursuant to 31 U.S.C. 3717(e)(2), not to exceed six percent a year on the amount due on a claim that is delinquent for more than 90 days. This charge shall accrue from the date of delinquency.

(e) Agencies may increase an "administrative claim" by the cost of living adjustment in lieu of charging interest and penalties under this section. Such increases shall be computed annually. Agencies should use this alternative only when there is a legitimate reason to do so, such as when calculating interest and penalties on a claim would be extremely difficult because of the age of the claim. "Administrative claim" includes, but is not limited to, a claim based on fines, penalties, and overpayments, but does not include a claim based on the extension of Government credit, such as those arising from loans and loan guaranties. The cost of living adjustment is the percentage by which the Consumer Price Index for the month of June of the calendar year preceding the adjustment exceeds the Consumer Price Index for the month of June of the calendar year in which the claim was determined or last adjusted.

(f) When a claim is paid in partial or installment payments, amounts received by the agency shall be applied first to outstanding penalties, second to administrative charges, third to interest, and lastly to principal.

(g) Agencies shall waive the collection of interest and administrative charges imposed pursuant to this section on the portion of the claim that is paid within 30 days after the date on which interest began to accrue. Agencies may extend this 30-day period on a case-by-case basis. In addition, agencies may waive interest, penalties, and administrative costs charged under this section, in

whole or in part, without regard to the amount of the claim, either under the criteria set forth in these standards for the compromise of claims, or if the agency determines that collection of these charges is against equity and good conscience or is not in the best interests of the United States.

(h) Agencies shall set forth in their regulations the circumstances under which interest and related charges will not be imposed for periods during which collection activity has been suspended pending agency review.

(i) Agencies are authorized to impose interest and related charges on claims not subject to 31 U.S.C. 3717 in accordance with the applicable common law.

§ 901.11 Analysis of costs.

Agency collection procedures should provide for periodic comparison of costs incurred and amounts collected. Data on costs and corresponding recovery rates for claims of different types and in various dollar ranges should be used to compare the cost effectiveness of alternative collection techniques, establish guidelines with respect to points at which costs of further collection efforts are likely to exceed recoveries, assist in evaluating offers in compromise, and establish minimum claim amounts below which collection efforts need not be taken.

§ 901.12 Use and disclosure of mailing addresses.

(a) When attempting to locate a debtor in order to collect or compromise a claim under parts 900–904 of this chapter or other authority, agencies may send a request to the Secretary of the Treasury (or designee) to obtain a debtor's mailing address from the records of the Internal Revenue Service.

(b) Agencies are authorized to use mailing addresses obtained under paragraph (a) of this section to enforce collection of a delinquent claim and may disclose such mailing addresses to other agencies and to collection agencies for collection purposes.

§ 901.13 Exemptions.

(a) The preceding sections of this part, to the extent they reflect remedies or procedures prescribed by the Debt Collection Act of 1982 and the Debt Collection Improvement Act of 1996, such as administrative offset, use of credit bureaus, contracting for collection agencies, and interest and related charges, do not apply to claims arising under, or payments made under, the Internal Revenue Code of 1986 as amended (26 U.S.C. 1 *et seq.*); the Social Security Act (42 U.S.C. 301 *et seq.*),

except to the extent provided under 42 U.S.C. 404 and 31 U.S.C. 3716(c); or the tariff laws of the United States. These remedies and procedures, however, may be authorized with respect to claims that are exempt from the Debt Collection Act of 1982 and the Debt Collection Improvement Act of 1996, to the extent that they are authorized under some other statute or the common law.

(b) This section should not be construed as prohibiting the use of these authorities or requirements when collecting claims owed by persons employed by agencies administering the laws cited in paragraph (a) of this section unless the claim arose under those laws.

PART 902—STANDARDS FOR THE COMPROMISE OF CLAIMS

Sec.

902.1—Scope and application.

902.2—Bases for compromise.

902.3—Enforcement policy.

902.4—Joint and several liability.

902.5—Further review of compromise offers.

902.6—Consideration of tax consequences to the Government.

902.7—Mutual releases of debtor and the Government.

Authority: 31 U.S.C. 3711.

§ 902.1 Scope and application.

(a) The standards set forth in this part apply to the compromise of claims pursuant to 31 U.S.C. 3711. An agency may exercise such compromise authority for claims arising out of activities of, or referred or transferred for collection services to, that agency when the amount of the claim then due, exclusive of interest, penalties, and administrative costs, does not exceed \$100,000 or any higher amount authorized by the Attorney General. Agency heads may designate officials within their respective agencies to exercise the authorities referred to in this section.

(b) Unless otherwise provided by law, when the principal balance of a claim, exclusive of interest, penalties, and administrative costs, exceeds \$100,000 or any higher amount authorized by the Attorney General, the authority to accept the compromise rests with the Department of Justice. The agency should evaluate the offer, using the factors set forth in this part. If the agency decides that an offer to compromise any claim in excess of \$100,000 is acceptable to the agency, it shall refer the claim to the appropriate litigating division in the Department of Justice using a Claims Collection Litigation Report (CCLR). Agencies may obtain the CCLR from the Department of Justice or local United States Attorney's

Office. The referral shall include appropriate financial information and a recommendation for the acceptance of the compromise offer. Justice Department approval is not required if the agency decides to reject a compromise offer.

§ 902.2 Bases for compromise.

(a) Agencies may compromise a claim if the Government cannot collect the full amount because:

(1) The debtor is unable to pay the full amount in a reasonable time, as verified through credit reports or other financial information;

(2) The Government is unable to collect the claim in full within a reasonable time by enforced collection proceedings;

(3) The cost of collecting the claim does not justify the enforced collection of the full amount; or

(4) There is significant doubt concerning the Government's ability to prove its case in court.

(b) In determining the debtor's inability to pay, among other relevant factors, agencies should consider the following:

(1) Age and health of the debtor;

(2) Present and potential income;

(3) Inheritance prospects;

(4) The possibility that assets have been concealed or improperly transferred by the debtor; and

(5) The availability of assets or income that may be realized by enforced collection proceedings.

(c) Agencies should verify the debtor's claim of inability to pay by using a credit report and other financial information as provided in paragraph (g) of this section. Agencies may use their own financial information form or may request suitable forms from the Department of Justice or local United States Attorney's Office. Agencies should consider the applicable exemptions available to the debtor under state and Federal law in determining the Government's ability to enforce collection. Agencies also may consider uncertainty as to the price that collateral or other property will bring at forced sale in determining the Government's ability to enforce collection. A compromise effected under this section should be for an amount that bears a reasonable relation to the amount that can be recovered by enforced collection procedures, with regard to the exemptions available to the debtor and the time that collection will take.

(d) If there is significant doubt concerning the Government's ability to prove its case in court for the full amount claimed, either because of the

legal issues involved or because of a bona fide dispute as to the facts, then the amount accepted in compromise of such cases should fairly reflect the probabilities of successful prosecution to judgment, with due regard given to the availability of witnesses and other evidentiary support for the Government's claim. In determining the litigative risks involved, agencies should consider the probable amount of court costs and attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412, that may be imposed against the Government if it is unsuccessful in litigation.

(e) Agencies may compromise a claim if the cost of collecting the claim does not justify the enforced collection of the full amount. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection, with consideration given to the time it will take to effect collection. Collection costs may be a substantial factor in the settlement of small claims. In determining whether the cost of collecting justifies enforced collection of the full amount, agencies should consider whether continued collection of the claim, regardless of cost, is necessary to further an enforcement principle, such as the Government's willingness to pursue aggressively defaulting and uncooperative debtors.

(f) Agencies generally should not accept compromises payable in installments. This is not an advantageous form of compromise in terms of time and administrative expense. If, however, payment of a compromise in installments is necessary, agencies should obtain a legally enforceable written agreement providing that, in the event of default in payment of the compromise, the full original principal balance of the claim prior to compromise, less sums paid thereon, is reinstated. Whenever possible, agencies should also obtain security for repayment in the manner set forth in part 901 of this title.

(g) Agencies should obtain a current financial statement from the debtor, executed under penalty of perjury, showing the debtor's assets and liabilities, income and expenses, as a basis for assessing the merits of a compromise proposal. Agencies also may obtain credit reports or other financial information to assess compromise offers. Agencies may use their own financial information form or may request suitable forms from the Department of Justice or the local United States Attorney's Office.

§ 902.3 Enforcement policy.

Agencies may compromise statutory penalties, forfeitures, or claims established as an aid to enforcement and to compel compliance, pursuant to this part, if the agency's enforcement policy in terms of deterrence and securing compliance, present and future, will be adequately served by the agency's acceptance of the sum to be agreed upon. Accidental or technical violations may be dealt with less severely than willful and substantial violations.

§ 902.4 Joint and several liability.

(a) When two or more debtors are jointly and severally liable, agencies should pursue collection activity against all debtors, as appropriate. Agencies should not attempt to allocate the burden of payment between the debtors but should proceed to liquidate the indebtedness as quickly as possible.

(b) Agencies should ensure that a compromise agreement with one debtor does not release the agency's claim against the remaining debtors. The amount of a compromise with one debtor shall not be considered a precedent or binding in determining the amount that will be required from other debtors jointly and severally liable on the claim.

§ 902.5 Further review of compromise offers.

If an agency receives a firm, written, substantive compromise offer on a claim that comes within its own delegated compromise authority, but is uncertain whether the offer should be accepted, it may refer the offer, using a CCLR accompanied by supporting data and particulars concerning the claim, to the appropriate litigating division in the Department of Justice. The Department of Justice may act upon such an offer or return it to the agency with instructions or advice.

§ 902.6 Consideration of tax consequences to the Government.

In negotiating a compromise with a business concern, agencies should consider the tax consequences to the Government. In particular, agencies should consider requiring a waiver of tax-loss-carry-forward and tax-loss-carry-back rights of the debtor.

§ 902.7 Mutual releases of debtor and the Government.

In all appropriate instances, a compromise that is accepted by an agency should be implemented by means of a mutual release, whereby the debtor is released from further non-tax liability on the compromised claim in consideration of payment in full of the compromise amount. The Government

and its officials, past and present, are released and discharged from any and all claims arising from the same transaction the debtor may have against them.

PART 903—STANDARDS FOR SUSPENDING OR TERMINATING COLLECTION ACTIVITY

Sec.

903.1 Scope and application.

903.2 Suspension of collection activity.

903.3 Termination of collection activity.

903.4 Exception to termination.

Authority: 31 U.S.C. 3711.

§ 903.1 Scope and application.

(a) The standards set forth in this part apply to the suspension or termination of collection activity pursuant to 31 U.S.C. 3711 on claims that do not exceed \$100,000, or such other amount as the Attorney General may direct, exclusive of interest, penalties, and administrative costs, after deducting the amount of partial payments or collections, if any. Prior to referring a claim to the Department of Justice for litigation, agencies may suspend or terminate collection under this part with respect to claims arising out of activities of, or referred or transferred for collection services to, that agency.

(b) If, after deducting the amount of any partial payments or collections, the principal amount of a claim exceeds \$100,000, or such other amount as the Attorney General may direct, exclusive of interest, penalties, and administrative costs, the authority to suspend or terminate rests solely with the Department of Justice. If the agency believes that suspension or termination of any claim in excess of \$100,000 may be appropriate, it shall refer the claim to the appropriate litigating division in the Department of Justice, using the Claims Collection Litigation Report. The referral should specify the reasons for the agency's recommendation. If, prior to referral to the Department of Justice, an agency determines that a claim is plainly erroneous or clearly without legal merit, the agency may terminate collection activity regardless of the amount involved without obtaining Department of Justice concurrence.

§ 903.2 Suspension of collection activity.

(a) Agencies may suspend collection activity on a claim when:

(1) The agency cannot locate the debtor;

(2) The debtor's financial condition is expected to improve; or

(3) The debtor has requested a waiver or review of the claim.

(b) Based on the current financial condition of the debtor, agencies may

suspend collection activity on a claim when the debtor's future prospects justify retention of the claim for periodic review and collection activity and:

(1) The applicable statute of limitations has not expired; or
 (2) Future collection can be effected by administrative offset, notwithstanding the expiration of the applicable statute of limitations for litigation of claims, with due regard to the 10-year limitation for administrative offset prescribed by 31 U.S.C. 3716(e)(1); or

(3) The debtor agrees to pay interest on the amount of the claim on which collection will be suspended, and such suspension is likely to enhance the debtor's ability to pay the full amount of the principal of the claim with interest at a later date.

(c) (1) Agencies shall suspend collection activity during the time required for consideration of the debtor's request for waiver or administrative review of the claim if the statute under which the request is sought prohibits the agency from collecting the debt during that time.

(2) If the statute under which the request is sought does not prohibit collection activity pending consideration of the request, agencies may use discretion, on a case-by-case basis, to suspend collection. Further, an agency ordinarily should suspend collection action upon a request for waiver or review if the agency is prohibited by statute or regulation from issuing a refund of amounts collected prior to agency consideration of the debtor's request. However, an agency should not suspend collection when the agency determines that the request for waiver or review is frivolous or was made primarily to delay collection.

(d) When an agency learns that a bankruptcy petition has been filed with respect to a debtor, in most cases the collection activity on a claim must be suspended, pursuant to the provisions of 11 U.S.C. 362, 1201, and 1301, unless the agency can clearly establish that the automatic stay has been lifted or is no longer in effect. Agencies should seek legal advice immediately from their agency counsel and, if legally permitted, take the necessary legal steps to ensure that no funds or money are paid by the agency to the debtor until relief from the automatic stay is obtained.

§ 903.3 Termination of collection activity.

(a) Agencies may terminate collection activity when:

(1) The agency is unable to collect any substantial amount through its own

efforts or through the efforts of a debt collection center;

(2) The agency is unable to locate the debtor;

(3) Costs of collection are anticipated to exceed the amount recoverable;

(4) The claim is legally without merit or enforcement of the claim is barred by any applicable statute of limitations;

(5) The claim cannot be substantiated; or

(6) The claim against the debtor has been discharged in bankruptcy.

(b) Before terminating collection activity, the agency should have pursued all appropriate means of collection and determined, based upon the results of the collection activity, that the claim is uncollectible. Termination of collection activity ceases active collection of the claim. The termination of collection activity does not preclude the agency from retaining a record of the account for purposes of:

(1) Selling the debt, if the Secretary determines that such sale is in the best interests of the United States;

(2) Pursuing collection at a subsequent date in the event there is a change in the debtor's status or a new collection tool becomes available;

(3) Offsetting against future income or assets not available at the time of termination of collection activity; or

(4) Screening future applicants for prior indebtedness.

(c) Generally, agencies shall terminate collection activity on a claim that has been discharged in bankruptcy, regardless of the amount. Agencies may continue collection activity, however, subject to the provisions of the Bankruptcy Code, for any payments provided under a plan of reorganization. Offset and recoupment rights may survive the discharge of the debtor in bankruptcy and, under some circumstances, claims also may survive the discharge. For example, the claims of an agency that is a known creditor of a debtor may survive a discharge if the agency did not receive formal notice of the proceedings. Agencies should seek legal advice from their agency counsel if they believe they have claims or offsets that may survive the discharge of a debtor.

§ 903.4 Exception to termination.

When a significant enforcement policy is involved, or recovery of a judgment is a prerequisite to the imposition of administrative sanctions, agencies may refer such a claim for litigation even though termination of collection activity might otherwise be appropriate.

PART 904—REFERRALS TO THE DEPARTMENT OF JUSTICE

Sec.

904.1 Prompt referral.

904.2 Claims Collection Litigation Report.

904.3 Preservation of evidence.

904.4 Minimum amount of referrals to the Department of Justice.

Authority: 31 U.S.C. 3711.

§ 904.1 Prompt referral.

(a) Agencies promptly shall refer to the Department of Justice for litigation claims on which aggressive collection activity has been taken in accordance with part 901 of this title and that cannot be compromised, or on which collection activity cannot be suspended or terminated, in accordance with parts 902 and 903 of this chapter. Agencies may refer those claims arising out of activities of, or referred or transferred for collection services to, that agency. Claims for which the principal amount is over \$1,000,000, or such other amount as the Attorney General may direct, exclusive of interest and penalties, shall be referred to the division responsible for litigating such claims at the Department of Justice, Washington, D.C. Claims for which the principal amount is \$1,000,000, or less, or such other amount as the Attorney General may direct, exclusive of interest or penalties, shall be referred to the Department of Justice's Nationwide Central Intake Facility as required by the CCLR instructions. Claims should be referred as early as possible, consistent with aggressive agency collection activity and the observance of the standards contained in parts 900–904 of this chapter, and, in any event, well within the period for initiating timely lawsuits against the debtors. Agencies shall make every effort to refer delinquent claims to the Department of Justice for litigation within one year of the date such claims last became delinquent. In the case of guaranteed or insured loans, agencies should make every effort to refer these delinquent claims to the Department of Justice for litigation within one year from the date the loan was presented to the agency for payment or re-insurance.

(b) The Department of Justice has exclusive jurisdiction over the claims referred to it pursuant to this section. The referring agency shall refrain from having any contact with the debtor and shall direct all debtor inquiries concerning the claim to the Department of Justice. The referring agency shall notify immediately the Department of Justice of any payments credited by the agency to the debtor's account after referral of a claim under this section.

The Department of Justice shall notify the referring agency, in a timely manner, of any payments it receives from the debtor.

§ 904.2 Claims Collection Litigation Report.

(a) Unless excepted by the Department of Justice, agencies shall complete the Claims Collection Litigation Report (CCLR) (See § 902.1(b) of this chapter.), accompanied by a signed Certificate of Indebtedness, to refer all administratively uncollectible claims to the Department of Justice for litigation. Referring agencies shall complete all of the sections of the CCLR appropriate to each claim as required by the CCLR instructions and furnish such other information as may be required in specific cases.

(b) Agencies shall indicate clearly on the CCLR the actions they wish the Department of Justice to take with respect to the referred claim. The CCLR permits the agency to indicate specifically any of a number of litigative activities which the Department of Justice may pursue, including enforced collection, judgment lien only, renew judgment lien only, renew judgment lien and enforce collection, program enforcement, foreclosure only, and foreclosure and deficiency judgment.

(c) Agencies also shall use the CCLR to refer claims to the Department of Justice to obtain that Department's approval of any proposals to compromise the claims or to suspend or terminate agency collection activity.

§ 904.3 Preservation of evidence.

Referring agencies must take care to preserve all files and records that may be needed by the Department of Justice to prove their claims in court. Agencies ordinarily should include certified copies of the documents that form the basis for the claim in the packages referring their claims to the Department of Justice for litigation. Agencies shall provide originals of such documents immediately upon request by the Department of Justice.

§ 904.4 Minimum amount of referrals to the Department of Justice.

(a) Agencies shall not refer for litigation claims of less than \$2,500, exclusive of interest, penalties, and administrative costs, or such other amount as the Attorney General shall from time to time prescribe. The Department of Justice promptly shall notify referring agencies if the Attorney General changes this minimum amount.

(b) Agencies shall not refer claims of less than the minimum amount unless:

(1) Litigation to collect such smaller claims is important to ensure compliance with the agency's policies or programs;

(2) The claim is being referred solely for the purpose of securing a judgment against the debtor, which will be filed as a lien against the debtor's property pursuant to 28 U.S.C. 3201 and returned to the referring agency for enforcement; or

(3) The debtor has the clear ability to pay the claim and the Government effectively can enforce payment, with due regard for the exemptions available to the debtor under state and Federal law and the judicial remedies available to the Government. Agencies should consult with the Financial Litigation Staff of the Executive Office for United States Attorneys in the Department of Justice prior to referring claims valued at less than the minimum amount.

Dated: December 16, 1997.

Robert E. Rubin,

Secretary of the Treasury.

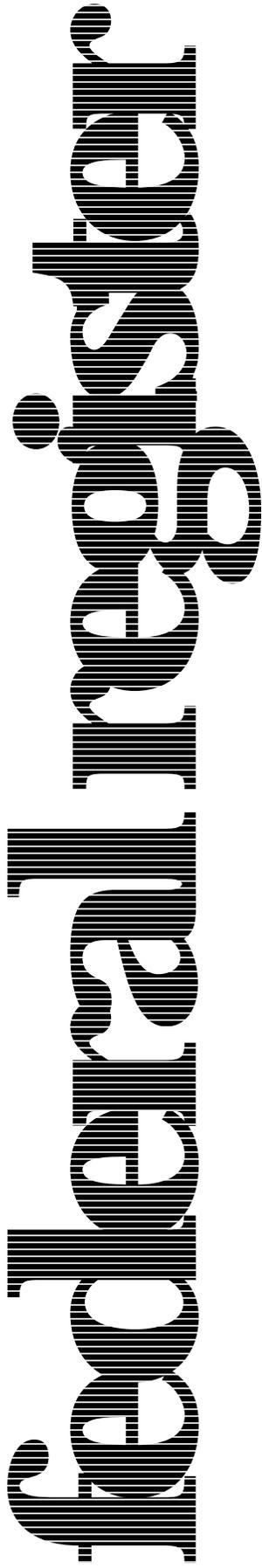
Dated: November 28, 1997.

Janet Reno,

Attorney General of the United States.

[FR Doc. 97-33338 Filed 12-30-97; 8:45 am]

BILLING CODE 4810-35-P, 4410-26-P



Wednesday
December 31, 1997

Part VIII

**Department of
Education**

**The Program To Encourage Minority
Students To Become Teachers; Notice**

DEPARTMENT OF EDUCATION

[CFDA-No.: 84-262A]

The Program To Encourage Minority Students To Become Teachers**AGENCY:** Department of Education.**ACTION:** Withdrawal of closing date notice inviting applications for new awards for fiscal year (FY) 1998.

SUMMARY: On October 7, 1997 a notice was published in the **Federal Register** (62 FR 52435) inviting applications for new awards under the Program to Encourage Minority Students to Become Teachers for FY 1998. However, Congress appropriated \$2,212,000, which is only enough funding for continuation grants. The Department of Education withdraws the previous notice inviting application for new awards for FY 1998 under the Program to Encourage Minority Students to Become Teachers. The Department will not make new awards in fiscal year 1998.

FOR FURTHER INFORMATION CONTACT: Vicki V. Payne, U.S. Department of

Education, 600 Independence Avenue, SW., Portals Building, Suite CY-80, Washington, DC 20202-5335. Telephone: (202) 260-3291. FAX: (202) 401-7432. Individuals who use a telecommunication device for 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. Internet address: vicki_payne@ed.gov

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.

Electronic Access To this Document

Anyone may view the document, as well as all other Department of Education documents published in the **Federal Register**, in text of portable document format (pdf) on the World Wide Web at either of the following sites:

<http://ocfo.ed.gov/fedreg/htm>
<http://www.ed.gov/news.html>

To use the pdf you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the preceding sites. If you have questions about using the pdf, call the U.S. Government Printing Office toll free at 1-888-293-6498.

Anyone may also view these documents in text copy only on an electronic bulletin board of the Department. Telephone: (202) 219-1511 or, toll free 1-800-222-4922. The documents are located under Option G—Files/Announcements, Bulletins and Press Releases.

Note: The official version of this document is the document published in the **Federal Register**.

Program Authority: 20 U.S.C. 1112, 1112a-1112e.

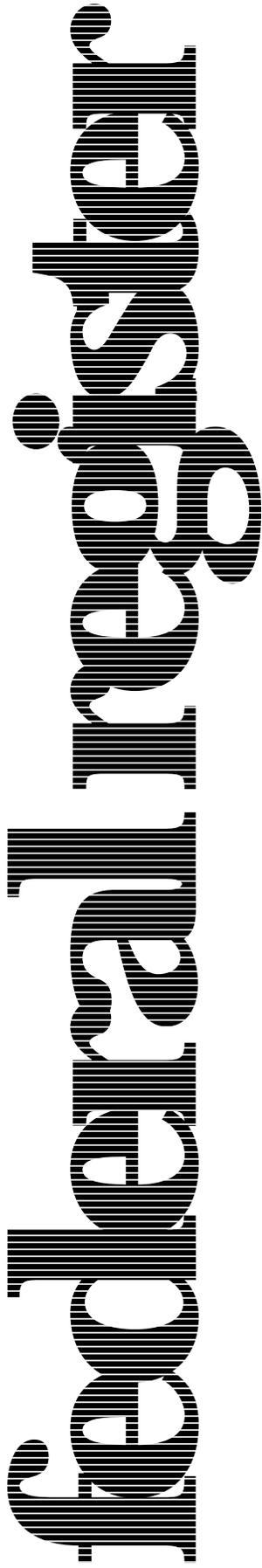
Dated: December 24, 1997.

David A. Longanecker,

Assistant Secretary for Postsecondary Education.

[FR Doc. 97-34134 Filed 12-30-97; 8:45 am]

BILLING CODE 4000-01-M



Wednesday
December 31, 1997

Part IX

**Department of
Interior**

Bureau of Reclamation

43 CFR Part 414

**Offstream Storage of Colorado River
Water and Interstate Redemption of
Storage Credits in the Lower Division
States; Proposed Rule**

DEPARTMENT OF THE INTERIOR**Bureau of Reclamation****43 CFR Part 414**

RIN 1006-AA40

Offstream Storage of Colorado River Water and Interstate Redemption of Storage Credits in the Lower Division States

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: Under this proposed rule Colorado River water may be stored offstream in the Lower Basin to permit future interstate use of Colorado River water in the Lower Division States (Arizona, California, or Nevada). This proposed rule would establish the procedural framework under which authorized entities (for example, a State-authorized water bank) in any Lower Division State could store offstream Colorado River water to develop storage credits associated with that water, and redeem those water storage credits within the Lower Division. This rule would increase the efficiency, flexibility, and certainty in Colorado River management.

DATES: Comments:

Any comments must be received by Reclamation at the address below on or before March 2, 1998.

Request for Public Hearings

Upon request, Reclamation will hold public hearings on the proposed rule in Las Vegas, Nevada, Phoenix, Arizona and Ontario, California. Reclamation will accept requests for public hearings until 4:00 p.m. Pacific time on January 30, 1998.

ADDRESSES:**Comments**

If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to Bureau of Reclamation, Administrative Record, Lower Colorado Regional Office, P.O. Box 61470, Boulder City, NV 89006-1470. You may also comment via the Internet at bjohnson@lc.usbr.gov (see Electronic Access and Filing Addresses under **SUPPLEMENTARY INFORMATION**).

In addition, you may hand-deliver comments to Bureau of Reclamation, Administrative Record, Lower Colorado Regional Office, 400 Railroad Avenue, Boulder City, Nevada.

Comments, including names and street addresses of respondents, will be available for public review at this

address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, Pacific time, except holidays. If you wish to request that Reclamation consider withholding your name or street address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your comment. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

Public Hearings

If Reclamation receives a request to schedule public hearings in Las Vegas, Nevada; Phoenix, Arizona; or Ontario, California, Reclamation will hold such hearings at the following locations: McCarran International Airport, 5757 Wayne Newton Boulevard, Commissioner's Meeting Room, 5th Floor, Terminal 1, Las Vegas, Nevada; Bureau of Indian Affairs conference room, 2 Arizona Center, 400 North 5th Street, 12th Floor, Phoenix, Arizona; Red Lion Hotel, 222 North Vineyard, Ontario, California. Upon request, Reclamation will consider holding public hearings in other locations, at times and on dates that Reclamation will announce prior to the hearings.

Request for public hearings and request to participate in public hearings

Submit requests for public hearings and requests to participate in public hearings orally or in writing to Mr. Dale E. Ensminger, Boulder Canyon Operations Office, Bureau of Reclamation, P.O. Box 61470, Boulder City, Nevada 89006-1470, telephone (702) 293-8659.

FOR FURTHER INFORMATION CONTACT: Mr. Dale Ensminger, telephone (702) 293-8659.

SUPPLEMENTARY INFORMATION: This section provides the following information:

- I. Public Comment Procedures
 - Written Comments
 - Electronic Access and Filing Addresses
 - Public Hearings
- II. Background
- III. Purpose of this Rule
- IV. Prior Rulemaking Proceedings
- V. Section-by-Section Analysis of Proposed Rule
- VI. Procedural Matters
 - Environmental Compliance
 - Paperwork Reduction Act
 - Regulatory Flexibility Act
 - Unfunded Mandates Reform Act of 1995
 - Executive Order 12612, Federalism Assessment

Executive Order 12630, Taking Implications Analysis
Executive Order 12866, Regulatory Planning and Review
Author
List of Subjects in 43 CFR Part 414

I. Public Comment Procedures*Written Comments*

Written comments on the proposed rule should be specific, should be confined to issues pertinent to the proposed rule, and should explain the reason for any recommended change. Where possible, comments should reference the specific section or paragraph of the proposed rule that the commenter is addressing. Reclamation will not necessarily consider or include in the Administrative Record for the final rule comments which Reclamation receives after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

Electronic Access and Filing Addresses

If you comment via the Internet at bjohnson@lc.usbr.gov (see **ADDRESSES**), please submit comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include "attn: AC1006-AA40" and your name and return address in your Internet message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at (702) 293-8411.

Public Hearings

Individuals who wish to attend but not testify at any hearing should contact the person identified under **FOR FURTHER INFORMATION CONTACT** beforehand to verify that Reclamation will hold the hearing. Reclamation will hold public hearings on the proposed rule as specified above if a member of the public requests a public hearing. Any person who desires to participate at a hearing at a particular location should inform Mr. Dale E. Ensminger under **FOR FURTHER INFORMATION CONTACT** either orally or in writing of the desired hearing location by 4:00 p.m. Pacific time January 30, 1998. If no one has contacted Mr. Dale E. Ensminger to express an interest in participating in a hearing at a given location by that date, Reclamation will not hold that hearing. If only one person expresses an interest, Reclamation may hold a public meeting rather than a hearing, and Reclamation will include the results in the Administrative Record.

If Reclamation holds a hearing, Reclamation will continue the hearing until all persons wishing to testify have

had an opportunity to do so. In order to assist the transcriber and to ensure an accurate record, Reclamation requests that each person who testifies at a hearing give the transcriber a copy of that testimony. In order to assist Reclamation in hearing preparation, Reclamation also requests that each person who plans to testify submit to Reclamation at the address previously specified (see ADDRESSES) an advance copy of that testimony.

II. Background

The Colorado River serves as a source of water for irrigation, domestic, and other uses in the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and in the Republic of Mexico. The initial apportionment of water from the Colorado River was made by an interstate compact, the Colorado River Compact, dated November 24, 1922 (Compact). The Compact became effective in 1929 following ratification by six states and approval by the Congress of the United States. The State of Arizona became the final State to ratify the Compact in 1944. The Compact defined the Colorado River Basin and divided the seven States into two basins, an Upper Basin and a Lower Basin. The Compact apportioned to each basin, in perpetuity, the exclusive beneficial consumptive use of 7.5 million acre-feet (maf) of water. Under the Compact, "consumptive use" means diversions of water from the mainstream of the Colorado River, including water drawn from the mainstream by underground pumping, less return flow to the river.

The Lower Basin includes those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry (Arizona), a point in the mainstream of the Colorado River 1 mile below the mouth of the Paria River. The Compact also grouped the seven States into two divisions, the Upper Division and the Lower Division. The Lower Division consists of the States of Arizona, California, and Nevada. All mainstream Colorado River water apportioned by the Compact to the Lower Basin is divided among the three Lower Division States. All mainstream Colorado River waters apportioned to the Lower Basin, except for a few thousand acre-feet apportioned to the State of Arizona, have been allocated to specific entities and, except for certain Federal establishments, placed under permanent water delivery contracts with the Secretary for irrigation or domestic use. These entities include irrigation

districts, water districts, municipalities, Federal establishments including Indian reservations, public institutions, private water companies, and individuals.

The Supreme Court of the United States, in its Opinion of June 3, 1963, (373 U.S. 546) and Decree entered March 9, 1964 (376 U.S. 340) (Decree), in the case of *Arizona v. California, et al.*, confirmed that the Secretary was vested with sufficient authority and charged with the responsibility to direct, manage, and coordinate the operation of dams and related works on the Colorado River in the Lower Basin. The Supreme Court concluded, among other things, that the Secretary derives significant authority from the contract authority under section 5 of the Boulder Canyon Project Act of 1928 (45 Stat. 1057, 43 U.S.C. 617) (BCPA) that requires water users in the Lower Basin to have a contract with the Secretary. The Supreme Court further concluded that Congress intended the Secretary, principally through the Secretary's section 5 contract power, to carry out the allocation of the waters of the mainstream of the Colorado River among the Lower Basin States and to decide which water users within each State would get water and on what terms. Accordingly, the Secretary acts as water master of the Colorado River in the Lower Basin.

The Decree excludes Federal establishments from the BCPA requirement for a contract with the Secretary, but the water allocated to a Federal establishment is included within the apportionment of the Lower Division State in which the Federal establishment is located. Waters available to a Lower Division State within its apportionment but with a priority date later than June 25, 1929, have been allocated by the Secretary to water users within that State after consultation with the State.

Many Colorado River water rights originated as "perfected rights" that are specified in the Decree as rights acquired in accordance with State law and exercised by the actual diversion of a specific quantity of water for beneficial use on a defined area of land or to definite municipal or industrial works, and in addition will include water rights created by the reservation of mainstream water for the use of Federal establishments under Federal law whether or not the water has been applied to beneficial use. The highest priority Colorado River water rights are present perfected rights (PPR's) that the Decree defines as those perfected rights existing on June 25, 1929 (the effective date of the BCPA). The Decree also recognizes Federal Indian reserved

rights for the quantity of water necessary to irrigate all the practically irrigable acreage on five Indian reservations along the Colorado River. The Decree defines the rights of Indian and other Federal reservations to be Federal establishment PPR's. PPR's are important because in any year in which there is less than 7.5 maf of Colorado River water available for consumptive use in the Lower Basin States, PPR's will be satisfied first in the order of their priority without regard to State lines.

In 1996, Arizona enacted a State-authorized program establishing an Arizona State Water bank that would allow offstream storage of Colorado River water and subsequent interstate delivery of such stored water through redemption of credits pursuant to Interstate Storage Agreements. In the future, other Lower Division States may enact comparable measures.

III. Purpose of this Rule

Arrangements that facilitate more efficient use of the limited Colorado River water resource are beneficial to all water users. This proposed rule addresses offstream storage of Colorado River water and development of storage credits by authorized entities within the Lower Division States. Authorized entities include a State water banking authority, or other entity of a Lower Division State holding entitlements to Colorado River water, expressly authorized pursuant to applicable laws of Lower Division States to: (1) Enter into Interstate Storage Agreements; (2) develop intentionally created unused apportionment; (3) acquire the right to use intentionally created unused apportionment; or (4) develop or redeem storage credits for the benefit of an authorized entity in another Lower Division State.

The rule will establish a framework for the Secretary to follow in approving and administering interstate agreements to allow offstream storage and contractual distribution of Colorado River water, and thereby encourage voluntary interstate water transactions among the Lower Division States. Such voluntary water transactions, including interstate contractual distribution of Colorado River water consistent with the BCPA and the requirements of the Supreme Court of the United States in its Decree entered March 9, 1964 (376 U.S. 340) (Decree) in *Arizona v. California, et al.*, can help to satisfy regional water demands. The proposed rule does not deal with intrastate storage and distribution of water.

The proposed rule will foster prudent water management in the Lower Division States by allowing authorized

entities of Consuming States, pursuant to an interstate agreement, to store Colorado River water offstream, to receive storage credits for the stored water, and to recover this water for future use. The offstream storage will be accomplished through an authorized entity of the Storing State. The water to be stored will be basic apportionment from the Storing State or unused basic apportionment or unused surplus apportionment of the Consuming State. The proposed rule is based on the understanding that this type of offstream storage is a beneficial consumptive use of Colorado River water. The rule is permissive in nature and is intended to encourage and facilitate these voluntary water transactions.

The proposed rule is designed to improve the Secretary's ability to fulfill his responsibilities to manage the Lower Basin of the Colorado River on a more efficient basis. This proposed rule is expected to be a first step toward improving the efficiency associated with management of the Colorado River in the Lower Basin.

While taking action in the form of this proposed rule to assist the States of the Lower Division of the Colorado River to meet their water needs, the Department also acknowledges its responsibilities to the Indian Tribes in the Lower Division. The Department is interested in finding ways that the Tribes may more fully benefit from the water rights they hold in the Lower Basin, and in protecting the availability of water supplies to which these rights attach.

The focus in the proposed rule is on the use of State-authorized entities, including water banks, as a vehicle for authorizing interstate storage and redemption of storage credits associated with Colorado River water. The Department believes that the interstate water storage and deliveries permitted by these rules can be implemented without compromising its responsibilities toward, and in fact may lead to benefits to, the Indian Tribes. The Department's proposed reliance on State-authorized entities is predicated, in part, on its expectation that these entities will be operated in a fashion that provides an opportunity for Indian Tribes to participate in storage and similar activities. In this regard the Department notes that the State of Arizona is examining "mechanisms that will enable Indian communities that hold entitlements to Colorado River water to participate in water banking with the Arizona Water Banking Authority." Arizona Laws 1996, ch. 308, § 27. The Department encourages Arizona and the other Lower Division

States to implement programs within the existing Law of the River that will allow the Tribes to more fully benefit from their water rights.

In addition, the Department will be mindful of the need to protect local tribal water resources when fulfilling its role as set forth in these interstate water banking rules. Tribes as well as other water rights holders may, for example, have concerns regarding the potential impacts of future groundwater withdrawals from a water bank on their water rights. The Department wants to work with Lower Division States and authorized entities banking Colorado River water to ensure that water stored and recovered for interstate delivery does not adversely impact those local tribal water resources. Under the proposed rule the Secretary will, when determining whether to approve a proposed interstate transaction, take into account, among other things, the potential impacts of a proposed transaction on water rights holders, including Indian Tribes. See § 414.3(b).

Finally, this proposal does not address, and is not intended to govern the exercise of, whatever authority the Secretary of the Interior has to consider and implement, in appropriate situations, tribal storage and water transfer activities.

Except as described below, the Secretary, in reviewing an Interstate Storage Agreement, will not focus on the price associated with utilization of storage credits or other financial details agreed to by the authorized entities as willing sellers and willing buyers. The transaction must leave the United States in no worse a financial position than if the transaction had not occurred. When it is operationally feasible to do so, United States facilities may be available for use in storing, delivering, and distributing Colorado River water offstream under the proposed rule to the extent that the United States is fully reimbursed for relevant capital, interest, and operation and maintenance costs. Approval to deliver Colorado River water cannot obligate the Federal Government to incur extra non-reimbursable expenses to store water or deliver it to a new location. Further, existing Reclamation law requires adjustment in repayment terms when use of the water shifts from a non-interest bearing category to an interest-bearing category, such as from agriculture use to municipal and industrial use. Additionally, if pumping power is needed to affect a given transaction, the parties to the transaction must provide or pay for such power, and may have to secure it from non-Federal sources.

The actions and transactions contemplated in the proposed rule are within the current authority of the Secretary, the BCPA, and the Decree. Under BCPA, with the exception of Federal Establishments PPR's, no authorized entity may receive Colorado River water except in accordance with a contract with the Secretary. Where appropriate to implement the Interstate Storage Agreement, the Secretary will contract for water deliveries under Section 5 of the Boulder Canyon Project Act. In accordance with specific approvals, offstream storage and development of storage credits for interstate purposes have already taken place on a limited basis. The proposed rule will provide a standard set of procedures to be used in place of the ad hoc processes that have been used for previous interstate water transactions. These procedures will provide greater flexibility, certainty, and assurance to all parties potentially interested in entering into interstate transactions for storage of Colorado River water and use or redemption of storage credits. This increased certainty is expected to promote more efficient management of the Colorado River and facilitate additional voluntary water transactions of this type among Lower Basin water users.

The Secretary will consider the implications of the proposed Interstate Storage Agreement for the financial interests of the United States and the United States will require the parties who benefit from the transactions to fund the United States' reasonable costs to evaluate, process, and/or approve transactions entered into under this rule. In considering a request for approval of an Interstate Storage Agreement for offstream storage of Colorado River water and use or redemption of storage credits, the Secretary will consider, among other relevant factors: applicable law; applicable contracts; potential effects on trust resources; potential effects on contractors or Federal entitlement holders, including Indian and non-Indian PPR holders and other Indian tribes; potential effects on other third parties; environmental impacts and effects on threatened and endangered species; comments from interested parties, particularly parties who may be affected by the proposed action; and other relevant factors, including the implications of the proposed Interstate Storage Agreement for the financial interests of the United States.

IV. Prior Rulemaking Proceedings

In 1991, 1992, and 1994, Reclamation developed draft rules for administering

Colorado River water entitlements and distributed drafts to known interested parties. Among other things, those drafts included provisions that would have allowed instream storage of water saved, interstate transfer of conserved water, reductions in entitlements due to nonuse, and proposed water conservation criteria. Because of the controversy associated with these proposals, Reclamation suspended further work on the rule in late 1994 to allow the Lower Division States time to develop a consensus on storage and interstate transfer issues. While a consensus on all of these issues has not been achieved, it appears that there is strong support and demand for a new, more narrowly focused rule that will facilitate offstream water storage and interstate water delivery programs in the Lower Basin.

V. Section by section analysis of the Proposed Rule

Section 414.1. Purpose

Under this proposed rule Colorado River water may be stored offstream to permit future interstate use of Colorado River water. This proposed rule would establish the procedural framework under which authorized entities of any of the Lower Division States (Arizona, California, or Nevada) could store offstream through another authorized entity (for example, State-authorized water banks) in any Lower Division State, Colorado River water allocated but not taken by water entitlement holders within the State where the storage occurs, or unused basic apportionment, or surplus apportionment of the Consuming State. The authorized entity of the Storing State would develop, on behalf of the authorized entity in the consuming state, storage credits associated with that water. When unused apportionment is intentionally created to satisfy a request for delivery of water from storage credits, the authorized entity must ensure that its State's consumptive use is decreased by a quantity sufficient to offset the quantity of storage credits that are to be made available as unused apportionment by the Secretary and delivered for use in another Lower Division State in accordance with Article II(B)(6) of the Decree. This rule would increase efficiency, flexibility, and certainty in Colorado River management.

The proposed rule establishes procedures for interstate contractual distribution derived from credits for Colorado River water stored offstream. These procedures will apply to all holders of entitlements to use Colorado

River water in the Lower Division States. The proposed rule allows authorized entities of any Lower Division State to enter into agreements with authorized entities of another Lower Division State to store Colorado River water offstream, develop storage credits, and redeem storage credits associated with that water, subject to the approval of the Secretary.

Section 414.2. Definitions

This section of the rule defines terms that are used in the rule. The following terms are defined by or derived from the Decree: basic apportionment, Colorado River water, consumptive use, mainstream, surplus apportionment, and unused apportionment. Most of the other terms were defined for the purposes of this rule to establish a common understanding of terms relating to storage of water.

All Interstate Storage Agreements for offstream storage of Colorado River water and the interstate redemption of storage credits under this proposed rule would be executed by a State water banking authority, or other entities holding entitlements to Colorado River water, expressly authorized pursuant to applicable laws of Lower Division States to: (1) enter into Interstate Storage Agreements; (2) develop intentionally created unused apportionment; (3) acquire the right to use intentionally created unused apportionment; or (4) develop or redeem storage credits for the benefit of an authorized entity in another Lower Division State. States are encouraged to define the term "authorized entity" broadly so as not to exclude appropriate entities potentially interested in entering into arrangements to develop or acquire water storage credits on an interstate basis. Constraints placed on "authorized entities" will have the likely effect of reducing the net benefits associated with the proposed rule.

The proposed rule includes a definition of intentionally created unused apportionment of Colorado River water. As proposed, it does not specify what measures or actions may be used to create such apportionment. In Section 414.3, the Secretary specifies the information that he will consider in approving any proposed Interstate Storage Agreement. Subparagraph (a)(7) of Section 414.3 directs that any request for approval of a proposed Interstate Storage Agreement, "specify which action the authorized entity will take to create intentionally created unused apportionment." The Department seeks comment on the issue of whether the final definition of intentionally created unused apportionment should specify

what types of measures or actions the Secretary would approve as intentionally created unused apportionment. Comments should identify actions that would be adequate to demonstrate the development of intentionally created unused apportionment.

Section 414.3. Interstate Storage Agreements and Redemption of Storage Credits

The proposed rule would authorize offstream storage of Colorado River water in the Lower Division States by State-authorized entities on the basis of approved Interstate Storage Agreements. Under this section of the proposed rule, a Lower Division State authorized entity could establish a water bank and store Colorado River water on behalf of authorized entities in the other two Lower Division States. Such water banks could store water consisting of water allocated but not taken by water entitlement holders within the Storing State, or unused basic apportionment, or surplus apportionment of the Consuming State.

The proposed rule assumes that there are two ways to "store" water in offstream storage: direct storage or indirect storage. Direct storage can be accomplished by putting water into an underground aquifer at an underground water storage facility or in a surface reservoir located off the mainstream of the Colorado River. Indirect storage can be accomplished through groundwater savings that result from replacing established groundwater use with Colorado River water.

A central feature of the procedures in the proposed rule is the Interstate Storage Agreement. Under this section of the proposed rule, the authorized entities of two or more Lower Division States may enter into an agreement to store Colorado River water offstream. To become effective, these agreements require approval by the Secretary. To obtain the approval of the Secretary, each Interstate Storage Agreement must contain a description of the following: quantity of water to be stored; location of storage; type and source of water; accounting, reporting and use of storage credits associated with water to be stored; end use of water to be stored; and the extent to which Federal facilities or resources will be used to deliver or store Colorado River water stored offstream.

Under the proposed rule, the Secretary has 120 days to approve or disapprove such agreements unless the Secretary determines that additional time is necessary to review the agreement because the proposal

involves significant environmental compliance activities or other issues. In reviewing any proposed Interstate Storage Agreement, the Secretary will consider the following: applicable law; applicable contracts; potential effects on trust resources; potential effects on contractors or Federal entitlement holders, including Indian and non-Indian present perfected rights (PPR) holders and other Indian tribes; potential effects on third parties; environmental impacts and effects on threatened and endangered species; comments from interested parties, particularly parties who may be affected by the proposed action; and other relevant factors, including the implications of the proposed Interstate Storage Agreement for the financial interests of the United States.

Under this section of the proposed rule, storage credits are developed for the benefit of the authorized entity for which Colorado River water is placed in offstream storage. The storage credits entitle the entity to recover water at a later date. The authorized entities involved in the transaction will account for the water diverted and stored offstream under an Interstate Storage Agreement, and prior to any redemption of storage credits certify to the Secretary that water associated with storage credits has been stored. The Secretary must be satisfied that necessary actions have been taken to develop intentionally created unused apportionment. Once this determination has been made, the Secretary will make available this intentionally created unused apportionment for use by the authorized entity of the Consuming State consistent with the BCPA, Article II(B)(6) of the Decree, and all other applicable laws. Also, under this section, Interstate Storage Agreements may be assigned in whole or in part to authorized entities upon the agreement of the parties to the Interstate Storage Agreement and approval of the Secretary.

Section 414.4. Reporting Requirements and Accounting for Storage Credits

Under this section of the proposed rule, each authorized entity that has stored Colorado River water offstream for interstate purposes must submit a report to the Secretary by January 31 of each year. The report will specify the quantity of Colorado River water that was stored during the previous year and is recoverable in future years and the number of storage credits associated with that water. Under this proposed rule, the Department has assumed that storage credits would be equal to the quantity of water stored less deductions

and losses from storage that includes losses attributable to evaporation or percolation or water required by State law to remain in an aquifer. Such reports will also specify the balance of Colorado River storage credits redeemed during the previous year and the balance of such credits that remain recoverable as of December 31 of the previous year. This reporting requirement will not impose a burden on the authorized entity of a Storing State because the authorized entity will need to maintain these records for its own purposes.

Under the proposed rule, the United States will continue to fulfill the requirements of the Decree that requires the Secretary to prepare and maintain, at least annually, complete, detailed, and accurate records of diversions of water from the mainstream, return flow of such water to the mainstream, and consumptive use of such water. Under the proposed rule, the water diverted and stored offstream will be accounted for as consumptively used in that same year in the Storing State, in accordance with Article V of the Decree. The accounting records would also reflect an equivalent quantity of storage credits in the Storing State. When unused apportionment is intentionally created to satisfy a request for delivery of water from storage credits, the authorized entity must take action to ensure that its State's consumptive use is decreased by a quantity sufficient to offset the quantity of water made available as unused apportionment by the Secretary and delivered for use in another Lower Division State. After the authorized entity confirms in writing to the Secretary the quantity of water to be delivered for use in the Consuming State and includes documentation of actions taken to intentionally create a like quantity of unused apportionment, the Secretary will declare unused apportionment available within the Storing State and allocate that unused apportionment to the Consuming State to allow recovery of the storage credits. The intentionally created unused apportionment so made available to the Consuming State by the Secretary will be accounted for as consumptively used when Colorado River water in the amount of the intentionally created unused apportionment is released for use in the Consuming State, in accordance with Article V of the Decree.

Under the proposed rule and in accordance with Article II(B)(6) of the Decree, the Secretary may release in any one year any Colorado River water that is apportioned for consumptive use in a Lower Division State but which will be unused in that State for consumptive

use in another Lower Division States in that same year. The water so released for consumptive use in the other Lower Division States is unused apportionment.

For example, under the proposed rule, when storage credits are redeemed, Colorado River water that would otherwise be supplied to a water user in a Storing State could be supplied from offstream storage in that State. The Storing State will reduce its Colorado River water use in accordance with the approved Interstate Storage Agreement. Then the Secretary, in accordance with the terms of Article II (B)(6) of the Decree, will make the Colorado River water available to the Consuming State. No other Lower Division State or other user in the Storing State will be able to claim the water since the Secretary is authorized under Article II (B)(6) of the Decree to make such water available, and the Secretary will have agreed to implement the terms of the Interstate Storage Agreement. No other Lower Division State will be eligible to receive water made available to the Consuming State under that Interstate Storage Agreement.

Section 414.5. Water Quality

This section of the rule is a disclaimer which states that except for specific water quality responsibilities that are established for the Secretary by Federal law, the Secretary does not guarantee the quality of water released or delivered through Federal facilities. Water quality will be monitored by the Environmental Protection Agency and the Army Corps of Engineers and will be subject to State or Tribal jurisdiction, as appropriate, in accordance with the Clean Water Act.

Section 414.6 Environmental Compliance

Under the proposed rule, the Secretary is responsible for ensuring the actions taken under the rule comply with the National Environmental Policy Act of 1969, as amended (NEPA), the Endangered Species Act of 1973, as amended (ESA), and will integrate the requirements of other statutes, laws, and executive orders as required for Federal actions taken under this proposed rule.

Federal actions requiring environmental compliance may include, but are not limited to, approval of transactions that entail changes in the place or quantity of water diversions necessary to store a Lower Division State's water. In evaluating a proposed Federal action taken under this part for compliance with the National Environmental Policy Act, the Secretary will consider effects on natural and

other resources as identified in the Bureau of Reclamation's National Environmental Policy Act (NEPA) Handbook and other relevant environmental laws and regulations. The parties to a proposed transaction would be responsible for completing environmental compliance documentation in accordance with the standards set forth in the Bureau of Reclamation's NEPA Handbook and subject to Reclamation approval prior to the Secretary's approval of the proposed action.

The Department, through Reclamation, will collect in advance the estimated costs incurred by the United States in evaluating, processing, or approving the action from the persons or entities who would benefit from a proposed action under this rule.

VI. Procedural Matters

Environmental Compliance

Reclamation has prepared a draft environmental assessment (DEA). Reclamation has placed the DEA on file in the Reclamation Administrative Record at the address specified previously. The public is invited to review the DEA by contacting Reclamation at the addresses listed above (see ADDRESSES) and suggests that anyone wishing to submit comments in response to the DEA do so in accordance with the *Written Comments* section above.

Compliance with NEPA, the ESA, and other relevant statutes, laws, and executive orders will be completed for future Federal actions taken under this rule to ensure that any action authorized or carried out by the Secretary does not jeopardize the continued existence of any threatened or endangered species, does not adversely modify or destroy a critical habitat, and is analyzed by an appropriate environmental document. Consultation and coordination between Reclamation, the Fish and Wildlife Service, other agencies, and interested parties will be completed on a case-by-case basis.

Paperwork Reduction Act

The Department believes that this rule does not contain information collection requirements that the Office of Management and Budget (OMB) must approve under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* This proposed rule is geographically limited to the States of Arizona, California and Nevada. The proposed rule covers authorized entities that would store Colorado River water off the mainstream of the Colorado River. The information to be reported will be compiled by the

authorized entities in the course of their normal business and the annual reports to the Secretary will not impose any significant time or cost burden. It is estimated that each respondent would need one hour at an estimated cost of \$20 to complete the annual reporting requirement. Moreover, the Department assumes that there will never be an industry-wide collection of information and assumes that there will always be fewer than 10 entities required to report information. Notwithstanding these circumstances, the Department intends to seek information collection approval from the OMB, pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

Regulatory Flexibility Act

Congress enacted The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. An initial RFA analysis has been completed. This rule will not impose any direct cost on small entities. A benefit-cost analysis was completed and concludes that the proposed rule does not impose significant or unique impact upon small governments (including Indian communities), small entities such as water purveyors, water districts, or associations, or individual entitlement holders.

Unfunded Mandates Reform Act of 1995

The adoption of 43 CFR part 414 will not result in any unfunded mandate to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year.

Executive Order 12612, Federalism Assessment

The proposed rule does not alter the relationship between the Federal Government and the States under the Decree nor does it alter the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, the Secretary has determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12630, Takings Implications Analysis

The proposed rule does not represent a government action capable of interfering with constitutionally

protected property rights. This rule does not impose additional fiscal burdens on the public. This rule would not result in physical invasion or occupancy of private property or substantially affect its value or use. The rule would not result in any Federal action that would place a restriction on a use of private property. The rule does not affect a Colorado River water entitlement holder's right to use its full water entitlement. Under the proposed rule, an authorized entity may store unused Colorado River water available from an entitlement holder's water rights only if the water right holder does not use or store that water on its own behalf. Under the proposed rule, the only water that can be used to satisfy storage credits is unused apportionment created by the forbearance of a use which otherwise would have occurred. Therefore, the Department of the Interior has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 12866, Regulatory Planning and Review

This proposed rule is a significant regulatory action under section 3(f)(4) of Executive Order 12866 because it raises novel legal or policy issues. Executive Order 12866 requires an assessment of potential costs and benefits under section 6(a)(3) of that Executive Order. Reclamation's benefit-cost analysis determines that the proposed rule does not impose significant or unique impacts upon small governments (including Indian communities), small entities such as water purveyors or associations, or even individual water entitlement holders.

The proposed rule authorizes the distribution of Colorado River water storage credits created by off stream storage on an interstate basis.

California and Nevada are looking for alternative water supplies to satisfy the increasing demands of economic development and population growth. The proposed rule may provide an opportunity for Colorado River water users in Nevada to experience a marginal costs savings in securing alternative supplies. Off stream storage of Colorado River water and interstate distribution of Colorado River water storage credits are voluntary actions. Should the costs of the procedures proposed in the rule to facilitate these transactions be greater than the costs of other alternative water supplies, California and Nevada would probably select the lower cost alternatives.

The benefit-cost analysis estimated net economic benefits of the proposed rule on a State and regional level using different water supply models and discount rates. The different water supply models represent potential water supply conditions on the Colorado River that affect interstate demand for water from an Arizona water bank and the magnitude of economic benefits obtained from that water. The discount rates used in the analysis were 5.75% (the average rate on municipal bonds in 1996, which is a rate faced by major water purveyors in California and Nevada) and 8.27% (the prime rate in 1996, which more accurately represents the cost of money).

Under a conservative water supply scenario characterized by 19 years of normal conditions on the Colorado River and one surplus year, discounted net economic benefits at the regional level ranged from \$12.8 to \$61.2 million at 5.75% and \$9.5 to \$47.7 million at 8.27%. Under a water supply scenario characterized by 10 years of surplus conditions on the Colorado River, the net economic benefits range from \$550,255 to \$4.8 million at 5.75% and \$350,789 to \$3.1 million at 8.27%. Under the scenario characterized by 10 surplus years, demand for banked water is relatively low because the Lower Division States can meet most of their water needs with diversions from the mainstream.

Reclamation has placed the full analysis on file in the Reclamation Administrative Record at the address specified previously (see ADDRESSES).

Author

The principal author of this rule is Mr. Dale E. Ensminger, Boulder Canyon Operations Office, Bureau of Reclamation, P.O. Box 61470, Boulder City, Nevada 89006-1470, telephone (702) 293-8659.

List of Subjects in 43 CFR Part 414

Administrative practice and procedure, Environmental protection, Public lands, Reporting and recordkeeping requirements, Water bank program, Water resources, Water storage, Water supply, Water quality.

Dated: December 22, 1997.

Patricia J. Beneke,

Assistant Secretary—Water and Science.

For the reasons stated in the preamble, the Bureau of Reclamation proposes to add a new part 414 to title 43 of the Code of Federal Regulations as follows:

PART 414—OFFSTREAM STORAGE OF COLORADO RIVER WATER AND INTERSTATE REDEMPTION STORAGE CREDITS IN THE LOWER DIVISION STATES

Sec.

414.1 Purpose.

414.2 Definitions.

414.3 Interstate storage agreements and redemption of storage credits.

414.4 Reporting requirements and accounting for storage credits.

414.5 Water quality.

414.6 Environmental compliance.

Authority: 43 U.S.C. 617; 43 U.S.C. 391; 43 U.S.C. 485; 43 U.S.C. 1501; 5 U.S.C. 553; 373 U.S. 546; 376 U.S. 340.

§ 414.1 Purpose.

This part sets forth the procedural framework for approval by the Secretary of the Interior of interstate agreements for the offstream storage of Colorado River water in the Lower Division States by State-authorized entities consistent with State law. In accordance with the Secretary's authority under Article II (B) (6) of the Decree entered March 9, 1964 (376 U.S. 340), in the case of *Arizona v. California, et al.* as supplemented and amended, this part also includes the procedural framework to develop and redeem storage credits associated with Colorado River water stored offstream by authorized entities consistent with State law. This part does not address intrastate storage or distribution of water not subject to an Interstate Storage Agreement.

§ 414.2 Definitions.

The following definitions, listed alphabetically, apply to this part:

Authorized entity means a State water banking authority, or other entity of a Lower Division State holding entitlements to Colorado River water, expressly authorized pursuant to applicable laws of Lower Division States to:

(1) Enter into Interstate Storage Agreements;

(2) Develop intentionally created unused apportionment;

(3) Acquire the right to use intentionally created unused apportionment; or

(4) Develop or redeem storage credits for the benefit of an authorized entity in another Lower Division State.

Basic apportionment means the Colorado River water apportioned to each Lower Division State when sufficient water is available for release, as determined by the Secretary of the Interior, to satisfy 7.5 million acre-feet (maf) of annual consumptive use in the Lower Division States. The annual basic apportionment for the Lower Division

States is 2.8 maf of consumptive use for the State of Arizona, 4.4 maf of consumptive use for the State of California, and 0.3 maf of consumptive use for the State of Nevada.

Colorado River water means water in or withdrawn from the mainstream.

Consuming State means a Lower Division State where water made available by redeeming storage credits is or will be used.

Consumptive use means diversions from the Colorado River less such return flow to the river as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation. Consumptive use from the mainstream within the Lower Division States includes all consumptive use of water from the mainstream, including water drawn from the mainstream by underground pumping. The Mexican treaty obligation is set forth in the February 3, 1944, Water Treaty between Mexico and the United States, including supplements and associated Minutes of the International Boundary and Water Commission.

Contractor means any person or entity in the States of Arizona, California, or Nevada who has a valid contract or agreement with the United States for the delivery of Colorado River water.

Decree means the decree entered March 9, 1964, by the Supreme Court in *Arizona v. California, et al.*, 373 U.S. 546 (1963), as supplemented or amended.

Entitlement means an authorization to beneficially use Colorado River water pursuant to:

- (1) A decreed right,
- (2) A contract with the United States through the Secretary, or
- (3) A reservation of water from the Secretary.

Federal entitlement holder means a Federal agency or Indian tribe identified in Article II(D) of the Decree as having an entitlement for the beneficial use of Colorado River water.

Intentionally created unused apportionment means unused apportionment that is created solely as a result of an agreement within a Storing State for the purposes of making Colorado River water available for use in a Consuming State in fulfillment of a request for redemption of storage credits pursuant to an Interstate Storage Agreement.

Interstate storage agreement means an agreement, consistent with this part, that provides for offstream storage of Colorado River water in a Storing State for authorized entities in Consuming States and for the recovery of the stored water. An Interstate Storage Agreement will be among authorized entities of two

or more Lower Division States and may include other entities that are determined to be appropriate to the performance and enforcement of the agreement under Federal law and the respective laws of the Storing State and the Consuming State.

Lower Division States means the States of Arizona, California, and Nevada.

Mainstream means the main channel of the Colorado River downstream from Lee Ferry within the United States, including the reservoirs behind dams on the main channel, and Senator Wash Reservoir off the main channel.

Offstream storage means storage in a surface reservoir off of the mainstream or in a groundwater aquifer. Offstream storage also includes indirect recharge when mainstream water is exchanged for groundwater that otherwise would be pumped and consumed.

Present perfected right or PPR means perfected rights defined by the Decree, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act (45 Stat. 1057, 43 U.S.C. 617) (BCPA). All present perfected rights are listed in the supplemental decrees entered January 9, 1979, and April 16, 1984, by the United States Supreme Court in *Arizona v. California, et al.*, as amended or supplemented.

Secretary means the Secretary of the Interior or an authorized representative.

Storage Credit refers to an accounting device to reflect a quantity of Colorado River water that is stored offstream.

Storing State means a Lower Division State in which water is stored off the mainstream.

Surplus apportionment means the Colorado River water apportioned to each Lower Division State when sufficient water is available for release, as determined by the Secretary, to satisfy in excess of 7.5 maf of annual consumptive use in the Lower Division States.

Unused apportionment means Colorado River water within a Lower Division State's basic or surplus apportionment, or both, which is not put to beneficial consumptive use during that year within that State.

Unused entitlement means any Colorado River water that is made available to but not scheduled and used by an entitlement holder during the year for which it is made available.

§ 414.3 Interstate storage agreements and redemption of storage credits.

(a) *Interstate storage agreements.* In accordance with Article II(B)(6) of the Decree, authorized entities of two or more Lower Division States may enter into Interstate Storage Agreements

subject to the approval of the Secretary in accordance with paragraph (b) of this section. An Interstate Storage Agreement will allow an authorized entity in a Storing State to store unused entitlement and/or unused apportionment for the credit of an authorized entity located in a Consuming State and will provide for the subsequent redemption of the credit. Such an agreement must:

(1) Specify the quantity of Colorado River water to be stored, by which authorized entity it will be stored, the Lower Division State in which it is to be stored, and the storage facility(ies) in which it will be stored.

(2) Specify whether the water to be stored will be basic apportionment from the Storing State or unused basic apportionment or unused surplus apportionment of the Consuming State. If it is to be unused apportionment, it may only be made available from the Consuming State and the agreement must so specify.

(3) Specify the quantity of storage credits associated with water stored offstream that will be available to the authorized entity in the Consuming State at the time water is actually stored under the agreement.

(4) Specify that accumulated storage credits may not be redeemed within the same calendar year in which the water that generated those credits was stored offstream.

(5) Specify that the authorized entity in the Consuming State will provide notice to the Lower Division States and to the Secretary no later than November 30 of its intention to request delivery of a specific quantity of Colorado River water by redeeming accumulated storage credits in the following calendar year.

(6) Specify that the authorized entity of a Storing State, after receiving a notice of intention to redeem offstream storage credits, will take actions to ensure that the Storing State's consumptive use of Colorado River water will be decreased by a quantity sufficient to develop intentionally created unused apportionment to offset the delivery of Colorado River water for use in the Consuming State in fulfillment of the storage credits.

(7) Specify which actions the authorized entity will take to develop intentionally created unused apportionment.

(8) Specify that the authorized entity of the Storing State must certify to the Secretary that intentionally created unused apportionment has been developed that would not otherwise exist and that the authorized entity will request the Secretary to make available

that quantity of Colorado River water for use in the Consuming State pursuant to Article II(B)(6) of the Decree to redeem storage credits.

(9) Indemnify the United States, its employees, agents, subcontractors, successors, or assigns from loss or claim for damages and from liability to persons or property, direct or indirect, and of any nature whatsoever arising by reason of the actions taken by the United States in accordance with this part.

(10) Identify the extent to which facilities constructed or financed by the United States will be used to store, convey, or distribute water associated with an Interstate Storage Agreement.

(b) *Approval by the Secretary.* A request for approval of an Interstate Storage Agreement should be made in writing to the Secretary. The request will be acknowledged in writing by the Secretary within 10 business days of receipt. The request should include copies of the proposed interstate agreement and any additional supporting data that clearly set forth the details of the proposed transaction. In reviewing the proposed interstate agreement, the Secretary will consider, among other relevant factors: applicable law; applicable contracts; potential effects on trust resources; potential effects on water rights holders, including contractors, Federal entitlement holders, Indian and non-Indian PPR holders, and other Indian tribes; potential effects on third parties; environmental impacts and effects on threatened and endangered species; comments from interested parties, particularly parties who may be affected by the proposed action; and other relevant factors, including the direct or indirect consequences of the proposed Interstate Storage Agreement on the financial interests of the United States. The Secretary will respond to the request within 120 days. However, if the proposal involves significant environmental compliance activities or other issues such that 120 days is an insufficient period in which to respond, the Secretary will communicate this to all parties to the proposed request and set out a schedule by which such work will be completed or such issues resolved. In that case, the Secretary will render a decision within 90 days of completion of the environmental compliance activities and resolution of other issues (if applicable). Where appropriate to implement the Interstate Storage Agreement, the Secretary will contract for water deliveries under Section 5 of the Boulder Canyon Project Act.

(c) *Stored water.* The authorized entity of the Storing State will account for the water diverted and stored offstream under an Interstate Storage Agreement, and prior to any redemption of storage credits will certify to the Secretary that water associated with storage credits has been stored.

(d) *Redemption of storage credits.* The Secretary must be satisfied that necessary actions have been taken to develop intentionally created unused apportionment for redemption of storage credits. Once this determination has been made, the Secretary will make available a quantity of Colorado River water to redeem those credits consistent with the BCPA, Article II(B)(6) of the Decree, and all other applicable laws. Intentionally created unused apportionment that is developed by the authorized entity of the Storing State will be made available to the authorized entity of the Consuming State and will not be made available to other contractors or Federal entitlement holders.

(e) *Assignment.* Interstate Storage Agreements may be assigned in whole or in part to authorized entities upon the agreement of the parties to the Interstate Storage Agreement and upon the approval by the Secretary consistent with the requirements of paragraph (b) of this section.

§ 414.4 Reporting requirements and accounting for storage credits.

Each authorized entity will annually report to the Secretary, by January 31, the quantity of water it diverted and stored on behalf of authorized users in other Lower Division States and the balance of storage credits remaining in

interstate storage for each entity as of December 31 of the prior calendar year. This water will be accounted for, in the records maintained by the Secretary under Article V of the Decree, as a consumptive use in the Storing State for the year in which it is stored. The Secretary will maintain individual balances of storage credits established by the offstream storage of water under Interstate Storage Agreements. The balances will be reduced when intentionally created unused apportionment is developed by the authorized entity in a Storing State and made available for use in a Consuming State. In the records maintained by the Secretary under Article V of the Decree, the taking of unused apportionment for use in a Consuming State by an authorized entity in redemption of its storage credits will be accounted for as consumptive use by the Consuming State of unused apportionment in the year the water is used, the same as with any other unused apportionment taken by that State.

§ 414.5 Water quality.

(a) *No guarantee of water quality.* The Secretary does not warrant the quality of water released or delivered under interstate agreements, and the United States will not be liable for damages of any kind resulting from water quality problems. The United States will not be under any obligation to construct or furnish water treatment facilities to maintain or improve water quality standards.

(b) *Water quality standards.* All contractors or Federal entitlement holders, in diverting, using, and returning Colorado River water, must

comply with all relevant water pollution laws and regulations of the United States, the Storing State, and the Consuming State, and must obtain all applicable permits or licenses from the appropriate Federal, State, or local authorities regarding water quality and water pollution matters.

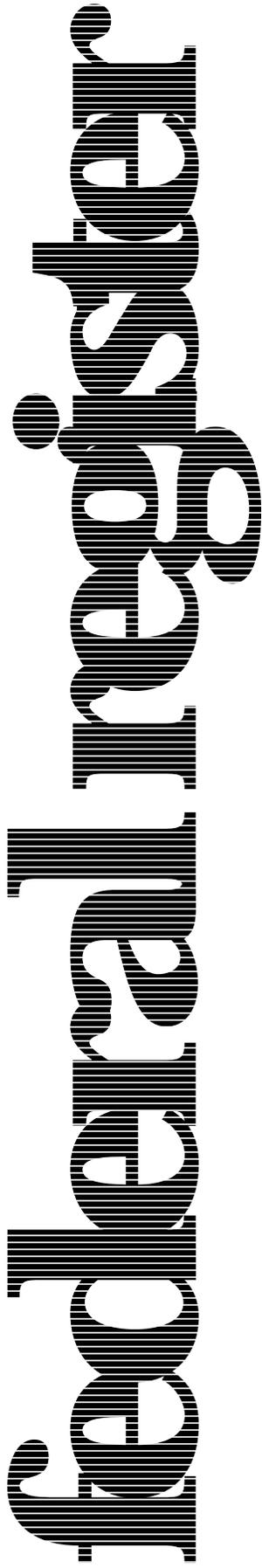
§ 414.6 Environmental compliance.

(a) *Ensuring environmental compliance.* The Secretary will ensure that environmental compliance is completed. The Secretary will be responsible for ensuring compliance with the National Environmental Policy Act of 1969, as amended, and the Endangered Species Act of 1973, as amended, and will integrate the requirements of other statutes, laws, and executive orders as required for Federal actions taken under this part.

(b) *Responsibility for environmental compliance work.* Authorized entities requesting Secretarial approval of an interstate transaction pursuant to this part may prepare the appropriate documentation and compliance document for a proposed Federal action such as approving a proposed interstate transaction. Such compliance documents must meet the standards set forth in Reclamation's National Environmental Policy Act Handbook before they can be adopted. All costs incurred by the United States in evaluating, processing, and/or approving transactions entered into under this part must be funded by the parties that propose the transaction.

[FR Doc. 97-33990 Filed 12-30-97; 8:45 am]

BILLING CODE 4310-94-P



Wednesday
December 31, 1997

Part X

**Department of
Energy**

Office of the Secretary

**10 CFR Part 1045
Nuclear Classification and
Declassification; Final Rule**

DEPARTMENT OF ENERGY

Office of the Secretary

10 CFR Part 1045

RIN 1901-AA21

Nuclear Classification and Declassification

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE or Department) is publishing a final rule revising its regulations concerning the policies and procedures on the identification of classified information. These regulations establish the policies and procedures implementing the requirements of the Atomic Energy Act of 1954 for the classification and declassification of information as Restricted Data and Formerly Restricted Data and also implement those requirements of Executive Order 12958 concerning National Security Information that directly affect the public. These regulations prescribe procedures to be used by all agencies of the Federal Government in the identification of Restricted Data and Formerly Restricted Data, and describe how members of the public may request DOE National Security Information and appeal DOE classification decisions regarding such requests.

EFFECTIVE DATE: This rule becomes effective June 29, 1998.

FOR FURTHER INFORMATION CONTACT: Janet O'Connell, Department of Energy, Office of Declassification, 19901 Germantown Road, Germantown, Maryland 20874-1290, (301) 903-1113, or John Gurney, Department of Energy, Office of the Assistant General Counsel for National Security, Washington, DC 20585, (202) 586-8269.

SUPPLEMENTARY INFORMATION:

I. Introduction

II. Background

III. Discussion of Comments

IV. Rulemaking Requirements

- A. Review Under Executive Order 12866
- B. Review Under Paperwork Reduction Act
- C. Review Under the National Environmental Policy Act
- D. Review Under Executive Order 12612
- E. Review Under Executive Order 12988
- F. Review Under the Unfunded Mandates Reform Act of 1995
- G. Review Under the Regulatory Flexibility Act

H. Review Under Small Business Regulatory Enforcement Fairness Act of 1996

V. Freedom of Information Act Considerations

I. Introduction

On January 15, 1997, DOE published a Notice of Proposed Rulemaking (62 FR 2251) establishing Government-wide requirements for the classification and declassification of Restricted Data (RD) and Formerly Restricted Data (FRD) and implementing those provisions of Executive Order (E.O.) 12958 that directly affect the public. Under the Atomic Energy Act of 1954, 42 U.S.C. 2011, the Department of Energy is responsible for the classification and declassification of nuclear-related information. Such information is classified as RD. The DOE has joint responsibility with the Department of Defense (DoD) for the classification and declassification of information which relates primarily to the military utilization of nuclear weapons. Nuclear weapons related military utilization information which can be protected as National Security Information (NSI) in the United States is classified as FRD. FRD is protected in the same manner as RD when transferred to another country or regional defense organization such as NATO. These regulations specify the policies and procedures that organizations and individuals shall follow in classifying and declassifying RD and FRD.

In formulating these policies and procedures, DOE has solicited and made use of a significant number of recommendations from the public and other agencies of the Federal Government (hereafter referred to as "agencies"); and the Department has embraced the goal of "open policies openly arrived at." The resulting regulation balances the Department's commitment to maximize the amount of information made available to the public with the need to protect national security and prevent nuclear proliferation.

Section 5.6(c) of E.O. 12958, "Classified National Security Information," requires agencies that originate or handle classified information to promulgate implementing regulations which shall be published in the **Federal Register** to the extent that they affect members of the public. Subpart D of today's rule implements those requirements of the Executive order and was approved by the Information Security Oversight Office (ISOO) on July 5, 1996, in accordance with section 5.3(b)(3) of E.O. 12958.

II. Background

This regulation is written in four Subparts. Subpart A provides general information on the management of the RD classification system, including the responsibilities of DOE and all agencies with access to RD and FRD. Subpart B describes procedures for the classification and declassification of RD and FRD information (as contrasted with classification and declassification of documents containing such information). Requirements and procedures for the review, classification, and declassification of RD and FRD documents to be implemented by all agencies are described in Subpart C. Lastly, Subpart D provides DOE requirements and procedures concerning NSI to the extent that they affect the public, as required by Executive Order 12958.

This regulation incorporates recommendations of the Classification Policy Study of July 1992, the Atomic Energy Act Study of January 1994, and the National Academy of Sciences Review of 1995, as well as some of the overarching issues in the Fundamental Classification Policy Review of January 1997. Copies of these studies are available from the contact person in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

III. Discussion of Comments*a. Introduction*

In response to the Notice of Proposed Rulemaking, DOE received thirty-nine (39) written comments. Twenty-three (23) were indications of no comment or concurrences. In addition, there were two commenters at a public hearing held on February 26, 1997. This section describes comments, discusses changes to the proposed rule which are incorporated in the final regulation, and provides an explanation of the comments which were evaluated, but not adopted by the Department. This section discusses both revisions to the proposed rule made in response to public comments and also those made by the DOE Office of Declassification of its own initiative.

b. General Comments

The following describes general comments received. One commenter recommended that the regulation "address more specifically how to handle RD/FRD documents which are interspersed among documents of agencies other than DOE." DOE concurs that additional guidance in this area is needed. However, the Department does not believe that this regulation is the appropriate vehicle for providing such

detail. The External Referral Working Group of the Intelligence Community Declassification Program Manager's Council is focusing on implementing E.O. 12958 and is developing standards which will address this issue.

One commenter had a number of comments relating to definitions used in sections 1045.3, 1045.4, and 1045.13. The commenter stated that the terms "reasonably," "could be expected," "exceptionally grave damage," "serious damage," and "damage" as contained in the definitions for Top Secret, Secret and Confidential, were highly subjective and vague and recommended that these terms be deleted or replaced. All of these definitions and terms are taken directly from E.O. 12958, with the exception of "undue risk" which is taken directly from the Atomic Energy Act of 1954, as amended. While the terms in E.O. 12958 strictly apply only to NSI, the Department believes it is clearly in the national interest that the RD system, to the extent possible, preserve commonality of terms with the more widely applied NSI system. The use of subjective modifiers such as "reasonably," "exceptionally grave damage" or "undue risk" is a reflection of the fact that classification is not an exact science. These terms, together with the phrase "could be expected," indicate that decisions by well-informed, trained officials should be based on their educated analysis of the probable future impact on the national security.

This commenter also indicated that declassification means a determination and does not necessarily result in DOE releasing the information into the public domain and can often require a specific waiting period which can last for months before the information is actually released. It can indeed take time to move information or documents from the classified domain and make them accessible to the public. The Department is pursuing a number of initiatives to reduce the amount of time it takes to declassify and release information to the public. The Department does not believe that this matter should be addressed by today's regulation.

One commenter noted that the definitions for "information" and "Government information" are too broad. The definition for "information" is appropriate and is included because it is important to distinguish, within the RD system, information from the medium of conveyance, e.g., documents or pictures. The definition of "Government information" is taken directly from E.O. 12958.

The commenter also suggested that classification guides are needed to limit what information can be classified and that it was unfortunate that these guides are themselves classified and unavailable to the public. DOE agrees that classification guides are needed and relies upon them as the primary source for derivative classification decisions. Classification guides provide the approved, detailed instructions describing what specific information is or is not classified, and the rationale for the instructions. By their very nature, classification guides must contain detailed descriptions of the information they are designed to protect. This level of detail in the guides greatly enhances their sensitivity, and requires that they, for the most part, be classified. Consequently, the public disclosure of classification guides would provide information that is harmful to United States nonproliferation and national security objectives.

The commenter indicated that the term "national security" was vague. The definition for this term is derived directly from E.O. 12958. Commenting on the definition of "Restricted Data," the commenter stated that the word "concerning" is too vague and broad. The definition for "Restricted Data" is derived directly from the Atomic Energy Act. One commenter expressed concern with the definition of "Special Nuclear Material" indicating that it would allow innocuous materials to be classified. The definition for "Special Nuclear Material" is derived directly from the Atomic Energy Act. Section 51 of the Act stipulates that to determine whether other material is special nuclear material in addition to that specified in the Act's definition of special nuclear material, the Department must find the material to be capable of releasing substantial amounts of atomic energy, that such a determination is in the interest of the common defense and security, and that the President must have expressly assented in writing to the determination. Finally, such designation would be reviewed by the Congress. Based on these requirements, it is unlikely that an innocuous material could be designated as a special nuclear material.

The commenter expressed concern that the word "relating" as used in section 1045.4 (c) is overly vague. The Department will apply the plain English definition of the term "relating" in this context.

As used in section 1045.13 (d) and (e), one commenter considered the terms "concerns" and "unduly" as subjective. The DOE intends to apply the plain English definitions for these terms.

Plain English definitions of the word "concern" include: "to relate to; be connected with; be of interest or importance to; or have an important relation or bearing." This is what is meant here. The word "unduly" is used to indicate that different classification levels have different dissemination restrictions, and the classification level assigned should be appropriate to the adjudged sensitivity.

One commenter suggests that in sections 1045.4 and 1045.8, DOE is using this rule to impose its classification system throughout the Government, to avoid such steps as the automatic 25 year declassification of NSI documents required by E.O. 12958, and to exert rights to oversee the operations of other Government agencies. In particular, the commenter emphasizes his belief that the oversight function should come from outside the agency. DOE is indeed using this rule to implement its responsibility to manage the Restricted Data system Government-wide, as authorized by section 161(p) of the Atomic Energy Act. DOE welcomes public scrutiny of its operations, but cannot delegate its statutory responsibility for oversight of the RD system to the general public or another agency. Additionally, DOE is in compliance with all provisions of E.O. 12958; it is noted that RD and FRD are exempt from automatic declassification under section 6.1 of the E.O.

c. Section-by-Section Analysis

The following describes the public comments which were received, in the order of the sections to which they pertain.

One commenter recommended that the Director of Declassification, the Director of Security Affairs, and the NRC have added to their list of responsibilities a requirement that they must interact with stakeholders to better understand the public's information needs. In response to this comment, DOE has added paragraph 1045.4(a)(8) to the responsibilities of the Director of Declassification which reads, "Periodically meet with interested members of the public to solicit input for the classification and declassification program."

Commenting on section 1045.5, one commenter asked for more detail concerning what is meant by the phrase "this part." The phrase "this part" refers to the entire regulation; Part 1045 of title 10 of the Code of Federal Regulations (i.e., 10 CFR Part 1045). This commenter also requested that section 1045.5 be modified to provide further detail concerning the possible sanctions and the administrative authorities. It is not

appropriate to specify in the regulation all details concerning administrative sanctions or other penalties since they are dependent on the offense committed and the circumstances. One commenter suggested that the Openness Advisory Panel include a representative of the stakeholder community. While the composition of the panel is not indicated in section 1045.6, all of its current members are public stakeholders and the charter of the panel indicates that members will be selected from the public stakeholder community. One commenter suggested that it is important that the deliberations of the Panel be open. All Openness Advisory Panel meetings held to date have been open to the public. Minutes of the meetings are available in the Department's FOIA reading room and on the Internet at the DOE OpenNet web site.

One commenter suggested that the Openness Advisory Panel be provided with more access to the inner workings of the DOE classification system, and the panel's recommendations should be made public at an early stage. The Office of Declassification has ensured that the panel has access to any information it needs on DOE classification policies or procedures, including access to classified information since many of the panel members have security clearances. Further, DOE is working to ensure that the panel's recommendations are made available to the public as soon as they are finalized.

One commenter suggested that the Openness Advisory Panel should be involved in overseeing the individual performance of DOE personnel in classification activities. The role of the Openness Advisory Panel is advisory, not oversight.

One commenter suggested that section 1045.7 be modified to ensure that persons making suggestions or complaints do not face any adverse action. DOE accepted this suggestion and 1045.7 (d) was added, "Under no circumstances shall persons be subject to retribution for making a suggestion or complaint regarding classification and declassification policies or programs."

One commenter recommended that the Openness Coordinator, specified in section 1045.7, make available to the general public a summary of all suggestions and complaints received, and of DOE actions taken in response. DOE plans to include this information in its publicly available annual report on the implementation of this regulation.

In response to a comment that performance requirements, specifically

related to timeliness of performing classification related activities in response to public requests, be included throughout the rule, the Department has added a new section, section 1045.9., to Subpart A to ensure a system is in place which measures the individual performance of those personnel who classify or declassify RD documents on a regular basis. This provision provides the framework for individual accountability and is the basis for a more credible classification system. A similar requirement exists for NSI classification under E.O. 12958.

In a comment on section 1045.12, one commenter suggested that a publicly available log of declassification actions should be maintained. DOE has been publishing such a log under the title, "Restricted Data Declassification Decisions 1946 to the Present."

Commenting on section 1045.13, one commenter objected to the inclusion of the word "solely" regarding the prohibition on classifying information bearing solely on the physical environment or public or worker health and safety. It is DOE's intent to be as open as possible with information concerning the physical environment or public or worker health and safety. However, when information of this nature cannot be revealed without also revealing other information harmful to the national security, its classification is not prohibited under section 1045.13. The regulation allows for such circumstances while the use of the word "solely" prohibits the classification of information that only concerns the physical environment or public or worker health and safety.

One commenter noted that section 1045.15 presents presumptions concerning nuclear waste created from the production of nuclear weapons, but does not deal with the waste produced when weapons are detonated underground at the Nevada Test Site (NTS). The commenter's particular interest is in the spatial distribution of waste. Section 1045.15 (b) and (c) point out that not all areas are covered by the presumptions, and that inclusion of information in a presumption does not mean that new information in this category is or is not classified. In 1994, the Department declassified the total waste burden, by isotope, left at NTS as of January 1, 1994, by all nuclear tests detonated below or within 100 meters of the water table. To provide some spatial resolution, tests conducted on Pahute Mesa were aggregated separately from the total for all other testing areas. No additional presumptions were added in response to this comment.

Concerning section 1045.16, one commenter stated that, "guidelines will have to be more specific to ensure that old conservative habits do not prevail resulting in many documents either remaining classified unnecessarily, or classified needlessly. The guidelines also need to be clear regarding imprecise concepts such as 'significant doubt', 'whether the information is so widely known,' etc., for the same reasons." These terms and concepts are not applied to the numerous document classification and declassification decisions which are made, only to initial information classification and declassification decisions. Document classification and declassification decisions are based primarily on classification guides which indicate whether or not certain items of information are classified. DOE has not developed guidelines for these concepts and definitions, primarily because DOE uses the plain English meaning of these terms and applies them to information on a case by case basis.

Regarding section 1045.17, one commenter requested that DOE explain why it included only a limited list of examples of information which is classified at the various classification levels. The list provided in the regulation is intended to be merely illustrative, not exhaustive.

One commenter objected to section 1045.18, permitting DOE to classify newly generated information in a previously declassified subject area and suggested that it will create a massive abuse of Government classification powers and should be deleted. This authority will only allow DOE to judiciously and responsibly classify new information which truly warrants protection in the interests of national security. Information already in the public domain will not be reclassified.

One commenter recommended that, "a requirement be included that all proposals for declassification and changes in controlled status be periodically reported to the public through the **Federal Register**, and that progress in pursuing such proposals also be reported." Controlled is a term applied to information that is unclassified but not publicly releasable. This regulation does not address controlled status, but section 1045.19, requires that the DOE Director of Declassification prepare a publicly available report on an annual basis on the implementation of this regulation. This report will include information on declassification proposals and progress with such proposals.

With respect to section 1045.19, one commenter suggested that the

classifier's duty station or agency, address, and telephone number be marked on a document classified as RD or FRD. Section 1045.40 (b) (4) requires that the classifier's name and position or title be marked on the document, if not the same as the document originator or signator. DOE does not believe the additional information requested needs to be included in the marking, since DOE can determine this information if the classifier's name and position or title is provided.

DOE received three comments concerning the Department's authority to classify RD which is generated outside of the Government, as specified in section 1045.21. One commenter indicated that this provision does not adequately define what type of RD will be covered and is a violation of first amendment rights. Another commenter suggested that exercising this authority may place sensitive information at risk and recommended that elimination of the "born classified" provisions of the Atomic Energy Act be sought through Congressional action. DOE evaluated these comments and determined that under the Atomic Energy Act, the Department has the authority and the obligation to apply this section to any information properly classified as RD. It should be noted that this authority would be exercised only in the case of a very serious national security matter where no other course of action is possible. In the past 50 years, this authority has been exercised only a few times.

DOE received three comments concerning the No Comment Policy as described in section 1045.22. One commenter indicated that this section was too broad. Another commenter suggested that the policy should not apply to all persons with access to RD and FRD because they are not sufficiently knowledgeable of all classified information in the public domain and recommended that this policy be restricted to Government officials and weapon designers. DOE will apply this policy to all individuals with access to RD and FRD. DOE cannot limit this policy to apply only to Government officials and weapons designers because RD information exists in subject areas other than weapons and is in the possession of numerous cleared contractors. One commenter suggested that this section is an attempt to intimidate and quiet DOE scientists. It should be noted that the policy is not intended to restrict scientists or others from commenting on an aspect of a public statement that is clearly unclassified, such as the basic physics of a process. The purpose of this policy

is to ensure that classified information that may already be in the public domain is not officially confirmed, resulting in damage to the national security or harm to U.S. nonproliferation objectives. As a result of these comments paragraph (a) of this section has been modified to read, "Authorized holders of RD and FRD shall not confirm or expand upon the classification status or technical accuracy of classified information in the public domain."

One commenter suggested that section 1045.35 be restructured to reflect differing training requirements depending on the type of authority an individual has. In response to this comment, the Department has revised section 1045.35(a) to read, "RD management officials shall ensure that persons with access to RD and FRD information are trained on the authorities required to classify and declassify RD and FRD information and documents and on handling procedures. RD management officials shall ensure that RD classifiers are trained on the procedures for classifying, declassifying, marking and handling RD and FRD information and documents." The commenter also recommended that RD classifiers be certified. The regulation requires that all RD classifiers be trained and (except within the DoD) designated. By including these requirements, DOE does not believe that an additional certification is necessary.

One commenter recommended that the rule strongly encourage, if not require, portion marking of documents by all agencies. This commenter also recommended that the bias towards using classification guides which is expressed in section 1045.32(a)(1) be modified. DOE recognizes that portion marking of documents containing NSI is required by E.O. 12958 and that portion marking is common practice in most agencies. However, DOE has made the conscious decision not to portion mark RD and FRD documents because the DOE classification system relies heavily on the use of classification guides. DOE prefers the use of classification guides over the use of source documents for derivative classification decisions, because use of guides results in more accurate and consistent classification decisions. The many individual decisions involved with using a portion marked document as a source document increase the probability for error. Further, a portion marked document is not revised to reflect changes in classification guidance and it may represent out-of-date classification policy, resulting in overclassification. A non-portion marked document should

also not be used as a source document. While it is possible that RD classifiers may attempt to use non-portion marked documents as source documents, it is less likely precisely because they are not portion marked. Therefore, DOE believes it is preferable not to portion mark in order to encourage the use of classification guides over source documents.

One commenter suggested that, "Documents containing both RD and NSI should be marked on the front page with an 'NSI Content Declassified on' date, which is the date that the document would be automatically declassified if it contained no RD." DOE considered this proposal but determined that it could not be accepted because under the Atomic Energy Act, documents containing RD information, regardless of whether they also contain NSI, must undergo a review prior to their declassification and release. At such time, the NSI content would also be reviewed and declassified if appropriate. In addition, this comment was not adopted because DOE is concerned that such a marking may be misread and result in the inadvertent disclosure of RD or FRD.

One commenter recommended that the rule contain a requirement that safety, health and environmental impact analysis/evaluations for classified facilities and activities contain both classified and unclassified versions, unless the existence of the facilities or the activities are considered RD, FRD or NSI. The commenter also suggested that the rule contain a requirement that the unclassified version contain documentation for conclusions that provisions for public and worker protection are at least comparable to that provided at unclassified facilities and that this requirement should include provisions for identifying the parts or phrases which are removed and the bases for the classification. This commenter also recommended that section 1045.41 specifically require that unclassified versions of documents be prepared for safety, health and environmental impact evaluations. In addition, another commenter made a similar suggestion indicating that when information must be classified which relates to the environment, the Department should include an analysis of the classification in the environmental documents. This commenter also recommended that the rules require in each case that the Department certify that the classified information cannot be declassified and why. This regulation cannot impose requirements on the actual content of a document, only its classification. In

response to these comments, the Department has enhanced the language in section 1045.41. A new paragraph, 1045.41(c), has been added which encourages document originators to provide a publicly releasable rationale for the classification of documents containing environmental, safety or health information, when unclassified versions cannot be prepared. In addition, one commenter recommended that DOE acknowledge the existence of a classified addendum. DOE accepted this suggestion and 1045.41(a) has been revised accordingly.

One commenter indicated that "Section 1045.52(a) proposes that any information subject to pending litigation is a basis for denial of declassification reviews", and recommended this proposal be deleted. This section indicates that if the Department has reviewed the information within the past 2 years, or the information is the subject of pending litigation, the Department shall inform the requester of this fact and of his or her appeal rights. The language in this section is derived directly from section 3.6 of E.O. 12958. DOE requested clarification from ISOO on this section and was advised that if information is subject to pending litigation, the Department should not process the request. This does not mean that the request is denied, rather that the request is not processed until the litigation is complete. Section 1045.53(a) was revised to reflect this clarification. This commenter also recommended that this section be revised to prohibit extension of appeals beyond 60 working days. While DOE makes every effort to complete appeal actions within the specified time frame, some actions may require additional time to complete because of extensive interagency coordination. Therefore, it is not practical to establish such a prohibition.

d. DOE Revisions

The following describes changes to the regulation made by DOE on its own initiative, not in response to any public comment. The title of the rule was changed from "Information Classification" to "Nuclear Classification and Declassification" in order to be more descriptive. In the preamble to the proposed rule, the Department indicated that the Openness Advisory Panel "will also serve as an independent authority to confirm for the public the validity of classification decisions in instances when the full rationale cannot be disclosed for reasons of national security." A panel of the Secretary of Energy Advisory Board (SEAB) provides advice and

recommendations to the SEAB and therefore cannot function as an "independent authority." Consequently, the Openness Advisory Panel will not function as an "independent authority" concerning the validity of classification decisions.

In section 1045.3, the definition of "contractor" was revised for accuracy to read, "means any industrial, educational, commercial or other entity, grantee or licensee at all tiers, including an individual, that has executed an agreement with the Federal Government for the purpose of performing under a contract, license or other agreement." The definition of "declassification" was modified to reflect that some information may be declassified but still require protection for national security reasons (e.g., Unclassified Controlled Nuclear Information). The definition of "information" was expanded for clarity. The definition of "National Security Information" was modified to add the words, "NSI is referred to as 'defense information' in the Atomic Energy Act." This change was made for clarity. Also, the definition of "Restricted Data classifier" was modified by adding the following words, "RD classifiers within the DoD may also declassify FRD documents." This change was made for accuracy and to be consistent with other sections of the regulation.

DOE has added language to section 1045.7(c) which reads, "DOE will make every effort to respond within 60 days." This change was made to ensure the Department is responsive to suggestions and complaints.

The Department has added language to section 1045.14(a) which requires that an RD classifier follow the process for submitting potential RD for evaluation whenever he or she is unable to locate classification guidance that can be applied to the information. Under previous procedures, RD classifiers could classify documents even though they were unable to locate classification guidance that applied to the information. This practice evolved from the "born classified" concept. This concept is now being de-emphasized since it is DOE practice that classification is not automatically prescribed. Consequently, this revision is necessary to ensure classification is not automatically applied when there is uncertainty as to the need for it. For completeness, the Department has also added paragraph (a)(1)(iv) to section 1045.14 which requires that the Director of Declassification notify classifiers of the information classification decisions made under this section.

For accuracy, DOE inserted the word, "category" after "RD classification" and

changed "Director of Declassification" to "Director of Security Affairs" in section 1045.14(c).

Section 1045.15(c) was modified to clearly state that the presumptions reflect the classification status of existing information and that new information in one of the presumption categories may or may not be classified. The Department has deleted section 1045.15(d)(2), the unclassified presumption which was worded "instruments and equipment". DOE was able to find numerous examples of classified instruments and equipment. Section 1045.15(d)(8) (now (7)), was revised by inserting the words "most of" before "their alloys." This change was made in response to DOE concerns that not all alloys and compounds are unclassified.

DOE revised proposed section 1045.15(d)(10) (now (9)), by deleting the word "all". This change was made because there is still one nuclear test yield range that remains classified. Proposed section 1045.15(d)(12) (now (11)) has been revised to add the words "not revealing size or details concerning the nuclear weapons stockpile." This revision is necessary because the presumption was too broad.

DOE revised proposed section 1045.15(d)(13) by changing the word "Operations" to "Any information." This change was made to broaden the scope of this "presumed unclassified" subject area. The original wording would have limited the scope to only those operations dealing exclusively with health, safety, and environmental matters, such as a site environmental cleanup project. The new wording includes any health, safety, and environmental information in any program regardless of its purpose.

As a result of a recent declassification action, the Department added paragraph 1045.15(d)(14), an unclassified presumption concerning the association of materials at specified DOE sites.

DOE has also added paragraph (c) to section 1045.16 for completeness, "The DOE Directors of Declassification and Security Affairs shall consider the presumptions in section 1045.15 (d) and (e) before applying the criteria in paragraph (d) of this section."

In section 1045.17(a)(1), examples are provided of RD information which warrants classification at the Top Secret level. For clarity, a more complete explanation of what type of nuclear weapons design information warrants classification at the Top Secret level is provided. Also, paragraph (a)(3) of section 1045.17 has been expanded to provide more examples of information

that warrant classification at the Confidential level.

For clarity, the sentence, "The DOE Director of Declassification shall not classify the information in such cases if it is widely disseminated in the public domain" has been added to section 1045.18.

Proposed section 1045.19(b) has been revised to include an address where persons may request the annual report on the status of the RD classification program. This report will be made available to any interested persons, including the Congress.

To ensure that the requirement to publish a **Federal Register** notice does not result in the disclosure of classified or sensitive information, section 1045.21(c) has been revised to read, "DOE shall publish a **Federal Register** notice when privately generated information is classified as RD, and shall ensure that the content of the notice is consistent with protecting the national security and the interests of the private party." Depending upon the circumstances, the **Federal Register** notice could be a simple acknowledgment that DOE has exercised the authority under this section if the identification of the circumstance would be classified.

Section 1045.32(a)(1) has been revised by deleting the word "properly" from the second sentence. DOE recognizes that some source documents are improperly classified. Nonetheless, RD classifiers may presume that the classification of a document marked RD or FRD is proper where there is no conflicting guidance. Therefore, this word has been removed. Where there is doubt about the classification of a source document and there is no classification guide topic to address the information, the RD classifier should follow the process described in section 1045.14. Paragraphs (a) (1) and (4) and (b)(2) were modified to reflect that joint Agency-DOE classification guides or Agency guides coordinated with the DOE should be used in these instances. Paragraph (a)(3) has been added to section 1045.32 which states "RD classifiers shall classify only documents in subject areas in which they have programmatic expertise." The purpose of this revision is to ensure that information is derivatively classified only by those individuals who have specific program knowledge of the information being classified. This is generally an accepted practice throughout the Government. This provision merely formalizes the procedure. Paragraph (a)(4) has been added to section 1045.32 to allow RD

classifiers to upgrade or downgrade the classification level of documents.

In section 1045.34, paragraph (b) has been added to read, "All contractor organizations with access to RD and FRD, including DoD contractors, shall designate RD classifiers." This change was made to clarify that the exemption from the designation requirement in paragraph (a) applies only to DoD federal employees. This provision is consistent with the National Industrial Security Program Operating Manual.

DOE changed the words, "persons working with RD and FRD information" to "all RD classifiers" in section 1045.37(f). This change is made since only RD classifiers, not all persons with access to RD and FRD, need classification guides.

Section 1045.38(c) has been modified by adding the words "and FRD" after "RD." This change is made for accuracy since both RD and FRD are exempt from the provisions of E.O. 12958.

Concerning the marking requirements in Section 1045.40, it is noted that these provisions fall under the purview of the DOE Office of Safeguards and Security, not the DOE Office of Declassification. Section 1045.40(b)(3) has been modified to require that the date of the guide or source document used to classify the document being marked, be identified. This change is made to ensure consistency in requirements throughout the Government. In section 1045.40(b)(4) "Name or position/title" was changed to "Name and position or title."

Proposed section 1045.40(d) was deleted since it did not provide a regulatory requirement.

For accuracy, in section 1045.40(e), (now (d)), "RD classifier" is changed to "individual authorizing the declassification."

Section 1045.42 has been revised to reflect that the Interagency Security Classification Appeals Panel (ISCAP) has no jurisdiction over Freedom of Information Act appeals.

The following language has been added to section 1045.42(b)(5) in order to ensure that information that is requested by the public in the form of a mandatory or Freedom of Information Act request is formally considered for declassification, "(i) Appeal reviews of RD or FRD documents shall be based on existing classification guidance. However, the DOE Director of Declassification shall review the RD and FRD information in the appealed document to determine if it may be a candidate for possible declassification. (ii) If declassification of the information appears appropriate, the DOE Director of Declassification shall initiate a formal

declassification action and so advise the requester."

The person responsible for ensuring that RD documents are periodically and systematically reviewed for declassification has been changed from the "DOE Director of Declassification" to "The Secretary" in section 1045.43(a). This change was made to elevate the level of the responsible agency official and to ensure this task is completed.

The Department revised section 1045.44 to read, "Any person with authorized access to RD or FRD who generates a document intended for public release in an RD or FRD subject area shall ensure that it is reviewed for classification by the appropriate DOE organization (for RD) or the appropriate DOE or DoD organization (for FRD) prior to its release." The purpose of this change is to ensure that documents intended for public release are reviewed by appropriate officials, rather than by any individual who derivatively classifies RD documents. Documents originated within the DOE are forwarded to the local classification officer for prepublication review. Documents originated outside of the DOE are processed in accordance with agency procedures and forwarded to the Director of Declassification for prepublication review.

A new section, section 1045.46, has been added to cover a situation where two or more pieces of unclassified information when associated or compiled together could reveal classified information. In the case of classification by association, two unclassified pieces of information may, when considered together, reveal classified information. For example, a shipment of an unclassified commercially available item of hardware to a contractor whose only activity is a classified project may cause the fact of the shipment to be classified. In the case of classification by compilation, a number of pieces of unclassified information that, when considered together, may contain some added value such as completeness or comprehensiveness of the information, may warrant classification. For example, individual DOE bibliographic citations of weapons data reports may be unclassified, however a complete compilation of these citations would represent all DOE weapons research conducted. Such a compilation would provide significant assistance to a potential proliferant and may therefore warrant classification. DOE determined that this section is needed to explain classification of RD or FRD by association or compilation. A similar

provision exists for classification by association and compilation for NSI under E.O. 12958.

For accuracy, the words, "Access to Information" were removed from the title of Subpart D. A new section 1045.51 entitled Applicability has been added, "This subpart applies to any person with authorized access to DOE NSI or who desires access to DOE documents containing NSI." The Purpose and Scope paragraph was modified to include the authorities for the classification of NSI. Sections 1045.51 and 52 were renumbered 1045.52 and 1045.53, respectively.

e. Comments Outside the Scope of the Rule.

The following provides a summary of comments outside the scope of this regulation. One commenter recommended that the Department examine the differing requirements within the DOE and the DoD for access to RD. This comment has been provided to the DOE Office of Safeguards and Security for consideration, since access requirements are under their purview.

Several commenters expressed concern with classification issues under the purview of the Office of Naval Reactors, Naval Nuclear Propulsion Program. Although the Office of Naval Reactors is subject to this regulation, they are responsible for implementation of their own classification program under the provisions of Executive Order 12344. Consequently, these comments were forwarded to the Office of Naval Reactors for appropriate disposition.

One commenter also provided a suggestion concerning the DOE policies for marking and use of "For Official Use Only (FOUO)" and "Unclassified Controlled Nuclear Information (UCNI)." Since the scope of this regulation does not include UCNI or FOUO, these comments will be considered for inclusion in other Departmental policies.

IV. Rulemaking Requirements

A. Review Under Executive Order 12866

One commenter suggested that the rule as proposed constitutes a "significant regulatory action" as that term is defined by Executive Order 12866. That order defines "significant regulatory action" as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2)

create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities or the principles set forth in this Executive Order. Today's rule imposes requirements on Government agencies, contractors and their employees that are authorized to have access to RD and FRD information and documents. Costs incurred by compliance with the rule are paid directly by the Government or are reimbursed by the Government. Although the rule's effect on the economy is difficult to gauge precisely, DOE has determined that the annual effect on the economy will fall far short of the \$100 million threshold and will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. DOE has coordinated the development of the rule with numerous agencies with access to RD and FRD. DOE has sought and received input and concurrences from DoD, Department of State and other federal agencies affected by today's rule and does not expect that the rule will create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule has no effect on the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. Finally, the rule raises no novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. Based on the foregoing, DOE has determined that today's rule does not constitute a "significant regulatory action" as defined in section 3(f) of E.O. 12866.

B. Review Under Paperwork Reduction Act

No new information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, are imposed by today's regulatory action.

C. Review Under the National Environmental Policy Act

This regulation amends DOE's policies and procedures for the classification and declassification of information. Implementation of this rule will not affect whether such information might cause or otherwise be associated with any environmental impacts. The

Department has therefore determined that this rule is covered under the Categorical Exclusion found at paragraph A.5 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to the establishment of a rulemaking interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

D. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987), requires that rules be reviewed for any substantial direct effect on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among various levels of Government. If there are sufficient substantial direct effects, then the Executive order requires preparation of a federal assessment to be used in all decisions involved in promulgating and implementing a policy action. Today's regulatory action amends DOE's policies and procedures on information classification and declassification. Therefore, the Department has determined that this rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

E. Review Under Executive Order 12988

Section 3 of Executive Order 12988, 61 FR 4729 (February 7, 1996), instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in Section 3 (a) and (b), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation describes any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of administrative remedies. The Department has determined that today's regulatory action meets the requirements of Section 3 (a) and (b) of Executive Order 12988.

F. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 requires each Agency to assess the effects of Federal regulatory action on State, local, and tribal governments and the private sector. Today's regulatory action

amends DOE's policies and procedures on information classification and declassification. The Department has determined that today's regulatory action does not impose a Federal mandate on State, local, or tribal governments, or on the private sector.

G. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, directs agencies to prepare a regulatory flexibility analysis for each proposed rule or to certify that the rule will not have a "significant economic impact on a substantial number of small entities." Today's rule amends DOE's policies and procedures on information classification and declassification. The rule applies to all agencies, persons and entities that generate and maintain RD or FRD information or documents. The Department has identified over 50 Federal Government entities that have access to RD or FRD information or documents. Each of these Government entities may, in turn, have contractors or consultants that have access to RD or FRD information or documents.

Section 1045.35 imposes on the Government, in the person of the RD management official, the responsibility to ensure that RD classifiers are properly trained. That section further imposes on the DOE Director of Declassification the obligation to develop and review training materials related to the implementation of this regulation. The regulation imposes on non-Government entities the requirement that persons with access to RD or FRD be properly trained. The economic impact of the training requirement on non-Government entities is limited to the labor hours required to familiarize those persons with access to RD and FRD with the training materials provided by DOE and the RD management official.

Section 1045.40 requires that Government and non-Government RD classifiers clearly mark each new document generated to convey that it contains RD or FRD information. The burden of the marking requirement varies depending on the number of documents the entity generates. DOE considers the proper marking of a classified document to be an act integrated in the act of creating the document. As such, the marking of individual documents containing RD and FRD imposes minimal costs on the entity generating new RD documents.

Finally, DOE recognizes that non-Government entities that generate documents containing RD or FRD will do so pursuant to a Government contract. In those instances, any costs

incurred in compliance with the regulation will be charged back to the Government.

Based on the foregoing, DOE has determined that the rule will not have a "significant economic impact." As permitted by section 605 of the Regulatory Flexibility Act, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities.

H. Review Under Small Business Regulatory Enforcement Fairness Act of 1996

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of the rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(3).

V. Freedom of Information Act (FOIA) Considerations

RD and FRD classified under the Atomic Energy Act fall within the scope of exemption 3 of the FOIA (5 U.S.C. 552(b)(3)). Thus RD and FRD are not subject to disclosure under the FOIA. Similarly, information that is properly classified as NSI under E.O. 12958 may be withheld from disclosure under exemption 1 of the FOIA.

DOE shall process requests for documents made under the FOIA in accordance with applicable DOE regulations and orders which implement the FOIA within the Department. DOE shall process these requests promptly and shall respond to the requester in a timely manner. DOE shall coordinate requests involving FRD information and RD information which relates primarily to the military utilization of nuclear weapons with the DoD. The Director of Security Affairs shall decide all appeals of denials of requests for classified information covered by sections 141 and 142 of the Atomic Energy Act and E.O. 12958.

List of Subjects in 10 CFR Part 1045

Classified information, Declassification, National security information.

Issued in Washington, DC, on December 22, 1997.

Federico Peña,
Secretary of Energy.

For the reasons set forth in the preamble, 10 CFR Part 1045 is revised to read as follows:

PART 1045—NUCLEAR CLASSIFICATION AND DECLASSIFICATION

Subpart A—Program Management of the Restricted Data and Formerly Restricted Data Classification System

Sec.

- 1045.1 Purpose and scope.
- 1045.2 Applicability.
- 1045.3 Definitions.
- 1045.4 Responsibilities.
- 1045.5 Sanctions.
- 1045.6 Openness Advisory Panel.
- 1045.7 Suggestions or complaints.
- 1045.8 Procedural exemptions.
- 1045.9 RD classification performance evaluation.

Subpart B—Identification of Restricted Data and Formerly Restricted Data Information

- 1045.10 Purpose and scope.
- 1045.11 Applicability.
- 1045.12 Authorities.
- 1045.13 Classification prohibitions.
- 1045.14 Process for classification and declassification of restricted data and formerly restricted data information.
- 1045.15 Classification and declassification presumptions.
- 1045.16 Criteria for evaluation of restricted data and formerly restricted data information.
- 1045.17 Classification levels.
- 1045.18 Newly generated information in a previously declassified subject area.
- 1045.19 Accountability for classification and declassification determinations.
- 1045.20 Ongoing call for declassification proposals.
- 1045.21 Privately generated restricted data.
- 1045.22 No comment policy.

Subpart C—Generation and Review of Documents Containing Restricted Data and Formerly Restricted Data

- 1045.30 Purpose and scope.
- 1045.31 Applicability.
- 1045.32 Authorities.
- 1045.33 Appointment of restricted data management official.
- 1045.34 Designation of restricted data classifiers.
- 1045.35 Training requirements.
- 1045.36 Reviews of agencies with access to restricted data and formerly restricted data.
- 1045.37 Classification guides.
- 1045.38 Automatic declassification prohibition.
- 1045.39 Challenging classification and declassification determinations.
- 1045.40 Marking requirements.
- 1045.41 Use of classified addendums.
- 1045.42 Mandatory and Freedom of Information Act reviews for declassification of restricted data and formerly restricted data documents.
- 1045.43 Systematic review for declassification.
- 1045.44 Classification review prior to public release.

1045.45 Review of unmarked documents with potential restricted data or formerly restricted data.

1045.46 Classification by association or compilation.

Subpart D—Executive Order 12958, “Classified National Security Information” Requirements Affecting the Public

1045.50 Purpose and scope.

1045.51 Applicability.

1045.52 Mandatory declassification review requests.

1045.53 Appeal of denial of mandatory declassification review requests.

Authority: 42 U.S.C. 2011; E.O. 12958, 60 FR 19825, 3 CFR, 1995 Comp., p. 333.

Subpart A—Program Management of the Restricted Data and Formerly Restricted Data Classification System

§ 1045.1 Purpose and scope.

This subpart establishes responsibilities associated with this part, describes the Openness Advisory Panel, defines key terms, describes sanctions related to violation of the policies and procedures in this part, and describes how to submit suggestions or complaints concerning the Restricted Data classification and declassification program, and how to request procedural exceptions.

§ 1045.2 Applicability.

This subpart applies to—

(a) Any person with authorized access to RD or FRD;

(b) Any agency with access to RD or FRD; and

(c) Any person who might generate information determined to be RD or FRD.

§ 1045.3 Definitions.

As used in this part:

Agency means any “Executive Agency” as defined in 5 U.S.C. 105; any “Military Department” as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into possession of RD or FRD information or documents.

Atomic Energy Act means the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.).

Authorized Holder means a person with the appropriate security clearance required to have access to classified information and the need to know the information in the performance of Government-approved activities.

Automatic Declassification means the declassification of information or documents based solely upon:

(1) The occurrence of a specific date or event as determined by the classifier; or

(2) The expiration of a maximum time frame for duration of classification established under Executive Order 12958.

Classification means the act or process by which information is determined to be classified information.

Classification Guide means a written record of detailed instructions as to whether specific information is classified, usually concerning a system, plan, project, or program. It identifies information to be classified and specifies the level (and duration for NSI only) of classification assigned to such information. Classification guides are the primary basis for reviewing documents to determine whether they contain classified information.

Classification Level means one of three designators:

(1) *Top Secret* is applied to information (RD, FRD, or NSI), the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the appropriate official is able to identify or describe.

(2) *Secret* is applied to information (RD, FRD, or NSI), the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the appropriate official is able to identify or describe.

(3) *Confidential*. (i) For NSI, Confidential is applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the appropriate official is able to identify or describe.

(ii) For RD and FRD, Confidential is applied to information, the unauthorized disclosure of which could reasonably be expected to cause undue risk to the common defense and security that the appropriate official is able to identify or describe.

Classified Information means:

(1) Information classified as RD or FRD under the Atomic Energy Act; or

(2) Information determined to require protection against unauthorized disclosure under Executive Order (E.O.) 12958 or prior Executive Orders (also identified as National Security Information or NSI).

Contractor means any industrial, educational, commercial or other entity, grantee or licensee at all tiers, including an individual, that has executed an agreement with the Federal Government for the purpose of performing under a contract, license or other agreement.

Declassification means a determination by appropriate authority that information or documents no longer require protection, as classified information, against unauthorized disclosure in the interests of national security.

Department or DOE means Department of Energy.

Director of Declassification means the Department of Energy Director, Office of

Declassification, or any person to whom the Director’s duties are delegated. The Director of Declassification is subordinate to the Director of Security Affairs.

Director of Security Affairs means the Department of Energy Director, Office of Security Affairs, or any person to whom the Director’s duties are delegated.

Document means the physical medium on or in which information is recorded, or a product or substance which contains or reveals information, regardless of its physical form or characteristics.

Formerly Restricted Data (FRD) means classified information jointly determined by DOE and the DoD to be related primarily to the military utilization of nuclear weapons and removed (by transclassification) from the RD category pursuant to section 142(d) of the Atomic Energy Act.

Government means the executive branch of the Federal Government of the United States.

Government Information means information that is owned by, produced by or for, or is under the control of the U.S. Government.

Information means facts, data, or knowledge itself, as opposed to the medium in which it is contained.

Interagency Security Classification Appeals Panel (ISCAP) means a panel created pursuant to Executive Order 12958 to perform functions specified in that order with respect to National Security Information.

National Security means the national defense or foreign relations of the United States.

National Security Information (NSI) means information that has been determined pursuant to Executive Order 12958 or prior Executive Orders to require protection against unauthorized disclosure and is marked to indicate its classification status when in document form. NSI is referred to as “defense information” in the Atomic Energy Act.

Nuclear weapon means atomic weapon.

Person means:

(1) Any individual, contractor, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency, any State, or any political subdivision thereof, or any political entity within a State; and

(2) Any legal successor, representative, agent, or agency of the foregoing.

Portion Marking means the application of certain classification

markings to individual words, phrases, sentences, paragraphs, or sections of a document to indicate their specific classification level and category.

Restricted Data (RD) means a kind of classified information that consists of all data concerning the following, but not including data declassified or removed from the RD category pursuant to section 142 of the Atomic Energy Act:

- (1) Design, manufacture, or utilization of atomic weapons;
- (2) Production of special nuclear material; or
- (3) Use of special nuclear material in the production of energy.

Restricted Data Classifier means an individual who derivatively classifies RD or FRD documents. Within the DoD, RD classifiers may also declassify FRD documents.

Restricted Data Management Official means an individual appointed by any agency with access to RD and FRD who is responsible for managing the implementation of this part within that agency or any person to whom these duties are delegated. This person may be the senior agency official required by E.O. 12958.

Secretary means the Secretary of Energy.

Source Document means a classified document, other than a classification guide, from which information is extracted for inclusion in another document. The classification of the information extracted is determined by the classification markings shown in the source document.

Special Nuclear Material means plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Secretary determines to be special nuclear material pursuant to the Atomic Energy Act.

§ 1045.4 Responsibilities.

(a) The DOE Director of Declassification shall:

- (1) Manage the Government-wide system for the classification and declassification of RD and FRD in accordance with the Atomic Energy Act;
- (2) In coordination with the DoD, develop regulations to implement the RD and FRD classification system;
- (3) Determine whether nuclear-related information is RD;
- (4) Oversee agency implementation of the RD and FRD classification system to ensure compliance with this part;
- (5) Review agency implementing policies and conduct on-site reviews of each agency's program established under this part;
- (6) Prepare and distribute classification guides concerning RD and

FRD and review such guides developed by any agency;

(7) Consider and take action on complaints and suggestions from any person with respect to administration of this program; and

(8) Periodically meet with interested members of the public to solicit input for the classification and declassification program.

(b) The DOE Director of Security Affairs shall:

- (1) Declassify RD which may be published without undue risk to the common defense and security;
- (2) Jointly with the DoD, determine which information in the RD category relating primarily to the military utilization of nuclear weapons may be declassified or placed into the FRD category; and
- (3) Jointly with the DoD, declassify FRD which may be published without undue risk to the common defense and security.

(c) The DoD jointly with the DOE shall:

- (1) Determine which information in the RD category relating primarily to the military utilization of nuclear weapons may be declassified or placed into the FRD category;
- (2) Ensure that classification guides for FRD and RD relating primarily to the military utilization of nuclear weapons are prepared; and
- (3) Declassify FRD and RD relating primarily to the military utilization of nuclear weapons which may be published without undue risk to the common defense and security.

(d) The Nuclear Regulatory Commission (NRC) shall:

- (1) Jointly with the DOE, develop classification guides for programs over which both agencies have cognizance; and
- (2) Ensure the review and proper classification of RD by RD classifiers under this part, which is generated by the NRC or by its licensed or regulated facilities and activities.

(e) Heads of Agencies with access to RD and FRD shall:

- (1) Ensure that RD and FRD are classified in such a manner as to assure the common defense and security in accordance with the policies established in this part;
- (2) Designate an RD management official to direct and administer the RD classification program within the agency; and
- (3) Promulgate implementing directives.

(f) Agency RD management officials shall:

- (1) Jointly with the DOE, develop classification guides for programs over which both agencies have cognizance;

(2) Ensure that agency and contractor personnel who generate RD and FRD documents have access to any classification guides needed;

(3) Ensure that persons with access to RD and FRD are trained on the authorities required to classify and declassify RD and FRD information and documents and on handling procedures and that RD classifiers are trained on the procedures for classifying, declassifying, marking and handling RD and FRD information and documents; and

(4) Cooperate and provide information as necessary to the DOE Director of Declassification to fulfill responsibilities under this part.

§ 1045.5 Sanctions.

(a) Knowing, willful, or negligent action contrary to the requirements of this part which results in the misclassification of information may result in appropriate sanctions. Such sanctions may range from administrative sanctions to civil or criminal penalties, depending on the nature and severity of the action as determined by appropriate authority, in accordance with applicable laws.

(b) Other violations of the policies and procedures contained in this part may be grounds for administrative sanctions as determined by appropriate authority.

§ 1045.6 Openness Advisory Panel.

The DOE shall maintain an Openness Advisory Panel, in accordance with the Federal Advisory Committee Act, to provide the Secretary with independent advice and recommendations on Departmental openness initiatives, including classification and declassification issues that affect the public.

§ 1045.7 Suggestions or complaints.

(a) Any person who has suggestions or complaints regarding the Department's classification and declassification policies and procedures may direct them in writing to the Openness Coordinator, Department of Energy, Office of Declassification, 19901 Germantown Road, Germantown, Maryland 20874-1290.

(b) Such letters should include a description of the issue or problem, the suggestion or complaint, all applicable background information, and an address for the response.

(c) DOE will make every effort to respond within 60 days.

(d) Under no circumstances shall persons be subject to retribution for making a suggestion or complaint regarding the Department's classification and declassification policies or programs.

§ 1045.8 Procedural exemptions.

(a) Exemptions to the procedural provisions of this part may be granted by the DOE Director of Declassification.

(b) A request for an exemption shall be made in writing to the DOE Director of Declassification and shall provide all relevant facts, justification, and a proposed alternate procedure.

§ 1045.9 RD classification performance evaluation.

(a) Heads of agencies shall ensure that RD management officials and those RD classifiers whose duties involve the classification or declassification of significant numbers of RD or FRD documents shall have their personnel performance evaluated with respect to classification activities.

(b) Procedures for the evaluation under paragraph (a) of this section may be the same as those in place for NSI related classification activities as required by Executive Order 12958.

Subpart B—Identification of Restricted Data and Formerly Restricted Data Information**§ 1045.10 Purpose and scope.**

(a) This subpart implements sections 141 and 142 (42 U.S.C. 2161 and 2162) of the Atomic Energy Act, which provide for Government-wide policies and procedures concerning the classification and declassification of RD and FRD information.

(b) This subpart establishes procedures for classification prohibitions for RD and FRD, describes authorities and procedures for identifying RD and FRD information, and specifies the policies and criteria DOE shall use in determining if nuclear-related information is RD or FRD.

§ 1045.11 Applicability.

This subpart applies to—

(a) Any person with authorized access to RD or FRD;

(b) Any agency with access to RD or FRD; and

(c) Any person who might generate information determined to be RD or FRD.

§ 1045.12 Authorities.

(a) The DOE Director of Declassification may determine whether nuclear-related information is RD.

(b) Except as provided in paragraph (c) of this section, the DOE Director of Security Affairs may declassify RD information.

(c) The DOE Director of Security Affairs, jointly with the DoD, may determine which information in the RD category relating primarily to the military utilization of nuclear weapons

may be declassified or placed into the FRD category.

(d) The DOE Director of Security Affairs jointly with the DoD may declassify FRD information.

§ 1045.13 Classification prohibitions.

In no case shall information be classified RD or FRD in order to:

(a) Conceal violations of law, inefficiency, or administrative error;

(b) Prevent embarrassment to a person, organization, or Agency;

(c) Restrain competition;

(d) Prevent or delay the release of information that does not require protection for national security or nonproliferation reasons;

(e) Unduly restrict dissemination by assigning an improper classification level; or

(f) Prevent or delay the release of information bearing solely on the physical environment or public or worker health and safety.

1045.14 Process for classification and declassification of restricted data and formerly restricted data information.

(a) *Classification of Restricted Data.*

(1) *Submission of Potential RD for Evaluation.* Any authorized holder who believes he or she has information which may be RD shall submit it to an RD classifier for evaluation. The RD classifier shall follow the process described in this paragraph whenever he or she is unable to locate guidance in a classification guide that can be applied to the information. The RD classifier shall forward the information to the DOE Director of Declassification via their local classification or security office. The DOE Director of Declassification shall determine whether the information is RD within 90 days of receipt by doing the following:

(i) Determine whether the information is already classified RD under current classification guidance; or

(ii) If it is not already classified, determine if the information concerns the design, manufacture, or utilization of nuclear weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy; and

(A) Apply the criteria in § 1045.16 and § 1045.17 as the basis for determining the appropriate classification; and

(B) Provide notification of the decision by revising applicable classification guides, if appropriate.

(2) *Protection of Potential RD during Evaluation.* Pending a determination by the DOE Director of Declassification, potential RD submitted for evaluation by authorized holders shall be protected

at a minimum as Confidential Restricted Data.

(b) *Declassification of Restricted Data.* The DOE Director of Security Affairs shall apply the criteria in § 1045.16 when determining whether RD may be declassified.

(c) *Classification of Formerly Restricted Data.* The DOE Director of Security Affairs, jointly with the DoD, shall remove information which relates primarily to the military utilization of nuclear weapons from the RD classification category and classify it as FRD.

(d) *Declassification of Formerly Restricted Data.* The DOE Director of Security Affairs, jointly with the DoD, shall apply the criteria in § 1045.16 when determining whether FRD may be declassified.

§ 1045.15 Classification and declassification presumptions.

(a) The DOE Directors of Declassification and Security Affairs shall consider the presumptions listed in paragraphs (d) and (e) of this section before applying the criteria in § 1045.16.

(b) Not all areas of nuclear-related information are covered by the presumptions.

(c) In general, existing information listed in paragraphs (d) and (e) of this section has the classification status indicated. Inclusion of specific existing information in one of the presumption categories does not mean that new information in a category is or is not classified, but only that arguments to differ from the presumed classification status of the information should use the appropriate presumption as a starting point.

(d) The DOE Directors of Declassification and Security Affairs shall presume that information in the following areas is unclassified unless application of the criteria in § 1045.16 indicates otherwise:

(1) Basic science: mathematics, chemistry, theoretical and experimental physics, engineering, materials science, biology and medicine;

(2) Magnetic confinement fusion technology;

(3) Civilian power reactors, including nuclear fuel cycle information but excluding technologies for uranium enrichment;

(4) Source materials (defined as uranium and thorium and ores containing them);

(5) Fact of use of safety features (e.g., insensitive high explosives, fire resistant pits) to lower the risks and reduce the consequences of nuclear weapon accidents;

(6) Generic weapons effects;

(7) Physical and chemical properties of uranium and plutonium, most of their alloys and compounds, under standard temperature and pressure conditions;

(8) Nuclear fuel reprocessing technology and reactor products not revealing classified production rates or inventories;

(9) The fact, time, location, and yield range (e.g., less than 20 kilotons or 20–150 kilotons) of U.S. nuclear tests;

(10) General descriptions of nuclear material production processes and theory of operation;

(11) DOE special nuclear material aggregate inventories and production rates not revealing size or details concerning the nuclear weapons stockpile;

(12) Types of waste products resulting from all DOE weapon and material production operations;

(13) Any information solely relating to the public and worker health and safety or to environmental quality; and

(14) The simple association or simple presence of any material (i.e., element, compound, isotope, alloy, etc.) at a specified DOE site.

(e) The DOE Directors of Declassification and Security Affairs shall presume that information in the following areas is classified unless the application of the criteria in § 1045.16 indicates otherwise:

(1) Detailed designs, specifications, and functional descriptions of nuclear explosives, whether in the active stockpile or retired;

(2) Material properties under conditions achieved in nuclear explosions that are principally useful only for design and analysis of nuclear weapons;

(3) Vulnerabilities of U.S. nuclear weapons to sabotage, countermeasures, or unauthorized use;

(4) Nuclear weapons logistics and operational performance information (e.g., specific weapon deployments, yields, capabilities), related to military utilization of those weapons required by the DoD;

(5) Details of the critical steps or components in nuclear material production processes; and

(6) Features of military nuclear reactors, especially naval nuclear propulsion reactors, that are not common to or required for civilian power reactors.

§ 1045.16 Criteria for evaluation of restricted data and formerly restricted data information.

(a) The DOE Director of Declassification shall classify information as RD and the DOE Director of Security Affairs shall maintain the

classification of RD (and FRD in coordination with the DoD) only if undue risk of damage to the common defense and security from its unauthorized disclosure can be identified and described.

(b) The DOE Director of Declassification shall not classify information and the DOE Director of Security Affairs shall declassify information if there is significant doubt about the need to classify the information.

(c) The DOE Directors of Declassification and Security Affairs shall consider the presumptions in § 1045.15 (d) and (e) before applying the criteria in paragraph (d) of this section.

(d) In determining whether information should be classified or declassified, the DOE Directors of Declassification and Security Affairs shall consider the following:

(1) Whether the information is so widely known or readily apparent to knowledgeable observers that its classification would cast doubt on the credibility of the classification system;

(2) Whether publication of the information would assist in the development of countermeasures or otherwise jeopardize any U.S. weapon or weapon system;

(3) Whether the information would hinder U.S. nonproliferation efforts by significantly assisting potential adversaries to develop or improve a nuclear weapon capability, produce nuclear weapons materials, or make other military use of nuclear energy;

(4) Whether publication of the information would have a detrimental effect on U.S. foreign relations;

(5) Whether publication of the information would benefit the public welfare, taking into account the importance of the information to public discussion and education and potential contribution to economic growth; and,

(6) Whether publication of the information would benefit the operation of any Government program by reducing operating costs or improving public acceptance.

1045.17 Classification levels.

(a) *Restricted Data.* The DOE Director of Declassification shall assign one of the following classification levels to RD information to reflect the sensitivity of the information to the national security. The greater the damage expected from unauthorized disclosure, the higher the classification level assigned to the information.

(1) *Top Secret.* The DOE Director of Declassification shall classify RD information Top Secret if it is vital to the national security and if its

unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of RD information that warrant Top Secret classification include detailed technical descriptions of critical features of a nuclear explosive design that would enable a proliferant or nuclear power to build or substantially improve a nuclear weapon, information that would make possible the unauthorized use of a U.S. nuclear weapon, or information revealing catastrophic failure or operational vulnerability in a U.S. nuclear weapon.

(2) *Secret.* The DOE Director of Declassification shall classify RD information as Secret if its unauthorized disclosure could reasonably be expected to cause serious damage to the national security, but the RD information is not sufficiently comprehensive to warrant designation as Top Secret. Examples of RD information that warrant Secret classification include designs for specific weapon components (not revealing critical features), key features of uranium enrichment technologies, or specifications of weapon materials.

(3) *Confidential.* The DOE Director of Declassification shall classify RD information as Confidential if it is deemed to be of significant use to a potential adversary or nuclear proliferant and its unauthorized disclosure could reasonably be expected to cause undue risk to the common defense and security. Examples of RD information that warrant Confidential classification are the amount of high explosives used in nuclear weapons, gaseous diffusion design information, and design information for Naval reactors.

(b) *Formerly Restricted Data.* The DOE Director of Declassification, jointly with the DoD, shall assign one of the classification levels in paragraph (a) of this section to FRD information to reflect its sensitivity to the national security.

§ 1045.18 Newly generated information in a previously declassified subject area.

(a) The DOE Director of Declassification may evaluate newly generated specific information in a previously declassified subject area using the criteria in section 1045.16 and classify it as RD, if warranted.

(b) The DOE Director of Declassification shall not classify the information in such cases if it is widely disseminated in the public domain.

§ 1045.19 Accountability for classification and declassification determinations.

(a) Whenever a classification or declassification determination concerning RD or FRD information is made, the DOE Directors of Declassification and Security Affairs shall be able to justify the determination. For FRD and RD primarily related to military utilization, the DOE Directors of Declassification and Security Affairs shall coordinate the determination and justification with the DoD. If the determination involves a departure from the presumptions in § 1045.15, the justification shall include a rationale for the departure. Often the justification itself will contain RD or FRD information. In such a case, the DOE Directors of Declassification and Security Affairs shall ensure that a separate justification can be prepared which is publicly releasable. The publicly releasable justification shall be made available to any interested person upon request to the DOE Director of Declassification.

(b) The DOE Director of Declassification shall prepare a report on an annual basis on the implementation of this part. This report shall be available to any interested person upon request to the DOE Director of Declassification. Requests may be submitted to the Department of Energy, Director of Declassification, 19901 Germantown Road, Germantown, Maryland 20874-1290.

§ 1045.20 Ongoing call for declassification proposals.

The DOE Director of Security Affairs shall consider proposals from the public or agencies or contractors for declassification of RD and FRD information on an ongoing basis. Declassification proposals for RD and FRD information shall be forwarded to the Department of Energy, Director of Security Affairs, 1000 Independence Avenue SW, Washington, DC 20585. Any proposed action shall include a description of the information concerned and may include a reason for the request. DOE and DoD shall coordinate with one another concerning declassification proposals for FRD information.

§ 1045.21 Privately generated restricted data.

(a) DOE may classify RD which is privately generated by persons not pursuant to Government contracts, in accordance with the Atomic Energy Act.

(b) In order for information privately generated by persons to be classified as RD, the Secretary or Deputy Secretary shall make the determination personally

and in writing. This authority shall not be delegated.

(c) DOE shall publish a **Federal Register** notice when privately generated information is classified as RD, and shall ensure that the content of the notice is consistent with protecting the national security and the interests of the private party.

§ 1045.22 No comment policy.

(a) Authorized holders of RD and FRD shall not confirm or expand upon the classification status or technical accuracy of classified information in the public domain.

(b) Unauthorized disclosure of classified information does not automatically result in the declassification of that information.

(c) If the disclosure of classified information is sufficiently authoritative or credible, the DOE Director of Security Affairs shall examine the possibility of declassification.

Subpart C—Generation and Review of Documents Containing Restricted Data and Formerly Restricted Data**§ 1045.30 Purpose and scope.**

This subpart specifies Government-wide classification program implementation requirements for agencies with access to RD and FRD, describes authorities and procedures for RD and FRD document classification and declassification, provides for periodic or systematic review of RD and FRD documents, and describes procedures for the mandatory review of RD and FRD documents. This subpart applies to all RD and FRD documents, regardless of whether they also contain National Security Information (NSI), or other controlled information such as "For Official Use Only" information or "Unclassified Controlled Nuclear Information."

§ 1045.31 Applicability.

This subpart applies to—

(a) Any person with authorized access to RD or FRD;

(b) Any agency with access to RD or FRD; and

(c) Any person generating a document containing RD or FRD.

§ 1045.32 Authorities.

(a) *Classification of RD and FRD documents.* (1) To the maximum extent practical, all RD and FRD documents shall be classified based on joint DOE-Agency classification guides or Agency guides coordinated with the DOE. When it is not practical to use classification guides, source documents may be used as an alternative.

(2) Only individuals designated as RD classifiers may classify RD and FRD documents, except within the DoD. Within the DoD, any individual with access to RD and FRD who has been trained may classify RD and FRD documents.

(3) RD classifiers shall classify only documents in subject areas in which they have programmatic expertise.

(4) RD classifiers may upgrade or downgrade the classification level of RD or FRD documents in accordance with joint DOE-Agency classification guides or Agency guides coordinated with the DOE. When it is not practical to use classification guides, source documents may be used as an alternative.

(b) *Declassification of RD and FRD documents.* (1) Only designated individuals in the DOE may declassify documents containing RD.

(2) Except as provided in paragraph (b)(3) of this section, only designated individuals in the DOE or appropriate individuals in DoD may declassify documents marked as FRD in accordance with joint DoD-DOE classification guides or DoD guides coordinated with the DOE.

(3) The DOE and DoD may delegate these authorities to other agencies and to contractors. Contractors without the delegated authority shall send any document marked as RD or FRD that needs to be considered for declassification to the appropriate agency office.

§ 1045.33 Appointment of restricted data management official.

(a) Each agency with access to RD or FRD shall appoint an official to be responsible for the implementation of this part and shall advise the DOE Director of Declassification of such appointment.

(b) This official shall ensure the proper implementation of this part within his or her agency and shall serve as the primary point of contact for coordination with the DOE Director of Declassification on RD and FRD classification and declassification issues.

(c) Within the DoD, an RD management official shall be appointed in each DoD agency.

§ 1045.34 Designation of restricted data classifiers.

(a) Except within the DoD, RD management officials shall ensure that persons who derivatively classify RD or FRD documents are designated by position or by name as RD classifiers.

(b) All contractor organizations with access to RD and FRD, including DoD contractors, shall designate RD classifiers.

§ 1045.35 Training requirements.

(a) RD management officials shall ensure that persons with access to RD and FRD information are trained on the authorities required to classify and declassify RD and FRD information and documents and on handling procedures. RD management officials shall ensure that RD classifiers are trained on the procedures for classifying, declassifying, marking and handling RD and FRD information and documents.

(b) The DOE Director of Declassification shall develop training materials related to implementation of this part and shall provide these materials to RD management officials and any other appropriate persons.

(c) The DOE Director of Declassification shall review any RD-related training material submitted by agency and contractor representatives to ensure consistency with current policy.

§ 1045.36 Reviews of agencies with access to restricted data and formerly restricted data.

(a) The DOE and each agency with access to RD and FRD shall consult periodically to assure appropriate implementation of this part. Such consultations may result in DOE conducting an on-site review within the agency if DOE and the RD management official determine that such a review would be mutually beneficial or that it is necessary to remedy a problem.

(b) To address issues concerning implementation of this part, the DOE Director of Declassification shall establish a standing group of all RD management officials to meet periodically.

§ 1045.37 Classification guides.

(a) The classification and declassification determinations made by the DOE Directors of Declassification and Security Affairs under the classification criteria in § 1045.16 shall be promulgated in classification guides.

(b) DOE shall jointly develop classification guides with the DoD, NRC, NASA, and other agencies as required for programs for which DOE and these agencies share responsibility.

(c) Agencies shall coordinate with the DOE Director of Declassification whenever they develop or revise classification guides with RD or FRD information topics.

(d) Originators of classification guides with RD or FRD topics shall review such guides at least every five years and make revisions as necessary.

(e) RD classifiers shall use classification guides as the primary basis for classifying and declassifying documents containing RD and FRD.

(f) Each RD management official shall ensure that all RD classifiers have access to all pertinent nuclear classification guides.

§ 1045.38 Automatic declassification prohibition.

(a) Documents containing RD and FRD remain classified until a positive action by an authorized person is taken to declassify them.

(b) In accordance with the Atomic Energy Act, no date or event for automatic declassification ever applies to RD and FRD documents, even if such documents also contain NSI.

(c) E.O. 12958 acknowledges that RD and FRD are exempt from all provisions of the E.O., including automatic declassification.

§ 1045.39 Challenging classification and declassification determinations.

(a) Any authorized holder of an RD or FRD document who, in good faith, believes that the RD or FRD document has an improper classification status is encouraged and expected to challenge the classification with the RD Classifier who classified the document.

(b) Agencies shall establish procedures under which authorized holders of RD and FRD documents are encouraged and expected to challenge any classification status they believe is improper. These procedures shall assure that:

(1) Under no circumstances are persons subject to retribution for bringing forth a classification challenge.

(2) The individual who initially receives the challenge provides a response within 90 days to the person bringing forth the challenge.

(3) A decision concerning a challenge involving RD or FRD may be appealed to the DOE Director of Declassification. In the case of FRD and RD related primarily to the military utilization of nuclear weapons, the DOE Director of Declassification shall coordinate with the DoD. If the justification for classification does not satisfy the person making the challenge, a further appeal may be made to the DOE Director of Security Affairs.

(c) Classification challenges concerning documents containing RD and FRD information are not subject to review by the Interagency Security Classification Appeals Panel, unless those documents also contain NSI which is the basis for the challenge. In such cases, the RD and FRD portions of the document shall be deleted and then the NSI and unclassified portions shall be provided to the Interagency Security Classification Appeals Panel for review.

§ 1045.40 Marking requirements.

(a) RD classifiers shall ensure that each RD and FRD document is clearly marked to convey to the holder that it contains RD or FRD information, the level of classification assigned, and the additional markings in paragraphs (b)(3) and (4) of this section.

(b) *Front Marking.* In addition to the overall classification level of the document, the following notices shall appear on the front of the document, as appropriate:

(1) If the document contains RD:
RESTRICTED DATA

This document contains RESTRICTED DATA as defined in the Atomic Energy Act of 1954. Unauthorized disclosure subject to administrative and criminal sanctions.

(2) If the document contains FRD but does not contain RD:

FORMERLY RESTRICTED DATA

Unauthorized disclosure subject to administrative and criminal sanctions. Handle as RESTRICTED DATA in foreign dissemination. Section 144b, Atomic Energy Act of 1954.

(3) An RD or FRD document shall be marked to identify the classification guide or source document, by title and date, used to classify the document:

Derived from:

(Classification Guide or source document—title and date)

(4) An RD or FRD document shall be marked with the identity of the RD classifier, unless the classifier is the same as the document originator or signer.

RD Classifier:

(Name and position or title)

(c) *Interior Page.* RD classifiers shall ensure that RD and FRD documents are clearly marked at the top and bottom of each interior page with the overall classification level and category of the document or the classification level and category of the page, whichever is preferred. The abbreviations "RD" and "FRD" may be used in conjunction with the document classification (e.g., SECRET RD or SECRET FRD).

(d) *Declassification Marking.* Declassified RD and FRD documents shall be marked with the identity of the individual authorizing the declassification, the declassification date and the classification guide which served as the basis for the declassification. Individuals authorizing the declassification shall ensure that the following marking is affixed on RD and FRD documents which they declassify:

Declassified on:

(Date)

Authorizing Individual:

(Name and position or title)

Authority:

(Classification Guide—title and date)

§ 1045.41 Use of classified addendums.

(a) In order to maximize the amount of information available to the public and to simplify document handling procedures, document originators should segregate RD or FRD into an addendum whenever practical. When RD or FRD is segregated into an addendum, the originator shall acknowledge the existence of the classified addendum unless such an acknowledgment would reveal classified information.

(b) When segregation of RD or FRD into an addendum is not practical, document originators are encouraged to prepare separate unclassified versions of documents with significant public interest.

(c) When documents contain environmental, safety or health information and a separate unclassified version cannot be prepared, document originators are encouraged to provide a publicly releasable rationale for the classification of the documents.

§ 1045.42 Mandatory and Freedom of Information Act reviews for declassification of restricted data and formerly restricted data documents.

(a) *General.* (1) Agencies with documents containing RD and FRD shall respond to mandatory review and Freedom of Information Act (FOIA) requests for these documents from the public.

(2) In response to a mandatory review or Freedom of Information Act request, DOE or DoD may refuse to confirm or deny the existence or nonexistence of the requested information whenever the fact of its existence or nonexistence is itself classified as RD or FRD.

(b) *Processing Requests.* (1) Agencies shall forward documents containing RD to DOE for review.

(2) Agencies shall forward documents containing FRD to the DOE or to the DoD for review, depending on which is the originating agency.

(3) The DOE and DoD shall coordinate the review of RD and FRD documents as appropriate.

(4) The review and appeal process is that described in subpart D of this part except for the appeal authority. DOE and DoD shall not forward RD and FRD documents to the the Interagency Security Classification Appeals Panel

(ISCAP) for appeal review unless those documents also contain NSI. In such cases, the DOE or DoD shall delete the RD and FRD portions prior to forwarding the NSI and unclassified portions to the ISCAP for review.

(5) *Information Declassification Actions resulting from appeal reviews.* (i) Appeal reviews of RD or FRD documents shall be based on existing classification guidance. However, the DOE Director of Declassification shall review the RD and FRD information in the appealed document to determine if it may be a candidate for possible declassification.

(ii) If declassification of the information appears appropriate, the DOE Director of Declassification shall initiate a formal declassification action and so advise the requester.

(c) *Denying Official.* (1) The denying official for documents containing RD is the DOE Director of Declassification.

(2) The denying official for documents containing FRD is either the DOE Director of Declassification or an appropriate DoD official.

(d) *Appeal Authority.* (1) The appeal authority for RD documents is the DOE Director of Security Affairs.

(2) The appeal authority for FRD documents is either the DOE Director of Security Affairs, or an appropriate DoD official.

(e) The denying official and appeal authority for Naval Nuclear Propulsion Information is the Director, Office of Naval Reactors.

(f) RD and FRD information contained in documents shall be withheld from public disclosure under exemption 3 of the FOIA (5 U.S.C. 522 (b)(3)) because such information is exempt under the statutory jurisdiction of the Atomic Energy Act.

§ 1045.43 Systematic review for declassification.

(a) The Secretary shall ensure that RD documents, and the DoD shall ensure that FRD documents, are periodically and systematically reviewed for declassification. The focus of the review shall be based on the degree of public and researcher interest and likelihood of declassification upon review.

(b) Agencies with RD or FRD document holdings shall cooperate with the DOE Director of Declassification (and with the DoD for FRD) to ensure the systematic review of RD and FRD documents.

(c) Review of documents in particular areas of public interest shall be considered if sufficient interest is demonstrated. Proposals for systematic document reviews of given collections or subject areas should be addressed to

the Director of Declassification, Department of Energy, 19901 Germantown Road, Germantown, MD 20874-1290.

§ 1045.44 Classification review prior to public release.

Any person with authorized access to RD or FRD who generates a document intended for public release in an RD or FRD subject area shall ensure that it is reviewed for classification by the appropriate DOE organization (for RD) or the appropriate DOE or DoD organization (for FRD) prior to its release.

§ 1045.45 Review of unmarked documents with potential restricted data or formerly restricted data.

(a) Individuals reviewing NSI records of permanent historical value under the automatic or systematic review provisions of E.O. 12958 may come upon documents that they suspect may contain RD or FRD, but which are not so marked. Such documents are not subject to automatic declassification.

(b) Such documents shall be reviewed by an RD Classifier as soon as possible to determine their classification status. Assistance may be requested from the DOE Director of Declassification.

§ 1045.46 Classification by association or compilation.

(a) If two pieces of unclassified information reveal classified information when associated, then RD classifiers may classify the document.

(b) RD classifiers may classify a document because a number of pieces of unclassified information considered together contain some added value such as completeness or comprehensiveness of the information which warrants classification.

Subpart D—Executive Order 12958 “Classified National Security Information” Requirements Affecting the Public**§ 1045.50 Purpose and scope.**

This subpart describes the procedures to be used by the public in questioning or appealing DOE decisions regarding the classification of NSI under E.O. 12958 and 32 CFR part 2001.

§ 1045.51 Applicability.

This subpart applies to any person with authorized access to DOE NSI or who desires access to DOE documents containing NSI.

§ 1045.52 Mandatory declassification review requests.

All DOE information classified as NSI is subject to review for declassification by the DOE if:

(a) The request for a review describes the document containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort;

(b) The information is not exempted from search and review under the Central Intelligence Agency Information Act;

(c) The information has not been reviewed for declassification within the past 2 years; and

(d) The request is sent to the Department of Energy, Director of Declassification, 19901 Germantown Road, Germantown, Maryland 20874-1290.

§ 1045.53 Appeal of denial of mandatory declassification review requests.

(a) If the Department has reviewed the information within the past 2 years, the request may not be processed. If the information is the subject of pending litigation, the processing of the request may be delayed pending completion of the litigation. The Department shall inform the requester of this fact and of the requester's appeal rights.

(b) When the Director of Declassification has denied a request for review of NSI, the requester may, within 30 calendar days of its receipt, appeal the determination to the Director of Security Affairs.

(c) *Elements of appeal.* The appeal shall be in writing and addressed to the

Director of Security Affairs, Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585. The appeal shall contain a concise statement of grounds upon which it is brought and a description of the relief sought. It should also include a discussion of all relevant authorities which include, but are not limited to DOE (and predecessor agencies) rulings, regulations, interpretations, and decisions on appeals, and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination being appealed shall be submitted with the appeal.

(d) *Receipt of appeal.* An appeal shall be considered to be received upon receipt by the DOE Director of Security Affairs.

(e) *Action within 60 working days.* The appeal authority shall act upon the appeal within 60 working days of its receipt. If no determination on the appeal has been issued at the end of the 60-day period, the requester may consider his or her administrative remedies to be exhausted and may seek a review by the Interagency Security Classification Appeals Panel (ISCAP). When no determination can be issued within the applicable time limit, the appeal shall nevertheless continue to be processed. On expiration of the time limit, DOE shall inform the requester of

the reason for the delay, of the date on which a determination may be expected to be issued, and of his or her right to seek further review by the ISCAP. Nothing in this subpart shall preclude the appeal authority and the requester from agreeing to an extension of time for the decision on an appeal. The DOE Director of Security Affairs shall confirm any such agreement in writing and shall clearly specify the total time agreed upon for the appeal decision.

(f) *Form of action on appeal.* The DOE Director of Security Affairs' action on an appeal shall be in writing and shall set forth the reason for the decision. The Department may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified under E.O. 12958.

(g) *Right of final appeal.* The requester has the right to appeal a final Department decision or a failure to provide a determination on an appeal within the allotted time to the ISCAP for those appeals dealing with NSI. In cases where NSI documents also contain RD and FRD, the RD and FRD portions of the document shall be deleted prior to forwarding the NSI and unclassified portions to the ISCAP for review.

[FR Doc. 97-33949 Filed 12-30-97; 8:45 am]

BILLING CODE 6450-01-P

Wednesday
December 31, 1997

Executive Order

Part XI

The President

Executive Order 13071—Adjustments of
Certain Rates of Pay

Presidential Documents

Title 3—**Executive Order 13071 of December 29, 1997****The President****Adjustments of Certain Rates of Pay**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the laws cited herein, it is hereby ordered as follows:

Section 1. *Statutory Pay Systems.* The rates of basic pay or salaries of the statutory pay systems (as defined in 5 U.S.C. 5302(1)), as adjusted under 5 U.S.C. 5303(b), are set forth on the schedules attached hereto and made a part hereof:

(a) The General Schedule (5 U.S.C. 5332(a)) at Schedule 1;

(b) The Foreign Service Schedule (22 U.S.C. 3963) at Schedule 2; and

(c) The schedules for the Veterans Health Administration of the Department of Veterans Affairs (38 U.S.C. 7306, 7404; section 301(a) of Public Law 102-40) at Schedule 3.

Sec. 2. *Senior Executive Service.* The rates of basic pay for senior executives in the Senior Executive Service, as adjusted under 5 U.S.C. 5382, are set forth on Schedule 4 attached hereto and made a part hereof.

Sec. 3. *Executive Salaries.* The rates of basic pay or salaries for the following offices and positions are set forth on the schedules attached hereto and made a part hereof:

(a) The Executive Schedule (5 U.S.C. 5312-5318) at Schedule 5;

(b) The Vice President (3 U.S.C. 104) and the Congress (2 U.S.C. 31) at Schedule 6; and

(c) Justices and judges (28 U.S.C. 5, 44(d), 135, 252, and 461(a)) at Schedule 7.

Sec. 4. *Uniformed Services.* Pursuant to sections 601 and 604 of Public Law 105-85, the rates of monthly basic pay (37 U.S.C. 203(a)) for members of the uniformed services and the rate of monthly cadet or midshipman pay (37 U.S.C. 203(c)) are set forth on Schedule 8 attached hereto and made a part hereof.

Sec. 5. *Locality-Based Comparability Payments.* (a) Pursuant to sections 5304 and 5304a of title 5, United States Code, locality-based comparability payments shall be paid in accordance with Schedule 9 attached hereto and made a part hereof.

(b) The Director of the Office of Personnel Management shall take such actions as may be necessary to implement these payments and to publish appropriate notice of such payments in the **Federal Register**.

Sec. 6. *Effective Dates.* Schedule 8 is effective on January 1, 1998. The other schedules contained herein are effective on the first day of the first applicable pay period beginning on or after January 1, 1998.

Sec. 7. *Prior Order Superseded.* Executive Order 13033 of December 27, 1996, is superseded.

THE WHITE HOUSE,
December 29, 1997.

A handwritten signature in black ink, reading "William Clinton". The signature is written in a cursive style with a large, prominent "W" and "C".

SCHEDULE 1--GENERAL SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 1998)

	1	2	3	4	5	6	7	8	9	10
GS-1	\$12,960	\$13,392	\$13,823	\$14,252	\$14,685	\$14,938	\$15,362	\$15,791	\$15,809	\$16,214
2	14,571	14,918	15,401	15,809	15,985	16,455	16,925	17,395	17,865	18,335
3	15,899	16,429	16,959	17,489	18,019	18,549	19,079	19,609	20,139	20,669
4	17,848	18,443	19,038	19,633	20,228	20,823	21,418	22,013	22,608	23,203
5	19,969	20,635	21,301	21,967	22,633	23,299	23,965	24,631	25,297	25,963
6	22,258	23,000	23,742	24,484	25,226	25,968	26,710	27,452	28,194	28,936
7	24,734	25,558	26,382	27,206	28,030	28,854	29,678	30,502	31,326	32,150
8	27,393	28,306	29,219	30,132	31,045	31,958	32,871	33,784	34,697	35,610
9	30,257	31,266	32,275	33,284	34,293	35,302	36,311	37,320	38,329	39,338
10	33,320	34,431	35,542	36,653	37,764	38,875	39,986	41,097	42,208	43,319
11	36,609	37,829	39,049	40,269	41,489	42,709	43,929	45,149	46,369	47,589
12	43,876	45,339	46,802	48,265	49,728	51,191	52,654	54,117	55,580	57,043
13	52,176	53,915	55,654	57,393	59,132	60,871	62,610	64,349	66,088	67,827
14	61,656	63,711	65,766	67,821	69,876	71,931	73,986	76,041	78,096	80,151
15	72,525	74,943	77,361	79,779	82,197	84,615	87,033	89,451	91,869	94,287

SCHEDULE 2--FOREIGN SERVICE SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 1998)

Step	Class	Class	Class	Class	Class	Class	Class	Class	Class
	1	2	3	4	5	6	7	8	9
1	\$72,525	\$58,767	\$47,619	\$38,586	\$31,266	\$27,951	\$24,987	\$22,338	\$19,969
2	74,701	60,530	49,048	39,744	32,204	28,790	25,737	23,008	20,568
3	76,942	62,346	50,519	40,936	33,170	29,653	26,509	23,698	21,185
4	79,250	64,216	52,035	42,164	34,165	30,543	27,304	24,409	21,821
5	81,628	66,143	53,596	43,429	35,190	31,459	28,123	25,142	22,475
6	84,076	68,127	55,203	44,732	36,246	32,403	28,967	25,896	23,150
7	86,599	70,171	56,860	46,074	37,333	33,375	29,836	26,673	23,844
8	89,197	72,276	58,565	47,456	38,453	34,376	30,731	27,473	24,559
9	91,873	74,444	60,322	48,880	39,607	35,407	31,653	28,297	25,296
10	94,287	76,678	62,132	50,346	40,795	36,470	32,602	29,146	26,055
11	94,287	78,978	63,996	51,856	42,019	37,564	33,580	30,020	26,837
12	94,287	81,347	65,916	53,412	43,279	38,691	34,588	30,921	27,642
13	94,287	83,788	67,893	55,014	44,578	39,851	35,625	31,849	28,471
14	94,287	86,301	69,930	56,665	45,915	41,047	36,694	32,804	29,325

**SCHEDULE 3--VETERANS HEALTH ADMINISTRATION SCHEDULES
DEPARTMENT OF VETERANS AFFAIRS**

(Effective on the first day of the first applicable pay period
beginning on or after January 1, 1998)

Schedule for the Office of the Under Secretary for Health
(38 U.S.C. 7306)*

Deputy Under Secretary for Health	\$123,168	**
Associate Deputy Under Secretary for Health	117,971	***
Assistant Under Secretaries for Health	114,494	***

	Minimum	Maximum
Medical Directors	\$97,687	\$110,714 ***
Service Directors	85,059	105,636
Director, National Center for Preventive Health	72,525	105,636

Physician and Dentist Schedule

Director Grade	\$85,059	\$105,636
Executive Grade	78,543	100,100
Chief Grade	72,525	94,287
Senior Grade	61,656	80,151
Intermediate Grade	52,176	67,827
Full Grade	43,876	57,043
Associate Grade	36,609	47,589

Clinical Podiatrist and Optometrist Schedule

Chief Grade	72,525	\$94,287
Senior Grade	61,656	80,151
Intermediate Grade	52,176	67,827
Full Grade	43,876	57,043
Associate Grade	36,609	47,589

Physician Assistant and Expanded-Function
Dental Auxiliary Schedule ****

Director Grade	\$72,525	\$94,287
Assistant Director Grade	61,656	80,151
Chief Grade	52,176	67,827
Senior Grade	43,876	57,043
Intermediate Grade	36,609	47,589
Full Grade	30,257	39,338
Associate Grade	26,037	33,849
Junior Grade	22,258	28,936

- * This schedule does not apply to the Assistant Under Secretary for Nursing Programs or the Director of Nursing Services. Pay for these positions is set by the Under Secretary for Health under 38 U.S.C. 7451.
- ** Pursuant to section 7404(d)(1) of title 38, United States Code, the rate of basic pay payable to this employee is limited to the rate for level IV of the Executive Schedule, which is \$118,400.
- *** Pursuant to section 7404(d)(2) of title 38, United States Code, the rate of basic pay payable to these employees is limited to the rate for level V of the Executive Schedule, which is \$110,700.
- **** Pursuant to section 301(a) of Public Law 102-40, these positions are paid according to the Nurse Schedule in 38 U.S.C. 4107(b) as in effect on August 14, 1990, with subsequent adjustments.

SCHEDULE 4--SENIOR EXECUTIVE SERVICE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 1998)

ES-1	\$99,200
ES-2	103,900
ES-3	108,600
ES-4	114,500
ES-5	118,400
ES-6	118,400

SCHEDULE 5--EXECUTIVE SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 1998)

level I	\$151,800
level II	136,700
level III	125,900
level IV	118,400
level V	110,700

SCHEDULE 6--VICE PRESIDENT AND MEMBERS OF CONGRESS

(Effective on the first day of the first applicable pay period beginning on or after January 1, 1998)

Vice President	\$175,400
Senators	136,700
Members of the House of Representatives	136,700
Delegates to the House of Representatives	136,700
Resident Commissioner from Puerto Rico	136,700
President pro tempore of the Senate	151,800
Majority leader and minority leader of the Senate	151,800
Majority leader and minority leader of the House of Representatives	151,800
Speaker of the House of Representatives	175,400

SCHEDULE 7--JUDICIAL SALARIES

(Effective on the first day of the first applicable pay period beginning on or after January 1, 1998)

Chief Justice of the United States	\$175,400
Associate Justices of the Supreme Court	167,900
Circuit Judges	145,000
District Judges	136,700
Judges of the Court of International Trade	136,700

SCHEDULE 8--PAY OF THE UNIFORMED SERVICES (PAGE 2)
 YEARS OF SERVICE (COMPUTED UNDER 37 U.S.C. 205)

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18	Over 20	Over 22	Over 24	Over 26
W-5	\$2,387.40	\$2,561.70	\$2,561.70	\$2,619.90	\$2,739.30	\$2,859.90	\$2,979.90	\$3,188.10	\$3,336.30	\$3,453.60	\$3,546.00	\$3,660.30	\$4,228.80	\$4,351.20	\$4,534.50
W-4	2,169.90	2,353.80	2,353.80	2,384.10	2,412.00	2,588.40	2,739.30	2,828.70	2,918.40	3,005.70	3,099.00	3,219.90	3,336.30	3,336.30	3,453.60
W-3	1,900.50	2,056.20	2,056.20	2,115.90	2,231.70	2,353.80	2,443.20	2,532.60	2,619.90	2,712.00	2,801.10	2,889.00	3,005.70	3,005.70	3,005.70
W-2	1,583.40	1,815.30	1,815.30	1,967.10	2,056.20	2,144.80	2,231.70	2,323.50	2,412.00	2,501.70	2,588.40	2,681.10	2,681.10	2,681.10	2,681.10

WARRANT OFFICERS

ENLISTED MEMBERS

E-9 *	-	-	-	-	-	-	\$2,328.90	\$2,777.40	\$2,839.80	\$2,904.00	\$2,970.90	\$3,037.50	\$3,096.00	\$3,258.60	\$3,385.50	\$3,576.00
E-8	\$1,626.30	\$1,755.60	\$1,820.10	\$1,884.30	\$1,948.50	\$2,010.60	2,396.10	2,458.80	2,522.70	2,589.60	2,648.40	2,713.50	2,873.10	3,000.90	3,193.50	
E-7	1,398.90	1,524.90	1,588.20	1,655.70	1,718.10	1,779.90	2,074.80	2,139.60	2,236.20	2,299.80	2,365.40	2,394.30	2,555.10	2,682.30	2,873.10	
E-6	1,227.60	1,336.20	1,401.00	1,462.20	1,558.20	1,621.80	1,845.30	1,940.10	2,001.30	2,065.80	2,097.00	2,097.00	2,097.00	2,097.00	2,097.00	
E-5	1,144.80	1,209.30	1,280.40	1,379.10	1,462.20	1,558.20	1,685.70	1,748.10	1,779.90	1,779.90	1,779.90	1,779.90	1,779.90	1,779.90	1,779.90	
E-4	1,079.10	1,137.90	1,183.20	1,230.30	1,330.30	1,433.70	1,433.70	1,433.70	1,433.70	1,433.70	1,433.70	1,433.70	1,433.70	1,433.70	1,433.70	
E-3	1,038.30	1,038.30	1,038.30	1,038.30	1,038.30	1,038.30	1,038.30	1,038.30	1,038.30	1,038.30	1,038.30	1,038.30	1,038.30	1,038.30	1,038.30	
E-2	926.10	926.10	926.10	926.10	926.10	926.10	926.10	926.10	926.10	926.10	926.10	926.10	926.10	926.10	926.10	
E-1 **	856.80	-	-	-	-	-	-	-	-	-	-	-	-	-	-	

* While serving as Sergeant Major of the Army, Master Chief Petty Officer of the Navy or Coast Guard, Chief Master Sergeant of the Air Force, or Sergeant Major of the Marine Corps, basic pay for this grade is \$4,346.40, regardless of cumulative years of service computed under section 205 of title 37, United States Code.

** Applies to personnel who have served 4 months or more on active duty.

*** Applies to personnel who have served less than 4 months on active duty.

SCHEDULE 8--PAY AND ALLOWANCES OF THE UNIFORMED SERVICES (PAGE 3)

Part II--RATE OF MONTHLY CADET OR MIDSHIPMAN PAY

The rate of monthly cadet or midshipman pay authorized by section 203(c) of title 37, United States Code, is \$558.04.

Note: As a result of the enactment of sections 602-604 of Public Law 105-85, the National Defense Authorization Act for Fiscal Year 1998, the Secretary of Defense now has the authority to adjust the rates of basic allowances for subsistence and housing. Therefore, these allowances are no longer adjusted by the President in conjunction with the adjustment of basic pay for members of the uniformed services. Accordingly, the tables of allowances included in previous orders are not included here, and the rate of monthly cadet or midshipman pay is redesignated as Part II of Schedule 8.

SCHEDULE 9--LOCALITY-BASED COMPARABILITY PAYMENTS

(Effective on the first day of the first applicable pay period
beginning on or after January 1, 1998)

<u>Locality Pay Area¹</u>	<u>Rate</u>
Atlanta, GA	6.18%
Boston-Worcester-Lawrence, MA-NH,ME,CT	8.61%
Chicago-Gary-Kenosha, IL-IN-WI	9.21%
Cincinnati-Hamilton, OH-KY-IN	7.71%
Cleveland-Akron, OH	6.35%
Columbus, OH	6.90%
Dallas-Fort Worth, TX	6.90%
Dayton-Springfield, OH	6.19%
Denver-Boulder-Greeley, CO	8.46%
Detroit-Ann Arbor-Flint, MI	9.36%
Hartford, CT	9.13%
Houston-Galveston-Brazoria, TX	11.96%
Huntsville, AL	5.84%
Indianapolis, IN	5.63%
Kansas City, MO-KS	6.06%
Los Angeles-Riverside-Orange County, CA	10.31%
Miami-Fort Lauderdale, FL	7.86%
Milwaukee-Racine, WI	6.19%
Minneapolis-St. Paul, MN-WI	7.32%
New York-Northern New Jersey-Long Island, NY-NJ-CT-PA	9.76%
Orlando, FL	5.42%
Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD	7.67%
Pittsburgh, PA	6.21%
Portland-Salem, OR-WA	7.17%
Richmond-Petersburg, VA	6.12%
Sacramento-Yolo, CA	7.64%
St. Louis, MO-IL	5.71%
San Diego, CA	7.94%
San Francisco-Oakland-San Jose, CA	12.06%
Seattle-Tacoma-Bremerton, WA	7.34%
Washington-Baltimore, DC-MD-VA-WV	7.27%
Rest of U.S.	5.42%

¹Locality Pay Areas are defined in 5 CFR 531.603.

Reader Aids

Federal Register

Vol. 62, No. 250

Wednesday, December 31, 1997

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	202-523-5227
E-mail	info@fedreg.nara.gov
Laws	
For additional information	523-5227
Presidential Documents	
Executive orders and proclamations	523-5227
The United States Government Manual	523-5227
Other Services	
Electronic and on-line services (voice)	523-4534
Privacy Act Compilation	523-3187
TDD for the hearing impaired	523-5229

ELECTRONIC BULLETIN BOARD

Free **Electronic Bulletin Board** service for Public Law numbers, Federal Register finding aids, and list of documents on public inspection. **202-275-0920**

FAX-ON-DEMAND

You may access our Fax-On-Demand service with a fax machine. There is no charge for the service except for long distance telephone charges the user may incur. The list of documents on public inspection and the daily Federal Register's table of contents are available. The document numbers are 7050-Public Inspection list and 7051-Table of Contents list. The public inspection list is updated immediately for documents filed on an emergency basis.

NOTE: YOU WILL ONLY GET A LISTING OF DOCUMENTS ON FILE. Documents on public inspection may be viewed and copied in our office located at 800 North Capitol Street, NW., Suite 700. The Fax-On-Demand telephone number is: **301-713-6905**

FEDERAL REGISTER PAGES AND DATES, DECEMBER

63441-63626.....	1
63627-63824.....	2
63825-64130.....	3
64131-64262.....	4
64263-64510.....	5
64511-64676.....	8
64677-65004.....	9
65005-65196.....	10
65197-65308.....	11
65309-65592.....	12
65593-65740.....	15
65741-65990.....	16
65991-66250.....	17
66251-66494.....	18
66495-66812.....	19
66813-66972.....	22
66973-67256.....	23
67257-67548.....	24
67549-67692.....	29
67693-68138.....	30
68139-68530.....	31

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.

3 CFR	760.....	68142
	905.....	68142
	925.....	68150
	927.....	66495
	959.....	67694
	1209.....	66973
	1412.....	63441
	1944.....	67216
	2003.....	67258
Proclamations:		
7056.....	64127	
7057.....	64131	
7058.....	65003	
7059.....	65309	
7060.....	65987	
7061.....	66251	
Executive Orders:		
13033 (Superseded by		
EO 13071).....	68521	
13069.....	65989	
13070.....	66493	
13071.....	68521	
Administrative Orders:		
Presidential Determinations:		
No. 98-4 of November		
14, 1997.....	63823	
No. 98-5 of November		
17, 1997.....	63619	
No. 96-6 of December		
2, 1997.....	65005	
No. 96-7 of December		
5, 1997.....	66253	
No. 96-8 of December		
5, 1997.....	66255	
5 CFR		
178.....	68139	
213.....	63627	
315.....	63627	
410.....	63630	
531.....	65311	
532.....	66973, 67257, 67258	
551.....	67238	
Proposed Rules:		
831.....	67295	
842.....	67295	
870.....	67295	
890.....	67295	
591.....	63630	
1201.....	66813	
7 CFR		
2.....	65593	
17.....	63606	
58.....	66257	
247.....	64511	
301.....	64133, 64263, 64677	
319.....	65007	
320.....	65007	
330.....	65007	
352.....	65007	
401.....	63631, 65313	
412.....	67693	
422.....	65321	
437.....	65338	
443.....	65344	
454.....	63631	
457.....	63631, 63633, 65130,	
	65313, 65321, 65338, 65344,	
	65741, 65991, 67117	
	760.....	68142
	905.....	68142
	925.....	68150
	927.....	66495
	959.....	67694
	1209.....	66973
	1412.....	63441
	1944.....	67216
	2003.....	67258
Proposed Rules:		
51.....	66033	
54.....	68232	
70.....	63471	
205.....	65850	
246.....	68233	
300.....	67761	
301.....	67761	
610.....	64174	
729.....	63678	
800.....	66036	
810.....	66036	
966.....	66312	
980.....	66312	
985.....	67297	
1301.....	65226	
8 CFR		
213a.....	64048	
214.....	67764	
299.....	64048	
9 CFR		
50.....	66259	
78.....	64134, 65596	
91.....	64265	
93.....	64265	
94.....	65747, 65999	
Proposed Rules:		
85.....	65630	
381.....	64767	
441.....	64767	
10 CFR		
30.....	63634	
32.....	63634	
50.....	63825, 66977	
70.....	63825	
73.....	63640	
1008.....	67518	
1045.....	68502	
1703.....	66815	
Proposed Rules:		
40.....	65039	
50.....	63892, 63911, 66038	
70.....	63911	
11 CFR		
Proposed Rules:		
100.....	66832	
102.....	67300	
104.....	67300	
108.....	67300	
114.....	65040, 66832	

12 CFR

3.....68064
 8.....64135
 202.....66412
 203.....66259
 208.....68064
 225.....68064
 226.....63441, 66179
 265.....64996
 325.....68064
 506.....66260, 67117
 516.....64138
 543.....64138
 544.....66260, 67117
 545.....64138, 66260, 67117, 67696
 550.....67696
 552.....64138, 66260, 67117
 556.....64138
 559.....66260, 67117
 560.....66260, 67117
 561.....66260, 67117
 563.....64138, 66260, 67117
 563e.....67696
 565.....66260, 67117
 567.....66260, 67117
 571.....67696
 575.....66260, 67117
 614.....63644, 66816
 703.....64146
 704.....64148
 725.....67549
 790.....65197
 791.....64266
 934.....65197
 960.....66977
 1780.....68152
 1806.....64440

Proposed Rules:
 211.....68424
 225.....64997
 226.....64769
 265.....68424
 404.....64177
 405.....64177
 708a.....64185
 708b.....64187

14 CFR
 39.....63622, 63828, 63830, 63831, 63835, 63836, 64268, 64511, 64513, 64514, 64517, 64519, 64680, 65009, 65011, 65198, 65352, 65355, 65597, 65600, 65601, 65603, 65604, 65749, 65750, 66001, 66264, 66266, 66268, 66269, 66271, 66498, 66500, 66502, 66506, 66508, 66511, 66512, 66980, 67550, 67552, 67708, 68154, 68156, 68158, 68159
 71.....64148, 64150, 64151, 64152, 64268, 64268, 64269, 64271, 64272, 64273, 64521, 65012, 65013, 65014, 65015, 65201, 65357, 65358, 65606, 66179, 66818, 67265, 67266, 67267, 67555, 67711, 67712, 67713
 73.....65359, 65360, 66002, 67268, 67269, 67711
 91.....66248, 67555, 68136
 93.....66248
 95.....65016, 65361, 65363
 97.....63447, 63449, 63451, 67556, 67559

121.....65202, 66248, 68136
 135.....66248
 142.....68136
 255.....63837, 66272
 1260.....63452

Proposed Rules:
 39.....63473, 63475, 63476, 63624, 63912, 63914, 64523, 64775, 64777, 64779, 64780, 64782, 64784, 64785, 64787, 65227, 65228, 65230, 65231, 65233, 65768, 66315, 66317, 66560, 66561, 66562, 66563, 66565, 66567, 67300, 67303, 68236, 68237, 68239
 71.....63916, 63917, 64321, 64321, 64322, 64323, 64525, 65040, 65041, 65308, 65383, 65631, 66838, 66840

15 CFR
 295.....64682
 801.....68161, 68163
 902.....67714
 922.....66003, 67723

Proposed Rules:
 806.....65043
 902.....67714
 960.....65384

16 CFR
 305.....67560

17 CFR
 15.....65203
 230.....64968, 65043
 239.....64968
 270.....64968
 274.....64687, 64968

Proposed Rules:
 1.....66569
 33.....66569
 200.....67940
 240.....67996, 67940, 367996, 68011, 68018
 249.....67940

18 CFR
 35.....64688
 37.....64715
 401.....64154

19 CFR
 4.....66521
 54.....68164

Proposed Rules:
 123.....67765
 142.....67765

20 CFR
 255.....64161
 295.....67724
 340.....64273
 404.....64274
 422.....64274

Proposed Rules:
 10.....67120
 25.....67120
 211.....64188
 422.....63681

21 CFR
 5.....67270
 101.....63647, 63653, 64634, 66275

179.....64102, 64107
 211.....66522
 500.....66982
 520.....65020
 522.....66983
 524.....65752
 558.....66522, 66984, 66985, 66986, 67273, 67724, 67725
 806.....67274
 866.....66003

Proposed Rules:
 101.....67771, 67775
 200.....64048
 201.....67770
 330.....67770
 358.....67770
 801.....67011
 803.....67011
 804.....67011
 806.....67011
 807.....67011
 808.....65384, 66179
 810.....67011
 820.....67011
 821.....67011
 876.....65770
 1002.....67011
 1020.....65235, 67011
 1308.....64526

22 CFR
 40.....67563, 67564
 120.....67274
 123.....67274
 124.....67274
 126.....67274
 127.....67274
 129.....67274

Proposed Rules:
 22.....63478
 51.....63478
 53.....63478

23 CFR
 1327.....63655

Proposed Rules:
 655.....64324

24 CFR
 100.....66424
 103.....66424
 201.....65180
 202.....65180
 203.....65180
 570.....64634
 888.....64521

Proposed Rules:
 81.....68060
 180.....66488

25 CFR
Proposed Rules:
 514.....65775

26 CFR
 1.....67725, 67726, 68165, 68167, 68173
 20.....68183
 25.....66987, 68183
 40.....67568
 54.....66932, 67688, 67689
 301.....68167
 601.....68167
 602.....66987, 68167, 68173

Proposed Rules:
 1.....64190, 66575, 67780

31.....67304
 40.....67589
 52.....67013
 54.....66967
 301.....68241, 68242

28 CFR
 0.....63453
 540.....65184, 65196

29 CFR
 520.....64956
 521.....64956
 522.....64956
 523.....64956
 527.....64956
 1614.....63847
 1910.....65203, 66275
 2590.....66932, 67689
 Ch. XXVI.....67728
 Ch. XL.....67728
 4011.....65607
 4022.....65607
 4044.....65609, 65610

Proposed Rules:
 1910.....65388
 2550.....66908
 4022.....66319

30 CFR
 206.....65753
 250.....67278
 251.....67278
 901.....66819

Proposed Rules:
 56.....65777, 67013, 68468
 57.....64789, 65777, 67013, 68468
 62.....65777, 67013, 68468
 70.....65777, 67013, 68468
 71.....65777, 67013, 68468
 75.....64789
 243.....68244
 250.....68244
 290.....68244
 913.....67014
 917.....63684, 65044
 926.....63685, 64327
 936.....65632
 938.....67590
 943.....67592, 67596, 67598
 946.....67016

31 CFR
 Ch. V.....67729
 500.....64720

Proposed Rules:
 356.....64528
 Ch. IX.....68476
 900.....68476
 901.....68476
 902.....68476
 903.....68476
 904.....68476

32 CFR
 175.....66523
 199.....66989, 66992
 318.....67291
 320.....65020

Proposed Rules:
 199.....64191, 67018
 901.....63485
 989.....67305

33 CFR
 96.....67492

100.....65021, 66995, 67570	260.....67736	146.....66932, 67689	9.....64914
117.....63847, 66005, 66006	261.....63458	205.....64301	12.....64914, 64916
151.....67526	264.....64636, 64795	232.....64301	13.....64914, 64916
160.....65203	265.....64636	233.....64301	16.....64914, 64916
165.....65022	268.....64504	235.....64301	17.....64914
Proposed Rules:	270.....64636	250.....64301	19.....64914, 64916, 64940
62.....67031	271.....67572	251.....64301	22.....64914
66.....67031	272.....67578	255.....64301	25.....64929
117.....66039, 68245	300.....65225, 67736, 68216	256.....64301	29.....64930
	721.....64738	257.....64301	31.....64930, 64931, 64932
36 CFR	Proposed Rules:	Ch. XI.....66529	32.....64914, 64916
701.....64279	51.....64532, 66841	1110.....66825	33.....64914, 64933
Proposed Rules:	52.....63687, 64329, 64543,	1630.....68219	34.....64914
1.....63488	647389, 65046, 65634,	1643.....67746	37.....64914
14.....63488	66040, 66042, 66043, 66046,	Proposed Rules:	38.....64914
242.....66216	66576, 66843, 67034, 67035,	1302.....65778	39.....64914
327.....64192	67320, 68246		41.....64916
1190.....67320	59.....67784	46 CFR	42.....64915, 64931, 64934,
1191.....67320	60.....67788	1.....67526	64940
	62.....65635, 67601	2.....67492	43.....64916
37 CFR	63.....65049, 66049, 67788	8.....67526	45.....64914
202.....63657, 66822	80.....63918	31.....67492, 67526	46.....64914
Proposed Rules:	81.....63687, 66578, 68246	69.....67526	47.....64936
253.....63502, 65777	85.....66841, 67818	71.....67492, 67526	49.....64916
255.....63506, 65778	89.....67818	91.....67492, 67526	51.....64914
	112.....63812	107.....67492, 67526	52.....64914, 64915, 64916
38 CFR	144.....67035	114.....64303	53.....64914, 64916, 64934,
4.....65207	146.....67035	115.....67492	64936, 64940
17.....64722	194.....64327	116.....64303	1201.....67749
21.....63847, 63848, 66277	271.....67601	117.....64303	1202.....67749
36.....63454	272.....67601	118.....64303	1203.....67749
Proposed Rules:	441.....66182, 67323	121.....64303	1205.....67749
20.....64790	721.....64738	122.....64303	1206.....67749
21.....66320	799.....67036, 67038, 67466	126.....67492	1209.....67749
		153.....67526	1214.....67749
39 CFR	41 CFR	154.....67526	1216.....67749
111.....63850	51-2.....66527	175.....64303, 65739, 67492	1217.....67749
255.....66996	51-4.....66527	176.....67492	1222.....67749
262.....64280	51-6.....66527	177.....64303	1224.....67749
265.....64280	60-1.....66970	178.....64303	1225.....67749
954.....66997, 68364	60-999.....66970	180.....64303	1236.....67749
	101-42.....68216	185.....64303	1237.....67749
40 CFR	101-43.....68216, 68217	189.....67492	1246.....67749
9.....66278	101-46.....68217	514.....63463	1252.....67749
52.....63454, 63456, 63658,	105-60.....64740	47 CFR	5231.....66826
64284, 64522, 64722, 64725,	Ch. 301.....63798, 68217	20.....63864	Proposed Rules:
65224, 65611, 65613, 66007,		22.....63864	204.....65782
66279, 66822, 66998, 67000,	42 CFR	25.....64167	1843.....64545
67002, 67004, 67006, 68187,	416.....66726	43.....64741	
68188	417.....63669	52.....64759	49 CFR
58.....67009	482.....66726	54.....65036, 65389	171.....65188, 66900
62.....65616, 67570	483.....67174	63.....64741	172.....66898
63.....64736, 65022	485.....66726	64.....64741, 64759	174.....66898
64.....63662	489.....66726	69.....65619, 66029	175.....66898
70.....63662	Proposed Rules:	73.....63674, 65392, 65764,	176.....66898
71.....63662	1001.....63689, 65049	65765, 65766, 66030, 66031,	177.....66898
72.....66278		66294, 66295, 66530, 66826	194.....67292
73.....66278	43 CFR	74.....65392	199.....67293
74.....66278	418.....66442	Proposed Rules:	219.....63464, 63675
75.....66278	3740.....65376	1.....65780, 66321	225.....63675
77.....66278	3810.....65376	21.....65780	240.....63464
78.....66278	3820.....65376	32.....65053	595.....67752
80.....63853, 68196	Proposed Rules:	73.....63690, 65781, 65782,	1241.....65378
81.....64284, 64725, 65025,	4.....64544, 68244	66323, 66324	Proposed Rules:
68188	414.....68492	74.....65780	172.....66903
82.....68028	3820.....67602	48 CFR	174.....66903
85.....67733	44 CFR	Ch. I.....64912, 64952	175.....66903
89.....67733	61.....66026	1.....64913, 64940	176.....66903
180.....63662, 63858, 64048,	65.....67737, 67741	2.....64914	177.....66903
64287, 64294, 65030, 65365,	67.....67742	4.....64915, 64916	191.....67602
65367, 65369, 66008, 66014,	Proposed Rules:	5.....64914	192.....67602, 67608
66020, 68208	67.....67819	6.....64916	193.....67602
185.....64048, 64284, 64287,	45 CFR	7.....64914	194.....67602
66020	144.....67689	8.....64914, 64916	195.....65635, 67608
186.....64048, 66020			213.....65401

243.....65479
376.....67821
572.....64546
Ch. X.....64193

50 CFR

17.....64306, 66295
20.....63608
222.....63467
260.....67585
285.....66828
600.....66531
62263677, 66304, 67010,
67714
64863872, 64765, 66304,
67754
660.....63876, 67610
67963877, 63878, 63880,
64760, 65379, 65622, 65626,
66031, 66311, 66829, 67754,
67755, 68228, 68229, 68230

Proposed Rules:

14.....64335
1764337, 64340, 64799,
64800, 65237, 65783, 65787,
66325, 66583, 67041, 67324
23.....64347
100.....66216
226.....66584
22766325
229.....65402
425.....66325
60065055, 66844, 67608
622.....65056, 68246
648.....65055, 66844
660.....66049, 67610
67963690, 65402, 65635,
65638, 65644, 67041

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 31, 1997**AGRICULTURE DEPARTMENT****Agricultural Marketing Service**

Onions grown in—
Texas; published 12-30-97

AGRICULTURE DEPARTMENT**Farm Service Agency**

Dairy indemnity payment program; published 12-31-97

ENVIRONMENTAL PROTECTION AGENCY

Air quality implementation plans; approval and promulgation; various States:
Iowa; published 12-1-97
Washington
Correction; published 12-31-97

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
Hexythiazox; published 12-31-97

Superfund program:

National oil and hazardous substances contingency plan—

National priorities list update; published 12-31-97

Toxic chemical release reporting; community right-to-know—

Metal mining, coal mining, etc.; industry group list additions; published 5-1-97

FEDERAL DEPOSIT INSURANCE CORPORATION**Risk-based capital**

Market risk; published 12-30-97

FEDERAL RESERVE SYSTEM**Risk-based capital:**

Market risk; published 12-30-97

HOUSING AND URBAN DEVELOPMENT DEPARTMENT**Federal Housing Enterprise Oversight Office**

Practice and procedure:

Civil money penalties; published 12-31-97

INTERIOR DEPARTMENT**Fish and Wildlife Service**

Migratory bird hunting:
Nontoxic shot approval procedures; test protocol; published 12-1-97

TRANSPORTATION DEPARTMENT

Computer reservation systems, carrier-owned:
Expiration date extension; published 12-18-97

TRANSPORTATION DEPARTMENT**Federal Aviation Administration**

Airworthiness directives:
Eurocopter Deutschland GmbH; published 12-16-97
Jetstream; published 11-24-97

TRANSPORTATION DEPARTMENT**Federal Railroad Administration**

Alcohol and drug abuse control and locomotive engineers qualifications:
Technical amendments; published 12-1-97

TREASURY DEPARTMENT Comptroller of the Currency

Fees assessment; national and District of Columbia banks:

Supervision of problem institutions; equitable distribution of costs; published 12-4-97

Risk-based capital:

Market risk; published 12-30-97

TREASURY DEPARTMENT Customs Service

Duty free entry of metal articles; technical change; published 12-31-97

TREASURY DEPARTMENT Internal Revenue Service**Estate and gift taxes:**

Property interests and powers disclaimer; published 12-31-97

Income taxes:

Adoption or change of accounting method requirements; elections time extended; published 12-31-97

Qualified small business stock; published 12-31-97

COMMENTS DUE NEXT WEEK**AGRICULTURE DEPARTMENT****Food Safety and Inspection Service**

Meat and poultry inspection:

Chilling processes; retained water in poultry products; protocols for obtaining data; comments due by 1-8-98; published 12-9-97

AGRICULTURE DEPARTMENT**Natural Resources Conservation Service****Technical assistance:**

State Technical Committees; membership and role expansion; comments due by 1-5-98; published 12-4-97

COMMERCE DEPARTMENT National Oceanic and Atmospheric Administration**Fishery conservation and management:**

Alaska; fisheries of Exclusive Economic Zone—

Pelagic shelf rockfish; comments due by 1-5-98; published 11-5-97

Atlantic highly migratory species—

Scoping document; availability and comment request; comments due by 1-9-98; published 11-28-97

Northeastern United States fisheries—

Experimental fishing permit applications; comments due by 1-6-98; published 12-22-97

EDUCATION DEPARTMENT

Privacy Act; implementation; comments due by 1-8-98; published 11-24-97

ENVIRONMENTAL PROTECTION AGENCY**Air pollutants, hazardous; national emission standards:**

Perchloroethylene; dry cleaning facilities; comments due by 1-9-98; published 12-10-97

Pesticide active ingredient production; comments due by 1-9-98; published 11-10-97

Air pollution control; new motor vehicles and engines:

Inspection/maintenance program requirements; on-board diagnostic checks; comments due by 1-6-98; published 12-22-97

Air pollution; standards of performance for new stationary sources:

Test methods and performance specifications; editorial changes and technical corrections; comments due by 1-5-98; published 11-18-97

Air quality implementation plans; approval and promulgation; various States:

Arizona; comments due by 1-5-98; published 12-9-97

California; comments due by 1-5-98; published 12-5-97

Wisconsin; comments due by 1-9-98; published 12-10-97

Clean Air Act:

Compliance assurance monitoring; comments due by 1-5-98; published 12-2-97

Toxic substances:

Significant new uses—
Methylenebistrisubstituted aniline-, etc.; comments due by 1-8-98; published 12-9-97

Testing requirements—
Biphenyl, etc.; comments due by 1-9-98; published 11-28-97

FEDERAL COMMUNICATIONS COMMISSION**Radio stations; table of assignments:**

Montana; comments due by 1-5-98; published 11-20-97

Television broadcasting:

Two-way transmissions; multipoint distribution service and instructional television fixed service licensees participation; comments due by 1-8-98; published 12-16-97

FEDERAL DEPOSIT INSURANCE CORPORATION**Practice and procedure:**

Application, notice and request procedures, and authority delegations; technical amendments; comments due by 1-7-98; published 10-9-97

FEDERAL RESERVE SYSTEM

Bank holding companies and change in bank control (Regulation Y):

Real estate appraisals; comments due by 1-8-98; published 12-9-97

HEALTH AND HUMAN SERVICES DEPARTMENT**Food and Drug Administration****Communicable diseases control:**

Lather brushes; treatment, sterilization, handling, storage, marking, and inspection; revocation; comments due by 1-5-98; published 10-20-97

HEALTH AND HUMAN SERVICES DEPARTMENT**Health Care Financing Administration**

Medicare:

Home health agency physician certification regulations; comments due by 1-5-98; published 11-5-97

INTERIOR DEPARTMENT**Land Management Bureau**

Range management:

Wild horse and burro adoptions; power of attorney use disallowed; comments due by 1-9-98; published 11-10-97

INTERIOR DEPARTMENT**Fish and Wildlife Service**

Endangered and threatened species:

Arkansas River shiner; comments due by 1-5-98; published 12-5-97

INTERIOR DEPARTMENT**Surface Mining Reclamation and Enforcement Office**

Permanent program and abandoned mine land reclamation plan submissions:

Illinois; comments due by 1-7-98; published 12-23-97
Kentucky; comments due by 1-9-98; published 12-10-97

POSTAL SERVICE

Freedom of Information Act; implementation; comments due by 1-5-98; published 12-5-97

SECURITIES AND EXCHANGE COMMISSION

Securities:

Equity index insurance products; structure, marketing, etc.; comments due by 1-5-98; published 11-21-97

SOCIAL SECURITY ADMINISTRATION

Social security benefits:

Disability benefits reduction on account of workers' compensation and public disability benefits and payments; proration methods; comments due by 1-5-98; published 11-12-97

TRANSPORTATION DEPARTMENT**Coast Guard**

Regattas and marine parades:

U.S. National Waterski Racing Championship; comments due by 1-9-98; published 11-25-97

Tank vessels:

Towing vessel safety; comments due by 1-5-98; published 10-6-97

TRANSPORTATION DEPARTMENT**Federal Aviation Administration**

Airworthiness directives:

Aerospatiale; comments due by 1-8-98; published 12-9-97

American Champion Aircraft Corp.; comments due by 1-8-98; published 11-3-97

Boeing; comments due by 1-5-98; published 11-25-97

Dornier; comments due by 1-8-98; published 12-9-97

Fokker; comments due by 1-8-98; published 12-9-97

Grumman; comments due by 1-8-98; published 12-9-97

Lockheed; comments due by 1-5-98; published 11-25-97

SAAB; comments due by 1-8-98; published 12-9-97

Twin Commander Aircraft Corp.; comments due by 1-6-98; published 10-31-97

Class D and E airspace; comments due by 1-8-98; published 11-24-97

Class E airspace; comments due by 1-5-98; published 11-19-97

TREASURY DEPARTMENT**Internal Revenue Service**

Income taxes:

Sales of obligations between interest payment dates; withholding on interest; comments due by 1-5-98; published 10-14-97

Source of income from sales of inventory partly from sources within possession of United States, etc.; comments due by 1-8-98; published 10-10-97

VETERANS AFFAIRS DEPARTMENT

Vocational rehabilitation and education:

Veterans education—

Service Members Occupational Conversion and Training Act; certification deadlines; comments due by 1-9-98; published 11-10-97

LIST OF PUBLIC LAWS

The List of Public Laws for the 105th Congress, First Session, has been completed. It will resume when bills are enacted into Public Law during the second session of the 105th Congress, which convenes on January 27, 1998.

Note: A Cumulative List of Public Laws for the first session of the 105th Congress is in Part II of this issue of the **Federal Register**.

Public Laws Electronic Notification Service (PENS)

Note: In order to provide better and faster service, PENS will begin using a new mailing-list management software. Effective January 5, 1997, if you wish to continue or begin receiving notification of newly enacted Public Laws, you will need to resubscribe or subscribe to PENS by sending E-mail to **LISTPROC@ETC.FED.GOV** with the message:

*SUBSCRIBE PUBLAWS-L
FIRSTNAME LASTNAME*

The text of laws is not available through this service and we cannot respond to specific inquiries sent to this address.