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Rules and Regulations

Federal Register
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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–SW–43–AD; Amendment 39–10990; AD 98–19–13]

Airworthiness Directives; Bell Helicopter Textron Canada (BHTC) Model 407 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This document publishes in the **Federal Register** an amendment adopting Airworthiness Directive (AD) 98–19–13, which was sent previously to all known U.S. owners and operators of BHTC Model 407 helicopters by individual letters. This AD requires, on or before the accumulation of 50 hours total time-in-service (TIS) on the engine-to-transmission driveshaft (driveshaft), replacing the driveshaft with an airworthy driveshaft. This amendment is prompted by analysis and test data which revealed that the life limit of the driveshaft is less than that which is stated in the applicable maintenance manual. The actions specified by this AD are intended to prevent failure of the driveshaft, loss of engine drive to the rotor system, damage to critical structural components, and subsequent loss of control of the helicopter.

DATES: Effective January 27, 1999. To all persons except those persons to whom it was made immediately effective by priority letter AD 98–19–13, issued on September 2, 1998, which contained the requirements of this amendment.

Comments for inclusion in the Rules Docket must be received on or before March 15, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 98–SW–43–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: Mr. Jurgen Priester, Aerospace Engineer, Rotorcraft Certification Office, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas, 76137, telephone (817) 222–5159, fax (817) 222–5783.

SUPPLEMENTARY INFORMATION: On September 2, 1998, the FAA issued priority letter AD 98–19–13, applicable to BHTC Model 407 helicopters, which requires, on or before the accumulation of 50 hours total TIS on the driveshaft, replacing the driveshaft with an airworthy driveshaft. That action was prompted by analysis and test data that revealed that the life limit of the driveshaft is less than that which is stated in the applicable maintenance manual. The published life limit has been 2,500 hours TIS; however, new data indicate the life limit should be approximately 50 hours TIS. This condition, if not corrected, could result in failure of the driveshaft, loss of engine drive to the rotor system, damage to critical structural components, and subsequent loss of control of the helicopter.

The FAA has reviewed Bell Helicopter Textron Alert Service Bulletin No. 407–98–19, dated June 19, 1998, which describes procedures for replacing the driveshaft, part number (P/N) 206–340–300–103, with driveshaft, P/N 206–340–300–105, which has a longer service life.

Since the unsafe condition described is likely to exist or develop on other BHTC Model 407 helicopters of the same type design, the FAA issued priority letter AD 98–19–13 to prevent failure of the driveshaft, loss of engine drive to the rotor system, damage to critical structural components, and subsequent loss of control of the helicopter. The AD requires, on or before the accumulation of 50 hours total TIS on the driveshaft, replacing the driveshaft, P/N 206–340–300–103, with an airworthy driveshaft, P/N 206–340–300–105. The short compliance time involved is required because the previously described critical unsafe condition can adversely affect the controllability of the helicopter. Therefore, replacing the driveshaft is required within 50 hours, and this AD must be issued immediately.

Since it was found that immediate corrective action was required, notice and opportunity for prior public comment thereon were impracticable and contrary to the public interest, and good cause existed to make the AD effective immediately by individual letters issued on September 2, 1998, to all known U.S. owners and operators of BHTC Model 407 helicopters. These conditions still exist, and the AD is hereby published in the **Federal Register** as an amendment to section 39.13 of the Federal Aviation Regulations (14 CFR 39.13) to make it effective to all persons.

The FAA estimates that 146 helicopters of U.S. registry will be affected by this AD, that it will take approximately 5 work hours per helicopter to accomplish the required actions, and that the average labor rate is $60 per work hour. Required parts will cost approximately $24,500 per helicopter. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $3,620,800.

Comments Invited

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by

interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 98–SW–43–AD.'' The postcard will be date stamped and returned to the commenter.

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

AD 98–19–13 Bell Helicopter Textron Canada: Amendment 39–10990. Docket No. 98–SW–43–AD.

Applicability: Model 407 helicopters, with engine-to-transmission driveshaft (driveshaft), part number (P/N) 206–340–300–103, installed, certificated in any category.

Note 1: This AD applies to each helicopter identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For helicopters that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must use the authority provided in paragraph (c) to request approval from the FAA. This approval may address either no action, if the current configuration eliminates the unsafe condition, or different actions necessary to address the unsafe condition described in this AD. Such a request should include an assessment of the effect of the changed configuration on the unsafe condition addressed by this AD. In no case does the presence of any modification, alteration, or repair remove any helicopter from the applicability of this AD.

Compliance: Required prior to or upon accumulating 50 hours total time-in-service (TIS) on driveshaft, P/N 206–340–300–103.

To prevent failure of the driveshaft, which could result in loss of engine drive to the rotor system, damage to critical structural components, and subsequent loss of control of the helicopter, accomplish the following:

(a) Remove driveshaft, P/N 206–340–300–103, and replace it with an airworthy driveshaft, P/N 206–340–300–105. Driveshaft, P/N 206–340–300–103, must not be installed on any helicopter.

Note 2: Bell Helicopter Textron Alert Service Bulletin No. 407–98–19, dated June 19, 1998, pertains to the subject of this AD. Removed driveshaft, P/N 206–340–300–103, should be destroyed.

(b) This AD revises the Airworthiness Limitations section of the maintenance manual by establishing a retirement life of 5,000 hours TIS for driveshaft, P/N 206–340–300–105. A component record card or equivalent record for this P/N must also be established.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Rotorcraft Certification Office, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Rotorcraft Certification Office.

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

(d) Special flight permits will not be issued.

(e) This amendment becomes effective on January 27, 1999. To all persons except those persons to whom it was made immediately effective by Priority Letter AD 98–19–13, issued September 2, 1998, which contained the requirements of this amendment.

Note 4: The subject of this AD is addressed in Transport Canada (Canada) AD CF–98–25, August 25, 1998.

Issued in Fort Worth, Texas, on January 5, 1999.

Henry A. Armstrong,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 99–615 Filed 1–11–99; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 98–AWP–32]

Revocation of Class E Airspace, Victorville, George AFB, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule

SUMMARY: This action will revoke the Class E airspace at Victorville, George Air Force Base (AFB), CA. In order to meet federal mandates with regard to Base Realignment and Closure (BRAC), the U.S. Air Force ceased air operations at George AFB in December 1992, thereby eliminating the criteria for Class E airspace.

EFFECTIVE DATE: 0901 UTC March 25, 1999.

FOR FURTHER INFORMATION CONTACT: Debra Trindle, Air Traffic Division, Airspace Specialist, AWP–520.10, Western-Pacific Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California 90261, telephone (310) 725–6613.

SUPPLEMENTARY INFORMATION:

History

In order to meet federal mandates with regard to Base Realignment and Closure, the U.S. Air Force ceased air operations at George AFB in December 1992. The intended effect of this action is to revoke the Class E airspace associated with George AFB airspace as published in Paragraph 6005 of FAA Order 7400.9F dated September 10, 1998, and effective September 16, 1998, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be subsequently removed from this Order.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations (14 CFR part 71) revokes previously designated controlled airspace associated with George AFB.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9F, Airspace Designations and Reporting Points, dated September 10, 1998, and effective September 16, 1998, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AWP CA E5 Victorville, George AFB, CA [Removed]

* * * * *

Issued in Los Angeles, California, on December 28, 1998.

John Clancy,

Manager, Air Traffic Division, Western-Pacific Region.

[FR Doc. 99–649 Filed 1–11–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 29430; Amdt. No. 1903]

RIN 2120–AA65

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference—approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;
2. The FAA Regional Office of the region in which affected airport is located; or
3. The Flight Inspection Area Office which originated the SIAP.

For Purchase

Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or
2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription

Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169. (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description on each SIAP is contained in the appropriate FAA Form 8260 and the National Flight Data Center (FDC)/Permanent (P) Notices to Airmen (NOTAM) which are incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation's Regulations (FAR). Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction of charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes SIAPs. For safety and timeliness of change considerations, this amendment incorporates only specific

changes contained in the content of the following FDC/P NOTAM for each SIAP. The SIAP information in some previously designated FDC/Temporary (FDC/T) NOTAMs is of such duration as to be permanent. With conversion to FDC/P NOTAMs, the respective FDC/T NOTAMs have been canceled.

The FDC/P NOTAMs for the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Approach Procedures (TERPS). In developing these chart changes to SIAPs by FDC/P NOTAMs, the TERPS criteria were applied to only these specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Further, the SIAPs contained in this amendment are based on the criteria contained in the TERPS. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore-(1) is not ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Navigation (air).

Issued in Washington, DC on December 24, 1998.

Richard O. Gordon,

Acting Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

1. The authority citation for part 97 is revised to read as follows:

Authority: 49 U.S.C. 40103, 40113, 40120, 44701; 49 U.S.C. 106(g); and 14 CFR 11.49(b)(2)

2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33 and 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, identified as follows:

** * * Effective Upon Publication*

FDC Date	State	City	Airport	FDC No.	SIAP
12/10/98	NE	NORFOLK	KARL STEFAN MEMORIAL	8/8646	ILS RWY 1, AMDT 4B...
12/10/98	NJ	WILDWOOD	CAP MAY COUNTY	8/8653	VOR OR GPS–A AMDT 2...
12/10/98	NJ	WILDWOOD	CAP MAY COUNTY	8/8654	VOR/DME RNAV OR GPS RWY 19 AMDT 6...
12/10/98	NJ	WILDWOOD	CAP MAY COUNTY	8/8651	GPS RWY 10 ORIG...
12/10/98	NJ	WILDWOOD	CAP MAY COUNTY	8/8655	LOC RWY 19 AMDT 5...
12/10/98	TX	PORT ARTHUR	JEFFERSON COUNTY/BEAUMONT-PORT ARTHUR.	8/8632	VOR/DME RWY 34, AMDT 7...
12/11/98	IL	CARBONDALE-MUR-PHYS-BORO.	SOUTHERN ILLINOIS	8/8686	ILS RWY 18L AMDT 12A...
12/11/98	IL	CARBONDALE-MUR-PHYS-BORO.	SOUTHERN ILLINOIS	8/8687	NDB OR GPS RWY 18L AMDT 12A...
12/11/98	IL	CENTRALIA	CENTRALIA MUNI	8/8693	VOR OR GPS–A, ORIG...
12/11/98	IL	FLORA	FLORA MUNI	8/8694	NDB OR GPS RWY 21, AMDT 4...
12/11/98	IL	FREEPORT	ALBERTUS	8/8685	VOR/DME RNAV OR GPS RWY 6, AMDT 5A...
12/11/98	IL	FREEPORT	ALBERTUS	8/8688	LOC RWY 24, ORIG...
12/11/98	IL	FREEPORT	ALBERTUS	8/8696	VOR OR GPS RWY 24, AMDT 6...
12/11/98	IL	HARRISBURG	HARRISBURG–RALEIGH	8/8675	GPS RWY 24 ORIG...
12/11/98	IL	HARRISBURG	HARRISBURG–RALEIGH	8/8676	NDB RWY 24 AMDT 10...
12/11/98	IL	JOLIET	JOLIET PARK DISTRICT	8/8692	VOR OR GPS RWY 12, AMDT 11...
12/11/98	IL	JOLIET	JOLIET PARK DISTRICT	8/8697	VOR/DME RNAV RWY 12, AMDT 12...
12/11/98	IL	MACOMB	MACOMB MUNI	8/8678	VOR/DME OR GPS–A, AMDT 7...
12/11/98	IL	MACOMB	MACOMB MUNI	8/8679	LOC RWY 27, AMDT 2...
12/11/98	IL	MACOMB	MACOMB MUNI	8/8680	NDB OR GPS RWY 27, AMDT 2B...
12/11/98	IL	MARION	WILLIAMSON COUNTY REGIONAL	8/8699	VOR RWY 20 AMDT 16...

FDC Date	State	City	Airport	FDC No.	SIAP
12/11/98	IL	MARION	WILLIAMSON COUNTY REGIONAL	8/8702	NDB OR GPS RWY 20 AMDT 9...
12/11/98	NC	MORGANTON	MORGANTON–LENOIR	8/8666	LOC RWY 3, ORIG–A...
12/11/98	NC	MORGANTON	MORGANTON–LENOIR	8/8667	NDB OR GPS RWY 3, AMDT 4A...
12/14/98	IL	CARBONDALE–MURPHYS-BORO.	SOUTHERN ILLINOIS	8/8740	VOR OR GPS–A, AMDT 5A...
12/14/98	IL	CHICAGO	LANSING MUNI	8/8759	VOR OR GPS–A AMDT 5...
12/14/98	IL	EFFINGHAM	EFFINGHAM COUNTY MEMORIAL	8/8760	LOC RWY 29, AMDT 1...
12/14/98	IL	EFFINGHAM	EFFINGHAM COUNTY MEMORIAL	8/8761	VOR OR GPS RWY 1, AMDT 9...
12/14/98	IL	FREEPORT	ALBERTUS	8/8741	NDB RWY 6, ORIG...
12/14/98	IL	KANKAKEE	GREATER KANKAKEE	8/8762	VOR OR GPS RWY 4, AMDT 5...
12/14/98	IL	KANKAKEE	GREATER KANKAKEE	8/8763	VOR OR GPS RWY 22, AMDT 6...
12/14/98	IL	KANKAKEE	GREATER KANKAKEE	8/8764	VOR/DME RNAV RWY 22, AMDT 3...
12/15/98	IL	CHICAGO	LANSING MUNI	8/8769	GPS RWY 27, ORIG...
12/15/98	IL	MATTOON-CHARLES-TON.	COLES COUNTY MEMORIAL	8/8787	VOR OR GPS RWY 6, AMDT 12...
12/15/98	IL	MATTON-CHARLESTON	COLES COUNTY MEMORIAL	8/8790	NDB OR GPS RWY 29, AMDT 4...
12/15/98	IL	MATTOON-CHARLES-TON.	COLES COUNTY MEMORIAL	8/8792	VOR OR GPS RWY 24, AMDT 10...
12/15/98	MI	GRAND RAPIDS	KENT COUNTY	8/8807	ILS RWY 35, ORIG–B...
12/15/98	MI	GRAND RAPIDS	KENT COUNTY	8/8808	ILS RWY 8R, AMDT 5B...
12/15/98	MI	GRAND RAPIDS	KENT COUNTY	8/8809	VOR RWY 35, ORIG–A...
12/15/98	MO	KANSAS CITY	KANSAS CITY INTL	8/8803	ILS RWY 9, AMDT 11...
12/15/98	MO	KANSAS CITY	KANSAS CITY INTL	8/8804	ILS RWY 19R, AMDT 9A (CATS I, II, III)...
12/15/98	MP	TINIAN ISLAND	WEST TINIAN	8/8800	GPS RWY 26 ORIG...
12/15/98	MP	TINIAN ISLAND	WEST TINIAN	8/8801	NDB–A AMDT 1...
12/15/98	MP	TINIAN ISLAND	WEST TINIAN	8/8802	GPS RWY 8 ORIG...
12/15/98	PA	STATE COLLEGE	UNIVERSITY PARK	8/8774	ILS RWY 24 AMDT 8...
12/16/98	IL	MATTOON–CHARLES-TON.	COLES COUNTY MEMORIAL	8/8820	ILS RWY 29, AMDT 5...
12/16/87	MT	CUT BANK	CUT BANK MUNI	8/8827	GPS RWY 31, ORIG...
12/16/98	RI	NORTH KINGSTOWN	QUONSET STATE	8/8821	VOR RWY 34 ORIG...
12/16/98	TN	MEMPHIS	MEMPHIS INTL	8/8825	ILS RWY 36L (CAT I, II, III), AMDT 13...
12/16/98	VA	HOT SPRINGS	INGALLS FIELD	8/8833	ILS RWY 24 AMDT 2A... THIS REPLACES FDC 8/8418 IN TL99–01.
12/17/98	NY	ELMIRA	ELMIRA/CORNING REGIONAL	8/8888	ILS RWY 24 AMDT 17...
12/17/98	NY	GLENS FALLS	GLENS FALLS/FLOYD D. BENNETT	8/8890	ILS RWY 1 AMDT 3A...
12/17/98	NY	ISLIP	LONG ISLAND MAC ARTHUR	8/8886	ILS RWY 6 AMDT 21A...
12/17/98	NY	ITHACA	TOMPKINS COUNTY	8/8891	ILS RWY 32 AMDT 4...
12/17/98	NY	NIAGARA FALLS	NIAGARA FALLS INTL	8/8889	ILS RWY 28R AMDT 22...
12/17/98	NY	ONEONTA	ONEONTA MUNI	8/8887	LOC RWY 24 AMDT 1A...
12/17/98	WI	LA CROSSE	LA CROSSE MUNI	8/8876	ILS RWY 18, AMDT 18...
12/18/98	LA	SULPHUR	SOUTHLAND FIELD	8/8907	NDB RWY 15, AMDT 1...
12/18/98	LA	SULPHUR	SOUTHLAND FIELD	8/8908	LOC RWY 15 AMDT 1...
12/18/98	NE	OMAHA	EPPLEY AIRFIELD	8/8901	ILS RWY 18 AMDT 6...
12/21/98	IL	MARION	WILLIAMSON COUNTY REGIONAL	8/8947	ILS RWY 20, AMDT 11...
12/21/98	VT	BENNINGTON	WILLIAM H. MORSE STATE	8/8951	VOR OR GPS–A AMDT 8...
12/21/98	VT	BENNINGTON	WILLIAM H. MORSE STATE	8/8952	GPS RWY 13 ORIG...

Freeport

ALBERTUS
Illinois
VOR/DME RNAV OR GPS RWY 6, AMDT 5A...
FDC Date: 12/11/98

FDC 8.8685 /PEP FI/P ALBERTUS, FREEPORT, IL VOR/DME RNAV OR GPS RWY 6, AMDT 51...DELETE ROCKFORD ALTIMETER SETTING MINIMUMS. DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT RECEIVED, USE ROCKFORD ALTIMETER SETTING. ALTERNATE MNMS STANDARD. THIS IS VOR/DME RNAV OR GPS RWY 6, AMDT 5B.

Carbondale-Murphysboro

SOUTHERN ILLINOIS
Illinois
ILS RWY 18L AMDT 12A...
FFC Date: 12/11/98

FDC 8/8686 /MDH/FI/P SOUTHERN ILLINOIS, CARBONDALE-MURPHYSBORO, IL, ILS RWY 18L AMDT 12A...DELETE CAPE GIRARDEAU ALTIMETER SETTING MINIMUMS. DELETE NOTE... WHEN CONTROL TOWER CLOSED, EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE, USE CAPE GIRARDEAU ALTIMETER SETTING, DELETE NOTE... S–ILS 18L VISIBILITY INCREASED ½ MILE FOR

INOPERATIVE MALSR WHEN USING CAPE GIRARDEAU ALTIMETER SETTING. ADD NOTE... ADF REQUIRED. THIS IS ILS RWY 18L AMDT 12B.

Carbondale-Murphysboro

SOUTHERN ILLINOIS
Illinios
NDB OR GPS RWY 18L AMDT 12A...
FDC Date 12/11/98

FDC 8/8687 /MDH/ FI/P SOUTHERN ILLINOIS, CARBONDALE-MURPHYSBORO, IL, NDB OR GPS RWY 18L AMDT 12A...DELETE CAPE GIRARDEAU ALTIMETER SETTING MINIMUMS. DELETE NOTE... WHEN CONTROL TOWER CLOSED, EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE, USE CAPE GIRARDEAU ALTIMETER SETTING. THIS IS NDB OR GPS RWY 18L AMDT 12B.

Freeport

ALBERTUS
Illinois
LOC RWY 24, ORIG...
FDC Date: 12/11/98

FDC 8.8688 /FEP/ FI/P ALBERTUS, FREEPORT, IL. LOC RWY 24, ORIG...DELETE ROCKFORD ALTIMETER SETTING MINIMUMS, DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT RECEIVED, USE ROCKFORD ALTIMETER SETTING, ALTERNATE MNMS STANDARD. THIS IS LOC RWY 24, ORIG–A.

Joliet

JOLIET PARK DISTRICT
Illinois
VOR OR GPS RWY 12, AMDT 11...
FDC Date: 12/11/98

FDC 8.8692 /JOT/FI/P JOLIET PARK DISTRICT, JOLIET, IL VOR OR GPS RWY 12, AMDT 11...DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT AVAILABLE, USE DUPAGE ALTIMETER SETTING AND INCREASE ALL MDAS 100 FEET AND VISIBILITY ¼ MILE. DELETE... ASTERISK AT STEPDOWN FIX ALTITUDE. DELETE PROFILE NOTE... 1160 WITH DUPAGE ALTIMETER SETTING. DELETE ALTERNATE MNMS NOTE... NA EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE. ALTERNATE MNMS STANDARD. THIS IS VOR OR GPS RWY 12, ADMT 11A.

Centralia

CENTRALIA MUNI
Illinois
VOR OR GPS–A, ORIG...
FDC Date: 12/11/98

FDC 8.8693 /ENL/ FI/P CENTRALIA MUNI, CENTRALIA, IL VOR OR GPS–A, ORIG...DELETE MIDAMERICA ALTIMETER SETTING MINIMUMS. DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT RECEIVED, USE MIDAMERICA ALTIMETER SETTING. DELETE ALTERNATE MNMS NOTE... NA EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE. ALTERNATE MNMS STANDARD. THIS IS VOR OR GPS–A, ORIG–A.

Flora

FLORA MUNI
Illinois
NDB OR GPS RWY 21, AMDT 4...
FDC Date: 12/11/98

FDC 8/8694 /FOA/ FI/P FLORA MUNI, FLORA, IL. NDS OR GPS RWY 21, AMDT 4...DELETE EVANSVILLE ALTIMETER SETTING MINIMUMS. DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT AVAILABLE, USE EVANSVILLE ALTIMETER SETTING. ALTERNATE MNMS STANDARD. THIS IS NDB OR GPS RWY 21, AMDT 4A.

Freeport

ALBERTUS
Illinois
VOR OR GPS RWY 24, AMDT 6...
FDC Date: 12/11/98

FDC 8/8696 /FEP/ FI/P ALBERTUS, FREEPORT, IL. VOR OR GPS RWY 24, AMDT 6...DELETE ROCKFORD ALTIMETER SETTING MINIMUMS. DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT RECEIVED, USE ROCKFORD ALTIMETER SETTING. ALTERNATE MNMS STANDARD. THIS IS VOR OR GPS RWY 24, AMDT 6A.

Joliet

Illinios
VOR/DME RNAV RWY 12, ADMT 12...
FDC Date: 12/11/98

FDC 8/8697 /JOT/FI/P JOLIET PARK DISTRICT, JOLIET, IL. VOR/DME RNAV RWY 12, AMDT 12...DELETE CHICAGO DUPAGE ALTIMETER SETTING MINIMUMS. DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT AVAILABLE, USE CHICAGO DUPAGE ALTIMETER SETTING. DELETE ALTERNATE MNMS NOTE... NA EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE. ALTERNATE MNMS STANDARD. THIS IS VOR/DME RNAV RWY 12, AMDT 12A.

Marion

WILLIAMSON COUNTY REGIONAL
Illinois
VOR RWY 20 AMDT 16...
FDC Date: 12/11/98

FDC 8.8699 /MWA/ FI/P WILLIAMSON COUNTY REGIONAL, MARION, IL. VOR RWY 20 AMDT 16...DELETE NOTE... WHEN CONTROL TOWER CLOSED, EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE, USE CAPE GIRARDEAU ALTIMETER SETTING AND INCREASE ALL MDAS 120 FEET AND VISIBILITY CATS B, C AND D ½ MILE. DELETE... ASTERISK AT STEPDOWN FIX ALTITUDE. DELETE PROFILE NOTE... 1260 WHEN USING CAPE GIRARDEAU ALTIMETER SETTING. DELETE ALTERNATE MINIMUMS NOTE... NA WHEN CONTROL TOWER CLOSED EXCEPT FOR OPERATOR WITH APPROVED WEATHER REPORTING SERVICE. ALTERNATE MINIMUMS STANDARD EXCEPT CAT D 800–2–¼. THIS IS VOR RWY 20 AMDT 16A.

Marion

WILLIAMSON COUNTY REGIONAL
Illinois
NDB OR GPS RWY 20 AMDT 9...
FDC Date: 12/11/98

FDC 8/8702 /MMA/ FI/P WILLIAMSON COUNTY REGIONAL, MARION, IL. NDB OR GPS RWY 20 AMDT 9...DELETE CAPE GIRARDEAU ALTIMETER SETTING MINIMUMS. DELETE NOTE...WHEN CONTROL TOWER CLOSED, EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE, USE CAPE GIRARDEAU ALTIMETER SETTING. ALTERNATE MINS STANDARD. THIS IS NDB OR GPS RWY 20, AMDT 9A.

Carbondale-Murphysboro

SOUTHERN ILLINOIS
Illinois
VOR OR GPS–A, AMDT 5A...
FDC Date: 12/14/98

FDC 8/8740 /MDH/ FI/P SOUTHERN ILLINOIS, CARBONDALE-MURPHYSBORO, IL. VOR OR GPS–A AMDT 5A...DELETE CAPE GIRARDEAU ALTIMETER SETTING MINIMUMS. DELETE NOTE...WHEN CONTROL TOWER CLOSED, EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE, USE CAPE GIRARDEAU ALTIMETER SETTING. DELETE ALTERNATE MINIMUMS NOTE...NA WHEN CONTROL TOWER CLOSED. ALTERNATE MINIMUMS STANDARD. THIS IS VOR OR GPS–A AMDT 5B.

Freeport

ALBERTUS
Illinois
NDB RWY 6, ORIG...
FDC Date: 12/14/98

FDC 8/8741 /FEP/ FI/P ALBERTUS, FREEPORT, IL. NDB RWY 6, ORIG...DELETE ROCKFORD ALTIMETER SETTING MINIMUMS. DELETE NOTE...OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT RECEIVED, USE ROCKFORD ALTIMETER SETTING. THIS IS NDB RWY 6, ORIG–A.

Chicago

LANSING MUNI
Illinois
VOR OR GPS–A AMDT 5...
FDC Date: 12/14/98

FDC 8/8759 /IGQ/ FI/P LANSING MUNI, CHICAGO, IL. VOR OR GPS–A AMDT 5...DELETE NOTE...IF LOCAL ALTIMETER SETTING NOT RECEIVED USE CHICAGO MIDWAY ALTIMETER SETTING AND INCREASE ALL MDAS 60 FEET. ALTERNATE MNMS STANDARD. THIS IS VOR OR GPS–A AMDT 5A.

Effingham

EFFINGHAM COUNTY MEMORIAL
Illinois
LOC RWY 29, AMDT 1...
FDC Date: 12/14/98

FDC 8/8760 /1H2/ FI/P EFFINGHAM COUNTY MEMORIAL, EFFINGHAM, IL. LOC RWY 29, AMDT 1... DELETE NOTE... IF LOCAL ALTIMETER SETTING NOT RECEIVED USE DECATUR ALTIMETER SETTING AND INCREASE ALL MDAS 120 FEET. ALTERNATE MNMS STANDARD. THIS IS LOC RWY 29 AMDT 1A.

Effingham

EFFINGHAM COUNTY MEMORIAL
Illinois
VOR OR GPS RWY 1, AMDT 9...
FDC Date: 12/14/98

FDC 8/8761 /IH2/ FI/P EFFINGHAM COUNTY MEMORIAL, EFFINGHAM, IL. VOR OR GPS RWY 1, AMDT 9...DELETE NOTE... IF LOCAL ALTIMETER SETTING NOT RECEIVED USE DECATUR ALTIMETER SETTING AND INCREASE ALL MDAS 120 FEET. DELETE ASTERISK AT STEPDOWN FIX ALTITUDE. DELETE PROFILE NOTE... 1300 WHEN USING DECATUR ALTIMETER SETTING. ALTERNATE MNMS STANDARD EXCEPT CAT D 800 2¼. THIS IS VOR OR GPS RWY 1, AMDT 9A.

Kankakee

GREATER KANKAKEE
Illinois
VOR OR GPS RWY 4 AMDT 5...
FDC Date: 12/14/98

FDC 8/8762 /IKK/ FI/P GREATER KANKAKEE, KANKAKEE, IL. VOR OR GPS RWY 4, AMDT 5...DLT CHICAGO MIDWAY ALSTG MNMS. DLT NOTE... OBTAIN LOCAL ALSTG ON AWOS–3, WHEN NOT AVBL, USE CHICAGO MIDWAY ALSTG. ALTN MNMS STANDARD. THIS IS VOR OR GPS RWY 4, AMDT 5A.

Kankakee

GREATER KANKAKEE
Illinois
VOR OR GPS RWY 22, AMDT 6...
FDC Date: 12/14/98

FDC 8/8763 /IKK/ FI/P GREATER KANKAKEE, KANKAKEE, IL. VOR OR GPS RWY 22, AMDT 6...DLT NOTE... OBTAIN LOCAL ALSTG ON AWOS–3, WHEN NOT AVBL, USE CHICAGO MIDWAY ALSTG AND INCR ALL MDA'S 200 FT; INCR ALL CAT C AND D VIS ½ MILE. ALTN MNMS STANDARD. THIS IS VOR OR GPS RWY 22, AMDT 6.

Kankakee

GREATER KANKAKEE
Illinois
VOR/DME RNAV RWY 22, AMDT 3...
FDC Date: 12/14/98

FDC 8/8764 /IKK/ FI/P GREATER KANKAKEE, KANKAKEE, IL. VOR/DME RNAV RWY 22, AMDT 3...DLT CHICAGO MIDWAY ALSTG MNMS. DLT NOTE...OBTAIN LOCAL ALSTG ON AWOS–3, WHEN NOT AVBL, USE CHICAGO MIDWAY ALSTG. ALTN MNMS STANDARD. THIS IS VOR/DME RNAV RWY 22, AMDT 3A.

Chicago

LANSING MUNI
Illinois
GPS RWY 27, ORIG...
FDC Date: 12/15/98

FDC 8/8769 /IGQ/ FI/P LANSING MUNI, CHICAGO, IL. GPS RWY 27, ORIG...DELETE NOTE...IF LOCAL ALTIMETER SETTING NOT RECEIVED USE CHICAGO MIDWAY ALTIMETER SETTING AND INCREASE ALL MDAS 40 FEET. THIS IS GPS RWY 27, ORIG–A.

Mattoon-Charleston

COLES COUNTY MEMORIAL
Illinois
VOR OR GPS RWY 6, AMDT 12...
FDC Date: 12/15/98

FDC 8/8787 /MTO/ FI/P COLES COUNTY MEMORIAL, MATTOON-CHARLESTON, IL. VOR OR GPS RWY 6, AMDT 12...DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT AVAILABLE USE DECATUR ALTIMETER SETTING AND INCREASE ALL MDA'S 160 FEET. DELETE ALTERNATE MNMS NOTE... NA EXCEPT STANDARD FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE. DELETE ASTERISK AT PROFILE STEPDOWN FIX ALTITUDE. DELETE PROFILE NOTE... 1380 WHEN USING DECATUR ALTIMETER SETTING. ALTERNATE MNMS STANDARD. THIS IS VOR OR GPS RWY 6, AMDT 12A.

Mattoon-Charleston

COLES COUNTY MEMORIAL
Illinois
NDB OR GPS RWY 29, AMDT 4...
FDC Date: 12/15/98

FDC 8/8790 /MTO/ FI/P COLES COUNTY MEMORIAL, MATTOON-CHARLESTON, IL. NDB OR GPS RWY 29, AMDT 4...DELETE DECATUR ALTIMETER SETTING MINIMUMS. DELETE NOTE... USE MATTOON ALTIMETER SETTING; WHEN NOT AVAILABLE, USE DECATUR ALTIMETER SETTING AND INCREASE ALL DH'S/MDA'S 160 FEET. DELETE ACTIVATE MALSR RWY 29, HIRL RWY 11–19, REIL RWY 6–24, MIRL RWY 6–24 CTAF. THIS IS NDB OR GPS RWY 29, AMDT 4A.

Mattoon-Charleston

COLES COUNTY MEMORIAL
Illinois
VOR OR GPS RWY 24, AMDT 10...
FDC Date: 12/15/98

FDC 8/8792 /MTO/ FI/P COLES COUNTY MEMORIAL, MATTOON-CHARLESTON, IL. VOR OR GPS RWY 24, AMDT 10...DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT AVAILABLE USE DECATUR ALTIMETER SETTING AND INCREASE ALL MDA'S 160 FEET. DELETE ALTERNATE MNMS NOTE... NA EXCEPT STANDARD FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE. DELETE ASTERISK AT PROFILE STEPDOWN FIX ALTITUDE. DELETE PROFILE NOTE... 1300 WHEN USING DECATUR ALTIMETER SETTING. ALTERNATE MNMS STANDARD. THIS IS VOR OR GPS RWY 24, AMDT 10A.

Mattoon-Charleston

COLES COUNTY MEMORIAL
Illinois
ILS RWY 29, AMDT 5...
FDC Date: 12/16/98

FDC 8/8820 /MTO/ FI/P COLES COUNTY MEMORIAL, MATTOON-CHARLESTON, IL. ILS RWY 29 AMDT 5...DELETE NOTE... USE MATTOON ALTIMETER SETTING, WHEN NOT AVAILABLE, USE DECATUR

ALTIMETER SETTING AND INCREASE ALL DH'S/MDA'S 160 FEET. ALTERNATE MNMS STANDARD. DELETE NOTE... CAT D S–LOC 29 VISIBILITY INCREASED 1/4 MILE FOR INOPERATIVE MM. THIS IS ILS RWY 29, AMDT 5A.

Marion

WILLIAMSON COUNTY REGIONAL
Illinois
ILS RWY 20, AMDT 11...
FDC Date: 12/21/98

FDC 8/8947 /MWA/ FI/P WILLIAMSON COUNTY REGIONAL, MARION, IL. ILS RWY 20, AMDT 11...DELETE CAPE GIRARDEAU ALTIMETER SETTING MINIMUMS. DELETE NOTE... WHEN CONTROL TOWER CLOSED, EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE, USE CAPE GIRARDEAU ALTIMETER SETTING. ALTERNATE MINS STANDARD. THIS IS ILS RWY 20 AMDT 11A.

Sulphur

SOUTHLAND FIELD
Louisiana
NDB RWY 15, AMDT 1...
FDC Date: 12/18/98

FDC 8/8907 /L75/ FI/P SOUTHLAND FIELD, SULPHUR, LA. NDB RWY 15, AMDT 1...CHANGE NOTE TO READ... INOPERATIVE TABLE DOES NOT APPLY TO S–15 CATS C AND D. THIS IS NDB RWY 15, AMDT 1A.

Sulphur

SOUTHLAND FIELD
Louisiana
LOC RWY 15, AMDT 1...
FDC Date: 12/18/98

FDC 8/8908 /L75/ FI/P SOUTHLAND FIELD, SURPHUR, LA. LOC RWY 15 AMDT 1...S–15 VIS CAT D 1. THIS IS LOC RWY 15, AMDT 1A.

Grand Rapids

KENT COUNTY
Michigan
ILS RWY 35, ORIG–B...
FDC Date: 12/15/98

FDC 8/8807 /GRR/ FI/P KENT COUNTY, GRAND RAPIDS, MI. ILS RWY 35, ORIG–B...S–ILS 35... VIS RVR 2400 ALL CATS. S–LOC 35... VIS CAT A AND B RVR 2400, CAT C AND D RVR 5000. LMBAW INT MNMS S–LOC 35... VIS CAT A THRU C RVR 2400, CAT D RVR 4000. THIS IS ILS RWY 35, ORIG–C.

Grand Rapids

KENT COUNTY
Michigan
ILS RWY 8R, AMDT 5B...
FDC Date: 12/15/98

FDC 8/8808 /GRR/ FI/P KENT COUNTY, GRAND RAPIDS, MI. ILS RWY 8R, AMDT 5B...S–ILS 8R... VIS RVR 2400 ALL CATS. S–LOC 8R... VIS CAT A AND B RVR 2400, CAT C AND D RVR 4000. THIS IS ILS RWY 8R, AMDT 5C.

Grand Rapids

KENT COUNTY
Michigan
VOR RWY 35, ORIG–A...
FDC Date: 12/15/98

FDC 8/8809 /GRR/ FI/P KENT COUNTY, GRAND RAPIDS, MI. VOR RWY 35, ORIG–A...S–35...VIS CAT A AND B RVR 2400, CAT C RVR 4000, CAT D RVR 5000. ALSKA INT MNMS S–35... VIS CAT A THRU C RVR 2400, CAT D RVR 5000. CHANGE NOTE... FOR INOP MALSR, INCR S–35 ALSKA INT MNMS CAT D VIS TO 1–1/4 TO READ FOR INOP MALSR, INCR S–35 ALSKA INT MNMS CAT D VIS TO RVR 6000. THIS IS VOR RWY 35, ORIG–B.

Kansas City

KANSAS CITY INTL
Missouri
ILS RWY 9, AMDT 11...
FDC Date: 12/15/98

FDC 8/8803 /MCI/ FI/P KANSAS CITY INTL, KANSAS CITY, MO. ILS RWY 9, AMDT 11...DLT ALL REFERENCE TO MM. THIS IS ILS RWY 9, AMDT 11.

Kansas City

KANSAS CITY INTL
Missouri
ILS RWY 19R, AMDT 9A (CATS I, II, III)...
FDC Date: 12/15/98

FDC 8/8804 /MCI/ FI/P KANSAS CITY INTL, KANSAS CITY, MO. ILS RWY 19R, AMDT 9A (CATS I, II, III)...DEPICT MM AT 3047 FT (.50 NM) TO THLD, GS ALT AT MM 1195 FT. THIS IS ILS RWY 19R, AMDT 9B

Tinian Island

WEST TINIAN
MP.
GPS RWY 26 ORIG...
FDC Date: 12/15/98

FDC 8/8800/ /TNI/ FI/P WEST TINIAN, TINIAN ISLAND, MP. GPS RWY 26 ORIG...DELETE NOTE...PROC NA AT NIGHT. THIS IS GPS RWY 26 ORIG–A.

Tinian Island

WEST TINIAN
MP.
NDB–A AMDT 1...
FDC Date: 12/15/98

FDC 8/8801 /TNI/ FI/P WEST TINIAN, TINIAN ISLAND, MP. NDB–A AMDT 1...DELETE NOTE...PROC NA AT NIGHT. THIS IS NDB–A AMDT 1A.

Tinian Island

WEST TINIAN
MP.
GPS RWY 8 ORIG...
FDC Date: 12/15/98

FDC 8/8802 /TNI/ FI/P WEST TINIAN, TINIAN ISLAND, MP. GPS RWY 8 ORIG...DELETE NOTE... PROC NA AT NIGHT. THIS IS GPS RWY 8 ORIG–A.

Cut Bank

CUT BANK MUNI
Montana
GPS RWY 31, ORIG...
FDC Date: 12/16/98

FDC 8/8827 /CTB/ FI/P CUT BANK MUNI, CUT BANK, MT. GPS RWY 31, ORIG...CHANGE MISSED APPROACH TO READ...CLIMB TO 6000 VIA 315 COURSE TO KOMBY WP AND HOLD.

Morganton

MORGANTON–LENOIR
North Carolina
LOC RWY 3, ORIG A...
FDC Date: 12/11/98

FDC 8/8666 /MRN/ FI/P MORGANTON–LENOIR, MORGANTON, NC. LOC RWY 3, ORIG–A...CIRCLING HAA CAT A 450, CATS B/C 470, CAT D 550. FM MNMS...CIRCLING HAA CAT A 430, CATS B/C 470, CAT D 550. DLT NOTE...OBTAIN LOCAL ALSTG CTAF; WHEN NOT RECEIVED, USE WILKES COUNTY ALSTG AND INCR ALL MDA'S 240 FT AND ALL VIS ¾ MILE. CHART...AWOS–S. THIS IS LOC RWY 3, ORIG–B.

Morganton

MORGANTON–LENOIR
North Carolina
NDB OR GPS RWY 3, AMDT 4A...
FDC Date: 12/11/98

FDC 8/8667 /MRN/ FI/P MORGANTON–LENOIR, MORGANTON, NC. NDB OR GPS RWY 3, AMDT 4A...CIRCLING HAA CATS A/B/C 510, CAT D 550. DLT NOTE... OBTAIN LOCAL ALSTG CTAF; WHEN NOT RECEIVED, USE WILKES COUNTY ALSTG AND INCR ALL MDA'S 240 FT AND ALL VIS ¾ MILE. CHART...AWOS–3. THIS IS NDB OR GPS RWY 3, AMDT 4B.

Norfolk

KARL STEFAN MEMORIAL
Nebraska
ILS RWY 1, AMDT 4B...
FDC Date: 12/10/98

FDC 8/8646 /OFK/ FI/P KARL STEFAN MEMORIAL, NORFOLK, NE.

ILS RWY 1, AMDT 4B...MIN ALT OFK/ 3 DME 2240 (LOC ONLY). THIS IS ILS RWY 1, AMDT 4C.

Omaha

EPPLEY AIRFIELD
Nebraska
ILS RWY 18 AMDT 6...
FDC Date: 12/18/98

FDC 8/8901 /OMA/ FI/P EPPLEY AIRFIELD, OMAHA, NE. ILS RWY 18 AMDT 6...S–ILS 18 VIS ½ ALL CATS. S–LOC 18 VIS ½ CATS A/B/C, VIS ¾ CAT D. CHART TCH...46 FEET. THIS IS ILS RWY 18, AMDT 6A.

Wildwood

CAPE MAY COUNTY
New Jersey
GPS RWY 10 ORIG...
FDC Date: 12/10/98

FDC 8/8651 /WWD/ FI/P CAPE MAY COUNTY, WILDWOOD, NJ. GPS RWY 10 ORIG...DELETE NOTE... CIRCLING NA NORTH OF RWY 28 AND EAST OF RWY 19 CATS C/D. THIS IS GPS RWY 10 ORIG–A.

Wildwood

CAPE MAY COUNTY
New Jersey
VOR OR GPS–A AMDT 2...
FDC Date: 12/10/98

FDC 8/8653 /WWD/ FI/P CAPE MAY COUNTY, WILDWOOD, NJ, VOR OR GPS–A AMDT 2...DELETE NOTE...CIRCLING NA EAST OF RWYS 19 AND NORTH OF RWY 28 CATS C/ D. ADD NOTE...CIRCLING NA NORTH OF RWY 28 AND EAST OF RWY 19 CATS C/D. THIS IS VOR OR GPS–A AMDT 2A.

Wildwood

CAPE MAY COUNTY
New Jersey
VOR/DME RNAV OR GPS RWY 19 AMDT 6...
FDC Date: 12/10/98

FDC 8/8654 /WWD/ FI/P CAPE MAY COUNTY, WILDWOOD, NJ. VOR/DME RNAV OR GPS RWY 19 AMDT 6...DELETE NOTE...CIRCLING NA EAST OF RWYS 19 AND 28 CATS C/ D. ADD NOTE...CIRCLING NA NORTH OF RWY 28 AND EAST OF RWY 19 CATS C/D. THIS IS VOR/DME RNAV OR GPS 19 AMDT 6A.

Wildwood

CAPE MAY COUNTY
New Jersey
LOC RWY 19 AMDT 5...
FDC Date: 12/10/98

FDC 8/8655 /WWD/ FI/P CAPE MAY COUNTY, WILDWOOD, NJ. LOC RWY 19 AMDT 5...DELETE NOTE...CIRCLING NA EAST OF RWY 1–19 CATS C/D. ADD NOTE...CIRCLING NA NORTH OF RWY 28 AND EAST OF RWY 19 CATS C/D. THIS IS LOC RWY 19 AMDT 5A.

Islip

LONG ISLAND MAC ARTHUR
New York
ILS RWY 6 AMDT 21A...
FDC Date: 12/17/98

FDC 8/8886 /ISP/ FI/P LONG ISLAND MAC ARTHUR, ISLIP, NY. ILS RWY 6 AMDT 21A...ADD NOTE... ADF REQUIRED. THIS IS ILS RWY 6 AMDT 21B.

Oneonta

ONEONTA MUNI
New York
LOC RWY 24 AMDT 1A...
FDC Date: 12/17/98

FDC 8/8887 /N66/ FI/P ONEONTA MUNI, ONEONTA, NY. LOC RWY 24 AMDT 1A...ADD NOTE...ADF REQUIRED. MSA FROM OZ NDB 090–180 4400, 180–270 3900, 270–090 3700. THIS IS LOC RWY 24 AMDT 1B.

Elmira

ELMIRA/CORNING REGIONAL
New York
ILS RWY 24 AMDT 17...
FDC Date: 12/17/98

FDC 8/8888 /ELM/ FI/P ELMIRA/ CORNING REGIONAL, ELMIRA, NY. ILS RWY 24 AMDT 17...ADD NOTE...ADF REQUIRED. THIS IS ILS RWY 24 AMDT 17A.

Niagara Falls

NIAGARA FALLS INTL
New York
ILS RWY 28R AMDT 22...
FDC Date: 12/17/98

FDC 8/8889 /IAG/ FI/P NIAGARA FALLS INTL, NIAGARA FALLS, NY. ILS RWY 28R AMDT 22...ADD NOTE...ADF REQUIRED. THIS IS ILS RWY 28R AMDT 22A.

Glens Falls

GLENS FALLS/FLOYD D. BENNETT
New York
ILS RWY 1 AMDT 3A...
FDC Date: 12/17/98

FDC 8/8890 /GFL/ FI/P GLENS FALLS/FLOYD D. BENNETT, GLENS FALLS, NY. ILS RWY 1 AMDT 3A...ADD NOTE...ADF REQUIRED. THIS IS ILS RWY 1 AMDT 3B.

Ithaca

TOMPKINS COUNTY
New York
ILS RWY 32 AMDT 4...
FDC Date: 12/17/98

FDC 8/8891 /ITH/ FI/P TOMPKINS COUNTY, ITHACA, NY. ILS RWY 32 AMDT 4...ADD NOTE...ADF REQUIRED. THIS IS ILS RWY 32 AMDT 4A.

State College

UNIVERSITY PARK
Pennsylvania
ILS RWY 24 AMDT 8...
FDC Date: 12/15/98

FDC 8/8774 /UNV/ FI/P UNIVERSITY PARK, STATE COLLEGE, PA. ILS RWY 24 AMDT 8...S–LOC 24 MDA 1620/HAT 394 ALL CATS. ADD NOTE... INOPERATIVE TABLE DOES NOT APPLY TO S–ILS 24. ADD NOTE...ADF REQUIRED. FOR INOPERATIVE MALSR INCREASE S–LOC 24 CAT A/ B/C VISIBILITY TO 1. THIS IS ILS RWY 24 AMDT 8A.

North Kingstown

QUONSET STATE
Rhode Island
VOR RWY 34 ORIG...
FDC Date: 12/16/98

FDC 8/8821 /OQU/ FI/P QUONSET STATE, NORTH KINGSTOWN, RI. VOR RWY 34 ORIG... DISTANCE FAF TO MAP 5.06 NM. DISTANCE FAF TO THLD F.16 NM. THIS IS VOR RWY 34 ORIG–A.

Memphis

MEMPHIS INTL
Tennessee
ILS RWY 36L (CAT I, II, III), AMDT 13...
FDC Date: 12/16/98

FDC 8/8825 /MEM/ FI/P MEMPHIS INTL, MEMPHIS, TN. ILS RWY 36L (CAT I, II, III), AMDT 13...MINIMUMS...S–LOC 36L... MDA 760/HAT 440 ALL CATS. VIS CAT C 4000, CAT D/E 5000. CAT III ILS; IIIC NA. THIS IS ILS RWY 36L (CAT I, II, III), AMDT 13A.

Port Arthur

JEFFERSON COUNTY/BEAUMONT–PORT ARTHUR
Texas
VOR/DME RWY 34, AMDT 7...
FDC Date: 12/10/98

FDC 8/8632 /BPT/ FI/P JEFFERSON COUNTY/BEAUMONT–PORT ARTHUR, PORT ARTHUR, TX. VOR/ DME RWY 34, AMDT 7...CHANGE ALL REFERENCE TO BPT R–179/5.00 DME TO READ BAXTR/BPT 5.00 DME. THIS IS VOR/DME RWY 34, AMDT 7A.

Hot Springs

INGALLS FIELD
Virginia
ILS RWY 24 AMDT 2A...
FDC Date: 12/16/98
THIS REPLACES FDC 8/8418 IN TL99–01.

FDC 8/8833 /HSP/ FI/P INGALLS FIELD, HOT SPRINGS, VA. ILS RWY 24

AMDT 2A...MSA FROM LWB VOR/ DME 5800 (28NM). CHART GREENBRIER (LWB) VOR/DME. THIS IS ILS RWY 24 AMDT 2B.

Bennington

WILLIAM H. MORSE STATE
Vermont
VOR OR GPS–A AMDT 8...
FDC Date: 12/21/98

FDC 8/8951 /DDH/ FI/P WILLIAM H. MORSE STATE, BENNINGTON, VT. VOR OR GPS–A AMDT 8...DELETE ALBANY ALSTG MNMS. DELETE NOTE... WHEN LOCAL ALTIMETER NOT RECEIVED, USE ALBANY ALSTG. CHART ASOS. THIS IS VOR OR GPS–A AMDT 8A.

Bennington

WILLIAM H. MORSE STATE
Vermont
GPS RWY 13 ORIG...
FDC Date: 12/21/98

FDC 8/8952 /DDH/ FI/P WILLIAM H. MORSE STATE, BENNINGTON, VT. GPS RWY 13 ORIG...DELETE ALBANY ALSTG MNMS, DELETE NOTE... WHEN LOCAL ALTIMETER NOT RECEIVED, USE ALBANY ALSTG. CHART ASOS. THIS IS GPS RWY 13 ORIG–A.

La Crosse

LA CROSSE MUNI
Wisconsin
ILS RWY 18, AMDT 18...
FDC Date: 12/17/98

FDC 8/8876 /LSE/ FI/P LA CROSSE MUNI, LA CROSSE, WI. ILS RWY 18, AMDT 18...DLT ALL REFERENCE TO MM. THIS IS ILS RWY 18, AMDT 18A.

Harrisburg

HARRISBURG–RALEIGH
Illinois
GPS RWY 24 ORIG...
FDC Date: 12/11/98

FDC 8/8675 /HSB/ FI/P HARRISBURG–RALEIGH, HARRISBURG IL. GPS RWY 24 ORIG...DELETE MOUNT VERNON ALTIMETER SETTING MINIMUMS. DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT RECEIVED, USE MOUNT VERNON ALTIMETER SETTING DELETE... ASTERISK AT STEPDOWN FIX ALTITUDE. DELETE PROFILE NOTE... 980 WHEN USING MOUNT VERNON ALTIMETER SETTING. THIS IS GPS RWY 24 ORIG–A.

Harrisburg

HARRISBURG–RALEIGH
Illinois
NDB RWY 24 AMDT 10...
FDC Date: 12/11/98

FDC 8/8676 /HSB/FI/P HARRISBURG–RALEIGH, HARRISBURG, IL. NDB RWY 24 AMDT 10...DELETE MOUNT VERNON ALTIMETER SETTING MINIMUMS. DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; WHEN NOT RECEIVED, USE MOUNT VERNON ALTIMETER SETTING ALTERNATE MNMS STANDARD. THIS IS NDB RWY 24 AMDT 10A.

Macomb

MACOMB MUNI
Illinois
VOR/DME OR GPS–A, AMDT 7...
FDC Date: 12/11/98

FDC 8/8678 /MQB/ FI/P MACOMB MUNI, MACOMB, IL. VOR/DME OR GPS–A, AMDT 7...DELETE BURLINGTON ALTIMETER SETTING MINIMUMS. DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; IF NOT RECEIVED, USE BURLINGTON ALTIMETER SETTING. DELETE ALTERNATE MNMS NOTE... NA EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE. ALTERNATE MNMS STANDARD. THIS IS VOR/DME OR GPS–A, AMDT 7A.

Macomb

MACOMB MUNI
Illinois
LOC RWY 27, AMDT 2...
FDC Date: 12/11/98

FDC 8/8679/MQB/ FI/P MACOMB MUNI, MACOMB, IL. LOC RWY 27, AMDT 2...DELETE BURLINGTON ALTIMETER SETTING MINIMUMS, DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; IF NOT RECEIVED, USE BURLINGTON ALTIMETER SETTING. DELETE ALTERNATE MNMS NOTE... NA EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE. ALTERNATE MNMS NA. THIS IS LOC RWY 27, AMDT 2A.

Macomb

MACOMB MUNI
Illinois
NDB OR GPS RWY 27, AMDT 2B...
FDC Date; 12/11/98

FDC 8/8680/MQB/ FI/P MACOMB MUNI, MACOMB, IL. NDB OR GPS RWY 27, AMDT 2B...DELETE BURLINGTON ALTIMETER SETTING MINIMUMS. DELETE NOTE... OBTAIN LOCAL ALTIMETER SETTING ON CTAF; IF NOT RECEIVED, USE BURLINGTON ALTIMETER SETTING. DELETE ALTERNATE MNMS NOTE... NA EXCEPT FOR OPERATORS WITH APPROVED WEATHER REPORTING SERVICE. ALTERNATE MNMS NA. THIS IS NDB OR GPS RWY 27, AMDT 2C.

[FR Doc. 99–648 Filed 1–11–99; 8:45 am]
BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 29429; Amdt. No. 1907]

RIN 2120–AA65

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference—approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located; or

3. The Flight Inspection Area Office which originated the SIAP.

For Purchase—Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional office of the region in which the affected airport is located.

By subscription—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK. 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation Regulations (FAR). The applicable FAA Forms are identified as FAA Forms 8260–3, 8260–4, and 8260–5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 is effective upon publication of each separate SIAP as contained in the transmittal. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (NFDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Approach Procedures (TERPS). In developing these SIAPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory. Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Navigation (air).

Issued in Washington, DC on December 24, 1998.

Richard O. Gordon,

Acting Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

1. The authority citation for part 97 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120, 44701; and 14 CFR 11.49(b)(2).

2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33 and 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, identified as follows:

* * * *Effective 28 January 1999*

Lago Vista, TX, Lago Vista TX-Rusty Allen, VOR/DME–A, Amdt 2A, CANCELLED
Park Falls WI, Park Falls Muni, NDB RWY 36, Orig

* * * *Effective 25 February 1999*

Haleyville, AL, Posey Field, VOR/DME OR GPS RWY 18, Amdt 4
Lexington, KY, Blue Grass, Radar-1, Amdt. 11, CANCELLED
Cincinnati, OH, Cincinnati Muni Airport-Lunken Field, NDB OR GPS RWY 21L, Amdt 14
Cincinnati, OH, Cincinnati Muni Airport-Lunken Field, NDB OR GPS RWY 25, Amdt 8
Cincinnati, OH, Cincinnati Muni Airport-Lunken Field, ILS RWY 21L, Amdt 16

* * * *Effective 25 March 1999*

Danville, IL, Vermilion County, ILS RWY 21, Amdt 6
Alliance, NE, Alliance Muni, NDB RWY 12, Orig
Alliance, NE, Alliance Muni, NDB RWY 30, Orig
Hartsville, SC, Hartsville Muni, NDB RWY 21, Orig
Hartsville, SC, Hartsville Muni, NDB OR GPS RWY 21, Amdt. 3B, CANCELLED

[FR Doc. 99–647 Filed 1–11–99; 8:45 am]

BILLING CODE 4910–13–M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 3

Temporary Licenses for Associated Persons, Floor Brokers, Floor Traders and Guaranteed Introducing Brokers

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) has adopted amendments to its rules governing the granting of a temporary license (TL) by the National Futures Association (NFA) to applicants for registration in the categories of associated person (AP), floor broker (FB), floor trader (FT), and guaranteed introducing broker (IBG). These amendments authorize NFA, in appropriate cases, to grant a TL to an

applicant despite a ''yes'' answer to a Disciplinary History question, which currently makes an applicant ineligible for a TL. The Commission adopted these amendments so that it could approve certain registration rules submitted by NFA without creating any inconsistency between the Commission's rules and those of NFA.

EFFECTIVE DATE: February 11, 1999.

FOR FURTHER INFORMATION CONTACT:
Lawrence B. Patent, Associate Chief Counsel, Division of Trading and Markets, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW, Washington, DC 20581. Telephone: (202) 418–5439.

SUPPLEMENTARY INFORMATION:

I. CFTC Rules

A. Proposed Rule Amendments

On September 21, 1998, the Commission issued proposed amendments to its rules governing the granting of a TL by NFA to applicants for registration in the categories of AP, FB, FT and IBG.[1] Among other things, these proposed rule amendments would authorize NFA, in appropriate cases, to grant a TL to an applicant despite a ''yes'' answer to a Disciplinary History question, which currently makes an applicant ineligible for a TL. The impetus for the Commission's proposals was NFA's submission for Commission approval of amendments to NFA rules 301 and 302, governing TLs for APs and IBGs, as well as new NFA Rule 303 to govern TLs for FBs and FTs. NFA's rule amendments and the new rule would eliminate the no ''yes'' answer criterion as an absolute bar to the issuance of a TL. The Commission proposed amendments to its own rules so that it could approve the rule amendments and new rule submitted by NFA without creating any inconsistency between the Commission's rules and those of NFA.[2] The Commission also proposed, in response to NFA's submission, to eliminate the ''no-new-yes'' answer requirements from its rules governing TLs of AP, FB or FT applicants whose registration terminated within the preceding 60 days in order to permit more of these applicants to obtain a TL upon mailing a new registration application (Form 8–R).

On its own initiative, the Commission proposed to amend two other provisions of its rules where a ''yes'' answer to a Disciplinary History question now prevents granting of *registration*, not merely a TL, since these provisions are modeled upon those governing TLs. These circumstances pertain to: (1) A registered FT seeking to become registered as an FB (Commission Rule 3.11(c)(2)(ii)); and (2) an AP whose registration is terminated because of the revocation or withdrawal of the sponsor's registration and who becomes associated with a new sponsor (Commission Rule 3.12(i)).[3]

B. Comments on Proposals

The Commission provided a 30-day comment period on its proposed rule amendments. Three comment letters were received, from NFA, the Chicago Mercantile Exchange and the Chicago Board of Trade. All three letters supported the Commission's proposals. NFA further suggested that the Commission avoid the necessity for adopting amendments to Commission rules to accommodate NFA rule amendments concerning registration processing by either: (1) Interpreting section 17(j) of the Act not to require identical CFTC and NFA rules but only rules that achieve the same underlying regulatory purpose; (2) amending Commission Rule 3.2(a) to eliminate the consistency requirement; or (3) repealing the Commission's registration processing rules.

C. Adoption of Rule Amendments

The Commission has carefully considered the comments received, but does not believe that it is appropriate to make further amendments to its Part 3 registration rules at this time as suggested by NFA. Accordingly, the Commission has determined to adopt the rule amendments as proposed.[4]

The Commission indicated when it proposed its rule amendments concerning TLs that it would approve amendments to NFA Rules 301 and 302, as well as new NFA Rule 303, when the Commission adopted the proposed amendments to its rules, and the Commission has done so.[5] NFA represents that it will use its authority to grant TLs to applicants with ''yes'' answers that (1) NFA has previously cleared, or (2) NFA knows that it intends to clear.[6] NFA further represents that, in evaluating whether any applicant should be granted a TL despite a ''yes'' answer to a Disciplinary History question, it will follow the recent guidance set forth by the Commission concerning the treatment of disciplinary histories of FBs, FTs and applicants for registration in either category.[7]

The Commission also wishes to note that certain of its rules related to TLs are not being amended. Commission rules provide that a TL shall terminate immediately upon notice to an applicant that the applicant failed to disclose relevant history or to disclose that, following the submission of the application, an event has occurred leading to an affirmative response. Such a notice must also be provided to the applicant's sponsor (in the case of an AP applicant), the contract market that has granted trading privileges (in the case of an FB or FT applicant) or the guarantor FCM (in the case of an IBG applicant).[8] The Commission emphasizes that all applicants must declare derogatory information as required by the registration forms since failure to do so may lead to termination of a TL and, if willful, to denial or conditioning of registration.[9]

The Commission further notes that it is not amending the provisions of its rules governing TLs for FB applicants that restrict such persons to operating as an FT while the applicant has a TL prior to being granted registration as an FB.[10]

II. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires that

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[1] 63 FR 51048 (Sept. 24, 1998).

[2] Section 17(j) of the Commodity Exchange Act (Act) 7 U.S.C. 21(j)(1994), provides in pertinent part that ''A registered futures association shall submit to the Commission any change in or addition to its rules. . . . The Commission shall approve such rules, if such rules are determined by the Commission to be consistent with the requirements of this section and not other-wise in violation of this act or the regulations issued pursuant to this Act. . . .'' *See also* Commission Rule 3.2(a).

[3] The AP situation could arise where, for example, one futures commission merchant (FCM) merges into another, the merged FCM withdraws its registration and the surviving FCM absorbs the APs of the disappearing FCM.

[4] A more complete discussion of the Commission's authority concerning TLs and NFA's rules in this area is set forth in the release announcing the Commission's proposed rule amendments, 63 FR 51048.

[5] 63 FR 51048, 51049 n.15.

[6] Examples of matters requiring a ''yes'' answer where NFA may determine to issue a TL under this new authority would include a petty theft misdemeanor conviction that predates the registration application by more than five years or a single exchange disciplinary action that involves only financial or minor recordkeeping requirements.

[7] *See* Commission Advisory 61–97 (Dec. 8, 1997), to which is attached a letter to Robert K. Wilmouth, NFA President, from Jean A. Webb, Secretary of the Commission, dated Dec. 4, 1997.

[8] The notice concerning failure to disclose or the occurrence of an event leading to an affirmative response also applies to a principal of an IBG. Commission Rules 3.42(a)(8) and 3.46(a)(10).

[9] *See* section 8a(2)(G) and (3)(G) of the Act; *Auster* v. *CFTC*, 687 F.2d 294 (9th Cir. 1982).

[10] This restriction to acting only in the capacity of an FT during the pendency of the TL does not apply if the FB applicant was registered as an FB within the preceding 60 days. Commission Rule 3.41(a).

agencies, in proposing rules, consider the impact of those rules on small businesses. The rule amendments discussed herein would affect APs, FBs, FTs and IBGs. The Commission has previously determined to evaluate within the context of a particular rule proposal whether all or some FBs, FTs, and IBGs should be considered ''small entities'' for purposes of the RFA and, if so, to analyze the economic impact on FBs, FTs, and IBGs of any such rule at that time.[11] The rule amendments discussed herein will not affect the requirements for filing an application for registration, but will permit certain persons to obtain a TL where it now is not possible and thus permit them to begin lawfully acting as industry professionals sooner. Accordingly, the Chairperson, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the action taken herein will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.* (Supp. I 1995)) imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. While the rule amendments discussed herein have no burden, the group of rules (3038–0023) of which they are a part has the following burden:

Average Burden hours Per Response: 15.76
Number of Respondents: 73,435
Frequency of Response: Annually and on occasion

Copies of the OMB approved information collection package associated with these rules may be obtained from Desk Officer, CFTC, Office of Management and Budget, Room 10202, NEOB, Washington, DC 20503, (202) 395–7340.

List of Subjects in 17 CFR Part 3

Brokers, Registration.

In consideration of the foregoing, and pursuant to the authority contained in the Commodity Exchange Act and, in particular, sections 4d, 4e, 4k, 8a and 17 thereof, 7 U.S.C. 6d, 6e, 6k, 12a and 21, the Commission hereby amends Part 3 of Chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 3—REGISTRATION

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

Authority: 5 U.S.C. 552, 552b; 7 U.S.C. 1a, 2, 4, 4a, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6m, 6n, 6o, 6p, 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21, and 23.

2. Section 3.11 is amended by revising paragraphs (c)(1)(i)(A) and (c)(1)(i)(B), by removing paragraph (c)(1)(i)(C), by revising paragraphs (c)(1)(ii)(A), (c)(1)(ii)(B) and (c)(1)(ii)(C), by removing paragraph (c)(1)(ii)(D) and redesignating paragraph (c)(1)(ii)(E) as paragraph (c)(1)(ii)(D), and by revising paragraph (c)(2)(ii) to read as follows:

§ 3.11 Registration of floor brokers and floor traders.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(A) The person's registration as a floor broker is not suspended or revoked; and

(B) There is no pending adjudicatory proceeding against the person under sections 6(c), 6(d), 6c, 6d, 8a or 9 of the Act or §§ 3.55 or 3.60 and, within the preceding twelve months, the Commission has not permitted the withdrawal of an application for registration in any capacity after initiating the procedures provided in § 3.51.

(ii) * * *

(A) The person's registration as a floor trader is not suspended or revoked; and

(B) There is no pending adjudicatory proceeding against the person under sections 6(c) 6(d), 6c, 6d, 8a or 9 of the Act or §§ 3.55 or 3.60 and, within the preceding twelve months, the Commission has not permitted the withdrawal of an application for registration in any capacity after initiating the procedures provided in § 3.51.

(C) If such person is seeking registration as a floor broker, the person will be granted a temporary license to act in the capacity of floor trader only if the person's prior registration was not subject to conditions or restrictions.

* * * * *

(2) * * *

(ii) Any person registered as a floor trader whose registration is not subject to conditions or restrictions and who continuously maintains trading privileges at any contract market that has made the certification required under § 3.40 will be registered as, and in the capacity of, a floor broker upon mailing to the National Futures Association of a Form 3–R completed and filed in accordance with the instructions thereto indicating the intention to change registration category, accompanied by evidence of the granting of trading privileges at the new contract market, if applicable.

* * * * *

3. Section 3.12 is amended by revising paragraph (d)(1)(iv) and (d)(1)(v), by removing paragraph (d)(1)(vi), by revising paragraphs (d)(3) and (i)(1)(v), by removing paragraph (i)(1)(vi) and redesignating paragraph (i)(1)(vii) as paragraph (i)(1)(vi), and by revising paragraph (i)(2) to read as follows:

§ 3.12 Registration of associated persons of futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators and leverage transaction merchants.

* * * * *

(d) * * *

(1) * * *

(iv) Whether there is a pending adjudicatory proceeding under sections 6(c), 6(d), 6c, 6d, 8a or 9 of the Act or §§ 3.55, 3.56 or 3.60 or if, within the preceding twelve months, the Commission has permitted the withdrawal of an application for registration in any capacity after instituting the procedures provided in § 3.51 and, if so, that the sponsor has been given a copy of the notice of the institution of a proceeding in connection therewith; and

(v) That the sponsor has received a copy of the notice of the institution of a proceeding if the applicant has certified, in accordance with paragraph (d)(1)(iv) of this section, that there is a proceeding pending against the applicant as described in that paragraph or that the Commission has permitted the withdrawal of an application for registration as described in that paragraph.

* * * * *

(3) The certifications permitted by paragraphs (d)(1)(i) and (v) of this section must be signed and dated by an officer, if the sponsor is a corporation, a general partner, if a partnership, or the proprietor, if a sole proprietorship. The certifications permitted by paragraphs (d)(1)(ii)–(iv) of this section must be signed and dated by the applicant for registration as an associated person.

* * * * *

(i) * * *

(1) * * *

(v) That the new sponsor has received a copy of the notice of the institution of a proceeding if the applicant for registration has certified, in accordance with paragraph (i)(1)(iv) of this section, that there is a proceeding pending

[11] *See* 47 FR 18618, 18620 (Apr. 30, 1982) (FBs); 48 FR 35248, 35276–35278 (Aug. 3, 1983) (IBGs); and 58 FR 19575, 19588 (Apr. 15, 1993) (FTs). With respect to APs, the Commission has previously stated that the RFA does not apply to APs because APs must be individuals under Section 4k of the Act and Rule 1.3(aa). *See* 48 FR 14933, 14954 n.115 (Apr. 6, 1983).

against the applicant as described in that paragraph or that the Commission has permitted the withdrawal of an application for registration as described in that paragraph; and

* * * * *

(2) The certifications required by paragraphs (i)(1)(i), (i)(1)(v), and (i)(1)(vi) of this section must be signed and dated by an officer, if the sponsor is a corporation, a general partner, if a partnership, or the proprietor, if a sole proprietorship. The certifications required by paragraphs (i)(1)(ii)–(iv) of this section must be signed and dated by the applicant for registration as an associated person.

* * * * *

4. Section 3.40 is amended by revising paragraph (a) to read as follows:

§ 3.40 Temporary licensing of applicants for associated person, floor broker or floor trader registration.

* * * * *

(a) A Form 8–R, properly completed in accordance with the instructions thereto;

* * * * *

5. Section 3.44 is amended by revising paragraphs (a)(2) and (a)(3) to read as follows:

§ 3.44 Temporary licensing of applicants for guaranteed introducing broker registration.

* * * * *

(a) * * *

(2) A Form 7–R properly completed in accordance with the instructions thereto;

(3) A Form 8–R for the applicant, if a sole proprietor, and each principal (including each branch office manager) thereof, properly completed in accordance with the instructions thereto, all of whom would be eligible for a temporary license if they had applied as associated persons.

* * * * *

Issued in Washington, DC, on January 6, 1999 by the Commission.

Jean E. Webb,

Secretary of the Commission.

[FR Doc. 99–653 Filed 1–11–99; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 229, 240 and 249

[Release Nos. 33–7620; 34–40884; FR54; File No. S7–17–98]

RIN 3235–AH43

Segment Reporting

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Commission today is adopting technical amendments to conform our reporting requirements with the Financial Accounting Standards Board's (''FASB'') Statement of Financial Accounting Standards (''SFAS'') No. 131, governing disclosures relating to a business enterprise's operating segments.

DATES: Effective Date: The rules will become effective on February 11, 1999. Compliance Date: Issuers may voluntarily comply with the revised rules before the effective date.

FOR FURTHER INFORMATION CONTACT: James R. Budge, Special Counsel, Division of Corporation Finance, at (202) 942–2950, Louise M. Dorsey, Assistant Chief Accountant, Division of Corporation Finance, at (202) 942–2960, or Robert F. Lavery, Assistant Chief Accountant, Office of the Chief Accountant, at (202) 942–4400, U.S. Securities and Exchange Commission, 450 Fifth Street, NW, Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Commission today adopts technical amendments to Rules 3–03 [1] and 12–16 [2] of Regulation S–X,[3] Items 101 [4] and 102 [5] of Regulation S–K,[6] and Schedule 14A [7] in order to conform our reporting requirements with the FASB's recently adopted SFAS No. 131. We also are making consistent changes to Form 20–F [8] and to Section 501.06 of the Codification of Financial Reporting Policies (''CFRP'').

I. Background

In 1976, the FASB issued SFAS No. 14, ''Financial Reporting for Segments of a Business Enterprise.'' SFAS No. 14 required corporations to disclose certain financial information by ''industry segment'' as defined in the statement and by geographic area. In December 1977, we adopted amendments to our rules to integrate the information to be furnished under SFAS No. 14 with the narrative and financial disclosures required in various disclosure forms.[9]

After extensive deliberations, including solicitation of public comments, the FASB adopted a number of fundamental changes to its standards for segment reporting by publishing SFAS No. 131 in June of 1997. SFAS No. 131 superseded SFAS No. 14 and established standards for reporting information about ''operating segments'' of an enterprise rather than following the ''industry segment'' standards that were in place previously.

On June 25, 1998, the Commission proposed for comment a number of technical changes to its reporting requirements to accommodate these modifications.[10] Twelve commenters responded to the solicitation for public views on the proposed approach. Generally, the commenters were supportive of our efforts to conform our rules with the FASB standards. We have determined to adopt the rules essentially as proposed. We believe that this action is in keeping with our long-standing policy to look to the private sector for the promulgation of generally accepted accounting principles (''GAAP'').[11] It also furthers our goal of integrating existing accounting information into the narrative disclosure in documents mandated by the federal securities laws. This release explains the new reporting requirements.

II. Rule Changes

A. Operating Segment Disclosure

SFAS No. 14 required, and the Commission's rules and forms have required, disclosure along ''industry segment'' lines. An ''industry segment,'' as defined by SFAS No. 14, was ''a component of an enterprise engaged in providing a product or service or a group of related products and services primarily to unaffiliated customers * * * for a profit.'' [12] Recognizing that businesses often evaluate their operations using criteria not necessarily related to the products or services offered to the public, the FASB replaced the industry segment reporting standard with one that requires businesses to

[1] 17 CFR 210.3–03.

[2] 17 CFR 210.12–16.

[3] 17 CFR Part 210.

[4] 17 CFR 229.101.

[5] 17 CFR 229.102.

[6] 17 CFR Part 229.

[7] 17 CFR 240.14a–101.

[8] 17 CFR 249.220f.

[9] Release No. 33–5893 (December 23, 1997) (42 FR 65554).

[10] Release No. 33–7549 (June 25, 1998) (63 FR 35886).

[11] Section 101 of the Codification of Financial Reporting Policies. The Commission initially issued its administrative policy concerning financial statements in 1938 and updated it in 1973 to recognize the establishment of the FASB.

[12] SFAS No. 14, ¶ 10.a.

report financial information on the basis of ''operating segments.'' [13] Under the new accounting standard, an operating segment is a component of a business, for which separate financial information is available, that management regularly evaluates in deciding how to allocate resources and assess performance.[14] Specifically, SFAS No. 131 states that an operating segment is a component of a business:

- That engages in activities from which it may earn revenues and incur expenses (including revenues and expenses relating to transactions with other components of the same business);
- Whose operating results are regularly reviewed by the enterprise's ''chief operating decision maker'' [15] to make decisions about resources to be allocated to the segment and assess its performance; and
- For which discrete financial information is available.

Under SFAS No. 131, a company generally must report separately information about an operating segment that meets any of the following thresholds:

- Its reported revenue, including both sales to external customers and intersegment sales and transfers, is 10 percent or more of the combined revenue of all reported operating segments, whether generated inside or outside of the company; [16]
- Its reported profit or loss is 10 percent or more of the greater of: (1) the combined reported profit of all operating segments that did not report a loss or (2) the combined reported loss of all operating segments that did report a loss; or
- Its assets are 10 percent or more of the combined assets of all operating segments.[17]

SFAS No. 131 not only changed how a business should identify its segments, it also changed the types of information to be disclosed for each segment. SFAS No. 14 required an issuer to report its revenues, operating profit (loss),[18] and identifiable assets [19] if a segment's revenues, operating profit, or identifiable assets were 10% or more of all the industry segments' revenues, operating profits, or assets, respectively. Issuers were to reconcile these three items to the consolidated amounts in the financial statements. In addition, SFAS No. 14 required issuers to report for each segment depreciation, depletion and amortization, capital expenditures, equity in net income of unconsolidated subsidiary or equity-method investee, and the effect of a change in accounting principle on operating profit (loss).

By contrast, SFAS No. 131 requires that a company provide for each reportable segment quantitative disclosure of two basic items—total assets and a measure of profit or loss. The new standard defines neither segment profit (loss) nor assets. Instead, management must determine what they will report based on how they operate their business. In addition, companies must disclose the following items for each segment, but only if management includes them in measuring segment profit or loss:

- Revenues from external customers;
- Revenues from other operating segments;
- Interest income; [20]
- Interest expense; [21]
- Depreciation, depletion and amortization;
- Unusual items;
- Equity in net income of equity method investees;
- Income taxes;
- Extraordinary items; and
- Significant non-cash items other than depreciation, depletion, and amortization.

A company also must disclose for each segment the amount of investment in equity-method investees and total expenditures for additions to long-lived assets if it includes the amount in its determination of segment assets.[22]

The company must reconcile the totals of the reportable segments' amounts for all of these listed items to consolidated amounts. The FASB required more items to be disclosed per segment under the new standard because analysts have long wanted more information and most of the items required should be already available in management reports.

Today we are amending our narrative and financial reporting rules to conform their segment reporting requirements to the FASB's revised accounting standards. We retain, however, certain requirements relating to disclosure of principal products or services and major customers that traditionally have differed from the FASB standards.[23] We address below each of the rule changes.[24]

1. Description of Business—Item 101

In the past, Regulation S–K Item 101(b)[25] required issuers to disclose in the business description sections of documents that they filed with the Commission financial information based on GAAP's old ''industry segment'' standard. Under revised Item 101, registrants will report segment information in accordance with GAAP's

[13] We use the proposed terms ''segment'' and ''segments'' as well as the phrase ''segments as defined by generally accepted accounting principles'' and similar terms or phrases in the rules rather than follow the accounting standard's nomenclature of ''operating segment.'' Registrants should construe these terms to mean a component of a business for which GAAP requires separate reporting in financial statements.

[14] We refer to this below as the ''management approach.''

[15] The term ''chief operating decision maker'' identifies a function, not a person with that title. This person's function is to allocate resources to and assess the performance of the company's segments. A chief operating decision maker frequently might be a company's chief executive officer or chief operating officer, but it also could be a group of decision makers, for example, the company's president, executive vice presidents and others.

[16] The FASB has proposed eliminating the word ''reported'' from the phrase ''all reported operating segments.'' *See* ¶ 7.t.(1)(a) of Proposed Statement of Financial Accounting Standards—Amendment to FASB Statement No. 66, Rescission of FASB Statement No. 75, and Technical Corrections, File Reference No. 190–A, dated October 13, 1998 (''Exposure Draft'').

[17] SFAS No. 131, ¶ 18.

[18] SFAS No. 14 specifically defined segment operating profit to be revenues less all operating expenses, which included depreciation and amortization. An issuer was to allocate operating expenses that were not directly traceable to a particular segment on a reasonable basis among the segments for whose benefit the expenses were incurred. The standard required an explanation of the amount and nature of any unusual or nonrecurring items added or deducted in determining operating profit of a segment. In addition, the standard defined any restructuring charges related to a specific segment as operating expenses of that segment and issuers were to deduct these charges in calculating that segment's operating profit or loss.

SFAS No. 14 excluded certain items in calculating segment profit. They were: General corporate expenses; interest expense (except included for financial institutions, insurance and leasing operations); equity in income (loss) of unconsolidated subsidiaries or equity investees; discontinued operations; extraordinary items; and, the effects of changes in accounting.

[19] Segment assets included all tangible and intangible assets used by the segment, including goodwill, other intangibles, and deferred income and expenses.

[20] Certain enterprises may report segment interest revenue net of interest expense. *See* SFAS No. 131, ¶ 27.

[21] *Id.*

[22] In its Exposure Draft, the FASB has proposed to modify the provisions of ¶¶27 and 28 of SFAS No. 131 to require companies to disclose the designated items for each segment, if included in the measure of profit or loss reviewed by or otherwise regularly provided to the chief operating decision maker. *See* ¶¶7.t.(3) and (4) of the Exposure Draft.

[23] *See* Sections II.A.1.a. and II.B.2.

[24] We are alsol adopting several technical amendments to update cross references to the new accounting standard. These revisions are Rules 3–03(e) and 12–16 of Regulation S–X and Item 14(b)(2)(ii)(A)*(3)(i)* of Schedule 14A.

[25] 17 CFR 229.101(b).

new operating segment standard.[26] Other changes to Item 101 follow.

a. Principal products or services. Item 101 historically has required a discussion, by segment, of the principal products produced and services rendered by the issuer, as well as the principal markets for and methods of distribution of each segment's products and services. On the other hand, GAAP required, and continues to require, disclosure of the types of products and services from which each segment derives its revenues, without reference to principal markets and methods of distribution. We continue to believe that information relating to principal markets and distribution methods is useful to investors; consequently we are retaining this provision.

Item 101 further requires registrants to disclose the amounts of revenues from each class of similar products and services based on quantitative thresholds. Specifically, the issuer must state the amount or percentage of total revenue contributed by any class of similar products or services that accounted for 10 percent or more of consolidated revenue in any of the last three fiscal years, or if total revenue did not exceed $50,000,000 during any of those three fiscal years, 15 percent or more of consolidated revenue.[27] SFAS No. 131 requires disclosure of revenues from external customers for each product and service or each group of similar products and services unless it is impracticable to do so.

Because SFAS No. 131 requires disclosure regardless of amount, unless impracticable, it appears that the new accounting standard may require more disclosure than Item 101. Consequently, we sought public comment as to whether we needed to maintain the quantitative thresholds of Item 101(c)(1)(i). Several commenters advocated eliminating the quantitative thresholds and simply relying on the GAAP standard, which they said implied a materiality standard for minimum disclosure. We believe that SFAS No. 131 will result in disclosure of a range of amounts of products and services, depending upon how a company defines a class of related products or services. In fact, SFAS No. 131 may require disclosure of amounts below the existing 10% threshold of Item 101. We believe a clearly stated minimum threshold for disclosure is desirable to eliminate any possible ambiguity that may result from attempts to apply an unwritten materiality threshold to small amounts of reportable revenues and is in keeping with the 10% threshold used to report segments under SFAS No. 131. We therefore have retained these Item 101 thresholds.

b. *Retroactive restatement of information.* Item 101 has required issuers to restate retroactively previously reported financial information when there has been a material change in the way they group products or services into industry segments and that change affects the reported segment information. By contrast, SFAS No. 131 provides that if an issuer changes the structure of its internal organization in a manner that causes the composition of its reportable segments to change, the issuer must restate the corresponding information for earlier periods unless it is impracticable to do so.[28] In the final rule we conform the language of Item 101 with the language of SFAS No. 131 regarding when a company must restate information.

c. *Appendix A.* Item 101 has included an appendix illustrating how to present the required industry segment information in tabular form. As proposed, we are eliminating this appendix and will rely instead on the SFAS No. 131 instructions governing how to present information relating to operating segments.

2. Property—Item 102

Regulation S–K Item 102 requires descriptions of an issuer's principal plants, mines, and other ''materially important'' physical properties. Companies must identify the industry segment(s) that use the described properties.[29] We are updating the item to reflect the new financial statement reporting requirements, as proposed.

3. Management's Discussion & Analysis—Item 303

Regulation S–K Item 303, which requires management to include a discussion and analysis of an issuer's financial condition and results of operations, provides:

> Where in the registrant's judgment a discussion of segment information or other subdivisions of the registrant's business would be appropriate to an understanding of such business, the discussion shall focus on each relevant, reportable segment or other subdivision of the business and on the registrant as a whole.[30]

The Commission historically has relied on the FASB's definition for segment disclosure in Management's Discussion and Analysis (''MD&A''). The Commission intends to continue to rely on the FASB's standards, thereby allowing issuers to use the management approach under SFAS No. 131. No rule change is necessary. Under the language in Item 303, a multi-segment registrant preparing a full fiscal year MD&A should analyze revenues, profitability (or losses) and total assets of each significant segment in formulating a judgment as to whether a discussion of segment information is necessary to an understanding of the business.

While we are not adopting changes to the language of Item 303, we are amending CFRP 501.06.a, which provides informal guidance about MD&A. The revisions conform the Codification's language with that of SFAS No. 131, and adds a new footnote, that reads:

> Where consistent with the registrant's internal management reports, SFAS No. 131 permits measures of segment profitability that differ from consolidated operating profit as defined by GAAP, or that exclude items included in the determination of the registrant's net income. Under SFAS No. 131, a registrant also must reconcile key segment amounts to the corresponding items reported in the consolidated financial statements in a note to the financial statements. Similarly, the Commission expects that the discussion of a segment whose profitability is determined on a basis that differs from consolidated operating profit as defined by GAAP or that excludes the effects of items attributable to the segment also will address the applicable reconciling items in Management's Discussion and Analysis. For example, if a material charge for restructuring or impairment relates to a specific segment, but is not included in management's measure of the segment's operating profit or loss, registrants would be expected to discuss in Management's Discussion and Analysis the applicable portion of the charge, the segment to which it relates and the circumstances of its incurrence. Likewise, the Commission expects that the effects of management's use of non-GAAP measures, either on a consolidated or segment basis, will be explained in a balanced and informative manner, and the disclosure will include a discussion of how that segment's performance has affected the registrant's GAAP financial statements.

Several commenters said that the footnote as proposed could be read to require registrants to reconcile the internal measure of segment profitability to pre-tax income from continuing operations by segment, which partial reconciliation by segment would go significantly beyond the requirements of SFAS No. 131. We have revised this language, as set out above,

[26] We also retain the provisions allowing an issuer to refer to other sections of the registration statement that include the required information in order to avoid duplicative disclosure.

[27] 17 CFR 229.101(c)(1)(i).

[28] *See* SFAS No. 131, ¶34.

[29] 17 CFR 229.102.

[30] 17 CFR 229.303(a).

to clarify that we are not requiring any incremental reconciliation of segment profit beyond what SFAS No. 131 requires. The note now makes it clear that we expect a narrative discussion in MD&A of items that affect the operating results of a segment but that are not included in segment operating profit defined by management.

4. Form 20–F

Form 20–F is the registration statement and annual report for foreign private issuers promulgated under the Securities Exchange Act of 1934 (''Exchange Act'').[31] Form 20–F has permitted a foreign registrant that presents financial statements according to United States GAAP to omit SFAS No. 14 disclosures if it provides the information required by Item 1 of the form. As proposed, we are replacing the reference to SFAS No. 14 with one to SFAS No. 131.[32]

Item 1 of Form 20–F requires registrants to disclose sales and revenues by categories of activity and geographical areas, as well as to discuss each category of activities that provide a disproportionate contribution to total ''operating profit'' of the registrant. We are not changing these requirements.

B. Other Reporting Requirements

SFAS No. 14 also set standards for disclosure of certain enterprise-wide information where the issuer did not provide the information in the segment disclosure, and Regulation S–K reflected those standards. As we proposed, we are updating our rules to conform with the revised requirements of SFAS No., 131, as we explain below.

1. Geographic Areas

Regulation S-K Item 101(d) has required an issuer to disclose for each of the issuer's last three fiscal years the amounts of revenue, operating profit or loss, and identifiable assets attributable to each of its geographic areas. It also required disclosure of the amount of export sales in the aggregate or by appropriate geographic area to which the issuer makes sales.

Under SFAS No. 131, issuers must disclose revenues from external customers deriving from:

- The issuer's country of domicile;
- All foreign countries in total from which the issuer derives revenues; and
- An individual foreign country, if material.

An issuer also must disclose the basis for attributing revenues from external customers to individual countries.

The new accounting standard also requires an issuer to disclose long-lived assets other than financial instruments, long-term customer relationships of a financial institution, mortgage and other servicing rights, deferred policy acquisition costs, as well as deferred tax assets located in its country of domicile and in all foreign countries, in total, in which the enterprise holds assets. If assets in an individual foreign country are material, an issuer must disclose those assets separately.[33]

We are revising our disclosure requirements to conform entirely with the new accounting standard. Consequently, issuers, even those whose segments are defined by geography, will continue to report designated information based on geographic areas, unless the information is already provided as part of the reportable operating segment information required by the accounting standards.[34] Consistent with SFAS No. 131, the rules no longer will require companies to disclose geographic information relating to profitability, unless their segments are defined by geographic areas, or export sales.

2. Major Customers

Since the adoption of SFAS No. 14, GAAP has required disclosure of revenues from major customers.[35] SFAS No. 131 now requires issuers to disclose the amount of revenues from each external customer that amounts to 10 percent or more of an enterprise's revenue as well as the identity of the segment(s) reporting the revenues. The accounting standards, however, have never required issuers to identify major customers. On the other hand, Regulation S-K Item 101 historically has required naming a major customer if sales to that customer equal 10 percent or more of the issuer's consolidated revenues and if the loss of the customer would have a material adverse effect on the issuer and its subsidiaries.[36] We continue to believe that the identity of major customers is material information to investors. This disclosure allows a reader to better assess risks associated with a particular customer, as well as material concentrations of revenues related to that customer. Consequently, we retain this Regulation S-K requirement, as we proposed.

C. Segment Information Added to Interim Reports

GAAP historically has not required segment reporting in interim financial statements. In SFAS No. 131, the FASB changed its position. Under the new accounting standards, issuers must include in condensed financial statements for interim periods the following information about each reportable segment:

- Revenues from external customers;
- Intersegment revenues;
- A measure of segment profit or loss;
- Total assets for which there has been a material change from the amount disclosed in the last annual report;
- A description of differences from the last annual report in the basis of segmentation or in the basis of measurement of segment profit or loss; and
- A reconciliation of the total of the reportable segments' measures of profit or loss to the enterprise's consolidated income before income taxes, extraordinary items, discontinued operations, and the cumulative effect of changes in accounting principles.[37]

Thus, for the first time, issuers must disclose in their interim financial statements, including those filed with the Commission, condensed financial information about the segments they have chosen as reportable segments for purposes of their annual reports.[38]

SFAS No. 131 is effective for fiscal years beginning after December 15,

[31] 15 U.S.C. 78a *et seq.*

[32] *See* Instruction 3 to Item 17 of Form 20–F. One commenter suggested also referencing International Accounting Standard 14 in this instruction. In light of the technical nature of this rulemaking, we believe that we should reexamine this suggestion in connection with substantive rulemaking projects involving this form that may arise in the future rather than adopt a provision that was not introduced in the proposals.

[33] *See* SFRAS No. 131, ¶38.

[34] *See* SFAS No. 121 ¶36. We are eliminating Appendix B of Regulation S–K Item 101. We also revise Instruction 2 to Item 101, which provides guidance about materiality analyses based on ''interperiod comparability,'' to reflect the elimination of the requirements to disclose the quantitative geographic information once required by SFAS No. 14.

[35] SFAS No. 30 amended SFAS No. 14 and retained this provision to disclose revenue from major customers.

[36] 17 CFR 229.101(a)(l)(vii).

[37] The FASB also amended Accounting Principles Board Opinion No. 28 (''APB No. 28''), governing interim financial reporting, to reflect this change. The stated purpose of APB No. 28 is ''to clarify the application of accounting principles and reporting practices to interim financial information, including interim financial statements and summarized interim financial data of publicly traded companies issued for external reporting purposes.'' APB No. 28¶1.

[38] SFAS No. 131, ¶33 currently states that segment information must be included in ''condensed financial statements of interim periods issued to shareholders.'' Since this language has caused some confusion relating to when segment information is required, the FASB has proposed, as a technical amendment, eliminating the words ''issued to shareholders'' to make it clear that the information is to be provided in all interim financial statements, regardless of whether delivered to shareholders. *See* Exosure Draft ¶7.t.(5). We understood this to be the FASB's interpretation of this requirement before we issued the proposals and we will expect to see segment information in all interim financial statements filed with the Commission.

1997.[39] The FASB specified, however, that issuers need not apply the new provisions to interim financial statements in the initial year of application, but they must report comparative information for interim periods in that initial year in financial statements for interim periods in the second year of application.[40] Consequently, through the Rules of General Application of Regulation S-X, which state that financial statements not prepared in accordance with GAAP will be presumed to be misleading or inaccurate,[41] we expect to begin to see comparative segment information reported in filings made by companies whose fiscal years ended after December 15, 1998 in their filings relating to their first quarter ending after March 15, 1999. A calendar year end company would provide comparative interim segment information beginning in its March 31, 1999 interim financial statements. No changes to our rules are necessary to implement the FASB's changes in this regard.

III. Certain Findings

We requested comment on whether the proposed revisions, if adopted, would have an adverse effect on competition or would impose a burden on competition that is neither necessary nor appropriate in furthering the purposes of the Securities Act and the Exchange Act. No commenter addressed this issue. In complying with our responsibilities under section 23(a)(2) of the Exchange Act, we have determined that there will be no adverse effect on competition and that the rule changes will not impose any unnecessary burden on competition that is not appropriate in furthering the purposes of the federal securities laws.[42]

We also find that our action will promote efficiency, competition and capital formation by making our disclosure standards uniform with the accounting standards. This is in keeping with our responsibilities under section 2(b) of the Securities Act[43] and section 3(f) of the Exchange Act.[44]

IV. Cost-Benefit Analysis

We anticipate that these rule changes will not impose any new regulatory costs on registrants, since the changes simply conform our disclosure requirements with current accounting principles, to which registrants are already subject. To the contrary, registrants will benefit from the obligation to follow uniform standards rather than potentially conflicting ones.

V. Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act,[45] Arthur Levitt, Chairman of the Commission, certified that the amendments proposed in this release would not, if adopted, have significant impact on a substantial number of small entities. The reason for this certification is that the amendments conform rules and forms to GAAP, as amended, to which registrants are already subject. We included the certification in the proposing release as Attachment A.

VI. Paperwork Reduction Act[46]

We determined that information collection burden hours will not change as a result of the technical amendments adopted today.

VII. Codification Update

The ''Codification of Financial Report Policies'' announced in Financial Reporting Release No. 1 (April 15, 1982) (47 FR 21028) is updated to:

1. Modify Section 501 by revising Section 501.06.a. to read as follows:

.a. Segment Analysis

In formulating a judgment as to whether a discussion of segment information is necessary to an understanding of the business, a multi-segment registrant preparing a full fiscal year MD&A should analyze revenues, profitability, and the cash needs of its significant segments.[47] To the extent any segment contributes in a materially disproportionate way to those items, or where discussion on a consolidated basis would present an incomplete and misleading picture of the enterprise, segment discussion should be included. This may occur, for example, when there are legal or other restrictions upon the free flow of funds from one segment, subsidiary, or division of the registrant to others; when known trends, demands, commitments, event, or uncertainties within a segment are reasonably likely to have a material effect on the business as a whole; when the ability to dispose of identified assets of a segment may be relevant to the financial flexibility of the registrant; and in other circumstances in which the registrant concludes that segment analysis is appropriate to an understanding of its business.

The following example illustrates segment disclosure for a manufacturer with two segments. The two segments contributed to segment profit amounts that were disproportionate to their respective revenues. The registrant discusses sales and segment profit trends, factors explaining such trends, and where applicable, known events that will impact future results of operations of the segment.

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[39] SFAS No. 131 ¶40.

[40] *Id*.

[41] *See* 17 CFR 210.4–01(a)(1).

[42] 15 U.S.C. 78w(a)(2).

[43] 15 U.S.C. 77b(b).

[44] 15 U.S.C. 78c(f).

[45] 5 U.S.C. 605(b).

[46] 44 U.S.C. 3501 *et seq.*

[47] Where consistent with the registrant's internal management reports, SFAS No. 131 permits measures of segment profitability that differ from consolidated operating profit as defined by GAAP, or that exclude items included in the determination of the registrant's net income. Under SFAS No. 131, a registrant also must reconcile key segment amounts to the corresponding items reported in the consolidated financial statements in a note to the financial statements. Similarly, the Commission expects that the discussion of a segment whose profitability is determined on a basis that differs from consolidated operating profit as defined by GAAP or that excludes the effects of items attributable to the segment also will address the applicable reconciling items in Management's Discussion and Analysis. For example, if a material charge for restructuring or impairment relates to a specific segment, but is not included in management's measure of the segment's operating profit or loss, registrants would be expected to discuss in Management's Discussion and Analysis the applicable portion of the charge, the segment to which it relates and the circumstances of its incurrence. Likewise, the Commission expects that the effects of management's use of non-GAAP measures, either on a consolidated or segment basis, will be explained in a balanced and informative manner, and the disclosure will include a discussion of how that segment's performance has affected the registrant's GAAP financial statements.

NET SALES BY SEGMENT

Segments	($ million)	Year 3		Year 2		Year 1
		Percent of total	($ million)	Percent of total	($ million)	Percent of total
Segment I	585	55	479	53	420	48
Segment II	472	45	433	47	457	52
Total Sales	1057	100	912	100	877	100

Year 3 vs. Year 2

Segment I sales increased 22% in Year 3 over the Year 2 period. The increase included the effect of the acquisition of Corporation T. Excluding this acquisition, sales would have increased by 16% over Year 2. Product Line A sales increased by 18% due to a 24% increase in selling prices, partially offset by lower shipments. Product Line B sales increased by 35% due to a 17% increase in selling prices and a 15% increase in shipment volume.

Segment II sales increased 9% due to a 12% increase in selling prices partly offset by a 3% reduction in shipment volume.

Year 2 vs. Year 1

Segment I sales increased 14% in Year 2. Product Line A sales increased 22%, in spite of a slight reduction in shipments, because of a 23% increase in selling prices.

Product Line B sales declined 5% due mainly to a 7% decrease in selling prices, partially offset by higher shipments.

The 5% decline in Segment II sales reflected a 3% reduction in selling prices and a 2% decline in shipments.

The substantial increases in selling prices of Product Line A during Year 3 and Year 2 occurred primarily because of heightened worldwide demand which exceeded the industry's production capacity. The Company expects these conditions to continue for the next several years. The Company anticipates that shipment volumes of Product Line A will increase as its new production facility reaches commercial production levels in Year 4.

Segment II shipment volumes have declined during the past two years primarily because of the discontinuation of certain products that were marginally profitable and did not have significant growth potential.

PROFIT BY SEGMENT

Segments	($ million)	Year 3		Year 2		Year 1
		Percent of total	($ million)	Percent of total	($ million)	Percent of total
Segment I	126	75	108	68	67	55
Segment II	42	25	51	32	54	45
Segment Profit	168	100	159	100	121	100

Year 3 vs. Year 2

Segment I profit was $18 million (17%) higher in Year 3 than in Year 2. This increase includes the effects of higher sales prices and slightly improved margins on Product Line A, higher shipments of Product Line B and the acquisition of Corporation T. Excluding this acquisition, Segment I profit would have been 11% higher than in Year 2. Partially offsetting these increases are costs and expenses of $11 million related to new plant start-up, slightly reduced margins on Product Line B and a $9 million increase in research and development expenses.

Segment II profit declined $9 million (18%) due mainly to substantially higher costs in Year 3 resulting from a 23% increase in average raw material costs which could not be fully recovered through sales prices increases. The Company expects that Segment II margins will continue to decline, although at a lesser rate than in Year 3 as competitive factors limit the Company's ability to recover cost increases.

Year 2 vs. Year 1

Segment I profit was $41 million (61%) higher in Year 2 than in Year 1. After excluding the effect of the $34 million non-recurring charge for the early retirement program in Year 1, Segment I profit in Year 2 was $18 million (27%) higher than in Year 1. This increase reflected higher prices and a corresponding 21% increase in margins on Product Line A, and a 17% increase in margins on Product Line B due primarily to costs reductions resulting from the early retirement program.

Segment II profit declined about $3 million (6%) due mainly to lower selling prices and slightly reduced margins in Year 2.

2. Replace paragraphs .01, .02 and .03 of Section 503 with new paragraph .01, to include the text of Section I of this release captioned ''Background'' and with new paragraph .02 to include the text of Section II.B.2 of this release captioned ''Major Customers.''

The Codification is a separate publication of the Commission. It will not be published in the Code of Federal Regulations.

VIII. Statutory Basis

The Commission proposes the rule changes explained in this release pursuant to sections 6, 7, 8, 10 and 19(a) of the Securities Act and Sections 3, 12, 13, 14, 15(d) and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Parts 210, 229, 240 and 249

Accounting, Registration requirements, Reporting and recordkeeping requirements, Securities.

Text of the Rules

Accordingly, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77aa(25), 77aa(26), 78j–1, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e(b), 79j(a), 79n, 79t(a), 80a–8, 80a–20, 80a–29, 80a–30, 80a–37(a), unless otherwise noted.

2. By amending § 210.3–03 by revising the first sentence of paragraph (e) to read as follows:

§ 210.3–03 Instructions to income statement requirements.

* * * * *

(e) Disclosures regarding segments required by generally accepted accounting principles shall be provided for each year for which an audited statement of income is provided. * * *

3. By amending § 210.12–16 by revising footnote one to the table to read as follows:

§ 210.12–16 Supplementary insurance information.

* * * * *

[1] Segments shown should be the same as those presented in the footnote disclosures called for by generally accepted accounting principles.

* * * * *

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

4. The authority citation for Part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

5. By amending § 229.101 (Item 101 of Regulation S–K) by revising the introductory text of paragraph (b), paragraph (b)(1) and paragraph (d); in paragraphs (c)(1) the introductory text, (c)(1)(i), (c)(1)(ii), (c)(1)(iv), and (c)(1)(v), by revising the term ''industry segment'' to read ''segment''; in paragraph (c)(1) the introductory text and in Instruction 1 in the Instructions to Item 101, by revising the term ''industry segments'' to read ''segments''; by revising Instruction 2 to Item 101, and by removing Appendix A—Industry Segments, and Appendix B—Foreign and Domestic Operations and Export Sales.

§ 229.101 (Item 101) Description of business.

* * * * *

(b) *Financial information about segments.* Report for each segment, as defined by generally accepted accounting principles, revenues from external customers, a measure of profit or loss and total assets. A registrant must report this information for each of the last three fiscal years or for as long as it has been in business, whichever period is shorter. If the information provided in response to this paragraph (b) conforms with generally accepted accounting principles, a registrant may include in its financial statements a cross reference to this data in lieu of presenting duplicative information in the financial statements; conversely, a registrant may cross reference to the financial statements.

(1) If a registrant changes the structure of its internal organization in a manner that causes the composition of its reportable segments to change, the registrant must restate the corresponding information for earlier periods, including interim periods, unless it is impracticable to do so. Following a change in the composition of its reportable segments, a registrant shall disclose whether it has restated the corresponding items of segment information for earlier periods. If it has not restated the items from earlier periods, the registrant shall disclose in the year in which the change occurs segment information for the current period under both the old basis and the new basis of segmentation, unless it is impracticable to do so.

* * * * *

(d) *Financial information about geographic areas.* (1) State for each of the registrant's last three fiscal years, or for each fiscal year the registrant has been engaged in business, whichever period is shorter:

(i) Revenues from external customers attributed to:

(A) The registrant's country of domicile;

(B) All foreign countries, in total, from which the registrant derives revenues; and

(C) Any individual foreign country, if material. Disclose the basis for attributing revenues from external customers to individual countries.

(ii) Long-lived assets, other than financial instruments, long-term customer relationships of a financial institution, mortgage and other servicing rights, deferred policy acquisition costs, and deferred tax assets, located in:

(A) The registrant's country of domicile;

(B) All foreign countries, in total, in which the registrant holds assets; and

(C) Any individual foreign country, if material.

(2) A registrant shall report the amounts based on the financial information that it uses to produce the general-purpose financial statements. If providing the geographic information is impracticable, the registrant shall disclose that fact. A registrant may wish to provide, in addition to the information required by paragraph (d)(1) of this section, subtotals of geographic information about groups of countries. To the extent that the disclosed information conforms with generally accepted accounting principles, the registrant may include in its financial statements a cross reference to this data in lieu of presenting duplicative data in its financial statements; conversely, a registrant may cross-reference to the financial statements.

(3) A registrant shall describe any risks attendant to the foreign operations and any dependence on one or more of the registrant's segments upon such foreign operations, unless it would be more appropriate to discuss this information in connection with the description of one or more of the registrant's segments under paragraph (c) of this item.

(4) If the registrant includes, or is required by Article 3 of Regulation S–X (17 CFR 210), to include, interim financial statements, discuss any facts relating to the information furnished under this paragraph (d) that, in the opinion of management, indicate that the three year financial data for geographic areas may not be indicative of current or future operations. To the extent necessary to the discussion, include comparative information.

Instructions to Item 101

* * * * *

2. Base the determination of whether information about segments is required for a particular year upon an evaluation of interperiod comparability. For instance, interperiod comparability would require a registrant to report segment information in the current period even if not material under the criteria for reportability of SFAS No. 131 if a segment has been significant in the immediately preceding period and the registrant expects it to be significant in the future.

* * * * *

Appendix A and B [Removed]

6. By amending § 229.102 by revising the term ''industry segment(s)'' in the introductory paragraph to read ''segment(s), as reported in the financial statements,''.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

7. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*(d), 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

§ 240.14a–101 [Amended]

8. By amending § 240.14a–101(Schedule 14A) in Item 14(b)(2)(ii)(A)(*3*)(*i*) by revising the phrase ''industry segments'' to read ''segments''.

PART 249—FORM, SECURITIES EXCHANGE ACT OF 1934

9. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted:

* * * * *

§ 249.220f (Form 20–F) [Amended]

10. By amending Form 20–F (referenced in § 249.220f) by removing the term ''SFAS 14'' from Instruction 3 to Item 17 and inserting the term ''SFAS No. 131'' in its place.

Note: The text of Form 20–F does not, and the amendment will not, appear in the Code of Federal Regulations.

By the Commission.

Dated: January 5, 1999.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–589 Filed 1–11–99; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF THE TREASURY

17 CFR Part 405

RIN 1505–AA74

Office of the Assistant Secretary for Financial Markets; Government Securities Act Regulations: Reports and Audit

AGENCY: Office of the Assistant Secretary for Financial Markets, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury (''Department'' or ''Treasury'') is publishing an amendment to the reporting requirements in § 405.2 of the regulations issued under the Government Securities Act of 1986 (''GSA''), as amended.[1] 17 CFR 405.2 of the GSA regulations requires entities registered with the Securities and Exchange Commission (''SEC'') as specialized government securities brokers and dealers (''registered government securities brokers and dealers'') under section 15C(a)(2) of the Securities Exchange Act of 1934 (the ''Exchange Act'')[2] to comply with the requirements of section 240.17a–5 of the Exchange Act (SEC Rule 17a–5). On July 13, 1998, the SEC issued an amendment to SEC Rule 17a–5 that requires general purpose broker-dealers to file two reports regarding their year 2000 (''Y2K'') readiness. The Department then published proposed Y2K reporting rules on October 5, 1998, that essentially parallel the SEC's Y2K reporting rules.[3]

EFFECTIVE DATE: February 11, 1999.

ADDRESSES: This final rule is available for downloading from the Bureau of the Public Debt's Internet site at the following address: www.publicdebt.treas.gov. It is also available for public inspection and copying at the Treasury Department Library, FOIA Collection, Room 5030, Main Treasury Building, 1500 Pennsylvania Avenue, NW, Washington, DC 20220. To visit the library, call (202) 622–0990 for an appointment.

FOR FURTHER INFORMATION CONTACT: Kerry Lanham (Acting Director) or Chuck Andreatta (Senior Financial Advisor), (202) 219–3632, Government Securities Regulations Staff, Bureau of the Public Debt, 999 E Street, NW, Room 315, Washington, DC 20239–0001.

SUPPLEMENTARY INFORMATION:

I. Background

On July 13, 1998, the SEC issued an amendment to SEC Rule 17a–5[4] that requires general purpose broker-dealers to file two reports regarding their year 2000 (''Y2K'') readiness.[5] Each report is to be filed with the SEC and the appropriate designated examining authority.

In developing its amendment, the SEC identified six stages involved in preparing for the year 2000: (1) awareness of potential Y2K problems; (2) assessment of what steps the broker-dealer must take to avoid Y2K problems; (3) implementation of the steps needed to avoid Y2K problems; (4) internal testing of software designed to avoid Y2K problems; (5) integrated or industry-wide testing of software designed to avoid Y2K problems (including testing with other broker-dealers, other financial institutions, and customers); and (6) implementation of tested software that will avoid Y2K problems.[6] The reports require broker-dealers to address these six stages of preparation.

For purposes of its amendment, the SEC identified ''year 2000 problems'' basically as problems arising from: (1) computer software incorrectly reading the date ''01/01/00'' as being the year 1900 or another incorrect year; (2) computer software incorrectly identifying a date in the year 1999 or any year thereafter; (3) computer software failing to detect that the year 2000 is a leap year; or (4) any other computer software error that is directly or indirectly caused by (1), (2), or (3). A failure by the securities industry to prevent or minimize these types of errors could endanger the nation's capital markets and place at risk the assets of millions of investors.

The reports will enable the SEC to monitor the steps broker-dealers are taking to manage and avoid Y2K problems. The reports will also: (1) enable the SEC staff to report to Congress in 1998 and 1999 regarding the industry's preparedness; (2) supplement the SEC's examination module for year 2000 issues; (3) help the SEC coordinate self-regulatory organizations on industry-wide testing, implementation, and contingency planning; and (4) help increase broker-dealer awareness that they should be taking specific steps now to prepare for the year 2000.[7]

Treasury's final Y2K rules incorporate the SEC's final rules at § 240.17a–5(e)(5), with minor modifications. The same report (Form BD–Y2K, Parts I and II) required under the SEC's rules is also required under Treasury's rules. This report is required to be submitted to the SEC and to the broker-dealer's designated examining authority. In addition, the Department requests that a copy of the report be provided directly to the Government Securities Regulations Staff.

[1] 15 U.S.C. 78*o*–55

[2] 15 U.S.C. 78*o*–5(a)(2).

[3] 63 FR 53326 (October 5, 1998).

[4] 17 CFR 240.17a–5.

[5] Securities Exchange Act Release No. 34–40162, (July 2, 1998), 63 FR 37668 (July 13, 1998).

[6] Securities Exchange Act Release No. 34–39724 (March 5, 1998) 63 FR 12057 (March 12, 1998).

[7] Id.

II. Comments Received in Response to Proposed Rules

The Department received one comment letter in response to its proposed amendments, from The Bond Market Association (''Association'').[8] The Association supports the Department's proposals. The Association, however, asked for clarification regarding the proposed exemption provided to a specialized government securities broker-dealer (''15C firm,'' i.e., registered with the SEC under Section 15C of the Exchange Act) that has an affiliated registered broker-dealer that files reports under the SEC's Y2K reporting rules. The proposed rule said that such 15C firms would be exempt from the Department's Y2K rules if the affiliate's reports encompass Y2K issues that include the 15C firm's transactions in, and holdings of, government securities. Specifically, the Association was concerned about how the SEC and Treasury would know if a 15C firm was relying on the exemption. The Association therefore recommended that Treasury consider requiring 15C firms relying on the exemption to write a letter to the SEC, Treasury and their designated examining authority stating their reliance on the exemption, the name of the affiliate that filed the report encompassing the information on government securities transactions, and the date the report was filed. This final rule basically adopts this recommendation.

The Association also asked for further clarification on which firms would qualify for this exemption. Specifically, the Association said that firms are concerned whether the reports already filed in August 1998 under the SEC's Y2K reporting rules would be deemed sufficient to satisfy the conditions of the exemption. Such reports would be deemed sufficient by the Department. If the affiliated firm filed a Form BD–Y2K prior to the August 31, 1998 SEC deadline (either Part I or both Parts I and II) and the report encompassed the 15C firm's government securities transactions and holdings, that 15C firm is exempt from the Department's Y2K reporting rules and will only be required to submit a letter as discussed above. If the 15C firm does not have such an affiliate that has already filed a Y2K report with the SEC, then the 15C firm must complete Form BD–Y2K under the Department's Y2K reporting rules.

In a footnote to its comment letter, The Bond Market Association informed the Department of its understanding that some 15C firms have already completed and filed their Y2K readiness reports even though they were not required to do so under the SEC's Y2K reporting rules. Any such 15C firms will be viewed by the Department as having filed their reports and will not have to file again. However, such firms should submit a letter to the SEC and their designated examining authority stating the date that the reports were submitted.

Finally, the Association recommended that Treasury consider finalizing and publishing its final rule in the **Federal Register** before November 15, 1998. The principal concern was that it would be difficult to report ''as of'' a date that was prior to the publication date in the **Federal Register**. To avoid this problem, the Department is requiring the reports to be filed by February 28, 1999, to reflect the status of a firm's Y2K readiness as of January 15, 1999.

III. Additional Analysis

At the same time that the SEC published its final Y2K reporting rules for general-purpose broker-dealers, it also issued a companion release to solicit comments on the feasibility of having an independent public accountant perform an ''agreed-upon procedures engagement.'' The proposed engagement would follow certain established procedures as an independent check on a broker-dealer's assertions in its second filing of Form BD–Y2K, which is due April 30, 1999.[9] The SEC subsequently adopted the proposed amendment for engagement of an independent public accountant, with some modifications.[10]

Although the Department reserves the right to require that Y2K reports be submitted again sometime during 1999, at this time the reports will be required to be filed only once, by the February 28, 1999 deadline, with no independent accountant involvement. The Department would expect, however, that an independent public accountant's required ''material inadequacies'' letter would include a discussion of Y2K issues if any potential problems in this regard were to be found.

Copies of Form BD–Y2K are available in the SEC's Public Reference Room at 450 Fifth Street, NW, Washington, DC 20549, or copies can be obtained from the SEC's Internet website at the following address: www.sec.gov.

IV. Notice Regarding Current Books and Records Requirements

Section 404.2 of the GSA regulations requires registered government securities broker-dealers, with certain modifications, to comply with SEC Rule 17a–3. This SEC rule requires registered broker-dealers to make and keep current certain books and records relating to the broker-dealer's business.[11] In the preambles to its proposed and final rules, the SEC warned that a broker-dealer with computer systems that have Y2K problems may be deemed not to have accurate and current records and in violation of Rule 17a–3.[12] The Department reiterates this advisory. The SEC also reminded broker-dealers that its Rule 17a–11 [13] requires every broker-dealer to promptly notify the SEC of its failure to make and keep current books and records.[14] The Department reminds registered government securities broker-dealers that they have this same requirement under § 405.3 of the GSA regulations.

V. Special Analyses

This rule does not meet the criteria for a ''significant regulatory action'' under Executive Order 12866.

In the preamble to the proposed rules, regarding the requirement under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), the Department certified that this amendment would not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis was not prepared.

The collection of information under this final amendment consists of the completion of Form BD–Y2K. This collection of information has been reviewed and approved by OMB and assigned control number 3235–0511.

List of Subjects in 17 CFR Part 405

Brokers, Government securities, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, 17 CFR Part 405 is amended as follows:

PART 405—REPORTS AND AUDIT

1. The authority citation for Part 405 continues to read as follows:

[8] Letter from Paula H. Simpkins, Vice President and Assistant General Counsel, The Bond Market Association, to Kerry Lanham, Acting Director, Government Securities Regulations Staff, dated November 4, 1998. The letter can be downloaded from the Bureau of the Public Debt's website at www.publicdebt.treas.gov. It is also available for inspection and copying at the Treasury Department Library at the address provided earlier in the rule.

[9] Securities Exchange Act Release No. 34–40164, (July 2, 1998) 63 FR 37709 (July 13, 1998).

[10] Securities Exchange Act Release No. 34–40608, (October 28, 1998) 63 FR 59208 (November 3, 1998).

[11] 17 CFR 240.17a–33.

[12] 63 FR 12056, 12059 (March 12, 1998) and 63 FR 37668 (July 13, 1998).

[13] 17 CFR 240.17a–11.

[14] See *supra* note 8.

Authority: 15 U.S.C. 78o–5(b)(1)(B), (b)(1)(C), (b)(2), (b)(4).

2. Section 405.2 is amended by redesignating paragraphs (a)(11) and (a)(12) as paragraphs (a)(15) and (a)(16), respectively, and adding new paragraphs (a)(11) through (a)(14) to read as follows:

§ 405.2 Reports to be made by registered government securities brokers and dealers.

(a) * * *

(11) Section 240.17a–5(e)(5)(ii) is modified to read as follows:

''(ii) No later than February 28, 1999, every registered government securities broker or dealer shall file Part I of Form BD–Y2K (§ 249.618 of this title) prepared as of January 15, 1999.''.

(12) Section 240.17a–5(e)(5)(iii) is modified to read as follows:

''(iii)(A) No later than February 28, 1999, every registered government securities broker or dealer required to maintain minimum liquid capital pursuant to § 402.2(b)(1) or (b)(2) of this title as of January 15, 1999, shall file Part II of Form BD–Y2K (§ 249.618 of this title). Part II of Form BD–Y2K shall address each topic in § 240.17a-5(e)(5)(iv) as of January 15, 1999.

''(B) No later than April 30, 1999, every registered government securities broker or dealer that was not required to file Part II of Form BD–Y2K under paragraph (e)(12)(iii)(A) of this section but was required to maintain minimum liquid capital pursuant to § 402.2(b)(1) or (b)(2) of this title at any time between January 16, 1999, and March 15, 1999, shall file Part II of Form BD–Y2K. Part II of Form BD–Y2K shall address each topic in § 240.17a-5(e)(5)(iv) as of March 15, 1999.

''(C) Any registered government securities broker or dealer that has an affiliated registered broker or dealer that files Form BD–Y2K subject to 17 CFR 240.17a–5(e)(5) will be exempted from paragraphs (e)(11) and (12) of this section, *provided* the affiliate's report encompasses the registered government securities broker's or dealer's transactions in, and holdings of, government securities. Any such registered government securities broker or dealer shall submit a letter stating its reliance on the exemption, the name of the affiliated registered broker or dealer that filed the report encompassing its government securities transactions and holdings, and the date the report was filed. The letter shall be filed with the SEC's principal office in Washington, D.C. and with the broker's or dealer's designated examining authority.''.

(13) The report by an independent public accountant described in § 240.17a-5(e)(5)(vi) of this title, concerning a broker's or dealer's process for addressing year 2000 problems, is not required.

(14) References to Form BD–Y2K mean Form BD–Y2K in § 249.618 of this title.

* * * * *

Dated: December 28, 1998.

Gary Gensler,

Assistant Secretary for Financial Markets.

Note: Form BD–Y2K does not appear in the *Code of Federal Regulations*. Form BD–Y2K is attached as Appendix A to this document as follows:

BILLING CODE 4810–39–P

Appendix A

Broker/Dealer-Year 2000 Report

FORM BD-Y2K

OMB APPROVAL	
OMB Number:	3235-0511
Expires:	December 31, 1999
Estimated average burden hours per response:	2

Cover Page

Submit Report To: (original plus 2 copies to the SEC; one copy to DEA)

United States Securities and Exchange Commission

Mail Stop A-2
450 5th Street, N.W. Washington, DC 20549

REPORT FOR:
- ☐ August 31,1998
- ☐ April 30, 1998

/ / MM DD YYYY
REPORT FILING DATE

Reporting Entity

Name of Broker/Dealer: _____

SEC File No: 8- | | | | | |

CRD File No: | | | | | |

Address of Principal Place of Business (Do Not Use P.O. Box No.):

_____
Street Address

_____
City State Zip

Contact Person Responsible for Filling Out This Form (Please provide your business address and phone number):

Name: _____

Title: _____

Phone: _____

Address: _____

City _____ State Zip

Signature _____

Title _____

Attention: Intentional misstatements or omissions of fact constitutes Federal Criminal Violations. (See 18 U.S.C. 1001 and 15 U.S.C. 78ff (a))

SEC 2435 (6-98)

GENERAL INSTRUCTIONS

These instructions are considered an integral part of Form BD-Y2K.

Form BD-Y2K is divided into two parts. As discussed below, Part I applies to each broker or dealer with a minimum net capital requirement of $5,000 or greater. Part II applies to only those brokers or dealers with a minimum net capital requirement of $100,000 or greater.

An original and two copies of each Form BD-Y2K must be filed with the Commission's principal office at mail stop A-2, 450 5th Street, N.W., Washington, D.C. 20549, and one copy of each Form BD-Y2K must be filed with the designated examining authority of the broker or dealer.

The original Form BD-Y2K that is required to be filed with the Securities and Exchange Commission ("Commission") must be manually signed. If the broker or dealer is a sole proprietorship, the signature shall be made by the proprietor; if a partnership, by a general partner; or if a corporation, by the Chief Executive Officer, or if not available, by any person authorized to act on behalf of the broker or dealer.

For the purposes of this Form BD-Y2K, the term "Year 2000 Problem" includes any erroneous result caused by computer software (i) incorrectly reading the date "01/01/00" or any year thereafter; (ii) incorrectly identifying a date in the year 1999 or any year thereafter; (iii) failing to detect that the Year 2000 is a leap year; and (iv) any other computer error that is directly or indirectly related to the problems set forth in (i), (ii), or (iii) above.

PART I

Pursuant to section 240.17a-5(e)(5)(ii)(A), no later than August 31, 1998, every broker or dealer required to maintain minimum net capital of $5,000 or greater as of July 15, 1998, pursuant to section 240.15c3-1(a)(2) shall file Part I of Form BD-Y2K prepared as of July 15, 1998, and no later than April 30, 1999, every broker or dealer required to maintain minimum net capital of $5,000 or greater as of March 15, 1999, pursuant to section 240.15c3-1(a)(2) shall file Part I of Form BD-Y2K prepared as of March 15, 1999.

Pursuant to section 240.17a-5(e)(5)(ii)(B), every broker or dealer that registers pursuant to section 15 of the Act between July 16, 1998 and December 31, 1998 or between March 16, 1999 and October 1, 1999, and that is required to maintain net capital pursuant to § 240.15c3-1(a)(2) of $5,000 or greater, shall file Part I of Form BD-Y2K no later than 30 days after its registration becomes effective. Part I of Form BD-Y2K shall be prepared as of the date its registration became effective.

Please do not write explanatory notes next to the questions on the Form.

PART II

Pursuant to section 240.17a-5(e)(5)(iii), no later than August 31, 1998, every broker or dealer with a minimum net capital requirement pursuant to section 240.15c3-1(a)(2) of $100,000 or greater as of July 15, 1998, shall file Part II of Form BD-Y2K prepared as of July 15, 1998.
Pursuant to section 240.17a-5(e)(5)(iii), no later than April 30, 1999, every broker or dealer with a minimum net capital requirement pursuant to section 240.15c3-1(a)(2) of $100,000 or greater as of March 15, 1999, and every broker or dealer required to file Part II of Form BD-Y2K as of July 15, 1998 shall file Part II of Form BD-Y2K prepared as of March 15, 1999.

Pursuant to section 240.17a-5(e)(5)(iii), every broker or dealer that registers pursuant to section 15 of the Act between July 15, 1998 and December 31, 1998 or between March 16, 1999 and October 1, 1999, and that is required to maintain net capital pursuant to § 240.15c3-1(a)(2) of $100,000 or greater, shall file Part II of Form BD-Y2K no later than 30 days after registration becomes effective. Part II of Form BD-Y2K shall address each topic in paragraphs (e)(5)(iv) of this section as of the effective date of its registration.

A broker or dealer required to complete Part II of the Form must also complete Part I. Each question should be answered in narrative form, even if your answer covers the same topics included in Part I of this Form.

PAPERWORK REDUCTION ACT DISCLOSURE

Form BD-Y2K requires a broker or dealer to file with the Commission and with its designated examining authority information concerning the broker's or dealer's efforts to address Year 2000 Problems. The Form is designed to (i) increase broker-dealer awareness that they should be taking specific steps now to prepare for the Year 2000; (ii) facilitate coordination with self regulatory organizations on industry wide testing, implementation, and contingency planning; (iii) supplement the Commission's examination module for Year 2000 issues; and (iv) provide information regarding the securities industry's preparedness for the Year 2000.

It is estimated that a broker or dealer will spend approximately 2 hours completing Part I of Form BD-Y2K and will spend approximately 35 hours completing Part II of Form BD-Y2K. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

No assurance of confidentiality is given by the Commission with respect to the responses made in the Form BD-Y2K. This filing will be available to the public.

This collection of information has been reviewed by the Office of Management and Budget (OMB) in accordance with the clearance requirements of 44 U.S.C. § 3507. This collection of information has been assigned Control Number 3235-0511 by OMB.

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 number. Section 17(a) of the Securities Exchange Act of 1934 authorized the Commission to collect the information on this Form from registrants. See 15 U.S.C. § 78q.

PART I

Firm Name _____

Firm Address _____

CITY STATE ZIP

REPORT FOR:

❑ August 31,1998

❑ April 30, 1998

/ /
MM DD YYYY
REPORT FILING DATE

SEC File No. 8- | | | | | |

Firm CRD No. | | | | | |

1. Year 2000 compliance plan

(a) Do you have a plan for Year 2000 compliance to address whether your computer systems will operate correctly after December 31, 1999?

❒ Yes
❒ No

(b) If not, are you:

❒ Developing a written plan? It is expected to be completed by: / / (MM DD YYYY)

❒ Not developing a written plan because you do not plan to be conducting business after January 1, 2000?

Plan to be out of business by: / / (MM DD YYYY)

❒ Other (Please specify) _____

_____

If you do not have a plan, go to question 2.

(c) Does the plan address external interfaces with third party computer systems that communicate with your systems?

❒ Yes
❒ No

(d) Is your Year 2000 compliance plan in writing?

❒ Yes
❒ No

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

BROKER/DEALER NAME: _____ **SEC File No.** 8- _____

Firm CRD No. _____

(e) Who has approved the plan? (Check all that apply)

- ❒ No approval
- ❒ Board of Directors
- ❒ Corporate officers
- ❒ Executive management
- ❒ Head of Information Technology
- ❒ Employees

(f) Has the plan been discussed with your outside auditors?

- ❒ Yes
- ❒ No

(g) What is the scope of coverage of the plan? (Check all that apply)

- ❒ All systems
- ❒ Mission critical systems
- ❒ Physical facilities
- ❒ Communications systems

(h) Which of your facilities does the plan cover? (Check all that apply)

- ❒ Our primary facility
- ❒ Certain U.S. facilities
- ❒ All U.S. facilities
- ❒ Certain facilities worldwide
- ❒ All facilities worldwide
- ❒ We have no international facilities

(i) Are your activities for non-U.S. clients covered by the plan?

- ❒ Yes
- ❒ No
- ❒ Not Applicable

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

BROKER/DEALER NAME: _____ SEC File No. 8- | | | | | |

Firm CRD No. | | | | | |

2. Funding for Year 2000 compliance

(a) Please indicate the month your fiscal year begins:

/ MM /

(b) Has specific funding been allocated for fiscal year 1998, fiscal year 1999, or fiscal year 2000 for your Year 2000 compliance plan?

(i) 1998
- ❒ Yes
- ❒ No

(ii) 1999
- ❒ Yes
- ❒ No

(iii) 2000
- ❒ Yes
- ❒ No

If funding has not been allocated for fiscal year 1999 or fiscal year 2000, mark "no." If you marked "no" for 1998, 1999, and 2000 go to question 3.

(c) What is your specific 1998 fiscal year budget allocation for Year 2000 compliance (including operating and capital expenditures)?

- ❒ Less than $1,000
- ❒ $1,001 - $10,000
- ❒ $10,001 - $50,000
- ❒ $50,001 - $100,000
- ❒ $100,001 - $500,000
- ❒ $500,001 - $1 million
- ❒ $1 million - $2 million
- ❒ $2 million - $5 million
- ❒ $5 million - $10 million
- ❒ $10 million - $20 million
- ❒ $20 million - $50 million
- ❒ $50 million - $100 million
- ❒ Over $100 million

BROKER/DEALER NAME: _____ **SEC File No.** 8- | | | | | |

Firm CRD No. | | | | | |

(d) What items are contained in your 1998 budget for Year 2000 compliance?
(Check all that apply)

- ❒ Assessment of the problem
- ❒ Correction of systems
- ❒ Replacement of systems
- ❒ Internal testing
- ❒ Point-to-point testing (including testing with broker-dealers, custodians, transfer agents, clearing agencies, other service providers, etc.)
- ❒ Training
- ❒ SIA industry wide testing
- ❒ Implementation of contingency plans

If you marked "no" for fiscal year 1999 and fiscal year 2000 in question 2(b), go to question 3.

(e) What is your specific 1999 fiscal year budget allocation for Year 2000 compliance (including operating and capital expenditures)?

- ❒ Less than $1,000
- ❒ $1,001 - $10,000
- ❒ $10,001 - $50,000
- ❒ $50,001 - $100,000
- ❒ $100,001 - $500,000
- ❒ $500,001 - $1 million
- ❒ $1 million - $2 million
- ❒ $2 million - $5 million
- ❒ $5 million - $10 million
- ❒ $10 million - $20 million
- ❒ $20 million - $50 million
- ❒ $50 million - $100 million
- ❒ Over $100 million

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

BROKER/DEALER NAME: _____ **SEC File No.** 8- | | | | | |

Firm CRD No. | | | | | |

(f) What items are contained in your 1999 budget for Year 2000 compliance?
(Check all that apply)

- ❒ Assessment of the problem
- ❒ Correction of systems
- ❒ Replacement of systems
- ❒ Internal testing
- ❒ Point-to-point testing (including testing with broker-dealers, custodians, transfer agents, clearing agencies, other service providers, etc.)
- ❒ Training
- ❒ SIA industry wide testing
- ❒ Implementation of contingency plans

If you marked "no" for fiscal year 2000 in question 2(b), go to question 3.

(g) What is your specific 2000 fiscal year budget allocation for Year 2000 compliance (including operating and capital expenditures)?

- ❒ Less than $1,000
- ❒ $1,001 - $10,000
- ❒ $10,001 - $50,000
- ❒ $50,001 - $100,000
- ❒ $100,001 - $500,000
- ❒ $500,001 - $1 million
- ❒ $1 million - $2 million
- ❒ $2 million - $5 million
- ❒ $5 million - $10 million
- ❒ $10 million - $20 million
- ❒ $20 million - $50 million
- ❒ $50 million - $100 million
- ❒ Over $100 million

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

BROKER/DEALER NAME: _____ **SEC File No.** 8- | | | | | |

Firm CRD No. | | | | | |

(h) What items are contained in your 2000 budget for Year 2000 compliance?
(Check all that apply)

- ❒ Assessment of the problem
- ❒ Correction of systems
- ❒ Replacement of systems
- ❒ Internal testing
- ❒ Point-to-point testing (including testing with broker-dealers, custodians, transfer agents, clearing agencies, other service providers, etc.)
- ❒ Training
- ❒ SIA industry wide testing
- ❒ Implementation of contingency plans

(3) Persons responsible for Year 2000

(a) Has one or more individuals been designated as responsible for your Year 2000 compliance?

- ❒ Yes
- ❒ No

(b) If yes, please provide the following information on the person primarily responsible:

_____
Name

_____
Title

_____
Business Name

_____
Street Address

_____
City State Zip

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

BROKER/DEALER NAME: _____ SEC File No. 8-_____

Firm CRD No. _____

4. Staffing for Year 2000

(a) Is this a full-time project for at least one individual (including both employees and consultants)?

- ❒ Yes
- ❒ No

(b) If yes, how many individuals are working full time on Year 2000 compliance?

- ❒ 1
- ❒ 2-5
- ❒ 6-10
- ❒ 11-20
- ❒ 21-50
- ❒ 51-100
- ❒ 101-200
- ❒ over 200

(c) Have you hired third parties to assist you on Year 2000 issues?

- ❒ Yes
- ❒ No

(d) If yes, what function(s) are the third parties performing?
(Check all that apply)

- ❒ Assessment of the problem
- ❒ Correction of systems
- ❒ Replacement of systems
- ❒ Internal testing
- ❒ Training
- ❒ Vendor assessment
- ❒ Point-to-point testing (including testing with broker-dealers, custodians, transfer agents, clearing agencies, other service providers, etc.)
- ❒ SIA industry wide testing
- ❒ Other (Please specify): _____

_____

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

BROKER/DEALER NAME: _____ **SEC File No.** 8- | | | | | | |

Firm CRD No. | | | | | |

(e) If you have not completed staffing your Year 2000 project, are you?

- ❒ Defining resources. This will be completed by: / / (MM DD YYYY)
- ❒ Unable to find sufficient staffing resources.
- ❒ Handling the staffing as part of your ongoing business operations.

5. Inventory of systems

(a) Have you inventoried all systems?

- ❒ Yes
- ❒ No

(b) What is the nature of the computer systems you utilize? (Check all that apply)

- ❒ Off the shelf
- ❒ Vendor provided
- ❒ In house developed (custom made)
- ❒ Other (Please specify): _____

_____

(c) Have you identified your mission critical systems?

- ❒ Yes
- ❒ No

(d) If no, this will be completed by: / / (MM DD YYYY)

(e) Have you determined which of your mission critical systems are not currently Year 2000 compliant?

- ❒ Yes
- ❒ No

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

BROKER/DEALER NAME: _____ SEC File No. 8- | | | | | |

Firm CRD No. | | | | | |

6. Awareness of the problem

(a) What steps have you taken to enhance **awareness** of potential Year 2000 Problems? (Check all that apply)

- ❒ None to date
- ❒ Designated individuals for Year 2000 compliance
- ❒ Presentations to the Board
- ❒ Presentations to management
- ❒ Presentations to employees
- ❒ Contacted third parties
- ❒ Other (Please specify): _____

_____

7. Progress on preparing mission critical systems for the Year 2000

What is your progress on the following stages of preparation for the Year 2000?

(a) **Assessment** of steps you will take to address Year 2000 Problems with your mission critical systems (including preparing an inventory of computer systems affected by the Year 2000):

- ❒ 0% complete
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-99%
- ❒ complete

If not completed, assessment expected to be completed by: / / (MM DD YYYY)

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

BROKER/DEALER NAME: _____ **SEC File No.** 8- _____

Firm CRD No. _____

(b) **Implementation** of steps you will take to address Year 2000 Problems with your mission critical systems:

- ❒ 0% complete
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-99%
- ❒ complete

If not completed, implementation expected to be completed by: ___/___/___ (MM DD YYYY)

(c) **Testing of your mission critical internal systems:**

- ❒ 0% complete
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-99%
- ❒ complete

If not completed, testing expected to be completed by: ___/___/___ (MM DD YYYY)

(d) Did your testing of internal systems result in material exceptions that remain unresolved as of this filing?

- ❒ Yes
- ❒ No

(e) Point-to-point testing of your mission critical systems (including testing with other broker-dealers, other financial institutions, customers, and vendors):

- ❒ 0% complete
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-99%
- ❒ complete

If not completed, testing expected to be completed by: ___/___/___ (MM DD YYYY)

Please do not write explanatory notes on this Form. SEC 2435 (6-98)

BROKER/DEALER NAME: _____ **SEC File No.** 8- | | | | | |

Firm CRD No. | | | | | |

(f) Did your point-to-point testing result in material exceptions that remain unresolved as of this filing?

- ❒ Yes
- ❒ No

(g) **Implementation** of tested software that addresses Year 2000 Problems with your mission critical systems:

- ❒ 0% complete
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-99%
- ❒ complete

If not completed, implementation expected to be completed by: MM / DD / YYYY

8. Progress on preparing all other systems for the Year 2000

What is your progress on the following stages of preparation for the Year 2000?

(a) **Assessment** of steps you will take to address Year 2000 Problems with your non-critical systems (including preparing an inventory of computer systems affected by the Year 2000):

- ❒ 0% complete
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-99%
- ❒ complete

If not completed, assessment expected to be completed by: MM / DD / YYYY

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

BROKER/DEALER NAME: _____ **SEC File No.** 8- | | | | | |

Firm CRD No. | | | | | |

(b) **Implementation** of steps you will take to address Year 2000 Problems with your non-critical systems:

- ❒ 0% complete
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-99%
- ❒ complete

If not completed, implementation expected to be completed by: / / (MM DD YYYY)

(c) **Testing of your non-critical internal systems:**

- ❒ 0% complete
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-99%
- ❒ complete

If not completed, testing expected to be completed by: / / (MM DD YYYY)

(d) Did your testing of internal systems result in material exceptions that remain unresolved as of this filing?

- ❒ Yes
- ❒ No

(e) **Point-to-point testing of your non-critical systems (including testing with other broker-dealers, other financial institutions, customers, and vendors):**

- ❒ 0% complete
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-99%
- ❒ complete

If not completed, testing expected to be completed by: / / (MM DD YYYY)

Please do not write explanatory notes on this Form. SEC 2435 (6-98)

BROKER/DEALER NAME: _____ SEC File No. 8- | | | | | | |

Firm CRD No. | | | | | |

(f) Did your point-to-point testing result in material exceptions that remain unresolved as of this filing?

- ❒ Yes
- ❒ No

(g) **Implementation** of tested software that address Year 2000 Problems with your non-critical systems:

- ❒ 0% complete
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-99%
- ❒ complete

If not completed, implementation expected to be completed by: / / (MM / DD / YYYY)

9. Contingency Plans

(a) Do you have a contingency plan for your systems if, after December 31, 1999, you have problems caused by Year 2000 Problems?

- ❒ Yes
- ❒ No

(b) If yes, is the contingency plan in writing?

- ❒ Yes
- ❒ No
- ❒ Not Applicable

(c) If not, what is your progress in preparing a contingency plan?

- ❒ 0% complete
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-100%

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

BROKER/DEALER NAME: _____ **SEC File No.** 8- | | | | | |

Firm CRD No. | | | | | |

(d) What is the scope of coverage of the contingency plan?
(Check all that apply)

- ❒ No systems
- ❒ Mission critical systems
- ❒ Physical facilities
- ❒ Communication systems
- ❒ All systems

(e) Who has approved the contingency plan?
(Check all that apply)

- ❒ No approval
- ❒ Board of Directors
- ❒ Corporate officers
- ❒ Executive management
- ❒ Head of Information Technology
- ❒ Employees

10. Third parties (including clearing firms, vendors, service providers, counterparties, etc.) who provide mission critical systems

(a) Have you identified all third parties upon whom you rely for your mission critical systems?

- ❒ Yes
- ❒ No

(b) If yes, how many third parties do you rely upon for your mission critical systems?

_____
(numeric value)

(c) What percentage of third parties upon whom you rely for mission critical systems have you contacted regarding their readiness for the Year 2000?

- ❒ 0%
- ❒ 1-25%
- ❒ 26-50%
- ❒ 51-75%
- ❒ 76-99%
- ❒ all

If not all, contact expected to be completed by: / / MM DD YYYY

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

BROKER/DEALER NAME: _____

SEC File No. 8- _____

Firm CRD No. _____

(d) Has any third party upon whom you rely for mission critical systems declined or failed to provide you with assurances that it is taking the necessary steps to prepare for the Year 2000?

- ❒ Yes
- ❒ No
- ❒ Not Applicable

(e) If yes, how many third parties providing mission critical systems have not provided such assurances? _____
(numeric value)

(f) Does your contingency plan account for third parties whose systems may fail after December 31, 1999?

- ❒ Yes
- ❒ No
- ❒ We have no contingency plan

Please do not write explanatory notes on this Form.

SEC 2435 (6-98)

PART II

Firm Name _____

Firm Address _____

_____

CITY STATE ZIP

REPORT FOR:

❑ August 31,1998

❑ April 30, 1998

/ /

MM DD YYYY

REPORT FILING DATE

SEC File No. 8- | | | | | |

Firm CRD No. | | | | | |

Pursuant to Section 240.17a-5(e)(5)(iv), identify a specific person or persons that are available to discuss the contents of this report and please respond to each of the following questions in narrative form. Each question must be answered, even if your answer covers the same topics included in Part I of this Form.

(A) Has the broker's or dealer's board of directors (or similar body) approved and funded plans for preparing and testing its computer systems for Year 2000 Problems?

(B) Do the broker's or dealer's plans for preparing and testing its computer systems for Year 2000 Problems exist in writing and do the plans address all mission critical computer systems of the broker or dealer wherever located throughout the world?

(C) Has the broker or dealer assigned existing employees, hired new employees, or engaged third parties to provide assistance in addressing Year 2000 Problems? If so, provide a description of the work that these groups of individuals have performed as of the date of each report.

(D) What is the broker's or dealer's current progress on each stage of preparation for potential problems caused by Year 2000 Problems? These stages are:

(1) Awareness of potential Year 2000 Problems;

(2) Assessment of what steps the broker or dealer must take to address Year 2000 Problems;

(3) Implementation of the steps needed to address Year 2000 Problems;

(4) Internal testing of software designed to address Year 2000 Problems, including the number and a description of the material exceptions resulting from such testing that are unresolved as of the reporting date;

(5) Point-to-point or industry wide testing of software designed to address Year 2000 Problems (including testing with other brokers or dealers, other financial institutions, and customers), including the number and a description of the material exceptions resulting from such testing that are unresolved as of the reporting date; and

(6) Implementation of tested software that will address Year 2000 Problems.

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BROKER/DEALER NAME: _____

SEC File No. 8- | | | | | |

Firm CRD No. | | | | | |

(E) Does the broker or dealer have written contingency plans in the event, that after December 31, 1999, it has problems caused by Year 2000 Problems?

(F) What levels of management of the broker or dealer are responsible for addressing potential problems caused by Year 2000 Problems? Provide a description of the responsibilities for each level of management regarding the Year 2000 Problems.

(G) Provide any additional material information concerning the broker's or dealer's management of Year 2000 Problems that will help the Commission and the designated examining authorities assess the readiness of the broker or dealer for the Year 2000.

SEC 2435 (6-98)

[FR Doc. 99–654 Filed 1–11–99; 8:45 am]
BILLING CODE 4810–39–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 172, 173, and 184

Foods and Drugs; Technical Amendments

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendments.

SUMMARY: The Food and Drug Administration (FDA) is amending its regulations that incorporate by reference analytical methods in the ''Food Chemicals Codex'' 3d edition, by updating these references to the 4th edition. Additionally, the agency is concomitantly updating the incorporation by reference for specifications in six regulations that incorporate by reference specification monographs in the ''Food Chemicals Codex'' 3d edition, by updating these references to the 4th edition. This action is being taken to meet the requirements for incorporation by reference set forth in 1 CFR part 51.

DATES: The regulation is effective January 12, 1999. The Director of the Office of the Federal Register approves the incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51 of certain publications listed in §§ 172.345(b), 172.665(d)(2), 172.723(b)(3), 173.310(c), 184.1007(b)(1), (b)(6), and (b)(7), 184.1257(b) and (b)(1), 184.1259(b)(3), 184.1282(b), 184.1293(b), 184.1530(b), 184.1699(b), 184.1979(b)(1) and (b)(2), 184.1979a(b)(1) and (b)(2), 184.1979b(b)(1) and (b)(2), and 184.1979c(b)(1) and (b)(2) (21 CFR 172.345(b), 172.665(d)(2), 172.723(b)(3), 173.310(c), 184.1007(b)(1), (b)(6), and (b)(7), 184.1257(b) and (b)(1), 184.1259(b)(3), 184.1282(b), 184.1293(b), 184.1530(b), 184.1699(b), 184.1979(b)(1) and (b)(2), 184.1979a(b)(1) and (b)(2), 184.1979b(b)(1) and (b)(2), and 184.1979c(b)(1) and (b)(2)), effective January 12, 1999.

FOR FURTHER INFORMATION CONTACT: Martha D. Peiperl, Center for Food Safety and Applied Nutrition (HFS–215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3077.

SUPPLEMENTARY INFORMATION: FDA is amending its regulations in parts 172, 173, and 184 (21 CFR parts 172, 173, and 184) that incorporate by reference analytical methods in the ''Food Chemicals Codex'' 3d edition, by revising §§ 172.665, 172.723, 173.310, 184.1007, 184.1257, 184.1259, 184.1979, 184.1979a, 184.1979b, and 184.1979c to incorporate identical methods in the 4th edition of the ''Food Chemicals Codex.'' Additionally, the agency is amending regulations in parts 172 and 184 that incorporate by reference specification monographs in the 3d edition of the ''Food Chemicals Codex,'' by revising §§ 172.345, 184.1257, 184.1282, 184.1293, 184.1530, and 184.1699 to incorporate identical specification monographs in the 4th edition. 1 CFR part 51 requires filing and updating of material that has been incorporated by reference in the CFR.

The agency is also taking this opportunity to amend the previous regulations to: (1) Reflect a change in the address of the National Academy Press and to add its Internet address; (2) reflect a change in the name and address of the Association of Official Analytical Chemists International (AOAC), as published as a technical amendment in the **Federal Register** of March 24, 1998 (63 FR 14035), which updated this reference in 21 CFR parts 101 through 169; and (3) revise sections in part 184.

FDA has reviewed the food ingredient regulations that incorporate by reference material in the ''Food Chemicals Codex.'' The edition of the ''Food Chemicals Codex'' cited when many of these regulations were established (3d edition) has been superseded by a subsequent edition (4th edition). The agency has compared specification monographs and methods in the 3d and 4th editions and found that no substantive changes have been made to the material incorporated by reference into the regulations amended in this document. The agency notes that in the 3d edition, reagents are often cited as test solutions (TS), without giving the strength of the reagent in the specification monograph or the analytical method. This requires the analyst to refer to the section on TS in the back of the volume. In ''Food Chemical Codex'' 4th edition, the TS reagent strengths are also given in the individual specification monographs and analytical methods. This change is only editorial in nature.

Publication of this document constitutes final action on these changes under the Administrative Procedure Act (5 U.S.C. 553). Notice and public procedure are unnecessary because FDA is merely updating incorporations by reference that involve nonsubstantive changes.

List of Subjects

21 CFR Part 172

Food additives, Incorporation by reference, Reporting and recordkeeping requirements.

21 CFR Part 173

Food additives, Incorporation by reference.

21 CFR Part 184

Food ingredients, Incorporation by reference.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR parts 172, 173, and 184 are amended as follows:

PART 172—FOOD ADDITIVES PERMITTED FOR DIRECT ADDITION TO FOOD FOR HUMAN CONSUMPTION

1. The authority citation for 21 CFR part 172 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 342, 348, 371, 379e.

2. Section 172.345 is amended by revising paragraph (b) to read as follows:

§ 172.345 Folic acid (folacin).

* * * * *

(b) Folic acid meets the specifications of the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 157–158, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

3. Section 172.665 is amended by revising paragraph (d)(2) to read as follows:

§ 172.665 Gellan gum.

* * * * *

(d) * * *

(2) Residual isopropyl alcohol (IPA) not to exceed 0.075 percent as determined by the procedure described in the Xanthan Gum monograph, the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 437–438, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

4. Section 172.723 is amended by revising paragraph (b)(3) to read as follows:

§ 172.723 Epoxidized soybean oil.

* * * * *

(b) * * *

(3) The heavy metals (as Pb) content cannot be more than 10 parts per million, as determined by the ''Heavy Metals Test,'' of the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 760–761, Method II (with a 2-gram sample and 20 microgram of lead ion in the control), which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

PART 173—SECONDARY DIRECT FOOD ADDITIVES PERMITTED IN FOOD FOR HUMAN CONSUMPTION

5. The authority citation for 21 CFR part 173 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348.

6. Section 173.310 is amended in the table in paragraph (c) in the entry for ''Sodium carboxymethylcellulose'' to read as follows:

§ 173.310 Boiler water additives.

* * * * *

(c) * * *

Substances	Limitations
* * *	* * * *
Sodium carboxymethylcellulose	Contains not less than 95 percent sodium carboxymethylcellulose on a dry-weight basis, with maximum substitution of 0.9 carboxymethylcellulose groups per anhydroglucose unit, and with a minimum viscosity of 15 centipoises for 2 percent by weight aqueous solution at 25 °C; by the method prescribed in the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 744–745, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.
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PART 184—DIRECT FOOD SUBSTANCES AFFIRMED AS GENERALLY RECOGNIZED AS SAFE

7. The authority citation for 21 CFR part 184 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348, 371.

8. Section 184.1007 is amended by revising paragraphs (b)(1), (b)(6), and (b)(7) to read as follows:

§ 184.1007 Aconitic acid.

* * * * *

(b) * * *

(1) *Assay*. Not less than 98.0 percent of $C_3H_3(COOH)_3$, using the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 102–103, test for citric acid, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, and a molecular weight of 174.11. Copies of the material incorporated by reference are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

(6) *Readily carbonizable substances*. Passes the test for citric acid of the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 102–103, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of this incorporation by reference is given in paragraph (b)(1) of this section.

(7) *Residue on ignition*. Not more than 0.1 percent as determined by the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 102–103, test for citric acid, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The availability of this incorporation by reference is given in paragraph (b)(1) of this section.

* * * * *

9. Section 184.1257 is amended by revising the introductory text of paragraph (b) and by revising paragraph (b)(1) to read as follows:

§ 184.1257 Clove and its derivatives.

* * * * *

(b) Clove bud oil, clove leaf oil, clove stem oil, and eugenol meet the specifications of the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 104–105, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food

and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC. As determined by analytical methods in the ''Food Chemicals Codex,'' clove oleoresin or other natural extractives (other than clove oils) meet the ''Food Chemicals Codex'' specifications for clove (clove bud) oil and the following modifications:

(1) The assay for phenols, as eugenol, by the ''Food Chemicals Codex'' test, 4th ed. (pp. 104–105), or the volatile oils content by the ''Food Chemicals Codex'' test, 4th ed. (pp. 104–105) should conform to the representation of the vendor;

* * * * *

10. Section 184.1259 is amended by revising paragraph (b)(3) to read as follows:

§ 184.1259 Cocoa butter substitute.

* * * * *

(b) * * *

(3) Heavy metals (as lead), not more than 10 milligrams per kilogram, as determined by the Heavy Metals Test of the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 760–761, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

11. Section 184.1282 is amended by revising paragraph (b) to read as follows:

§ 184.1282 Dill and its derivatives.

* * * * * *

(b) Dill oils meet the description and specifications of the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 122–123, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

12. Section 184.1293 is amended by revising paragraph (b) to read as follows:

§ 184.1293 Ethyl alcohol.

* * * * *

(b) The ingredient meets the specifications of the ''Food Chemicals Codex,'' 4th ed. (1996), p. 136, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

13. Section 184.1530 is amended by revising paragraph (b) to read as follows:

§ 184.1530 Niacin.

* * * * *

(b) The ingredient meets the specifications of the ''Food Chemicals Codex,'' 4th ed. (1996), p. 264, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

14. Section 184.1699 is amended by revising paragraph (b) to read as follows:

§ 184.1699 Oil of rue.

* * * * *

(b) Oil of rue meets the specifications of the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 342–343, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

15. Section 184.1979 is amended by revising the introductory text of paragraph (b)(1), by revising paragraph (b)(2), and by removing footnote numbers ''1'' and ''2'' to read as follows:

§ 184.1979 Whey.

* * * * *

(b) * * *

(1) The analysis of whey, concentrated whey, and dry (dried) whey, on a dry product basis, based on analytical methods in the referenced sections of ''Official Methods of Analysis of the Association of Official Analytical Chemists,'' 13th ed. (1980), which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, is given in paragraphs (b)(1)(i) through (b)(1)(vii) of this section. Copies may be obtained from the Association of Official Analytical Chemists International, 481 North Frederick Ave., suite 500, Gaithersburg, MD 20877–2504, or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

(2) Limits of impurities are: Heavy metals (as lead). Not more than 10 parts per million (0.001 percent) as determined by the method described in the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 760–761, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

16. Section 184.1979a is amended by revising the introductory text of paragraph (b)(1), by revising paragraph (b)(2), and by removing footnote numbers ''1'' and ''2'' to read as follows:

§ 184.1979a Reduced lactose whey.

* * * * *

(b) * * *

(1) The analysis of reduced lactose whey, on a dry product basis, based on analytical methods in the referenced sections of ''Official Methods of Analysis of the Association of Official Analytical Chemists,'' 13th ed. (1980), which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, is given in paragraphs (b)(1)(i) through (b)(1)(vii) of this section. Copies may be obtained from the Association of Official Analytical Chemists International, 481 North Frederick Ave., suite 500, Gaithersburg, MD 20877–2504, or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

(2) Limits of impurities are: Heavy metals (as lead). Not more than 10 parts per million (0.001 percent), as determined by the method described in the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 760–761, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

17. Section 184.1979b is amended by revising the introductory text of paragraph (b)(1), by revising paragraph (b)(2), and by removing footnote number ''1'' to read as follows:

§ 184.1979b Reduced minerals whey.

* * * * *

(b) * * *

(1) The analysis of reduced minerals whey, on a dry product basis, based on analytical methods in the referenced sections of ''Official Methods of Analysis of the Association of Official Analytical Chemists,'' 13th ed. (1980), which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, is given in paragraphs (b)(1)(i) through (b)(1)(vii) of this section. Copies may be obtained from the Association of Official Analytical Chemists International, 481 North Frederick Ave., suite 500, Gaithersburg, MD 20877–2504, or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

(2) Limits of impurities are: Heavy metals (as lead). Not more than 10 parts per million (0.001 percent), as determined by the method described in the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 760–761, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

18. Section 184.1979c is amended by revising the introductory text of paragraph (b)(1), by revising paragraph (b)(2), and by removing footnote numbers ''1'' and ''2'' to read as follows:

§ 184.1979c Whey protein concentrate.

* * * * *

(b) * * *

(1) The analysis of whey protein concentrate, on a dry product basis, based on analytical methods in the referenced sections of ''Official Methods of Analysis of the Association of Official Analytical Chemists,'' 13th ed. (1980), which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, is given in paragraphs (b)(1)(i) through (b)(1)(vii) of this section. Copies may be obtained from the Association of Official Analytical Chemists International, 481 North Frederick Ave., suite 500, Gaithersburg, MD 20877–2504, or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

(2) Limits of impurities are: Heavy metals (as lead). Not more than 10 parts per million (0.001 percent), as determined by the method described in the ''Food Chemicals Codex,'' 4th ed. (1996), pp. 760–761, which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies are available from the National Academy Press, Box 285, 2101 Constitution Ave. NW., Washington, DC 20055 (Internet address ''http://www.nap.edu''), or may be examined at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 200 C St. SW., rm. 3321, Washington, DC, or at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

* * * * *

Dated: December 7, 1998.

L. Robert Lake,

Director, Office of Policy, Planning and Strategic Initiatives, Center for Food Safety and Applied Nutrition.

[FR Doc. 99–563 Filed 1–11–99; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Clomipramine Hydrochloride Tablets

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Novartis Animal Health US, Inc. The NADA provides for oral veterinary prescription use of clomipramine hydrochloride tablets to be used as part of a comprehensive behavioral management program to treat separation anxiety in dogs greater than 6 months of age.

EFFECTIVE DATE: January 12, 1999.

FOR FURTHER INFORMATION CONTACT: Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–7540.

SUPPLEMENTARY INFORMATION: Novartis Animal Health US, Inc., P.O. Box 18300, Greensboro, NC 27419–8300, filed NADA 141–120 that provides for oral veterinary prescription administration of Clomicalm™ (clomipramine hydrochloride) tablets at 2 to 4 milligrams (mg)/kilogram body weight per day (0.9 to 1.8 mg per pound per day) administered as a single daily dose or divided twice daily to dogs greater than 6 months of age. The NADA is approved as of December 10, 1998, and the regulations are amended in 21 CFR

part 520 by adding new § 520.455 to reflect the approval. The basis for approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(i)), this approval qualifies for a 5-year period of marketing exclusivity beginning December 10, 1998, because no active ingredient (including any ester or salt of the active ingredient) has been approved in any other application.

FDA has determined under 21 CFR 25.33(d)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

List of Subjects in 21 CFR Part 520

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

2. Section 520.455 is added to read as follows:

§ 520.455 Clomipramine hydrochloride tablets.

(a) *Specifications.* Each tablet contains 20, 40, or 80 milligrams of clomipramine hydrochloride.

(b) *Sponsor.* See No. 058198 in § 510.600(c) of this chapter.

(c) *Conditions of use*—(1) *Amount.* 2 to 4 milligrams of clomipramine hydrochloride per kilogram (0.9 to 1.8 milligrams per pound) of body weight per day, administered as a single daily dose or divided twice daily.

(2) *Indications for use.* For use as part of a comprehensive behavioral management program to treat separation anxiety in dogs greater than 6 months of age.

(3) *Limitations.* Federal law restricts this drug to use by or on the order of a licensed veterinarian.

Dated: January 4, 1999.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 99–639 Filed 1–11–99; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 807

[Docket No. 98N–0520]

Medical Devices; Establishment Registration and Device Listing for Manufacturers and Distributors of Devices; Confirmation of Effective Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: The Food and Drug Administration (FDA) published in the **Federal Register** of September 29, 1998 (63 FR 51825), a direct final rule and a correction document published in the **Federal Register** of November 27, 1998 (63 FR 65554). The direct final rule amends certain regulations that govern establishment registration and device listing by domestic distributors. This document confirms the effective date of the direct final rule.

EFFECTIVE DATE: The effective date of the direct final rule published at 63 FR 51825 is confirmed as February 11, 1999.

FOR FURTHER INFORMATION CONTACT: Walter W. Morgenstern, Center for Devices and Radiological Health (HFZ–305), Food and Drug Administration, 2094 Gaither Rd., Rockville, MD 20857, 301–594–4699.

SUPPLEMENTARY INFORMATION: FDA solicited comments concerning the direct final rule for a 75-day period ending on December 14, 1998. FDA stated that the effective date of the direct final rule would be on February 11, 1999, 60 days after the end of the comment period, unless any significant adverse comment was submitted to FDA during the comment period. FDA did not receive any significant adverse comment. The direct final rule contained no information collection. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3502) was not required.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, notice is given that no objections or requests for a hearing were filed in response to the September 29, 1998, final rule. Accordingly, the amendments issued thereby are effective on February 11, 1999.

Dated: January 4, 1999.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 99–565 Filed 1–11–99; 8:45 am]

BILLING CODE 4160–01–F

Proposed Rules

Federal Register
Vol. 64, No. 7
Tuesday, January 12, 1999

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.

DELAWARE RIVER BASIN COMMISSION

18 CFR Part 430

Protected Area Permits for New Withdrawals; Proposed Amendments to the Commission's Ground Water Protected Area Regulations for Southeastern Pennsylvania; Public Hearing

AGENCY: Delaware River Basin Commission.

ACTION: Notice of proposed rulemaking and public hearing.

SUMMARY: Notice is hereby given that the Delaware River Basin Commission will hold a public hearing to receive comments on proposed amendments to its Ground Water Protected Area Regulations for Southeastern Pennsylvania with respect to the establishment of numerical ground water withdrawal limits for 62 subbasins which are entirely or partially within the Ground Water Protected Area. Limits, based upon baseflow frequency analyses, were initially specified for the 14 subbasins in the Neshaminy Creek Basin. Limits for the remaining 62 subbasins are based upon additional baseflow frequency analyses provided by the U.S. Geological Survey in 1998. Although the limits within the Neshaminy Creek Basin remain unchanged, the withdrawal limits for the entire protected area are presented in this notice.

DATES: The public hearing will be held on Tuesday, March 9, 1999 beginning at 1 p.m. and continuing until 5 p.m., as long as there are people present wishing to testify. The hearing will resume at 7 p.m. and continue until 9 p.m., as long as there are people present wishing to testify.

The deadline for inclusion of written comments in the hearing record will be announced at the hearing. Persons wishing to testify at the hearing are requested to register with the Secretary in advance of the hearing.

ADDRESSES: Written comments should be submitted to Susan M. Weisman, Delaware River Basin Commission, P.O. Box 7360, West Trenton, New Jersey 08628. The public hearings will be held in the Hearing Room of the Pennsylvania Department of Environmental Protection's Southeastern Regional Office at 555 E. North Lane, Lee Park Suite 6010, Conshohocken, Pennsylvania.

FOR FURTHER INFORMATION CONTACT: Copies of the Commission's Ground Water Protected Area Regulations for Southeastern Pennsylvania may be obtained by contacting Susan M. Weisman, Commission Secretary, at (609) 883–9500 ext. 203.

SUPPLEMENTARY INFORMATION:

Background and Rationale

The Commission's Ground Water Protected Area Regulations for Southeastern Pennsylvania were adopted in 1980 to prevent depletion of ground water, protect the interests and rights of lawful users of the same water source, and balance and reconcile alternative and conflicting uses of limited water resources in the area. Lowered water tables resulting from withdrawals in excess of recharge rates have led to reduction of flows in some perennial streams in the region and have dried up some stream reaches which previously flowed all year. Such reductions in base flow interfere with instream and downstream water uses, adversely affect fisheries and aquatic life, and threaten to reduce the capacity of streams in the region to assimilate pollutants.

On January 28, 1998, the Commission adopted amendments to the Ground Water Protected Area Regulations which established a two-tiered system of withdrawal limits. The first tier serves as a warning that a subbasin is ''potentially stressed''. In potentially stressed subbasins, applicants for new or expanded ground water withdrawals are required to implement one or more programs to mitigate adverse impacts of additional ground water withdrawals. Acceptable programs include: conjunctive use of ground water and surface water; expanded water conservation; control of ground water infiltration to the receiving sewer systems; and artificial recharge and spray irrigation. The second tier serves as the maximum withdrawal limit. The Commission seeks to prevent ground water withdrawals from exceeding the maximum withdrawal limit.

The regulations also provide incentives for holders of existing DRBC dockets and protected area permits to implement the above-cited conjunctive use and conservation programs to mitigate the adverse impacts of their ground water withdrawals. If docket or permit holders successfully implement one or both programs, the Commission could extend the docket or permit duration for up to ten years.

The regulations also specify administrative criteria for issuing and review of dockets and permits as well as protocol for updating and revising withdrawal limits to provide additional protection for streams designated by the Commonwealth of Pennsylvania as ''high quality'' or ''exceptional value'', or to correspond with any integrated resources plans adopted by municipalities for subbasins.

The ground water study which provided the basis for the withdrawal limits for the subbasins in the Neshaminy Creek Basin was prepared by the U.S. Geological Survey in cooperation with the Commission and is entitled ''Water-Use Analysis Program for the Neshaminy Creek Basin, Bucks and Montgomery Counties, Pennsylvania.'' The U.S. Geological Survey was contracted by the Commission to prepare a similar study to investigate the withdrawal limits for the remaining subbasins in the protected area. The results of both studies are recorded on CD-ROM which is available from the Commission. Specific software, the Access database and ArcView from ESRI are required to view the CD-ROM. To review the CD-ROM at the Commission's offices, please contact Judith Strong, at (609) 883–9500 ext. 263 for an appointment. To order the CD-ROM at a cost of $10, please contact Carolyn Hartman at (609) 883–9500 ext. 249. To review the CD-ROM at locations within the protected area, please contact Susan M. Weisman at (609) 883–9500 ext. 203.

List of Subjects in 18 CFR Part 430

Water supply.

The subject of the hearing will be as follows:

Amendment to the Commission's Ground Water Protected Area Regulations for Southeastern Pennsylvania Relating to the Establishment of Numerical Ground Water Withdrawal Limits for Subbasins in the Protected Area

For the reasons set forth in the preamble, part 430 is proposed to be amended as follows:

PART 430—GROUND WATER PROTECTION AREA: PENNSYLVANIA

1. The authority citation for part 430 continues to read as follows:

Authority: Pub. L. 87–328 (75 Stat. 688).

§ 430.13 [Amended]

2. Section 430.13 is amended by revising paragraph (i)(3) to read as follows:

* * * * *

(i) * * *

(3)(i) The potentially stressed levels and withdrawal limits for all delineated basins and subbasins are set forth below:

Subbasin	Potentially stressed (mgy) *	Withdrawal limit (mgy)
Neshaminy Creek Basin		
West Branch Neshaminy Creek Basin	1054	1405
Pine Run Basin	596	795
North Branch Neshaminy Creek	853	1131
Doylestown Subbasin Neshaminy Creek	710	946
Warwick Subbasin Neshaminy Creek	889	1185
Warrington Subbasin Little Neshaminy Creek	505	673
Park Creek Basin	582	776
Warminster Subbasin Little Neshaminy Creek	1016	1355
Mill Creek Basin	1174	1565
Northampton Subbasin Neshaminy Creek	596	794
Newtown Creek	298	397
Core Creek Basin	494	658
Ironworks Creek Basin	326	434
Lower Section Subbasin Neshaminy Creek	3026	4034
Schuylkill River Basin		
Hay Creek	974	1299
Lower Reach Manatawny-Ironstone Creek	1811	2414
Pigeon Creek	611	815
Schuylkill-Crow Creek	1157	1543
Schuylkill-Mingo Creek	671	895
Schuylkill-Plymouth-Mill Creeks	4446	5929
Schuylkill-Sixpenny Creek	1490	1987
Schuylkill-Sprogels Run	1091	1455
Schuylkill-Stony Creek	687	916
Schuylkill-Trout Creek	1082	1443
Stony Creek	1242	1655
Valley Creek	1865	2486
French and Pickering Creek Subbasins		
Lower Reach French Creek	634	845
Lower Reach Pickering Creek	1716	2288
Middle Reach French Creek	1608	2145
South Branch French Creek	1044	1393
Upper Reach French Creek	1295	1726
Upper Reach Pickering Creek	1358	1811
Perkiomen and Skippack Creek Subbasins		
East Branch Perkiomen-Indian Creeks	633	844
East Branch Perkiomen-Mill Creeks	720	961
East Branch Perkiomen-Morris Run	1214	1619
Hosensack-Indian Creeks	1257	1676
Lower Reach Skippack Creek	1069	1426
Perkiomen-Deep Creeks	1047	1396
Perkiomen-Lodal Creeks	1200	1600
Perkiomen-Macoby Creek	1252	1669
Swamp-Middle Creeks	1423	1898
Swamp-Minister Creeks	547	730
Swamp-Scioto Creeks	746	994
Towamencin Creek	466	622
Unami-Licking Creeks	992	1322
Unami-Ridge Valley Creeks	1068	1424
Upper Reach Perkiomen Creek	1223	1631
Upper Reach Skippack Creek	813	1084
West Branch Perkiomen Creek	1566	2088

Subbasin	Potentially stressed (mgy) *	Withdrawal limit (mgy)
Delaware River Basin		
Jericho Creek	421	562
Mill Creek	1600	2134
Paunnacussing Creek	513	684
Pidcock Creek	563	751
Upper Reach Cobbs Creek	871	1161
Upper Reach Crum Creek	1290	1721
Upper Reach Darby Creek	1625	2167
Upper Reach East Branch Chester Creek	1865	2487
Upper Reach Frankford Creek	1414	1886
Upper Reach Poquessing Creek	1008	1344
Upper Reach Ridley Creek	1707	2275
Tohickon Subbasin		
Tohickon-Beaver-Morgan Creeks	1156	1541
Tohickon-Deep Run	956	1274
Tohickon-Geddes-Cabin Runs	602	803
Tohickon-Lake Nockamixon	556	741
Tohickon-Three Mile Run	726	968
Pennypack and Wissahickon Subbasins		
Lower Reach Wissahickon Creek	2750	3666
Upper Reach Wissahickon Creek	1302	1736
Middle Reach Pennypack Creek	1295	1727
Upper Reach Pennypack Creek	1358	1811
Brandywine Creek Subbasin		
East Branch Brandywine-Taylor Run	1054	1405
Middle Reach Brandywine Creek	823	1098
Upper Reach Brandywine Creek	1614	2153
West Branch Brandywine-Beaver Run	2110	2813
West Branch Brandywine-Broad Run	2380	3173
West Valley Creek	1673	2231
Lehigh Subbasin		
Upper Reach Saucon Creek	946	1262

*mgy means million gallons per year.

(ii) Subject to public notice and hearing, this section may be updated or revised based upon new and evolving information on hydrology and streamflow and ground water monitoring or in accordance with paragraph (i)(2) of this section.

2. This regulation is proposed to be effective upon adoption of the final rule.

(Delaware River Basin Compact, 75 Stat. 688.)

Dated: January 4, 1999.

Susan M. Weisman,

Secretary.

[FR Doc. 99–670 Filed 1–11–99; 8:45 am]

BILLING CODE 6360–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 98P–0043]

Food Labeling: Nutrition Labeling of Dietary Supplements on a ''Per Day'' Basis

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its nutrition labeling regulations for dietary supplements to provide that the quantitative amount and the percent of Daily Value of a dietary ingredient may be voluntarily presented on a ''per day'' basis in addition to the required ''per serving'' basis, if a recommendation is made on the label that the dietary supplement be consumed more than once per day. This proposal responds to a citizen petition requesting that these regulations be modified to include this provision. FDA is proposing this action to provide manufacturers of dietary supplements flexibility to voluntarily present additional label information to consumers.

DATES: Submit written comments by March 29, 1999. Submit written comments on the information collection provisions by February 11, 1999. See section IX of this document for the effective date of any final rule that may issue based on this proposal.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit written comments on the information

collection provisions to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW., Washington, DC 20503, ATTN: Desk Officer for FDA.

FOR FURTHER INFORMATION CONTACT: Carole L. Adler, Center for Food Safety and Applied Nutrition (HFS–165), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–5494.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 23, 1997 (62 FR 49826), FDA published a final rule entitled ''Food Labeling; Statement of Identity, Nutrition Labeling and Ingredient Labeling of Dietary Supplements; Compliance Policy Guide, Revocation'' (hereinafter referred to as the ''September 23, 1997, final rule''). This document was published in response to the Dietary Supplement Health and Education Act of 1994 (the DSHEA) and established requirements for the identification of dietary supplements and for their nutrition labeling and ingredient labeling. These regulations provide, in part, that quantitative information be listed ''per serving'' and voluntarily ''per unit.'' The effective date of the September 23, 1997, final rule is March 23, 1999.

In the November 27, 1991, proposed rule on nutrition labeling entitled ''Food Labeling; Reference Daily Intakes and Daily Reference Values; Mandatory Status of Nutrition Labeling and Nutrient Content Revision'' (56 FR 60366 at 60382), the agency suggested that the required nutrition information for dietary supplements be provided in ''units'' and ''units per day'' if label directions advise consumption of more than one unit per day. The agency believed that, because more than one unit of a supplement is often consumed per day, the daily amount recommended by the manufacturer for consumption should be clearly stated. As addressed in the January 6, 1993, final rule entitled ''Food Labeling: Mandatory Status of Nutrition Labeling and Nutrient Content Revision, Format for Nutrition Label'' (58 FR 2079 at 2168), the agency received several comments opposing dual labeling (i.e., ''per unit'' and ''per day'') of nutrition information if more than one unit is specified for consumption per day. Comments were opposed for various reasons, including that dual declaration may create consumer confusion, overcrowd labels, and discriminate against supplements that do not provide ''units per day'' information. The agency was persuaded that dual declaration may create a readability problem for consumers, given the limited space available on most dietary supplements, and that recommended daily consumption of other than well-defined dosages (e.g., ''consume 1 to 3 tablets per day'') would pose a problem in terms of labeling on a ''per day'' basis. The agency tentatively concluded that labeling ''per unit'' would be more useful in that the product would always be consumed ''per unit,'' and that consumers may not always follow the manufacturer's recommendations to consume a certain number of units per day of the product. The agency planned to propose that nutrition information be provided ''per unit'' in its future rulemaking required by the Dietary Supplement Act (the DS act) (see 58 FR 2079 at 2169).

In the interim, FDA reexamined this issue, and in its June 18, 1993, proposal entitled ''Food Labeling; General Requirements for Nutrition Labeling for Dietary Supplements of Vitamins, Minerals, Herbs, or Other Similar Nutritional Substances'' (58 FR 33715 at 33716), tentatively concluded that quantitative information should be presented ''per serving'' rather than ''per unit.'' The agency explained in this document that consumers might be confused by a ''per unit'' declaration when more than one unit is to be consumed at one time (e.g., two capsules with each meal) because they might assume that the ''per unit'' information represents the amount specified for consumption at one time (i.e., ''per serving'') similar to conventional foods. The agency also noted that it preferred one consistent method of labeling for the various forms of supplements and that ''per unit'' labeling was not as appropriate for supplements that do not come in discrete units (e.g., liquid or powdered supplements). Therefore, the agency proposed that quantitative information be provided on a ''per serving'' basis consistent with § 101.9 (21 CFR 101.9). The agency maintained this requirement in the January 4, 1994, final rule entitled ''Food Labeling; General Requirements for Nutrition Labeling for Dietary Supplements of Vitamins, Minerals, Herbs, or Other Similar Nutritional Substances'' (59 FR 354 at 359).

The DSHEA added section 403(q)(5)(F)(ii) (21 U.S.C. 343(q)(5)(F)(ii)) to the Federal Food, Drug, and Cosmetic Act (the act). This section specifies that the listing of dietary ingredients in nutrition labeling shall include the quantity of each such ingredient ''per serving.'' Therefore, in its December 28, 1995, proposal entitled ''Food Labeling; Statement of Identity, Nutrition Labeling and Ingredient Labeling of Dietary Supplements'' (60 FR 67194 at 67198), FDA proposed in § 101.36(b)(2)(ii) (21 CFR 101.36(b)(2)(ii)) that quantitative information be listed on a ''per serving'' basis. This requirement was unchanged in the September 23, 1997, final rule (62 FR 49826 at 49830). However, the agency was persuaded that there may be some products in which the unit amount may be of interest to consumers, and, therefore, added § 101.36(b)(2)(iv) to provide for quantitative information to be presented voluntarily on a ''per unit'' basis in addition to the required ''per serving'' basis in § 101.36(b)(2)(ii) (62 FR 49826 at 49830).

II. Citizen Petition

The Nutrilite Division of Amway Corp., (hereinafter referred to as ''the petitioner''), submitted a citizen petition (filed January 23, 1998, Docket No. 98P–0043/CP1), requesting that FDA amend its nutrition labeling regulations for dietary supplements to permit the option of listing the quantitative amount and the percent of Daily Value of dietary ingredients on a ''per day'' basis in addition to the required ''per serving'' basis if the label of the product advises that the dietary supplement be consumed more than once per day.

Specifically, the petitioner requested that FDA redesignate paragraphs (e)(9) and (e)(10) of § 101.36 as (e)(10) and (e)(11). In place of former paragraph (e)(9) of § 101.36, the petitioner requested that a new § 101.36(e)(9) state:

> If the labeling for a dietary supplement recommends that more than one serving be consumed per day, the text of the ''Supplement Facts'' may also declare the total quantitative amount and the total percent of the Daily Value that will be consumed per day of each dietary ingredient. This additional information shall be provided in separate columns or other separate placement, but in the same type size and same format employed for the rest of the ''Supplement Facts'' information, and shall be introduced by the headings ''Total Amount Per Day'' and ''Total % DV Per Day''.

The petitioner noted that the labels of some dietary supplements recommend consumption of more than one per day, for instance, in the morning and in the evening (i.e., two times a day), or with breakfast, lunch, and dinner (i.e., three times a day). The petitioner asserted that for safety reasons, the consumer should be provided with information about the quantitative amount and the percent of the Daily Value of each dietary ingredient to be consumed per day.

The petitioner stated that it recognizes that the DSHEA provides that the listing of dietary ingredients be on a ''per

serving'' basis, but that does not prevent FDA from allowing information about the quantity of each dietary ingredient consumed per day to be declared voluntarily.

The petitioner maintained that providing additional columns of information to augment the basic nutrition labeling information would not be confusing or misleading, is consistent with the nutrition labeling regulations for dietary supplements, and would not conflict in any way with the required information. The petitioner noted that FDA has already authorized additional columns of information in other circumstances for dietary supplements (e.g., when a product contains two or more separately packaged dietary supplements that differ from each other (§ 101.36(e)(8) and (e)(10)(iii)), and dietary information may be provided on a ''per unit'' basis in addition to a ''per serving'' basis (§ 101.36(b)(2)(iv)). The petitioner also provided examples of situations when additional columns for conventional foods may be used (e.g., two or more forms of the same food, and food commonly combined with other ingredients or that is cooked or otherwise prepared before eating may be presented ''as purchased'' and ''as prepared'' (§ 101.9(e) and (h)(4)).

The petitioner noted that § 101.9(b)(11) provides that if a product is promoted on the label, or in labeling or advertising for a use that differs in quantity by twofold or greater from the use upon which the reference amount in § 101.12(b) (21 CFR 101.12(b)) was based, then the manufacturer shall provide a second column of nutrition information based on the amount customarily consumed in the promoted use, in addition to the nutrition information per serving derived from the reference amount in § 101.12(b). According to the petitioner, this provision, which § 101.36(b) references, includes the voluntary declaration of nutrition information for dietary supplements on a ''per day'' basis if the label recommends consumption more than once per day.

III. The Proposal

The agency acknowledges that it had previous concerns about quantitative information for dietary supplements being presented on a ''per day'' basis, and has discussed them in section I of this document. However, the agency is persuaded by the petitioner that this additional information may be useful to impress upon consumers of dietary supplement products the total daily intake of each dietary ingredient they will receive from a product that is recommended for consumption multiple times per day. Therefore, the agency tentatively concludes that if the labeling of a dietary supplement recommends consumption more than once per day, it would be acceptable to provide quantitative information ''per day'' in addition to ''per serving'' when the product label has sufficient space available to present this information in accordance with the format requirements specified in § 101.36(e) or the special labeling provisions for small and intermediate-sized packages in § 101.36(i)(2).

The agency does not agree that this provision is covered by § 101.9(b)(11). That paragraph refers to usage at one eating occasion of a quantity that differs by twofold from the quantity upon which the reference amount was based, not to the usage over a day's time.

The agency agrees with the petitioner that it is appropriate to place this provision in § 101.36(e), which is the section pertaining to the presentation of nutrition information. In doing so, the agency is proposing to remove paragraph § 101.36(b)(2)(iv), which provides for the optional listing of quantitative information on a ''per unit'' basis and include this provision in a new § 101.36(e)(9). Accordingly, FDA is modifying the sample language provided by the petitioner for a new § 101.36(e)(9) and is proposing to provide in that paragraph that quantitative information by weight (or volume, if permitted) may be declared on either a ''per unit'' or ''per day'' basis in addition to the required ''per serving'' basis. The agency is also proposing to redesignate existing paragraphs (e)(9), (e)(10) and (e)(11) of § 101.36 as (e)(10), (e)(11), and (e)(12), respectively, and to revise the reference in (e)(12) accordingly.

As is the case when nutrient information is given in additional columns as shown in current § 101.36(e)(10)(ii) and (e)(10)(iii), FDA believes that it is critical that clearly labeled column headings are provided to prevent consumer confusion about the information. Therefore, FDA is also proposing to provide a sample label in new § 101.36(e)(11)(viii) of a suggested format for a dietary supplement providing information on both a ''per serving'' and ''per day'' basis. FDA requests comments on the proposed changes.

The regulation specifying nutrition labeling requirements for dietary supplements will become effective March 23, 1999, and many dietary supplement manufacturers are currently making label changes necessary to come into compliance with those requirements. Although the agency does not expect to complete this rulemaking in time for the ''per day'' information to be incorporated as part of the current changes, it has considered whether the information should be allowed on an interim basis prior to completion of the rulemaking so that firms wishing to incorporate it now with the other changes may do so. Because the agency believes that the proposed ''per day'' information would not be misleading, FDA does not intend to object to manufacturers declaring information on a ''per day'' basis prior to issuance of a final rule, provided it is presented in a manner consistent with this proposal. However, manufacturers should be aware that a final rule on this issue may differ from this proposal and that they would then be required to change their labels to conform to the final rule.

IV. Analysis of Impacts

A. Benefit/Cost Analysis

FDA has examined the impacts of this proposed rule under Executive Order 12866. Executive Order 12866 directs agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). According to Executive Order 12866, a regulatory action is ''economically significant'' if it meets any one of a number of specified conditions, including having an annual effect on the economy of $100 million or adversely affecting in a material way a sector of the economy, competition, or jobs. A regulation is considered ''significant'' under Executive Order 12866 if it raises novel legal or policy issues. FDA finds that this proposed rule is neither an economically significant nor a significant regulatory action as defined by Executive Order 12866.

In addition, FDA has determined that this rule does not constitute a significant rule under the Unfunded Mandates Reform Act of 1995 requiring cost-benefit and other analyses. A significant rule is defined in section 1531(a) of the Unfunded Mandates Reform Act of 1995 as ''a Federal mandate that may result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100,000,000 (adjusted annually for inflation) in any 1 year.''

Finally, in accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the administrator of the Office of Information and

Regulatory Affairs of the Office of Management and Budget has determined that this proposed rule is not a major rule for the purpose of congressional review.

FDA is proposing to allow the nutrition labeling of dietary supplements to present the quantitative amount by weight (or volume, if permitted) and the percent of Daily Value of a dietary ingredient on a ''per day'' basis in addition to the required ''per serving'' basis. This action provides manufacturers of dietary supplements flexibility to voluntarily present additional label information to consumers. This rule will result in costs and benefits only to the extent that firms elect to take advantage of the option of presenting information on a ''per day'' basis. No firm will bear the cost of redesigning labels unless it believes that the claim will result in increased sales of its product.

B. Small Entity Analysis

FDA has examined the impacts of this proposed rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612). If a rule has a significant impact on a substantial number of small entities, the Regulatory Flexibility Act requires agencies to analyze options that would minimize the economic impact of that rule on small entities. Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), the agency certifies that this proposed rule will not have a significant impact on a substantial number of small entities.

This proposed rule would provide for voluntary, ''per day'' labeling of dietary supplements. Because ''per day'' labeling would be permitted and not required, a firm, including any small firm, will change its labeling and incur costs only if the benefits to it (e.g., increased sales) exceed the costs. FDA further notes that small product lines from certain small firms are exempt from the dietary supplement nutrition labeling requirements provided no claims are made.

V. The Paperwork Reduction Act of 1995

This proposed rule contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The title, description, and respondent description of the information collection provisions are shown in this section of this document with an estimate of the annual reporting burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Title: Food Labeling: Nutrition Labeling of Dietary Supplements on a ''Per Day'' Basis.

Description: Section 403(q)(5)(F) of the act provides that dietary supplements shall bear nutrition labeling in a manner that is appropriate for the product and that is specified in regulations issued by FDA. FDA issued regulations establishing the requirements for nutrition labeling in § 101.36 in the September 23, 1997, final rule. FDA is proposing to amend its nutrition labeling regulations for dietary supplements to provide that firms may voluntarily present the quantitative amount and the percent of Daily Value of dietary ingredients on a ''per day'' basis in addition to the required ''per serving'' basis, if a recommendation is made on the label that the dietary supplement be consumed more than once per day. These proposed provisions are in response to a citizen petition submitted by a manufacturer and marketer of dietary supplements. This proposed action would provide suppliers of dietary supplements flexibility to present additional label information voluntarily to consumers.

Respondent Description: Suppliers of dietary supplements.

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	No. or Responses per Respondent	Total Annual Responses	Hours per Response	Total Annual Hours	Total Operating Costs
101.36(e)	85	10	850	0.25	213	$83,000

[1] There are no capital or maintenance costs associated with this collection of information.

These estimates are based on agency communications with industry (Refs. 1, 2, and 3) and FDA's knowledge of, and experience with, food labeling. FDA estimated in the September 23, 1997, final rule (62 FR 49826 at 49846) that there were a maximum of 850 suppliers of dietary supplements and that, on average, each supplier had 40 products whose labels required revision. FDA estimates that only 10 percent, or 85, of the dietary supplement suppliers would revise the labels of their products to incorporate nutrition levels for the daily use of their products. FDA also estimates that daily use levels for nutrition information would generally be placed on at most 25 percent, or at most 10, of a firm's estimated 40 products, although this number would vary by firm based on the types of products that it produces. FDA also believes that the burden associated with the proposed disclosure of nutrition information on a daily use basis for dietary supplements would be a one-time burden for the small number of firms that would decide voluntarily to add this additional information to the labels for their products, separate from any other label changes for their products. FDA estimates that at least 90 percent of firms would coordinate addition of daily use nutrition information with other changes in their labels, in which case the voluntary cost of transmitting the information to consumers in labeling would be subsumed almost entirely in the cost of these other voluntary or required labeling changes. The incremental cost for these 76 firms would be approximately $50 per label for 760 labels, or $38,000 total. For the remaining 9 firms that would not coordinate changes with other labeling changes, FDA estimates that the cost would be approximately $500 per label

for 90 labels, or $45,000 total. The estimated total operating costs in Table 1 are, therefore, $83,000 total. Respondents are already required to disclose the quantitative amount and percent of Daily Value of dietary ingredients per serving as part of the nutrition information for dietary supplements. Respondents may also provide such information on a per unit basis. The information provided for under the proposed rule would be generated by simple extrapolation from that information.

In compliance with 44 U.S.C. 3507(d), the agency has submitted the information collection provision of the proposed rule to OMB for review. Interested persons are requested to send comments regarding information collection by February 11, 1999, to the Office of Information and Regulatory Affairs, OMB (address above), ATTN: Desk Officer for FDA.

VI. Environmental Impact

The agency has determined under 21 CFR 25.30(k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VII. References

The following references have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Memorandum of telephone conversation of August 10, 1998, between James C. Lassiter, Amway Corp., and Gerad L. McCowin, Office of Food Labeling, FDA.

2. Memorandum of telephone conversation of August 20, 1998, between Paul Bolar, Pharmavite Corp., and Gerad L. McCowin, Office of Food Labeling, FDA.

3. Memorandum of telephone conversation of August 20, 1998, between Mike Bradley and Bill Cochrane, Leiner, Inc., and Gerad L. McCowin, Office of Food Labeling, FDA.

VIII. Comments

Interested persons may by March 29, 1999 submit to the Dockets Management Branch (address above) written comments regarding this proposal, except that comments regarding information collection are to be submitted to the Office of Information and Regulatory Affairs, OMB (address above), by February 11, 1999. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

IX. Effective Date

The agency is proposing that any final rule that may issue based upon this proposed rule become effective 30 days after its date of publication in the **Federal Register**.

List of Subjects in 21 CFR Part 101

Food labeling, Nutrition, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 101 be amended as follows:

PART 101—FOOD LABELING

1. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: 15 U.S.C. 1453, 1454, 1455; 21 U.S.C. 321, 331, 342, 343, 348, 371.

2. Section 101.36 is amended by removing paragraph (b)(2)(iv); by redesignating paragraphs (e)(9), (e)(10), and (e)(11) as paragraphs (e)(10), (e)(11), and (e)(12), respectively; by adding new paragraph (e)(9); by adding paragraph (e)(11)(viii) to newly redesignated paragraph (e)(11); and by revising newly redesignated paragraph (e)(12) to read as follows:

§ 101.36 Nutrition labeling of dietary supplements.

* * * * *

(e) * * *

(9) The quantitative amount by weight (or volume, if permitted) and the percent of Daily Value may be presented on a ''per unit'' basis in addition to on a ''per serving'' basis, as required in paragraph (b)(2)(ii) and (b)(2)(iii) of this section. Alternatively, if a recommendation is made on the label that a dietary supplement be consumed more than once per day, the total quantitative amount and the percent of the Daily Value that will be consumed per day of each dietary ingredient may be presented. The ''per unit'' or ''per day'' information shall be presented in additional columns to the right of the ''per serving'' information and shall be clearly identified by appropriate headings as illustrated in paragraph (e)(11)(viii) of this section.

* * * * *

(11) * * *

BILLING CODE 4160–01–F

(viii) Dietary supplement illustrating "per serving" and "per day" information:

Supplement Facts

Serving Size 1 Caplet

	Per Caplet		Per Day (3 Caplets)	
	Amount	% Daily Value	Amount	% Daily Value
Calcium (as calcium citrate)	500 mg	50%	1500 mg	150%
Vitamin D (as cholecalciferol)	125 IU	31%	375 IU	93%

BILLING CODE 4160–01–C

(12) If space is not adequate to list the required information as shown in the sample labels in paragraph (e)(11) of this section, the list may be split and continued to the right as long as the headings are repeated. The list to the right shall be set off by a line that distinguishes it and sets it apart from the dietary ingredients and percent of Daily Value information given to the left. The following sample label illustrates this display:

* * * * *

Dated: January 4, 1999.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 99–564 Filed 1–11–99; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 126

[USCG–1998–4302]

RIN 2115–AE22

Handling of Class 1 (Explosive) Materials or Other Dangerous Cargoes within or Contiguous to Waterfront Facilities

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking; reopening of comment period.

SUMMARY: The Coast Guard is reopening the comment period for the notice of proposed rulemaking (NPRM) for Handling of Class 1 (Explosive) Materials or Other Dangerous Cargoes within or Contiguous to Waterfront Facilities to March 1, 1999 to allow additional time for public comment.

DATES: Comments must reach the Coast Guard on or before March 1, 1999.

ADDRESSES: You may mail comments to the Docket Management Facility [USCG–1998–4302], U.S. Department of Transportation (DOT), Room PL–401, 400 Seventh Street SW., Washington, DC 20590–0001, or deliver them to room PL–401, located on the Plaza Level of the Nassif Building at the same address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

The Docket Management Facility maintains the public docket for this rulemaking. Comments will become part of this docket and will be available for inspection or copying at room PL–401, located on the Plaza Level of the Nassif Building at the above address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also electronically access the public docket for this rulemaking on the Internet at http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: For information concerning the NPRM provisions, contact LCDR John Farthing, Project Manager, Vessel and Facility Operating Standards Divisions, Coast Guard, telephone 202–267–6451, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. For information on the public docket, contact Dorothy Walker, Chief, Dockets, telephone 202–366–9329.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages you to participate in this rulemaking by submitting written data, views, or arguments. If you submit comments, you should include your name and address, identify this notice (USCG–1998–4302) and the specific section or question in this document to which your comments apply, and give the reason for each comment. Please submit all comments and attachments in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing to the DOT Docket Management Facility at the address under **ADDRESSES.** If you want acknowledgment of receipt of your comments, you should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period.

The Coast Guard plans no public meeting. Persons may request a public meeting by writing to the Docket Management Facility at the address under **ADDRESSES**. The request must identify this docket [USCG–1998–4302] and should include the reasons why a public meeting would be helpful to this rulemaking. If we determine that a meeting should be held, we will announce the time and place in a later notice in the **Federal Register**.

Background and Purpose

The regulations in 33 CFR part 126 prescribing requirements for designated waterfront facilities that handle, store, and transfer hazardous materials to and from vessels were written in the 1950s and have never been significantly updated. On October 29, 1998 (63 FR 57964), we published a NPRM proposing to amend part 126 by updating the requirements to meet current industry standards for containerized hazardous material cargoes. The closing date for the original comment period was scheduled for December 28, 1998.

During the original NPRM comment period we received several comments requesting an extension of the comment period. One comment from an industry group potentially affected by these regulations stated that it is meeting in mid-December and needs more time to develop comments. Another comment indicated difficulty meeting the December 28, 1998 deadline because the shipping industry is typically very busy during the holiday season. We accept these as reasonable requests and we are reopening the NPRM comment period by 60 days. The new NPRM comment period will close March 1, 1999.

Dated: January 5, 1999.

Joseph J. Angelo,

Acting Assistant Commandant for Marine Safety and Environmental Protection.

[FR Doc. 99–536 Filed 1–11–99; 8:45 am]

BILLING CODE 4910–15–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA–189–0128; FRL–6217–8]

Approval and Promulgation of State Implementation Plans; California—South Coast

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve in part and disapprove in part a state implementation plan (SIP) revision submitted by the State of California to provide for attainment of the ozone national ambient air quality standard (NAAQS) in the Los Angeles-South Coast Air Basin Area (South Coast). EPA is proposing the approval and disapproval of the SIP revisions under provisions of the Clean Air Act (CAA) regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards, and plan requirements for nonattainment areas.

DATES: Written comments must be received by February 11, 1999.

ADDRESSES: Comments should be sent to Dave Jesson, Air Planning Office (AIR–2), Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

The rulemaking docket for this notice is available for public inspection at EPA's Region IX office during normal

business hours. A reasonable fee may be charged for copying parts of the docket.

Copies of the SIP materials are also available for inspection at the following locations:

California Air Resources Board, 2020 L Street, Sacramento, California

South Coast Air Quality Management District, 21865 E. Copley Drive, Diamond Bar, California

FOR FURTHER INFORMATION CONTACT: Dave Jesson at (415) 744–1288.

SUPPLEMENTARY INFORMATION:

I. Background

A. Summary

1. Introduction

This proposed action relates to a 1997 revision to the 1994 ozone SIP for the South Coast.[1] The South Coast Air Quality Management District (SCAQMD) adopted the revision within weeks of EPA's approval of the 1994 ozone SIP. The 1997 proposed revision to the ozone SIP was not federally required, but was adopted to address, in a comprehensive and consistent fashion, federal and state requirements for particulate matter, carbon monoxide, and nitrogen dioxide, and state requirements for an ozone plan update. In order to understand the basis for EPA's proposed disapproval of the 1997 revision, it is necessary to understand the 1994 ozone SIP, several aspects of which are unique. An overview of the 1994 ozone SIP for the South Coast appears below, followed by a description of the 1997 proposed revision.

2. 1994 South Coast Ozone SIP

On November 15, 1994, the State of California submitted the 1994 ozone plan for the South. The plan was subsequently amended and we approved the plan on September 25, 1996, as the first fully approved and federally enforceable ozone SIP for the South Coast.

The 1994 plan was built on 4 decades of State and local leadership in researching, developing, adopting, and implementing new air pollution control strategies. By that date, the California and South Coast air quality agencies and industry had a world-wide reputation for pushing technological progress to achieve the world's cleanest cars, fuels, consumer products, industrial controls, and paints and coatings.

As a direct result of this extraordinary effort by elected officials, governmental agencies, industry, and the residents of Southern California, air pollution levels had been dramatically reduced: the number of days per year with dirty air and the peak concentrations had dropped by more than 60 percent, and severe episode days (where health warnings are issued to all residents and pollution-generating activities must be curtailed) had been completely eliminated. This accomplishment is more remarkable in view of Southern California's extraordinary growth during these years and the continued dependence of the area on private vehicle use.

Despite the State and local achievements, however, Southern California in 1994 continued to have by far the dirtiest air in the country. For example, the South Coast in 1994 recorded 1-hour levels at or above 0.120 parts per million (ppm) for ozone, or smog, on 107 days in the Los Angeles-Long Beach area and 123 days in the Riverside-San Bernardino area, while other major metropolitan areas had values at or above 0.120 ppm on far fewer days: Houston 32, New York 9, Detroit 6, Philadelphia 5, Atlanta 4, and Chicago 2.[2] Similarly, the South Coast has recorded particulate matter or (soot) and carbon monoxide pollution levels greater than other urban areas in the U.S., and was the only area of the country in violation of the nitrogen dioxide NAAQS under the 1990 CAA Amendments.

Recognizing that all residents have a right to clean air and that clean air investments have a high benefit-cost ratio,[3] the California Air Resources Board (CARB) and SCAQMD cooperated in the adoption of a 1994 plan laying out the strategies that would bring clean air by the federal deadline of 2010.

The State committed to implement 9 new mobile source control measures, an enhanced motor vehicle inspection and maintenance (or Smog Check) program, and incremental regulatory reductions in the smog-forming constituents of consumer products and pesticides, and to develop advanced, long-term controls for onroad and nonroad vehicles and engines.

The Governing Board of the SCAQMD and the Southern California Association of Governments (SCAG) committed to implement 60 new specific controls, and SCAQMD also bound itself to achieve additional emission reductions in the future from advanced technology measures.

Together these State and local measures would reduce the 1990 emissions level of 2878 tons per day (tpd) to 1032 tpd. Modeling analyses by the SCAQMD estimated, however, that the smog problem could not be solved without an additional 156 tpd reduction in pollutants. The State determined that we should achieve these remaining reductions by promulgating national mobile source controls in accordance with our new authorities under the 1990 CAA Amendments.

We concluded that California had no authority under the U.S. Constitution or the Clean Air Act to require us to contribute particular measures and emissions reductions to the SIP for the South Coast. We appreciated, however, the significant level of commitment by the State and SCAQMD reflected in the 1994 ozone plan and we wished to do our share in contributing further mobile source controls consistent with our national authorities and responsibilities. We also saw merit in the State's desire to cooperate with us in negotiating with affected industry consistent Federal and California mobile source standards.

We therefore approved the 1994 ozone SIP based upon commitments by the State and EPA to participate in a public consultative process on mobile source controls, leading to a decision in mid-1997 on what further reductions needed to be achieved and which entity should have responsibility for them. We and California further committed to adopt any additional controls, as necessary and appropriate, to achieve the emission reductions required for attainment of the ozone standard in the South Coast.

We believe that we have now achieved, or have rulemaking in progress to accomplish, almost all of the reductions the State purported to assign to us in the 1994 ozone SIP—approximately 145 tpd out of a 156 tpd ''assignment.'' This is the result of close coordination between California and EPA and cooperation by manufacturers and users of mobile source engines and equipment, culminating in agreements on aggressive new standards for trucks and buses and most categories of nonroad mobile sources, ranging from forklifts to outboard engines, and from locomotives to tractors. We believe that

[1] For a description of the boundaries of the Los Angeles-South Coast Air Basin, see 40 CFR 81.305. The nonattainment area includes all of Orange County and the more populated portions of Los Angeles, San Bernardino, and Riverside Counties.

[2] The national ambient air quality standard (NAAQS) for ozone is 0.12 ppm averaged over a 1-hour period.

[3] *The Socioeconomic Assessment Report for the 1994 Air Quality Management Plan* (SCAQMD, August 1994) calculated total benefits of clean air achieved under the plan to exceed total plan costs by between $0.9 and $1.5 billion per year. This calculation applies to ozone, PM, and visibility benefits, but does not include unquantifiable benefits such as reduction in chronic illness, reduction in lung function in human beings, reduced damage to livestock and plant life, and erosion of building materials. Furthermore, 75% of the costs of the plan are associated with measure TCM–04 (transportation improvements).

these aggressive Federal controls will have clean air benefits nationally, and that the stringent new standards will ensure that all sources of the pollution problem contribute their share to needed emission reductions.

California's plan assumed, however, that stringent new emissions standards would be set for aircraft engines and ocean-going vessels. Unfortunately, the international standard-setting process for commercial aircraft engines and ocean-going vessels has not resulted in standards that will benefit the South Coast appreciably by 2010, especially in view of the long life-span of these engines. Moreover, the State assumed an unrealistically rapid turnover rate for harbor craft, and therefore overestimated reductions that would be achieved in 2010, even by a very stringent federal standard.

While we and the State continue to work with the ports, shippers, airports, and airlines to achieve reductions from their operations, we now expect that there will remain a small shortfall in the ''federal'' category. Unfortunately, the SCAQMD has filed a suit against us to promulgate the aircraft and ocean-going vessel standards postulated by the State, although all parties are now aware that the standards are set internationally and that the international standards recently adopted will not, in fact, achieve the reductions anticipated by the State in its 1994 SIP submittal.

The SCAQMD has also sued us to end the public consultative process by making specific additional federal commitments to adopt regulations for all remaining emission reduction assignments. In response to a suit from environmental groups, we have already negotiated a settlement that requires us by June 1, 1999, to conclude the public consultative process, determine remaining responsibilities of the State and EPA, and schedule adoption of controls to fulfill those responsibilities.

Thus, we believe that both District suits are a waste of public resources, and we conclude that it would be inconsistent with our pending obligations to resolve the public consultative process for us to approve a new South Coast SIP that includes Federal assignments to undertake discretionary controls.

3. 1997 South Coast Ozone Plan

As we finalized our approval of the 1994 ozone SIP, the SCAQMD unveiled a replacement plan. This revised plan abandoned, relaxed, or postponed approximately 30 measures in the ozone SIP. The revised plan employed new growth projections, new inventories, and new modeling analyses to support the proposition that the area could meet the minimum statutory progress requirements and eventually attain the ozone NAAQS despite the extensive rollback in near-term controls.

When the revised plan was announced, we indicated our serious concerns about the direction of the plan, particularly its backsliding at the very time we were issuing revised ozone NAAQS and new fine particulate matter (PM–2.5) NAAQS that would require still greater levels of control than were reflected in the 1994 ozone SIP. We noted that the extremely high ozone and PM levels in the South Coast continued to represent one of our country's most severe environmental and public health problems—problems highlighted by the hundreds of scientific studies that formed the basis of the new and revised NAAQS. We encouraged the District to focus on implementation of the newly approved SIP and, if measures proved to be infeasible or ineffective, to adopt replacement measures in order to sustain progress.

The SCAQMD nevertheless adopted the revised plan in November 1996, and the State submitted the plan as a proposed SIP revision in early February 1997. We continued to express our concerns and to remind the SCAQMD that the District, responsible for public health in the most polluted area of the country, had an obligation to increase its efforts rather than regress. We have repeatedly indicated that we support the District's flexibility to amend or replace any measure when it is determined to be infeasible or ineffective, but we cannot support the significant relaxation of the SIP represented by the 1997 plan.

After adopting a plan revision that postponed or eliminated most of the near-term measures in the 1994 ozone SIP, the District has since failed to meet most of its implementation commitments in the 1997 ozone plan. This is consistent with the District's record over the past 4 years, during which the SCAQMD has adopted and revised credit and trading rules and has amended existing prohibitory rules to postpone compliance dates, but has adopted only a handful of new measures designed to reduce pollution levels.

On September 26, 1997, environmental groups sued the SCAQMD and CARB in federal district court, seeking a court order to compel the agencies to meet their federally enforceable commitments to adopt and implement control measures in the 1994 ozone SIP. We urged the parties to attempt settlement and we provided a facilitator for the sessions. Negotiations began in the early Spring of 1998, and a proposed settlement was drafted in late June. The SCAQMD Governing Board, however, rejected the proposed settlement in June 1998.

On November 4, 1998, the SCAQMD filed suit against us to compel our action on the 1997 plans, repeating the argument that the plan should be approved. We have been consistent in expressing our contrary view, that the Clean Air Act gives us authority to approve revised SIPs but does not allow us to approve revisions that represent a significant retreat from the approved SIP. We believe that it would be particularly ill-advised to approve major relaxations in the South Coast, where the public suffers by far the worst pollution levels in the country.

We continue to hope that the SCAQMD will decide to meet its difficult responsibilities to protect public health and, in so doing, will both strengthen the plan and begin fully to implement the plan to fulfill the 1994 plan's promise of clean air progress.

B. The South Coast Ozone Problem

Ground-level ozone is formed when nitrogen oxides (NO_X), volatile organic compounds (VOCs), and oxygen react in the presence of sunlight, generally at elevated temperatures.[4] Strategies for reducing smog typically require reductions in both VOC and NO_X emissions.

Ozone causes serious health problems by damaging lung tissue and sensitizing the lungs to other irritants. When inhaled, even at very low levels, ozone can cause acute respiratory problems; aggravate asthma; cause temporary decreases in lung capacity of 15 to 20 percent in healthy adults, cause inflammation of lung tissue; lead to hospital admissions and emergency room visits; and impair the body's immune system defenses, making people more susceptible to respiratory illnesses, including bronchitis and pneumonia. Children are most at risk from exposure to ozone because they breathe more air per pound of body weight than adults; their respiratory systems are still developing and thus more susceptible to environmental threats; and children exercise outdoors more than adults in the high-ozone months of summer.

Direct exposure to NO_X and VOCs also has adverse public health consequences. Exposure to elevated NO_X concentrations can reduce breathing efficiency, increase lung and airway irritation, and exacerbate symptoms of respiratory illness, lung

[4] The South Coast plan sometimes substitutes the term Reactive Organic Gases (ROG) for VOC. These terms are essentially synonymous.

congestion, wheeze, and increased bronchitis in children. VOCs include many toxic compounds (such as benzene), which can cause respiratory, immunological, neurological, reproductive, developmental, and mutagenic problems. Some VOCs have been identified as probable or known human carcinogens.

Since the strategies in the 1994 ozone SIP and 1997 ozone plan address VOC and NO_X, the primary precursor of particulate matter in the South Coast, the plans also affect PM concentrations.

Particulate matter is associated with a number of significant respiratory and cardiovascular-related effects, including premature death, increased hospitalization, increased emergency room visits, increased respiratory symptoms, increased disease (especially among children and people with lung disease such as asthma), and decreased lung function.

Both ozone and PM damage vegetation. Experimental studies on the major commercial crops in the U.S. suggest that ozone may be responsible for significant agricultural crop yield losses.

Under section 109 of the CAA, EPA established primary, health-related NAAQS for ozone: 0.12 ppm averaged over a 1-hour period. See 44 FR 8220 (February 8, 1979). EPA also set NAAQS for particulate matter up to 10 microns in diameter (PM–10): 150 micrograms per cubic meter (ug/m3) averaged over a 24-hour period, and 50 ug/m3 as an annual arithmetic average of the 24-hour samples. See 52 FR 24672 (July 1, 1987).

On July 18, 1997, EPA reaffirmed the annual PM–10 standard and slightly revised the 24-hour standard (62 FR 38651). At the same time, EPA also established two new standards for PM, both applying only to particulate matter up to 2.5 microns in diameter (PM–2.5). Finally, on July 18, 1997, EPA also revised the ozone NAAQS, replacing the 1-hour standard with a standard of 0.08 ppm averaged over an 8-hour period (62 FR 38855). EPA has not yet issued specific plan and control requirements for the new and revised NAAQS.

The South Coast has continuously had by far the worst 1-hour ozone concentrations in the country, both in terms of peak concentrations and number of violations. While the South Coast ozone levels have greatly improved over the years, the trend is not continuous. For example, in 1998 there have been 12 Stage I Alerts (which are triggered by ozone concentrations at or above 0.20 ppm), compared to only 1 in 1997.

The South Coast typically has among the worst PM–10 annual mean and 24-hour concentration in the country. Last year, the South Coast had the second worst PM–10 annual mean concentration of U.S. urbanized areas, with only Phoenix recording a worse level.

C. Clean Air Act Requirements

The Federal CAA was substantially amended in 1990 to establish new planning requirements and attainment deadlines for the NAAQS. Under section 107(d)(1)(C) of the Act, areas designated nonattainment prior to enactment of the 1990 amendments, including the South Coast, were designated nonattainment by operation of law.

Under section 181(a) of the Act, each ozone area designated nonattainment under section 107(d) was also classified by operation of law as either marginal, moderate, serious, severe, or extreme, depending on the 1986–1988 design value for the area. An ozone area with a design value at and above 0.280 ppm was classified as extreme. The South Coast was the only area so classified. Section 181(a) sets attainment deadlines for each class of area. The attainment date for an extreme area is as expeditiously as practicable but no later than November 15, 2010.

Section 172 of the Act contains general requirements applicable to SIPs for nonattainment areas. Section 182 of the Act set out additional air quality planning requirements for ozone nonattainment areas.

The most fundamental of these nonattainment area provisions applicable to the South Coast is the requirement that the State submit by November 15, 1994, a SIP demonstrating attainment of the ozone NAAQS. This demonstration must be based upon enforceable measures to achieve emission reductions leading to emissions at or below the level predicted to result in attainment of the NAAQS throughout the nonattainment area. The measures must be implemented expeditiously and must ensure attainment no later than the applicable CAA deadline.

EPA has issued a ''General Preamble'' describing the Agency's preliminary views on how EPA intends to act on SIPs submitted under Title I of the Act. See generally 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992. The reader should refer to the General Preamble for a more detailed discussion of EPA's preliminary interpretations of Title I requirements. In this proposed rulemaking action, EPA applies these policies to the South Coast ozone SIP submittal, taking into consideration the specific factual issues presented.

D. SIP Submittals Must Meet Requirements of the Pre-Existing NAAQS

Before the SCAQMD adopted the 1997 ozone plan, EPA had already announced its intention to issue new and revised ozone and PM NAAQS. The SCAQMD included in Chapter 10 of the 1997 South Coast Air Quality Management Plan (AQMP) an initial analysis of the emission reductions that might be needed to attain the anticipated new and revised ozone and PM NAAQS. The SCAQMD concluded that significantly greater reductions would be required to attain the new and revised NAAQS that were under consideration. However, the SCAQMD prepared the plans to address only the NAAQS then in effect.

Although EPA has now promulgated revised ozone NAAQS, EPA is not evaluating the plan based upon the NAAQS issued in 1997. The Agency will not require states to submit SIPs to address the revised NAAQS for several years. The pre-existing 1-hour ozone NAAQS remain in effect in each nonattainment area until the area attains NAAQS. Thus, the 1-hour NAAQS of 0.12 ppm will not be revoked in the South Coast until the area has recorded 3 years with no more than 3 concentrations at or above 0.125 ppm at any monitor. State and local agencies remain under an obligation to adopt and implement SIPs to attain the pre-existing ozone NAAQS until the EPA revokes the NAAQS for the area.[5]

E. EPA Actions on Prior South Coast Ozone SIP Revisions

The SCAQMD adopted an ozone plan on September 9, 1994. This plan, which was included in the 1994 South Coast AQMP, was supplemented by State measures adopted by CARB and was submitted as a proposed revision to the California SIP on November 15, 1994. On July 10, 1996, CARB submitted an extensive revision to the South Coast control measure adoption schedule, to adjust for slippage in the plan's initial implementation. On January 8, 1997 (62 FR 1150), EPA finalized approval of the South Coast ozone plan, including the ozone portions of the 1994 South Coast

[5] EPA has determined that subpart 2 of part D of Title I of the CAA should continue to apply as a matter of law for the purposes of achieving attainment of the current 1-hour ozone standard until an area attains the standard. See the final rule promulgating the revised ozone NAAQS (July 18, 1997, at 62 FR 38873 for ozone), ''Implementation Plan for Revised Air Quality Standards'' (July 18, 1997, at 62 FR 38424), and ''Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM10 NAAQS'' (memo from Richard D. Wilson, Acting Assistant Administrator for Air and Radiation, dated December 29, 1997).

AQMP, as amended in 1996, and the State measures.[6]

F. South Coast 1997 Plan Revision

On February 5, 1997, CARB submitted as a revision to the California SIP the 1997 Air Quality Management Plan for the South Coast Air Basin (SCAB), Antelope Valley, and Coachella Valley, adopted by the SCAQMD on November 15, 1996. This submittal addressed all four pollutants for which the South Coast was designated nonattainment: ozone, PM–10, carbon monoxide (CO) and nitrogen dioxide (NO2).

EPA has previously acted on two components of the 1997 AQMP. On April 21, 1998, EPA granted interim final approval to the 1997 South Coast CO plan (63 FR 19661).[7] EPA has also fully approved the 1997 South Coast NO2 attainment and maintenance plan and the State's request on March 4, 1998, to redesignate the South Coast to attainment for NO2 (63 FR 39747, July 24, 1998).

The ozone and PM–10 portions of the South Coast 1997 AQMP became complete by operation of law on August 5, 1997.[8] SCAQMD and CARB intend the 1997 ozone plan to supersede completely the 1994 ozone SIP with respect to the SCAQMD portion of the plan. As discussed, EPA has not yet issued its interpretation of CAA section 172(e) to prevent backsliding in PM–10 nonattainment areas. EPA intends to propose action on the South Coast 1997 PM–10 plan in separate rulemaking.

The State has revised several of its own measures that are part of the South Coast plan, but at this time CARB has submitted as a SIP revision only one of these changes. On April 15, 1998, CARB submitted new Measure M17 (Additional Emission Reductions from Heavy-Duty Vehicles) as a replacement for Measure M7 (Accelerated Retirement of Heavy-Duty Vehicles). EPA will take action on Measure M17 in separate rulemaking.

The 1997 ozone plan includes, among other things, attainment demonstrations based on updated VMT projections reflecting new forecasts prepared by SCAG, an amended Regional Mobility Element adopted by SCAG, revised motor vehicle emissions estimates using California's EMFAC7G and BURDEN7G program, new stationary and area source emission inventories, amended SCAQMD control measure commitments, and revised Urban Airshed Modeling (UAM), using the new inventories and changes to other modeling inputs.

II. Review of the Plan Submittal and Proposed EPA Action

A. Summary of Proposed Action

In this document, EPA is proposing to approve in part and disapprove in part the 1997 ozone plan. The ozone plan for the South Coast depends on commitments by SCAQMD to adopt and implement various VOC and NO_X control measures by particular dates to achieve specific emission reductions needed for progress and attainment. EPA proposes to disapprove the control measure portion of the plan for the reasons discussed in section II.D., below. EPA proposes also to disapprove the progress and attainment demonstrations in the plan, since these plan elements depend upon the control measure provisions.

B. Procedural Requirements

Both SCAQMD and CARB have satisfied applicable statutory and regulatory requirements for reasonable public notice and hearing prior to adoption of the plan and each of the plan amendments. SCAQMD conducted numerous public workshops and public hearings prior to the adoption hearing on November 15, 1996, at which the 1997 AQMP was adopted by the SCAQMD Governing Board (Resolution No. 96–23). On January 23, 1997, the CARB Governing Board adopted the plan (Resolution No. 97–1). The plan was submitted to EPA by Michael P. Kenny, Executive Officer of CARB, on February 5, 1997. The SIP submittal includes proof of publication for notices of SCAQMD and CARB public hearings, as evidence that all hearings were properly noticed. Therefore, EPA proposes to approve the 1997 ozone plan as meeting the procedural requirements of section 110(a)(1) of the CAA.

C. Baseline and Projected Emissions Inventory

The revised and updated emissions inventory included in the 1997 AQMP conforms to EPA's guidance documents.[9] This EPA guidance allows approval of California's motor vehicle emissions factors in place of the corresponding federal emissions factors. The motor vehicle emissions factors used in the plan were generated by the CARB EMFAC7G and BURDEN7G program. The gridded inventory for motor vehicles was then produced using an updated Caltrans Direct Travel Impact Model (DTIM2) (Systems Applications International, 1994) to combine EMFAC7G data with transportation modeling performed by SCAG.

SCAG provided the baseline socioeconomic data used in the plan. These forecasts include the following predicted growth through the ozone attainment year.

[6] Some of the State and SCAQMD measures in the plan had been approved in prior rulemakings. See, particularly, 60 FR 43379 (August 21, 1995), approving CARB regulations relating to antiperspirants and deodorants and other consumer products, reformulated gasoline and diesel fuel, and certain new-technology measures adopted by CARB and SCAQMD.

[7] EPA approved the CO plan with respect to the CAA requirements for notice and adoption, baseline and projected emissions inventory, and vehicle miles traveled (VMT) forecasts. EPA granted interim approval to the CO attainment demonstration, quantitative milestones, and reasonable further progress, since these plan elements depend, in part, on emission reductions from the State's enhanced motor vehicle inspection and maintenance program. The I/M program was given interim approval in EPA's final action on the 1994 ozone SIP (see 62 FR 1165–1168, January 8, 1997) under section 187(a)(6) of the CAA and section 348© of the National Highway System Designation Act (Pub. L. 104–59).

[8] EPA adopted the completeness criteria on February 16, 1990 (55 FR 5830) and, pursuant to section 110(k)(1)(A) of the CAA, revised the criteria on August 26, 1991 (56 FR 42216).

[9] See, for example, Procedures for the Preparation of Emission Inventories for Carbon Monoxide and Precursors of Ozone, Volume I: General Guidance for Stationary Sources, EPA—450/4–91–016; Procedures for Emission Inventory Preparation, Volume IV: Mobile Sources, EPA—450/5–91–026d Revised.

1997 AQMP BASELINE SOCIOECONOMIC FORECASTS

[In millions]

Category	1993	2000	2010
Population	13.8	14.8	16.7
Daily Vehicle Miles Traveled (VMT)	293.3	317.9	377.9
Daily Vehicle Trips	31.2	33.2	37.9

EPA notes that these predictions assume that the area's growth will increase at rates considerably below long-term historic trends.[10] This makes it particularly important for transportation agencies to track actual VMT and trip numbers carefully, and to trigger remedial actions, if necessary, before the plan fails to meet scheduled reduction targets. The growth projections for industrial categories are also generally lower than past trends, and EPA strongly encourages the SCAQMD to revise the emission inventories and adopt additional control measures, as may be necessary, if information suggests that growth will exceed the SIP projections.

The plan includes interpolated inventories for all milestone years for ozone precursors. The methodologies used to prepare the base year and projected emissions inventories, as described in Chapter 3 and Appendix 3 of the AQMP, are acceptable. Accordingly, EPA proposes to approve the 1997 ozone plan with respect to the emissions inventory requirements of sections 172(c)(3) and 182(a)(1) of the CAA.

D. Control Measures

CAA sections 110(a)(2)(A) and 172(c)(6) require that all measures and other elements in the SIP be enforceable. As discussed at length in EPA's approval of the 1994 California ozone SIPs, EPA has interpreted these provisions to allow for approval of attainment demonstrations that rely, in part, on commitments to adopt and implement rules in the future, so long as the commitments are specific and enforceable (see 57 FR 13556 and 13568, April 16, 1992; and 62 FR 1155–1157, January 8, 1997).

The attainment demonstration in the 1997 ozone plan rests on emission reductions derived from adopted regulations and from rules and programs which SCAQMD commits to adopt. The plan measures that are scheduled for adoption in the future are commonly referred to as ''committal measures.'' In the case of the South Coast, the committal measures are further divided into near-term measures and long-term (or new-technology) measures, which are authorized for extreme ozone nonattainment areas under CAA section 182(e)(5). The 1994 ozone SIP contains 66 near-term control measures for adoption by SCAQMD, SCAG, or local governments, and 5 long-term measures for adoption by SCAQMD. The 1997 ozone plan includes 36 near-term control measures for adoption by SCAQMD, SCAG, or local governments, and 6 long-term measures for adoption by SCAQMD. Both plans contain the same group of near-term and long-term measures assigned to the State or to the Federal government (see discussion below in Section II.D.3.)

EPA proposes to disapprove the SCAQMD's committal measures for 4 reasons.

1. SCAQMD Is Already in Default of Many Control Measure Commitments

Although the plan schedules SCAQMD adoption of 23 VOC/NO_X regulations or programs by the end of 1998, the SCAQMD has adopted less than 10, and no additional measures are scheduled for adoption by the end of the year. EPA does not believe there is a basis for approving commitments to adopt rules and programs or to approve an attainment demonstration based, in part, on reductions from these rules and programs, if the adoption dates have passed and the rules or programs have not been adopted. The SCAQMD's faithful implementation of the plan would cure this deficiency.

2. The Control Measures Are an Impermissible Relaxation of the SIP

The commitments in the 1997 ozone plan to adopt VOC and NO_X control measures represent backsliding from the 1994 ozone SIP. The 1997 plan abandons, relaxes, or postpones approximately 30 control measures in the approved South Coast ozone SIP. Specifically, SCAQMD removed, postponed, relaxed, or shifted to a ''further evaluation'' category the following control measures, which were scheduled for near-term adoption in the 1994 ozone SIP: CTS–A Electronic Components, CTS–C Solvent Cleaning, CTS–D Marine/Pleasure Craft Coatings, CTS–E Adhesives, CTS–F Motor Vehicle Non-Assembly Coating, CTS–G Paper/Fabric/Film Coatings, CTS–H Metal Parts/Product Coatings, CTS–I Graphic Arts/Screen Printing, CTS–J Wood Products Coatings, CTS–K Aerospace/Component Coatings, CTS–L Automotive Assembly Operations, CTS–02 Solvents and Coatings at Non-RECLAIM Sources, CTS–07 Architectural Coatings, FUG–01 Organic Liquid Transfer, FUG–02 Active Draining of Liquid Products, FUG–04 Fugitive Emissions of VOCs, RFL–02 Gasoline Dispensing Facilities, RFL–03 Pleasure-Boat Fueling Operations, CMB–02F Internal Combustion Engines, CMB–05 Clean Stationary Fuels, PRC–02 Bakeries, PRC–03 Restaurant Operations, WST–01 Livestock Waste, WST–03 Waste Burning, WST–04 Disposal of Materials Containing VOCs, ISR–01 Special Events Centers, ISR–02 Shopping Centers, ISR–04 Airport Ground Access, ISR–05 Trip Reduction for Schools, ADV–CTS–02 Advanced Technology—Coatings. This list does not include control measures approved as part of the 1994 ozone SIP but without assigned emission reduction credits.

The scale of the SIP relaxation may be seen in the table below, ''South Coast 1994 Ozone SIP and 1997 Ozone Plan VOC Emission Reductions from SCAQMD/SCAG Local Rules for Each Rate-of-Progress Milestone Year.'' [11]

[10] The 1997 AQMP's growth projections are also considerably reduced from those used in the 1994 ozone SIP, which used 2010 projections of 17.4 million for population, 413.9 million miles for daily VMT, and 45.7 million vehicle trips per day.

[11] The table is not adjusted to harmonize the control category baseline emission inventories. A small number of near-term control measures in the 1994 ozone SIP were adopted as regulations before the 1997 plan was issued. The emission reductions from these adopted regulations were treated as ''baseline'' emissions in the 1997 plan, rather than as near-term emission reductions. In addition, the 1997 plan revises the emissions inventory in the 1994 ozone SIP and reduces the emissions inventory for the control categories and the emission reductions associated with some of the 1994 ozone SIP's near-term control measures.

SOUTH COAST 1994 OZONE SIP AND 1997 OZONE PLAN VOC EMISSION REDUCTIONS FROM SCAQMD/SCAG LOCAL RULES FOR EACH RATE-OF-PROGRESS MILESTONE YEAR

[In tons per day rounded to nearest ton]

	1999	2002	2005	2008	2010
1994 Ozone SIP					
Near-Term	104	186	233	268	285
Long-Term	0	20	32	121	180
Total	104	207	266	389	465
1997 Ozone Plan					
Near-Term	11	41	67	86	91
Long-Term	0	0	3	54	89
Total	11	41	70	140	180

Section 110(l) of the Act provides that EPA may not approve a SIP revision if the revision will interfere with attainment or reasonable further progress or any other applicable requirement of the Act. Based on the measures relaxed or deleted and the associated loss of emissions reductions, EPA concludes that the 1997 ozone plan constitutes an unapprovable relaxation of the ozone SIP.[12] The State has not demonstrated why it is not reasonable or feasible for the SCAQMD to adopt measures sufficient to achieve emission reductions on the 1994 ozone SIP schedule, thus potentially expediting attainment of the standard.

EPA believes that the SCAQMD can identify and adopt substitute near-term measures. In fact, the SCAQMD has already adopted or scheduled for near-term adoption some measures not included in the 1997 plan.[13] Thus, this deficiency in the 1997 plan could be cured if the SCAQMD submits commitments to adopt additional control measures along with a demonstration that the amended plan provides for attainment on a schedule that is as expeditious as practical.

3. The Plan Includes Unlawful Assignments of Control Measure Responsibility to EPA

The plan relies in part on reductions from control measures assigned to EPA to adopt in the future. In acting on the 1994 ozone SIP, which also included these ''federal measures,'' EPA stated that the Agency does not accept California's proposition that a state can, under the CAA, assign SIP responsibilities to the Federal government (61 FR 10936, March 18, 1996, 62 FR 1151, January 8, 1997).

Rather than disapprove the 1994 plan, EPA elected to establish a brief ''public consultative process'' to identify the best options for achieving further emission reductions from mobile source controls to contribute to attainment of the NAAQS in the South Coast. EPA indicated that at the conclusion of this process, in June 1997, EPA expected that the State would be able to amend the South Coast attainment demonstration based on the final mix of national, State and local controls. See 61 FR 10923 (March 18, 1996) and 62 FR 1151–1153 (January 8, 1997).

As part of the final SIP approval, EPA approved CARB's commitment to amend the South Coast ozone SIP by December 31, 1997, and to adopt additional mobile source measures, as appropriate, by December 31, 1999, to resolve SIP shortfalls remaining at the end of the public consultative process. See 40 CFR 52.220(C)(235)(I)(A)(1). In taking final action to approve the 1994 ozone SIP, EPA also made a commitment to adopt additional federal mobile source measures which are determined to be appropriate for EPA and needed for ozone attainment in the South Coast. See 40 CFR 52.241.

EPA has not yet concluded the public consultative process, but has been sued by environmental groups to do so (*Coalition for Clean Air, et. al. vs. South Coast Air Quality Management District, California Air Resources Board, and U.S. Environmental Protection Agency*, No. CV 97–6916 HLH (C.D. Cal.)). Subsequently, the SCAQMD also sued EPA for failing to adopt certain of the Federal Measures included in California's 1994 ozone SIP and to resolve the public consultative process and adopt measures determined to be appropriate for the Agency.

EPA has recently entered into a Consent Decree with the environmental plaintiffs to conclude the public consultative process and to determine by June 1, 1999, the respective responsibilities of EPA and the State for adopting measures to achieve the remaining emission reduction requirements. This Consent Decree was lodged with the U.S. District Court on November 13, 1998. EPA sought public comment on the Consent Decree on December 9, 1998 (63 FR 67879).

In light of the imminent conclusion of the public consultative process provided for in EPA's final approval of the 1994 ozone SIP, the Agency has determined that it is not appropriate to approve another South Coast plan that includes emission reductions associated with specific Federal Measures assigned by the State to EPA, much less a plan that increases the illegal emission reduction assignment to the Federal government, as the 1997 plan does for several source categories.[14] EPA reiterates its position that states do not have the authority under the Clean Air Act or the Constitution to assign SIP responsibility to the Federal government.

EPA expects that this particular SIP deficiency will be resolved in the future

[12] The SCAQMD has argued that CAA section 110(a)(2)(H) authorizes states to amend their SIPs as new information becomes available, provided the resulting plan is adequate to attain the NAAQS it implements and it otherwise continues to comply with the CAA. Section 110(a)(2)(H) of the CAA actually requires that a SIP ''provide for revision of such plan from time to time as may be necessary to take account of * * * the availability of improved or more expeditious methods of attaining such [NAAQS] * * *.'' This CAA provision clearly contemplates that states should revise their plans to provide for greater or more expeditious emission reductions. In contrast, the District has elected to relax its plan, and the governing provision of the Act for relaxations is section 110(l).

[13] For example, SCAQMD's June 13, 1997 amendment to Rule 1171 Solvent Cleaning Operations contributes VOC reductions not specifically called for in the 1997 plan. As an example of another feasible control option that could achieve significant VOC reductions, EPA has encouraged SCAQMD implementation of more stringent requirements for spray booths.

[14] For example, the 1997 plan increases the emission reduction assignment for measures M13 (Marine Vessels), M15 (Aircraft), and M16 (Pleasure Craft).

through an amendment to the SIP providing specific enforceable commitments, if appropriate, by responsible agencies to adopt mobile source control measures sufficient to eliminate any shortfall in emissions reductions that might remain at the end of the public consultative process.

4. Section 182(e)(5)

As noted above, CAA section 182(e)(5) authorizes EPA to approve long-term, conceptual measures that rely on new technologies or new control techniques as part of the attainment demonstration for the South Coast, the only extreme ozone nonattainment area. This CAA provision recognizes the difficulty faced by CARB, SCAQMD, and SCAG in fully developing and adopting in the near-term all of the controls that are needed to achieve attainment by the 2010 deadline.

There is no evidence, however, that CAA section 182(e)(5) was enacted to provide a broad excuse for postponing the adoption of available near-term controls because they are difficult or unpopular. Moreover, the progressive nature of control technology development is evidently a basic assumption behind the CAA section 182(e)(5) provision. It would not be consistent with that assumption to authorize agencies to amend their approved SIP to replace numerous near-term control measures and emission reductions with long-term commitments. On the contrary, later revisions to the SIP should reduce, rather than increase, the long-term measure element.

EPA's proposed approval of the 1994 ozone SIP for the South Coast elicited extensive comments from environmental groups. These commenters felt that the SIP should be disapproved because it relied too extensively on speculative and poorly defined long-term measures. The commenters argued that these measures should be replaced by more near-term controls and better defined and supported long-term measures.

In response to these comments and based on further discussions with CARB and the SCAQMD, EPA included in the final approval the following interpretation of the section 182(e)(5) provisions of the CAA as they apply to the 1994 ozone SIP and any subsequent revisions to the South Coast ozone SIP.

Measures which the 1994 South Coast Ozone SIP scheduled for adoption and implementation, or any portion of the emissions reductions scheduled to be achieved as a result of implementation of those near-term measures, may not be converted, at some future time, into section 182(e)(5) new-technology measures or moved into emissions reductions associated with section 182(e)(5) new technology measures, without a convincing showing in a SIP revision that the technologies relied upon in the near-term rules have been found to be technologically infeasible or ineffective in achieving emissions reductions in the near-term. The near-term measures in the 1994 SIP have not been determined to ''anticipate development of new control techniques or improvement of existing control technologies'' (section 182(e)(5)). On the contrary, they were evidently determined by the SCAQMD and CARB to be both available and necessary for expeditious progress in reducing emissions in the near term in the South Coast. Should either CARB or the SCAQMD determine that new information requires a reconsideration of the near-term feasibility of the 1994 SIP near-term measures, the agencies must submit a SIP revision demonstrating convincingly that the standards defined in this paragraph above for conversion of near-term measures to section 182(e)(5) new technology measures has been met. Absent such a convincing showing, a SIP revision will not be approved by EPA.

In view of continuing progress in the development and successful application of control technologies and control techniques, the amount and relative proportion of reductions from measures scheduled for long-term adoption under section 182(e)(5), as compared to measures already adopted in regulatory form or scheduled for near-term adoption, should clearly decrease in any future SIP update. EPA will not approve a SIP revision that contains an increase in the amount and relative proportion of reductions scheduled for long-term adoption under section 182(e)(5) that is inconsistent with the standard defined in the preceding paragraph. Further, to the extent new modeling performed in any subsequent SIP revision demonstrates that there is an increase in the year 2010 carrying capacity for ROG and NO_X, this change shall not be used to decrease the amount of emissions reductions scheduled to be achieved by any near-term measure from the 1994 SIP unless CARB or the SCAQMD make the convincing showing required by the preceding paragraph.

(62 FR 1179)

As mentioned, the 1997 ozone plan deletes or relaxes some 30 VOC/NO_X near-term measures in the 1994 ozone SIP, shifts others to the contingency/further study category or to the long-term measure category, and decreases the proportion of VOC emission reductions from near-term measures, while increasing the carrying capacity for VOC.[15]

Chapter 9 of the 1997 plan addresses the SIP approval criteria quoted above by brief discussions and by labelling those 1994 SIP measures that are deleted (14 VOC/NO_X measures) or placed in a contingency/further study category (17 VOC/NO_X measures) as ''not cost-effective,'' ''technically infeasible,'' ''minimal emission reduction potential,'' ''low public acceptability,'' and ''economic concerns, implementation authority.''

EPA believes that the 1997 ozone plan revision violates the intent of CAA section 182(e)(5). This section of the Act was intended to allow an extreme ozone nonattainment area additional time, if necessary, beyond the November 15, 1994 ozone SIP submittal deadline, to develop, adopt, and submit some of the specific regulations and programs needed to achieve attainment. EPA finds no indication that the provision was designed to allow a state to design SIP revisions that progressively postpone SIP commitments to adopt regulations and programs in the near-term, and in so doing to shift the balance of the SIP increasingly toward vague and undocumented future commitments. EPA therefore is inclined to consider the increased reliance of the 1997 ozone plan on long-term, conceptual measures to be a basis for disapproval of the control measure portion of the plan. However, the Agency particularly solicits public comment on whether the proposed 1997 revision can be reconciled with the purpose and language of CAA section 182(e)(5) or should be disapproved, in part, because the South Coast's substitute plan is inconsistent with this section of the Act.

As discussed in Section II.D.2 above, EPA believes that the SCAQMD recognizes that additional near-term measures can be added to avoid increasing the proportion of emission reductions assigned to the long-term measure category. SCAQMD adoption and submittal of replacement near-term measures could ensure that the plan complies with the Act's provisions relating to inclusion of long-term measures in the attainment demonstration.

E. Attainment Demonstration

The attainment demonstration was conducted using the Urban Airshed Model. The UAM analysis uses 4 episodes in 1987, including a September 7–9 episode with a peak concentration of 0.33 ppm.

[15] The 1997 ozone plan adds several new measures: FLX–01 Intercredit Trading Program, FLX–02 Air Quality Investment Program, and MSC–03 Promotion of Catalyst-Surface Coating Technology Programs for Air Conditioning Units, MON–09 In-Use Vehicle Emission Mitigation, MON–10 Emissions Reduction Credit for Truck Stop Electrification, and MOF–07 Credits for the Replacement of Existing Pleasure Craft Engines with New Lower Polluting Engines. All of these measures, however, are designed to enhance compliance flexibility and none contributes emissions reductions.

Previous SCAQMD modeling analyses also used a more challenging episode, June 5–7, 1985, which had a peak concentration of 0.36 ppm. For the 1997 plan, the SCAQMD modeled the 1985 episode but did not show attainment with all control measures, and the episode was dropped for purposes of the attainment demonstration. SCAQMD based its decision not to use the 1985 episode on the age of the episode and the District's contention that the episode reflects meteorological conditions that rarely occur in the South Coast. Current EPA modeling guidelines allow use of a ''weight of evidence'' analysis to justify abandonment of episodes with extremely rare meteorological conditions.[16] On November 18, 1998, the SCAQMD submitted a weight of evidence analysis for the June 1985 episode.[17] A copy of this analysis has been placed in the docket for this rulemaking. The analysis addresses EPA's current modeling guidance and argues for elimination of the 1985 episode under a weight of evidence approach. Attachment B to the November 18, 1998, SCAQMD correspondence addresses the acceptability of the remaining 4 episodes as a basis for an attainment demonstration. The SCAQMD provides evidence that the episodes are representative of the types of meteorological episodes expected in the South Coast Air Basin when high ozone concentrations occur. The evidence examines the episodes based on the deviation index (Horie CART analysis) and the Chu-Cox methodology for assessing episode frequency.

The model performance for the 1987 episodes shows a high systematic bias (for example, ozone underprediction of 44% for June 24 and 40% for June 25; 47% for September 8 and 38% for September 9). This underprediction is significantly reduced if motor vehicle VOC emissions are doubled. For example, the underprediction becomes 24% for June 24 and 19% for June 25; and 2% for September 8 and 3% for September 9.

The SCAQMD contends that this inventory adjustment is warranted, since it is generally conceded that motor vehicle VOC emissions were substantially underestimated in the 1987 historical episode emissions calculations. If this inventory adjustment is valid, model performance for the UAM simulation is within EPA's acceptable range of accuracy.

The 1997 ozone plan's modeling analysis predicts attainment with VOC emissions are reduced to 413 tons per day (tpd) and NO_X emissions are reduced to 530 tpd. For comparison purposes, the 1994 ozone SIP projected attainment with carrying capacities of 323 tpd VOC and 553 tpd NO_X, while the final 1994 AQMP identifies the carrying capacities as 313 tpd VOC and 274 tpd NO_X.

The ozone plan's modeled attainment demonstration is based on emission reductions from the 1997 ozone plan's suite of control measures. As discussed in section II.D., EPA proposes to disapprove these control measures for the 3 reasons discussed in section II.D. The 1997 ozone plan therefore does not meet the CAA section 182(c)(2)(A) requirement that the plan include ''(a) demonstration that the plan, as revised, will provide for attainment of the ozone national ambient air quality standard by the applicable attainment date.'' EPA proposes to disapprove the ozone plan with respect to the attainment demonstration requirements of CAA section 182(c)(2)(A), because of the deficiencies in the control measure portions of the plan.

E. Quantitative milestones and reasonable further progress (RFP)

1. Clean Air Act Provisions

CAA section 182(c)(2) requires that ozone SIPs include quantitative milestones that are to be achieved every 3 years until the area is redesignated attainment and that demonstrate reasonable further progress (RFP) toward attainment by the applicable date. CAA section 171(a) of the Act defines RFP as ''such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.''

For ozone areas classified as serious or above, CAA section 182(c)(2) requires that the SIP must provide for reductions in ozone season, weekday VOC emissions of at least 3 percent per year net of growth averaged over each consecutive 3-year period beginning in 1996 until the attainment date. This is in addition to the 15 percent reduction over the first 6-year period required by CAA section 182(b)(1) for moderate areas. EPA believes that ''(by) meeting the specific 3 percent reduction requirements (of CAA section 182(c)(2)), the State will also satisfy the general RFP requirements of section 172(c)(2) for the time period discussed.'' (General Preamble, April 16, 1992, 57 FR 13518.)

The 1997 ozone plan shows reductions consistent with the 3 percent per year rate of progress requirement for 1999 through use of VOC emission reductions alone. Beginning in 2002, however, the plan does not have enough creditable VOC reductions to meet the milestones, and must substitute NO_X reductions, as allowed by CAA section 182(c)(2)(C). The schedule for these milestone years in the 1997 ozone plan is 6 percent VOC and 3 percent NO_X in 2005; 0.5 percent VOC and 8.5 percent NO_X in 2008; and 0.5 percent VOC and 5.5 percent NO_X in 2010. The rate of progress schedule in the 1994 ozone SIP far exceeds the CAA progress requirements for each milestone year using VOC emission reductions alone (see EPA's final approval of the 1994 ozone SIP, January 8, 1997, 62 FR 1181, table entitled ''South Coast ROP Forecasts'').

Compliance with the milestone and RFP requirements of the Act requires that all of the creditable emission reductions be approved as enforceable parts of the SIP (General Preamble, April 16, 1992, at 57 FR 13517). Because EPA proposes to disapprove the control measure provisions in the ozone plan, EPA also proposes to disapprove the plan with respect to the CAA section 182(c)(2) quantitative milestone and reasonable further progress requirements.

F. Summary of Proposed EPA Actions

EPA proposes the following actions on elements of the South Coast ozone plan, as submitted on February 5, 1997:

(1) Approval of procedural requirements, under sections 110(a)(1) and 110(k)(3) of the CAA;

(2) Approval of baseline and projected emission inventories, under sections 110(a)(1), 110(k)(3), 172(c)(3) and 182(a)(1) of the CAA;

(3) Disapproval of the VOC and NO_X control measure provisions, under CAA sections 110(k)(3), 110(l), 172(c)(6), and 182(e)(5);

(4) Disapproval of the attainment demonstration, under CAA sections 110(k)(3) and 182(c)(2)(A) of the CAA; and

(5) Disapproval of quantitative milestones and reasonable further progress, under sections 110(k)(3) and 182(c)(2) of the CAA.

As discussed above, the partial disapproval of the ozone SIP revision does not trigger mandatory sanctions under CAA section 179, since EPA's approval of the 1994 South Coast ozone

[16] U.S.E.P.A., Guidance on Use of Modeled Results to Demonstrate Attainment of the Ozone NAAQS, EPA–454/B–95–007 (1996).

[17] Letter from Barry R. Wallerstein, SCAQMD Executive Officer, to Felicia Marcus, Regional Administrator, EPA Region IX, Attachment A.

plan with respect to the same requirements remains in force.

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

III. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.) 12866, Regulatory Planning and Review.

B. Executive Order 12875

Under Executive Order 12875, Enhancing the Intergovernmental Partnership, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.'' Today's rule does not create a mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of E.O. 12875 do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.'' Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because 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 create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.*, v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

F. 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 annual costs to State, local, or tribal governments in the aggregate; or to private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that this action does not include a Federal mandate that may result in estimated annual 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 and disapprove pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Oxides of nitrogen, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 30, 1998.

Felicia Marcus,

Regional Administrator, Region IX.

[FR Doc. 99–666 Filed 1–11–99; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 63 and 302

[FRL–6216–8]

RIN 2060–AI08

Redefinition of the Glycol Ethers Category Under Section 112(b)(1) of the Clean Air Act and Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The proposed rule, upon promulgation, will amend the Clean Air Act (CAA) list of hazardous air pollutants (HAP) in section 112(b)(1). Under section 112(b)(3)(D), EPA may delete specific substances from listed categories. This proposed rule modifies the definition of the glycol ethers category in a manner to exclude each of the compounds known as surfactant alcohol ethoxylates and their derivatives (SAED). This delisting action is being proposed by EPA in response to an analysis of potential exposure and hazards of SAED that was prepared by the Soap and Detergent Association (SDA) and submitted to EPA. Based on this information, EPA has made an initial determination that there are adequate data on the health and environmental effects of these substances to determine that emissions, ambient concentrations, bioaccumulation, or deposition of these substances may not reasonably be anticipated to cause adverse human health or environmental effects. By today's document, EPA is also proposing to make conforming changes in the definition of glycol ethers with respect to designation of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

DATES: Written comments must be received by EPA on or before March 15, 1999. The EPA will hold a public hearing if EPA receives a written request for such a hearing on or before February 11, 1999. If a hearing is requested in a timely manner, EPA will publish an additional document in the **Federal Register** advising interested persons of the date, time, and location of the hearing. Moreover, if a hearing is held, EPA will keep the record open for 30 days after such hearing to receive rebuttal or supplementary information.

ADDRESSES: *Comments.* Comments on both of the proposed actions discussed in this notice should be submitted (in duplicate if possible) to the EPA's Air and Radiation and Information Docket (6101), Attention Docket Number A–98–39, Room M1500, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460. *Docket.* Docket No. A–98–39, which includes a copy of the submission by the SDA, and an EPA analysis of that submission, will be available for inspection and copying between 8 a.m. and 4 p.m., Monday through Friday, at the EPA's Air and Radiation and Information Docket, Room M1500, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Dr. Roy L. Smith, Environmental Protection Agency, Office of Air Quality Planning and Standards (MD–15), Research Triangle Park, NC 27711; (919) 541–5362.

SUPPLEMENTARY INFORMATION:

I. Listing and Delisting of HAP

Section 112 of the CAA contains a mandate for EPA to evaluate and control emissions of HAP. Section 112(b)(1) includes an initial list of HAP that is composed of specific chemical compounds and groups of compounds. This list is used to identify source categories for which the EPA will subsequently promulgate emissions standards.

Section 112(b)(2) requires EPA to conduct periodic reviews of the initial list of HAP set forth in section 112(b)(1) and outlines criteria to be applied in deciding whether to add or delete particular substances. Section 112(b)(2) identifies pollutants that should be added to the list as:

> * * * pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise * * *

Section 112(b)(3) establishes general requirements for petitioning EPA to modify the HAP list by adding or deleting a substance. In general, the burden is on a petitioner to include sufficient information to support the requested addition or deletion under the substantive criteria set forth in section 112(b)(3)(B) and (C). The Administrator must either grant or deny a petition within 18 months of receipt. If the Administrator decides to grant a petition, the Agency publishes a written explanation of the Administrator's decision, along with a proposed rule to add or delete the substance. If the Administrator decides to deny the petition, the Agency publishes a written explanation of the basis for denial. A decision to deny a petition is final Agency action subject to review in the D.C. Circuit Court of Appeals under section 307(b).

To promulgate a final rule deleting a substance from the HAP list, section 112(b)(3)(C) provides that the Administrator must determine that:

> * * * there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation, or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects.

The EPA will grant a petition to delete a substance and publish a proposed rule to delete that substance if it makes an initial determination that this criterion has been met. After affording an opportunity for comment and for a hearing, EPA will make a final determination whether the criterion has been met.

The Administrator may also act to add or delete a substance on her own initiative. In this instance, the EPA has been engaged in a substantive dialogue with the SDA, a national trade association representing manufacturers of cleaning products and ingredients, concerning the toxicity of and exposure to SAED, a group of compounds which is within the current definition of the glycol ethers category as listed in section 112(b)(1). At the request of EPA, the SDA compiled information on this class of compounds needed by EPA to apply the statutory criteria for delisting under section 112(b)(3). The SDA submitted the resulting report to EPA. Although the SDA has elected not to formally petition EPA to delete SAED compounds from the HAP list, EPA has made an initial determination based on the SDA report that the statutory criteria for delisting SAED are satisfied, and is, therefore, issuing this proposal.

EPA does not interpret section 112(b)(3)(C) to require absolute certainty that a pollutant will not cause adverse effects on human health or the environment before it may be deleted

from the list. The use of the terms ''adequate'' and ''reasonably'' indicate that the Agency must weigh the potential uncertainties and their likely significance. Uncertainties concerning the risk of adverse health or environmental effects may be mitigated if EPA can determine that projected exposures are sufficiently low to provide reasonable assurance that such adverse effects will not occur. Similarly, uncertainties concerning the magnitude of projected exposures may be mitigated if EPA can determine that the levels which might cause adverse health or environmental effects are sufficiently high to provide reasonable assurance that exposures will not reach harmful levels.

II. EPA Analysis of the SDA Submission

The SDA contended that the present definition of glycol ethers adopted by Congress in section 112(b)(1) was incorporated verbatim from the definition of glycol ethers utilized in section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. 11023. The SDA noted that EPA subsequently modified the definition of glycol ethers under EPCRA to exclude SAED compounds (59 FR 34386, July 5, 1994), and requested that EPA make a conforming change in the CAA list. EPA has responded that the substantive criteria for deleting chemicals under EPCRA section 313(d) are materially different than the criteria for deleting a hazardous pollutant under section 112(b)(3). It is EPA's view that, whatever the origins of the glycol ethers definition in section 112(b)(1), EPA cannot redefine the glycol ethers category to exclude particular compounds without making a substantive determination that such compounds meet the applicable criteria for HAP delisting. Under section 112(3)(D), EPA may delete specific substances included in certain listed categories without a Chemical Abstract Service number, including the glycol ethers category.

Although the SDA does not necessarily agree with EPA that deletion of individual compounds is the only manner in which EPA may adopt the requested redefinition of the glycol ethers category, the SDA agreed to assist EPA in this effort by collecting information concerning SAED compounds that would enable EPA to make a substantive assessment of potential risks under section 112(b)(3). On April 25, 1997, the SDA submitted to EPA a report entitled ''Exposure Assessment Undertaken to Support the Evaluation of the HAP Definition 'Glycol Ethers'.''

Surfactant alcohol ethoxylates and their derivatives comprise a group of compounds that, individually, satisfy the following definition:

$R–(OCH_2CH_2)_n–OR'$

Where:

n = 1, 2, or 3;
R = alkyl C8 or greater
R′= any group

Rather than asking the SDA to compile an exhaustive list of each specified SAED compound, EPA requested that the SDA undertake a generic analysis of the potential toxicity of, and potential exposure to, SAED compounds as a group. EPA requested that the analysis be based to the extent possible on worst-case assumptions which could be deemed to be conservative with respect to each and every individual compound in the SAED group. Such an approach to delisting would normally be impracticable due to the likelihood that use of such extreme assumptions would greatly exaggerate the magnitude of potential risks. In this instance, such an approach was considered practical only because of assertions by the SDA that SAED compounds present both very low potential toxicity and very limited exposure potential.

The report submitted by the SDA presented estimates of both the potential exposure to, and potential toxicity of, SAED compounds. The principal emissions estimate in the report was based on a hypothetical facility using 600 million pounds per year of SAED, a figure coinciding with the total annual domestic production of Shell Chemical Company, the largest SAED manufacturer. The report then conservatively estimated emissions for this hypothetical facility associated with the storage and transmission, processing, and fugitive releases of the SAED compounds.

Emissions of SAED from raw materials during storage and handling were estimated by assuming emissions of a total volume of air, fully saturated with SAED, equal to the total volume of liquid SAED. This estimate was based, in turn, on the vapor pressure of the lowest molecular weight compound in the SAED category, although typical SAED compounds have greater molecular weight and substantially lower volatility. Additional SAED emissions from manufacture of SAED compounds and formulation of other products containing SAED were estimated by making assumptions concerning the effect on emissions of increased temperatures and ventilation rates and reduced SAED concentrations in the finished products. Finally, an estimate of fugitive emissions was calculated from the estimated point source emissions by applying a proportionality factor derived from reported emissions for all glycol ethers in the EPA Toxics Release Inventory database, although it is likely that the proportion of total emissions attributable to fugitive releases would be much less for SAED compounds than for the lower molecular weight glycol ethers. This analysis produced an aggregate emissions rate for the hypothetical facility of 105 pounds of SAED per year.

Exposures at the fence line for the hypothetical facility were then estimated using the SCREEN3 dispersion model and the calculated aggregate emissions rate, based on a variety of assumptions concerning terrain, stack height and configuration, and distance to the fence line. The predicted annual average SAED concentration associated with an emissions rate of 105 pounds/year was 0.03 micrograms of SAED per cubic meter of air for a ''representative'' facility and 97.3 micrograms per cubic meter for a ''hypothetical worst-case'' facility.

The SDA submission also summarized the available toxicity data on SAED compounds. There have been few acute and no subchronic inhalation studies utilizing SAED compounds. Available animal study data do not indicate any adverse effects at air concentrations up to those produced by full saturation with SAED vapors. Acute toxicity has been demonstrated only when animals inhaled undiluted SAED in the form of a respirable aerosol. In one 10-day repeated inhalation study, test animals exhibited local respiratory irritation. Long-term animal studies of SAED administered by the oral or dermal routes have not reported any significant effects such as skin sensitization, reproductive or developmental toxicity, genetic mutations, or cancer. Evidence on the toxic potential of glycol ethers as a group strongly suggests that toxic potency decreases as molecular weight increases. Therefore, SAED (which have high molecular weight) are likely to be substantially less toxic than lighter glycol ether compounds for which more complete toxicity data are available.

There is no verified or proposed reference concentration (RfC) for any SAED compound. The SDA developed a proposed ''key exposure index'' for chronic exposure to SAED compounds based on the subchronic RfC for 2-methoxy-1-propanol (MP), a structurally similar compound which also has no demonstrated systemic toxicity by

inhalation. Two-methoxy-1-propanol has a lower molecular weight (90 grams per mole) than the lightest SAED compound (ethylene glycol octyl ether, 174 grams per mole). Therefore, MP is expected to be more toxic than any SAED compound, and its use as a surrogate should be conservative.

The SDA's analysis began with the subchronic RfC for MP, then reduced it by a factor of 10 to account for the differences between subchronic effects and chronic effects, and by an additional factor of between 1 and 10 to account for the use of data for a structurally related compound. This resulted in a proposed concentration range of 0.2 to 2.0 milligrams per cubic meter (mg/m^3) at which no adverse effects would be expected in human populations, including sensitive individuals. The SDA's proposed concentration range is approximately 1,000 to 10,000 times lower than the acutely toxic level for inhalation in rats. It is also approximately 1,000 to 10,000 times greater than the exposure estimated by the SDA for a ''representative'' facility and 2 to 20 times greater than the estimated exposure for a ''hypothetical worst-case'' facility.

The proposed chronic no-effect concentration range for SAED of 0.2 to 2.0 mg/m^3 is also consistent with chronic RfCs available from EPA's Integrated Risk Information System (IRIS) for lower-molecular weight, non-SAED glycol ethers (i.e., 0.2 mg/m^3 for 2-ethoxyethanol and 0.09 mg/m^3 for 2-methoxyethanol acetate). A third IRIS assessment will shortly be proposed for 2-butoxyethanol, in which EPA expects to include an RfC in the range of 10 to 70 mg/m^3. The SDA's analysis has, therefore, treated SAED as if they were as toxic as much lighter glycol ether compounds, which EPA considers to be unlikely.

Although the SDA document does not include a discussion of levels of SAED that would be protective of non-human species, the toxicity data used to support the health impact assessment were obtained from animal studies. The derivation of human no-effect levels from these animal data, appropriately adjusted for uncertainty, should be protective of non-human animal species as well. Overall, there is no evidence to suggest that any species or any ecosystem would be harmed by any exposure below the SAED no-effect level proposed for humans.

Based on the SDA submission as a whole, EPA believes that the available data on potential exposure to, and toxicity of, SAED compounds are considerably more limited than would normally be necessary to support the findings required by section 112(b)(3) before EPA may delete a substance from the HAP list. However, there is a sufficiently large discrepancy between the maximum predicted exposure level for these compounds based on plausible worst-case assumptions and the lowest concentration likely to present any potential risk of adverse effects to compensate for the paucity of the data. The conservative techniques used by the SDA in its submission, which tend to overestimate both exposure to and toxicity of SAED, are appropriate in the context of the limited data which are available on SAED compounds.

Unlike the SDA, EPA does not believe that the process by which Congress adopted the current definition of glycol ethers in section 112(b)(1) can be construed as relieving EPA of the obligation to apply the statutory criteria before deleting any substance included in the present definition. Nevertheless, it is important to observe that there is no evidence suggesting that the current broader definition of glycol ethers was adopted because of any actual concerns regarding the potential hazards of SAED compounds. EPA believes that the absence of any discernable affirmative rationale for the initial inclusion of SAED compounds in the statutory HAP list, while not dispositive in itself, lends additional support to the Agency's conclusion that the available evidence supports deletion of these compounds.

Based on the available information, EPA has made an initial determination, with respect to each and every individual substance which satisfies the definition of SAED compounds set forth above, that there is adequate data on the health and environmental effects of those substances to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substances may not reasonably be anticipated to cause adverse human health or environmental effects. As such, EPA is proposing to effectuate this determination by redefining the entire glycol ethers category in a manner which excludes each of the deleted substances.

III. Proposed Revision of CERCLA Designation

When a HAP is listed under section 112 of the CAA, it is also defined as a hazardous substance under section 101(14) of CERCLA, 42 U.S.C. 9601(14). In an April 4, 1985 final rule, under its authority in section 102(a) of CERCLA, EPA designated and listed, in the table at 40 CFR 302.4, all the elements and compounds and hazardous wastes incorporated as hazardous substances by reference to other environmental statutes under section 101(14)(see 50 FR 13456). In a June 12, 1995 final rule, EPA revised Table 302.4 to add, among other HAP newly listed by the 1990 CAA Amendments, the broad generic category of glycol ethers (see 60 FR 30926). The EPA designated the broad generic category of glycol ethers as hazardous under CERCLA based solely on its inclusion in the CAA HAP list. The Agency has no independent basis upon which to retain the current definition of the glycol ethers category in order to include the SAED compounds as CERCLA hazardous substances. Therefore, should the definition of glycol ethers in the HAP list in the CAA be amended as proposed in today's rulemaking, the Agency is also proposing to make a corresponding change to the list of CERCLA hazardous substances at 40 CFR Part 302, Table 302.4.

IV. Administrative Requirements

A. Executive Order 12866

Today's proposed actions do not meet the definition of ''significant regulatory action'' as set forth in Executive Order (E.O.) 12866 and are, therefore, not subject to review by the Office of Management and Budget (OMB). The E.O. 12886 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 E.O.

Although EPA is not aware of any adverse effects associated with the present inclusion of SAED compounds on the CAA HAP and the CERCLA hazardous substance lists, the effect of the proposed rules will be to reduce potential regulatory obligations. There are no identifiable adverse effects associated with either of the proposed rules. Neither of the proposed rules meets any of the criteria enumerated above, and EPA, therefore, has determined that neither of these actions

constitutes a ''significant regulatory action'' under the terms of E.O. 12866.

B. Paperwork Reduction Act

As required by the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, OMB must clear any reporting and recordkeeping requirements that qualify as an ''information collection request'' under PRA. Neither of the proposed rules in this notice contain any new information collection requirements.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires that a Regulatory Flexibility Analysis be performed for proposed rules that potentially have ''significant impact on a substantial number of small entities.'' Small entities are small businesses, organizations, and governmental jurisdictions.

Present Regulatory Flexibility Act guidelines indicate that an economic impact should be considered significant if it meets one of the following criteria: (1) Compliance increases annual production costs by more than 5 percent, assuming costs are passed on to consumers; (2) compliance costs as a percentage of sales for small entities are at least 10 percent more than compliance costs as a percentage of sales for large entities; (3) capital costs of compliance represent a ''significant'' portion of capital available to small entities, considering internal cash flow plus external financial capabilities; or (4) regulatory requirements are likely to result in closure of small entities.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that neither of the proposed rules, if promulgated, will have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Neither of the proposed rules in this document contain any Federal mandate (under the regulatory provisions of title II of UMRA) for State, local or tribal governments or the private sector.

E. Executive Order 13045

The E.O. 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks,'' (62 FR 19885, April 23, 1997) requires EPA rulemaking that involves decisions on environmental health risks or safety risks to consider whether such risks may disproportionately affect children. Toxicological data used to support this proposed rule were obtained from animal studies. Estimated human no-effect levels were derived by applying an intraspecies uncertainty factor designed to protect children and other sensitive members of human populations. EPA anticipates that, in the absence of studies of exposed children, that this uncertainty factor will adequately protect the entire human population, including children.

F. Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

Today's rule does not create a mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

G. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments because it will result in no increase either in air pollution or reporting requirements. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

H. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. 104–113, Section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects

40 CFR Part 63

Air pollution control, Chemicals, Glycol ethers.

40 CFR Part 302

Hazardous substances, Chemicals, Glycol ethers.

Dated: December 30, 1998.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, it is proposed that title 40, chapter I, parts 63 and 302 of the Code of Federal Regulations be amended as follows:

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

2. Part 63, subpart C is amended by adding § 63.61 to read as follows:

§ 63.61 Redefinition of glycol ethers listed as hazardous air pollutants.

The definition of the glycol ethers category of hazardous air pollutants, as established by 42 U.S.C. 7412(b)(1) includes mono- and di-ethers of ethylene glycol, diethylene glycol, and triethylene glycol R-$(OCH_2CH_2)_n$-OR′

Where:

n= 1, 2, or 3

R= alkyl C_7 or less, or phenyl or alkyl substituted phenyl

R′= H, or alkyl C_7 or less, or carboxylic acid ester, sulfate, phosphate, nitrate, or sulfonate.

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

1. The authority citation for part 302 continues to read as follows:

Authority: 42 U.S.C. 9602, 9603, and 9604; 33 U.S.C. 1321 and 1361.

§ 302.4 [Amended]

2. In § 302.4, footnote d to Table 302.4 is revised to read as follows:

* * * * *

[d] Includes mono- and di-ethers of ethylene glycol, diethylene glycol, and triethylene glycol R-$(OCH_2CH_2)_n$-OR′

where:

n= 1, 2, or 3

R= alkyl C_7 or less, or phenyl or alkyl substituted phenyl

R′= H, or alkyl C_7 or less, or carboxylic acid ester, sulfate, phosphate, nitrate, or sulfonate.

[FR Doc. 99–323 Filed 1–11–99; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

Office of the Inspector General

42 CFR Parts 409, 410, 411, 412, 413, 419, 489, 498, and 1003

[HCFA–1005–2N]

RIN 0938–AI56

Medicare Program; Prospective Payment System for Hospital Outpatient Services; Extension of Comment Period

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice of extension of comment period for proposed rule.

SUMMARY: This document extends the comment period for the second time on a proposed rule published in the **Federal Register** on September 8, 1998, (63 FR 47552). In that rule, as required by sections 4521, 4522, and 4523 of the Balanced Budget Act of 1997, we proposed to eliminate the formula-driven overpayment for certain outpatient hospital services, extend reductions in payment for costs of hospital outpatient services, and establish in regulations a prospective payment system for hospital outpatient services (and for Medicare Part B services furnished to inpatients who have no Part A coverage.) The comment period is extended for 60 days.

DATES: The comment period is extended to 5 p.m. on March 9, 1999.

ADDRESSES: Mail written comments (one original and three copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: HCFA–1005–P, P.O. Box 26688, Baltimore, MD 21207–0488.

If you prefer, you may deliver your written comments (one original and three copies) to one of the following addresses: Room 443–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–09–26, Central Building, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code HCFA–1005–P. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 443–G of the Department's offices at 200 Independence Avenue, SW, Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

For comments that relate to information collection requirements, mail a copy of comments to: Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Allison Herron Eydt, HCFA Desk Officer.

FOR FURTHER INFORMATION CONTACT: Janet Wellham, (410) 786–4510.

SUPPLEMENTARY INFORMATION: On September 8, 1998, we issued a proposed rule in the **Federal Register** (63 FR 47552) that would do the following:

- Eliminate the formula-driven overpayment for certain outpatient hospital services;
- Extend reductions in payment for costs of hospital outpatient services;
- Establish in regulations a prospective payment system for hospital outpatient services, for partial hospitalization services furnished by community mental health centers, and for certain Medicare Part B services furnished to inpatients who have no Part A coverage;
- Propose new requirements for provider departments and provider-based entities;
- Implement section 9343(c) of the Omnibus Budget Reconciliation Act of 1986, which prohibits Medicare payment for nonphysician services furnished to a hospital outpatient by a provider or supplier other than a hospital unless the services are furnished under an arrangement with the hospital;
- Authorize the Department of Health and Human Services' Office of Inspector General to impose a civil money penalty against any individual or entity who knowingly presents a bill for non-physician or other bundled services not provided directly or under such an arrangement.

The comment period for the proposed rule closed on November 9, 1998. Because of the scope of the proposed rule, hospitals and numerous professional associations requested more time to analyze the potential consequences of the rule. Therefore, we published a notice on November 13, 1998 (63 FR 63429), which extended the comment period until January 8, 1999. Because of further requests from hospitals and professional associations, we are again extending the public comment period for an additional 60 days, until March 9, 1999.

Published elsewhere in this issue of the **Federal Register** is a document extending for an additional 60 days, the comment period for the proposed rule published in the June 12, 1998, **Federal Register** in which we propose to rebase Medicare payment rates and update the list of approved procedures for ambulatory surgical centers (ASCs) (63 FR 32290). We are extending the comment period for the June 12, 1998, ASC proposed rule to be concurrent with the extended comment period for the September 8, 1998, hospital outpatient proposed rule because Medicare payments to ASCs are closely linked to the manner in which Medicare proposes to pay hospitals under a prospective payment system for surgical services furnished on an outpatient basis.

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: January 4, 1999.

Nancy-Ann Min DeParle,

Administrator, Health Care Financing Administration.

Dated: January 6, 1999.

Donna E. Shalala,

Secretary.

[FR Doc. 99–641 Filed 1–8–99; 9:17 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 416 and 488

(HCFA–1885–4N)

RIN 0938–AH81

Medicare Program; Update of Ratesetting Methodology, Payment Rates, Payment Policies, and the List of Covered Procedures for Ambulatory Surgical Centers Effective October 1, 1998; Extension of Comment Period

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice of extension of comment period for proposed rule.

SUMMARY: This document extends the comment period for the fourth time on a proposed rule published in the **Federal Register** on June 12, 1998, (63 FR 32290). In that rule we proposed to make various changes, including changes to the ambulatory surgical center (ASC) payment methodology and the list of Medicare covered procedures. The comment period is extended for 60 days.

DATES: The comment period is extended to 5 p.m. on March 9, 1999.

ADDRESSES: Mail written comments (one original and three copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: HCFA–1885–P, P.O. Box 26688, Baltimore, MD 21207–0488.

If you prefer, you may deliver your written comments (one original and three copies) to one of the following addresses: Room 443–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–09–26, Central Building, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code HCFA–1885–P. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 443–G of the Department's offices at 200 Independence Avenue, SW, Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

For comments that relate to information collection requirements, mail a copy of comments to: Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Allison Herron Eydt, HCFA Desk Officer.

FOR FURTHER INFORMATION CONTACT: Terri Harris, (410) 786–6830.

SUPPLEMENTARY INFORMATION: On June 12, 1998, we issued a proposed rule in the **Federal Register** (63 FR 32290) that would do the following:

- Update the criteria for determining which surgical procedures can be appropriately and safely performed in an ASC.
- Make additions to and deletions from the current list of Medicare covered ASC procedures based on the revised criteria.
- Rebase the ASC payment rates using cost, charge, and utilization data collected by a 1994 survey of ASCs.
- Refine the ratesetting methodology that was implemented by a final notice published on February 8, 1990, in the **Federal Register**.
- Require that ASC payment, coverage, and wage index updates be implemented annually on January 1 rather than having these updates occur randomly throughout the year.
- Reduce regulatory burden.
- Make several technical policy changes.

The proposed rule would also implement requirements of section 1833(i)(1) and (2) of the Social Security Act. We indicated that comments would be considered if we received them by August 11, 1998.

We received requests from numerous ASCs and professional associations for more time to analyze the potential consequences of the rule. We issued a notice in the **Federal Register** on August 14, 1998, (63 FR 43655) announcing extension of the public comment period to September 10, 1998.

On September 8, 1998, we published a proposed rule in the **Federal Register** entitled ''Medicare Program; Prospective Payment System for Hospital Outpatient Services'' (63 FR 47552). We received additional requests from ASCs and professional associations for more time to analyze the impact of the hospital outpatient proposed rule, and for a delay in the implementation of the ASC final rule to be concurrent with implementation of the hospital outpatient prospective payment system.

On October 1, 1998, we reopened the comment period for the June 12, 1998, ASC proposed rule until November 9, 1998, to coincide with the comment period for the September 8, 1998, hospital outpatient proposed rule. We also gave notice in the October 1, 1998, **Federal Register** (63 FR 52663) of a delay in the adoption of the provisions of the June 12, 1998, ASC proposed rule as a final rule to be concurrent with the adoption as final of the hospital outpatient prospective payment system as soon as possible after January 1, 2000. In the November 13, 1998, **Federal Register** (63 FR 63430), we further extended the comment period until January 8, 1999.

Published elsewhere in this issue of the **Federal Register** is a document extending for an additional 60 days the comment period for the September 8, 1998, hospital outpatient proposed rule (63 FR 47552). Because Medicare payments to ASCs are closely linked to the way Medicare proposes to pay hospitals under a prospective payment system for surgical services furnished on an outpatient basis, we are extending the comment period for the June 12, 1998, ASC proposed rule for an additional 60 days to be concurrent with the extended comment period for the September 8, 1998, hospital outpatient proposed rule. The comment period will close at 5 p.m. on March 9, 1999.

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: January 4, 1999.

Nancy-Ann Min DeParle,

Administrator, Health Care Financing Administration.

Dated: January 6, 1999.

Donna E. Shalala,

Secretary.

[FR Doc. 99–640 Filed 1–8–99; 9:17 am]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 25

[ET Docket No. 98–206, FCC 98–310]

Fixed Satellite Service and Terrestrial System in the Ku-Band

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This Notice of Proposed Rulemaking (''*NPRM*'') proposes to establish non-geostationary satellite orbit (''NGSO'') fixed satellite service (''FSS'') operations which could provide global broadband wireless services. This *NPRM* seeks to develop appropriate spectrum sharing criteria to allow the proposed NGSO FSS operations in the Ku band without interfering with incumbent operations. If appropriate sharing criteria are adopted, NGSO FSS operations could increase spectrum usage, provide a wide variety of broadband wireless services and increase competition within the satellite service industry. The *NPRM* also seeks to develop a more extensive record regarding the ability of terrestrial based service that would retransmit local television signals and provide one-way data services to direct broadcast satellite (''DBS'') subscribers in the 12.2–12.7 GHz band.

DATES: Comments are due February 16, 1999, reply comments are due March 15, 1999. Written comments by the public on the proposed and/or modified information collections are due March 15, 1999. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before March 15, 1999.

ADDRESSES: All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room C–1804, 445 Twelfth Street, S.W., Washington, DC 20554 or via internet to jboely@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or via the internet to fain__t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: Tom Derenge, Office of Engineering and Technology, (202) 418–2451. For additional information or copies of the information collections contact Judy Boley at (202) 418–0214 or via internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rule Making*, ET Docket 98–206, FCC 98–310, adopted November 19, 1998, and released November 24, 1998. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY-C404), 445 Twelfth Street, S.W., Washington, D.C., and also may be purchased from the Commission's duplication contractor, International Transcription Service, (202) 857–3800, 1231 20th Street, N.W. Washington, D.C. 20036. This Notice of Proposed Rulemaking contains proposed or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA). It has been submitted to the Office of Management and Budget (OMB) for review under the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed or modified information collections contained in this proceeding.

Summary of the Notice of Proposed Rulemaking

1. The Commission takes this action in response to two Petitions for Rulemaking filed on July 3, 1997 and March 6, 1998, by SkyBridge L.L.C. (''SkyBridge'')(RM–9147) and Northpoint Technology (''Northpoint'') (RM–9245), respectively. Additionally, the *NPRM* considers changes to the International Radio Regulations contained in the Final Acts of the 1997 World Radiocommunication Conference (''Final Acts of WRC–97''), Geneva, 1997.

2. *Skybridge Petition.* SkyBridge requests that the Commission amend its rules to permit non-geostationary satellite orbit (''NGSO'') fixed satellite service (''FSS'') systems to operate in the United States (''U.S.'') in the 10.7–12.7 GHz band for NGSO space-to-earth links (''downlinks'') (a total of 2 gigahertz) and in the 12.75–13.25 GHz, 13.75–14.5 GHz, and 17.3–17.8 GHz bands for NGSO earth-to-space links (''uplinks'') (a total of 1.75 gigahertz). The requested downlink bands are generally used by geostationary-satellite orbit (''GSO'') FSS, DBS and fixed services. The requested appliance bands are generally used by GSO FSS operations, fixed services, mobile services, and Government operations. SkyBridge proposes technical criteria which it claims would protect GSO satellite and terrestrial operations in these bands from unacceptable interference from NGSO FSS systems. SkyBridge contends that its system would provide high-speed Internet and on-line access services, video conferencing and telephony, entertainment services, interactive video on demand, and a variety of substitutes for terrestrial infrastructure links.

3. *WRC–97/2000.* To promote spectrum sharing between NGSO systems and other services, WRC–97 adopted spectrum sharing criteria for NGSO systems in the Ku and Ka-bands (see *Notice* at paragraphs 4–6 for an explanation). However, because the studies justifying the WRC–97 action had not gone through the typical International Telecommunications Union (''ITU'') study group process for validation, several components of the spectrum sharing criteria are deemed provisional, or are subject to review and possible modification at WRC–2000 to determine whether they adequately protect incumbent operations. Currently, Joint Task Group (''JTG'') 4–9–11, in which the U.S. participates, is conducting technical analyses of NGSO FSS sharing issues in preparation for WRC–2000.

4. *Northpoint Petition.* Northpoint proposes to provide terrestrial retransmission of local television signals and provide one-way data services to DBS receivers in the 12.2–12.7 GHz band on a secondary basis. Northpoint states that its proposal would allow DBS subscribers to receive local television programming and one-way data services with minimal additional equipment and thus would permit the DBS service to compete more fully with cable television services. Because Northpoint is requesting that its technology be permitted to operate in some of the same spectrum requested by SkyBridge, we are addressing both petitions in this proceeding.

5. The *NPRM* proposes to allow NGSO FSS downlink operations on a co-

primary basis in the 10.7–12.7 GHz band, and allow NGSO FSS appliance operations on a co-primary basis in the 12.75–13.25 GHz and 13.8–14.5 GHz bands. The *NPRM* does not propose to allow NGSO FSS appliance operations in the 13.75–13.8 GHz band due to potential interference with Government operations and in the 17.3–17.8 GHz band because of a conflict with use of this band for broadcasting satellite services (''BSS'') and radiolocation services. The *NPRM* proposes to use the WRC–97 power flux density (''pfd'') limits for sharing with the terrestrial fixed services and seeks comment on the WRC–97 spectrum sharing criteria (*e.g.*, accumulative pfd (''apfd'') and effective pfd (''epfd'') limits and off-axis eirp limits) for sharing with other services. The *NPRM* requests further analysis regarding the adequacy of the WRC–97 limits, including the impacts of multiple NGSO FSS systems, as well as alternative proposals to enable NGSO FSS operations in these frequency bands. The *NPRM* also proposes to adopt coordination requirements and other procedures to facilitate NGSO FSS sharing with incumbent services. Further, the *NPRM* proposes to implement the WRC–97 allocation of the 12.2–12.7 GHz band to the FSS, and proposes initial licensing and service rules for NGSO FSS.

6. The *NPRM* does not propose to adopt Northpoint's suggested use of the 12.2–12.7 GHz band, but seeks to develop a more thorough record to determine the spectrum sharing feasibility of its proposed system. Specifically, the *NPRM* requests further analysis regarding Northpoint's ability to operate in the DBS band without causing harmful degradation of DBS service to customers. Further, the *NPRM* asks whether the SkyBridge and Northpoint proposals could both share spectrum with DBS and, if not, whether the band should be segmented to accommodate both proposed services (assuming sharing is feasible).

7. We note that there are other proceedings which could influence the spectrum bands requested by these two petitions. Specifically, on April 1, 1998, OpTel, Inc. (OpTel), an operator of private cable systems, filed a Petition for Rulemaking (RM–9257) with the Commission to amend parts 78 and 101 of the Commission's rules to allow licensees in the fixed microwave service to use frequencies in the 12.7–13.25 GHz band to transmit video programming material to end users. Additionally, the Commission has initiated a proceeding to consider the carriage of digital broadcast television signals over the cable TV infrastructure which may create capacity demands on the CARS frequencies. The *NPRM* requests comment on whether these proceedings would conflict with potential NGSO FSS operations in the 12.75–13.25 GHz band.

Initial Regulatory Flexibility Analysis

8. As required by the Regulatory Flexibility Act (''RFA''),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (''IRFA'') of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (''*NPRM*''). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* provided above. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. 603(a). In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

Need for, and Objectives of, the Proposed Rules

9. We undertake this proceeding to address the spectrum sharing issues presented by SkyBridge's and Northpoint's proposed use of spectrum in the Ku-band frequency range. These proposals could increase competition and provide new advanced services to the public. Specifically, SkyBridge's proposal could provide new high-speed data services and offer additional competition to other satellite services, and terrestrial wireless and wireline services. Similarly, Northpoint's proposal could provide local video and new data services and facilitate competition to cable television systems. There is, however, extensive use of the requested frequency bands in the U.S. and these incumbent operations provide important and valuable services to the public. While we desire to promote competition and innovation by allowing for new services or additional spectrum use, we also need to consider the competing interests of the incumbent services in these bands.

10. Therefore, we propose to permit non-geostationary satellite orbit (''NGSO'') fixed-satellite service (''FSS'') operations[2] in certain segments of the Ku-band[3] and propose rules and policies to govern such operations. We also propose or ask for comment on technical criteria to ensure that such NGSO FSS operations do not cause harmful interference to existing users or do not unduly constrain future growth of incumbent services. Specifically, we ask whether the spectrum sharing criteria developed at the 1997 International Telecommunication Union (''ITU'') World Radiocommunication Conference (''WRC–97'')[4] are adequate to permit NGSO FSS operations in various segments of the Ku-band or whether other criteria are needed to protect incumbent users. In addition, we ask for comment on a proposal to permit terrestrial use of the 12.2–12.7 GHz band for the retransmission of local television and provision of one-way data services by direct broadcast satellite (''DBS'') service operators and their affiliates.

Legal Basis

11. The proposed action is authorized under sections 4(i), 7(a), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157(a), 303(c), 303(f), 303(g), and 303(r).

Description and Estimate of the Number of Small Entities To Which the Proposed Rules May Apply

12. Skybridge has requested that the Commission amend Parts 2 and 25 of its rules to permit NGSO FSS systems to operate in the United States (''U.S.'') in the 10.7–12.7 GHz band for NGSO space-to-earth links (''downlinks'') (a total of 2 gigahertz) and in the 12.75–13.25 GHz, 13.75–14.5 GHz, and 17.3–17.8 GHz bands for NGSO earth-to-space links (''uplinks'') (a total of 1.75 gigahertz). The requested downlink bands are generally used by

[1] See 5 U.S.C. 603. The RFA, see, 5 U.S.C. 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Public Law 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] NGSO satellite systems, such as proposed by SkyBridge, are characterized by a constellation of satellites continuously orbiting the earth, rather than appearing to remain stationary relative to a user as a geostationary satellite does. NGSO satellites operate at lower altitudes and therefore appear to move from horizon to horizon. As the NGSO satellites move through their orbit, they transmit to and receive from earth stations that are in view of the satellite. Geostationary satellites orbit 22,300 miles above the Earth in the plane of the Earth's equator. At this altitude, the geostationary satellite's position appears fixed relative to an observer on the Earth.

[3] The Ku-band generally refers to frequencies within the 12 GHz to 18 GHz range. The specific bands subject to this proceeding are the 10.7–12.7 GHz, 12.75–13.25 GHz, 13.75–14.5 GHz, and 17.3–17.8 GHz bands. For the purposes of this proceeding, we use the term ''Ku-band'' to refer generally to all of the frequency bands listed above that are under consideration in this proceeding.

[4] *See Final Acts of the 1997 World Radiocommunication Conference (''Final Acts of WRC–97''*); Article S21, Article S22, Resolution 130, Resolution 131, Resolution 538 (Geneva, 1997).

geostationary-satellite orbit (''GSO'') FSS, DBS and fixed services. The requested appliance bands are used by GSO FSS operations, fixed services, mobile services, and Government operations.

13. The RFA generally defines the term ''small entity '' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [5] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[6] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (''SBA'').[7] A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' [8]

14. Regarding incumbent cable television operations in the 12.75–13.25 GHz band, the SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,788 total cable and other pay television services and 1,423 had less than $11 million in revenue.

15. The Communications Act also contains a definition of a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450. We do not request nor do we collect information concerning whether cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, and thus are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

16. Regarding incumbent DBS operations in the 12.2–12.7 GHz band, because DBS provides subscription services, DBS falls within the SBA definition of Cable and Other Pay Television Services (SIC 4841). This definition provides that a small entity is expressed as one with $11.0 million or less in annual receipts. As of December 1996, there were eight DBS licensees. However, the Commission does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. Although DBS service requires a great investment of capital for operation, we acknowledge that there are several new entrants in this field that may not yet have generated more than $11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

17. Regarding incumbent GSO FSS satellite use and the proposed NGSO FSS use in these requested bands, the Commission has not developed a definition of small entities applicable to geostationary or non-geostationary orbit fixed-satellite service applicants or licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to Communications Services, Not Elsewhere Classified. This definition provides that a small entity is one with $11.0 million or less in annual receipts.[9] According to Census Bureau data, there are 848 firms that fall under the category of Communications Services, Not Elsewhere Classified which could potentially fall into the geostationary or non-geostationary orbit fixed-satellite service category. Of those, approximately 775 reported annual receipts of $11 million or less and qualify as small entities.[10] Generally, these NGSO and GSO FSS systems cost several millions of dollars to construct and operate. Therefore the NGSO and GSO FSS companies, or their parent companies, rarely qualify under this definition as a small entity.

18. Regarding Auxiliary, Special Broadcast and other program distribution services in the Ku-band. This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radio broadcasting stations (SIC 4832) and television broadcasting stations (SIC 4833). These definitions provide, respectively, that a small entity is one with either $5.0 million or less in annual receipts or $10.5 million in annual receipts. 13 CFR 121.201, SIC CODES 4832 and 4833. There are currently 2,720 FM translators and boosters, 4,952 TV translators. The FCC does not collect financial information on any broadcast facility and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe, however, that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business (as noted, either $5 million for a radio station or $10.5 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a ''small business concern'' because they are not independently owned and operated.

19. Incumbent microwave services in the 10.7–11.7 GHz and 12.75–13.25 GHz bands, include common carrier, private operational fixed, and broadcast auxiliary radio services. At present, there are 22,015 common carrier licensees, approximately 61,670 private

[5] Id. § 601(6).

[6] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' 5 U.S.C. 601(3).

[7] Small Business Act, 15 U.S.C. 632 (1996).

[8] 5 U.S.C. 601(4).

[9] 13 CFR 121.201, Standard Industrial Classification (SIC) Code 4899.

[10] U.S. Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, Utilities, UC92–S–1, Subject Series, Establishment and Firm Size, Table 2D, Employment Size of Firms: 1992, SIC Code 4899 (issued May 1995).

operational fixed licensees and broadcast auxiliary radio licensees in the microwave services. Inasmuch as the Commission has not yet defined a small business with respect to microwave services, we will utilize the SBA's definition applicable to radiotelephone companies—i.e., an entity with no more than 1,500 persons. 13 CFR 121.201, SIC CODE 4812. We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

20. We propose to apply the part 25 rules governing reporting requirements for FSS systems. Specifically, licensees are required to file an annual report with the Commission describing: the status of satellite construction and anticipated launch dates, including any major delays or problems encountered; a listing of any unscheduled satellite outages for more than 30 minutes including the cause(s) of any such outages; and a detailed description of the utilization made of each satellite on each of the in-orbit satellites.

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

21. We propose to adopt or seek comment on adequate spectrum sharing criteria to minimize the potential for interference of these new NGSO FSS operations on incumbent operations, many of which qualify as small entities. Further, to promote system growth for the fixed microwave service (which includes most of the small entities under consideration in this proceeding), we are proposing to establish exclusion areas around the top 50 cities in the U.S. which would not permit NGSO earth stations to construct in these areas for several years. This proposal should permit fixed service small entities some level of assurance that future fixed links could be established without hinderance from NGSO FSS earth stations. We request comment on other alternatives that could minimize the impact of this action on small entities.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

22. None.

23. The Commission's Office of Public Affairs, Reference Operations Division will send a copy of this *NPRM* to the Chief Counsel for Advocacy of the Small Business Administration.

24. Paperwork Reduction Act. This Notice of Proposed Rulemaking contains either a proposed or modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Notice of Proposed Rulemaking, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due at the same time as other comments on the NPRM; OMB comments are due March 15, 1999. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Control Number: N.A.

Title: Fixed Satellite Service and NGSO Sharing in Ku-Band.

Form No.: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 5.

Estimated time per response: 22 hours.

Total Annual Burden: 110 hours.

Total Annual Cost: This includes the charges for hiring an attorney, legal assistant, or engineer at $150 an hour to complete the submissions. The estimated average time to complete space station submissions is 20 hours per response. Based on the assumption that applicants will hire outside counsel at an approximate cost of $150 per hour, it is estimated that the cost per submission will be $3,300.00.

Needs and Uses: In accordance with the Communications Act, the information collected will be used by the Commission in evaluating applications requesting authority to operate pursuant to part 25 of the Commission's rules. The information will be used to determine the legal, technical, and financial ability of the applicants and will assist the Commission in determining whether grant of such authorizations are in the public interest.

List of Subjects

47 CFR Part 2

Communications equipment, Radio.

47 CFR Part 25

Communications equipment, Radio, Satellites.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 99–578 Filed 1–11–99; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 171

[Docket No. RSPA–98–4943 (HM–225B)]

RIN 2137–AD31

Hazardous Materials: Authorization for the Continued Manufacture of Certain MC 331 Cargo Tanks

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes to extend from March 1, 1999 to July 1, 1999, the period for continued manufacture of MC 331 cargo tanks without certification and demonstrated performance of the emergency discharge control system. The intent of this NPRM is to provide for the uninterrupted production of specification MC 331 cargo tanks used in the transportation of propane, anhydrous ammonia and other liquefied compressed gases.

DATES: Comments must be received on or before February 11, 1999.

ADDRESSES: Address written comments to the Dockets Management System, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW, Washington, DC 20590–0001. Identify the docket number RSPA–98–4943 at the beginning of the comments and submit two copies. If you want to receive confirmation of receipt of your comments, include a self-addressed, stamped postcard. Comments also may be submitted by e-mail to *rules@rspa.dot.gov*.

Dockets Management System is located on the Plaza Level of the Nassif Building at the Department of Transportation at the above address. You can review public dockets there between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday, except

Federal holidays. In addition, you can review comments by accessing the docket management system through the DOT home page *(http://dms.dot.gov)*.

FOR FURTHER INFORMATION CONTACT: Jennifer Karim or Susan Gorsky, Office of Hazardous Materials Standards, Research and Special Programs Administration (202) 366–8553.

SUPPLEMENTARY INFORMATION: On February 19, 1997, under Docket No. RSPA–97–2133 (HM–225) (62 FR 7638), the Research and Special Programs Administration (RSPA, ''we'') issued an emergency interim final rule to specify the conditions under which MC 330 and MC 331 cargo tank motor vehicles could continue to operate while RSPA and the industry addressed operational problems related to the cargo tank emergency discharge control system. A final rule extending and revising the provisions of the emergency interim final rule was issued on August 18, 1997 (62 FR 44038). The August 18 final rule included a provision permitting continued manufacture of MC 331 cargo tanks without certification and demonstrated performance of the emergency discharge control system until March 1, 1999.

We issued a final rule responding to petitions for reconsideration and clarifying certain provisions of the August 18 final rule on December 10, 1997 (62 FR 65187). In this rule, RSPA extended the expiration date of certain provisions of the rule from March 1, 1999 to July 1, 1999. This change was based on a request from Farmland Industries, Inc. and The Fertilizer Institute asking that the agency allow a four-month extension of the expiration date to July 1, 1999, to avoid expiration of the requirements at the beginning of the fertilizer industry's peak delivery season.

A provision in the August 18, 1997 final rule permits, until March 1, 1999, a new cargo tank motor vehicle to be marked and certified as conforming to specification MC 331 without certification and demonstrated performance of the emergency discharge control system. RSPA did not change the date for this provision in the December 10, 1997 final rule because it was not requested by petitioners and we did not anticipate a need to extend the date at that time. RSPA has subsequently established a negotiated rulemaking committee (the Committee) which is developing alternative safety standards for unloading liquefied compressed gases to replace those standards which expire on July 1, 1999. The work of the Committee is expected to extend beyond March 1, 1999. Therefore, we believe there is a need to extend the March 1, 1999 date until July 1, 1999, consistent with the expiration of the final rule, and are proposing to extend the date in this document. During its December 1–2, 1998 meeting, the Committee agreed that we should propose this change.

Regulatory Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and was not reviewed by the Office of Management and Budget. The rule is not considered significant under the regulatory policies and procedures of the Department of Transportation (44 FR 11034).

RSPA did not prepare a regulatory evaluation for this NPRM addressing the issue of extending the expiration date of the rule. However, a final regulatory evaluation was prepared in support of the final rule published on December 10, 1997. The final regulatory evaluation is available for review in that public docket.

Executive Order 12612

This proposed rule has been analyzed according to the principles and criteria contained in Executive Order 12612 (''Federalism''). The Federal hazardous materials transportation law (49 U.S.C. 5101—5127) contains an express preemption provision that preempts State, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

(A) The designation, description, and classification of hazardous materials;

(B) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

(C) The preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements relating to the number, content, and placement of such documents;

(D) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials; or

(E) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials.

Title 49 U.S.C. 5125(b)(2) provides that DOT must determine and publish in the **Federal Register** the effective date of Federal preemption. That effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. RSPA solicits comments on whether the proposed rule would have any effect on State, local or Indian tribe requirements and, if so, the most appropriate effective date of Federal preemption. We have determined that this proposed rule does not have sufficient Federalism impacts to warrant the preparation of a federalism assessment.

Executive Order 13084

The revised regulation evolving from this NPRM will not significantly or uniquely affect the communities of Indian tribal governments when analyzed under the principles and criteria contained in Executive Order (''Consultation and Coordination with Indian Tribal Government''). Therefore, the funding and consultation requirements of this Executive Order would not apply. Nevertheless, this NPRM specifically requests comments from affected persons, including Indian tribal governments, as to its potential impact.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), RSPA must consider whether a notice of proposed rulemaking would have a significant economic impact on a substantial number of small entities. This rule proposes only to extend the expiration date of the current rule from March 1, 1999 to July 1, 1999. Therefore, I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, no person is required to respond to a collection of information unless it displays a valid OMB control number. This NPRM does not propose any new information collection requirements.

Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Unfunded Mandates Reform Act

This proposed rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of

1995. It does not result in costs of $100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

Impact on Business Processes and Computer Systems

Many computers that use two digits to keep track of dates will, on January 1, 2000, recognize ''double zero'' not as 2000 but as 1900. This glitch, the Year 2000 problem, could cause computers to stop running or to start generating erroneous data. The Year 2000 problem poses a threat to the global economy in which Americans live and work. With the help of the President's Council on Year 2000 Conversion, Federal agencies are reaching out to increase awareness of the problem and to offer support. We do not want to impose new requirements that would mandate business process changes when the resources necessary to implement those requirements would otherwise be applied to the Year 2000 problem.

This NPRM does not impose business process changes or require modifications to computer systems. Because this NPRM does not affect organizations' ability to respond to the Year 2000 problem, we do not intend to delay the effectiveness of the proposed requirements in this NPRM.

List of Subjects in 49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR Part 171 would be amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for Part 171 would continue to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 171.5 [Amended]

2. In § 171.5, in paragraph (a)(3), the date ''March 1, 1999'' would be revised to read ''July 1, 1999''.

Issued in Washington, DC, on January 6, 1999, under authority delegated in 49 CFR part 106.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 99–623 Filed 1–11–99; 8:45 am]

BILLING CODE: 4910–60–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 230

[FRA Docket No. RSSL–98–2, Notice No. 2]

Inspection and Maintenance Standards for Steam Locomotives; Proposed Revisions

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of public hearing.

SUMMARY: By notice of proposed rulemaking (NPRM) published on September 25, 1998 (63 FR 51404), FRA proposed revisions to the regulations governing steam locomotive inspections and maintenance. In that proposed rule, FRA announced that it did not intend to schedule a public hearing regarding this proposal absent a specific request to do so. During the period for written comments, FRA received several requests for a public hearing to address issues raised by this proposal. FRA now intends to hold a public hearing to provide interested parties the opportunity to comment on the proposed revisions contained in the NPRM. This document announces the public hearing.

DATES: A public hearing will be held at 9:00 a.m. February 4, 1999.

ADDRESSES: (1) *Public Hearing:* A hearing to provide interested parties the opportunity to comment on the proposed revisions contained in the NPRM will be held at the following location: The Omni Marina Hotel, 707 North Shoreline Boulevard, Corpus Christi, Texas 78401 (512) 882–1700

(2) *Docket Clerk:* Written notification should identify the docket number and be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, RCC–10, 400 Seventh Street, Stop 10, SW, Washington, DC 20590 (202) 493–6030.

FOR FURTHER INFORMATION CONTACT: John Megary, Regional Administrator, Federal Railroad Administration, 8701 Beford-Euless Road, Suite 425, Hurst, TX 76053 (telephone 817–284–8142); George Scerbo, Motive Power & Equipment Specialist, Federal Railroad Administration, (telephone 202–493–6249); or Paul F. Byrnes, Trial Attorney, Office of the Chief Counsel, Federal Railroad Administration, 400 Seventh Street, SW, Stop 10, Washington, DC 20950 (telephone 202–493–6032).

SUPPLEMENTARY INFORMATION:

Public Participation Procedures

Any person wishing to participate in the public hearing should notify the Docket Clerk by mail or telephone at least five working days prior to the date of the hearing or conference. The notification should identify the party the person represents, and the particular subject(s) the person plans to address. The notification should also provide the Docket Clerk with the participant's mailing address.

Issued in Washington, DC, on January 6, 1999.

Grady C. Cothen,

Deputy Associate Administrator For Safety And Program Development.

[FR Doc. 99–677 Filed 1–11–99; 8:45 am]

BILLING CODE 4910–06–P

Notices

Federal Register

Vol. 64, No. 7

Tuesday, January 12, 1999

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 Cargil, Inc., of Wayzata, Minnesota, an exclusive license to Patent No. 5,710,099 issued January 20, 1998, and divisional application 08/887,679, filed July 3, 1997 which will issue as Patent No. 5,854,178 on December 29, 1998, both entitled ''Bioactive Compounds.'' Notice of availability was published in the **Federal Register** on July 18, 1996.

DATES: Comments must be received on or before March 15, 1999.

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 Cargil, 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. 99–619 Filed 1–11–99; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

National Drought Policy Commission

AGENCY: Farm Service Agency, USDA.

ACTION: Notice of establishment; request for nominations and comments.

SUMMARY: The Department of Agriculture (USDA) will provide administrative support for the National Drought Policy Commission (Commission) established by Pub. L. 105–199, signed by the President on July 16, 1998. The Charter for the Commission became effective on January 4, 1999. The purpose of the Commission is to provide advice and recommendations on the creation of an integrated, coordinated Federal policy designed to prepare for and respond to serious drought emergencies. This document solicits nominations of individuals to be considered for selection as Commission members. Comments are requested on categories of membership and duties of the Commission.

DATES: Written nominations must be received on or before February 11, 1999.

ADDRESSES: Nominations should be sent to Leona Dittus, Executive Director, National Drought Policy Commission, USDA, Farm Service Agency, 1400 Independence Avenue, SW, Room 6701 South Building, STOP 0501, Washington, DC 20250–0501.

FOR FURTHER INFORMATION CONTACT: Leona Dittus, telephone (202) 720–3168.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Secretary of Agriculture has chartered the National Drought Policy Commission, hereafter referred to as the Commission. The purpose of the Commission is to provide advice and recommendations on the creation of an integrated, coordinated Federal policy designed to prepare for and respond to serious drought emergencies. On the basis of a thorough study, the Commission shall submit a report to the President and Congress with regard to national drought policy.

The Secretary of Agriculture, or his designee, will be Chairperson of the Commission. The Vice Chairperson will act in his/her stead. The Commission will select the Vice Chairperson from among the members who are not Federal officers or employees. The Commission shall be composed of 16 members. The members of the Commission shall include: (A) the Secretary of Agriculture, or the designee of the Secretary, who shall chair the Commission; (B) the Secretary of the Interior, or the designee of the Secretary; (C) the Secretary of the Army, or the designee of the Secretary; (D) the Secretary of Commerce, or the designee of the Secretary; (E) the Director of the Federal Emergency Management Agency, or the designee of the Director; (F) the Administrator of the Small Business Administration, or the designee of the Administrator; (G) two persons nominated by the National Governors' Association and appointed by the President, of whom (i) one shall be the Governor of a State east of the Mississippi River; and (ii) one shall be the Governor of a State west of the Mississippi River; (H) a person nominated by the National Association of Counties and appointed by the President; (I) a person nominated by the United States Conference of Mayors and appointed by the President; and (J) six persons, appointed by the Secretary of Agriculture in coordination with the Secretary of the Interior and the Secretary of the Army, who shall be representative of groups acutely affected by drought emergencies, such as the agricultural production community, the credit community, rural and urban water associations, Native Americans, and fishing and environmental interests.

The Secretary of Agriculture invites those individuals, organizations and groups acutely affected by drought emergencies to nominate individuals for membership to the Commission. Nominations should describe and document the proposed member's qualifications for membership to the Commission. The Secretary seeks a diverse group of members representing a broad spectrum of persons interested in national drought policy.

Individuals receiving nominations will be contacted and biographical information must be completed and

returned to USDA within 5 working days of its receipt, to expedite the clearance process that is required before selection by the Secretary of Agriculture.

Equal opportunity practices will be followed in all appointments to the Commission in accordance with USDA policies. To ensure that the recommendations of the Commission have taken into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

Signed at Washington, DC, on January 6, 1999.

Parks Shackelford,

Acting Administrator, Farm Service Agency.

[FR Doc. 99–651 Filed 1–11–99; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Cascade Point Access Road EIS (R10–MB–368) Record of Decision, USDA Forest Service, Tongass National Forest, Juneau Ranger District

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: The USDA Forest Service, Tongass National Forest, Juneau Ranger District, has re-issued the Record of Decision for the Cascade Point Access Road Final Environmental Impact Statement (EIS). Based on the analysis in the Final Environmental Impact Statement, John Sherrod, Acting Chatham Area Assistant Forest Supervisor, selected Alternative B—the Proposed Action, which authorizes issuance of a road easement to Goldbelt, Inc., with the following modifications:

1. Signs will be posted along the access road delineating National Forest System land from private land.

2. The access road will be open to public vehicular traffic upon completion of certain facilities at Cascade Point and when development activities do not create hazards to public safety.

3. A parking turnout will be constructed adjacent to the road on National Forest System land where public land extends to the beach.

4. A qualified archaeologist will be on-site during ground disturbing activities associated with construction to actively monitor for cultural resources.

The previous Record of Decision was signed on March 10, 1998 and subsequently withdrawn on July 13, 1998 pending review of documentation supporting the decision.

DATES: Implementation of decisions subject to appeal pursuant to 36 CFR part 215, may occur on, but not before, five (5) business days from the close of the appeal filing period. The appeal filing period for this decision closes 45 days after publication of legal notice of the decision in the Juneau Empire newspaper published in Juneau, Alaska. The legal notice is expected to be published in the Juneau Empire on January 8, 1999.

ADDRESS: This decision is subject to administrative review (appeal) pursuant to 36 CFR Part 215. A written notice of appeal must be filed with the Appeal Deciding Officer: James Caplan, Acting Regional Forester, Regional Office, P.O. Box 21628, Juneau, AK 99802.

For further information or a copy of the Cascade Point Access Road Record of Decision or Final Environmental Impact Statement contact: Jennette de Leeuw, USDA Forest Service, Juneau Ranger District, 8465 Old Dairy Road, Juneau, AK 99801, (907) 790–7445; email jdeleeuw/r10@fs.fed.us.

Dated: December 29, 1998.

John C. Sherrod,

Acting Assistant Forest Supervisor.

[FR Doc. 99–612 Filed 1–11–99; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

John Day/Snake Resource Advisory Council, Hells Canyon Subgroup

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Hells Canyon Subgroup of the John Day/Snake Resource Advisory Council will meet on February 5 and 6, 1999 at the Nez Perce Tribal Offices located in Lapwai, Idaho.

The meeting will begin at 9:00 a.m. and continue until 5:00 p.m. the first day and will begin at 7:30 a.m. and continue until 12:00 p.m. on the second day. Agenda items to be covered include: (1) Consensus Process; (2) Conflict of Interest discussion; (3) Budget; (4) Endangered Species Act; (5) tour of the Clarkston facility; (6) Quorum resolution; (7) Treaty Rights; (8) Open public forum. All meetings are open to the public. Public comments will be received at 1:00 p.m. on February 5.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Kendall Clark, Area Ranger, USDA, Hells Canyon National Recreation Area, 88401 Highway 82, Enterprise, OR 97828, 541–426–5501.

Dated: January 4, 1999.

Kendall Clark,

Area Ranger.

[FR Doc. 99–613 Filed 1–11–99; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Klamath Provincial Advisory Committee (PAC); Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Klamath Provincial Advisory Committee will meet on January 14–15, 1999, at the Miner's Inn Convention Center, 122 East Miner, Yreka, California. On Thursday, January 14, the PAC will meet from 9:00 a.m. to 4:45 p.m. On Friday, January 15, the meeting will start at 8:00 a.m. and adjourn at 12:15 p.m. Agenda items for the meeting include: (1) Timber Sale Project Decision-making Process; (2) January 1997 Storm Damage Report/ Update; (3) Fuels Analysis Update; (4) Subcommittee Reports; and (5) Public Comment Periods. All PAC meetings are open to the public. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT: Connie Hendryx, USDA, Klamath National Forest, 1312 Fairlane Road, Yreka, California 96097; telephone 530–841–4468 (voice), TDD 530–841–4573.

Dated: January 5, 1999.

Jan Ford,

Klamath PAC Support Staff.

[FR Doc. 99–620 Filed 1–11–99; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Availability of Record of Decision for the Double Creek Watershed Project in Washington and Osage Counties, Oklahoma

AGENCY: Natural Resources Conservation Service (NRCS) in Oklahoma. U.S. Department of Agriculture.

ACTION: Notice of Availability of Record of Decision.

SUMMARY: Ronnie L. Clark, responsible Federal official for projects

administered under the provisions of Pub. L. 83–566, 16 U.S.C. 1001–1008, in the State of Oklahoma, is hereby providing notification that a record of decision to proceed with the installation of the Double Creek Watershed project is available. Single copies of this record of decision may be obtained from Bob Tillman, Geologist, Water Resources Section, Natural Resources Conservation Service, 100 USDA, Suite 203, Stillwater, Oklahoma, 74074, telephone (405) 742–1223.

SUPPLEMENTARY INFORMATION: 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.

Dated: December 1, 1998.

Ronnie L. Clark,

State Conservationist, Oklahoma.

[FR Doc. 99–618 Filed 1–11–99; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Proposed Changes to Section IV of the Field Office Technical Guide (FOTG) of the Natural Resources Conservation Service in Oklahoma

AGENCY: Natural Resources Conservation Service (NRCS) in Oklahoma, U.S. Department of Agriculture.

ACTION: Notice of availability of a proposed change in Section IV of the FOTG of the NRCS in Oklahoma for review and comment.

SUMMARY: It is the intention of NRCS in Oklahoma to issue a new conservation practice standard in Section IV of the FOTG. The new standard is Alley Cropping (Code 311). This practice may be used in conservation systems that treat highly erodible land.

DATES: Comments will be received for a 30-day period commencing with this date of publication.

FOR FURTHER INFORMATION CONTACT: Inquire in writing to Keith Vaughan, State Resource Conservationist, Natural Resources Conservation Service (NRCS), 100 USDA, Suite 203, Stillwater, OK 74074–2655. Copies of these standards will be made available upon written request. You may submit electronic requests and comments to Keith.Vaughan@ok.usda.gov

FOR FURTHER INFORMATION CONTACT: Keith Vaughan, 405–742–1240.

SUPPLEMENTARY INFORMATION: Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 states that revisions made after enactment of the law, to NRCS state technical guides used to carry out highly erodible land and wetland provisions of the law, shall be made available for public review and comment. For the next 30 days, the NRCS in Oklahoma will receive comments relative to the proposed change. Following that period, a determination will be made by the NRCS in Oklahoma regarding disposition of those comments and a final determination of change will be made.

Dated: December 18, 1998.

Ronnie L. Clark,

State Conservationist, Stillwater, Oklahoma

[FR Doc. 99–617 Filed 1–11–99; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Notice of Government Owned Invention Available for Licensing

SUMMARY: The inventions listed below are owned in whole or in part by the U.S. Government, as represented by the Department of Commerce. The Department of Commerce's ownership interest in the inventions is available for licensing in accordance with 35 U.S.C. 207 and 37 CFR Part 404 to achieve expeditious commercialization of results of Federally funded research and development.

FOR FURTHER INFORMATION CONTACT: Technical and licensing information on these inventions may be obtained by writing to: National Institute of Standards and Technology, Office of Technology Partnerships, 100 Bureau Drive, Stop 2200, Gaithersburg, MD 20899–2200; Fax 301–869–2751. Any request for information should include the NIST Docket No. and Title for the relevant invention as indicated below.

SUPPLEMENTARY INFORMATION: NIST may enter into a Cooperative Research and Development Agreement (''CRADA'') with the licensee to perform further research on the invention for purpose of commercialization. The inventions available for licensing are:

NIST Docket Number: 91–029US.

Title: X-ray Moire Microscope.

Abstract: An x-ray microscope having an incident x-ray beam from an x-ray source, a first crystal element extending at an angle (Beta) across the path of the incident x-ray beam, a second crystal element extending parallel to the first crystal element and in spaced relationship thereto, a sample in spaced relationship to the second crystal element and downstream thereof relative to the incident x-ray beam, the first and second crystal elements being movable relative to each other and to the incident x-ray beam so that the orientation of atoms in the second crystal element do not match the orientation of atoms in the first crystal element to produce a forward incident x-ray beam in the direction of the original beam and a diffracted x-ray beam at an angle relative to the incident x-ray beam, the forward and diffracted beams being directed onto the sample, a forward transmitted detector for receiving the forward transmitted incident x-ray beam and a transmitted diffracted x-ray detector for receiving the diffracted x-ray beam. Aperture elements may be provided in front of the detectors for controlling the forward and diffracted beams incident on the detectors.

NIST Docket Number: 96–023US.

Title: Process for Destroying Halogenated Compounds.

Abstract: This invention is available for licensing only on a non-exclusive basis. A method of destroying Halogenated compounds by a vapor phase chemical reaction using an alkali metal vapor, alkaline earth metal vapor, or a combination of the two, in a heated reactor to produce mineralized or solid products. The production of solid products, such as halide salts and particulate carbon, yields numerous advantages in the collection and disposal of the resulting products. The invention is especially useful for the destruction of chlorofluorocarbons.

Robert E. Hebner,

Acting Deputy Director.

[FR Doc. 99–674 Filed 1–11–99; 8:45 am]

BILLING CODE 3510–13–M

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Announcement of a Partially Closed Meeting of the Manufacturing Extension Partnership National Advisory Board

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice of partially closed meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that the National Institute of Standards and Technology's (NIST's) Manufacturing Extension Partnership National Advisory Board (MEPNAB) will meet to hold a meeting on Wednesday, January 13, 1999. The MEPNAB is composed of nine members appointed by the Director of NIST who were selected for their expertise in the area of industrial extension and their work on behalf of smaller manufacturers. The Board was set up, under the direction of the Director of the NIST, to fill a need for outside input on MEP. MEP is a unique program consisting of centers in all 50 states and Puerto Rico. The centers have been created by a state, federal and local partnership. The Board works closely with the MEP to provide input and advice on MEP's programs, plans and policies. The purpose of this meeting is to delve into areas the Board selected at the previous meeting. The agenda includes a presentation on ''1999: The Year of the Small Manufacturer'', MEP 1999 Program Priorities, an overview of the Year 2000 initiative, and a status update on the Board's Subcommittee, Review of Center Evaluation. The portion of the meeting, which involves personnel and proprietary budget information, will be closed to the public. All other portions of the meeting will be open to the public.

DATES AND ADDRESSES: The meeting will convene on January 13, 1999, at 8 a.m. and will adjourn at 3:30 p.m. and will be held at the National Institute of Standards and Technology, Building 101, Lecture Room B, Gaithersburg, Maryland. The closed portion of the meeting is scheduled from 8–9:30 a.m.

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Administration with the concurrence of the General Counsel formally determined on December 21, 1998, pursuant to section 10(d) of the Federal Advisory Committee Act, that these portions of the meeting may be properly closed because they are concerned with matters that are within the purview of 5 U.S.C. 522(c)(4), (6) and (9)(b). A copy of the determination is available for public inspection in the Central Reference and Records Inspection Facility, Room 6219, Maine Commerce.

MEP's services to smaller manufacturers address the needs of the national market as well as the unique needs of each company. Since MEP is committed to providing this type of individualized service through its centers, the program requires the perspective of locally based experts to be incorporated into its national plans. The MEPNAB was established at the direction of the NIST Director to maintain MEP's focus on local and market-based needs. The MEPNAB was approved on October 24, 1996, in accordance with the Federal Advisory Committee Act, 5 U.S.C. app. 2., to provide advice on MEP programs, plans, and policies; to assess the soundness of MEP plans and strategies; to assess the current performance against MEP program plans, and to function in an advisory capacity. The Board will meet three times a year and reports to the Director of NIST. This will be the first meeting of the MEPNAB in 1999.

FOR FURTHER INFORMATION CONTACT: Linda Acierto, Assistant to the Director for Policy, Manufacturing Extension Partnership, National Institute of Standards and Technology, Gaithersburg, MD 20899, telephone number (301) 975–5033.

Dated: January 7, 1999.

Robert E. Hebner,

Acting Deputy Director, National Institute of Standards and Technology.

[FR Doc. 99–645 Filed 1–11–99; 8:45 am]

BILLING CODE 3510–13–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010599D]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting (work session).

SUMMARY: The Pacific Fishery Management Council's (Council) Highly Migratory Species (HMS) Policy Committee and HMS Advisory Subpanel will hold a public meeting.

DATES: The meeting will be held from 10:00 a.m. to 5:00 p.m. on Tuesday, January 26, 1999.

ADDRESSES: The meeting will be held at the U.S. Tuna Foundation Offices, One Tuna Lane,(740 North Harbor Drive), San Diego, CA.

Council address: Pacific Fishery Management Council, 2130 SW Fifth Avenue, Suite 224, Portland, OR 97201.

FOR FURTHER INFORMATION CONTACT: Mr. Larry Six, Executive Director, telephone: (503) 326–6352.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to prepare Council recommendations for the next session of the Multilateral High Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific to be held February 10–19, 1999 in Honolulu, HI.

Although other issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice.

Special Accommodations

The work session is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. John Rhoton at (503) 326–6352 at least 5 days prior to the work session date.

Dated: January 7, 1999.

Gary C. Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 99–656 Filed 1–11–99; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010599E]

South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting of its Executive Committee.

DATES: The meeting will be held from January 27-28, 1999. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meeting will be held at the NMFS Southeast Regional Office, 9721 Executive Center Drive North, St. Petersburg, FL; telephone: 727-570-5305.

Council address: South Atlantic Fishery Management Council, One Southpark Circle, Suite 306; Charleston, SC 29407-4699.

FOR FURTHER INFORMATION CONTACT: Susan Buchanan, Public Information Officer; telephone: (843) 571-4366; fax:

(843) 769-4520; email: susan.buchanan@noaa.gov

SUPPLEMENTARY INFORMATION:

Meeting Dates

January 27, 1999, 1:00 p.m. to 5:00 p.m.

The Executive Committee will hear the status of Council actions relative to the Sustainable Fisheries Act and the implementation schedule for the Council's sustainable fisheries act amendments. The Committee will also discuss how the Council and NMFS can work together to meet the mandates of the Sustainable Fisheries Act, discuss coordination of the Council's preparation of stock assessment and fishery evaluation (SAFE) reports, hear an overview of the Atlantic Coastal Cooperative Statistics Program (ACCSP), and make revisions to the Council's Operations Plan.

January 28, 1999, 9:00 a.m. to 12:00 noon

The Committee will discuss Calendar Year 1999 Council activities and budget and discuss coordination of Council activities and planned actions with the NMFS regional office and fisheries center resources.

Although other issues not contained in this agenda may come before this Committee for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) by January 20, 1999.

Dated: January 7, 1999.

Gary C. Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 99–655 Filed 1–11–99; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0141]

Submission for OMB Review; Comment Request for Buy American Act—Construction (Grimberg Decision)

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Buy American Act—Construction (Grimberg Decision). A request for public comments was published at 63 FR 59950, November 6, 1998. No comments were received.

DATES: Comments may be submitted on or before February 11, 1999.

FOR FURTHER INFORMATION CONTACT: Paul Linfield, Federal Acquisition Policy Division, GSA (202) 501–1757.

ADDRESSES: Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: FAR Desk Officer, General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4035, Washington, DC 20405.

SUPPLEMENTARY INFORMATION:

A. Purpose

The clauses at FAR 52.225–5, Buy American Act—Construction Materials, and FAR 52.225–15, Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement, provide that offerors/contractors requesting to use foreign construction material, other than construction material eligible under a trade agreement, shall provide adequate information for Government evaluation of the request. These regulations implement the Buy American Act for construction (41 U.S.C. 10a–10d).

B. Annual Reporting Burden

Public reporting burden for this collection of information is estimated to average *2.5* hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows: Respondents, *500;* responses per respondent, *2;* total annual responses, *1,000;* preparation hours per response, *2.5;* and total response burden hours, *2,500*.

OBTAINING COPIES OF PROPOSALS: Requester may obtain a copy of justification from the General Services Administration, FAR Secretariat (MVRS), Room 4035, Washington, DC 20405, telephone (202) 208–7312. Please cite OMB Control No. 9000–0141 regarding Buy American Act—Construction (Grimberg Decision) in all correspondence.

Dated: January 7, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

[FR Doc. 99–675 Filed 1–11–99; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Group, Office of the Chief Financial and Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 11, 1999.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Danny Werfel, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, N.W., Room 10235, New Executive Office Building, Washington, D.C. 20503 or should be electronically mailed to the internet address *Werfel d@al.eop.gov*. Requests for copies of the proposed information collection requests should be addressed to Patrick J. Sherrill, Department of Education, 600 Independence Avenue, S.W., Room 5624, Regional Office Building 3, Washington, D.C. 20202–4651, or should be electronically mailed to the internet address *Pat Sherrill@ed.gov*, or should be faxed to 202–708–9346.

FOR FURTHER INFORMATION CONTACT: Patrick J. Sherrill (202) 708–8196. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Group, Office of the Chief Financial and Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment at the address specified above. Copies of the requests are available from Patrick J. Sherrill at the address specified above.

Dated: January 6, 1999.

Kent H. Hannaman,

Leader, Information Management Group, Office of the Chief Financial and Chief Information Officer.

Office of Postsecondary Education

Type of Review: Extension.

Title: Federal Stafford Loan (Subsidized and Unsubsidized) Program Master Promissory Note.

Frequency: On occasion.

Affected Public: Individuals or households; Businesses or other for-profits; Not-for-profit institutions.

Reporting and Recordkeeping Burden:

Responses: 1,400,000

Burden Hours: 1,400,000

Abstract: This promissory note is the means by which a Federal Stafford Program Loan borrower promises to repay his or her loan.

Office of Postsecondary Education

Type of Review: Revision.

Title: Fiscal Operations Report and Application to Participate in Federal Perkins Loan, Federal Supplemental Educational Opportunity Grant, and Federal Work-Study Program.

Frequency: Annually.

Affected Public: Business or other for-profit; Not-for-profit institutions; State, local or Tribal Gov't; SEAs or LEAs.

Reporting and Recordkeeping Burden:

Responses: 4,100

Burden Hours: 68,863

Abstract: This application data will be used to compute the amount of funds needed by each institution during the 2000–2001 Award Year. The Fiscal Operations Report data will be used to assess program effectiveness, account for funds expended during the 1998–1999 Award Year, and for calculating institutional awards.

Office of Postsecondary Education

Type of Review: New.

Title: Application Demonstration Projects for Faculty Training in Disability Issues.

Frequency: Every three years.

Affected Public: Not-for-profit institutions.

Reporting and Recordkeeping Burden:

Responses: 30

Burden Hours: 2,400

Abstract: Demonstration Projects to Ensure Students with Disabilities Receive a Quality Higher Education.

Program: Collect program and budget information to make grants to institutions of higher education.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1890–0001). Therefore, this 30-day public comment period notice will be the only public comment notice published for this information collection.

[FR Doc. 99–616 Filed 1–11–99; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Floodplain Involvement for the Transfer of Parcel H at the Miamisburg Environmental Management Project

AGENCY: Ohio Field Office, Miamisburg Environmental Management Project (MEMP), Department of Energy (DOE).

ACTION: Notice of floodplain involvement.

SUMMARY: This is to give notice of DOE's proposal to transfer ownership of approximately 14 acres of property in the northeast corner of the MEMP site, located approximately 10 (ten) miles southwest of Dayton, Ohio. The property, designated Parcel H, has been determined to be excess to DOE's long-term needs. As a result, ownership of this property will be transferred to a non-Federal entity. A small portion of Parcel H lies within the 100-year floodplain, i.e., the area is subject to a 1% chance per year of inundation from a nearby tributary of the Great Miami River. In accordance with 10 CFR 1022.5(d), DOE will identify those uses that are restricted under Federal, state, and local floodplain regulations. The future owner of Parcel H will be made aware of the applicable governing regulations on or adjacent to the 100-year floodplain.

DATES: Written comments must be received by the DOE at the following address on or before January 27, 1999.

ADDRESSES: For further information on this proposed action, including a site map and/or copy of the Floodplain Assessment, contact: Mr. Frank Schmaltz, Project Manager, U.S. Department of Energy, Miamisburg Environmental Management Project, P.O. Box 66, Miamisburg, OH 45343–0066; Phone: 937–865–3620; Facsimile: 937–865–4489.

FOR FURTHER INFORMATION CONTACT: For further information on general DOE floodplain and wetland environmental review requirements, contact: Ms. Carol Borgstrom, Director, Office of NEPA Policy and Assistance, EH–42, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585; Phone: 202–586–4600 or 1–800–472–2756.

SUPPLEMENTARY INFORMATION: The proposed activity would support ultimate disposition of the MEMP site. The MEMP site has been determined to be excess to DOE's long-term needs. This decision is supported by the Nonnuclear Consolidation Environmental Assessment (DOE/EA–0792) and associated Finding of No Significant Impact (FONSI) dated September 14, 1993, and the Memorandum of Understanding (MOU) between the DOE Defense Programs, Environmental Management and Nuclear Energy Programs, dated August 1, 1995. In order to meet the programmatic need to disposition land determined to be excess to DOE's needs, ownership of the site will be transferred to a non-Federal entity. The property will be released in phases, as certain parcels of property are still in use or are not yet suitable for transfer. This notice addresses one parcel of land,

comprising approximately 14 acres of property in the northeast corner of the MEMP site.

Issued in Miamisburg, Ohio on December 30, 1998.

Susan L. Smiley,

NEPA Compliance Officer, Ohio Field Office.

[FR Doc. 99–635 Filed 1–11–99; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Notice of Floodplain Involvement for the Transfer of the South Property at the Miamisburg Environmental Management Project

AGENCY: Ohio Field Office, Miamisburg Environmental Management Project (MEMP), Department of Energy (DOE).

ACTION: Notice of Floodplain Involvement.

SUMMARY: This is to give notice of DOE's proposal to transfer ownership of approximately 123 acres of undeveloped property in the southern portion of the MEMP site, located approximately 10 (ten) miles southwest of Dayton, Ohio. The property, designated the South Property, has been determined to be excess to DOE's long-term needs. As a result, ownership of this property will be transferred to a non-Federal entity. A small portion of the South Property lies within the 100-year floodplain, i.e., the area is subject to a 1% chance per year of inundation from the Great Miami River. In accordance with 10 CFR 1022.5(d), DOE will identify those uses that are restricted under Federal, state, and local floodplain regulations. The future owner of the South Property will be made aware of the applicable governing regulations on or adjacent to the 100-year floodplain.

DATES: Written comments must be received by the DOE at the following address on or before January 27, 1999.

ADDRESSES: For further information on this proposed action, including a site map and/or copy of the Floodplain Assessment, contact: Ms. Sue Smiley, NEPA Compliance Officer, U. S. Department of Energy, Ohio Field Office, P. O. Box 66, Miamisburg, OH 45343–0066; Phone: 937–865–3984; Facsimile: 937–865–4489.

FOR FURTHER INFORMATION CONTACT: For further information on general DOE floodplain and wetland environmental review requirements, contact: Ms. Carol Borgstrom, Director, Office of NEPA Policy and Assistance, EH–42, U. S. Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585; Phone: 202–586–4600 or 1–800–472–2756.

SUPPLEMENTARY INFORMATION: The proposed activity would support ultimate disposition of the MEMP site. The MEMP site has been determined to be excess to DOE's long-term needs. This decision is supported by the *Nonnuclear Consolidation Environmental Assessment* (DOE/EA–0792) and associated Finding of No Significant Impact (FONSI) dated September 14, 1993, and the Memorandum of Understanding (MOU) between the DOE Defense Programs, Environmental Management and Nuclear Energy Programs, dated August 1, 1995. In order to meet the programmatic need to disposition land determined to be excess to DOE's needs, ownership of the site will be transferred to a non-Federal entity. The property will be released in phases, as certain parcels of land are still in use or are not yet suitable for transfer. This notice addresses that portion of the South Property which lies within the 100-year floodplain. The proposed sale of the South Property, as a whole, will be evaluated under the National Environmental Policy Act (NEPA) process. The NEPA document, which will include the Floodplain Assessment, will be made available to Interested or Affected States and Tribes, as well as other key stakeholders/members of the public. Transfer of the South Property will not occur until the NEPA process has been completed.

Issued in Miamisburg, Ohio on December 30, 1998.

G. Leah Dever,

Manager, Ohio Field Office.

[FR Doc. 99–636 Filed 1–11–99; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–197–000]

ANR Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

January 6, 1999.

Take notice that on December 31, 1998, ANR Pipeline Company (ANR) tendered for filing as part of its FERC Gas Tariff, the following tariff sheets to become effective February 1, 1999:

Thirty-fifth Revised Sheet No. 8
Thirty-fifth Revised Sheet No. 9
Thirty-fourth Revised Sheet No. 13
Forty-first Revised Sheet No. 18

ANR states that the above-referenced tariff sheets are being filed to eliminate the currently effective pricing differential surcharges and base rate adjustments, due to the expiration of the recovery period for such transition costs.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protects must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–588 Filed 1–11–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–274–003]

Black Marlin Pipeline Company; Notice of Compliance Filing

January 6, 1999.

Take notice that on December 31, 1998, Black Marlin Pipeline Company (BMPL) tendered for filing to become part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheet, effective January 1, 1999:

Substitute Ninth Revised Sheet No. 4

BMPL states that on December 30, 1998, the Federal Energy Regulatory Commission issued an order (Order) approving the November 19, 1998 Stipulation and Agreement of Settlement (Settlement) in BMPL's Section 4 Rate Case Filing in Docket No. RP98–274. In compliance with the Order and the terms of the Settlement, BMPL is filing revisions to the referenced tariff sheet to reflect the transportation rates as included in Appendix A of the Settlement, and is moving into effect January 1, 1999 Second Revised Sheet Nos. 200 and 213F eliminating BMPL's transportation revenue sharing mechanism.

Any person desiring to protest this filing should file a protest with the

Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–584 Filed 1–11–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP95–408–025]

Columbia Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

January 6, 1999.

Take notice that on December 31, 1998, Columbia Gas Transmission Corporation (Columbia) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets, bearing a proposed effective date of February 1, 1999:

Thirty-third Revised Sheet No. 25
Thirty-third Revised Sheet No. 26
Thirty-third Revised Sheet No. 27
Thirty-third Revised Sheet No. 28
First Revised Sheet No. 28B
Seventeenth Revised Sheet No. 30
Fourteenth Revised Sheet No. 30A
Thirteenth Revised Sheet No. 31

Columbia states that this filing is being submitted pursuant to Stipulation II, Article I, Section D (Rates) of the settlement in Docket No. RP95–408 et al. approved by the Commission on April 17, 1997 (79 FERC § 61,044 (1997)) (Settlement). Pursuant to Section D, paragraph (2), subject to other adjustments provided for in the Settlement, the base tariff settlement rates applicable to services for the period beginning February 1, 1999, are set forth on Appendix E, Schedule 5, attached to Stipulation II. Columbia is making this filing to move into effect the rates set forth on Appendix E, Schedule 5, for the period beginning February 1, 1999, subject to the following adjustments: (1) ''Stipulation II Adjustment filing to Rate Schedule FTS Rate Design Determinants'' filed on May 1, 1998 in Docket No. RP98–209 and (2) Settlement Component adjustment filed on December 1, 1998, in Docket No. RP99–169. See Attachment A for details on the adjusted settlement rates to be effective at February 1, 1999.

Columbia states that copies of its filing have been mailed to all firm customers, interruptible customers, affected state commissions, and parties on the official service list in RP95–408, et. al.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–582 Filed 1–11–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–404–000]

Mississippi River Transmission Corporation; Notice of Technical Conference

January 6, 1999.

Take notice that the Commission staff will convene a technical conference as provided by the Commission order in this proceeding issued October 14, 1998. The conference will be held on Thursday, January 14, 1999, beginning at 10:00 a.m. in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

All interested persons and Staff are invited to attend.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–585 Filed 1–11–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–248–002]

Northwest Pipeline Corporation; Notice of Compliance Filing

January 6, 1999.

Take notice that on December 31, 1998, Northwest Pipeline Corporation (Northwest) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the following tariff sheets, to be effective December 11, 1998:

Substitute Fourth Revised Sheet No. 104
Second Substitute Fourth Revised Sheet No. 274
Second Substitute Original Sheet No. 274–A
Second Substitute Fourth Revised Sheet No. 275
Second Substitute Second Revised Sheet No. 276
Second Substitute Third Revised Sheet No. 277
Second Substitute Second Revised Sheet No. 278
Second Substitute Original Revised Sheet No. 278–A

Northwest states that the purpose of this filing is to make minor corrections to its December 23, 1998 filing in this docket.

Northwest states that a copy of this filing has been served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–583 Filed 1–11–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–266–005]

Ozark Gas Transmission L. L. C.; Notice of Compliance Filing

January 6, 1999.

Take notice that on December 17, 1998, Ozark Gas Transmission L. L. C. (Ozark), filed as part of its FERC Gas Tariff, Original Volume 1, the following revised tariff sheets, with a proposed effective date of November 1, 1998, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Substitute Original Sheet No. 13
Substitute Original Sheet No. 17
Original Sheet No. 17A
Substitute Original Sheet No. 24
Original Sheet No. 24A
Substitute Original Sheet No. 40
Substitute Original Sheet No. 41
Substitute Original Sheet No. 46
Substitute Original Sheet No. 47
Substitute Original Sheet No. 48
Substitute Original Sheet No. 49
Substitute Original Sheet No. 51
Original Sheet No. 51A
Substitute Original Sheet No. 64
Substitute Original Sheet No. 66
Substitute Original Sheet No. 73
Substitute Original Sheet No. 74
Substitute Original Sheet No. 79
Substitute Original Sheet No. 80
Original Sheet No. 80A
Substitute Original Sheet No. 86
Original Sheet No. 86A
Substitute Original Sheet No. 88
Original Sheet No. 88A
Substitute Original Sheet No. 102
Substitute Original Sheet No. 105
Substitute Original Sheet No. 106
Substitute Original Sheet No. 109

Ozark also filed a notice of cancellation of entire tariff of Ozark Gas Transmission System's FERC Gas Tariff.

Ozark states that this filing is to comply with the Commission's order issued on December 2, 1998.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before January 13, 1999. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make the Protestants parties to the proceeding. Any person wishing to become a party to a proceeding must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–581 Filed 1–11–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER97–2358–000, ER98–2087–000, ER98–2351–000]

Pacific Gas & Electric Co.; Notice of Settlement Conference

January 6, 1999.

Take notice that a settlement conference will be convened in the subject proceedings commencing Tuesday, January 19, 1999, at 10 a.m. and continuing to Wednesday, January 20, 1999. The conference will be held at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC.

Any party, as defined by 18 CFR 385.102(c), or any participant, as defined by 18 CFR 385.102 (b), may attend. A person wishing to become a party must move to intervene and receive intervenor status pursuant to § 385.214 of the Commission's regulations.

For additional information, please contact Jo Ann Scott at (202) 208–0764, or Linda Lee at (202) 208–0673. Ms. Scott or Ms. Lee can also be reached by e-mail at joann.scott@ferc.fed.us, or at linda.lee@ferc.fed.us.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–627 Filed 1–11–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM99–2–17–000]

Texas Eastern Transmission Corp.; Notice of Proposed Changes in FERC Gas Tariff

January 6, 1999.

Take notice that on December 31, 1998 Texas Eastern Transmission Corporation (Texas Eastern) tendered for filing as part of its FERC Gas Tariff, Sixth Revised Volume No. 1 and Original Volume No. 2, revised tariff sheets listed on Appendix A to the filing to become effective February 1, 1999.

Texas Eastern states that these revised tariff sheets are filed pursuant to Section 15.1, Electric Power Cost (EPC) Adjustment, of the General Terms and Conditions of Texas Eastern's FERC Gas Tariff, Sixth Revised Volume No. 1. Texas Eastern states that Section 15.1 provides that Texas Eastern shall file to be effective each February 1 revised rates for each applicable zone and rate schedule based upon the projected annual electric power costs required for the operation of transmission compressor stations with electric motor prime movers and to also reflect the EPC Surcharge which is designed to clear the balance in the Deferred EPC Account.

Texas Eastern states that these revised tariff sheets are being filed to reflect reductions in Texas Eastern's projected costs for the use of electric power for the twelve month period beginning February 1, 1999 and the balance in the EPC Deferred Account for the twelve months ended October 31, 1998.

Texas Eastern states that the rate decreases proposed to the primary firm capacity reservation charges, usage rates and 100% load factor average costs for full Access Area Boundary service from the Access Area Zone, East Louisiana, to the three market area zones are as follows:

Zone	Reservation	Usage	100% LF
Market 1	$(0.021)/dth	$(.0007)/dth	$(.0014)/dth
Market 2	$(0.062)/dth	$(.0022)/dth	$(.0042)/dth
Market 3	$(0.091)/dth	$(.0033)/dth	$(.0063)/dth

Texas Eastern states that copies of it filing have been mailed to all affected customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the

Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with §§ 385.214 or 385.211 of the Commission's rules and regulations. All such motions or protests must be filed in accordance with § 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–626 Filed 1–11–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP99–194–000 and RP89–183–084]

Williams Gas Pipelines Central, Inc.; Notice of Proposed Changes in FERC Gas Tariff

January 6, 1999.

Take notice that on December 31, 1998, Williams Gas Pipelines Central, Inc. (Williams), tendered for filing to become part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, with the proposed effective date of February 1, 1999:

Fourth Revised Sheet No. 6
Seventh Revised Sheet No. 6A

Williams states that this filing is being made pursuant to Article 14, of the General Terms and Conditions of its FERC Gas Tariff, Original Volume No. 1. Williams hereby submits its first quarter, 1999, report of GSR costs.

Williams states that a copy of its filing was served on all participants listed on the service lists maintained by the Commission in the dockets referenced above and on all of Williams' jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commisison in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–587 Filed 1–11–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP98–408–003 and RP98–412–003]

Wyoming Interstate Company, Ltd.; Notice of Tariff Compliance Filing

January 6, 1999.

Take notice that on December 31, 1998, Wyoming Interstate Company, Ltd. (WIC), tendered for filing to become part of its FERC Gas Tariff, First Revised Volume No. 1, Second Sub Third Revised Sheet No. 42G, and Second Revised Volume No. 2, Second Sub Fourth Revised Sheet No. 52, and Second Sub Fourth Revised Sheet No. 64C to be effective November 2, 1998.

WIC states that it has been pointed out that it made certain minor errors in its Compliance Filing filed November 23, 1998 in Docket Nos. RP98–408 and RP98–412. WIC is filing substitute tariff sheets to correct these errors.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–586 Filed 1–11–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC99–19–000, et al.]

Public Service Company of New Mexico, et al.; Electric Rate and Corporate Regulation Filings

January 4, 1999.

Take notice that the following filings have been made with the Commission:

1. Public Service Company of New Mexico

[Docket No. EC99–19–000]

Take notice that on December 28, 1998, Public Service Company of New Mexico (PNM), pursuant to Section 203 of the Federal Power Act, tendered for filing an application seeking an order or other appropriate determination approving the sale by PNM to Pittsburg and Midway Coal Mining Company (Pitt-Midway) of a 10 mile 115 kV transmission line.

Copies of this filing have been served upon Pitt-Midway and the New Mexico Public Utility Commission.

Comment date: January 28, 1999, in accordance with Standard Paragraph E at the end of this notice.

2. Rocky Road Power, LLC

[Docket No. EG99–52–000]

Take notice that on December 29, 1998, Rocky Road Power, LLC, 1000 Louisiana, Suite 5800, Houston, Texas, filed with the Federal Energy Regulatory Commission, an Application for Determination of Exempt Wholesale Generator Status, pursuant to Part 365 of the Commission's Regulations.

Rocky Road Power, LLC is a limited liability company, organized under the laws of the State of Delaware, and engaged directly and exclusively in owning and operating the Rocky Road Power, LLC electric generating facility (the Facility) to be located in Kane County, Illinois, and selling electric energy and related ancillary services at wholesale from the Facility. The Facility will consist of three gas turbine generators, two nominally rated at approximately 110 MW and one at approximately 30 MW, for a total of 250 MW, a metering station, and associated transmission interconnection components.

Comment date: January 25, 1999, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

3. UtiliCorp United Inc., Missouri Public Service, WestPlains Energy-Kansas, and WestPlains Energy-Colorado

[Docket No. ER99–203–000]

Take notice that on December 29, 1998, UtiliCorp United Inc., on behalf of itself and its operating divisions Missouri Public Service, WestPlains Energy-Kansas, and WestPlains Energy-Colorado, tendered its compliance filing in this docket.

Comment date: January 19, 1999, in accordance with Standard Paragraph E at the end of this notice.

4. Entergy Services, Inc., Clarksdale Public Utilities Commission v. Entergy Services, Inc.

[Docket No. ER99–218–001, EL98–72–000, and EL98–73–000]

Take notice that on December 28, 1998, Entergy Services, Inc. (Entergy Services), on behalf of Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (collectively, the Entergy Operating Companies), tendered for filing a Power and Energy Agreement between Entergy Services, as agent for the Entergy Operating Companies, and Municipal Energy Agency of Mississippi, for the sale of power under Entergy Services' Rate Schedule SP. The Agreement was submitted in compliance with the Commission's order in Clarksdale Public Utilities Commission v. Entergy Services, Inc., 85 FERC ¶ 61,268 (1998).

Comment date: January 19, 1999, in accordance with Standard Paragraph E at the end of this notice.

5. New York State Electric & Gas Corporation

[Docket No. ER99–221–001]

Take notice that on December 29, 1998, New York State Electric & Gas (NYSEG) tendered for filing with the Federal Energy Regulatory Commission NYSEG's Code of Conduct in compliance with Commission's December 14, 1998 Order in this Docket.

Notice of said filing has been served upon the New York State Public Service Commission.

Comment date: January 19, 1999, in accordance with Standard Paragraph E at the end of this notice.

6. Consolidated Edison Company of New York

[Docket No. ER99–1066–000]

Take notice that on December 29, 1998, Consolidated Edison Company of New York (Con Edison or the Company) filed a service agreement with West Penn Power d/b/a/ Allegheny Energy (AE), for the provision of non-firm electric transmission service pursuant to Con Edison's Open Access Transmission Tariff dated December 2, 1998.

A copy of this Service Agreement has been served on Allegheny Energy.

Comment date: January 19, 1999, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–625 Filed 1–11–99; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6217–9]

Drinking Water State Revolving Fund (DWSRF) Program Policy Announcement: Eligibility of Reimbursement of Incurred Costs for Approved Projects

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is issuing a policy decision for the Drinking Water State Revolving Fund (DWSRF) program that will allow States to reimburse construction costs incurred by a public water system prior to execution of a loan agreement under specific conditions. The Agency published the proposed policy in the **Federal Register** on June 12, 1998 to seek public comment. Comments received during the comment period and in a stakeholder meeting held on July 13, 1998 were considered in developing the final policy.

BACKGROUND: The Safe Drinking Water Act (SDWA), as amended in 1996, established a DWSRF program to provide grants to States which, in turn, use the funds to provide loans to public water systems for infrastructure improvements. States are responsible for developing a priority system that identifies how projects will be ranked for funding and a comprehensive list of projects, in priority order, that are eligible for funding. States must also identify which projects on this comprehensive list will get funding within the current year, either by developing a separate fundable list or noting those projects on the comprehensive list. Both privately-owned and publicly-owned systems are eligible for funding. The Act also contains a provision which allows State DWSRF programs to provide loans to publicly-owned systems to refinance eligible projects. Specifically, section 1452(f)(2) allows States ''to buy or refinance the debt obligation of a municipality, intermunicipal or interstate agency within the State * * * in any case in which a debt obligation is incurred after July 1, 1993.'' The eligibility for refinancing does not extend to privately- owned systems.

A number of States expressed concern that a strict interpretation of this refinance provision could delay construction of projects associated with privately-owned systems that are on the priority list for funding and are needed to solve public health problems. In some States, particularly those that leverage capitalization grants to generate more funds for projects, loan agreements with applicants are finalized at specific time periods during the year to coincide with financing. These States often make ''bridge'' loans to fund activities prior to execution of the formal loan agreement which occurs after the State has completed financing. Other States face challenges related to the seasonal nature of construction schedules. States wanted to have the flexibility to notify eligible privately and publicly-owned systems that they will receive funding from the State and then reimburse the systems for costs incurred in the time period between the notification and execution of the loan agreement. This flexibility would encourage systems to move ahead with construction in order to, for example, take advantage of seasonal construction cycles.

EPA does not believe that the intention of section 1452(f)(2) was to preclude funding of eligible costs in these situations. Projects which have been identified for funding on the priority list and that receive notification from the State should be able to move

ahead with construction and have these short-term construction costs included in the DWSRF loan under certain conditions.

In its June 12, 1998 **Federal Register** document, the EPA proposed that any project that has been given approval, authorization to proceed, or any similar action by the State prior to the actual project construction could be eligible for reimbursement of construction expenses incurred after such State action, provided that the project met all of the requirements of the DWSRF program. Such a project would have to be on the State's fundable list, developed using a priority system approved by EPA. A project on the comprehensive list which could be funded when a project on the fundable list was bypassed using the State's bypass procedures could also be eligible for reimbursement of costs incurred after the system had been informed that it would receive funding. These requirements would apply regardless of whether the system financed costs using a short-term debt instrument or internal capital.

The proposal further noted that projects receiving reimbursement of incurred costs would be subject to all other Federal requirements required of a recipient of Federal funds, including an environmental review which must consider the impacts of the project based on the pre-construction site conditions. A failure to comply with the State's environmental review process could not be justified on the grounds that costs had already been incurred, environmental impacts had already been caused, or contractual obligations had been made prior to the binding commitment.

Finally, the proposal solicited comment on whether a privately-owned system that had been constructed without meeting the above listed criteria could get refinanced from the DWSRF if it used internal capital instead of a debt obligation. The proposal suggested that internal capital be treated the same as a debt obligation in these situations.

Comments

Comments were received from 20 parties, all but one of whom supported the policy of reimbursing systems that initiate construction after being notified of the State's intent to fund the project. Most of the concern about the policy was directed at two aspects of the proposal. The first concerned viewing internal capital used by a system to complete construction, without having first met the criteria for reimbursement, as equivalent to a debt obligation. Seven commentors indicated that internal capital should not be viewed as equivalent to debt—that if a system uses its own funds, it should be allowed to apply for a loan to cover those costs. The second was whether to allow reimbursement of planning and design costs that occurred prior to the system's receiving notification to proceed. Eleven commentors indicated that planning and design should be treated in the same manner as it is for other loans. They noted that if EPA were to determine that planning and design costs were only eligible after a system had received notification from the State that it would receive funds, it would make it more difficult for privately-owned systems to get on the priority list in States which require planning and design to be completed before the project can even be placed on the fundable list. This would also be inconsistent with the Clean Water SRF policy that includes costs incurred for planning and design in the project loan, regardless of when planning and design occurred. The commentors recommended that reimbursement include construction costs and prebuilding costs, which include planning and design.

A few commentors recommended that EPA extend the time frame over which costs could be reimbursed to include the time period during which the SDWA Amendments were in development, to July 1, 1993 (target date for refinancing publicly-owned systems), or to the date that a State passed legislation authorizing its program. A few State representatives asked for flexibility in defining what constitutes authorization to proceed and noted that in some States, the requirement that a project be on a fundable list before costs can be reimbursed would be too late in that State's process.

Response to Comments

EPA recognizes that excluding eligibility of planning and design costs could be problematic for systems and for States. Disallowing these costs for reimbursed projects would imply that prebuilding costs incurred by privately-owned systems when preparing to apply for a loan could not be recouped. Additionally, it is more consistent with the Clean Water SRF and the DWSRF for publicly-owned systems to consider these costs eligible.

Concerning the issue of whether internal capital should be viewed the same as a debt obligation, EPA believes that there is no substantive difference between internal capital and a debt obligation when a system requests a DWSRF loan to fund a project that it has completed. EPA further believes that congressional intent and the statute restricts the use of DWSRF funds for refinancing to projects that were completed by publicly-owned systems and that the only exception to this is the short-term reimbursement of costs to allow systems that are in line to receive funds to begin construction as soon as possible. EPA, therefore, does not support extending the time frame from which privately-owned systems could be eligible for reimbursement.

In developing the proposal, the Agency recognized that States differ somewhat in their procedures for notifying applicants that they will receive a loan and has proposed language that allows considerable flexibility.

Final Policy

The refinancing of project costs associated with a privately-owned system is an ineligible activity under the DWSRF program, regardless of the source of financing used to complete a project.

A project (for a privately-or publicly-owned system) that has been given approval, authorization to proceed, or any similar action by the State prior to initiation of construction will be eligible for reimbursement for construction costs incurred after such State action, provided that the project meets all of the requirements of the DWSRF program and the following criteria. Such a project must be on the State's fundable list, developed using a priority system approved by EPA. A project on the comprehensive list which is funded when a project on the fundable list is bypassed using the State's bypass procedures may also be eligible for reimbursement of costs incurred after the system has been informed that it will receive funding. Prebuilding costs, such as planning and design, are also eligible when a system receives a loan for construction. Systems may receive reimbursement regardless of the method used to finance the short-term construction costs. Internal capital and debt obligations will be viewed as equivalent for the purposes of this policy.

Projects receiving reimbursement of incurred costs are subject to all other Federal requirements required of a recipient of Federal funds, including an environmental review which must consider the impacts of the project based on the pre-construction site conditions. Failure to comply with the State's environmental review process cannot be justified on the grounds that costs have already been incurred, environmental impacts have already been caused, or contractual obligations

have been made prior to the binding commitment.

FOR FURTHER INFORMATION CONTACT: The Safe Drinking Water Act Hotline, telephone (800) 426–4791. Information about the DWSRF program, including program guidelines and State contact information, is available from the EPA Office of Ground Water and Drinking Water Web Site at the URL address ''http://www.epa.gov/safewater.''

Dated: December 28, 1998.

Cynthia C. Dougherty,

Director, Office of Ground Water and Drinking Water.

[FR Doc. 99–665 Filed 1–11–99; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6217–5]

Notice of Proposed Purchaser Agreement Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as Amended by the Superfund Amendments and Reauthorization Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (''CERCLA''), 42 U.S.C. 9601–9675, notice is hereby given that a proposed purchaser agreement (''Purchaser Agreement'') associated with the O'Brien Machinery Superfund Site, Downingtown, Chester County, Pennsylvania was executed by the Environmental Protection Agency and the Department of Justice and is now subject to public comment, after which the United States may modify or withdraw its consent if comments received disclose facts or considerations which indicate that the Purchaser Agreement is inappropriate, improper, or inadequate. The Purchaser Agreement would resolve certain potential EPA claims under section 107 of CERCLA, 42 U.S.C. 9607, against Serena, Inc. (''Purchaser''). The settlement would require the Purchaser to, among other things, (1) perform the response action set forth in the Scope of Work attached as Exhibit 3 to the Purchaser Agreement, (2) perform the following property revitalization activities: conduct a controlled demolition of existing structures at the Site; remove the debris; and redevelop the property for residential housing.

For thirty (30) days following the date of publication of this document, the Agency will receive written comments relating to the Purchaser Agreement. The Agency's response to any comments received will be available for public inspection at the U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103.

DATES: Comments must be submitted on or before February 11, 1999.

AVAILABILITY: The Purchaser Agreement and additional background information relating to the Purchaser Agreement are available for public inspection at the U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103. A copy of the Purchaser Agreement may be obtained from Thomas A. Cinti (3RC42), Assistant Regional Counsel, U.S. Environmental Protection Agency, 1650 Arch Street, Philadelphia, PA 19103.

Comments should reference the ''O'Brien Machinery Superfund Site, Prospective Purchaser Agreement'' and ''EPA Docket No. III–98–073–DC,'' and should be forwarded to Thomas A. Cinti at the above address.

FOR FURTHER INFORMATION CONTACT: Thomas A. Cinti (3RC42), Assistant Regional Counsel, U.S. Environmental Protection Agency, 1650 Arch Street, Philadelphia, PA 19103, Phone: (215) 814–2634.

Dated: January 4, 1999.

W. Michael McCabe,

Regional Administrator, Region III.

[FR Doc. 99–556 Filed 1–11–99; 8:45 am]

BILLING CODE 6560–50–P

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 February 5, 1999.

A. Federal Reserve Bank of Kansas City (D. Michael Manies, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. BOK Financial Corporation, and BOK Merger Corporation Number Seven, both of Tulsa, Oklahoma; to acquire 100 percent of the voting shares of First Bancshares of Muskogee, Inc., Muskogee, Oklahoma, and thereby indirectly acquire First National Bank and Trust Company of Muskogee, Muskogee, Oklahoma. BOK Merger Corporation Number Seven also has applied to become a bank holding company.

Applicant also has applied to acquire First Muskogee Insurance Corporation, Muskogee, Oklahoma, and thereby engage in credit-related insurance activities, pursuant to § 225.28(b)(11) of Regulation Y.

2. J.R. Montgomery Bancorporation, Lawton, Oklahoma; to acquire 1.0 percent, for a total of 38.3 percent, of the voting shares of The Fort Sill National Bank, Fort Sill, Oklahoma.

Board of Governors of the Federal Reserve System, January 6, 1999.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 99–567 Filed 1–11–99; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:00 a.m., Tuesday, January 19, 1999.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED: 1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Lynn S. Fox, Assistant to the Board; 202–452–3204.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at http://www.federalreserve.gov for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: January 8, 1999.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 99–784 Filed 1–8–99; 3:27 pm]

BILLING CODE 6210–01–P

GENERAL ACCOUNTING OFFICE

Federal Accounting Standards Advisory Board

AGENCY: General Accounting Office.

ACTION: Request for Comments on Exposure Draft, *Amendments To Deferred Maintenance Reporting.*

SUMMARY: The Federal Accounting Standards Advisory Board (FASAB) requests comments on the Exposure Draft of a proposed statement of federal accounting standards, *Amendments To Deferred Maintenance Reporting,* published in December 1998. The deadline for the receipt of written comments is hereby extended to February 12, 1999 from the January 22 date printed in the Exposure Draft.

Deferred maintenance reporting is a required disclosure per Statement of Federal Financial Accounting Standards No. 6, *Accounting for Property, Plant, and Equipment* and is referenced in Federal Financial Accounting Standards No. 8, *Supplementary Stewardship Reporting.* This amendment would not modify the information to be provided users of federal financial statements, but would, however, modify the placement of that information.

Interested parties are encouraged to comment on any issues in this document. The text of the documents can be viewed through the electronic Financenet on the FASAB Home Page www.financenet.gov/fasab.htm. Hard copies may be obtained from FASAB, 441 G St., NW, Suite 3B18, Washington, DC 20548. Telephone: 202–512–7350.

FOR FURTHER INFORMATION, CONTACT: Wendy Comes, Executive Director, 441 G St., NW., Room 3B18, Washington, DC 20548, or call (202) 512–7350.

Authority: Federal Advisory Committee Act. Pub. L. No. 92–463, sec. 10(a)(2), 86 Stat. 770, 774 (1972) (current version at 5 U.S.C. app. section 10(a)(2) (1988); 41 CFR 101–6.1015 (1990).

Dated: January 6, 1999.

Wendy M. Comes,

Executive Director.

[FR Doc. 99–577 Filed 1–11–99; 8:45 am]

BILLING CODE 1610–01–M

GENERAL SERVICES ADMINISTRATION

President's Commission on the Celebration of Women in American History

AGENCY: General Services Administration.

ACTION: Meeting notice.

SUMMARY: Notice is hereby given that the President's Commission on the Celebration of Women in American History will hold an open meeting from 9:00 a.m. to 5:00 p.m. on Friday, January 22, 1999, at the Martin Luther King Jr. National Historic Site, 450 Auburn Avenue, NE, Atlanta, GA.

PURPOSE: To update members on committee operations and activities. Guest speakers will address known events or celebrations of women (past or present) in their local community and/or nationally. Participants may wish to make a statement covering personal interests in the history of women in America or share thoughts on appropriate commemorative events.

FOR FURTHER INFORMATION CONTACT: Martha Davis (202) 501–0705, Assistant to the Associate Administrator for Communications, General Services Administration. Also, inquiries may be sent to *martha.davis@gsa.gov.* Under 41 CFR 101–6.1015(b)(2) less than 15 days notice of the meeting is provided due to delays in organizing schedules.

Dated: January 5, 1999.

Beth Newburger,

Associate Administrator for Communications.

[FR Doc. 99–558 Filed 1–11–99; 8:45 am]

BILLING CODE 6820–34–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Temporary Assistance to Needy Families, Medicaid, Aid to Needy Aged, Blind, or Disabled Persons and for the new Children's Health Insurance Programs for October 1, 1999 through September 30, 2000

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: The Federal Medical Assistance Percentages and Enhanced Federal Medical Assistance Percentages for Fiscal Year 2000 have been calculated pursuant to the Social Security Act (the Act). These percentages will be effective from October 1, 1999 through September 30, 2000. This notice announces the calculated ''Federal Medical Assistance Percentages'' and ''Enhanced Federal Medical Assistance Percentages'' that we will use in determining the amount of Federal matching in State medical and medical insurance expenditures and for the annual reconciliation of contingency funds under Title IV–A. The table gives figures for each of the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. Programs under title XIX of the Act exist in each jurisdiction; programs under titles I, X, and XIV operate only in Guam and the Virgin Islands; while a program under title XVI (AABD) operates only in Puerto Rico. Programs under title XXI are new. They began functioning in 1998. The percentages in this notice apply to State expenditures for assistance payments, medical services and medical insurance services (except family planning which is subject to a higher matching rate). The statute provides separately for Federal matching of administrative costs.

Section 1905(b) and 2105(b) of the Act, as revised by section 9528 of Pub. L. 99–272, require the Secretary of Health and Human Services to publish these percentages each year. The Secretary is to figure the percentages, by formulas in sections 1905(b) and 2105(b) of the Act, from the Department of Commerce's statistics of average income per person in each State and in the Nation as a whole. The percentages are within the upper and lower limits given in those two sections of the Act. The statute specifies the percentages to be applied to Puerto Rico, the Virgin

Islands, Guam, American Samoa, and the Northern Mariana Islands.

The ''Federal medical assistance percentages'' are for Medicaid. States may claim at the Federal medical assistance percentage without regard to any maximum on the dollar amounts per recipient which may be counted under paragraph (2) of sections 3(a), 1003(a), and 1403(a) of the Act. These percentages will also be used for the annual reconciliation of any Contingency funds received under the Temporary Assistance for Needy Families program.

The ''Enhanced Federal Medical Assistance Percentages'' are for use in the new Children's Health Insurance Program under Title XXI, and for some or all of children's medical assistance under the new Medicaid sections 1905(u)(2) and 1905(u)(3).

DATES: The percentages listed will be effective for each of the 4 quarter-year periods in the period beginning October 1, 1999 and ending September 30, 2000.

FOR FURTHER INFORMATION CONTACT: Mr. Gene Moyer, Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation, Room 442E Hubert H. Humphrey Building, 200 Independence Avenue SW, Washington, DC 20201, Telephone (202) 690–7861.

(Catalog of Federal Domestic Assistance Program Nos. 93.588- Temporary Assistance for Needy Families; 93.563-Child Support Enforcement; 93.659-Adoption Assistance; 93.778-Medical Assistance Program; 93.767-Children's Health Insurance Programs)

Dated: January 5, 1999.

Donna E. Shalala,

Secretary of Health and Human Services.

BILLING CODE 4150–04–M

Federal medical assistance percentages and enhanced Federal medical assistance percentages, effective October 1, 1999-September 30, 2000 (Fiscal year 2000)

State	Federal Medical Assistance Percentages	Enhanced Federal Medical Assistance Percentages
Alabama	69.57	78.70
Alaska	59.80	71.86 **
American Samoa	50.00	65.00 *
Arizona	65.92	76.14
Arkansas	72.85	80.99
California	51.67	66.17
Colorado	50.00	65.00
Connecticut	50.00	65.00
Delaware	50.00	65.00
District of Columbia	70.00	79.00 **
Florida	56.52	69.57
Georgia	59.88	71.91
Guam	50.00	65.00 *
Hawaii	51.01	65.71
Idaho	70.15	79.11
Illinois	50.00	65.00
Indiana	61.74	73.22
Iowa	63.06	74.14
Kansas	60.03	72.02
Kentucky	70.55	79.38
Louisiana	70.32	79.22
Maine	66.22	76.36
Maryland	50.00	65.00
Massachusetts	50.00	65.00
Michigan	55.11	68.58
Minnesota	51.48	66.04
Mississippi	76.80	83.76
Missouri	60.51	72.36
Montana	72.30	80.61
Nebraska	60.88	72.62
Nevada	50.00	65.00
New Hampshire	50.00	65.00
New Jersey	50.00	65.00
New Mexico	73.32	81.32
New York	50.00	65.00
North Carolina	62.49	73.74

North Dakota	70.42	79.29
Northern Mariana Islands	50.00	65.00 *
Ohio	58.67	71.07
Oklahoma	71.09	79.76
Oregon	59.96	71.97
Pennsylvania	53.82	67.67
Puerto Rico	50.00	65.00 *
Rhode Island	53.77	67.64
South Carolina	69.95	78.96
South Dakota	68.72	78.11
Tennessee	63.10	74.17
Texas	61.36	72.95
Utah	71.55	80.08
Vermont	62.24	73.57
Virgin Islands	50.00	65.00 *
Virginia	51.67	66.17
Washington	51.83	66.28
West Virginia	74.78	82.35
Wisconsin	58.78	71.15
Wyoming	64.04	74.83

*For purposes of section 1118 of the Social Security Act, the percentage used under titles I, X, XIV, and XVI and Part A of title IV will be 75 per centum.

**For 1998, 1999, and 2000, the values in the table were set for state plans under Titles XIX and XXI and for capitation payments and DSH allotments under those titles. For other purposes, including programs remaining in Title IV of the Act, the percentage for Alaska is 54.13. For D. C, the percentage for other such purposes is 50.00

[FR Doc. 99–663 Filed 1–11–99; 8:45 am]

BILLING CODE 4150–04–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Children's Bureau; Kinship Care Advisory Panel; Notice of Meeting

AGENCY HOLDING THE MEETING: Children's Bureau.

DATE AND TIME: January 28, 1999, 9 a.m.–5 p.m.

NAME: Kinship Care Advisory Panel.

PLACE: The Inn and Conference Center, University of Maryland, University College, University Boulevard, at Adelphi Road, College Park, Maryland 20742.

SUMMARY: The Adoption and Safe Families Act of 1997 (Pub. L. 105–89) signed into law on November 19, 1997, includes a section requiring the Secretary of Health and Human Services to prepare a report to the Congress on children in foster care who are placed in the care of a relative. Section 303 of Pub. L. 105–89 requires the Secretary, in consultation with the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate to convene an advisory panel on kinship care to review an initial report and advise the Secretary on the extent to which children in foster care are placed in the care of a relative. The report will be based on the comments submitted by the advisory panel and will include policy recommendations from the Secretary. The Secretary shall present the report to the Congress by June 1, 1999.

SUPPLEMENTARY INFORMATION: This meeting is open to the public and is barrier free. Meeting records will also be open to the public and will be kept at the Switzer Building located at 330 ''C'' Street, SW., Washington, DC 20447.

FOR FURTHER INFORMATION CONTACT: Geneva Ware-Rice, Switzer Building, 330 ''C'' Street, SW., Washington, DC 20447, 202–205–8305.

Dated: January 5, 1999.

Carol W. Williams,

Associate Commissioner, Children's Bureau.

[FR Doc. 99–657 Filed 1–11–99; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Senior Executive Service; Performance Review Board Members

Title 5 U.S. Code, section 4314 (c)(4) of the Civil Service Reform Act of 1978, Pub. L. 95–454, requires that the appointment of Performance Review Board members be published in the **Federal Register**.

The following persons will serve on the Performance Review Board or Panels which oversee the evaluation of performance appraisals of Senior Executive Service members of the Administration for Children and Families.

Diann Dawson
Leon McCowan
Madeline Mocko
Carol W. Williams
Elizabeth M. James

Dated: January 7, 1999.

Olivia A. Golden,

Assistant Secretary for Children and Families.

[FR Doc. 99–658 Filed 1–11–99; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 94N–0424]

Mohammad Uddin; Proposal to Debar; Opportunity for a Hearing

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is proposing to issue an order under the Federal Food, Drug, and Cosmetic Act (the act) permanently debarring Mr. Mohammad Uddin from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this proposal on a finding that Mr. Uddin was convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the act. This notice also offers Mr. Uddin an opportunity for a hearing on the proposal. The agency is issuing this notice in the **Federal Register** because all other appropriate means of service of the notice upon Mr. Uddin have proven ineffective.

DATES: Written request for a hearing by February 11, 1999.

ADDRESSES: Submit written requests for a hearing and supporting information to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Christine F. Rogers, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–2041.

SUPPLEMENTARY INFORMATION:

I. Conduct Related to Conviction

On November 19, 1993, Mr. Uddin entered into a plea agreement to plead guilty to one count of obstruction of an agency proceeding. Based on this plea, the United States District Court for the District of Maryland entered judgment against Mr. Uddin on June 17, 1994, for one count of obstruction of an agency proceeding, a Federal felony offense under 18 U.S.C. 1505.

The underlying facts supporting this felony conviction, and to which Mr. Uddin stipulated in his plea agreement, are as follows:

Mr. Uddin was Assistant Vice President of Research and Development at Halsey Drug Co., Inc. (Halsey), during the period August 1987 through March 10, 1993. During an FDA inspection of Halsey on October 22, 1990, to determine Halsey's compliance with the act, Mr. Uddin was interviewed by FDA investigators. Although Mr. Uddin knew that Halsey had made three research and development (R&D) batches of sulfamethoxazole/trimethoprim (generic Bactrim), during the interview he told the investigators that these batches had not been made. He also told the investigators that he had made filing batches of generic Bactrim in both single and double strength dosage forms, when, in fact, he had not made the single strength batch. Mr. Uddin's false statements to FDA investigators obstructed FDA's inspection and audit of Halsey.

II. FDA's Finding

Section 306(a)(2)(B) of the act (21 U.S.C. 335a(a)(2)(B)) requires debarment of an individual if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product. Mr. Uddin's felony conviction under 18 U.S.C. 1505 was for illegal conduct relating to the regulation of Halsey's drug product. His false statements to FDA investigators concerned matters that affect FDA's regulatory decisions about drug products. Under section 306(l)(2) of the act, mandatory debarment applies when an individual is convicted within the 5

years preceding this notice. Section 306(c)(2)(A)(ii) of the act requires that Mr. Uddin's debarment be permanent.

III. Proposed Action and Notice of Opportunity for a Hearing

Based on the findings discussed previously in this document, FDA proposes to issue an order under section 306(a)(2) of the act permanently debarring Mr. Uddin from providing services in any capacity to a person that has an approved or pending drug product application.

In accordance with section 306 of the act and part 12 (21 CFR part 12), Mr. Uddin is hereby given an opportunity for a hearing to show why he should not be debarred. If Mr. Uddin decides to seek a hearing, he must file on or before February 11, 1999, a written notice of appearance and request for a hearing. The procedures and requirements governing this notice of opportunity for a hearing, a notice of appearance and request for a hearing, information and analyses to justify a hearing, and a grant or denial of a hearing are contained in part 12 and section 306(i) of the act.

Mr. Uddin's failure to file a timely written notice of appearance and request for a hearing constitutes an election by him not to use the opportunity for a hearing concerning his debarment, and a waiver of any contentions concerning this action. If Mr. Uddin does not request a hearing in the manner prescribed by the regulations, the agency will not hold a hearing and will issue the debarment order as proposed in this letter.

A request for a hearing may not rest upon mere allegations or denials but must present specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the information and factual analyses in the request for a hearing that there is no genuine and substantial issue of fact which precludes the order of debarment, the Commissioner of Food and Drugs will enter summary judgment against Mr. Uddin, making findings and conclusions and denying a hearing.

The facts underlying Mr. Uddin's conviction are not at issue in this proceeding. The only material issue is whether Mr. Uddin was convicted as alleged in this notice and, if so, whether, as a matter of law, this conviction mandates his debarment.

A request for a hearing, including any information or factual analyses relied on to justify a hearing, must be identified with Docket No. 94N–0424 and sent to the Dockets Management Branch (address above). All submissions pursuant to this notice of opportunity for a hearing are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j). Publicly available submissions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under section 306 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 335a) and under authority delegated to the Director, Center for Drug Evaluation and Research (21 CFR 5.99).

Dated: December 23, 1998.

Janet Woodcock,

Director, Center for Drug Evaluation and Research.

[FR Doc. 99–562 Filed 1–11–99; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA–0319, 0381, 1856/1893, and 1880/1882]

Agency Information Collection Activities: Proposed Collection; Comment Request

Agency: Health Care Financing Administration, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. Type of Information Collection Request: Extension of a currently approved collection; Title of Information Collection: State Medicaid Eligibility Quality Control (MEQC) Sample Section Lists and Supporting Regulations in 42 CFR 431.800–431.865; Form No.: HCFA–0319 (OMB# 0938–0147); Use: At the beginning of each month, State agencies are required to submit sample selection lists which identify all of the cases selected for review in the States' samples. These reviews are conducted to determine whether the sampled cases meet applicable State Title XIX eligibility requirements. The sample selection lists contain identifying information on Medicaid beneficiaries such as: State agency review number; beneficiary's name and address; the name of the county where beneficiary resides; and the Medicaid case number. The reviews are also used to assess beneficiary liability, if any, and to determine the amounts paid to provide Medicaid services for these cases.; Frequency: Monthly; Affected Public: State, Local or Tribal Government; Number of Respondents: 55; Total Annual Responses: 660; Total Annual Hours: 5,280.

2. Type of Information Collection Request: Extension of a currently approved collection; Title of Information Collection: Identification of Extension Units of Outpatient Physical Therapy (OPT) and Outpatient Speech Pathology (OSP) Providers and Supporting Regulations in 42 CFR 485.701–785.729; Form No.: HCFA–381 (OMB# 0938–0273); Use: Medicare requires OPT/OSP providers to be surveyed to determine compliance with Federal requirements. When an OPT/OSP provider furnishes services to locations other than their already certified premises (extension locations), those premises are considered to be part of the OPT/OSP provider and are subject to the same Medicare regulations as the primary location. This form is used by the State survey agencies and by the HCFA regional offices to identify and monitor extension locations to ensure their compliance with Federal requirements. The HCFA–381 form requests information such as: facility name, provider number, where services are rendered, and the number of OPT/OSP services rendered.; Frequency: Annually; Affected Public: Business or other for-profit; Number of Respondents: 2,300; Total Annual Responses: 2,300; Total Annual Hours: 575.

3. Type of Information Collection Request: Extension of a currently approved collection; Title of Information Collection: Request for Certification in the Medicare and/ or Medicaid Program to Provide Outpatient Physical Therapy (OPT) and/or Speech Pathology Services, Outpatient Physical Therapy Speech Pathology Survey Report and Supporting Regulations in 42 CFR 485.701–485.729; Form No.: HCFA–1856/1893 (OMB# 0938–0065); Use: The request for certification form is

used by State agency surveyors to determine if minimum Medicare eligibility requirements are being met by OPT providers. The survey report form records whether providers or suppliers are complying with HCFA health and safety requirements. The basic identifying information from this form is coded into the Online Survey Certification and Reporting System and serves as the information base for the creation of a record for future Federal certification and for monitoring activity.; Frequency: On occasion; Affected Public: Business or other for-profit; Number of Respondents: 1,700; Total Annual Responses: 1,700; Total Annual Hours: 446.

4. Type of Information Collection Request: Extension of a currently approved collection; Title of Information Collection: Request for Certification as Supplier of Portable X-ray Services under the Medicare/Medicaid Program for Portable X-ray Survey Report and Supporting Regulations in 42 CFR 405.1411–405.1416 and 486.100–486.110; Form No.: HCFA–1880/1882 (OMB# 0938–0027); Use: The Medicare program requires portable X-ray suppliers to be surveyed for health and safety standards. The HCFA–1880 is used by the surveyor to determine if a portable X-ray applicant meets the eligibility requirements. It also promotes data reduction or introduction, and retrieval from the Online Survey Certification and Reporting (OSCAR) System by the HCFA Regional Offices. The HCFA–1882 is the survey form that records survey results. The form is primarily a coding work sheet designed to facilitate data reduction and retrieval into the OSCAR system at the HCFA Regional Offices. Frequency: On occasion; Affected Public: Business or other for profit; Number of Respondents: 520; Total Annual Responses: 520; Total Annual Hours: 137.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: HCFA, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards, Attention: Louis Blank, Room N2–14–26, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: January 4, 1999.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 99–669 Filed 1–11–99; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[HCFA–1062–NC]

RIN 0938–AJ32

Medicare and Medicaid Programs; Announcement of Additional Applications From Hospitals Requesting Waivers for Organ Procurement Service Area Assignments

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice with comment period.

SUMMARY: This notice announces additional applications that we have received from hospitals requesting waivers from entering into agreements with their designated organ procurement organizations (OPOs). Section 1138(a)(2) of the Social Security Act allows the Secretary of the Department of Health and Human Services to grant waivers to hospitals that want to enter into an agreement with a specific OPO that is not the designated OPO for the hospital's service area. This notice also requests comments from OPOs and the general public for our consideration in determining whether these waivers should be granted.

DATES: Comments will be considered if we receive them at the appropriate address no later than 5 p.m. on March 15, 1999.

ADDRESSES: Mail written comments (1 original and 3 copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: HCFA–1062–NC, P.O. Box 26676, Baltimore, MD 21244–0517.

If you prefer, you may deliver your written comments (1 original and 3 copies) to one of the following addresses: Room 443–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Comments may also be submitted electronically to the following e-mail address: HCFA1062NC@hcfa.gov. E-mail comments must include the full name, postal address, and affiliation (if applicable) of the sender and must be submitted to the referenced address to be considered. All comments must be incorporated in the e-mail message because we may not be able to access attachments.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code HCFA–1062–NC. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 443–G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, Monday through Friday from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

FOR FURTHER INFORMATION CONTACT: Mark A. Horney, (410) 786–4554.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1138(a)(1)(A)(iii) of the Social Security Act (the Act) provides that a participating hospital must notify its designated organ procurement organization (OPO) of potential organ donors. The designated OPO, as defined under section 1138(a)(3)(B) of the Act, is determined by the service area in which the hospital is located. Under section 1138(a)(1)(C) of the Act, the hospital must have an agreement to identify potential organ donors only to that designated OPO.

Section 1138(a)(2) of the Act provides that a participating hospital may obtain a waiver of these requirements from the Secretary of the Department of Health and Human Services (the Secretary). A waiver allows the hospital to have an agreement with an OPO other than its designated OPO if conditions specified in section 1138(a)(2)(A) of the Act are met.

Section 1138(a)(2)(A) states that in granting a waiver, the Secretary must determine that such a waiver—

- Is expected to increase organ donation; and
- Will ensure equitable treatment of patients referred for transplants within the service area served by the hospital's designated OPO and within the service area served by the OPO with which the hospital seeks to enter into an agreement under the waiver.

In making a waiver determination, section 1138(a)(2)(B) of the Act provides

that the Secretary may consider, among other factors:

- Cost effectiveness.
- Improvements in quality.
- Whether there has been any change in a hospital's designated OPO service area due to the changes made on or after December 28, 1992, in definition of metropolitan statistical areas.
- The length and continuity of a hospital's relationship with the OPO other than the designated OPO.

Under section 1138(a)(2)(D) of the Act, the Secretary is required to publish a notice of any waiver application within 30 days of receiving the application and offer interested parties an opportunity to comment, in writing, within 60 days of the published notice.

The regulations at 42 CFR 486.316(d) provide that if we change the OPO designated for an area, hospitals located in that area must enter into agreements with the newly designated OPO or submit a request for a waiver within 30 days of notice of the change in designation. The criteria that the Secretary uses to evaluate the waiver in these cases are the same as those described above under section 1138(a)(2)(A) of the Act and have been incorporated into the regulations at § 486.316(e).

Section 486.316(g) further specifies that a hospital may continue to operate under its existing agreement with an out-of-area OPO while we are processing the waiver request submitted in accordance with § 486.316(d).

In accordance with section 1138(a)(2)(D) of the Act, this notice announces applications from hospitals requesting waivers from entering into agreements with their designated OPOs. This notice supplements previous notices announcing OPO waivers published on January 19, 1996, May 17, 1996, November 8, 1996, April 21, 1997, September 17, 1997, and September 23, 1998 (61 FR 1389, 61 FR 24941, 61 FR 57876, 62 FR 19326, 62 FR 48872, and 63 FR 50919).

II. Waiver Request Procedures

In October 1995, we issued a Program Memorandum (Transmittal No. A–95–11) that was supplied to each hospital. This Program Memorandum detailed the waiver process and discussed the information that hospitals must provide in requesting a waiver. We indicated that upon receipt of the waiver requests, we would publish a **Federal Register** notice to solicit public comments, as required by section 1138(a)(2)(D) of the Act.

We will review the requests and the comments received. During the review process we may consult, on an as-needed basis, with the Public Health Service's Division of Transplantation, the United Network for Organ Sharing, and our regional offices. If necessary, we may request additional clarifying information from the applying hospital or others. We will then make a final determination on the waiver requests and notify the affected hospitals and OPOs.

III. Hospital Waiver Requests

As allowed under § 486.316(e), each of the following hospitals has requested a waiver to have an agreement with an alternative, out-of-area OPO. This listing includes the name of the facility requesting a waiver, the city and state of the facility, the requested OPO, and the currently designated area OPO.

Name of facility	City	State	Designated OPO	Requested OPO
The Kings Daughter Hospital	Greenville	MS	TNMS	MSOP
Delta Regional Medical Center	Greenville	MS	TNMS	MSOP
Oktibbeha County Hospital	Starkville	MS	TNMS	MSOP
Greenwood Leflore Hospital	Greenwood	MS	TNMS	MSOP
Grenada Lake Medical Center	Grenada	MS	TNMS	MSOP
North Mississippi Medical Center	Tupelo	MS	TNMS	MSOP
Gilmore Memorial Hospital	Amory	MS	TNMS	MSOP
Genesee Mercy Healthcare	Batavia	NY	NYFL	NYWN
Baraga County Memorial Hospital	L'Anse	MI	WIUW	MIOP
Grand View Hospital	Ironwood	MI	WIUW	MIOP
Bell Memorial	Ishpeming	MI	WIUW	MIOP
Iron County Community Hospitals	Crystal Falls	MI	WIUW	MIOP
St. Mary's Hospital	Superior	WI	MNOP	WIUW
Affinity Health Systems	Oshkosh	WI	WIUW	WISE
New London Family Medical Center	New London	WI	WIUW	WISE
Calumet Medical Center	Chilton	WI	WIUW	WISE
Culpeper Memorial Hospital	Culpeper	VA	DCTC	VAOP
Warren Memorial Hospital	Front Royal	VA	DCTC	VAOP
City Hospital	Martinsburg	WV	DCTC	VAOP
Mary Washington Hospital	Fredericksburg	VA	DCTC	VAOP

The following three hospitals have requested a waiver under § 486.316(e) for a reason unrelated to a change in the designated service area of an OPO. Accordingly, these waivers will only be effective upon completion of our review.

Name of facility	City	State	Designated OPO	Requested OPO
Mansfield Hospital	Mansfield	OH	OHLC	OHLP
Shelby Hospital	Shelby	OH	OHLC	OHLP
Fletcher Allen	Burlington	VT	MAOB	NYAP

IV. Key to the OPO Codes

The key to the acronyms used in the listings to identify OPOs and their addresses is as follows:

DCTC—Washington Regional Transplant Consortium, 8110 Gateway Road, Suite 101 W, Falls Church, VA 22042
MAOB—New England Organ Bank, One Gateway Center, Newton, MA 02158
MIOP—Organ Procurement Agency of Michigan, 2203 Platt Road, Ann Arbor, MI 48104
MNOP—Lifesource, Upper Midwest Organ Procurement Organization Inc., 2550 University Avenue West, Suite 315 South, St. Paul, MN 55114–1904
MSOP—Mississippi Organ Recovery Agency, Inc., 12 River Bend Place, Suite B, Jackson, MS 39208
NYAP—OPO of Albany Medical College, 47 Scotland Avenue, AP8, Albany, NY 12208
NYFL—Finger Lakes Donor Recovery Network, Corporate Woods of Brighton, Building 120, Suite 180, Rochester, NY 14623
NYWN—Upstate New York Transplant Services, Inc., 165 Genesee Street, Suite 103, Buffalo, NY 14209
OHLC—Life Connection of Ohio, 1545 Holland Road, Suite C, Maumee, OH 43537
OHLP—Lifeline of Ohio, 770 Kinnear Road, Suite 200, Columbus, OH 43212
TNMS—Mid-South Transplant Foundation, 956 Court Avenue, Memphis, TN 38163
VAOP—Virginia Organ Procurement Agency, 1527 Huguenot Road, Midlothian, VA 23113
WISE—Wisconsin Donor Network, Froedtert Memorial Lutheran Hospital 9200 West Wisconsin Avenue, Milwaukee, WI 53226
WIUW—University of Wisconsin OPO, University of Wisconsin Hospital and Clinics, 600 Highland Avenue, Madison, WI 53792

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection requirement should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Therefore, we are soliciting public comment on the information collection requirements for the issue described below.

Designation of one OPO for each service area:

Section 486.316(e) states the requirements for a Medicare or Medicaid participating hospital to request a waiver permitting the hospital to have an agreement with a designated OPO other than the OPO designated for the service area in which the hospital is located. However, the burden associated with these requirements is currently approved under OMB 0938–0688, HCFA–R–13, Conditions of Coverage for Organ Procurement Organizations, with an expiration date of November 30, 1999.

If you comment on any of these information collection and record keeping requirements, please mail copies directly to the following:

Health Care Financing Administration, Office of Information Services, Security and Standards Groups, Division of HCFA Enterprise Standards, Attention: Louis Blank, HCFA–1062–NC, Room N2–14–26, 7500 Security Boulevard, Baltimore, MD 21244–1850, and

Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Allison Eydt, HCFA Desk Officer, Room 10235, New Executive Office Building, Washington, DC 20503.

Authority: Section 1138 of the Social Security Act (42 U.S.C. 1320b–8).

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; Program No. 93.774 Medicare—Supplementary Medical Insurance, and Program No. 93.778, Medical Assistance Program)

Dated: January 5, 1999.

Robert A. Berenson,

Director, Center for Health Plans and Providers, Health Care Financing Administration.

[FR Doc. 99–630 Filed 1–11–99; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

Publication of OIG Special Fraud Alert on Physician Liability for Certifications in the Provision of Medical Equipment and Supplies and Home Health Services

AGENCY: Office of Inspector General (OIG), HHS.

ACTION: Notice

SUMMARY: This **Federal Register** notice sets forth a recently issued OIG Special Fraud Alert concerning physician liability for certifications in the provision of medical equipment and supplies and home health services. For the most part, OIG Special Fraud Alerts address national trends in health care fraud, including potential violations of the Medicare anti-kickback statute. This Special Fraud Alert, issued to the health care provider community and now being reprinted in this issue of the **Federal Register**, specifically highlights physicians' responsibilities in making certifications for home health services and durable medical equipment, and the legal significance of the certifications.

FOR FURTHER INFORMATION CONTACT: Joel J. Schaer, Office of Counsel to the Inspector General, (202) 619–0089.

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Inspector General (OIG) issues Special Fraud Alerts based on information it obtains concerning particular fraudulent or abusive practices within the health care industry.

Special Fraud Alerts are intended for widespread dissemination to the health care provider community, as well as those charged with administering the Medicare and Medicaid programs. To date, the OIG has published in the **Federal Register** the texts of 9 previously-issued Special Fraud Alerts.[1] It is the OIG's intention to publish future Special Fraud Alerts in this same manner as a regular part of our dissemination of such information.[2]

In an effort to promote voluntary compliance in the health care industry and assist providers in their compliance efforts, the OIG has developed a Special Fraud Alert, set forth below, that addresses potential problem areas with

[1] See December 19, 1994 (59 FR 65372); August 10, 1995 (60 FR 40847); June 17, 1996 (61 FR 30623); and April 24, 1998 (63 FR 20415).

[2] All OIG Special Fraud Alerts are also available on the internet at the OIG web site at http://www.dhhs.gov/progorg/oig/frdalrt/index.htm.

regard to physician certification in the provision of medical equipment and supplies and home health services. Among other things, this newly-issued Special Fraud Alert addresses: (1) the importance of physician certification for Medicare; (2) how improper physician certifications foster fraud; and (3) potential consequences for knowingly signing a false or misleading certification, or signing with reckless disregard for the truth. A reprint of this Special Fraud Alert follows.

II. Special Fraud Alert: Physician Liability for Certifications in the Provision of Medical Equipment and Supplies and Home Health Services (January 1999)

The Office of Inspector General (OIG) was established at the Department of Health and Human Services by Congress in 1976 to identify and eliminate fraud, waste, and abuse in the Department's programs and to promote efficiency and economy in departmental operations. The OIG carries out this mission through a nationwide program of audits, inspections, and investigations.

To reduce fraud and abuse in the Federal health care programs, including Medicare and Medicaid, the OIG actively investigates fraudulent schemes that obtain money from these programs and, when appropriate, issues Special Fraud Alerts that identify segments of the health care industry that are particularly vulnerable to abuse. Copies of all OIG Special Fraud Alerts are available on the internet at http://www.dhhs.gov/progorg/oig/frdalrt/index.htm.

We are issuing this Fraud Alert because physicians may not appreciate the legal and programmatic significance of certifications they make in connection with the ordering of certain items and services for their Medicare patients. While the OIG believes that the actual incidence of physicians' intentionally submitting false or misleading certifications of medical necessity for durable medical equipment or home health care is relatively infrequent, physician laxity in reviewing and completing these certifications contributes to fraudulent and abusive practices by unscrupulous suppliers and home health providers. We urge physicians and their staff to report any suspicious activity in connection with the solicitation or completion of certifications to the OIG.

Physicians should also be aware that they are subject to substantial criminal, civil, and administrative penalties if they sign a certification knowing that the information relating to medical necessity is false, or with reckless disregard as to the truth of the information being submitted. While a physician's signature on a false or misleading certification made through mistake, simple negligence, or inadvertence will not result in personal liability, the physician may unwittingly be facilitating the perpetration of fraud on Medicare by suppliers or providers. Accordingly, we urge all physicians to review and familiarize themselves with the information in this Fraud Alert. If a physician has any questions as to the application of these requirements to specific facts, the physician should contact the appropriate Medicare Fiscal Intermediary or Carrier.

The Importance of Physician Certification for Medicare

The Medicare program only pays for health care services that are medically necessary. In determining what services are medically necessary, Medicare primarily relies on the professional judgment of the beneficiary's treating physician, since he or she knows the patient's history and makes critical decisions, such as admitting the patient to the hospital; ordering tests, drugs, and treatments; and determining the length of treatment. In other words, the physician has a key role in determining both the medical need for, and utilization of, many health care services, including those furnished and billed by other providers and suppliers.

Congress has conditioned payment for many Medicare items and services on a certification signed by a physician attesting that the item or service is medically necessary. For example, physicians are routinely required to certify to the medical necessity for any service for which they submit bills to the Medicare program.

Physicians also are involved in attesting to medical necessity when ordering services or supplies that must be billed and provided by an independent supplier or provider. Medicare requires physicians to certify to the medical necessity for many of these items and services through prescriptions, orders, or, in certain specific circumstances, Certificates of Medical Necessity (CMNs). These documentation requirements substantiate that the physician has reviewed the patient's condition and has determined that services or supplies are medically necessary.

Two areas where the documentation of medical necessity by physician certification plays a key role are (i) home health services and (ii) durable medical equipment (DME). Through various OIG audits, we have discovered that physicians sometimes fail to discharge their responsibility to assess their patients' conditions and need for home health care. Similarly, the OIG has found numerous examples of physicians who have ordered DME or signed CMNs for DME without reviewing the medical necessity for the item or even knowing the patient.

Physician Certification for Home Health Services

Medicare will pay a Medicare-certified home health agency for home health care provided under a physician's plan of care to a patient confined to the home. Covered services may include skilled nursing services, home health aide services, physical and occupational therapy and speech language pathology, medical social services, medical supplies (other than drugs and biologicals), and DME.

As a condition for payment, Medicare requires a patient's treating physician to certify initially and recertify at least every 62 days (2 months) that:

- The patient is confined to the home;
- The individual needs or needed (i) intermittent skilled nursing care; (ii) speech or physical therapy or speech-language pathology services; or (iii) occupational therapy or a continued need for occupational therapy (payment for occupational therapy will be made only upon an initial certification that includes care under (i) or (ii) or a recertification where the initial certification included care under (i) or (ii));
- A plan of care has been established and periodically reviewed by the physician; and
- The services are (were) furnished while the patient is (was) under the care of a physician.

The physician must order the home health services, either orally or in writing, prior to the services being furnished. The physician certification must be obtained at the time the plan of treatment is established or as soon thereafter as possible. The physician certification must be signed and dated prior to the submission of the claim to Medicare. If a physician has any questions as to the application of these requirements to specific facts, the physician should contact the appropriate Medicare Fiscal Intermediary or Carrier.

Physician Orders and Certificates of Medical Necessity for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies for Home Use

DME is equipment that can withstand repeated use, is primarily used for a medical purpose, and is not generally used in the absence of illness or injury.

Examples include hospital beds, wheelchairs, and oxygen delivery systems. Medicare will cover medical supplies that are necessary for the effective use of DME, as well as surgical dressings, catheters, and ostomy bags. However, Medicare will only cover DME and supplies that have been ordered or prescribed by a physician. The order or prescription must be personally signed and dated by the patient's treating physician.

DME suppliers that submit bills to Medicare are required to maintain the physician's original written order or prescription in their files. The order or prescription must include:

- The beneficiary's name and full address;
- The physician's signature;
- The date the physician signed the prescription or order;
- A description of the items needed;
- The start date of the order (if appropriate); and

the diagnosis (if required by Medicare program policies) and a realistic estimate of the total length of time the equipment will be needed (in months or years).

For certain items or supplies, including supplies provided on a periodic basis and drugs, additional information may be required. For supplies provided on a periodic basis, appropriate information on the quantity used, the frequency of change, and the duration of need should be included. If drugs are included in the order, the dosage, frequency of administration, and, if applicable, the duration of infusion and concentration should be included.

Medicare further requires claims for payment for certain kinds of DME to be accompanied by a CMN signed by a treating physician (unless the DME is prescribed as part of a plan of care for home health services). When a CMN is required, the provider or supplier must keep the CMN containing the treating physician's original signature and date on file.

Generally, a CMN has four sections:

- Section A contains general information on the patient, supplier, and physician. Section A may be completed by the supplier.
- Section B contains the medical necessity justification for DME. This cannot be filled out by the supplier. Section B must be completed by the physician, a non-physician clinician involved in the care of the patient, or a physician employee. If the physician did not personally complete section B, the name of the person who did complete section B and his or her title and employer must be specified.
- Section C contains a description of the equipment and its cost. Section C is completed by the supplier.
- Section D is the treating physician's attestation and signature, which certifies that the physician has reviewed sections A, B, and C of the CMN and that the information in section B is true, accurate, and complete. Section D must be signed by the treating physician. Signature stamps and date stamps are not acceptable.

By signing the CMN, the physician represents that:

- He or she is the patient's treating physician and the information regarding the physician's address and unique physician identification number (UPIN) is correct;

The entire CMN, including the sections filled out by the supplier, was completed prior to the physician's signature; and

The information in section B relating to medical necessity is true, accurate, and complete to the best of the physician's knowledge.

Improper Physician Certifications Foster Fraud

Unscrupulous suppliers and providers may steer physicians into signing or authorizing improper certifications of medical necessity. In some instances, the certification forms or statements are completed by DME suppliers or home health agencies and presented to the physician, who then signs the forms without verifying the actual need for the items or services. In many cases, the physician may obtain no personal benefit when signing these unverified orders and is only accommodating the supplier or provider. While a physician's signature on a false or misleading certification made through mistake, simple negligence, or inadvertence will not result in personal liability, the physician may unwittingly be facilitating the perpetration of fraud on Medicare by suppliers or providers. When the physician knows the information is false or acts with reckless disregard as to the truth of the statement, such physician risks criminal, civil, and administrative penalties.

Sometimes, a physician may receive compensation in exchange for his or her signature. Compensation can take the form of cash payments, free goods, or any other thing of value. Such cases may trigger additional criminal and civil penalties under the anti-kickback statute.

The following are examples of inappropriate certifications uncovered by the OIG in the course of its investigations of fraud in the provision of home health services and medical equipment and supplies:

A physician knowingly signs a number of forms provided by a home health agency that falsely represent that skilled nursing services are medically necessary in order to qualify the patient for home health services.

A physician certifies that a patient is confined to the home and qualifies for home health services, even though the patient tells the physician that her only restrictions are due to arthritis in her hands, and she has no restrictions on her routine activities, such as grocery shopping.

At the prompting of a DME supplier, a physician signs a stack of blank CMNs for transcutaneous electrical nerve stimulators (TENS) units. The CMNs are later completed with false information in support of fraudulent claims for the equipment. The false information purports to show that the physician ordered and certified to the medical necessity for the TENS units for which the supplier has submitted claims.

A physician signs CMNs for respiratory medical equipment falsely representing that the equipment was medically necessary.

A physician signs CMNs for wheelchairs and hospital beds without seeing the patients, then falsifies his medical charts to indicate that he treated them.

A physician accepts anywhere from $50 to $400 from a DME supplier for each prescription he signs for oxygen concentrators and nebulizers.

Potential Consequences for Unlawful Acts

A physician is not personally liable for erroneous claims due to mistakes, inadvertence, or simple negligence. However, knowingly signing a false or misleading certification or signing with reckless disregard for the truth can lead to serious criminal, civil, and administrative penalties including:

Criminal prosecution;

Fines as high as $10,000 per false claim plus treble damages; or

administrative sanctions including: exclusion from participation in Federal health care programs, withholding or recovery of payments, and loss of license or disciplinary actions by state regulatory agencies.

Physicians may violate these laws when, for example:

They sign a certification as a ''courtesy'' to a patient, service provider, or DME supplier when they have not first made a determination of medical necessity;

They knowingly or recklessly sign a false or misleading certification that causes a false claim to be submitted to a Federal health care program; or

They receive any financial benefit for signing the certification (including free or reduced rent, patient referrals, supplies, equipment, or free labor).

Even if they do not receive any financial or other benefit from providers or suppliers, physicians may be liable for making false or misleading certifications.

What To Do If You Have Information About Fraud and Abuse Against Medicare or Medicaid Programs

If you have information about physicians, home health agencies, or medical equipment and supply companies engaging in any of the activities described above, contact any of the regional offices of the Office of Investigations of the Office of Inspector General, U.S. Department of Health and Human Services, at the following locations:

Field offices	States served	Telephone
Boston	MA, VT, NH, ME, RI, CT	617–565–2664
New York	NY, NJ, PR, VI	212–264–1691
Philadelphia	PA, MD, DE, WV, VA, DC	215–861–4586
Atlanta	GA, KY, NC, SC, FL, TN, AL, MS	404–562–7603
Chicago	IL, MN, WI, MI, IN, OH, IA, MO	312–353–2740
Dallas	TX, NM, OK, AR, LA, CO, UT, WY, MT, ND, SD, NE, KS	214–767–8406
Los Angeles	AZ, NV, So. CA	714–246–8302
San Francisco	No. CA, AK, HI OR, ID, WA	415–437–7961

To Report Suspected Fraud, Call or Write: 1–800-HHS-TIPS (1–800–447–8477), Department of Health and Human Services, Office of Inspector General, P.O. Box 23489, L'Enfant Plaza Station, Washington, D.C. 20026–3489.

Dated: January 6, 1999.

June Gibbs Brown,

Inspector General.

[FR Doc. 99–631 Filed 1–11–99; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Meeting of the National Reading Panel

Notice is hereby given of the fifth Washington area meeting of the National Reading Panel. The meeting will be held on Thursday, January 21, 1999, from 12:30 to 6:00 PM at the Holiday Inn Georgetown, 2101 Wisconsin Avenue, NW, Washington, DC 20007. The entire meeting will be open to the public.

The National Reading Panel was requested by Congress and created by the Director of the National Institute of Child Health and Human Development in consultation with the Secretary of Education. The Panel will study the effectiveness of various approaches to teaching children how to read and report on the best ways to apply these findings in classrooms and at home. Its members include prominent reading researchers, teachers, child development experts, leaders in elementary and higher education, and parents. The Chair of the Panel is Dr. Donald N. Langenberg, Chancellor of the University System of Maryland.

The Panel will build on the recently announced findings presented by the National Research Council's Committee on the Prevention of Reading Difficulties in Young Children. Based on a review of the literature, the Panel will: determine the readiness for application in the classroom of the results of these research studies; identify appropriate means to rapidly disseminate this information to facilitate effective reading instruction in the schools; and identify gaps in the knowledge base for reading instruction and the best ways to close these gaps.

The agenda for this meeting will include discussing the recommendations made by the science members of the National Reading Panel, who have been developing a proposed methodology to select and evaluate research studies. A period of time will be set aside at approximately 4:00 PM for members of the public to address the Panel and express their view regarding the Panel's mission. Individuals desiring an opportunity to speak before the Panel should address their requests to F. William Dommel, Jr., J.D., Executive Director, National Reading Panel, c/o Ms. Amy Andryszak and either mail them to the Widmeyer-Baker Group, 1875 Connecticut Avenue, NW, Suite 800, Washington, DC 20009, or e-mail them to *amya@twbg.com,* or fax them to 202–667–0902. Requests for addressing the Panel should be received by January 15, 1999. Panel business permitting, each public speaker will be allowed five minutes to present his or her views. In the event of a large number of public speakers, the Panel Chair retains the option to further limit the presentation time allowed to each. Although the time permitted for oral presentations will be brief, the full text of all written comments submitted to the Panel will be made available to the Panel members for consideration.

For further information contact Ms. Amy Andryszak at 202–667–0901. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. Amy Andryszak by January 15, 1999.

Dated: December 23, 1998.

Duane Alexander,

Director, National Institute of Child Health and Human Development.

[FR Doc. 99–601 Filed 1–11–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; 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.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel Studies of Chemical Deposition in Mammals (RFP 98–29).

Date: January 27, 1999.

Time: 9:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS–East Campus Building 4401, Conference Room 3446, Research Triangle Park, NC 27709.

Contact Person: Linda K. Bass, Scientific Review Administrator, Nat'l Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–24, Research Triangle Park, NC 27709, (919) 541–1307.

(Catalogue of Federal Domestic Assistance Program Nos. 93.113, Biological Response on Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing; 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basis Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences, National Institutes of Health, HHS)

Dated: January 5, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 99–602 Filed 1–11–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel Conference Grants (R13s).

Date: January 15, 1999.

Time: 9 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS–EAST Campus, Building 4401, Conference Room 3446, Research Triangle Park, NC 27709, (Telephone Conference Call).

Contact Person: Patrick J. Mastin, PHD, Scientific Review Administrator, National Institute of Environmental Health Science, P.O. Box 12233, Research Triangle Park, NC 27709, 919/541/4964.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel Pathology Support for the National Toxicology Program (NTP) Quality Assessment.

Date: January 20, 1999.

Time: 9 a.m. to 11 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS–East Campus, Building 4401, Conference Room 3446, Research Triangle Park, NC 27709, (Telephone Conference Call).

Contact Person: Patrick J. Mastin, PHD, Scientific Review Administrator, 79 Alexander Drive, Research Triangle Park, NC 27709, (919) 541–1446.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing; 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences, National Institutes of Health, HHS)

Dated: January 5, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 99–603 Filed 1–11–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Board of Regents of the National Library of Medicine.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Board of Regents of the National Library of Medicine, Research and Development Subcommittee.

Date: January 19, 1999.

Time: 3:30 p.m. to 5 p.m.

Agenda: Review research and developments and programs of the National Center for Biotechnology Information.

Place: National Library of Medicine, Building 38A, Conference Room 8N–805, 8600 Rockville Pike, Bethesda, MD 20894.

Contact Person: Donald A.B. Lindberg, MD, Director, National Library of Medicine, National Institutes of Health, PHS, DHHS, Bldg. 38, Room 2E17B, Bethesda, MD 20894.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: January 5, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 99–599 Filed 1–11–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Recombinant DNA Advisory Committee; Cancellation of Meeting

Notice is hereby given of the cancellation of the Recombinant DNA Advisory Committee, January 7, 1999, 5:50 p.m. to 9:30 p.m., Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, Maryland 20814, which was published in the **Federal Register** on December 22, 1998, 63 FR 70789.

The meeting was canceled due to lack of agenda items.

Dated: January 6, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, National Institutes of Health.

[FR Doc. 99–600 Filed 1–11–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; Notice of 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 a meeting of the Board of Governors of the Warren Grant Magnuson Clinical Center.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(6). Title 5 U.S.C., to discuss the performance of the Director, Clinical Center, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Governors of the Warren Grant Magnuson Clinical Center.

Date: January 29, 1999.

Open: 8:30 a.m. to 2 p.m.

Agenda: For discussion of program policies and issues.

Place: National Institutes of Health, Clinical Center Medical Board Room, 2C116, 9000 Rockville Pike, Bethesda, MD 20892.

Closed: 2 p.m. to 3 p.m.

Agenda: To review and evaluate the performance of the Director, Clinical Center.

Place: National Institutes of Health, Clinical Center Medical Board Room, 2C116, 9000 Rockville Pike, Bethesda, MD 20892.

Contact Person: Maureen E. Gormley, Executive Secretary, Warren Grant Magnuson Clinical Center, National Institutes of Health, Building 10, Room 2C146, Bethesda, MD 20892, 301/496–2897.

Dated: January 5, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 99–604 Filed 1–11–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered and Threatened Wildlife and Plants: Notice of Availability and Opening of Comment Period for an Application for Incidental Take Permit to Allow Take of an Endangered Species by the Town of Rome, Adams County, Wisconsin, and National Environmental Policy Act Determination

SUMMARY: The U.S. Fish and Wildlife Service (Service) provides notice of the availability of a Habitat Conservation Plan/Incidental Take Permit Application from the Town of Rome, Adams County, Wisconsin, and the Service's National Environmental Policy Act Determination for the proposed action of permit issuance. The Applicant proposes to reconstruct approximately 4.25 miles of an existing roadway (Badger Avenue) which includes construction work in the associated road rights-of-way. An approximately 2.5-mile segment of the roadway project area includes patches of habitat occupied by the endangered Karner blue butterfly (*Lycaeides melissa samuelis*). Construction activities that may impact the Karner blue butterfly include clearing, grubbing, and grading operations. Post construction right-of-way mowing may also result in the take of the Karner blue butterfly. The applicant has prepared a Habitat Conservation Plan (HCP) for the project area which includes measures to minimize, mitigate and monitor impacts to the butterfly and its habitat. Due to the nature of the proposed action, the Service proposes to issue a permit for a period of 20 years to include the limited take of occupied habitat for the road construction project and subsequent mowing program, compensation for take through appropriate minimization and mitigation measures, and implementation of a post-construction monitoring program to assure the success of the minimization and mitigation measures. The HCP and Incidental Take Permit Application are available for public review and comment for a period of 30 days. All comments received, including commentors names and addresses, will become part of the Service's Administrative Record and may be made available to the public.

DATES: Written comments on the Habitat Conservation Plan/Incidental Take Permit Application and the Service's NEPA Determination should be received on or before February 11, 1999.

ADDRESSES: Persons wishing to review the application and associated documents may obtain copies by writing to the Regional HCP/NEPA Coordinator, Fish and Wildlife Service, 1 Federal Drive, Fort Snelling, Minnesota 55111–4056. Documents will be available for public inspection by appointment only, during normal business hours (8:00–4:30), at the U.S. Fish and Wildlife Service, 1 Federal Drive, Fort Snelling, Minnesota, (612–713–5350) and at the U.S. Fish and Wildlife Service, 1015 Challenger Court, Green Bay, Wisconsin (920–465–7440). Written comments should be submitted to the Regional HCP/NEPA Coordinator at the address listed above or via FAX at 612–713–5292. Please refer to permit number TE006295 when submitting comments.

FOR FURTHER INFORMATION, CONTACT: Ms. Lisa Mandell, Regional HCP/NEPA Coordinator, at (612) 713–5350.

Dated: January 5, 1999.

Charles M. Wooley,

Program Assistant Regional Director, Ecological Services, Region 3, Fort Snelling, Minnesota.

[FR Doc. 99–614 Filed 1–11–99; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Receipt of Petitions for Federal Acknowledgment of Existence as an Indian Tribe

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

Pursuant to 25 CFR 83.9(a) notice is hereby given that the following groups have each filed a letter of intent to petition for acknowledgment by the Secretary of the Interior that the group exists as an Indian tribe. Each letter of intent was received by the Bureau of Indian Affairs (BIA) on the date indicated, and was signed by members of the group's governing body.

Pokanoket/Wampanoag Federation/ Wampanoag Nation/Pokanoket Tribe/ And Bands, c/o Bernice Young, 77 Aquarius Drive, Warwick, Rhode Island 02889. January 5, 1998.
Montaukett Tribe of Long Island, c/o Robert D. Cooper, P.O. Box 126, Austin Drive, East Hampton, New York 11937–0126. March 16, 1998.
Comanche Penateka Tribe, c/o George H. Salazar, 80 Lyerly, #82, Houston, Texas 77022. April 3, 1998.
Western Arkansas Cherokee Tribe, c/o Paul Thomas Vickers, P.O. Box 1131, Midway, Arkansas 72653. April 7, 1998.
Calusa-Seminole Indian Nation, c/o Wayne Bowen, 343 Soquel Avenue #93, Santa Cruz, California 95062. April 28, 1998.
Western Cherokee Nation of Arkansas and Missouri, c/o Lola Smith Scholl, Hwy. 351, Paragould, Arkansas 72450. May 1, 1998.
Cherokee Nation West—Southern Band of the Eastern Cherokee Indians of Arkansas & Missouri, c/o Lee R. Brodie, 1611 Cherokee Avenue, P.O. Box 918, Seneca, Missouri 64865. May 11, 1998.
The Displaced Elem Lineage Emancipated Members Alliance (DELEMA), c/o Richard J. Steward, 3357 Hoen Avenue, Santa Rosa, California 95405. May 11, 1998.
Tribal Council of the Carrizo/ Comecrudo Nation of Texas, c/o Juan B. Macias, 5319 East 6th Street, Lubbock, Texas 79403. July 6, 1998.
Southern Pequot Tribe, c/o Ransford L. Collins, 97 Fog Plain Road, Waterford, Connecticut 06385. July 7, 1998
Shawnee Nation, Ohio Blue Creek Band of Adams County, c/o Cora Tula Watters, 696 Black's Run Road, Lynx, Ohio 45650. August 5, 1998.
Konkow Valley Band of Maidu, c/o Alfred E. Clark, 360B Grand Avenue, Oroville, California 95965. August 11, 1998.
Piedmont American Indian Association, c/o Howard E. (Gene) Norris, 411 Tebblewood Drive, Simpsonville, South Carolina 29680. August 20, 1998
Mississippi Band of Chickasaw Indians, c/o David Tomby, P.O. Box 3251, Jackson, Mississippi 39207. September 15, 1998.
Seaconke Wampanoag Tribe, c/o Wilfred Greene, 347C Mishnock Road, Greenwich, Rhode Island 02817. October 29, 1998.
Gabrieleno Band of Mission Indians of California, c/o Susan Frank, P.O. Box 3022, Beaumont, California 92223. November 3, 1998.
T'si-akim Maidu, c/o Donald E. Ryberg, P.O. Box 3951, Quincy, California 95972. November 16, 1998.

This is a notice of receipt of these letters of intent to petition and does not constitute notice that the petitions are under active consideration. Notice of active consideration will be sent by mail to the petitioner and other interested parties at the appropriate time.

Under Section 83.9(a) of the Federal regulations, third parties may submit factual and/or legal arguments in support of or in opposition to each group's petition and may request to be kept informed of all general actions affecting the petition. Third parties should provide copies of their submissions to the petitioner. Any information submitted will be made available on the same basis as other information in the BIA's files. The petitioner will be provided an opportunity to respond to such submissions prior to a final determination regarding the petitioner's status.

The petitions may be examined, by appointment, in the Department of the Interior, BIA, Branch of Acknowledgment and Research, Room 3427–MIB, 1849 C Street, N.W., Washington, D.C. 20240, Phone: (202) 208–3592.

Dated: December 28, 1998.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 99–561 Filed 1–11–99; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–951–99–1020–00]

Call for Nominations for Butte Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to solicit public nominations for a vacant Category 3 position on the Butte Resource Advisory Council (RAC). Category 3 is made up of individuals who are representatives of state, county and local government; Native American tribes; academicians involved in natural sciences; and the public at large. The term of the position will expire in September 1999.

The RACs provide advice and recommendations to the Bureau of Land Management (BLM) on land use planning and management of public lands within their geographic areas.

Public nominations will be considered for 45 days after the publication of this notice. Individuals may nominate themselves or others; nominees must be residents of Montana. Nominees will be evaluated based on their education, training, and experience on the issues and knowledge of the geographical area covered by the Butte RAC. Nominees should have demonstrated a commitment to collaborative resource decision-making.

All nominations must be accompanied by letters of reference from represented interests or organizations, a completed background information nomination form, and any other information that speaks to the nominee's qualifications.

DATE: All nominations must be received by the BLM Butte Field Office no later than February 26, 1999.

FOR FURTHER INFORMATION CONTACT: Jeanne Sullivan, BLM Butte Field Office, 106 North Parkmont, PO Box 3388, Butte, Montana 59701; telephone 406–494–5059.

Dated: December 30, 1998.

Bill Weatherly,

Acting Field Manager.

[FR Doc. 99–611 Filed 1–11–99; 8:45 am]

BILLING CODE 4310–DN–M

DEPARTMENT OF INTERIOR

Bureau of Land Management

[DES–98–57]

Notice of Availability of Draft Environmental Impact Statement

ACTION: Notice of availability.

SUMMARY: Notice is hereby given that the Bureau of Land Management (BLM) has prepared a Draft Environmental Impact Statement (EIS) for the Colorado Sodium Products Development Project (Project), located in Rio Blanco County and Garfield County, Colorado.

DATES: In accordance with the National Environmental Policy Act, the BLM will conduct public meetings to solicit comments on this draft EIS. These public meetings will be held in two locations:

1. Bureau of Land Management, White River Resource Area Office, 73544 Highway 64, Meeker, Colorado, on February 10, 1999, at 7:00 PM.

2. Town Hall Council Chambers, 222 Grand Valley Way, Parachute, Colorado, on February 11, 1999 at 7:00 PM.

Written comments and recommendations on this Draft EIS should be received on or before March 9, 1999.

ADDRESSES: Address all comments concerning this notice to Mr. Larry

Shults, Natural Resource Specialist, U.S. Bureau of Land Management, White River Resource Area, 73544 Highway 64, Meeker, CO 81641.

FOR FURTHER INFORMATION CONTACT: Larry Shults, (970) 878–3601.

SUPPLEMENTARY INFORMATION: American Soda, L.L.P. (American Soda) intends to construct and operate a commercial nahcolite solution mining operation in the northcentral portion of the Piceance Creek Basin in Rio Blanco County, Colorado. Nahcolite is naturally occurring sodium bicarbonate that is found in association with oil shale deposits. After the nahcolite is removed from the ground, it would be processed into a sodium carbonate solution and transported by a 44-mile pipeline south to a processing operation to be located at an existing industrial site in the Parachute Valley in Garfield County, Colorado. There it would be further processed to commercial grade sodium carbonate, sodium bicarbonate, and other sodium products which would then be shipped from the processing facility via a 4-mile long dedicated rail spur to an interstate rail connection near the town of Parachute.

John J. Mehlhoff,

Resource Area Manager, White River Resource Area.

[FR Doc. 99–605 Filed 1–11–99; 8:45 am]

BILLING CODE 4310–JB–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM 030–1430–01; NMNM 86816]

Public land order No. 7375; Withdrawal of Public Lands for Sacramento Escarpment Area of Critical Environmental Concern; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order withdraws 5,364.87 acres of public lands from surface entry and mining for a period of 20 years, for the Bureau of Land Management to protect and preserve the special status species, scenic values, and unique resources of the Sacramento Escarpment Area of Critical Environmental Concern. The lands have been and will remain open to mineral leasing. An additional 80 acres of non-Federal lands, if acquired by the United States, would become subject to the withdrawal.

EFFECTIVE DATE: January 12, 1999.

FOR FURTHER INFORMATION CONTACT: Lorraine J. Salas, BLM Las Cruces District Office, 1800 Marquess, Las Cruces, New Mexico 88005, 505–525–4388.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1994), it is ordered as follows:

1. Subject to valid existing rights, the following described public lands are hereby withdrawn from settlement, sale, location, or entry under the general land laws, including the United States mining laws (30 U.S.C. Ch. 2 (1994)), but not from leasing under the mineral leasing laws, to protect the Bureau of Land Management's Sacramento Escarpment Area of Critical Environmental Concern:

New Mexico Principal Meridian

T. 17 S., R. 10 E.,
  Sec. 4, S½NW¼ and SW¼ (unsurveyed);
  Sec. 5, S½NE¼, SE¼NW¼, and S½;
  Sec. 7, SE¼NE¼, NE¼SE¼, and S½SE¼;
  Sec. 8, N½, SW¼, NW¼SE¼, and S½SE¼;
  Sec. 17, E½ and N½NW¼ (unsurveyed);
  Sec. 20, NE¼ and E½SE¼;
  Sec. 28 (unsurveyed);
  Sec. 29, E½;
  Sec. 33 (unsurveyed).
T. 18 S., R. 10 E.,
  Sec. 4 (unsurveyed);
  Sec. 5, lots 1 and 2, and S½NE¼;
  Sec. 8, E½NE¼;
  Sec. 9 (unsurveyed);
  Sec. 35, E½ (unsurveyed).
T. 19 S., R. 10 E.,
  Sec. 2, E½NE¼, NW¼NE¼, N½SW¼NE¼, and N½NE¼SE¼.

The areas described aggregate approximately 5,364.87 acres in Otero County.

2. The following described non-Federal lands are located within the boundary of the Sacramento Escarpment Area of Critical Environmental Concern. In the event these lands return to Federal ownership, they would be subject to the terms and conditions of this withdrawal:

New Mexico Principal Meridian

T. 17 S., R. 10 E.,
  Sec. 8, NE¼SE¼;
  Sec. 20, NW¼SE¼.

The areas described aggregate 80 acres in Otero County.

3. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of the lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resources other than under the mining laws.

4. This withdrawal will expire 20 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (1994), the Secretary determines that the withdrawal shall be extended.

Dated: December 23, 1998.

John Berry,

Assistant Secretary of the Interior.

[FR Doc. 99–673 Filed 1–11–99; 8:45 am]

BILLING CODE 4310–VC–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

Renewal of the Advisory Committee on Voluntary Foreign Aid

AGENCY: United States Agency for International Development.

ACTION: Notice of renewal of advisory committee.

SUMMARY: Pursuant to the Federal Advisory Committee Act, the Administrator has determined that renewal of the Advisory Committee on Voluntary Foreign Aid for a two-year period, beginning January 1, 1999, is necessary and in the public interest.

FOR FURTHER INFORMATION CONTACT: Noreen O'Meara, (202) 712–5979.

Dated: January 4, 1999.

Noreen O'Meara,

Director, Advisory Committee on Voluntary Foreign Aid (ACVFA).

[FR Doc. 99–672 Filed 1–11–99; 8:45 am]

BILLING CODE 6116–01–M

AGENCY FOR INTERNATIONAL DEVELOPMENT

Malaria Vaccine Development Program; Federal Advisory Committee; Notice of Meeting

Pursuant to the Federal Advisory Committee Act, notice is hereby given of a meeting of the USAID Malaria Vaccine Development Program (MVDP) Federal Advisory Committee. The meeting will be held from 8:30 am to 5:00 pm on January 20, 1999 and from 8:30 to noon on January 21, 1999 at the Conference Room of the Environmental Health Project located in Suite 300, 1611 North Kent Street in Arlington, VA 22209–2111.

The agenda will concentrate on the activities of the MVDP over the past six months and plans for the next year.

The meeting will be open to the public unless it is necessary to discuss procurement sensitive information; should this be the case, it will be announced and the meeting closed at the appropriate time. Any interested person may attend the meeting, may file written statements with the committee

before or after the meeting, or present any oral statements in accordance with procedures established by the committee, to the extent that time available for the meeting permits.

Those wishing to attend the meeting or to obtain additional information about the USAID MVDP should contact Carter Diggs, the designated Federal Officer for the USAID MDP Federal Advisory Committee at the Office of Health and Nutrition.

USAID/G/PHN/HN/EH, Room 3.07–013, 3rd floor RRB, Washington, DC 20523–3700, telephone (202) 712–5728, Fax (202) 216–3702, cdiggs@usaid.gov.

Carter Diggs,

USAID Designated Federal Officer, (Technical Advisor, Malaria Vaccine Development Program).

[FR Doc. 99–671 Filed 1–11–99; 8:45 am]

BILLING CODE 6116–01–M

INTERNATIONAL TRADE COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission

TIME AND DATE: January 19, 1999 at 2:00 pm.

PLACE: Room 101, 500 E Street S.W., Washington, DC 20436.

STATUS: Open to the public.

Matters To Be Considered:

1. Agenda for future meeting: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701–TA–386 and 731–TA–812–813 (Preliminary) (Live Cattle from Canada and Mexico)—briefing and vote.
5. Outstanding action jackets:

(1) Document No. GC–98–061: Decision on petition of complainant Atmel for relief from final determination finding U.S. Patent No. 4,451,903 unenforceable in Inv. No. 337–TA–395 (Certain EPROM, EEPROM, Flash Memory, and Flash Microcontroller Semiconductor Devices and Products Containing Same).

(2) Document No. GC–98–068: Whether to review final initial determination finding no violation of section 337 in Inv. No. 337–TA–403 (Certain Acesulfame Potassium and Blends and Products Containing Same).

(3) Document No. INV–98–099: Approval of additional language concerning Commission deadlines in institution and scheduling notices.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: January 7, 1999.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 99–779 Filed 1–8–99; 3:08 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response Compensation and Liability Act (''CERCLA'')

In accordance with Departmental policy, 28 CFR 50.7, 38 FR 19029, and 42 U.S.C. 9622(d), notice is hereby given that a proposed consent decree in *United States* v. *Jane Doe, as Executrix of the Estate of Edmund Barbera, et al.*, 96 Civ. 8563 (BSJ), was lodged on December 28, 1998, with the United States District Court for the Southern District of New York. The Consent Decree addresses the hazardous waste contamination at the Port Refinery Superfund Site (the ''Site''), located in the Village of Rye Brook, Westchester County, New York. The Consent Decree requires twenty-two generators of hazardous substances transported to the Site to pay to the United States a total of $1,137,845.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Jane Doe, as Executrix of the Estate of Edmund Barbera, et al.*, DOJ Ref. #90–11–3–1142A.

The proposed consent decree may be examined at the office of the United States Attorney for the Southern District of New York, 100 Church Street, New York, New York, 10007 (contact Assistant United States Attorney Kathy S. Marks); the Region II Office of the Environmental Protection Agency, 290 Broadway, New York, New York, 10007–1866 (contact Assistant Regional Counsel Michael Mintzer); and at the Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005. In requesting a copy please refer to the referenced case and enclose a check in the amount of $12.00 (25 cents per page reproduction costs) for the Consent Decree, payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 99–608 Filed 1–11–99; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response Compensation & Liability Act and Resources Conservation and Recovery Act

Notice is hereby given that on *December 24, 1998,* a proposed Consent Decree (''proposed Decree'') in *United States* v. *Seymour Recycling, et al.*, Civil Action No. IP–80–457–C, was lodged with the United States District Court for the Southern District of Indiana.

In this action the United States sought both recovery of costs and injunctive relief, all relating to responses that had been taken and would need to be taken relating to the threatened release of hazardous substances from the Seymour Recycling Site (''Site''), located in Seymour, Indiana. Under the proposed Decree, Defendant Jellico Chemical Company (''Jellico'') will pay the sum of $61,000.00 (plus certain amounts of interest) to the United States, in reimbursement of some of the costs incurred by the United States in connection with threatened releases of hazardous substances from the Site. In return for this payment, the United States covenants not to sue Jellico under either the Comprehensive Environmental Response Compensation and Liability Act (''CERCLA'') or under the Resource Conservation and Recovery Act (''RCRA'') for certain past costs previously incurred by the United States in connection with the Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530, and should refer to *United States* v. *Seymour Recycling, et al.*, Civil No. IP–80–457–C, D.J. Ref. 62–26S–19. Commenters may request an opportunity for a public meeting in the affected area.

The proposed Decree may be examined at the Office of the United States Attorney, Southern District of Indiana, United States Courthouse, 5th Floor, 46 East Ohio Street, Indianapolis, Indiana 46204; at U.S. EPA Region 5, Office of Regional Counsel, 77 West Jackson Boulevard (C–29A), Chicago, Illinois 60604; and at the Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005. In requesting a copy, please enclose a check in the amount of $5.00 (25 cents per page reproduction cost) payable to the Consent Decree Library.

Joel M. Gross,

Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 99–606 Filed 1–11–99; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on December 23, 1998, a proposed Consent Decree in *United States* v. *Southern California Edison Company,* Civil Action number F–98–5595 AWI SMS, was lodged with the United States District Court for the Eastern District of California.

In this action, the United States sought to recover past response costs as well as future response costs incurred and to be incurred by the United States at the Southern California Edison Visalia Poleyard Superfund Site (''Site'') in Visalia, Tulare County, California. The Consent Decree resolves claims pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607, against defendant Southern California Edison Company. In the proposed consent decree, the Defendant agrees to pay to the United States $264,000 for past response costs which the United States paid through February 28, 1998, and has also agreed to reimburse the United States for all costs paid at or in connection with the Site after February 28, 1998 that are not inconsistent with the National Contingency Plan.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Southern California Edison Company,* D.J. Ref. 90–11–3–06062.

The Consent Decree may be examined at the Office of the United States Attorney, Eastern District of California, Federal Building Room 3654, 1130 ''O'' Street, Fresno, CA 93721, at U.S. EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105–3901, and at the Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005. In requesting a copy, please enclose a check in the amount of $7 (25 cents per page reproduction cost) payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 99–609 Filed 1–11–99; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

In accordance with Departmental policy, 28 CFR 50.7, and Section 122 of CERCLA, 42 U.S.C. 9622, notice is hereby given that on December 17, 1998, a proposed *De Minimis* Consent Decree in *United States* v. *Stricker Paint Products, Inc.*, Civil Action No. 98–40421, was lodged with the United States District Court for the Eastern District of Michigan, Southern Division. This consent decree represents a settlement of claims of the United States against Stricker Paint Products, Inc. for reimbursement of response costs and injunctive relief in connection with the Metamora Landfill Superfund Site (''Site'') pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 *et seq.*

Under this settlement with the United States, Stricker Paint Products, Inc. will pay $105,192, over a period of three years, in reimbursement of response costs incurred by the United States Environmental Protection Agency at the Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Stricker Paint Products, Inc.*, D.J. Ref. 90–11–3–289/2.

The proposed Consent Decree may be examined at the Office of the United States Attorney, Eastern District of Michigan, Southern Division, 211 West Fort Street, Suite 2300, Detroit, MI 48226, at the Region 5 Office of the Environmental Protection Agency, 77 West Jackson Street, Chicago, Illinois 60604–3590, and at the Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005. In requesting a copy, please enclose a check in the amount of $5.25 (25 cents per page reproduction cost) payable to the Consent Decree Library.

Joel. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 99–607 Filed 1–11–99; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Antitrust Division

U.S. versus Concert plc and MCI Communications Corporation; United States Notice of Defendant's Motion to Terminate Modified Final Judgment

Notice is hereby given that MCI WorldCom, Inc. (''MCI WorldCom''), successor-in-interest to defendant MCI Communications Corporation (''MCI''), and British Telecommunications plc (''BT''), predecessor-in-interest to defendant Concert plc, have moved to terminate the Modified Final Judgment entered by this Court on September 16, 1997. In a stipulation also filed with the Court, the Department of Justice (''Department'') has tentatively consented to termination of the Judgment, but has reserved the right to withdraw its consent pending receipt of public comments.

On June 15, 1994, the United States filed its complaint in this case. The complaint alleged that the acquisition by British Telecommunications plc (''BT'') of a 20% ownership interest in MCI Communications Corporation (''MCI'') created an incentive for BT, using its existing market power in the

United Kingdom, to favor MCI at the expense of other United States international carriers in the market or markets for international telecommunications services between the United States and the United Kingdom. The complaint also alleged that the formation of a joint venture between BT and MCI to provide seamless global network services to multinational corporations created an incentive for BT to use its dominance in the UK to favor the joint venture at the expense of other global network service providers in the provision of the UK segment essential to any seamless global network.

The Final Judgment, filed contemporaneously with the complaint and entered by the Court on September 29, 1994 after a Tunney Act review, contained three categories of provisions designed to remedy the anticompetitive effects of the partial acquisition: (1) transparency or reporting provisions; (2) confidentiality provisions; and (3) a provision relating to International Simple Resale (''ISR''). These provisions were specifically designed to diminish the risk that BT would successfully act on its incentive to use its market power to discriminate in favor of MCI or the joint venture. After the Final Judgment was entered, BT and MCI consummated BT's 20% acquisition and formed the joint venture known as Concert Communications Company.

In November 1996, BT and MCI entered into a Merger Agreement and Plan of Merger pursuant to which BT agreed to acquire the remaining 80% of MCI. The new parent company was to be renamed Concert plc. Although the Department had thoroughly analyzed all of the competitive consequences associated with BT's initial 20% acquisition of MCI, the Department undertook an evaluation of the changes in market conditions since 1994 in order to determine whether a modification of the existing decree was appropriate under the circumstances.

As a result of its new analysis, the Department concluded that BT's incentives and ability to discriminate against MCI's and Concert's competitors still existed. Consequently, the Department recommended that the provisions of the Final Judgment aimed at deterring and detecting discrimination be retained and, in some circumstances, strengthened. In addition, the Department determined that certain modifications to the confidentiality provisions were necessary in order to ensure that the proposed full integration of BT and MCI would not impair the effectiveness of the protection afforded by the Final Judgment. On September 16, 1997, after fully considering the comments received and the United States' response to those comments, the Court entered the Modified Final Judgment proposed by the parties.

Thereafter, on November 9, 1997, MCI and BT terminated their merger agreement and BT agreed to acquire MCI's 24.9% interest in the Concert joint venture. Contemporaneously therewith, MCI entered into a new merger agreement with WorldCom, Inc. (''WorldCom''), and WorldCom agreed to acquire BT's 20% interest in MCI. On September 15, 1998, the foregoing transactions were consummated. Currently, BT has no equity interest in MCI or MCI WorldCom. Conversely, neither MCI WorldCom nor MCI has any equity interest in the Concert joint venture.

The Department, MCI WorldCom and BT have filed memoranda with the Court setting forth the reasons why they believe that termination of the Modified Final Judgment would serve the public interest. Copies of MCI WorldCom's and BT's motion to terminate, the stipulation containing the Department's consent, the supporting memoranda, and all additional papers filed with the Court in connection with this motion will be available for inspection at the Antitrust Documents Group of the Antitrust Division, U.S. Department of Justice, Room 215, North Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20004, and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the duplicating fee determined by Department of Justice regulations.

Interested persons may submit comments regarding the proposed termination of the Judgment to the Department. Such comments must be received by the Antitrust Division within sixty (60) days and will be filed with the Court by the Department. Comments should be addressed to Donald J. Russell, Chief, Telecommunications Task Force, Antitrust Division, U.S. Department of Justice, 1401 H Street, N.W., Suite 8000, Washington, D.C. 20005, telephone (202) 514–6381.

Constance K. Robinson,

Director of Operations & Merger Enforcement, Antitrust Division.

[FR Doc. 99–610 Filed 1–11–99; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 98–29]

Bill Lloyd Drug; Revocation of Registration

On April 17, 1998, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Bill Lloyd Drug (Respondent) of Graham, Texas, notifying it of an opportunity to show cause as to why DEA should not revoke its DEA Certificate of Registration AB2243246, and deny any pending applications for renewal of such registration as a retail pharmacy pursuant to 21 U.S.C. 824(a)(4) and 823(f) for reason that its continued registration would be inconsistent with the public interest.

By letter dated May 15, 1998, Respondent filed a request for a hearing and the matter was docketed before Administrative Law Judge Gail A. Randall. On May 21, 1998, Judge Randall issued an Order for Prehearing Statements, and on June 10, 1998, the Government filed its prehearing statement. Respondent was given until July 2, 1998, to file its prehearing statement. In her Order for Prehearing Statements, the Administrative Law Judge cautioned Respondent ''that failure to file timely a prehearing statement as directed above may be considered a waiver of hearing and an implied withdrawal of a request for hearing.'' On July 8, 1998, Judge Randall issued an Order indicating that she had not yet received a prehearing statement from Respondent; advising Respondent that failure to file a prehearing statement will be deemed a waiver of its right to a hearing; and giving Respondent until July 22, 1998, to file such a statement along with a motion for late acceptance.

On July 27, 1998, the Administrative Law Judge issued an Order Terminating Proceedings, finding that Respondent had failed to file a prehearing statement, and therefore, concluding that Respondent waived its right to a hearing. Judge Randall noted that the record would be transmitted to the then-Acting Deputy Administrator for entry of a final order based upon the investigative file. Therefore, the Deputy Administrator, finding that Respondent has waived its right to a hearing, hereby enters his final order without a hearing and based upon the investigative file pursuant to 21 CFR 1301.43(e) and 1301.46.

The Deputy Administrator finds that DEA initiated an investigation of Respondent following receipt of information that individuals were getting controlled substances from Respondent without presenting a prescription from a physician. DEA investigators went to Respondent on August 14, 1996, to conduct an accountability audit of selected Schedule III and IV controlled substances for the period March 5, 1995 to August 14, 1996. The audit revealed shortages of 4,791 dosage units and overages of 4,216 dosage units. While reviewing Respondent's prescription records, the investigators noticed that a number of the prescriptions were visibly altered, that many prescriptions were duplicated, and that there were prescriptions that had been filled with no date, no DEA number or an incorrect DEA number.

In November 1996, investigators obtained statements from three physicians whose names appeared on prescriptions found at Respondent. Each of the physicians reviewed a list of the prescriptions attributed to them and determined that they had not authorized the prescriptions.

Also, in November 1996, investigators obtained statements from three individuals regarding the dispensing practices at Respondent. One individual stated that she had not received any of the hydrocodone or Vicodin that was indicated on prescriptions bearing her name as the patient. Another individual stated that she had been going to Respondent for 15 years and at one point she did not have a refill on a cough suppressant. Bill Lloyd, Respondent's owner and pharmacist, told her that he would refill the prescription and that she could bring him a prescription later to cover the dispensation. Bill Lloyd would sell her controlled substances without a prescription for $10.00 an ounce for cough syrup and for $1.00 a pill for other controlled substances. According to the individual, Bill Lloyd would tell her to bring in a prescription of any kind because he could ''fix it.'' the individual reviewed the prescriptions attributed to her and stated that there was no way that she could have used all of the prescriptions listed. At most she would receive 50 pills at a time given the large amount of money Bill Lloyd charged her. Finally, the second individual's husband told investigators that he suspected that Bill Lloyd was giving codeine type drugs to his wife without a prescription. He stated that he confronted Bill Lloyd at least two times but that Bill Lloyd ''made light of my threats to turn him in to [the] authorities, laughed at me, and said (or implied) that it would cause my wife much more trouble than it would cause him.''

A cooperating individual went to Respondent pharmacy on November 13, 20, and 26, 1996, to attempt to purchase controlled substances without a physician's prescription. During each visit, the cooperating individual was monitored by law enforcement personnel. One each occasion, the individual obtained 40 hydrocodone 5 mg. tablets from Respondent pharmacy in an unlabeled bottle without presenting a prescription. On December 5, 1996, the cooperating individual attempted to introduce an undercover officer to obtain controlled substances without a physician's authorization, but Bill Lloyd refused to sell hydrocodone on this occasion without a prescription.

On December 17, 1996, investigators obtained statements from three other individuals regarding the illegal sale of controlled substances by Bill Lloyd. These individuals indicated that Bill Lloyd would sell them whatever controlled substance they wanted. He would charge between $1.00 and $3.00 per pill or he would trade controlled substances for things of value such as tools, rings or razors. One individual indicated that the drug bottles that he obtained from Respondent never had a label on them.

Pursuant to 21 U.S.C. 824(a)(4) and 823(f), the Deputy Administrator may revoke a DEA Certificate of Registration and deny any application for such registration, if he determines that the continued registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered:

(1) The recommendation of the appropriate state licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under federal or state laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable state, federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health or safety.

These factors are to be considered in the disjunctive, the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration denied. See Henry J. Schwarz, Jr., M.D., 54 FR 16,422 (1989).

Regarding factor one, there is no evidence in the record that the State of Texas has taken any action against Respondent's pharmacy permit or the pharmacist permit of Bill Lloyd. As to factor three, there is also no evidence that Respondent pharmacy or Bill Lloyd have been convicted of any controlled substance related offense.

However, there is more than ample evidence in the record regarding factors two and four, Respondent's experience in dispensing controlled substances and its compliance with applicable controlled substance laws. The shortages and overages revealed by the accountability audit show that Respondent does not keep complete and accurate records of its controlled substance handling as required by 21 U.S.C. 827 and 21 CFR 1304.21. Respondent dispensed controlled substances pursuant to prescriptions that were visibly altered and that did not contain the required information in violation of 21 CFR 1306.04 and 1306.05. Finally, Respondents dispensing of controlled substances without a physician's authorization violates 21 U.S.C. 841 and 21 CFR 1306.04

There does not appear to be any evidence in the record regarding other conduct by Respondent that would threaten the public health and safety under factor five.

But the Deputy Administrator is extremely troubled by Respondent's dispensing practices. The evidence in the record indicates that Respondent pharmacy and Bill Lloyd, its owner and pharmacist, were actively involved in the diversion of controlled substances into the illicit market. Such behavior by DEA registrant cannot be tolerated. Respondent has not offered any evidence in mitigation. Therefore, the Deputy Administrator concludes that Respondent's continued registration would be inconsistent with the public interest.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration AB2243246, previously issued to Bill Lloyd Drug, be, and it hereby is, revoked. The Deputy Administrator further orders that any pending applications for the renewal of such registration, be, and they hereby are, denied. This order is effective February 11, 1999.

Dated: January 5, 1999.

Donnie R. Marshall,

Deputy Administrator.

[FR Doc. 99–557 Filed 1–11–99; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Emergency Review; Comment Request

January 6, 1999.

The Department of Labor has submitted the following information collection request (ICR), utilizing emergency review procedures, to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (P.L. 104–13, 44 U.S.C. Chapter 35). OMB approval has been requested by January 19, 1999. 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 x143.

Comments and questions about the ICR listed below should be forwarded to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for Employment and Training, Office of Management and Budget, Room 10235, Washington, D.C. 20503 (202) 395–7316.

The Office of Management and Budget 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.

Agency: Employment and Training Administration.

Title: Welfare-to-Work Competitive Grants: Solicitation for Grant Applications.

OMB Number: 1205–Onew.

Frequency: Annually.

Affected Public: Public and private entities.

Number of Respondents: 1,000.

Estimated Time Per Respondent: 20 hours.

Total Burden Hours: 20,000.

Total Burden Cost (capital/startup): $800,000.

Total Burden Cost (operating/maintaining): 0.

Description: The Balanced Budget Act of 1997, signed by the President on August 5, 1997, authorized the Department of Labor to provide Welfare-to-Work (WtW) grants to States and local communities to provide transitional employment assistance to move Temporary Assistance for Needy Families (TANF) recipients with significant employment barriers into unsubsidized jobs providing long-term employment opportunities. Under the WtW grants program, 25% of funds will be provided through competitive grants to political subdivisions, PICs (Private Industry Councils), and private entities. In order to receive competitive grant funds, the statue provides that a private entity must submit an application in conjunction with the applicable PICs or political subdivisions and in consultation with the State.

Todd R. Owen,

Department Clearance Officer.

[FR Doc. 99–629 Filed 1–11–99, 8:45am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Advisory Committee on Construction Safety and Health; Notice of Open Meeting

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

SUMMARY: Notice is hereby given that the Advisory Committee on Construction Safety and Health (ACCSH) will meet January 28 and 29, 1999, at the Frances Perkins Department of Labor Building, 200 Constitution Avenue, NW, Washington, DC This meeting is open to the public.

DATES: ACCSH will meet from 9 a.m. to 4:30 p.m. on Thursday, January 28 and from 9:00 a.m. 12:00 p.m. Friday, January 29 in rooms N–3437 A, B and C.

SUPPLEMENTARY INFORMATION: For further information contact Theresa Berry, Office of Public Affairs, Room N–3647, telephone (202) 693–1999 at the Occupational Safety and Health Administration, 200 Constitution Avenue, NW., Washington, DC, 20210.

An official record of the meeting will be available for public inspection at the OSHA Docket Office, Room N–2625, telephone 202–693–2350. All ACCSH meetings and those of its work groups are open to the public. Individuals with disabilities requiring reasonable accommodations should contact Theresa Berry no later than January 21, 1999, at the above address.

ACCSH was established under section 107(e)(1) of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) and section 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 656).

The agenda items include:

- ACCSH Work Group Updates, to include such subjects as: Sanitation, Data Collection/Enforcement, Musculoskeletal Disorders, Safety and Health Management Standard, Training, Fall Protection, Silica, and Multi-Employer Citation Policy.
- Construction Standards and Policy Updates to include the Proposed Standard on Subpart R ''Steel Erection,'' Tower Erection, and Powered Industrial Truck Training.
- Special Presentations will include topics such as: Cold Stress, Highway Workzone Safety, and Small Business Outreach.

The following ACCSH Work Groups are scheduled to meet in the Frances Perkins Building:

- Safety and Health Management Standard and Training—1 p.m. to 4:30 p.m. January 26 in room N–5437 B.
- Sanitation—9 am—12 p.m January 26 in room N–5437 A.
- Data Collection—9 a.m. to 12 p.m. January 27 in room C–5515 1A.
- Musculoskeletal Disorders—9 a.m. to 4 p.m. January 27 in room N–4437 A.
- Fall Protection—8:30 a.m. to 4 p.m. January 27 in room N–5437 A

Multi-Employer Citation Policy—1 p.m. to 4 p.m. in room January 27 S–3215 A&B.

Other workgroups may meet before the ACCSH meeting or after adjournment of the meeting on January 29, 1999.

For additional information on work groups contact Jim Boom, Office of Construction Services, Room N–3603, Telephone (202) 693–2020, at the Occupational Safety and Health Administration, 200 Constitution Avenue, NW., Washington, DC 20210.

Interested persons may submit written data, views or comments, preferably with 20 copies, to Theresa Berry, at the address above. Those submissions received prior to the meeting will be provided to ACCSH and will be included in the record of the meeting.

Interested persons may also request to make an oral presentation by notifying Theresa Berry before the meeting. The request must state the amount of time desired, the interest that the person represents, and a brief outline of the presentation. ACCSH may grant requests, as time permits, at the discretion of the Chair of ACCSH.

Signed at Washington, DC this 6th day of January, 1999.

Charles N. Jeffress,

Assistant Secretary of Labor.

[FR Doc. 99–622 Filed 1–11–99; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (99–004)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATE: January 12, 1999.

FOR FURTHER INFORMATION CONTACT: Edward Fein, Patent Counsel, Johnson Space Center, Mail Code HA, Houston, TX 77058; telephone (281) 483–0837.

NASA Case No. MSC–22419–6: Porous Article With Surface Functionality And Method For Preparing Same;

NASA Case No. MSC–22757–2: Automated Propellant Blending;

NASA Case No. MSC–22722–1: Compact, Stiff, Remote-Activated Lightweight Quick-Release Clamp;

NASA Case No. MSC–22695–1: A Urine Preservative.

Dated: January 5, 1999.

Edward A. Frankle,

General Counsel.

[FR Doc. 99–569 Filed 1–11–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 99–005]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: January 12, 1999.

FOR FURTHER INFORMATION CONTACT: Thomas H. Jones, Patent Counsel, NASA Management Office-JPL, 4800 Oak Grove Drive, Mail Stop 180–801, Pasadena, CA 91109; telephone (818) 354–5179.

NASA Case No. NPO–19077–3–CU: A Modular Hierarchical Approach to Learning;

NASA Case No. NPO–20402–1CU: Micromachined Thermoelectric Sensors and Arrays and Process for Producing.

Dated: January 5, 1999.

Edward A. Frankle,

General Counsel.

[FR Doc. 99–570 Filed 1–11–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 99–006]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: January 12, 1999.

FOR FURTHER INFORMATION CONTACT: Beth Vrioni Patent Counsel, Kennedy Space Center, Mail Stop MM–E, Kennedy Space Center, FL 32899; telephone (407) 867–6225.

NASA Case No. KSC–11937: Communication System With Adaptive Noise Suppression;

NASA Case No. KSC–12070: CLCS Console Enclosures.

Dated: January 5, 1999.

Edward A. Frankle,

General Counsel.

[FR Doc. 99–571 Filed 1–11–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 99–007]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: January 12, 1999.

FOR FURTHER INFORMATION CONTACT: Robert L. Broad, Jr., Patent Counsel, Marshall Space Flight Center, Mail Stop CC01, Huntsville, AL 35812; telephone (256) 544–0021.

NASA Case No. MFS–31205–1: Injector For Liquid Fueled Rocket Engine;

NASA Case No. MFS–31176–1: Rotational—Translational Fourier Imaging System;

NASA Case No. MFS–30125–1: Friction Stir Weld (FSW) System For Welding And Weld Repair;

NASA Case No. MFS–31377–1CU: Low-Temperature, Controllable-Stress Electroplating Of Ultra-High-Strength Glassy Metals;

NASA Case No. MFS–31186–1: Power Divider For Harmonically Rich Waveforms;

NASA Case No. MFS–31270–1: Load Transfer Mechanism For a Turbine Disk;

NASA Case No. MFS–31284–1: Fabrication of Bulk High Temperature Superconductors Using Ba(NO3)2 In The Precursors Mixture;

NASA Case No. MFS–31238–1: Position Sensor With Integrated Signal-Conditioning Electronics On A Printed Wiring Board;

NASA Case No. MFS–31237–1: Resolver To 360 Degree Linear Analog Converter & Method;

NASA Case No. MFS–31219–1: Arc-Tangent Circuit For Continuous Linear Output;

NASA Case No. MFS–31218–1: Non-Contact Linear Actuator Position Sensor & Controller Insensitive To Air Gap Between Armature & Magnetic Bracket;

NASA Case No. MFS–31146–1: Passive Capture Joint With 3 Degrees Of Freedom;

NASA Case No. MFS–31376–1: Advanced Composite Baseball/Softball Bat (Two Piece);

NASA Case No. MFS–31208–1: Advanced Composite Baseball/Softball Bat (One Piece);

NASA Case No. MFS–31258–1: Releasable Roller Clutch;

NASA Case No. MFS–31278–1: Synchronized Docking System;

NASA Case No. MFS–31279–1: Synchronized Autonomous Docking System;

NASA Case No. MFS–31281–1: Self-Synchronized Target Subsystem For Automated Docking Systems;

NASA Case No. MFS–31249–1: Method Of Determining The Inhomogeneity Of A High TC Superconductor;

NASA Case No. MFS–31138–1: Rocket Engine Thrust Chamber Assembly;

NASA Case No. MFS–31269–1: Orbital Friction Stir Weld System;

NASA Case No. MFS–31184–1: Pressure-Driven Magnetically-Coupled Conveyance;

NASA Case No. MFS–31294–2: Aluminum Alloy And Articles Cast Therefrom;

NASA Case No. MFS–31379–1: Composite Tank;

NASA Case No. MFS–31267–1SB: Gradient Coatings;

NASA Case No. MFS–31043–1: Non-Contact, Capacitance Based Method System For Symbol Recognition;

NASA Case No. MFS–31044–1: Radiographic Based Method and System For Identifying Manufactured Assemblies;

NASA Case No. MFS–31075–1: Thermal Imaging Based Method and System for Symbol Recognition.

Dated: January 5, 1999.

Edward A. Frankle,

General Counsel.

[FR Doc. 99–572 Filed 1–11–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 99–008]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: January 12, 1999.

FOR FURTHER INFORMATION CONTACT: Kent N. Stone, Patent Attorney, Lewis Research Center, Mail Stop 500–118, Cleveland, Ohio 44135–3191; telephone (216) 433–8855.

NASA Case No. LEW 16390–2: Controlled Thermal Expansion Coat For Thermal Barrier Coatings;

NASA Case No. LEW 16638–1: Capacitative Extensometer Particularly Suited For Measuring In Vivo Bone Strain.

Dated: January 5, 1999.

Edward A. Frankle,

General Counsel.

[FR Doc. 99–573 Filed 1–11–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 99–009]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: January 12, 1999.

FOR FURTHER INFORMATION CONTACT: Office of the Patent Counsel, Langley Research Center, Mail Stop 212, Hampton, VA 23681–0001; telephone (757) 864–9260.

NASA Case No. LAR 15400–1: Liquid Crystal Display Cell Containing Soluble Optically Transparent Polyimide Alignment Layer;

NASA Case No. LAR 15410–1: Ceramic Shell Casting System For Slip Casting, Pressure Casting and Core Molds;

NASA Case No. LAR 15659–1: Method and Apparatus To Fabricate A Fully-Consolidated Fiber Reinforced Tape From Polymer Powder Preimpregnated Fiber Tow Bundles For Automated Tow Placement;

NASA Case No. LAR 15676–1-CU: Metallized Polymer Surfaces And Metal-Polymer Composites Prepared by Supercritical Fluid Infusion Of A Metal Precursor Followed by The Thermal Reduction;

NASA Case No. LAR 15258–2: Apparatus For Linewidth Reduction In Distributed Feedback Or Distributed Bragg Reflector Semiconductor Lasers Using Vertical Emission (Div of-1);

NASA Case No. LAR 15876–1-SB: Vortex Generator Manufacturing Process;

NASA Case No. LAR 15295–2: Sawtooth Planform Concept;

NASA Case No. LAR 15686–1: A Device For The Insertion Of Discontinuous Through-the-Thickness Reinforcements Into Preforms And Prepreg Materials;

NASA Case No. LAR 15897–1: Non-Intrusive Optical Measurement Of Fuel Quantity And Qualitative Density Variations Throughout The Fuel Using Focusing Schlieren Techniques.

Dated: January 5, 1999.

Edward A. Frankle,

General Counsel.

[FR Doc. 99–574 Filed 1–11–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 99–010]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: January 5, 1999.

FOR FURTHER INFORMATION CONTACT: Guy M. Miller, Patent Counsel, Goddard Space Flight Center, Mail Code 750.2, Greenbelt, MD 20771; telephone (301) 286–7351.

NASA Case No. GSC–13996–1: Single Unit, Mission Configurable Cast Structure For Spacecraft;

NASA Case No. GSC–13997–1: Evolvable, High Performance, Mission Configurable, Data System Architecture For Spacecraft;

NASA Case No. GSC–13998–1: Multiple Mission, Plug And Play, Configurable Spacecraft Architecture;

NASA Case No. GSC–13707–1: Dual Antenna Compensating Combiner (DACC);

NASA Case No. GSC–14006–1: Flexible Wedges.

Dated: January 5, 1999.

Edward A. Frankle,

General Counsel.

[FR Doc. 99–575 Filed 1–11–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (99–011)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: January 12, 1999.

FOR FURTHER INFORMATION CONTACT: Kathleen Dal Bon, Patent Counsel, Ames Research Center, Mail Code 202A–3, Moffett Field, CA 94035; telephone (650) 604–5104.

NASA Case No. ARC–14202–1SB: Refractory Oxidative-Resistant Ceramic Carbon Insulation;

NASA Case No. ARC–14275–1CU: Triangle Geometry Processing For Surface Modeling And Cartesian Grid Generation;

NASA Case No. ARC–14300–1: Telemetric Hydrocephalus Shunt Monitor;

NASA Case No. ARC–14299–1: Data Acquisition And Analysis Program For Physiological Monitoring;

NASA Case No. ARC–14283–1: Implantable Pill-Transmitters For Physiological Monitoring;

NASA Case No. ARC–14301–1: A Sensor System For Continuous Chemical And Biological Analyte Monitoring;

NASA Case No. ARC–14246–2: Substrate Selection For Mounting Adatom Chains in Electronic Applications;

NASA Case No. ARC–14287–1: Virtual Surgery Cutting Tool;

NASA Case No. ARC–14270–1: MESHER: Three-Dimensional Surface Generation From Volumetric Data Sets;

NASA Case No. ARC–14269–1: Polygon Reduction in 3-Dimensional Meshes;

NASA Case No. ARC–14035–1: Reconstruction of Serial Sections (ROSS 3–D Reconstruction Program)

NASA Case No. ARC–14281–2: Neural Network Based Redesign Of Transonic Turbines For Improved Unsteady Aerodynamic Performance.

Dated: January 5, 1999.

Edward A. Frankle,

General Counsel.

[FR Doc. 99–576 Filed 1–11–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (99–003)]

Aerospace Safety Advisory Panel Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the Aerospace Safety Advisory Panel.

DATES: Thursday, February 4, 1999, 1:00 p.m. to 2:30 p.m.

ADDRESSES: National Aeronautics and Space Administration, 300 E Street, SW, Room 9H40, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Notify Mr. Norman B. Starkey, Executive Director, Aerospace Safety Advisory Panel, National Aeronautics and Space Administration, Washington, DC 20546, (202) 358–4453, if you plan to attend.

SUPPLEMENTARY INFORMATION: The Aerospace Safety Advisory Panel will present its annual report to the NASA Administrator. This presentation is pursuant to carrying out its statutory duties for which the Panel reviews, identifies, evaluates, and advises on those program activities, systems, procedures, and management activities that can contribute to program risk. Priority is given to those programs that involve the safety of human flight. The major subjects covered will be:

Workforce, Space Shuttle Program, International Space Station Program, Extravehicular Activity, Aero-Space Technology, and Computer Hardware/Software. The Aerospace Safety Advisory Panel is currently chaired by Mr. Richard D. Blomberg and is composed of nine members and six consultants. The meeting will be open to the public up to the capacity of the room (approximately 60 persons including members of the Panel).

Dated: December 29, 1998.

Matthew M. Crouch,

NASA Advisory Committee Management Officer.

[FR Doc. 99–568 Filed 1–11–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL GAMBLING IMPACT STUDY COMMISSION

Meetings

AGENCY: National Gambling Impact Study Commission.

ACTION: Notice of Remaining Commission Meetings/Activities.

SUMMARY: The National Gambling Impact Study Commission, established under Pub. L. 104–169, dated August 3, 1996, is entering the final eight months of its mission to study the social and economic impacts of legalized gambling in America. This publication provides notice of the remaining scheduled meetings and other activities in 1999.

Tentative Meeting Schedule

NGISC Subcommittees, January 1999
NGISC Retreat—Full Commission, February 8–10, 1999
Founders Inn and Conference Center, 5641 Indian River Road, Virginia Beach, VA 23464
NGISC—Full Commission Meeting, March 18, 1999
Washington, DC
Report Subcommittee Meeting, April 7–8, 1999
NGISC Meeting, April 27–28, 1999
Washington, DC
Invited Comment Meeting, May 11, 1999
Washington, DC
NGISC—Full Commission Meeting, May 12, 1999
Washington, DC
NGISC Conference Call, May 17, 1999
NGISC Conference Call, June 10, 1999

Status

Meetings conducted by the full Commission, and, where possible, those of its subcommittees, will be fully open to the public unless otherwise announced at least 15 days in advance. As further details on specific times and locations affecting the meetings listed above are finalized, the Commission will make that information available on its web site, *www.ngisc.gov,* and will distribute advisories to all individuals/organizations in its FAX directory. Information on full Commission meetings will be provided at least 15 days in advance using the procedures outlined above. Where possible, information on subcommittee meetings will be provided in the same format. Individuals or organizations unable to access meeting information using these methods should contact the Commission to make alternative arrangements.

CONTACT PERSONS: For further information contact Craig Stevens at

(202) 523–8217, or write to 800 North Capitol St., NW, Suite 450, Washington, DC 20002.

SUPPLEMENTARY INFORMATION: This notice is provided to maintain the Commission's commitment to openness and to invite public participation where outlined. While this notice covers events currently planned for the remaining life of the Commission, it does not include any Commission activities which may be scheduled after its publication and at times and/or locations not outlined above. In such instances, to ensure advance notice is provided to interested members of the public, the Commission requests that interested parties register with the Commission's FAX directory by contacting Mr. Craig Stevens at (202) 523–8217, and/or by following closely the Commission's web site: *www.ngisc.gov*. Interested parties may also provide this information by e-mail to 'cstevens@btgcinema.com.' In addition to the scheduled invited comment period on May 11, 1999, written comments from members of the public are invited at any time. Written comments can be sent to 800 North Capitol Street, NW, Suite 450, Washington, DC 20002.

Tim Bidwell,

Special Assistant to the Chairman.

[FR Doc. 99–632 Filed 1–11–99; 8:45 am]

BILLING CODE 6802–ET–P

NATIONAL SCIENCE FOUNDATION

Special Emphasis Panel in Engineering Education and Centers; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: Special Emphasis Panel in Engineering Education and Centers (173).

Date/Time: February 2, 1999; 7:45 a.m. to 5 p.m.

Place: National Science Foundation, Room 310, 4201 Wilson Boulevard, Arlington, VA 22230.

Type of Meeting: Closed.

Contact Person: Joy Pauschke, Program Director, Engineering Education and Centers Division, National Science Foundation, Room 585, 4201 Wilson Boulevard, Arlington, VA 22230.

Purpose of Meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda: To review and evaluate Engineering Research Centers Proposals as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b. (c) (4) and (6) of the Government in the Sunshine Act.

Dated: January 6, 1999.

Linda Allen-Benton,

Acting Director, Division of Human Resource Management.

[FR Doc. 99–579 Filed 1–11–99; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of January 11, 18, 25, and February 1, 1999.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of January 11

Monday, January 11

2:00 p.m.
Briefing on Risk-Informed Initiatives (Public Meeting) (Contact: Gary Holahan/Tom King, 301–415–5790)

Tuesday, January 12

9:00 a.m.
Briefing on Decommissioning Criteria for West Valley (Public Meeting) (Contact: Jack Parrot, 301–415–6700)

Wednesday, January 13

10:00 a.m.
Briefing on Reactor Licensing Initiatives (Public Meeting)(Contact: Roy Zimmerman/Bob Perch, 301–415–1422)

11:30 a.m.
Affirmation Session (Public Meeting) (If Needed)

Friday, January 15

9:00 a.m.
Briefing on Investigative Matters (Closed—Ex. 5 & 7)

10:30 a.m.
Briefing by Executive Branch (Closed—Ex. 1)

Week of January 18—Tentative

Tuesday, January 19

2:00 p.m.
Briefing on Status of Third Party Oversight of Millstone Station's Employee Concerns Program and Safety Conscious Work Environment (Public Meeting) (Contact: Bill Dean, 301–415–7380)

Wednesday, January 20

9:30 a.m.
Briefing on Reactor Inspection, Enforcement And Assessment (Public Meeting) (Contact: Frank Gillespie, 301–415–1275)

11:00 a.m.
Affirmation Session (Public Meeting) (If Needed)

Week of January 25—Tentative

Tuesday, January 26

3:30 p.m.
Affirmation Session (Public Meeting) (If Needed)

Week of February 1—Tentative

Tuesday, February 2

3:30 p.m.
Affirmation Session (Public Meeting) (if needed)

Wednesday, February 3

2:00 p.m.
Meeting with Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting) (Contact: John Larkins, 301–415–7360)

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at:

http://www.nrc.gov/SECY/smj/schedule.htm

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to it, please contact the Office of the Secretary, Attn: Operations Branch, Washington, D.C. 20555 (301–415–1661). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to wmh@nrc.gov or dkw@nrc.gov.

Dated: January 7, 1999.

William M. Hill, Jr.,

Secy Tracking Officer, Office of the Secretary.

[FR Doc. 99–761 Filed 1–8–99; 2:34 pm]

BILLING CODE 7590–01–M

*THE SCHEDULE FOR COMMISSION MEETINGS IS SUBJECT TO CHANGE ON SHORT NOTICE. TO VERIFY THE STATUS OF MEETINGS CALL (RECORDING)—(301) 415–1292. CONTACT PERSON FOR MORE INFORMATION: Bill Hill (301) 415–1661.

NUCLEAR REGULATORY COMMISSION

[Docket No.: 040–06563]

Notice of Consideration of Amendment Request for Decommissioning the Mallinckrodt Chemical, Inc. Facility in St. Louis, Missouri, and an Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission is considering issuance of a license amendment to Possession Only License No. STB–401 (STB–401), issued to Mallinckrodt Chemical, Inc. (the licensee), to authorize decommissioning of its former Columbium-Tantalum (C-T) processing facility in St. Louis, Missouri.

On November 20, 1997, the licensee submitted Phase I of the C-T facility decommissioning plan (DP) to NRC for review. The Phase I DP summarized the decommissioning activities that will be undertaken to remediate the C-T process equipment and buildings, and support buildings at the St. Louis, Missouri facility. Radioactive contamination in the C-T processing facility consists of building rubble and equipment contaminated with U–238, U–235, U–234 (and their progeny Th-230 and Ra-226 and others) and Th-232 (and its progeny Ra-228 and Th-228 and others) resulting from licensed operation that occurred from 1961 to 1985.

The NRC will require the licensee to remediate the C-T processing facility to meet NRC's decommissioning criteria, and during the decommissioning activities, to maintain effluents and doses within NRC requirements and as low as reasonably achievable.

Prior to approving the DP, NRC will have made findings required by the Atomic Energy Act of 1954, as amended, and NRC's regulations. These findings will be documented in a Safety Evaluation Report and an Environmental Assessment. Approval of the DP will be documented in an amendment to STB–401.

The NRC hereby provides notice that this is a proceeding on an application for amendment of a license falling within the scope of Subpart L, ''Informal Hearing Procedures for Adjudication in Material Licensing Proceedings,'' of NRC's rules and practice for domestic licensing proceedings in 10 CFR part 2. Pursuant to § 2.1205(a), any person whose interest may be affected by this proceeding may file a request for a hearing in accordance with § 2.1205(c). A request for a hearing must be filed within thirty (30) days of the date of publication of this **Federal Register** notice.

The request for a hearing must be filed with the Office of the Secretary either:

1. By delivery to the Docketing and Service Branch of the Secretary at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738; or

2. By mail or telegram addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Attention: Docketing and Service Branch.

In addition to meeting other applicable requirements of 10 CFR part 2 of NRC's regulations, a request for a hearing filed by a person other than an applicant must describe in detail:

1. The interest of the requester in the proceeding;

2. How that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in 2.1205(g);

3. The requestor's area of concern about the licensing activity that is the subject matter of the proceeding; and

4. The circumstances establishing that the request for a hearing is timely in accordance with § 2.1205(c).

In accordance with § 2.1205(e), each request for a hearing must also be served, by delivering it personally or by mail, to:

1. The applicant, Mallinckrodt Chemical Inc., Mallinckrodt & Second Streets, P.O Box 5439, St Louis, Missouri Attention: Mr. Robert F. Boland

2. The NRC staff, by delivery to the Executive Director for Operations, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, or by mail, addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

For further details with respect to this action, the Phase I DP is available for inspection at the NRC's Public Document Room, 2120 L Street NW, Washington, DC 20555.

Dated at Rockville, MD, this 5th day of January, 1999.

For the Nuclear Regulatory Commission.

John W. N. Hickey,

Chief, Low-Level Waste and Decommissioning Projects Branch, Division of Waste Management, Office of Nuclear Material Safety And Safeguards.

[FR Doc. 99–659 Filed 1–11–99; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Proposed Collection; Comment Request for Review of an Expiring Information Collection: Standard Form (SF) 3102

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 review of an expiring information collection. The SF 3102, Designation of Beneficiary, is used by employees and annuitants covered under the Federal Employees Retirement System to designate a beneficiary to receive any lump sum due in the event of his/her death. Approximately 1,136 SF 3102 forms are completed annually. Each form takes approximately 15 minutes to complete. The annual estimated burden is 284 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 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 Mary Beth Smith-Toomey on (202) 606–8358, or E-mail to mbtoomey@opm.gov

DATES: Comments on this proposal should be received on or before March 15, 1999.

ADDRESSES: Send or deliver comments to—John C. Crawford, Chief, FERS Division, Retirement and Insurance Service, U.S. Office of Personnel Management, 1900 E Street, NW, Room 3313, Washington, DC 20415.

For information regarding administrative coordination—Contact: Cyrus S. Benson, Budget & Administrative Services Division, (202) 606–0623.

Office of Personnel Management.

Janice R. Lachance,

Director.

[FR Doc. 99–580 Filed 1–11–99; 8:45 am]

BILLING CODE 6325–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 23633; 812–11184]

Franklin Gold Fund, et al.; Notice of Application

January 5, 1999.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order under sections 6(c), 12(d)(1)(J), and 17(b) of the Investment Company Act of 1940 (the ''Act'') for exemptions from sections 12(d)(1)(A) and (B) and 17(a) of the Act, and under section 17(d) of the Act and rule 17d-1 to permit certain joint transactions.

SUMMARY OF APPLICATION: The requested order would permit certain registered management investment companies and private accounts to use uninvested cash and cash collateral to purchase shares of one or more affiliated money market funds, and engage in certain transactions with each other. The order would supersede a prior order.[1] The order also would amend a prior order permitting a fund of funds to purchase shares of certain registered investment companies in the same group of investment companies in excess of the limits of section 12(d)(1)(A).[2]

APPLICANTS: Franklin Gold Fund, Franklin Asset Allocation Fund, Franklin Equity Fund, Franklin High Income Trust, Franklin Custodian Funds, Inc., Franklin California Tax-Free Income Fund, Inc., Franklin New York Tax-Free Income Fund, Franklin Federal Tax-Free Income Fund, Franklin Tax-Free Trust, Franklin California Tax-Free Trust, Franklin New York Tax-Free Trust, Franklin Investors Securities Trust, Institutional Fiduciary Trust, Franklin Value Investors Trust, Franklin Strategic Mortgage Portfolio, Franklin Municipal Securities Trust, Franklin Managed Trust, Franklin Strategic Series, Adjustable Rate Securities Portfolios, Franklin Templeton International Trust, Franklin Real Estate Securities Trust, Franklin Templeton Global Trust, Franklin Valuemark Funds, Franklin Universal Trust, Franklin Multi-Income Trust, Franklin Templeton Fund Allocator Series, Franklin Money Fund, Franklin Templeton Money Fund Trust, Franklin Federal Money Fund, Franklin Tax-Exempt Money Fund, Franklin Mutual Series Fund Inc., Franklin Floating Rate Trust, The Money Market Portfolios (collectively, the ''Franklin Funds''), Templeton Growth Fund, Inc., Templeton Funds, Inc., Templeton Global Smaller Companies Fund, Inc., Templeton Income Trust, Templeton Global Real Estate Fund, Templeton Capital Accumulator Fund, Inc., Templeton Globe Opportunities Trust, Templeton American Trust, Inc., Templeton Institutional Funds, Inc., Templeton Developing Markets Trust, Templeton Global Investment Trust, Templeton Emerging Markets Fund, Inc., Templeton Global Income Fund, Inc., Templeton Global Governments Income Trust, Templeton Emerging Markets Income Fund, Inc., Templeton China World Fund, Inc., Templeton Emerging Markets Appreciation Fund, Inc., Templeton Dragon Fund, Inc., Templeton Vietnam and Southeast Asia Fund, Inc., Templeton Russia Fund, Inc., Templeton Variable Products Series Fund (collectively, the ''Templeton Funds,'' together with the Franklin Funds, the ''Franklin Templeton Funds''),[3] Franklin Adviser, Inc., Franklin Advisory Services, Inc., Franklin Investment Advisory Services, Inc., Templeton Asset Management, Ltd., Templeton Global Advisors Limited, Franklin Mutual Advisers, Inc., Templeton Investment Counsel, Inc., (collectively, ''Franklin Templeton Advisers''), and institutional and individual managed accounts advised by the Franklin Templeton Advisers or an entity controlling, controlled by, or under common control with the Franklin Templeton Advisers (''Managed Accounts'').

FILING DATE: The application was filed on June 22, 1998, and amended on November 12, 1998. Applicants have agreed to file an amendment during the notice period, the substance of which is incorporated in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 1, 1999, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Applicants, 777 Mariners Island Boulevard, San Mateo, CA 94404.

FOR FURTHER INFORMATION CONTACT: Kathleen L. Knisely, Staff Attorney, at (202) 942–0517, or Edward P. Macdonald, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549 (tel. 202–942–8090).

Applicants' Representations

1. Each of the Franklin Templeton Funds is a management investment company registered under the Act. Certain of the Franklin Templeton Funds are money market funds subject to the requirements of rule 2a–7 under the Act (''Money Market Funds''). The Franklin Templeton Funds are advised by the Franklin Templeton Advisers, each of which is, or will be, registered under the Investment Advisers Act of 1940. The Franklin Templeton Advisers also serve as investment advisers to the Managed Account. The accountholders of the Managed Accounts are individual institutions and natural persons. The Managed Accounts are not pooled investment vehicles.

2. Applicants state that each of the Franklin Templeton Funds has, or may be expected to have, uninvested cash held by its custodian bank. Such cash may result from a variety of sources, including dividends or interested received on portfolio securities, unsettled securities transactions, reserves held for investment strategy purposes, scheduled maturity of investments, liquidation of securities to meet anticipated redemptions, and new monies received from investors (''Uninvested Cash''). Some of the Franklin Templeton Funds also may loan their portfolio securities to registered broker-dealers or other institutional investors (''Securities Lending Program''). The loans are secured by cash collateral equal at all times to the market value of the

[1] *Franklin Investors Securities Trust, et al.*, Investment Company Act Release Nos. 18363 (Oct. 10, 1991) (notice) and 18401 (Nov. 7, 1991) (order) (''Cash Sweep Order'').

[2] *Franklin Templeton Fund Manager, et al.*, Investment Company Act Release Nos. 21964 (May 20, 1996) (notice) and 22022 (June 17, 1996) (order) (''Fund of Funds Order'').

[3] All existing Franklin Templeton Funds that currently intend to rely on the order are named as applicants. Any other existing Franklin Templeton Fund and any future Franklin Templeton Fund will rely on the order only in accordance with the terms and conditions of the application.

securities loaned (''Cash Collateral,'' together with Uninvested Cash, ''Cash Balances''). The Managed Accounts also may have Cash Balances.

3. Applicants request an order to permit (i) a Franklin Templeton Fund or Managed Account to use its Cash Balances to purchase shares of one or more of the Money Market Funds; and (ii) the Money Market Funds to sell their shares to, and redeem their shares from, the Franklin Templeton Funds and Managed Accounts. The order also would amend the Fund of Funds Order to permit certain funds in which the Franklin Templeton Allocator Series may invest pursuant to the Fund of Funds Order to invest in shares of the Money Market Funds to the extent permitted by this order.

4. Applicants also state that certain of the Franklin Templeton Funds and Managed Accounts currently engage in purchase and sale transactions involving short-term money market instruments in reliance on rule 17a–7 under the Act (''Interfund Transactions''). Applicants request relief to permit these transactions when the Franklin Templeton Funds and Managed Accounts become affiliated persons by reason of owning more than 5% of a Money Market Fund.

Applicants' Legal Analysis

Section 12(d)(1)

1. Section 12(d)(1)(A) of the Act provides that no registered investment company may acquire securities of another investment company if such securities represent more than 3% of the acquired company's outstanding voting stock, more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other acquired investment companies, represent more than 10% of the acquiring company's outstanding total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by the investment company.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction from any provision of section 12(d)(1) if and to the extent that such exemption is consistent with the public interest and the protection of investors.

3. Applicants request relief under section 12(d)(1)(J) to permit the Franklin Templeton Funds to use their Cash Balances to acquire shares of the Money Market Funds in excess of the percentage limitations in section 12(d)(1)(A), provided however, that in all cases a Franklin Templeton Fund's aggregate investment of Uninvested Cash in shares of the Money Market Funds will not exceed 25% of the Franklin Templeton Fund's total assets at any time. Applicants also request relief to permit the Money Market Funds to sell their securities to a Franklin Templeton Fund in excess of the percentage limitations in section 12(d)(1)(B). The Money Market Funds will not acquire securities of any other investment company in excess of the limitations contained in section 12(d)(1)(A) of the Act.

4. Applicants state that the proposed arrangement will not result in the abuses that sections 12(d)(1)(A) and (B) were intended to prevent. Applicants state that the proposed arrangement will not result in inappropriate layering of either sales charges or investment advisory fees. Shares of the Money Market Funds sold to the Franklin Templeton Funds will not be subject to a sales load, redemption fee, asset-based distribution fee or service fee. In connection with approving any advisory contract for a Franklin Templeton Group Fund, the board of directors or trustees of each Fund (''Board''), including a majority of the directors or trustees who are not ''interested persons,'' as defined in section 2(a)(19) of the Act (''Independent Directors''), shall consider to what extent, if any, the advisory fees charged to the Franklin Templeton Fund by the Franklin Templeton Adviser should be reduced to account for reduced services provided to the Fund by the Adviser as a result of Cash Balances being invested in the Money Market Funds.

5. Applicants also state that there is no threat of redemption to gain undue influence over the Money Market Funds. The Franklin Templeton Advisers and entities controlling, controlled by, and under common control with the Franklin Templeton Advisers will serve as investment advisers to the Franklin Templeton Funds and the Money Market Funds. Applicants also state that due to the highly liquid nature of each of the Money Market Fund's portfolios, there will be no need to maintain any special reserve or balances to meet redemptions by the Franklin Templeton Funds.

Section 17(a)

6. Section 17(a) of the Act makes it unlawful for any affiliated person of a registered investment company, acting as principal, to sell or purchase any security to or from the company. Section 2(a)(3) of the Act defines an affiliated person of an investment company to include any investment adviser to the investment company and any person directly or indirectly controlling, controlled by, or under common control with the investment adviser. The Franklin Templeton Funds, the Managed Accounts, and Money Market Funds share a common investment adviser and thus may be deemed to be under common control. As a result, section 17(a) would prohibit the sale of the shares of Money Market Funds to the Franklin Templeton Funds and the Managed Accounts, and the redemption of the shares by Money Market Funds.

7. Rule 17a–7 under the Act excepts from the prohibitions of section 17(a) the purchase or sale of certain securities between registered investment companies which are affiliated persons, or affiliated persons of affiliated persons, of each other or between a registered investment company and a person which is an affiliated person of such company (or an affiliated person of an affiliated person) solely by reason of having a common investment adviser, common officers, and/or common directors. Applicants state that the Franklin Templeton Funds and the Managed Accounts could be deemed to be affiliated persons of each other, and of the Money Market Funds, by virtue of the Franklin Templeton Funds and the Managed Accounts owning 5% or more of the outstanding voting securities of a Money Market Fund. Thus, applicants believe they would be unable to rely on rule 17a–7 to effect Interfund Transactions.

8. Section 17(b) of the Act authorizes the Commission to exempt a transaction from section 17(a) of the act if the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, the proposed transaction is consistent with the policy of each investment company concerned, and with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt persons or transactions from any provision of the Act, if the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly

intended by the policy and provisions of the Act.

9. Applicants submit that their request for relief to permit the purchase and redemption of shares of the Money Market Funds by the Franklin Templeton Funds and the Managed Accounts satisfies the standards in sections 6(c) and 17(b). Applicants state that the Franklin Templeton Funds will retain their ability to invest Uninvested Cash directly in money market instruments as authorized by their respective investment objectives and policies, if they believe they can obtain a higher rate of return, or for any other reason. Similarly, the Money Market Funds have the right to discontinue selling shares to any of the Franklin Templeton Funds or the Managed Accounts if the Money Market Fund's Board determines that such sale would adversely affect its portfolio management and operations. In addition, applicants note that shares of Money Market Funds will be purchased and redeemed at their net asset value, the same consideration paid and received for these shares by any other shareholder.

10. Applicants also request relief under sections 6(c) and 17(b) to permit the Interfund Transactions. Applicants submit that the Franklin Templeton Funds, the Managed Accounts, and Money Market Funds will comply with rule 17a–7 under the Act in all respects, other than the requirement that the participants be affiliated solely by reason of having a common investment adviser or affiliated investment advisers, common officers or common directors, solely because the Franklin Templeton Funds and the Managed Accounts might become affiliated person within the meaning of section 2(a)(3)(A) and (B) of the Act. Applicants state that the Interfund Transactions do not raise the types of concerns that section was designed to address. Applicants also state that the Interfund Transactions will be reasonable and fair, will not involve overreaching, and will be consistent with the purposes of the Act and the policy of each registered investment company concerned.

Section 17(d) and Rule 17d–1

11. Section 17(d) of the Act and rule 17d–1 under the Act prohibit an affiliated person of an investment company, acting as principal, from participating or effecting any transaction in connection with any joint enterprise or joint arrangement in which the investment company participates. Applicants believe that each Franklin Templeton Fund and each Managed Account, by participating in the proposed transactions, and each Franklin Templeton Adviser of a Franklin Templeton Fund or of a Managed Account, by managing the assets of the Franklin Templeton Funds, the Managed Accounts, and the Money Market Funds, could be deemed to be participating in a joint arrangement within the meaning of section 17(d) and rule 17d–1 under the Act.

12. In considering whether to grant an exemption under rule 17d–1, the Commission considers whether the investment company's participation in such joint enterprise is consistent with the provisions, policies, and purposes of the Act, and the extent to which such participation is on a basis different from or less advantageous than that of other participants. Applicants submit that the investments by the Franklin Templeton Funds and the Managed Accounts in the Money Market Funds will be on the same basis and will be indistinguishable from that of any other participant or shareholder and that the transactions will be consistent with the Act.

Applicants' Conditions

Applications agree that the order granting the requested relief shall be subject to the following conditions:

1. Shares of the Money Market Funds sold to and redeemed by the Franklin Templeton Funds and the Managed Accounts will not be subject to a sales load, redemption fee, distribution fee under a plan adopted in accordance with rule 12b–1 under the Act, or service fee (as defined in rule 2830(b)(9) of the NASD's Conduct Rules).

2. No Money Market Fund will acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

3. Each Franklin Templeton Fund will invest Uninvested Cash in a Money Market Fund only to the extent that the Franklin Templeton Fund's aggregate investment of Uninvested Cash in all the Money Market Funds does not exceed 25% of the Franklin Templeton Fund's total assets. For purposes of this limitation, each Franklin Templeton Fund or series thereof will be treated as a separate investment company.

4. Each Franklin Templeton Fund, each Managed Account, each Money Market Fund, and any future fund relying on the order will be advised by a Franklin Templeton Adviser or a person controlling, controlled by, or under common control with a Franklin Templeton Adviser.

5. Investment by a Franklin Templeton Fund in shares of a Money Market Fund will be consistent with each Franklin Templeton Fund's respective investment restrictions and policies as set forth in its prospectus and statement of additional information.

6. Before the next meeting of the Board of a Franklin Templeton Fund is held for the purpose of voting on an advisory contract under section 15 of the Act, the Franklin Templeton Adviser to the Franklin Templeton Fund will provide the Board with specific information regarding the approximate cost to the Franklin Templeton Adviser of, or portion of the advisory fee under the existing advisory fee attributable to, managing the Cash Balances of the Franklin Templeton Fund that can be expected to be invested in the Money Market Funds. In connection with approving any advisory contract for a Franklin Templeton Fund, the Board, including a majority of Independent Directors, shall consider to what extent, if any, the advisory fees charged to the Franklin Templeton Fund by the Franklin Templeton Adviser should be reduced to account for reduced services provided to the Fund by the Adviser as a result of Cash Balances being invested in the Money Market Funds. The minute books of the Franklin Templeton Fund will record fully the Board's consideration in approving the investment advisory contract, including the considerations referred to above.

7. Before a Franklin Templeton Fund may participate in the Securities Lending Program, a majority of the directors or trustees (including a majority of the Independent Directors) of the Franklin Templeton Fund will approve the Fund's participation in the Securities Lending Program. Such directors or trustees also will evaluate the securities lending arrangement no less frequently than annually and determine that any investment of Cash Collateral in the Money Market Funds is in the best interests of the shareholders of the Franklin Templeton Fund.

8. To engage in Interfund Transactions, the Franklin Templeton Funds, the Managed Accounts, and Money Market Funds will comply with rule 17a–7 under the Act in all respects other than the requirement that the parties to the transactions be affiliated persons (or affiliated persons of affiliated persons) of each other solely by reason of having a common investment adviser or investment advisers which are affiliated persons of each other, common officers, and/or common directors, solely because the Franklin Templeton Funds and the Managed Accounts might become affiliated persons within the meaning of section 2(a)(3)(A) and (B) of the Act.

Condition 2 to the Fund of Funds order is amended to read as follows: ''No Underlying Portfolio will acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that the Underlying Portfolio other than a Money Market Fund acquires securities of another investment company pursuant to exemptive relief from the Commission permitting the Underlying Portfolio to purchase securities of an affiliated money market fund for short-term cash management purposes.''

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–591 Filed 1–11–99; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40869; File No. S7–24–89]

Joint Industry Plan; Solicitation of Comments and Order Approving Request to Extend Temporary Effectiveness of Reporting Plan for Nasdaq/National Market Securities Traded on an Exchange on an Unlisted or Listed Basis, Submitted by the National Association of Securities Dealers, Inc., the Boston Stock Exchange, Inc., the Chicago Stock Exchange, Inc. and the Philadelphia Stock Exchange, Inc.

December 31, 1998.

I. Introduction

On December 30, 1998, the National Association of Securities Dealers, Inc. (''NASD''), on behalf of itself and the Boston Stock Exchange, Inc. (''BSE''), the Chicago Stock Exchange, Inc. (''CHX''), and the Philadelphia Stock Exchange, Inc. (''Phlx'') submitted to the Securities and Exchange Commission (''Commission'' or ''SEC'') a proposal to extend the operation of a joint transaction reporting plan (''Plan'') [1] for Nasdaq/National Market (''Nasdaq/NM'') (previously referred to as Nasdaq/NMS) securities traded on an exchange on an unlisted or listed basis.[2] The proposal would extend the effectiveness of the Plan, as amended by Revised Amendment No. 9, as defined in footnote 3, through September 30, 1999.[3] The Commission also is extending certain exemptive relief as described below. The December 1998 Extension Request also requests that the Commission approve the Plan, as amended, on a permanent basis on or before September 30, 1999. During the nine-month extension of the Plan, the Commission will consider whether to approve the proposed Plan, as amended, on a permanent basis.

II. Background

The Plan governs the collection, consolidation and dissemination of quotation and transaction information for Nasdaq/NM securities listed on an exchange or traded on an exchange pursuant to a grant of UTP.[4] The Commission approved trading pursuant to the Plan on a one-year pilot basis, with the pilot period to commence when transaction reporting pursuant to the Plan commenced. The Commission originally approved the Plan on June 26, 1990.[5] Accordingly, the pilot period commenced on July 12, 1993 and was scheduled to expire on July 12, 1994.[6] The Plan has since been in operation on an extended pilot basis.[7]

III. Description of the Plan

The Plan provides for the collection from Plan Participants and the consolidation and dissemination to vendors, subscribers and others of quotation and transaction information in ''eligible securities.''[8] The Plan contains various provisions concerning its operation, including: Implementation of the Plan; Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information; Reporting Requirements (including hours of operation); Standards and Methods of Ensuring Promptness, Accuracy and Completeness of Transaction Reports; Terms and Conditions of access; Description of Operation of Facility Contemplated by the Plan; Method and Frequency of Processor Evaluation; Written Understandings of Agreements Relating to Interpretation of, or Participation in, the Plan; Calculation of the Best Bid and Offer (''BBO''), Dispute Resolution; and Method of Determination and Imposition, and Amount of Fees and Charges.[9]

IV. Exemptive Relief

In conjunction with the Plan, on a temporary basis scheduled to expire on December 31, 1998, the Commission granted an exemption to vendors from

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[1] *See* Letter from Robert E. Aber, Vice President and General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission, dated December 30, 1998 (''December 1998 Extension Request''). The December 1998 Extension Request also requests that the Commission continue to provide exemptive relief, previously granted in connection with the Plan on a temporary basis, from Rules 11Ac1–2 and 11Aa3–1 under the Securities Exchange Act of 1934, as amended (''Act''). 15 U.S.C. 78a *et seq.* The signatories to the Plan are the Participants for purposes of this release, however, the BSE joined the Plan as a ''limited participant'' and reports quotation information and transaction reports only in Nasdaq/NM securities listed on the BSE. Originally, the American Stock Exchange, Inc. (''Amex'') was a Participant but withdrew its participation from the Plan in August 1994.

[2] Section 12 of the Act generally requires an exchange to trade only those securities that the exchange lists, except that Section 12(f) of the Act permits unlisted trading privileges (''UTP'') under certain circumstances. For example, Section 12(f) among other things, permits exchanges to trade certain securities that are traded over-the-counter (''OTC/UTP''), but only pursuant to a Commission order or rule. The present order fulfills this Section 12(f) requirement. For a more complete discussion of the Section 12(f) requirement, *see* November 1995 Extension Order, infra note 7.

[3] On March 18, 1996, the Commission solicited comment on a revenue sharing agreement among the Participants. *See* March 1996 Extension Order, infra note 7. Thereafter the Participants submitted certain technical revisions to the revenue sharing agreement (''Revised Amendment No. 9''). *See* Letter from Robert E. Aber, Vice President and General Counsel, Nasdaq, to Jonathan G. Katz, Secretary, Commission, dated September 13, 1996. *See also* September 1996 Extension Order, infra note 7.

[4] *See* Section 12(f)(2) of the Act.

[5] *See* Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990) (''1990 Plan Approval Order'').

[6] *See* letter from David T. Rusoff, Roley & Lardner, to Betsy Prout, Division of Market Regulation (''Division''), SEC, dated May 9, 1994.

[7] *See* Securities Exchange Act Release No. 34371 (July 13, 1994), 59 FR 37103 (July 20, 1994); Securities Exchange Act Release No. 35221 (January 11, 1995), 60 FR 3886 (January 19, 1995); Securities Exchange Act Release No. 36102 (August 14, 1995), 60 FR 43626 (August 22, 1995) (''August 1995 Approval Order''); Securities Exchange Act Release No. 36226 (September 13, 1995), 60 FR 49029 (September 21, 1995); Securities Exchange Act Release No. 36368 (October 13, 1995), 60 FR 54091 (October 19, 1995); Securities Exchange Act Release No. 36481 (November 13, 1995), 60 FR 58119 (November 24, 1995) (''November 1995 Extension Order''); Securities Exchange Act Release No. 36589 (December 13, 1995), 60 FR 65696 (December 20, 1995); Securities Exchange Act Release No. 36650 (December 28, 1995), 61 FR 358 (January 4, 1996); Securities Exchange Act Release No. 36934 (March 6, 1996), 61 FR 10408 (March 13, 1996); Securities Exchange Act Release No. 36985 (March 18, 1996), 61 FR 12122 (March 25, 1996) (''March 1996 Extension Order''); Securities Exchange Act Release No. 37689 (September 16, 1996), 61 FR 50058 (September 24, 1996) (''September 1996 Extension Order''); Securities Exchange Act Release No. 37772 (October 1, 1996), 61 FR 52980 (October 9, 1996); Securities Exchange Act Release No. 38457 (March 31, 1997), 62 FR 16880 (April 8, 1997); Securities Exchange Act Release No. 38794 (June 30, 1997) 62 FR 36586 (July 8, 1997); Securities Exchange Act Release No. 39505 (December 31, 1997) 63 FR 1515 (January 9, 1998); and Securities Exchange Act Release No. 40151 (July 1, 1998) 63 FR 36979 (July 8, 1998) (''July 1998 Extension Order'').

[8] The Plan defines ''*eligible security*'' as any Nasdaq/NM security as to which unlisted trading privileges have been granted to a national securities exchange pursuant to Section 12(f) of the Act or that is listed on a national securities exchange.

[9] The full text of the Plan, as well as a ''Concept Paper'' describing the requirements of the Plan, are contained in the original filing which is available for inspection and copying in the Commission's public reference room.

Rule 11Ac1–2 under the Act regarding the calculation of BBO[10] and granted the BSE an exemption from the provision of Rule 11Aa3–1 under the Act that requires transaction reporting plans to include market identifiers for transaction reports and last sale data. As discussed further below in the *Summary of Comments*, the Participants ask in the December 1998 Extension Request that the Commission grant an extension of the exemptive relief described above to vendors until the BBO calculation issue is resolved. Additionally, in the December 1998 Extension Request, the Participants also request that the Commission grant an extension of the exemptive relief described above to the BSE for as long as the BSE is a Limited Participant under the Plan.

V. Summary of Comments

In the July 1998 Extension Order, the Commission requested comment on the following issues: whether the BBO calculation for securities traded pursuant to the Plan should be based on a price/time/size methodology or a price/size/time methodology; whether there is a need for a trade through rule; and the impact of the CHX's intended use of BRASS, as defined below.

With respect to the BBO calculation issue, the Nasdaq Board approved a recommendation to modify the methodology for calculating the BBO on Nasdaq in order to prioritize quotes based on a price/size/time algorithm instead of the current price/time/size algorithm, provided that Nasdaq market makers are subject to a minimum quote size requirement of 100 shares for at least 1,000 Nasdaq securities. In furtherance of this goal, on October 29, 1997, the Commission approved an NASD proposal to extend and expand the ''Actual Size Rule'' [11] to a total of 150 securities from 100 securities.[12] More recently, the NASD proposed to expand the Actual Size Rule to cover all Nasdaq securities and to implement this rule on a permanent basis.[13] In addition, the NASD submitted a proposed rule change to establish an integrated order delivery and execution system for directed orders and non-directed orders.[14] The proposed new system, if approved, would replace the NASD's SOES and SelectNet systems and would have an impact on the Plan (*e.g.*, the manner in which Plan participants interact with orders and quotes displayed in Nasdaq). The Nasdaq Board approved a recommendation, under which the methodology for calculating the BBO on Nasdaq would be changed to a price/size/time algorithm, from the current price/time/size algorithm, provided that: Nasdaq market makers no longer are subject to a 1,000 share minimum quote size; and the formula used to determine the quoted size of the Nasdaq market be reconsidered to reflect all market maker quotes at the same price level, if, and when, Nasdaq develops the technological capacity to afford market makers' simultaneous access to such quotes.[15] An extension of the Plan until September 30, 1999 has been requested in order to resolve the BBO issue.[16]

With respect to the need for a trade through rule, the NASD has represented that it continues to maintain that it would be more appropriate to address this issue once the issue of electronic access to Nasdaq market makers' quotes has been resolved.

With regard to the CHX's use of BRASS, by September 30, 1999 the CHX intends to replace its existing trade support system for accessing securities subject to the Plan and begin using BRASS, developed by Automated Securities Clearance, Limited (''ASC''). BRASS is a trade support and order routing system which offers subscribers, generally broker-dealers, software and hardware to enable them to perform various functions. ASC grants its subscribers a license to operate the BRASS software through a customized computer terminal purchased from ASC or by running the BRASS software on their own terminals. The CHX has represented that ASC has specifically customized BRASS to meet the special needs of the CHX. Among other things, Nasdaq market makers that already subscribe to BRASS will be able to route OTC/UTP orders to specialists on the CHX floor through a SelectNet linkage with BRASS workstations on the CHX floor. Conversely, CHX specialists will be able to route orders into SelectNet through their BRASS workstations.[17] The Commission notes that ASC will be subject to the Commission's inspection and examination procedures with regards to the specific customized BRASS system that ASC will provide to the CHX because ASC will be operating a facility of an exchange.

The Commission notes that the CHX commented on the July 1998 Extension Order requesting an expansion of the number of Nasdaq/NM securities eligible to be traded on an unlisted basis on an exchange, from 500 to 1000, pursuant to the Plan.[18] The CHX notes that exchange trading in Nasdaq/NM securities began in April 1987 when the CHX began trading 25 Nasdaq/NM securities.[19] In 1990, the Commission expanded the number of eligible Nasdaq/NM securities to 100 [20] and in 1995 the Commission expanded the number to 500.[21] The CHX believes that investors are directly benefited from

[10] Rule 11Ac1–2 under the Act requires that the best bid or best offer be computed on a price/size/time algorithm in certain circumstances. Specifically, Rule 11Ac1–2 under the Act provides that ''in the event two or more reporting market centers make available identical bids or offers for a reported security, the best bid or offer . . . shall be computed by ranking all such identical bids or offers . . . first by size . . . then by time.'' The exemption permits vendors to display the BBO for Nasdaq securities to the Plan on a price/time/size basis.

[11] *See* Securities Exchange Act Release No. 39285 (October 29, 1997), 62 FR 59932 (November 5, 1997).

[12] *See* Securities Exchange Act Release No. 38513 (April 15, 1997), 62 FR 19369 (April 21, 1997). Under the Actual Size Rule, market makers in certain Nasdaq securities are subject to a minimum quotation size requirement of 100 shares instead of the applicable small order execution system (''SOES'') tier size for that security.

[13] *See* Securities Exchange Act Release No. 39760 (March 16, 1998), 63 FR 13894 (March 23, 1998).

[14] *See* Securities Exchange Act Release No. 39718 (March 4, 1998) 63 FR 12124 (March 12, 1998). (''IODES Proposal'') Directed orders are those that an order-entry firm chooses to send to a specific Nasdaq market maker, electronic communications network (''ECN'') or UTP exchange for delivery and execution. Non-directed orders are those that are not sent to a particular Nasdaq market maker or ECN. In other words, when the broker-dealer entering the order does not specify the particular Nasdaq market maker, ECN or UTP exchange it wants to access, the order will be sent to the next available executing participant quoting at the national BBO.

[15] The NASD Board approved a recommendation that the price/size/time algorithm be utilized when a meaningful portion of Nasdaq securities are subject to a minimum quote size requirement of 100 shares. In addition, the Nasdaq and NASD Boards agreed that if Nasdaq develops the technological capability to afford market makers simultaneous electronic access to all market maker quotes at the same price level, the methodology used to determine the quoted size of the Nasdaq market will be re-examined to accommodate reflection of the fully accessible size displayed on Nasdaq.

[16] The BSE submitted comments to the SEC concerning the proposed new order delivery and execution systems's impact on the Plan, preservation of the BSE's rights concerning issues still not agreed upon or specifically covered by the Plan (specifically the need for a trade-through rule). *See* Comment letter No. 1511, SR–NASD–98–17 from Karen A. Aluise, Vice President, BSE to Jonathan G. Katz, Secretary, SEC dated May 14, 1998. In addition, the CHX submitted comments to the SEC concerning the IODES proposal and encouraged the Commission to grant permanent approval of the Plan. *See* Comment letter No. 1160, SR–NASD–98–17 from Patricia L. Levy, Senior Vice President and General Counsel, CHX to Jonathan G. Katz, Secretary, SEC dated May 13, 1998.

[17] *See* December 1997 Extension Request and Letter from George T. Simon, Foley & Lardner to Howard L. Kramer, Senior Associate Director, Division, SEC, dated December 12, 1997.

[18] *See* Letter from George T. Simon, Foley & Lardner, to Robert L.D. Colby, Deputy Director, Division, SEC, dated November 6, 1998.

[19] Securities Exchange Act Release No. 24406 (April 29, 1987) 52 FR 17495 (May 8, 1987).

[20] *See* 1990 Plan Approval Order, supra note 7.

[21] *See* August 1995 Extension Order, supra note 7.

trading Nasdaq/NM securities on the CHX floor because it provides investors with auction-based trading, including unified opening transactions, in Nasdaq/NM securities. In addition, the CHX represents that it has assigned virtually all of its current allocation of 500 Nasdaq/NM securities.

The Commission continues to solicit comment regarding the BBO calculation, the trade through rule and the CHX's use of the BRASS system as well as issues presented by changes occurring in the market place. The Commission also solicits comment on the CHX's request to expand the number of Nasdaq/NM securities eligible to be traded on an unlisted basis on an exchange, pursuant to the Plan.

VI. Discussion

The Commission finds that an extension of temporary approval of the operation of the Plan, as amended, through September 30, 1999, is appropriate and in furtherance of Section 11A of the Act. The Commission believes that such extension will provide the Participants with additional time to seek Commission approval of pending proposals concerning the BBO calculation [22] and to begin to make reasonable proposals concerning a trade through rule to facilitate the trading of OTC securities pursuant to UTP. In addition, the Commission believes that the extension will afford the CHX adequate time to test the BRASS system, address any operating issues concerning its use and implement it. While the Commission continues to solicit comment on these matters, the Commission believes that these matters should be addressed directly by the Participants on or before September 30, 1999 so that the Commission may have ample time to determine whether to approve the Plan on a permanent basis by September 30, 1999.

The Commission also finds that it is appropriate to extend the exemptive relief from Rule 11Ac1-2 under the Act until the earlier of September 30, 1999 or until such time as the calculation methodology for the BBO is based on a price/size/time algorithm pursuant to a mutual agreement among the Participants approved by the Commission. The Commission further finds that it is appropriate to extend the exemptive relief from Rule 11Aa3-1 under the Act, that requires transaction reporting plans to include market identifiers for transaction reports and last sale data, to the BSE through September 30, 1999. The Commission believes that the extensions of the exemptive relief provided to vendors and the BSE, respectively, are consistent with the Act, the Rules thereunder, and specifically with the objectives set forth in Sections 12(f) and 11A of the Act and in Rules 11Aa-3 and 11Aa3-2 thereunder.

[22] *See e.g.,* Actual Size Rule Release, supra note 13 and IODES Proposal, supra note 14.

VII. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the extension, including whether the extension is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W. Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan amendment that are filed with the Commission and all written communications relating to the proposed plan amendment 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. All submissions should refer to File No. S7–24–89 and should be submitted by February 2, 1999.

VIII. Conclusion

It is therefore ordered, pursuant to Sections 12(f) and 11A of the Act and paragraph (c)(2) of Rule 11Aa3-2 thereunder, that the Participants' request to extend the effectiveness of the Joint Transaction Reporting Plan, as amended, for Nasdaq/National Market securities traded on an exchange on an unlisted or listed basis through September 30, 1999, and certain exemptive relief through September 30, 1999, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[23]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–638 Filed 1–11–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40881; File No. SR–Amex–98–46]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Relating to Revised Equity Fee Schedule

Janaury 4, 1999.

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 11, 1998, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Amex. 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

Amex is proposing to revise its equity fee schedule to reflect the transaction charges that will be imposed on trades in Select Sector SPDRs and the Nasdaq 100 Index Trust, the new exchange-traded fund products that are scheduled to begin trading in December and January, respectively.[3] The text of the proposed rule change is set forth below. Proposed new language is italicized.

[23] 17 CFR 200.30-3(a)(29).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.196–4.

[3] In December 1998, the Commission approved trading of Select Sector SPDRs, *see* Securities Exchange Act Release No. 40749 (December 4, 1998), 63 FR 68483 (December 11, 1998), and noticed the Exchange's intention to trade the Nasdaq 100 Index Trust, *see* Securities Exchange Act Release No. 40809 (December 18, 1998), 63 FR 71524 (December 28, 1998).

Amex Equity Fee Schedule

I.

Transaction charges

Share—Based Charge

Total shares/month	*Rate, per share*
Up to 16,500,000	$.00225
16,500,00–25,000,000	.00200
25,000,001–33,000,000	.00175
Over 33,000,000	.00150

Value—Based Charge

Total gross dollar value/month	*Rate per $1,000*
Up to $200,000,000	$0.7500
$200,000,001–300,000,000	.07000
$300,000,001–400,000,000	.06500
Over $400,000,000	.05000

Notes:

1. In calculating these charges, each order will be assessed on the first 25,000 shares only.
2. Amex specialist/REMM trades are 100% deductible.
3. Amex option specialist/ROT trades in paired securities are 100% deductible.
4. The value-based portion of the transaction charge (based on the value of shares traded) is subject to a maximum charge of $40 per trade.
5. Proprietary trades in Canadian securities are charged at 50% of the above rates.
6. PER System orders for up to 1,099 shares will not be assessed a share or value charge. This provision does not apply to PER orders of a member of member organization trading as an agent for the account of a non-member competing market maker. A ''competing market maker'' is defined as a specialist or market maker registered as such on a registered stock exchange (other than the Amex), or a market maker bidding and offering over-the-counter, in an Amex-traded security.
7. In lieu of the above transaction charge, a separate fee will be imposed for executing trades in Standard & Poor's Depositary Receipts (''SPDRs''), *Select Sector Standard & Poor's Depositary Receipts (''Select Sector SPDRs''),* Standard and Poor's MidCap Depositary Receipts (''MidCap SPDRs''), DIAMONDS, *and the Nasdaq 100 Index Trust,* which will vary depending on for whom the trade is executed. Specialists will be charged a transaction fee of $.006 per share (.60 per 100 shares), capped at $300 per trade (50,000 shares). Registered Traders will be charged a transaction fee of $.007 per share ($.70 per 100 shares), capped at $350 per trade (50,000 shares). Off-floor orders (i.e., customer and broker-dealer) will be charged a transaction fee of $.006 per share ($.60 per 100 shares), capped at $100 per trade (16.667 shares).
8. PER System orders for up to 5,099 shares in SPDRs, *Select Sector SPDRs,* MidCap SPDRs, DIAMONDS, *and the Nasdaq 100 Index Trust* will not be assessed a transaction charge. This provision does not apply to PER orders of a member of member organization trading as an agent for the account of a non-member competing market maker.

II.

Regulatory Fee

.00005 × Total Value

Notes:

1. All trades executed on the Exchange in SPDRs, *Select Sector SPDRs,* MidCap SPDRs, DIAMONDS, *and the Nasdaq 100 Index Trust* will be exempt from the regulatory fee. This provision does not apply to PER orders of a member or member organization trading as agent for the account of a non-member competing market maker.

III. DIAMONDS Specialist Fee

In addition to the $.006 per share transaction charge imposed on the specialist in DIAMONDS under Note 7 above, such specialist will be required to pay a separate fee of $90,000 per months, payable at the beginning of each month.

II. Self-Regulatory Organization's Statement of the Purpose of , and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Amex included statements concerning the purpose of, and basis for, the fee 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. Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In 1997, the Amex approved certain changes in its equity fee schedule relative to trades in SPDRs, MidCap SPDRs, and DIAMONDS executed on the Amex. Under the fee schedule, specialists are charged a transaction fee of $.006 per share ($.60 per 100 shares), capped at $300 per trade (50,000 shares). Registered Traders are charged a transaction fee of $.007 per share ($.70 per 100 shares), capped at $350 per trade (50,000 shares). Off-floor orders (both customer and broker-dealer) are charged a transaction fee of $.006 per share ($.60 per 100 shares), capped at $100 per trade (16,667 shares).

In addition to the foregoing, orders up to 5,099 shares in SPDRs, MidCap SPDRs, and DIAMONDS routed to the Amex floor electronically through the Amex's Post Execution Reporting (PER) System are not assessed a transaction fee. However, the fee schedule operates on a principle consistent with that applied in the context of the Amex's current fee waiver in equities generally for PER orders up to 1,099 shares, in that the various fee waivers in SPDRs, MidCap SPDRs, and DIAMONDS are not available to PER orders for the account of a nonmember competing market maker.

In connection with the introduction of Select Sector SPDRs and the Nasdaq 100 Index Trust, the new exchange-traded fund products scheduled to begin trading in December and January, we are imposing on such products the same transaction fee schedule that we impose

on trading in SPDRs, MidCap SPDRs, and DIAMONDS. These fees are calculated to provide low costs to users of the products while making the cost of trading on the Exchange comparable to the economics of trading these and functionally similar products in other markets. The Exchange will notify member firms regarding the fee change, as well as the date of its effectiveness.

2. Statutory Basis

The fee change is consistent with section 6(b) of the Act in general and furthers the objectives of section 6(b)(4) in particular in that it is intended to assure the equitable allocation of reasonable dues, fees, and other charges among members, issuers and other persons using the Exchange's facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

Amex 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.

C. Self-Regulatory Organization's Statement on Comments on the proposed Rule Change Received From members, Participants or Others

Amex 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, which establishes or changes a due, fee, or other charge applicable to members of the Exchange, has become effective pursuant to section 19(b)(3)(A) of the Act[4] and subparagraph (e)(2) of Rule 19b–4 thereunder.[5]

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 arguments concerning the foregoing, including whether the foregoing is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the rule change that are filed with the Commission, and all written communications relating to the 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 Amex. All submissions should refer to File No. SR–Amex–98–46 and should be submitted by February 2, 1999.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–597 Filed 1–11–99; 8:45 am]

BILLING CODE 8010–01–M

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(e)(2).

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40871; File No. SR–BSE–98–15]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to Mandatory Year 2000 Testing

December 31, 1998.

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 23, 1998, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange seeks to adopt mandatory Year 2000 testing and reporting guidelines. The text of the proposed rule change is below. Proposed new language is italicized.

* * * * *

CHAPTER XXXIII

Boston Exchange Automated Communication Order-routing Network

(BEACON)

Year 2000 Testing

Sec. 8(a) Each member and member organization shall participate in testing of computer systems designed to prepare for Year 2000, in a manner and frequency prescribed by the Exchange, and shall provide to the Exchange reports related to such testing as requested by the Exchange.

(b) The Exchange may exempt a member or member organization from this requirement if that member cannot be accommodated in the testing schedule by the organization conducting the test, if the member does not employ computers in its business, or for other good reasons.

(c) Every member of the Exchange that clears securities transactions on behalf of other broker-dealers must take reasonable measures to ensure that each broker-dealer for which it clears securities transactions conducts testing with such member.

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 Exchange 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 Exchange 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 proposed rule change is to specifically mandate that all Exchange member firms, unless exempt, participate in Year 2000 (''Y2K'') tests and report on Y2K remediation progress. The Exchange is proposing that the rule expire on January 2, 2001 so that the Exchange will be empowered to continue requiring testing and reporting as necessary to correct any Y2K problems which may not be resolved prior to January 1, 2000, as well as any unforeseen problems which may arise after January 1, 2000. Unresolved programming issues could result in erroneous data causing significant disruption in the securities industry,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

and the various levels of testing occurring today will help to identify where additional work is required. Thus the Exchange seeks to mandate compliance with testing guidelines and will discipline members that fail to participate in the required Y2K testing and reporting of progress to the Exchange.

Testing requirements may include participation in Securities Industry Association (''SIA'') sponsored industry-wide point-to-point tests and extended point-to-point tests. Reporting requirements may include compliance with Commission-mandated B/D reports and any Exchange requested reports, questionnaires or surveys regarding preparations, preparedness and/or results.[3]

In addition, the Exchange proposes to exempt members and member organizations from this requirement if they cannot be accommodated in the testing schedule by the organization conducting the test, if they do not employ computers in their business, or for other good reasons. Furthermore, the Exchange proposes to require that any member of the Exchange that clears securities transactions on behalf of other broker-dealers must take reasonable measures to ensure that each broker-dealer for which it clears securities transactions conducts testing with such member.

2. Basis

The Exchange believes that the statutory basis for the proposed rule change is section 6(b)(5) of the Act,[4] which requires that an exchange have rules that are designed 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 to perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[3] The potential scope of BSE's testing and reporting requirements was clarified during a conversation between Karen Aluise, Vice President, BSE, and Joshua Kans, Attorney, Division of Market Regulation, Commission, December 22, 1998.

[5] 15 U.S.C. 78f(b)(5).

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. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission has concluded, for the reasons set forth below, that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder. Mandating Year 2000 testing and reporting is consistent with section 6(b)(5) of the Act, which, among other aspects, requires that the rules of an exchange promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and remove impediments to and perfect he mechanism of a free and open market and a national market system. The Commission believes that the proposed rule change will facilitate the BSE's and member firms' efforts to ensure the securities markets' continued smooth operation during the period leading up to and beyond January 1, 2000.

The Exchange has requested that the Commission approve the proposed rule change prior to the 30th day after the date of publication of notice of the filing in the **Federal Register** to ensure that as many firms as possible participate in Year 2000 testing. The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of notice of the filing in the **Federal Register.** It is vital that self-regulatory organizations (''SROs'') such as the BSE have the authority to mandate that their member firms participate in Year 2000 testing and that they report test results (and other Year 2000 information) to the SROs. The proposed rule change will help the BSE participate in coordinating Year 2000 testing, including industry-wide testing, and in remediating any potential Year 2000 problems. This, in turn, will help ensure that the industry-wide tests and the BSE's Year 2000 efforts are successful. The proposed rule change will also help the BSE work with its member firms, the SIA, and other SROs to minimize any possible disruptions the Year 2000 may cause.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the BSE. All submissions should refer to File No. SR–BSE–98–15 and should be submitted by February 2, 1999.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act [5] that the proposed rule change (SR–BSE–98–15) is hereby approved on an accelerated basis.[6]

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–590 Filed 1–11–99; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40883; File No. SR–BSE–98–11]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to its Competing Specialist Initiative

January 5, 1999.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act),[1]

[5] 15 U.S.C. 78s(b)(2).

[6] In approving the proposal, the Commission has considered the rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

and Rule 19b–4 thereunder,[2] notice is hereby given that on November 23, 1998, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Item I, II and III below, which Items have been prepared by the Exchange. 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 Exchange seeks to amend its Procedures for Competing Specialists to modify the procedures by which a regular specialist may object to competition in a stock.

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 Exchange included statements concerning the propose 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 Exchange 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 Propose of, and Statutory Basis, for, the Proposed Rule Change

(1) Purpose

The purpose of the proposed rule change is to amend the Procedures for Competing Specialists, which are set forth in Chapter XV, section 18 of the Exchange's rules, to address certain administrative and procedural issues regarding a specialist's ability to object to another specialist's request that the Exchange permit competition in a security. The Exchange seeks to clearly outline the procedural process by which a regular specialist may object to competition, as well as the appeal process in the event that the Market Performance Committee rules against the objection.

The current rules provide that a regular specialist may object to competition with or without cause. Only the regular specialist can object to competition in a stock. The Commission's order approving the Exchange's Competing Specialist Initiative noted that the Market Performance Committee may not deny applications based solely on such an objection, but only in circumstances wherein the stock at issue requires special treatment such that an entering competitor could jeopardize the fair and orderly market maintained by the regular specialist.[3]

The Exchange's current procedure requires the regular specialist to object in writing within 48 hours of notice of another specialist's application to compete in a stock. This objection is then reviewed by the Market Performance Committee, which determines whether to permit competition. Currently, if the Market Performance Committee rules in favor of competition, the Procedures for Competing Specialists permit the regular specialist to appeal that ruling to the Executive Committee of the Exchange. Moreover, a regular specialist may appeal a decision of the Executive Committee to the Board of Governors of the Exchange.[4] Competition may not begin during the appeal process.[5]

The Exchange seeks to streamline the procedural process for objection and appeal. The Exchange proposes to require that a regular specialist submit an objection on an Exchange designated form within 48 hours after receiving notice of the request to compete, and that the regular specialist submit in writing the reasons for objecting within 24 hours of the objection. The Exchange further proposes to schedule a Market Performance Committee meeting and to permit the regular specialist to appear before that committee to discuss the reasons for objection. Under the proposal, if the regular specialist appeals the decision of the Market Performance Committee, the appeal will be heard by the full Board of Governors of the Exchange, eliminating the interim step of review by the Executive Committee.

In addition, the Exchange seeks to provide that, if the Market Performance Committee rules in favor of competition, competition will commence pending the outcome of any appeal. The Exchange believes that the Market Performance Committee is best situated to determine whether a regular specialist has a legitimate claim for objection. Once that determination has been made, the appeal process could potentially last several months or longer, effectively prohibiting competition. Permitting the commencement of competition will permit the specialist seeking to compete to satisfy the needs of his customers.

(2) Basis

The Exchange believes that the statutory basis for the proposed rule change is section 6(b)(5) of the Act,[6] in that it is designed 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; and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will 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

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 date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule

[2] 17 C.F.R. 19b–4.

[3] *See* Securities Exchange Act Release No. 37045 (March 29, 1996), 61 FR 15318 (April 5, 1996).

[4] *See* BSE Constitution, Art. II. section 6, which provides that certain persons affected by a decision of a committee acting under powers delegated by the Board of Governors may require that the Board review the decision.

[5] The Exchange's existing procedures for handling objections to competition were clarified during a conversation between Karen Aluise, Vice President, BSE, and Joshua Kans, Attorney, Division of Market Regulation, Commission, December 2, 1998.

[6] 15 U.S.C. 78f(b)(5).

change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 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, 450 Fifth Street, NW., Washington, DC 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–BSE–98–11 and should be submitted by February 2, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–596 Filed 1–11–99; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40879; File No. SR–BSE–98–13]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to Portfolio Depositary Receipts

January 4, 1999.

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 8, 1998, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the BSE.[3] 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 BSE seeks to amend section 5 of Chapter XXIV of its rules regarding Portfolio Depositary Receipts to insert trademark information concerning Standard & Poor's products. The text of the proposed rule change is available at the Office of the Secretary, the BSE 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 BSE 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 BSE 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 proposed rule change is to amend Section 5 of Chapter XXIV of BSE rules regarding Portfolio Depositary Receipts to insert a footnote regarding Standard & Poor's standard trademark information and the Exchange's right to limited use of those marks pursuant to a license agreement with Standard & Poor's.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with section 6(b)[4] of the Act, in general, and furthers the objectives of section 6(b)(5),[5] in particular, in that it is designed to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and 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, in general, to protect inverstors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The BSE does not believe that the proposed rule change will 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

No written comments were either solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1)— Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from December 8, 1998, the date on which it was filed, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act[6] and subparagraph (e)(6) of Rule 19b–4 thereunder.[7] Although Rule 19b–4(e)(6) requires that an Exchange submit a notice of its intent to file at least five days prior to the filing date, the Commission waived this period for the proposed rule change at the Exchange's request.

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 arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 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

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The BSE submitted Amendment No. 1 to the proposed rule change, which made certain non-substantive textual changes and redesignated the proposal as immediately effective pursuant to section 19(b)(3)(A) of the Act and Rule 19b–4(e)(6) thereunder. *See* letter from Karen A. Aluise, Vice President, BSE, to Anitra Cassas, Attorney, Division of Market Regulation, Commission, dated December 18, 1998.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(e)(6).

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 with also be available for inspection and copying at the principal office of the BSE. All submissions should refer to File No. SR–BSE–98–13 and should be submitted by February 2, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

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BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40875; File Nos. SR–CBOE–98–25; Amex–98–22; PCX–98–33; and Phlx–98–36]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Changes by the Chicago Board Options Stock Exchange, Inc., American Stock Exchange, Inc., Pacific Exchange, Inc., and Philadelphia Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 1 and 2 by the Chicago Board Options Exchange; Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 by the American Stock Exchange; Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 by the Pacific Exchange; Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 1 and 2 by the Philadelphia Stock Exchange; Relating to an Increase in Position and Exercise Limits for Standardized Equity Options

December 31, 1998.

I. Introduction

On June 8, 1998, the Chicago Board Options Exchange, Inc. (''CBOE''); on June 24, 1998, the American Stock Exchange, Inc. (''Amex''); July 1, 1998, the Pacific Exchange, Inc. (''PCX''); and on August 14, 1998, the Philadelphia Stock Exchange, Inc. (''Phlx'') (collectively, the ''Exchanges''); submitted to the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'')[1] and Rule 19b–4 thereunder,[2] proposed rule changes to increase position and exercise limits for standardized equity options to three times their current levels.

The proposed rule changes were published for comment in the **Federal Register** on July 9, 1998, July 9, 1998, July 14, 1998, and September 11, 1998.[3] CBOE filed two amendments to its proposed rule change, respectively on November 12 and November 18, 1998.[4] Amex filed an amendment to its proposed rule change on November 23, 1998.[5] PCX filed and amendment to its proposed rule change on December 14, 1998.[6] Phlx filed two amendments to its proposed rule change on September 15 and December 4, 1998.[7] One comment was received on the CBOE's proposal.[8] This order approves the proposals, as amended.

II. Description

The Exchanges propose to increase position and exercise limits for standardized equity options[9] to three times their current levels.[10] The current position and exercise limits subject standardized equity options to one of five different position limits depending on the trading volume and outstanding share for the underlying security. The limits are 4,500; 7,500; 10,500; 20,000; and 25,000 contracts on the same side of the market. Under the proposed changes the new limits will be: 13,500; 22,500; 31,500; 60,000; and 75,000. The Exchanges believe sophisticated surveillance techniques at options exchanges adequately protect the

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release Nos. 40160 (July 1, 1998), 63 FR 37155 (July 9, 1998) (CBOE); 40159 (July 1, 1998), 63 FR 37151 (July 9, 1998) (Amex); 40172 (July 6, 1998), 63 FR 37913 (July 14, 1997) (PCX); and 40400 (September 3, 1998), 63 FR 48777 (September 11, 1998) (Phlx).

[4] *See* Letter to Michael Walinskas, Deputy Associate Director, Division of Market Regulation, Commission, from Timothy Thompson, CBOE, dated November 10, 1998 (''CBOE Amendment No. 1''). CBOE Amendment No. 1, in addition to making certain non-substantive changes, implements a new hedge reporting requirement with respect to customer accounts holding an equity option position in excess of 10,000 contracts on the same side of the market. *See also* Letter to Michael Walinskas, Deputy Associate Director, Division of Market Regulation, Commission, from Timothy Thompson, CBOE, dated November 17, 1998 (''CBOE Amendment No. 2''). CBOE Amendment No. 2 clarifies that the 10,000 contract reporting requirement does not apply to CBOE market-maker accounts. The amendment provides that the Exchange has the authority to impose additional margin on the clearing firm carrying the subject customer account in the event an under-hedged equity option position in excess of 10,000 contracts is noted. CBOE Amendment No. 2 also clarifies that the reporting threshold for FLEX equity options will remain unchanged upon the Commission's approval of the current proposed rule change.

[5] *See* Letter to Michael Walinskas, Deputy Associate Director, Division of Market Regulation, Commission, from Scott G. Van Hatten, Legal Counsel, Amex, dated November 20, 1998 (''Amex Amendment No. 1''). Amex Amendment No. 1 implements a new hedge reporting requirement on members, other than exchange market-makers, with respect to customer accounts holding an equity option position in excess of 10,000 contracts on the same side of the market. The amendment provides that the Exchange has the authority to impose additional margin on the clearing firm carrying the subject customer account in the event an under-hedged equity option position in excess of 10,000 contracts is noted. Amex Amendment No. 1 also clarifies that the reporting threshold for FLEX equity options will remain unchanged upon the Commission's approval of the current proposed rule change.

[6] *See* Letter to Michael Walinskas, Deputy Associate Director, Division of Market Regulation, Commission, from Robert Pacileo, Staff Attorney, PCX, dated December 14, 1998 (''PCX Amendment No. 1''). PCX Amendment No. 1, in addition to making technical language changes, implements a new hedge reporting requirement on members, other than exchange market-makers, with respect to customer accounts holding an equity option position in excess of 10,000 contracts on the same side of the market. The amendment provides that the Exchange has the authority to impose additional margin on the clearing firm carrying the subject customer account in the event an under-hedged equity option position in excess of 10,000 contracts is noted. PCX Amendment No. 1 also clarifies that the reporting threshold for FLEX equity options will remain unchanged upon the Commission's approval of the current proposed rule change.

[7] *See* Letter to Michael Walinskas, Deputy Associate Director, Division of Market Regulation, Commission, from Linda S. Christie, Counsel, Phlx, dated September 14, 1998 (''Phlx Amendment No. 1''). Phlx Amendment No. 1 makes minor technical changes by clarifying the new position limits in the examples presented in Commentary .08(a) of Phlx Rule 1001. *See also* Letter to Michael Walinskas, Deputy Associate Director, Division of Market Regulation, Commission, from John Dayton, Phlx, dated December 3, 1998 (''Phlx Amendment No. 2''). Phlx Amendment No. 2, in addition to making certain non-substantive changes, implements a new hedge reporting requirement on members, other than exchange market-makers, with respect to customer accounts holding an equity option position in excess of 10,000 contracts on the same side of the market. The amendment provides that the Exchange has the authority to impose additional margin on the clearing firm carrying the subject customer account in the event an under-hedged equity option position in excess of 10,000 contracts is noted. Phlx Amendment No. 2 also clarifies that the reporting threshold for FLEX equity options will remain unchanged upon the Commission's approval of the current proposed rule change.

[8] *See* Letter to Jonathan G. Katz, Secretary, Commission, from Kathryn V. Natale, Deputy General Counsel/Director of Compliance-Americas, Credit Suisse First Boston, dated September 23, 1998 (''CSFB Letter''). The CSFB Letter generally supported the position and exercise limit increase.

[9] Standardized options are exchange-traded options issued by the Options Clearing Corporation (''OCC'') that have standard terms with respect to strike prices, expiration dates, and the amount of the underlying security.

[10] Position limits impose a ceiling on the aggregate number of option contracts on the same side of the market (*i.e.*, aggregating long calls and short puts or long puts and short calls) that an investor, or a group of investors acting in concert, may hold or write. Exercise limits impose a ceiling on the aggregate long positions in option contracts that an investor, or group of investors acting in concert, can or will have exercised within five consecutive business days.

integrity of the markets for the options that will be subject to these increased position and exercise limits. The proposed rule change also will implement a new hedge reporting requirement on members, other than exchange market-makers, with respect to customer accounts holding an equity option position in excess of 10,000 contracts on the same side of the market.

III. Discussion

The Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of section 6 of the Act.[11] Specifically, the Commission believes that the proposed rule changes are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. The Commission also believes that the proposed rule changes are consistent with section 11A of the Act[12] in that they will enhance competition by allowing the Exchanges to compete better with the growing over-the-counter (OTC) market in customized equity options and with entities not subject to position limit rules.[13]

The Commission notes that the Exchanges believe that position and exercise limits, at their current levels, no longer serve their stated purpose. In the past, the Commission has stated that:

> Since the inception of standardized options trading, the options exchanges have had rules imposing limits on the aggregate number of options contracts that a member or customer could hold or exercise. These rules are intended to prevent the establishment of options positions that can be used or might create incentives to manipulative or disrupt the underlying market so as to benefit the options position. In particular, position and exercise limits are designed to minimize the potential for mini-manipulations and for corners or squeezes of the underlying market. In addition, such limits serve to reduce the possibility for disruption of the options market itself, especially in illiquid options classes.[14]

Although the Commission does not agree with the Exchanges that position and exercise limits no longer serve their intended purpose, the Commission believes that it is appropriate at this time to allow for an increase in position and exercise limits. In making this determination, the Commission has been careful to balance two competing concerns when considering the appropriate level at which to set equity option position and exercise limits. The Commission has recognized that the limits must be sufficient to prevent investors from disrupting the market for the underlying security by acquiring and exercising a number of options contracts disproportionate to the deliverable supply and average trading volume of the underlying security. At the same time, the Commission has realized that limits must not be established at levels that are so low as to discourage participation in the options market by institutions and other investors with substantial hedging needs or to prevent specialists and market-makers from adequately meeting their obligations to maintain a fair and orderly market.[15]

In general, the Commission has taken a gradual, evolutionary approach toward expansion of position and exercise limits. At this time, the Commission believes that an increase in position and exercise limits is appropriate for several reasons. First, the attributes of the exchange options markets include, among other things, a centralized market center, an auction market with posted transparent market quotations and transaction reporting, parameters and procedures for clearance and settlement, and the guarantee of the OCC for all contracts traded on the Exchanges. The high level of price and transaction transparency in the centralized exchange setting helps to deter illegal and manipulative trading activity. Furthermore, because OCC serves as the counter-party guarantor in every exchange-traded transaction, the potential for disruption to the market as a result of a customer acquiring and exercising a number of options contracts disproportionate to the deliverable supply is substantially reduced. Second, an increase in position and exercise limits could bring additional depth and liquidity to the listed options markets without significantly increasing concerns regarding intermarket manipulations or disruptions of the options or the underlying securities.

Third, the Exchanges' surveillance programs and enhanced reporting procedures should detect and deter trading abuses that could arise from the tripling of the current limits. Currently, the Exchanges' member firms are required to report to the exchanges those accounts that, on the previous business day, maintained aggregate long or short positions on the same side of the market of 200 or more contracts of any single class of options, identify the number of option contracts comprising each position and, in the case of short positions, state whether they are covered or uncovered (referred to as the ''Large Options Position Report'' or ''LOPR''). The submission of specific information relating to hedged positions currently is not required but can be obtained upon request. In order to better monitor potentially large unhedged options positions that will be subject to significantly higher position limits, the Exchanges are adopting an additional reporting requirement and position monitoring program. The Exchanges have proposed to implement a new reporting requirement with respect to customer accounts holding an equity option position in excess of 10,000 contracts on the same side of the market.[16] Member firms will be required to report and update hedging information concerning the position, including a detailed description of the hedge employed. The Commission believes that this reporting requirement provides an additional flag to the Exchanges concerning accounts maintaining large positions. Receipt and review of this information will enable the Exchanges to better assess whether the account is properly hedged, whether additional margin should be imposed, or whether other regulatory action by the Exchange is necessary. Furthermore, large stock holdings must be disclosed to the Commission by way of Schedule 13D or 13G.[17] Options positions are part of any reportable positions and cannot be legally hidden.

Fourth, the Commission believes that financial requirements imposed by each Exchange and by the Commission

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[11] *See* 15 U.S.C. 78f(b). In approving this rule change, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation, consistent with section 3 of the Act. *Id.* at 78c(f).

[12] *See* 15 U.S.C. 78k–1.

[13] In approving this rule change, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation, consistent with Section 3 of the Act. *Id.*, at 78c(f).

[14] *See e.g.*, Exchange Act Release No. 33283 (December 3, 1993), 58 FR 65204 (December 13, 1993) (CBOE–93–43) (order approving an increase in position and exercise limits for standardized equity options).

[15] *See* H.R. Rep. No. IFC–3, 96th Cong., 1st Sess. At 189–91 (Comm. Print 1978).

[16] The Amex requested that the reporting level being adopted be revised from 10,000 contracts to in excess of 13,500 contracts. The Amex believes that the reporting obligations and the requisite analyses at the 10,000 contract reporting level will require the Amex to analyze positions in a large number of accounts holding between 10,000 and 13,500 contracts, but that in nearly every case could permissibly hold at least 25,000 unhedged option contracts. *See* Letter to Michael Walinskas, Deputy Associate Director, Division of Market Regulation, Commission, from Scott G. Van Hatten, Legal Counsel, Amex, dated December 4, 1998. The Commission has determined that the 10,000 contract reporting level is appropriate at this time.

[17] Exchange Act Rule 13d–1.

adequately address concerns that a member or its customer may try to maintain an inordinately large unhedged position in an equity option. Current margin and risk-based haircut methodologies serve to limit the size of positions maintained by any one account by increasing the margin and/or capital that a member must maintain for a large position held by itself or by its customer. The Exchanges also have the authority under their respective rules to impose a higher margin requirement upon the member or member organization when the Exchange determines a higher requirement is warranted. In addition, the Commission's net capital rule, Rule 15c3–1 under the Exchange Act, imposes a capital charge on members to the extent of any margin deficiency resulting from the higher margin requirement. The significant increases in unhedged options capital charges resulting from the September 1997 adoption of risk-based haircuts and the Exchange margin requirements applicable to these products under Exchange rules serves as an additional form of protection.[18]

Fifth, an increase in position and exercise limits should attract business back from the less-transparent OTC market to the Exchanges where the trades will be subject to reporting requirements and surveillance. Exchange member firms have repeatedly expressed their belief that position limits are an impediment to their business and that they have no choice but to move their business to off-shore markets where position limits are not an issue.[19] The increase in position and exercise limits for standardized equity options should allow the Exchanges to better compete with the growing OTC market in customized equity options, thereby encouraging fair competition among brokers and exchange markets.

The Commission observes that CSFB, the sole commenter on the proposals, generally favors the increase in position and exercise limits. CSFB believes, however, that the current five-tier position limit system should be consolidated into a three-tier system. CSFB believes that consolidation of the position limit tiers would simplify the monitoring of options positions and reduce confusion for options traders and compliance personnel. The Commission notes that the Exchanges' proposed rule changes did not propose to consolidate the position limit tiers. Specifically, the Exchanges did not seek to amend their respective proposals in response to the comment letter. Nevertheless, the Commission recognizes that the comment may have merit and that the Exchanges may consider to incorporate the views contained in the comment letter in future rule proposals.

The Commission finds good cause to approve Phlx Amendment No. 1 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register.** Phlx Amendment No. 1 corrects a rule language oversight in Phlx's filing. Specifically, Phlx Amendment No. 1 makes minor technical changes by clarifying the new position limits in the examples presented in Commentary .08(a) of Phlx Rule 1001. Accordingly, the Commission believes that it is consistent with section 6(b) of the Act to approve Phlx Amendment No. 1 to the proposed rule change on an accelerated basis.

The Commission finds good cause to approve Amex Amendment No. 1, PCX Amendment No. 1, and Phlx Amendment No. 2 to the proposed rule changes prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register.** Amex Amendment No. 1, PCX Amendment No. 1, and Phlx Amendment No. 2 implement a new hedge reporting requirement on members, other than exchange market-makers, with respect to customer accounts holding an equity option position in excess of 10,000 contracts on the same side of the market. The amendments provide that the Exchanges have the authority to impose additional margin on the clearing firm carrying the subject customer account in the event an under-hedged equity option position in excess of 10,000 contracts is noted. These amendments also clarify that the reporting threshold for FLEX equity options will remain unchanged upon the Commission's approval of the current proposed rule changes. The Commission believes that receipt and review of this hedging information at the 10,000 contract threshold will enable the Exchanges to better assess whether an account is properly hedged, whether additional margin should be imposed, or whether other regulatory action by the Exchange is necessary. Furthermore, the clarification as to the reporting threshold for FLEX equity options helps to avoid an inadvertent increase in this threshold as a result of approving the current proposed rule changes. Accordingly, the Commission believes that it is consistent with section 6(b) of the Act to approve Amex Amendment No. 1, PCX Amendment No. 1, and Phlx Amendment No. 2 to the proposed rule changes on an accelerated basis.

The Commission finds good cause to approve CBOE Amendment No. 1 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register.** CBOE Amendment No. 1, in addition to making certain non-substantive changes, implements a new hedge reporting requirement with respect to customer accounts holding an equity option position in excess of 10,000 contracts on the same side of the market. The Commission believes that receipt and review of this hedging information at the 10,000 contract threshold will enable the Exchange to better assess whether an account is properly hedged, whether additional margin should be imposed, or whether other regulatory action by the Exchange is necessary. Accordingly, the Commission believes that it is consistent with section 6(b) of the Act to approve CBOE Amendment No. 1 to the proposed rule change on an accelerated basis.

The Commission finds good cause to approve CBOE Amendment No. 2 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register.** CBOE Amendment No. 2 clarifies that the 10,000 contract reporting requirement does not apply to CBOE market-maker accounts. This clarification is consistent with the rules of other exchanges. The amendment provides that the Exchange has the authority to impose additional margin on the clearing firm carrying the subject customer account in the event an under-hedged equity option position in excess of 10,000 contracts is noted. CBOE Amendment No. 2 also clarifies that the reporting threshold for FLEX equity options will remain unchanged upon the Commission's approval of the current proposed rule change. This clarification helps to avoid an inadvertent increase in the FLEX equity reporting threshold as a result of approving the current proposed rule change. Accordingly, the Commission believes that it is consistent with section 6(b) of the Act to approve CBOE Amendment No. 2 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 the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six

[18] *See* Exchange Act Release No. 38248 (February 6, 1997), 62 FR 6474 (February 12, 1997) (adopting Risk Based Haircuts); and CBOE Rule 12.3 *Margins.*

[19] *See, e.g.,* CSFB Letter.

copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File Nos. SR–CBOE–98–25; Amex–98–22; PCX–98–33; and/or Phlx–98–36 and should be submitted by February 2, 1999.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[20] that the proposed rule changes (SR–CBOE–98–25; SR–AMEX–98–22; SR–PCX–98–33; and SR–Phlx–98–36) are approved, as amended.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[21]

[FR Doc. 99–594 Filed 1–11–99; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34– 40868; File No. SR–CHX–98–33]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Chicago Stock Exchange, Incorporated Relating to the Trading of Nasdaq/NM Securities on the CHX

December 31, 1998.

On December 21, 1998 the Chicago Stock Exchange Incorporated (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposed rule change.

I. Self-Regulatory Organizations Statement of the Terms of Substance of the Proposed Rule Change

The Exchange hereby requests a six month extension of the pilot program relating to the trading of Nasdaq/NM Securities on the Exchange that is currently due to expire on December 31, 1998. Specifically, the pilot program amended Article XX, Rule 37 and Article XX, Rule 43 of the Exchange's Rules and the Exchange proposes that the amendments remain in effect on a pilot basis through June 30, 1999.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On May 4, 1987, the Commission approved certain Exchange rules and procedures relating to the trading of Nasdaq/NM securities on the Exchange.[2] Among other things, these rules made the Exchange's BEST Rule guarantee (Article XX, Rule 37(a)) applicable to Nasdaq/NM securities and made Nasdaq/NM securities eligible for the automatic execution feature of the Exchange's Midwest Automated Execution System (''MAX system'').[3]

On January 3, 1997, the Commission approved,[4] on a one year pilot basis, a program that eliminated the requirement that CHX specialists automatically execute orders in Nasdaq/NM securities when the specialist is not quoting at the national best bid or best offer (''NBBO'').[5] When the Commission approved the program on a pilot basis, it stated that the arrangement in place for Exchange Specialists to access over-the-counter (''OTC'') market makers was not an ideal linkage between the markets on a permanent basis and that the Exchange should work with Nasdaq to establish a more effective linkage. In addition, the Commission requested that the Exchange submit a report to the Commission describing the Exchange's experience with the pilot program. The Commission stated that the report should include at least six months worth of trading data. Due to programming issues, the pilot program was not implemented until April, 1997.

Six months of trading data did not become available until November, 1997. As a result, the Exchange requested an additional three month extension to collect the data and prepare the report for the Commission. On December 31, 1997, the Commission extended the pilot program for an additional three months, until March 31, 1998, to give the Exchange additional time to prepare and submit the report and to give the Commission adequate time to review the report prior to approving the pilot on a permanent basis.[6] The Exchange submitted the report to the Commission on January 30, 1998.

The Exchange, prior to the pilot expiring, requested another three month extension. On March 31, 1998, the Commission approved the pilot for an

[20] 15 U.S.C. 78s(b)(2).

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] *See* Securities Exchange Act Release No. 24424 (May 4, 1987), 52 FR 17868 (May 12, 1987) (order approving File No. SR–MSE–87–2). *See also* Securities Exchange Act Release Nos. 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990) (order expanding the number of eligible securities to 100); and 36102 (August 14, 1995), 60 FR 43626 (August 22, 1995) (order expanding the number of eligible securities to 500). The Commission notes that the CHX commented on the July 1998 extension order of the OTC–UTP Plan (Securities Exchange Act Release No. 40151 (July 1, 1998) 63 FR 36979 (July 8, 1998)) requesting an expansion of the number of Nasdaq/NM securities eligible to be traded on an unlisted basis on an exchange, from 500 to 1000, pursuant to the Plan. *See* Letter from George T. Simon, Foley & Lardner, to Robert L.D. Colby, Deputy Director, Division of Market Regulation (''Division''), SEC, dated November 6, 1998. The CHX believes that investors are directly benefited from trading Nasdaq/NM securities on the CHX floor because it provides investors with auction-based trading, including unified opening transactions, in Nasdaq/NM securities. In addition, the CHX represents that it has assigned virtually all of its current allocation of 500 Nasdaq/NM securities. The Commission solicited comments on the CHX request in the December 1998 extension order of the OTC–UTP Plan (Securities Exchange Act Release No. 40869 (December 31, 1998)).

[3] The MAX system may be used to provide an automated delivery and execution facility for orders that are eligible for execution under the Exchange's BEST Rule and certain other orders. *See* CHX, Art. XX, Rule 37(b). A MAX order that fits under the BEST parameters is executed pursuant to the BEST Rule via the MAX system. If an order is outside the BEST parameters, the BEST Rule does not apply, but MAX system handling rules do apply.

[4] *See* Securities Exchange Act Release No. 38119 (January 3, 1997) 62 FR 1788 (January 13, 1997) (''January 1997 Order'').

[5] The NBBO is the best bid or offer disseminated pursuant to Rule 11Ac1–1 under the Act.

[6] *See* Securities Exchange Act Release No. 39512 (December 31, 1997), 63 FR 1517 (January 9, 1998).

additional three month period, until June 30, 1998.[7] On July 1, 1998 the Commission approved the pilot for an additional six month period, until December 31, 1998.[8] The Exchange now requests another extension of the current pilot program, through June 30, 1999.

Under the pilot program, specialists must continue to accept agency[9] market orders or marketable limit orders, but only for orders of 100 to 1000 shares in Nasdaq/NM securities rather than the 2099 share limit previously in place.[10] Specialists, however, must accept all agency limit orders in Nasdaq/NM securities from 100 up to and including 10,000 shares for placement in the limit order book. As described below, however, specialists are required to automatically execute Nasdaq/NM orders only if they are quoting at the NBBO when the order was received.

The pilot program requires the specialist to set the MAX auto-execution threshold at 1000 shares or greater for Nasdaq/NM securities. When a CHX specialist is quoting at the NBBO, orders for a number of shares less than or equal to the auto-execution threshold set by the specialist will be automatically executed (in an amount up to the size of the specialist's quote). Orders in securities quoted with a spread greater than the minimum variation are executed automatically after a fifteen second delay from the time the order is entered into MAX. The size of the specialist's bid or offer is then automatically decremented by the size of the execution. When the specialist's quote is exhausted, the system will generate an autoquote at an increment away from the NBBO, as determined by the specialist from time to time, for either 100 or 1000 shares, depending on the issue.[11]

When the specialist is not quoting a Nasdaq/NM security at the NBBO, it can elect, on an order-by-order basis, to manually execute orders in that security. If the specialist does not elect manual execution, MAX market and marketable limit orders in that security that are of a size equal to or less than the auto-execution threshold will automatically be executed at the NBBO after a twenty second delay, provided that the auto-execution threshold is less than or equal to the NBBO.[12] If the specialist elects manual execution, the specialist must either manually execute the order at the NBBO or a better price or act as agent for the order in seeking to obtain the best available price for the order on a marketplace other than the Exchange. If the specialist decides to act as agent for the order, the pilot program requires the specialist to use order-routing systems to obtain an execution where appropriate. Market and marketable limit orders that are for a number of shares greater than the auto-execution threshold are not subject to these requirements, and may be canceled within one minute of being entered into MAX or designated as an open order.

2. Statutory Basis

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, in particular, with the requirements of section 6(b). In particular, the proposal is consistent with the requirements of section 6(b)(5)[13] of the Act which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public interest. The proposal is also consistent with sections 11A(a)(1)(C) and 11A(a)(1)(D) of the Act.

The CHX's proposal to not require automatic execution for Nasdaq/NM securities when the specialist is not quoting at the NBBO, and to allow the specialist to execute the order as agent, is intended to conform CHX specialist obligations to those applicable to OTC market makers in Nasdaq/NM securities, while recognizing that the CHX provides a separate, competitive market for Nasdaq/NM securities. The rules establish execution procedures and guarantees that attempt to provide an execution reflective of the best quotes among OTC market makers and specialists in Nasdaq/NM securities without subjecting CHX specialists to execution guarantees that are substantially greater than those imposed on their competitors.

a. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose a burden on competition.

b. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No comments were solicited or received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington DC 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, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the Exchange. All submissions should refer to file number SR–CHX–98–33 and should be submitted by February 2, 1999.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the Exchange's proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act, which requires that an Exchange have rules designed to prevent fraudulent and manipulative acts and practices, 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

[7] *See* Securities Exchange Act Release No. 39823 (March 31, 1998) 63 FR 17246 (April 8, 1998).

[8] *See* Securities Exchange Act Release No. 40150 (July 1, 1998) 63 FR 36983 (July 8, 1998).

[9] The term ''agency order'' means an order for the account of a customer, but shall not include professional orders as defined in CHX, Article XXX, Rule 2, interpretation and policy .04. The Rule defines a ''professional order'' as any order for the account of a broker-dealer, the account of an associated person of a broker-dealer, or any account in which a broker-dealer or an associated person of a broker-dealer has any direct or indirect interest.

[10] The 100 to 2099 share auto-acceptance threshold previously in place continues to apply to Dually Listed securities (those issues that are traded on the CHX and are listed on either the New York Stock Exchange or the American Stock Exchange).

[11] Specifically, the autoquote is currently for one normal unit of trading (usually 100 shares) in issues that became subject to mandatory compliance with Rule 11Ac1–4 under the Act on or prior to February 24, 1997, and for 1000 shares in other issues.

[12] The twenty second delay is designed, in part, to provide an opportunity for the order to receive price improvement from the specialist's displayed quote.

[13] 15 U.S.C. 78f(b)(5).

general, to protect investors and the public interest, The Commission also believes that the proposal is consistent with section 11A(a)(1)(C) and 11A(a)(1)(D) of the Act because the Exchange's proposal conforms CHX specialist obligations to those applicable to OTC market makers in Nasdaq/NM securities, while CHX provides a separate, competitive market for Nasdaq/NM securities.

The Commission notes, however, that while the Exchange has been working towards establishing a linkage, specialists and OTC market makers do not yet have an effective method of routing orders to each other. The Commission expects the Exchange to continue to work towards establishing a linkage with the Nasdaq systems as requested in the January 1997 Order.[14] The Commission is approving the extension of the pilot so that the rules of the Exchange will operate without interruption.

The Commission, therefore, finds good cause for approving the proposed rule change prior to thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**.

It is therefore ordered, pursuant to section 19(b)(2)[15] of the Act that the proposed rule change (SR–CHX–98–33) be, and hereby is, approved through June 30, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–592 Filed 1–11–99; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40880; File No. SR–CHX–98–30]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Changes by the Chicago Stock Exchange, Inc. Relating to MAX Executions of S&P 500 Issues, Floor Telephone Booth and Post Space Fees, and a Fee Waiver

January 4, 1999.

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 21, 1998, the Chicago Stock Exchange, Incorporated (''CHX'' 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 CHX. 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 Exchange proposes to amend its Membership Dues and Fees Schedule to eliminate all transaction and order processing fees related to transactions in the stocks comprising the Standard & Poor's 500 Stock Price Index (the ''S&P 500''), as determined and revised by Standard & Poor's from time to time, executed through the Exchange's Midwest Automated Execution System (the ''MAX'' System), effective January 1, 1999. Further, the Exchange proposes to amend its Membership Dues and Fees Schedule to change the floor telephone booth and post space fees charged to members from flat-rate fees to usage-based fees, effective July 1, 1999. In connection with the floor telephone booth and post space fee changes, the Exchange proposes to waive for six months, from January 1, 1999 to June 30, 1999, the existing floor telephone booth and post space charges applicable to floor members. The text of the proposed rule change is as follows (additions are *italicized;* delections are [bracketed]):

Membership Dues and Fees

(c) Order Processing Fee Schedule:

Odd Lots	$.35 per trade.
	$400.00 maximum monthly fee.
Open Limit Orders	$.25 per trade (assessed on execution).

The above order processing fees shall not apply to transactions in NASDAQ/NMS Securities, *or to transactions in the stocks comprising the Standard & Poor's 500 Stock Price Index executed through MAX.*

(d) Transaction Fee Schedule:

(1) Market orders sent via MAX	No charge.
(2) All others orders (except as set forth below):	
	Rate per share
First 500 shares	$.00
Next 2,000 shares	$.0075
Next 7,500 shares	$.005
Remaining shares	$.004 (up to a maximum of $100.00 per side)
(3) Monthly maximums for fees incurred in (2) above:	
(i) Maximum monthly transaction fees for orders sent via MAX.	$7,000
(ii) Maximum monthly transaction fee for firms without a floor broker or market maker presence on the floor.	$78,000
(iii) Maximum monthly transaction fee for firms with a floor broker or market maker presence on the floor.	$54,000
(iv) Maximum monthly transaction fees shall not exceed the lesser of that specified in (ii) or (iii) above, or $.40 per 100 average monthly gross round lot shares.	

The above transaction fees shall not apply to transactions *executed through MAX* in Tape B eligible issues *or in the stocks comprising the Standard & Poor's 500 Stock Price Index.* [which are executed through MAX.]

* * * * * * *

(e) Equipment/Space Charges:

[14] *See* January 1997 Order, supra note 4.

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(I).

[2] 17 CFR 240.19b-4.

Floor Telephone Booth	[$42 per month per booth with one telephone and $10 per month for each additional telephone in such a booth, except that there will be a minimum of $42 per month per firm occupying the booth.] *Effective July 1, 1999, the expense to the Exchange of leasing the space occupied by the telephone booths shall be allocated pro rata based on usage among all floor members and member organizations on a monthly basis. Each member or member organization's portion shall be determined based on the percentage of actual square footage of floor telephone booth space occupied by each member.*
Post Space	[$100 each per month] *Effective July 1, 1999, the expense of the Exchange of leasing the post space shall be allocated pro rata based on usage among all floor members and member organizations on a monthly basis. Each member or member organization's portion shall be determined based on the actual square footage of the post occupied by each member.*
Technical Equipment (per month)	Four Screen Rich Units: 250.00 Three Screen Rich Units: 208.35 Two Screen Rich Units: 166.65 Max Floor Broker Terminals: 37.95 Floor Broker Printer: 49.95 Specialist Back Post MAX Terminals: 37.95 Specialist Printer: 49.95
Teletype Space	$25 per month for each machine of every firm employing private teletype facilities on the Floor.
Quote Machines	Quotron equipment, $180 per month. Equipment options extra.
Floor Box Rental	$1 per month, payable annually.

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 CHX 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 CHX 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 Exchange is proposing three changes to its Membership Dues and Fees Schedule in this filing. First, the Exchange is proposing to eliminate all transaction and order processing fees for transactions in the stocks comprising the Standard & Poor's 500 Stock Price Index, as determined and revised by Standard & Poor's from time to time, executed through the Exchange's MAX System, effective January 1, 1999. The purpose of this change is to make the Exchange more competitive in attracting order flow in these actively traded stocks.

Second, the Exchange is proposing to change the floor telephone booth and post space fees from flat-rate fees to pro rata fees based on the Exchange's cost of leasing the space as divided among members according to the square footage of floor telephone booth and post space occupied by each member, effective July 1, 1999. The purpose of this change is to pass through to floor members the Exchange's actual cost of leasing the space on the Floor so that member fees more accurately reflect actual Exchange costs.

Finally, the Exchange is proposing to waive, for a period of six months, the current floor telephone booth and post space charges applicable to floor members. The waiver period will begin January 1, 1999, and end June 30, 1999, thus coinciding with the start of the new floor telephone booth and post space fee structure.

The Exchange's Finance Committee has determined that after the proposed changes in fee structure, the Exchange will have ample capital and resources to continue to fulfill its proscribed duties in its capacity as a self-regulatory organization and as a registered national securities exchange.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)(4) of the Act in that it provides for the equitable allocation of reasonable dues, fees and other charges among members, issuers, and other persons using the Exchange's facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The CHX 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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange 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, which establishes or changes a due, fee, or other charge applicable to members of the Exchange, has become effective pursuant to section 19(b)(3)(A) of the Act[3] and subparagraph (e)(2) of Rule 19b–4 thereunder.[4] At any time within 60 days of the filing of such 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, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(e)(2).

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 CHX. All submissions should refer to File No. SR–CHX–98–30 and should be submitted by February 2, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secertary.

[FR Doc. 99–595 Filed 1–11–99; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40876; File No. SR-Phlx 98–56]

Self-Regulatory Organizations; Notice of Filing and Order Granting Partial Accelerated Approval to Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Enhanced Parity Split Pilot Program for Equity and Index Option Specialists and the Adoption of an Enhanced Parity Split for Specialists that Develop and Trade New Products

December 31, 1998.

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 28, 1998, the Philadelphia Stock Exchange, Inc. (''Exchange'' or ''Phlx'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant partial accelerted approval to the proposed rule change.

[5] 17 CFR 200.30-3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange seeks the extension of an permanent approval of its enhanced parity split pilot program for equity and index option specialists (''Pilot Program''). The Pilot Program is currently scheduled to expire on December 31, 1998. In addition, the Exchange proposes to amend Exchange Rule 1014(g) ''Equity Option and Index Option Priority and Parity,'' and its corollary Option Floor Procedure Advice B–6 to provide an enhanced parity split for Exchange specialists that develop and trade new products.

The text of the proposed rule change is available at the Office of the Secretary, the Exchange, and at the Commision.

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 Exchange 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 Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

a. Permanent Approval of the Pilot Program. On August 26, 1994, the Commission approved the Pilot Program to provide Exchange specialists with an enhanced participation in parity equity option trades.[3] Initially, the Pilot Program was approved for a one year period ending August 26, 1995. On November 30, 1994, the Commission approved the Exchange's proposal to include index option specialists in the Pilot Program.[4] The Pilot Program was later revised on March 1, 1995, with respect to situations where less than three controlled accounts are on parity with the specialist.[5] The Pilot Program was subsequently renewed without change on three occasions.[6]

Most recently, the Pilot Program was extended to December 31, 1998, and modified so that (1) the enhanced parity split applies to all index options, in addition to applying to 50% of each specialist's equity option issues and 100% of all new option classes allocated to the specialist during the year; and (2) specialists may revise the list of eligible equity options on a quarterly basis, rather than annually.[7]

The Exchange now seeks the extension [8] of and permanent approval [9] of the Pilot Program. The Pilot Program currently works as follows: When an equity or index option specialist is on parity will one controlled account [10] and the order is for more than five contracts, the specialist will receive 60% of the contracts and the controlled account will receive 40%. When the specialist is on parity with two controlled accounts and the order is for more than five contracts, the specialist will receive 40% of the contracts and each controlled account will receive 30%. When the specialist is on parity with three or more controlled accounts and the order is for more than five contracts, the specialist will be counted as two crowd participants when dividing up the contracts. In any of these situations, if a customer is on parity, the customer will not be disadvantaged by receiving a lesser allotment than any other crowd participant, including the specialist.[11]

[3] Securities Exchange Act Release No. 34606 (Aug. 26, 1994), 59 FR 45741 (Sept. 2, 1994).

[4] Securities Exchange Act Release No. 35028 (Nov. 30, 1994), 59 FR 63151 (Dec. 7, 1994).

[5] Securities Exchange Act Release No. 35429 (Mar. 1, 1995), 60 FR 12802 (Mar. 8, 1995).

[6] Securities Exchange Act Release Nos. 36122 (Aug. 18, 1995), 60 FR 44530 (Aug. 28, 1995); 37524 (Aug 5, 1996), 61 FR 42080 (Aug. 13, 1996); and 38924 (Aug. 11, 1997), 62 FR 44170 (Aug. 19, 1997.

[7] Securities Exchange Act Release No. 39401 (Dec. 4, 1997), 62 FR 65300 (Dec. 11, 1997). The Exchange has noted that it maintains a separate, permanent enhanced parity split program for ''new'' option specialist units that trade newly listed options. *See* Exchange rule 1014(g)(iii), ''New Unit/New Option Enhanced Specialist Participation'' and Securities Exchange Act Release No. 34109 (May 25, 1994), 59 FR 28570 (June 2, 1994).

[8] The Exchange has requested that the Commission accelerate approval of the proposed rule change for the portion relating to the extension of the enhanced parity split Pilot Program for a six-month period or until the Commission approves the Exchange's request for permanent approval of the Pilot Program, whichever occurs first.

[9] Under the proposal, the text of Exchange Rule 1014 and its corollary Option Floor Procedure Advice B–6 would be revised to eliminate references to an expiration date.

[10] A controlled account is defined as ''any account controlled by or under common control with a member broker-dealer.'' Customer accounts, which include discretionary accounts, are defined as all accounts other than controlled accounts and specialist accounts. *See* Exchange Rule 1014(g).

[11] As the Commission noted in the most recent order extending the Pilot Program, the application of the enhanced parity split is mandatory. Therefore, with respect to any equity or index options transaction that implicates the enhanced

Continued

In connection with the most extension of the Pilot Program,[12] the Commission noted that prior to granting another extension or permanent approval of the Pilot Program, the Exchange would be required to submit a report (''Report'') discussing: (i) Whether the Pilot Program has generated any evidence of any adverse effect on competition or investors, in particular, or the market for equity or index options, in general; (ii) whether the Exchange has received any complaints, either written or otherwise, concerning the operation of the Pilot Program; and (iii) whether the Exchange has taken any disciplinary action against, or commenced any investigations, examinations, or inquiries concerning the operation of the Pilot Program, as well as the outcome of any such matter.

The Exchange incorporated the findings of its Report into the proposed rule change filing. According to the Exchange, its regulatory personnel have not observed during the past year evidence of any adverse effects on competition, investors, or the market for equity or index options. As to the second issue, the Exchange has not received any complaints, either orally or in writing, from investors or Exchange members regarding the Pilot Program. Finally, regarding disciplinary actions, investigations, examinations or inquiries; the Exchange reports that it did not commence any investigations relating to the Pilot Program this past year.

b. Enhanced Parity Split for Exchange Specialists that Develop and Trade New Products. The Exchange separately proposes to adopt an enhanced parity split for Exchange specialists that develop and trade new products.[13] The proposal provides that when the specialist is on parity with three or more controlled accounts in the crowd, the specialist will receive 40% of the contracts and the controlled accounts will receive the remaining 60%. When the specialist is on parity with less than three controlled accounts in the crowd, the specialist will receive 60% of the contracts and the controlled accounts will receive 40%. In either of these situations, if a customer is on parity, the customer may not receive a lesser allotment than any other crowd participant, including the specialist.

The Exchange stated that this proposal is intended to encourage specialist units to develop and trade new products, and to provide liquidity in such products, thereby attracting order flow to the Exchange. The Exchange believes the proposal balances the competing interests of specialists and Registered Option Traders, while encouraging specialists to take an active role in supporting and marketing a new product, both important activities in a competitive environment. The Exchange has indicated that the proposal is limited to new products developed *and* traded by the same specialist unit. Therefore, if one specialist unit develops a new product but another specialist unit is allocated specialist privileges in that same new product,[14] the specialist unit trading the new product would not be entitled to the proposed enhanced parity split. The Exchange's Options Committee will determine whether a specialist ''developed'' a new product.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6 of the Act,[15] in general, and with section 6(b)(5),[16] in particular, in that it is designed to promote just and equitable principles of trade; prevent fraudulent and manipulative acts and practices; foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; remove impediments to and perfect the mechanism of a free and open market and a national market system; and protect investors and the public interest. The Exchange further believes that the proposal balances the competing interests of specialists and market makers while assisting specialists in making tight and liquid markets in assigned issues. Finally, the Exchange believes the proposal protects the public interest by assuring that a customer's participation is never disadvantaged by the enhanced parity split.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed rule change will not 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

The Exchange did not solicit or receive written comments with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 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, NW, Washington, DC 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–98–56 and should be submitted by February 2, 1999.

V. Commission's Findings and Order Granting Partial Accelerated Approval of Proposed Rule Change

The Commission has carefully reviewed the Exchange's proposed rule change and believes, for the reasons set forth below, the proposal is consistent with the requirements of section 6 of the

parity split, the specialist is required to accept the preferential allocation and may not decline the enhancement. *See* Securities Exchange Act Release No. 39401 (Dec. 4, 1997), 62 FR 65300 (Dec. 11, 1997).

[12] *Id.*

[13] The Exchange previously filed this proposal with the Commission in the form of a pilot program. *See* File No. SR–Phlx–98–47. However, in accordance with the Commission's request, the Exchange has withdrawn the previous proposal and now seeks permanent approval of the proposed rule change.

[14] Allocation determination are governed by Exchange Rules 500–526.

[15] 15 U.S.C. 78f.

[16] 15 U.S.C. 78f(b)(5).

Act[17] and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission believes the proposal is consistent with section 6(b)(5) of the Act[18] because it will promote just and equitable principles of trade; remove impediments to, and perfect the mechanism of a free and open market; and protect investors and the public interest.[19]

The Exchange has requested partial accelerated approval of the proposed rule change so that the Pilot Program may continue to operate without interruption. Specifically, the Exchange has requested that the Commission accelerate approval of the proposed rule change for the portion relating to the extension of the enhanced parity split Pilot Program for a six-month period or until the Commission approves the Exchange's request for permanent approval of the Pilot Program, whichever occurs first. As noted earlier, the Pilot Program is due to expire on December 31, 1998. Therefore, unless the Pilot Program is immediately extended, the Exchange's equity and index option specialists will no longer be permitted to avail themselves of the enhanced parity split.

The Commission finds good cause for granting partial accelerated approval of the proposed rule change prior to the thirtieth day after the date of publication of notice therefore in the **Federal Register.** The Commission believes it is reasonable that Exchange specialists be permitted to avail themselves of the enhanced parity split on a continuous basis without disruption. Therefore, the Commission believes it is appropriate to grant partial accelerated approval of the proposal to extend the Pilot Program for six months or until the Commission approves the Exchange's request for permanent approval of the Pilot Program, whichever occurs first.

The Commission recognizes that the purpose of the enhanced parity split is to encourage equity and index option specialists to make deep and liquid markets in order to attract order flow to the Exchange. The Commission has previously noted that specialists have responsibilities that other crowd participants do not share, such as the staff costs associated with continually updating and disseminating quotes.[20] As a result, the Commission believes it is reasonable for the Exchange to grant certain advantages to specialists, such as the enhanced parity split, to attract and retain well capitalized specialist at the Exchange. As long as these advantages do not unreasonably restrain competition and do not harm investors, the Commission believes that the granting of such benefits to specialists, in general is within the business judgment of the Exchange.

The Commission notes that the application of the Exchange's enhanced parity split cannot cause a customer on parity to receive a smaller participation than any other crowd participant, including the specialist. The Commission believes this provision adequately protects customer orders from any negative impact that might flow from application of the enhanced parity split. As a result, a customer on parity is ensured a participation that, at a minimum, is equal to that given any other crowd participant on parity.[21] Therefore, the Commission believes it is consistent with section 6(b)(5) and Section 19(b)(2) of the Act to grant partial accelerated approval to the proposed rule change.[22]

VI. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the portion of the proposed rule change, SR–Phlx–98–56, seeking the extension of the enhanced parity split Pilot Program for a six-month period ending June 30, 1999, or until the Commission approves the Exchange's request for permanent approval of the Pilot Program, whichever occurs first, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[23]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–593 Filed 1–11–99; 8:45 am]

BILLING CODE 8010–01–M

[17] 15 U.S.C. 78f.

[18] 15 U.S.C. 78f(b)(5).

[19] In granting partial accelerated approval of this proposed rule change, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[20] *See e.g.* Securities Exchange Act Release No. 35177 (Dec. 29, 1994), 60 FR 2419 (Jan. 9, 1995).

[21] The Commission notes that this provision is consistent with the enhanced parity split that currently applies to the Exchange's specialists in foreign currency options. *See* Securities Exchange Act Release No. 40557 (Oct 15, 1998), 63 FR 56284 (Oct. 21, 1998).

[22] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40885; File No. SR–SCCP–98–04]

January 5, 1999.

Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Reducing Certain Trade Recording Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on September 29, 1998, the Stock Clearing Corporation of Philadelphia (''SCCP'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by SCCP. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to extend on a pilot basis for three months through December 31, 1998, a reduction in SCCP's fee schedule for trade recording fees for certain specialists.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

In its filing with the Commission, SCCP included statements concerning the purpose of and statutory basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. SCCP has prepared summaries set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

SCCP proposes to extend, for a three month period, its pilot program that reduces SCCP's trade recording fees for certain specialists. On February 9, 1998, the Commission temporarily approved the trade recording fee reduction effective for trades settling January 2,

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified parts of these statements.

1998, through April 30, 1998.[3] Subsequently, the Commission has approved extensions of the pilot program through September 30, 1998.[4]

Prior to the approval and implementation of the pilot program, SCCP charged a trade recording fee of $.47 per side for regular trades. The pilot program bifurcates the category of trade recording fees for regular trades into trades not matching with PACE orders and trades matching with PACE orders.[5] The trade recording fees for trades not matching with PACE orders remains $.47 per side. The pilot program reduces SCCP's trade recording fees for trades matching with PACE orders to: (i) $.27 per side for first 2,500 trades per month and (ii) $.10 per side for trades in excess of 2,500 per month.

SCCP believes that the trade recording fee reduction is equitable and reasonable. SCCP state that the PACE System provides participants and their customers with automated order entry, execution, and processing. One of the benefits of small order entry systems, such as PACE, is that customers pay lower fees for the use of PACE as opposed to manual order entry. SCCP further states that another benefit of PACE is the increased efficiency associated with automated order processing. In fact, lower fees generally recognize the reduction of participant and exchange personnel involved in PACE transactions. Therefore, reducing the total cost of exchange trading, in an equitable fashion, should encourage additional PACE business, which in turn, extends the many benefits of PACE to additional customers.

SCCP also believes that the proposed rule change provides tangible benefits for specialists that further promotes PACE business. Lower PACE fees for specialists should encourage specialists to more aggressively offer price improvement and should also provide increased liquidity for specialists as it reduces their cost of doing business. Additionally, lower PACE fees should make the fees for PHLX trades more competitive with other exchanges. This proposed rule change thus provides financial incentives for specialists to provide competitive markets at the PHLX.

For these reasons, SCCP believes that the proposed rule change is consistent with Section 17A(b)(3)(D) of the Act,[6] which requires that the rules of a registered clearing agency provide for equitable allocation of reasonable dues, fees, and other charges for services which it provides to its participants.

(B) Self-Regulatory Organization's Statement on Burden on Competition

SCCP 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

Because the foregoing rule change establishes or changes a due, fee, or other imposed by SCCP, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[7] and Rule 19b–4(e)(2) thereunder[8] until December 31, 1998. This extension will give the Commission and SCCP additional time to evaluate whether the pilot program fees are equitable. At any time within sixty 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 arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other that 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 SCCP. All submissions should refer to the File No. SR–SCCP–98–04 and should be submitted by February 2, 1999.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–637 Filed 1–11–99; 8:45 am]

BILLING CODE 8010–01–M

[3] Securities Exchange Act Release No. 39630 (February 9, 1998), 63 FR 7848.

[4] Securities Exchange Act Release Nos. 39948 (May 4, 1998), 63 FR 25538 and 40274 (July 22, 1998), 63 FR 40578.

[5] PACE, an acronym for the Philadelphia Stock Exchange Automated Communication and Execution System, is a real time order routing and execution system.

[6] 15 U.S.C. 78q–1(b)(3)(D).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(e)(2).

[9] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice No. 2957]

Advisory Committee on Private International Law (ACPIL), Study Group on Electronic Commerce; Meeting Notice

The Study Group on Electronic Commerce of the Advisory Committee on Private International Law (ACPIL) will hold its next meeting from 1:00 to 5:00 p.m. on Wednesday, January 27 in Washington, DC. The purpose of the meeting will be to review recent proposals for international rules on electronic signature and authentication systems to be considered in February at the United Nations Commission on International Trade Law (UNCITRAL).

UNCITRAL has had before it since May 1997 proposals for rules on certain aspects of electronic signature and authentication systems. Consensus has been difficult to reach internationally, and the next meeting of the Commission is expected to determine whether that is feasible at this point in the development of electronic systems applications as well as underlying legal and technical rules or standards. A recent document prepared by the Secretariat on the basis of consultations with States, UN Doc.A/CN.9/WG.IV/WP.80, December 15, 1998, which contains proposed rules will be considered. Background documents and the status of this project are set out in UN Doc.A/CN.9/WG.IV/WP.78, December 2, 1998.

The proposed rules cover definitions of electronic and enhanced electronic signatures, signature holder and information certifier; compliance with requirements for signatures and originals, the obligations of signature holders and information certifiers, reliance, and other matters. At issue is whether they are a workable approach for international rules, which can at the

same time bridge the gap between countries who have sought rules favoring certain existing technologies and those seeking a minimalist approach until both market and new technology developments become more clear, and thus the effect on commerce and business applications more predictable.

The status of ongoing projects at various international bodies, both intergovernmental and private sector, as well as federal and state domestic law developments in the United States will be reviewed as appropriate. These may include recent developments at the OECD, APEC, the ICC and others, and the status of the proposed Uniform Electronic Transactions Act (UETA) and Uniform Commercial Code Article 2B, in view of the close connection between them in an era of globalization of commerce, information, and borderless connections through data networks. US proposals for a multilateral convention or bilateral agreements incorporating relevant provisions of the 1996 UNCITRAL Model Law will also be reviewed.

Recent UN documents that will be on the table at the Study Group meeting are available from the Office of Legal Adviser at the contact numbers indicated below, or at the following UN web page addresses: http://www.un.or.at/uncitral/english/sessions/wg__ec/wp-80.htm,and wp–78.htm. For additional background documents on electronic commerce, including the 1996 UNCITRAL Model Law on Electronic Commerce, as well as general information on other international law unification projects at the Commission, such as international project finance, secured interest financing and commercial arbitration, access the UNCITRAL web page at www.un.or.at/uncitral/index.html.

The Advisory Committee meeting will take place at the Department of Commerce at 14th and Pennsylvania Ave., NW in the Secretary's Conference Room 5855; attendees should use the main entrance on 14th Street. The meeting is open to the public up to the capacity of the meeting room; persons who cannot attend are welcome to comment, including any recommendations for possible U.S. positions on these matters. For further information, please contact Mark Bohannon, Chief Counsel for Technology at the Department of Commerce, (202) 482–1984, fax 482–0253, or Harold Burman, Advisory Committee Executive Director, at (202) 776–8421, fax 776–8482. Written comments or requests to be added to the ACPIL mailing list on electronic commerce can be sent to the Office of Legal Adviser (L/PIL), 2430 ''E'' Street, NW, Suite 355 South Building, Washington, DC 20037–2800.

Harold S. Burman,

Advisory Committee, Executive Director.

[FR Doc. 99–680 Filed 1–11–99; 8:45 am]

BILLING CODE 4710–08–U

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Trade Policy Staff Committee (TPSC); Request for Comments on CITEL Multilateral Negotiations Regarding a Mutual Recognition Agreement for Telecommunications Equipment

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for public comments.

SUMMARY: The Trade Policy Staff Committee (TPSC) requests comments from interested persons to be used in formulating U.S. positions and objectives for negotiations on a mutual recognition agreement (MRA) for telecommunications equipment among member states of the Inter-American Telecommunications Commission (CITEL) of the Organization of American States (OAS).

DATES: Comments are due by noon on Tuesday, February 16, 1999.

ADDRESSES: Comments should be submitted to Gloria Blue, Executive Secretary, TPSC, ATTN: CITEL Telecom MRA Comments, Office of the United States Trade Representative, Room 122, 600 17th Street, NW, Washington, DC 20508.

FOR FURTHER INFORMATION CONTACT: William Corbett, Office of Industry Affairs, (202) 395–9586; or Joanna McIntosh, Office of General Counsel, (202) 395–7203.

SUPPLEMENTARY INFORMATION: Leaders at the December 1994 Summit of the Americas noted that the OAS has an important role to play in the development of telecommunications and information infrastructure in the Americas. CITEL is the OAS entity that is responsible for facilitating and furthering this development. CITEL member states include: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Suriname, St. Kitts and Nevis, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

The Working Group on Equipment Certification of the CITEL Permanent Consultative Committee I (PCC–I) is a biannual forum in which the telecommunications officials of CITEL member states undertake cooperative endeavors: to liberalize trade in telecommunications goods and services; to facilitate private sector interaction with telecommunications authorities on policy and business issues; to coordinate efforts to promote human resources development in the regional telecommunications industry; and to improve regional telecommunications infrastructure. At its next meeting in February or March 1999, the CITEL Working Group on Equipment Certification will begin negotiations on a draft MRA for telecommunications equipment among CITEL member states.

Mutual recognition agreements allow exporters to test and/or certify equipment to importing countries' mandatory technical requirements. An MRA for telecommunications equipment among CITEL member states potentially would reduce redundancy in performing conformity assessments to satisfy importing countries' approval processes. This would shorten approval times in a sector subject to ever-shortening product life cycles, and thereby facilitate trade in telecommunications equipment among CITEL member states. An MRA for telecommunications equipment would enhance benefits accruing to the United States from the reduction in tariffs on telecommunications equipment under the Information Technology Agreement.

The World Trade Organization Agreement on Technical Barriers to Trade encourages members to enter into mutual recognition agreements that ''give mutual satisfaction regarding their potential for facilitating trade in the products concerned.'' An MRA does not require harmonization of mandatory technical requirements.

Public Comment: Requirements for Submissions

The TPSC, chaired by the Office of the United States Trade Representative (USTR) and including representatives of the Federal Communications Commission and the National Institute of Standards and Technology, requests comments on an MRA for telecommunications equipment among CITEL member states. These comments are to be used in the preparation of negotiating positions for upcoming CITEL Ad Hoc Equipment Certification Working Group meetings. Comments

should address: the potential for such an agreement to remove important non-tariff barriers affecting trade in telecommunications equipment, and the prospective benefits of such an agreement to U.S. producers, workers, and consumers. All comments must be in English, addressed to Gloria Blue, Executive Secretary, TPSC, ATTN: CITEL Telecom MRA Comments, Office of the United States Trade Representative, and submitted in 15 copies by noon on Tuesday, February 16, 1999.

All comments will be placed in the USTR Reading Room for inspection shortly after the filing deadline, except business confidential information exempt from public inspection in accordance with 15 CFR 2003.6. Confidential information submitted in accordance with 15 CFR 2003.6, must be clearly marked ''BUSINESS CONFIDENTIAL'' in a contrasting color ink at the top of each page on each of 15 copies, and must be accompanied by 15 copies of a nonconfidential summary of the confidential information. The nonconfidential summary will be placed in the USTR Public Reading Room.

An appointment to review the comments may be made by calling Brenda Webb at (202) 395–6186. The USTR Reading Room is open to the public from 9:30 a.m. to 12 noon, and from 1:00 p.m. to 4:00 p.m., Monday through Friday, and is located in Room 101.

Frederick L. Montgomery,

Chairman, Trade Policy Staff Committee.

[FR Doc. 99–718 Filed 1–11–99; 8:45 am]

BILLING CODE 3190–01–M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Comments Concerning Compliance With Telecommunications Trade Agreements and Market Opportunities for Electronic Commerce

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of request for public comment.

SUMMARY: Pursuant to sections 1372 and 1377 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 3107), the Office of the United States Trade Representative (USTR) is reviewing, and requests comments on: the operation and effectiveness of the World Trade Organization (WTO) Basic Telecommunications Agreement, other WTO agreements affecting market opportunities for telecommunications products and services of the United States, the North American Free Trade Agreement (NAFTA), and other telecommunications trade agreements with Japan, Korea, Mexico and Taiwan; technical assistance for compliance with telecommunications commitments; and issues affecting market opportunities for electronic commerce. The USTR will conclude the review on March 31, 1999.

DATES: Comment are due by noon on Tuesday, February 16, 1999.

ADDRESSES: Comments must be submitted to Gloria Blue, Executive Secretary, Trade Policy Staff Committee, ATTN: Section 1377 Comments, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508.

FOR FURTHER INFORMATION CONTACT: William Corbett, Office of Industry, (202) 395–9586; or Joanna McIntosh, Office of the General Counsel, (202) 395–7203.

SUPPLEMENTARY INFORMATION: Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 requires the USTR to review annually the operation and effectiveness of all U.S. trade agreements regarding telecommunications products and services of the United States that are in force with respect to the United States. The purpose of the review is to determine whether any act, policy, or practice of a country that has entered into a telecommunications trade agreement is not in compliance with the terms of such agreement, or otherwise denies to U.S. firms, within the context of the terms of such agreements, mutually advantageous market opportunities. For the current review, the USTR seeks comments on whether:

(1) Any WTO members appear not to be in compliance with their specific commitments under the WTO Base Telecommunications Agreement or with other WTO obligations, *e.g.,* the WTO General Agreement on Trade in Services (GATS), including the Annex on Telecommunications (GATS), that affect market opportunities for U.S. telecommunications products and services; and

(2) Canada or Mexico have failed to comply with their commitments under NAFTA or whether Japan, Korea, Mexico or Taiwan have failed to comply with their commitments under bilateral telecommunications agreements with the United States.

Consistent with the findings and purposes in section 1372 of the Act, the USTR also seeks comments on:

(3) What foreign countries' compliance with their telecommunications trade agreement commitments would benefit most from bilateral or multilateral technical assistance, especially with respect to the pro-competitive regulatory commitments made under the of WTO Basic Telecommunications Agreement; and

(4) Issues affecting market opportunities for electronic commerce (*e.g.,* the Internet and other interactive computer services) as advanced telecommunications capabilities are deployed in foreign countries.

WTO Basic Telecommunications Agreement

The GATS contains general obligations that apply to all members and services whether or not listed in WTO members' schedules and specific obligations that apply only to services scheduled by a member. The Fourth Protocol to the GATS is the legal instrument embodying seventy WTO members' basic telecommunications services commitments under the GATS. The Fourth Protocol is generally referred to as the WTO Basic Telecommunications Agreement. The agreement entered into force on February 6, 1998 and 65 WTO members have accepted it thus far. A description of each member's specific commitments as embodied in the agreement is available at www.wto.org.

The WTO Basic Telecommunications Agreement encompasses commitments in three areas: market access, national treatment (including investment), and pro-competitive regulatory principles. For countries making full commitments: their market access commitments open local, long-distance and international service through any means of network technology, either on a facilities basis or through resale of existing network capacity; their national treatment commitments ensure treatment no less favorable to U.S. services or service suppliers than to services or service suppliers of the WTO member making the commitment (*e.g.,* U.S. companies can acquire, establish or hold a significant stake in foreign telecommunications companies to the same extent as companies of the WTO member making the commitment); and the pro-competitive regulatory principles, set forth in a Reference Paper and incorporated in the members' schedules, commit members to establish independent regulatory bodies, guarantee that U.S. companies will be able to interconnect with networks in foreign countries at fair prices, forbid anti-competitive practices such as cross-subsidization, and mandate transparency of government regulations and licensing.

The USTR seeks comment on whether any WTO members that have accepted the WTO Basic Telecommunications Agreement have not made the necessary legislative or regulatory changes to implement their commitments, or permit acts, policies, or practices in their markets that do not appear to be in compliance with these commitments. In addition, the USTR seeks comments on whether any WTO members permit acts, policies, or practices that do not appear to be in compliance with other WTO obligations, *e.g.* the GATS, that affect market opportunities for telecommunications products and services of the United States.

NAFTA and Bilateral Trade Agreements

The USTR seeks comments on the operation and effectiveness of NAFTA and the following bilateral trade agreements regarding telecommunications products and services, *See* 63 FR 1140 (January 8, 1998) for further information concerning these agreements and USTER Press Release 98–38 (available at www.ustr.gov) for the results of the 1997–98 section 1377 review concerning these agreements.

Canada: NAFTA Chapter 13 and other telecommunications-related provisions.

Japan: The Nippon Telephone and Telegraph (NTT) agreement, which expires on June 30, 1999; the 1994 U.S.-Japan Public Sector Procurement Agreement on Telecommunications Products and Services; and, additional telecommunications trade agreements with Japan, including a series of agreements on: international value-added network services (IVANS) (1990–91); open government procurement of all satellites, except for government research and development (R&D) satellites (1990); network channel terminating equipment (NCTE) (1990); and cellular and third-party radio systems (1989) and cellular radio systems (1994).

Korea: Agreements in the areas of protection of intellectual property rights (IPR), type approval of telecommunications equipment, transparent standard-setting processes and non-discriminatory access to Korea Telecommunications' procurement of telecommunications products.

Mexico: NAFTA Chapter 13 and other telecommunications-related provisions; and, the 1997 understanding regarding test data acceptance agreements between product safety testing laboratories.

Taiwan: The February 1998 agreement on WTO accession commitments in telecommunications services and interconnection pricing for provision of wireless services in Taiwan; and, the July 1996 agreement on the licensing and provision of wireless services through the establishment of a competitive, transparent and fair wireless market in Taiwan.

Technical Assistance

The USTR also seeks comments on what foreign countries' compliance with their telecommunications trade agreement commitments would benefit most from bilateral or multilateral technical assistance, especially with respect to the pro-competitive regulatory commitments made under the WTO Basic Telecommunications Agreement. The USTR's goal is to collect information that will help to refine U.S. government programs and U.S. policies towards relevant multilateral organizations. This will assist concerned agencies in giving due weight to technical assistance activities in support of implementation of telecommunications trade commitments under the WTO.

Global Electronic Commerce

On November 30, 1998, the President of the United States reported on the progress that the United States has made in the past fifteen months on implementing the July 1997 ''Framework for Global Electronic Commerce'' and launched five new initiatives, including an initiative to eliminate foreign barriers to the deployment of advanced telecommunications capabilities. See U.S. Government Working Group on Electronic Commerce, First Annual Report, November 1998 (available at www.ecommerce.gov). The particular focus of this initiative will be to identify issues that affect the competitive international marketplace for Internet and other interactive computer services as advanced telecommunications capabilities are deployed in foreign countries. Accordingly, the USTR seeks comments on issues affecting market opportunities for electronic commerce in foreign countries.

Public Comment: Requirements for Submissions

USTR requests comments on: the operation and effectiveness of the WTO Basic Telecommunications Agreement, other WTO agreements affecting market opportunities for telecommunications products and services of the United States, the NAFTA, and other telecommunications trade agreements with Japan, Korea, Mexico, and Taiwan; technical assistance for compliance with telecommunications commitments; and issues affecting market opportunities for electronic commerce. All comments must be in English, identify on the first page of the comments the telecommunications trade agreement(s) discussed therein, be addressed to Gloria Blue, Executive Secretary, TPSC, ATTN: Section 1377 Comments, Trade Policy Staff Committee, Office of the U.S. Trade Representative, and be submitted in 15 copies by noon on Tuesday, February 15, 1999.

All comments will be placed in the USTR Reading Room for inspection shortly after the filing deadline, except business Confidential information exempt from public inspection in accordance with 15 CFR 2003.6. Confidential information submitted in accordance with 15 CFR 2003.6, must be clearly marked ''BUSINESS CONFIDENTIAL'' in a contrasting color ink at the top of each page on each of 15 copies, and must be accompanied by 15 copies of a nonconfidential summary of the confidential information. The nonconfidential summary will be placed in the USTR Public Reading Room.

An appointment to review the comments may be made by calling Brenda Webb at (202) 395–6186. The USTR Reading Room is open to the public from 9:30 a.m. to 12 noon, and from 1:00 p.m. to 4:00 p.m., Monday through Friday, and is located in Room 101.

Frederick L. Montgomery,

Chairman, Trade Policy Staff Committee.

[FR Doc. 99–717 Filed 1–11–99; 8:45 am]

BILLING CODE 3190–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Index of Administrator's Decisions and Orders in Civil Penalty Actions; Publication

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of publication.

SUMMARY: This notice constitutes the required quarterly publication of an index of the Administrator's decisions and orders in civil penalty cases. *This publication represents the quarter ending on December 31, 1998.* This publication ensures that the agency is in compliance with statutory indexing requirements.

FOR FURTHER INFORMATION CONTACT: James S. Dillman, Assistant Chief Counsel for Litigation (AGC–400), Federal Aviation Administration, 400 7th Street, SW., Suite PL 200–A,

Washington, DC 20590; telephone number: (202) 366–4118.

SUPPLEMENTARY INFORMATION: The Administrative Procedure Act requires Federal agencies to maintain and make available for public inspection and copying current indexes containing identifying information regarding materials required to be made available or published. 5 U.S.C. 552(a)(2). In a notice issued on July 11, 1990, and published in the **Federal Register** (55 FR 29148; July 17, 1990), the FAA announced the public availability of several indexes and summaries providing identifying information about the decisions and orders issued by the Administrator under the FAA's civil penalty assessment authority. In the same notice, the FAA provided information about the rules of practice governing hearings and appeals of civil penalty actions set forth in 14 CFR part 13, subpart G.

The FAA maintains an index of the Administrator's decisions and orders in civil penalty actions organized by order number and containing identifying information about each decision or order. The FAA also maintains a cumulative subject-matter index and digests organized by order number. The indexes are published on a quarterly basis (i.e., January, April, July, and October.)

The FAA first published these indexes and digests for all decisions and orders issued by the Administrator through September 30, 1990. 55 FR 45984; October 31, 1990. The FAA announced in that notice that only the subject-matter index would be published cumulatively and that the order number index would be non-cumulative. The FAA announced in a later notice that the order number indexes published in January would reflect all of the civil penalty decisions for the previous year. 58 FR 5044; 1/19/93.

The previous quarterly publications of the indexes have appeared in the **Federal Register** as follows:

Dates of quarter	Federal Register publication
11/1/89–9/30/90	55 FR 45984; 10/31/90.
10/1/90–12/31/90	56 FR 44886; 2/6/91.
1/1/91–3/31/91	56 FR 20250; 5/2/91.
4/1/91–6/30/91	56 FR 31984; 7/12/91.
7/1/91–9/30/91	56 FR 51735; 10/15/91.
10/1/91–12/31/91	57 FR 2299; 1/21/92.
1/1/92–3/31/92	57 FR 12359; 4/9/92.
4/1/92–6/30/92	57 FR 32825; 7/23/92.
7/1/92–9/30/92	57 FR 48255; 10/22/92.
10/1/92–12/31/92	58 FR 5044; 1/19/93.
1/1/93–3/31/93	58 FR 21199; 4/19/93.
4/1/93–6/30/93	58 FR 42120; 8/6/93.
7/1/93–9/30/93	58 FR 58218; 10/29/93.
10/1/93–12/31/93	59 FR 5466; 2/4/94.
1/1/94–3/31/94	59 FR 22196; 4/29/94.
4/1/94–6/30/94	59 FR 39618; 8/3/94.
7/1/94–12/31/94	60 FR 4454; 1/23/95.
1/1/95–3/31/95	60 FR 19318; 4/17/95.
4/1/95–6/30/95	60 FR 36854; 7/18/95.
7/1/95–9/30/95	60 FR 53228; 10/12/95.
10/1/95–12/31/95	61 FR 1972; 1/24/96.
1/1/96–3/31/96	61 FR 16955; 4/18/96.
4/1/96–6/30/96	61 FR 37526; 7/18/96.
7/1/96–9/30/96	61 FR 54833; 10/22/96.
10/1/96–12/31/96	62 FR 2434; 1/16/97.
1/1/97–3/31/97	62 FR 24533; 5/2/97.
4/1/97–6/30/97	62 FR 38339; 7/17/97.
7/1/97–9/30/97	62 FR 53856; 10/16/97.
10/1/97–12/31/97	63 FR 3373; 1/22/98.
1/1/98–3/31/98	63 FR 19559; 4/20/98.
4/1/98–6/30/98	63 FR 37914; 7/14/98.
7/1/98–9/30/98	63 FR 57729; 10/18/98.

Availability of Decisions and Orders. The civil penalty decisions and orders, and the indexes and digests are available in FAA offices. Also, the Administrator's civil penalty decisions have been published by commercial publishers (Hawkins Publishing Company and Clark Boardman Callahan) and are available on computer on-line services (Westlaw, LEXIS, Compuserve and FedWorld). A list of the addresses of the FAA offices where the civil penalty decisions may be reviewed and information regarding these commercial publications and computer databases appear at the end of this notice.

Accessibility through the Internet. Information regarding the accessibility over the Internet of documents contained in the FAA Civil Penalty Docket in non-security cases in which the complaint was filed on or after December 1, 1997, is set forth at the end of this notice.

Civil Penalty Actions—Orders Issued by the Administrator Order Number Index

(This index includes all decisions and orders issued by the Administrator from January 1, 1998, to December 31, 1998.)

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98–3 3/12/98	Thomas Fedele CP94EA0289
98–4 3/12/98	Larry's Flying Service CP97AL0002
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13.230	92–19 Cornwall; 95–26 Hereth; 96–24 Horizon.
13.231	92–3 Park.
13.232	89–5 Schultz; 90–20 Degenhardt; 92–1 Costello; 92–18 Bargen; 92–32 Barnhill; 93–28 Strohl; 94–28 Toyota; 95–12 Toyota; 95–16 Mulhall; 96–6 Ignatov; 98–18 General Aviation.
13.233	89–1 Gressani; 89–4 Metz; 89–5 Schultz; 89–7 Zenkner; 89–8 Thunderbird Accessories; 90–3 Metz; 90–11 Thunderbird Accessories; 90–19 Continental Airlines; 90–20 Degenhardt; 90–25 & 90–27 Gabbert; 90–35 P. Adams; 90–19 Continental Airlines; 90–39 Hart; 91–2 Continental Airlines; 91–3 Lewis; 91–7 Pardue; 91–8 Watts Agricultural Aviation; 91–10 Graham; 91–11 Continental Airlines; 91–12 Bargen; 91–24 Esau; 91–26 Britt Airways; 91–31 Terry & Menne; 91–32 Bargen; 91–43 & 91–44 Delta; 91–45 Park; 91–46 Delta; 91–47 Delta; 91–48 Wendt; 91–52 KDS Aviation; 91–53 Koller; 92–1 Costello; 92–3 Park; 92–7 West; 92–11 Alilin; 92–15 Dillman; 92–16 Wendt; 92–18 Bargen; 92–19 Cornwall; 92–27 Wendt; 92–32 Barnhill; 92–34 Carrell; 92–35 Bay Land Aviation; 92–36 Southwest Airlines; 92–39 Beck; 92–45 O'Brien; 92–52 Beck; 92–56 Montauk Caribbean Airways; 92–57 Detroit Metro. Wayne Co. Airport; 92–67 USAir; 92–69 McCabe; 92–72 Giuffrida; 92–74 Wendt; 92–78 TWA; 93–5 Wendt; 93–6 Westair Commuter; 93–7 Dunn; 93–8 Nunez; 93–19 Pacific Sky Supply; 93–23 Allen; 93–27 Simmons; 93–28 Strohl; 93–31 Allen; 93–32 Nunez; 94–9 B & G Instruments; 94–10 Boyle; 94–12 Bartusiak; 94–15 Columna; 94–18 Luxemburg; 94–23 Perez; 94–24 Page; 94–26 French Aircraft; 94–28 Toyota; 95–2 Meronek; 95–9 Woodhouse; 95–13 Kilrain; 95–23 Atlantic World Airways; 95–25 Conquest; 95–26 Hereth; 96–1 [Airport Operator; 96–2 Skydiving Center; 97–1 Midtown Neon Sign; 97–2 Sanford Air; 97–7 Stalling; 97–22 Sanford Air; 97–24 Gordon Air; 97–31 Sanford Air; 97–33 Rawlings; 97–38 Air St. Thomas; 98–4 Larry's Flying Service; 98–3 Fedele; Continental Airlines 98–6; LAX 98–7; 98–10 Rawlings; 98–15 Squire; 98–18 General Aviation; 98–19 Martin & Jaworski; 98–20 Koenig.
13.234	90–19 Continental Airlines; 90–31 Carroll; 90–32 & 90–38 Continental Airlines; 91–4 [Airport Operator]; 95–12 Toyota; 96–9 [Airport Operator]; 96–23 Kilrain.
13.235	90–11 Thunderbird Accessories; 90–12 Continental Airlines; 90–15 Playter; 90–17 Wilson; 92–7 West.
Part 14	92–74 & 93–2 Wendt; 95–18 Pacific Sky Supply.
14.01	91–17 & 92–71 KDS Aviation.
14.04	91–17, 91–52 & 92–71 KDS Aviation; 93–10 Costello; 95–27 Valley Air.
14.05	90–17 Wilson.
14.12	95–27 Valley Air.
14.20	91–52 KDS Aviation; 96–22 Woodhouse.
14.22	93–29 Sweeney.
14.23	98–19 Martin & Jaworski.
14.26	91–52 KDS Aviation; 95–27 Valley Air.
14.28	95–9 Woodhouse.
21.181	96–25 USAir.
21.303	93–19 Pacific Sky Supply; 95–18 Pacific Sky Supply.
25.787	97–30 Emery Worldwide Airlines.
25.855	92–37 Giuffrida; 97–30 Emery Worldwide Airlines.
39.3	92–10 Flight Unlimited; 94–4 Northwest Aircraft Rental.
43.3	92–73 Wyatt; 97–31 Sanford Air; 98–18 General Aviation.
43.5	96–18 Kilrain; 97–31 Sanford Air.
43.9	91–8 Watts Agricultural Aviation; 97–31 Sanford Air; 98–4 Larry's Flying Service.

43.13	90–11 Thunderbird Accessories; 94–3 Valley Air, 94–38 Bohan; 96–3 America West Airlines; 96–25 USAir; 97–9 Alphin; 97–10 Alphin; 97–30 Emery Worldwide Airlines; 97–31 Sanford Air; 97–32 Florida Propeller.
43.15	90–25 & 90–27 Gabbert; 91–8 Watts Agricultural Aviation; 94–2 Woodhouse; 96–18 Kilrain.
65.15	92–73 Wyatt.
65.92	92–73 Wyatt.
91.7	97–8 Pacific Av.d/b/a Inter-Island Helicopters; 97–16 Mauna Kea; 98–18 General Aviation.
91.8 (91.11 as of 8/18/90)	92–3 Park.
91.9 (91.13 as of 8/18/90)	90–15 Playter; 91–12 & 91–31 Terry & Menne; 92–8 Watkins; 92–40 Wendt; 92–48 USAir; 92–49 Richardson & Shimp; 92–47 Cornwall; 92–70 USAir; 93–9 Wendt; 93–17 Metcalf; 93–18 Westair Commuter; 93–29 Sweeney; 94–29 Sutton; 95–26 Hereth; 96–17 Fenner.
91.11	96–6 Ignatov; 97–12 Mayer; 98–12 Stout.
91.29 (91.7 as of 8/18/90)	91–8 Watts Agricultural Aviation; 92–10 Flight Unlimited; 94–4 Northwest Aircraft Rental.
91.65 (91.111 as of 8/18/90)	91–29 Sweeney; 94–21 Sweeney.
91.67 (91.113 as of 8/18/90)	91–29 Sweeney.
91.71	97–11 Hampson.
91.75 (91.123 as of 8/18/90)	91–12 & 91–31 Terry & Menne; 92–8 Watkins; 92–40 Wendt; 92–49 Richardson & Shimp; 93–9 Wendt.
91.79 (91.119 as of 8/18/90)	90–15 Playter; 92–47 Cornwall; 93–17 Metcalf.
91.87 (91.129 as of 8/18/90)	91–12 & 91–31 Terry & Menne; 92–8 Watkins.
91.103	92–26 Hereth.
91.111	96–17 Fenner.
91.113	96–17 Fenner.
91.151	95–26 Hereth.
91.173 (91.417 as of 8/18/90)	91–8 Watts Agricultural Aviation.
91.205	98–18 General Aviation.
91.213	97–11 Hampton.
91.403	97–8 Pacific Av. d/b/a Inter-Island Helicopters; 97–31 Sanford Air
91.405	97–16 Mauna Kea; 98–4 Larry's Flying Service; 98–18 General Aviation.
91.407	98–4 Larry's Flying Service.
91.417	98–18 General Aviation.
91.517	98–12 Stout.
91.703	94–29 Stutton.
105.29	98–3 Fedele; 98–19 Martin & Jaworski.
107.1	90–19 Continental Airlines; 90–20 Degenhardt; 91–4 [Airport Operator]; 91–58 [Airport Operator]; 98–7 LAX.
107.9	98–7 LAX
107.13	90–12 & 90–19 Continental Airlines; 91–4 [Airport Operator]; 91–18 [Airport Operator]; 91–40 [Airport Operator]; 91–41 [Airport Operator]; 91–58 [Airport Operator]; 96–1 [Airport Operator]; 97–23 Detroit Metropolitan; 98–7 LAX.
107.20	90–24 Bayer; 92–58 Hoedl; 97–20 Werle; 98–20 Koenig.
107.21	89–5 Schultz; 90–10 Webb; 90–22 Degenhardt; 90–23 Broyles; 90–26 & 90–43 Waddell; 90–33 Cato; 90–39 Hart; 91–3 Lewis; 91–10 Graham; 91–30 Trujillo; 91–38 Esau; 91–53 Koller; 92–32 Barnhill; 92–38 Cronberg; 92–46 Sutton-Sautter; 92–51 Koblick; 92–59 Petek-Jackson; 94–5 Grant; 94–31 Smalling; 97–7 Stalling.
107.25	94–30 Columna.
108.5	90–12 90–18, 90–19, 91–2 & 91–9 Continental Airlines; 91–33 Delta Air Lines; 91–54 Alaska Airlines; 91–55 Continental Airlines; 92–13 & 94–1 Delta Air Lines; 94–44 American Airlines; 96–16 WestAir; 96–19 [Air Carrier]; 98–22 Northwest Airlines.
108.7	90–18 & 90–19 Continental Airlines.
108.9	98–22 Northwest Airlines.
108.10	96–16 WestAir.
108.11	90–23 Broyles; 90–26 Waddell; 91–3 Lewis; 92–46 Sutton-Sautter; 94–44 American Airlines.
108.13	90–12 & 90–19 Continental Airlines; 90–37 Northwest Airlines.
108.18	98–6 Continental Airlines.
121.133	90–18 Continental Airlines.
121.153	92–48 & 92–70 USAir; 95–11 Horizon; 96–3 America West Airlines; 96–24 Horizon; 96–25 USAir; 97–21 Delta; 97–30 Emery Worldwide Airlines.
121.221	97–30 Emery Worldwide Airlines.
121.317	92–37 Giuffrida; 94–18 Luxemburg.
121.318	92–37 Giuffrida.
121.367	90–12 Continental Airlines; 96–25 USAir.
121.571	92–37 Giuffrida.
121.575	98–11 TWA.

121.577	98–11 TWA.
121.589	97–12 Mayer.
121.628	95–11 Horizon; 97–21 Delta; 97–30 Emery Worldwide Airlines.
135.1	95–8 Charter Airlines; 95–25 Conquest.
135.5	94–3 Valley Air; 94–20 Conquest Helicopters; 95–25 Conquest; 95–27 Valley Air; 96–15 Valley Air.
135.25	92–10 Flight Unlimited; 94–3 Valley Air; 95–27 Valley Air 96–15 Valley Air.
135.63	94–40 Polynesian Airways; 95–17 Larry's Flying Service; 95–28 Atlantic; 96–4 South Aero.
135.87	90–21 Carroll.
135.95	95–17 Larry's Flying Service.
135.179	97–11 Hampton.
135.185	94–40 Polynesian Airways.
135.263	95–9 Charter Airlines; 96–4 South Aero.
135.267	95–8 Charter Airlines; 95–17 Larry's Flying Service; 96–4 South Aero.
135.293	95–17 Larry's Flying Service; 96–4 South Aero.
135.343	95–17 Larry's Flying Service.
135.411	97–11 Hampton.
135.413	94–3 Valley Air; 96–15 Valley Air; 97–8 Pacific Av. d/b/a Inter-Island Helicopters; 97–16 Mauna Kea.
135.421	93–36 Valley Air; 94–3 Valley Air; 96–15 Valley Air.
135.437	94–3 Valley Air; 96–15 Valley Air.
141.101	98–18 General Aviation.
145.1	97–10 Alphin.
145.3	97–10 Alphin.
145.25	97–10 Alphin.
145.45	97–10 Alphin.
145.47	97–10 Alphin.
145.49	97–10 Alphin.
145.53	90–11 Thunderbird Accessories.
145.57	94–2 Woodhouse; 97–9 Alphin; 97–32 Florida Propeller.
145.61	90–11 Thunderbird Accessories.
191	90–12 & 90–19 Continental Airlines; 90–37 Northwest Airlines; 98–6 Continental Airlines.
298.1	92–10 Flight Unlimited.
302.8	90–22 USAir.
49 CFR:	
1.47	92–76 Safety Equipment.
171 et seq.	95–10 Diamond.
171.2	92–77 TCI; 94–28 Toyota; 94–31 Smalling; 95–16 Mulhall; 96–26 Midtown; 98–2 Carr.
171.8	92–77 TCI.
172.101	92–77 TCI; 94–28 Toyota; 94–31 Smalling; 96–26 Midtown.
172.200	92–77 TCI; 94–28 Toyota; 95–16 Mulhall; 96–26 Midtown; 98–2 Carr.
172.202	92–77 TCI; 94–28 Toyota; 94–31 Smalling; 95–16 Mulhall; 98–2 Carr.
172.203	94–28 Toyota.
172.204	92–77 TCI; 94–28 Toyota; 94–31 Smalling; 95–16 Mulhall; 98–2 Carr.
172.300	94–31 Smalling, 95–16 Mulhall; 96–26 Midtown; 98–2 Carr.
172.301	94–31 Smalling; 95–16 Mulhall; 98–2 Carr.
172.304	92–77 TCI; 94–31 Smalling; 95–16 Mulhall; 98–2 Carr.
172.400	92–77 TCI; 94–28 Toyota; 94–31 Smalling; 95–16 Mulhall; 98–2 Carr.
172.402	94–28 Toyota.
172.406	92–77 TCI.
173.1	92–77 TCI; 94–28 Toyota; 94–31 Smalling; 95–16 Mulhall; 98–2 Carr.
173.3	94–28 Toyota; 94–31 Smalling; 98–2 Carr.
173.6	94–28 Toyota.
173.22(a)	94–28 Toyota; 94–31 Smalling; 98–2 Carr.
173.24	94–28 Toyota; 95–16 Mulhall.
173.25	94–28 Toyota.
173.27	92–77 TCI.
173.62	98–2 Carr.
173.115	92–77 TCI.
173.240	92–77 TCI.
173.243	94–28 Toyota.
173.260	94–28 Toyota.
173.266	94–28 Toyota; 94–31 Smalling.
175.25	94–31 Smalling.
191.5	97–13 Westair Cummuter.
191.7	97–13 Westair Commuter.

821.30	92–73 Wyatt..
821.33	90–21 Carroll.
Status:	
5 U.S.C.:	
504	90–17 Wilson; 91-17 & 92–71 KDS Aviation; 92–74, 93–2 & 93–9 Wendt; 93–29 Sweeney; 94–17 TCI; 95–27 Valley Air; 96–22 Woodhouse; 98–19 Martin & Jaworski.
552	90–12, 90–18 & 90–19 Continental Airlines; 93–10 Costello.
554	90–18 Continental Airlines; 90–21 Carroll; 95–12 Toyota.
556	90–21 Carroll; 91–54 Alaska Airlines.
557	90–20 Degenhardt; 90–21 Carroll; 90–37 Northwest Airlines; 94–28 Toyota.
705	95–14 Charter Airlines.
5332	95–27 Valley Air.
11 U.S.C.:	
362	91–2 Continental Airlines.
28 U.S.C.:	
2412	93–10 Costello; 96–22 Woodhouse.
2462	90–21 Carroll.
49 U.S.C.:	
5123	95–16 Mulhall; 96–26 & 97–1 Midtown Neon Sign; 98–2 Carr.
40102	96–17 Fenner.
44701	96–6 Ignatov; 96–17 Fenner.
44704	96–3 America West Airlines; 96–15 Valley Air.
46110	96–22 Woodhouse; 97–1 Midtown Neon Sign.
46301	97–1 Midtown Neon Sign; 97–16 Mauna Kea; 97–20 Werle.
46302	98–24 Stevens.
46303	97–7 Stalling.
49 U.S.C. App.:	
1301(31) (operate)	93–18 Westair Commuter.
(32) (person)	93–18 Westair Commuter.
1356	90–18 & 90–19, 91–2 Continental Airlines.
1357	90–18, 90–19 & 91–2 Continental Airlines; 91–41 [Airport Operator]; 91–58 [Airport Operator].
1421	92–10 Flight Unlimited; 92–48 USAir; 92–70 USAir; 93–9 Wendt.
1429	92–73 Wyatt.
1471	89–5 Schultz; 90–10 Webb; 90–20 Degenhardt; 90–12, 90–18 & 90–19 Continental Airlines; 90–23 Broyles; 90–26 & 90–43 Waddell; 90–33 Cato; 90–37 Northwest Airlines; 90–39 Hart; 91–2 Continental Airlines; 91–3 Lewis; 91–18 [Airport Operator]; 91–53 Killer; 92–5 Delta Air Lines; 92–10 Flight Unlimited; 92–46 Sutton-Sautter; 92–51 Koblick; 92–74 Wendt; 92–76 Safety Equipment; 94–20 Conquest Helicopters; 94–40 Polynesian Airways; 96–6 Ignatov; 97–7 Stalling.
1472	96–6 Ignatov.
1475	90–20 Degenhardt; 90–12 Continental Airlines; 90–18, 90–19 & 91–1 Continental Airlines; 91–3 Lewis; 91–18 [Airport Operator]; 94–40 Polynesian Airways.
1486	90–21 Carroll; 96–22 Woodhouse.
1809	92–77 TCI; 94–19 Pony Express; 94–28 Toyota; 94–31 Smalling; 95–12 Toyota.

Civil Penalty Actions—Orders Issued by the Administrator Digests

(This digest includes all decisions and orders issued by the Administrator from October 1, 1998, to December 31, 1998.)

The digests of the Administrator's final decisions and orders are arranged by order number, and briefly summarize key points of the decision. The following compilation of digests includes all final decisions and orders issued by the Administrator from October 1, 1998, to December 31, 1998. The FAA publishes non-cumulative supplements to this compilation on a quarterly basis (*e.g.*, April, July, October, and January of each year).

These digests do not constitute legal authority, and should not be cited or relied upon as such. The digests are not intended to serve as a substitute for proper legal research. Parties, attorneys, and other interested persons should always consult the full text of the Administrator's decisions before citing them in any context.

In the Matter of General Aviation, Inc.

Order No. 98–18 (10/9/98)

Uncleared Mechanical Discrepancies. This case involves a company that allegedly rented out to the public a Cessna with uncleared mechanical discrepancies on numerous flights. The law judge found the violations and assessed a $7,500 civil penalty. General Aviation appealed.

Effect of Change in ALJ's and Late-Issued Decision. General Aviation argues that a change in the law judges and a 3-month delay in issuing the initial decision caused unacceptable delay and confusion. According to the Chief administrative law judge's order reassigning the case, reassignment was in the interest of judicial efficiency. If the original law judge's caseload was so heavy that it delayed the hearing the change in law judges may have expedited the case. As for alleged confusion, General Aviation fails to specify what confusion occurred, how it unfairly prejudiced General Aviation, and why General Aviation failed to act to cure the alleged confusion. Arguably, confusion and loss of detail were less likely because, rather than simply issuing an oral decision at the end of the hearing, the law judge took the time to obtain the transcript, review the record,

deliberate and issue a written decision. The law judge's decision is more than 5 single-spaced decision, detailed, logical, and well-supported by references to the record.

Airworthiness. Despite General Aviation's argument that the agency failed to prove that the left fuel gauge was inoperative and the aircraft unairworthy, General Aviation's President admitted both orally and in writing that the left fuel gauge was unreliable and had been for some time.

Squawk Sheet as Maintenance Record. General Aviation's argument that the squawk sheet, on which a renter pilot had noted that several mechanical discrepancies, did not constitute a maintenance record, is rejected. It would defy logic and the agency's safety mandate to hold that a record of mechanical discrepancies does not constitute a maintenance record.

Tapping of Fuel Gauge Not Preventive Maintenance. Tapping on a fuel gauge does not constitute preventive maintenance, as it is not listed Appendix 4 to 14 CFR part 43.

Appropriateness of Sanction. General Aviation failed to preserve the issue of financial hardship for appeal. It is too late to raise the issue now, for the first time, on appeal. Under all the circumstances of this case, a $7,500 penalty is appropriate. There were numerous flights with an unairworthy aircraft (26 flights over the course of 19 days), repeated failures to correct the discrepancies, even after the inspectors called the problem to General Aviation's attention, and General Aviation had a prior violation. A $7,500 penalty is markedly less than that suggested by the Sanction Guidance Table, and takes into account the relatively small size of General Aviation's operation.

In the Matter of Peter A. Martin and James C. Jaworski

Order No. 98–19 (10/9/98)

Attorney Fees Case. In the underlying civil penalty action, the FAA alleged that Martin and Jaworski parachuted too close to clouds, but the law judge determined that even though the FAA made out a prima facie case, it failed to prove the violations by a preponderance of the evidence. Martin and Jaworski then filed an application to recover their attorney fees, which the law judge denied, and Martin and Jaworski have appealed.

Alleged Failure to Investigate Thoroughly as Violation of Due Process. Although Martin and Jaworski fail to say who else the inspectors should have interviewed and what they would have said that would have made a difference. Martin and Jaworski also say the inspectors failed to gather evidence—specifically, a videotape Jaworski made of the jump and weather reports. But the inspectors did view the videotape—they simply did not find it probative because they had questions about its authenticity. If Martin and Jaworski believed the videotape would exonerate them, they could have subpoenaed it and introduced it themselves. Given the inspectors' certainty that they saw the violations with their own eyes, it is not surprising that they did not attempt to interview further witnesses or obtain weather reports.

FAA's Alleged Intent to Show Down Parachute Operations. Martin and Jaworski have no evidence that the FAA had a nefarious purpose, which was to shut down all parachute operations at the airport. The inspectors did testify that the FAA had increased surveillance because of complaints of safety violations by skydivers, but there is nothing improper about this.

Alleged Failure to Provide Martin and Jaworski and Chance to Replay. Under agency rules, applicants for attorney fees may file a reply to the FAA's answer to their fee applications. Martin and Jaworski had such an opportunity, but failed to do so.

Alleged Failure to Notify Martin and Jaworski of Withdrawal of Appeal. Martin and Jaworski argue that the FAA must pay the fees they incurred after the FAA withdrew its appeal in the underlying civil penalty action because the agency failed to notify Martin and Jaworski of its withdrawal. But the only work performed for Martin and Jaworski after the FAA withdrew its appeal was 2 hours preparing the application for fees. If Martin and Jaworski were not entitled to fees because the agency was substantially justified, as here, they are not entitled to fees incurred in preparing the application. Also, the agency did notify Martin and Jaworski of its withdrawal. It served them personally, if not their designated representative. Designation and notice of withdrawal seem to have crossed in the mail.

In the Matter of Richard S. Koenig

Order No. 98–20 (10/9/98)

Alleged Failure to Submit to Security Screening. Koenig allegedly failed to submit to security screening. The agency filed a motion for decision arguing that Koenig admitted the violation in his answer to the complaint. The law judge granted the motion, assessed the $500 civil penalty requested in the complaint, and Koenig appealed.

Motion to Dismiss Based on Allegedly Untimely Appeal Brief. The agency filed a motion to dismiss Koenig's appeal, arguing that Koenig failed to file a timely appeal brief. But the agency attorney failed to take into account the mailing rule. Koenig's appeal brief is in fact timely, so the motion to dismiss is denied.

Alleged Error in Concluding Koenig Admitted Violation. The law judge did not err in finding the violation admitted. Koenig admitted that he became impatient and angry, that he grabbed his backpack, which was still setting at the entrance of the belt, and that he took off to meet his flight. He further admitted that when the security people called him back, he told them, ''Sorry, you had your chance and you blew it.''

Alleged ALJ Conflict of Interest. Koenig argues that the law judge is an FAA employee and has a conflict of interest. The law judges are not employed by FAA, but by the Department of Transportation. Federal courts have upheld the adjudicatory system used in FAA civil penalty cases.

Alleged Violation as Too Small to Pursue. Despite Koenig's argument that his violation is too small for the FAA to pursue, refusal to submit to security screening is a serious matter. The screenings are designed to prevent violence and terrorism aboard aircraft. The risk of missing a flight can never justify violating security regulations.

In the Matter of Ottoe L. Blankson

Order No. 98–21 (10/9/98)

Late-Filed Appeal. Blankson filed his notice of appeal 11 days late. The Administrator holds that Blankson failed to demonstrate good cause for filing a late notice of appeal. Blankson claimed that the law judge had mailed the order assessing civil penalty to his former address in the Bronx with the wrong zip code for that address. However, Blankson had not provided the law judge with his new address in Georgia. Held: Blankson's negligence in not giving the law judge the new address outweighs the law judge's inadvertent use of the wrong zip code. Blankson's failure to provide the law judge with the change of address reflects an unacceptable degree of diligence in the prosecution of his appeal.

Dismissal of Request for Hearing. The Administrator holds, in the alternative, that it was not error for the law judge to dismiss Blankson's request for hearing. Blankson argued that he did not know that he was required to respond to each allegation in the complaint specifically. However, Rules of Practice require that a person filing

an answer respond to each numbered paragraph of the complaint, and provide that a general denial is deemed a failure to file an answer. 14 CFR 13.209(e). This rule was summarized in the complaint as well as in the law judges orders, including the Order Requiring a Proper Answer to the Complaint. Consequently, Blankson should have known the requirements for an answer.

In the Matter of Northwest Airlines, Inc.

Order No. 98–22 (11/10/98)

Appeal Denied. Northwest appealed from the assessment of a $40,000 civil penalty by the law judge for multiple violations of 14 CFR 108.5(a)(1) and 108.9(c). The Administrator rejects Northwest's arguments that the sanction was excessive.

This case involves the failure by Northwest, through its contractor, ITS, to adhere to certain requirements in Northwest's Air Carrier Standard Security Program (ACSSP). Specifically, it was alleged that over a three-day period, Northwest assigned an individual who was not qualified to serve as a Checkpoint Security Supervisor (CSS) to the CSS position at a particular checkpoint. Further, at another checkpoint at the same airport, Northwest, through ITS, did not have an agent working in the capacity of a CSS. Also, at yet another checkpoint, an agent assigned to serve as the CSS was performing nonscreening duties, and another employee was conducting screening duties although he was not current on his recurrent training.

In its Answer, Northwest admitted the allegations contained in Counts I–III of the Complaint. Subsequently, Northwest's counsel submitted a letter to the law judge explaining that the parties had agreed that the facts alleged in the Complaint will be deemed admitted and that written briefs would be submitted on the issue of sanction. Thus, no hearing was held in this matter. Northwest did not submit any evidence to support the arguments that it made in its brief to justify a reduction in the civil penalty. Unsubstantiated and unsupported factual allegations by attorneys in briefs do not constitute evidence, Hence, Northwest failed to prove that it had taken any corrective action that warranted a reduction in the civil penalty. Furthermore, even if Northwest had introduced the necessary evidence, Northwest's arguments did not justify a reduction in the civil penalty. The Administrator finds that due to the number and gravity of the violations, a significant civil penalty is appropriate. The law judge properly applied the guidance set forth in the Sanction Guidance Table regarding these violations.

In the Matter of Instead Balloon Services

Order No. 98–23 (11/24/98)

Notice of Appeal Construed as a Brief. Instead Balloon Services (IBS) failed to file a separate appeal brief. However, IBS's notice of appeal was sufficiently detailed to be construed as an appeal brief.

Appeal Denied. The law judge regarded IBS's failure to appear at the hearing (about which IBS has notice) as a constructive withdrawal of its request for hearing. The Administrator rejected IBS's explanation for its failure to attend the hearing—that the law judge's prehearing rulings displayed a clear bias against IBS and that a ruling against IBS at the hearing was a foregone conclusion. Held: The Administrator could find no bias in the law judge's prehearing rulings. Failure to appear at a hearing does not constitute an acceptable means of protesting rulings by a law judge. The Administrator agrees with the law judge—if IBS wanted a hearing, it should have taken the opportunity that it was given.

In the Matter of Peter Stevens

Order No. 98–24 (12/18/98)

Appeal Denied. The Administrator denied Stevens appeal from the law judge's initial decision findings that Stevens had violated 49 U.S.C. 46302 by giving false information about having a bomb in his suitcase to a skycap at the airport. The Administrator found that the law judge had addressed the circumstances in the record that led to his conclusion that Stevens' words could reasonably be believed. Those circumstances included two recent high-profile plan crashes, one involving suspected sabotage, and security concerns connected with the impending 50th anniversary of the United Nations and the Pope's visit. The $500 civil penalty was affirmed.

In the Matter of Howard Gotbetter

Order No. 98–25 (12/23/98)

Interlocutory Appeal of Right Dismissed. Gotbetter filed what purported to be an interlocutory appeal of right. However, Gotbetter was not entitled to file an interlocutory appeal of right under 14 C.F.R. § 13.219(c). Hence, the interlocutory appeal was dismissed, and the case was remanded to the law judge, who was instructed to give Gotbetter additional time in which to file an answer.

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Docket

The FAA Hearing Docket is located at FAA Headquarters, 800 Independence Avenue, SW, Room 926A, Washington, DC, 20591 (tel. no. 202–267–3641.) The clerk of the FAA Hearing Docket is Ms. Stephanie McCain. All documents required to be filed in civil penalty proceedings must be filed with the FAA Hearing Docket Clerk at the FAA Hearing Docket. (See 14 CFR 13.210.) Materials contained in the dockets of any case not containing sensitive security information (protected by 14 CFR Part 191) may be viewed at the FAA Hearing Docket.

In addition, materials filed in the FAA Hearing Docket in non-security cases in which the complaints were filed on or after December 1, 1997, are available for inspection at the Department of Transportation Docket, located at 400 7th Street, SW, Room PL–401, Washington, DC, 20590, (tel. No. 202–366–9329.) While the originals will be retained in the FAA Hearing Docket, the DOT Docket will scan copies of documents in non-security cases in which the complaint was filed after December 1, 1997, into their computer database. Individuals who have access to the Internet can view the materials in these dockets using the following Internet address: http://dms.dot.gov.

FAA Offices

The Administrator's decisions and orders, indexes, and digests are available for public inspection and copying at the following location in FAA headquarters: FAA Hearing Docket, Federal Aviation Administration, 800 Independence Avenue, SW., room 924A, Washington, DC 20591; (202) 267–3641.

These materials are also available at all FAA regional and center legal offices at the following locations:

Office of the Regional Counsel for the Aeronautical Center (AMC–7), Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73125; (405) 954–3296.

Office of the Regional Counsel for the Alaskan Region (AAL–7), Alaskan Region Headquarters, 222 West 7th Avenue, Anchorage, AL 99513; (907) 271–5269.

Office of the Regional Counsel for the Central Region (ACE–7), Central Region Headquarters, 601 East 12th Street, Federal Building, Kansas City, MO 64106; (816) 426–5446.

Office of the Regional Counsel for the Eastern Region (AEA–7), Eastern Region Headquarters, JFK International Airport, Federal Building, Jamaica, NY 11430; (718) 553–3285.

Office of the Regional Counsel for the Great Lakes Region (AGL–7), 2300 East Devon Avenue, Suite 419, Des Plaines, IL 60018; (708) 294–7108.

Office of the Regional Counsel for the New England Region (ANE–7), New England Region Headquarters, 12 New England Executive Park, Room 401, Burlington, MA 01803–5299; (617) 238–7050.

Office of the Regional Counsel for the Northwest Mountain Region (ANM–7), Northwest Mountain Region Headquarters, 1601 Lind Avenue, SW, Renton WA 98055–4056; (425) 227–2007.

Office of the Regional Counsel for the Southern Region (ASO–7), Southern Region Headquarters, 1701 Columbia Avenue, College Park, GA 30337; (404) 305–5200.

Office of the Regional Counsel for the Southwest Region (ASW–7), Southwest Region Headquarters, 2601 Meacham Blvd., Forth Worth, TX 76137–4298; (817) 222–5087.

Office of the Regional Counsel for the Technical Center (ACT–7), Federal Aviation Administration Technical Center, Atlantic City International Airport, Atlantic City, NJ 08405; (609) 485–7087.

Office of the Regional Counsel for the Western-Pacific Region (AWP–7), Western-Pacific Region Headquarters, 15000 Aviation Boulevard, Lawndale, CA 90261; (310) 725–7100.

Issued in Washington, DC on January 4, 1999.

James S. Dillman,

Assistant Chief Counsel for Litigation.

[FR Doc. 99–650 Filed 1–11–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Major Investment Study and Draft Environmental Impact Statement on the Proposed Schuylkill Valley Metro Project Between the City of Philadelphia and the City of Reading and the Borough of Wyomissing, Berks County, PA

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of intent to conduct a Major Investment Study and prepare a Draft Environmental Impact Statement.

SUMMARY: The Federal Transit Administration (FTA), as Federal lead agency, and the Southeastern Pennsylvania Transportation Authority (SEPTA), as local lead agency, in conjunction with the Berks Area Reading Transportation Authority (BARTA) intend to conduct a Major Investment Study (MIS) and prepare a Draft Environmental Impact Statement (DEIS) on a proposed investment strategy to improve mobility in the Schuylkill Valley Corridor (Corridor). The Corridor is approximately 62 miles long and varies from one half to two miles in width from the City of Philadelphia to the City of Reading and the Borough of Wyomissing in Berks County, Pennsylvania.

Among the alternatives that the MIS/DEIS will evaluate are: (1) No Build Alternative. This alternative involves no change to transportation services or facilities in the Corridor beyond already committed projects. (2) Transportation Systems Management (TSM) Alternative. This alternative would optimize existing transportation facilities with low-cost investments to meet the travel demand expected over the next 20 years. Components of this alternative that will be investigated include selected highway capacity enhancements and express bus service. (3) Commuter Rail Alternative. This alternative would utilize existing rail rights-of-way from Philadelphia to Reading and share trackage with freight rail operations. (4) Light Rail Alternative. This alternative would require dedicated trackage and utilize existing rights-of-way for most of its length. Street running of light rail vehicles through selected portions of Philadelphia may be necessary. Other alternatives or revisions to the above alternatives generated through the scoping process will also be considered.

Scoping will be accomplished through correspondence with interested persons, organizations, and Federal, State, and local agencies, and three public meetings.

DATES: *Comment Due Date:* Written comments on the scope of the alternatives and impacts to be considered should be submitted by February 26, 1999. Written comments should be sent to Mr. Jim Fritz, Senior Operations Planner and Project Manager, SEPTA, 1234 Market Street, 9th Floor, Philadelphia, PA 19107–3780. Written comments may also be provided at the public scoping meetings scheduled below: The public scoping meetings will take place on: (1) February 9, 1999, (2) February 10, 1999 and (3) February 11, 1999. See **ADDRESSES** below.

People with special needs should contact Mr. Jim Fritz at SEPTA at the address below or by calling (215) 580–7438. The buildings in which the scoping meetings will be conducted are accessible to people with disabilities, and provisions will be made for the hearing impaired.

The meetings will be held in an ''open-house'' format, and representatives will be available to discuss the project throughout the time periods given. Informational displays and written material will also be available throughout the time periods given.

ADDRESSES: Written comments should be sent to Mr. Jim Fritz, Senior Operations Planner and Project Manager, SEPTA, 1234 Market Street, 9th Floor, Philadelphia, PA 19107–3780. Written comments may also be made at the public scoping meetings. The meetings will be held at the following locations:

(1) February 9, 1999 from 4:00 to 8:00 PM at Winnet Student Life Building Great Hall, Room S219, Philadelphia Community College, 1700 Spring Garden Street, Philadelphia, PA 19130.

(2) February 10, 1999 from 4:00 to 8:00 PM at Upper Merion Township Building Freedom Hall, 175 West Valley Forge Road, King of Prussia, PA 19406.

(3) February 11, 1999 from 4:00 to 8:00 PM at Berks County Services Center Multi-purpose Room, 2nd Floor, Berks County Courthouse, 633 Court Street, Reading, PA 19601.

FOR FURTHER INFORMATION CONTACT: Mr. Jim Fritz, Senior Operations Planner and Project Manager, SEPTA, 1234 Market Street, 9th Floor, Philadelphia, PA 19107–3780, (215) 580–7438, or fax (215) 580–7163.

SUPPLEMENTARY INFORMATION:

I. Scoping

FTA, SEPTA, and BARTA invite interested individuals, organizations, and Federal, State, and local agencies to participate in defining transportation alternatives to be evaluated in the MIS/DEIS and identifying any significant social, economic, or environmental issues related to the alternatives. An information packet describing the results of the Schuylkill Valley Metro Feasibility Report, the need for improved mobility in the Corridor, the study area, the proposed alternatives, and the impact areas to be evaluated is being mailed to affected Federal, State, and local agencies. Other interested parties may request the scoping materials by contacting Mr. Jim Fritz, Senior Operations Planner and Project Manager, SEPTA, 1234 Market Street, 9th Floor, Philadelphia, PA 19107–3780, (215) 580–7438, or fax (215) 580–7163. Scoping comments may be made in writing at the public scoping meetings or may be sent to Mr. Fritz at the above address. See the Scoping meeting **DATES** section above for the locations and times. During scoping, comments should focus on identifying social, economic, or environmental impacts to be evaluated and suggesting alternatives that meet the identified mobility needs in a cost-effective manner. However, scoping is not the appropriate time to indicate a preference for a particular alternative. Comments on the preferences should be communicated after the MIS/DEIS has been completed. If you wish to be placed on the mailing list to receive further information as the project develops, contact Mr. Jim Fritz, Senior Operations Planner and Project Manager, SEPTA, 1234 Market Street, 9th Floor, Philadelphia, PA 19107–3780, (215) 580–7438, or fax (215) 580–7163.

II. Description of Study Area and Project Need

The study area, known as the Schuylkill Valley Corridor (Corridor), extends approximately 62 miles from the central business district of Philadelphia through Montgomery and Chester Counties to the City of Reading and the Borough of Wyomissing in Berks County, Pennsylvania. The axis of the Corridor is defined by the Schuylkill River, which runs generally in a northwest-southeast orientation. Varying from one half to two miles in width, the Corridor is comprised either wholly or partially of 52 municipalities and portions of Philadelphia. Two principal highways, the Schuylkill Expressway (I–76) and the US Route 422 Expressway, form the Corridor's transportation spine.

The tremendous increase in population and employment over the past two decades has established the Corridor as one of the primary growth areas of southeastern Pennsylvania. As a result of rapid growth, the Corridor's major highways and feeder roads are sustaining severe and growing congestion. Land development has occurred rapidly and at low densities resulting in the loss of farmland and open space. While most new development and capital investment is occurring outside urbanized areas, the older former industrial towns along the Schuylkill River are in need of economic development. Public transportation in the study area is limited, consisting of bus service oriented primarily toward the ends of the Corridor and commuter rail service between Philadelphia and Norristown.

The Corridor is a major employment destination in southeastern Pennsylvania. High concentrations of jobs are found in the central business districts of Philadelphia and Reading while major office, industrial, and retail complexes are located along the Corridor's highways.

The MIS/DEIS phase is the next step in transportation planning and project development following the completion of the Schuylkill Valley Metro Feasibility Report. The MIS/DEIS process employs a far-reaching public involvement program, continuous coordination with affected and interested agencies and community stakeholders, and a detailed evaluation of a wide range of alternatives to meet the mobility needs identified in the MIS/DEIS.

The MIS/DEIS process is designed to examine a number of alternatives. Detailed analysis at a conceptual engineering level will be performed for a set of multi-modal alternatives to identify cost, ridership, cost-effectiveness measures, and environmental benefits and impacts.

III. Alternatives

Among the alternatives that the MIS/DEIS will evaluate are: (1) No Build Alternative. This alternative involves no change to transportation services or facilities in the Corridor beyond already committed projects. (2) Transportation Systems Management (TSM) Alternative. This alternative would optimize existing transportation facilities with low-cost investments to meet the travel demand expected over the next 20 years. Components of this alternative that will be investigated include selected highway capacity enhancements and express bus service. (3) Commuter Rail Alternative. This alternative would utilize existing rail rights-of-way from Philadelphia to Reading and share trackage with freight rail operations. (4) Light Rail Alternative. This alternative would require dedicated trackage over most of its length and utilize existing rights-of-way for most of its route. Street running of light rail vehicles through selected portions of Philadelphia may be necessary. (5) Highway Alternative. Possible improvements and/or additions to the existing highway network will be considered. Other alternatives or revisions to the above alternatives generated through the scoping process will also be considered.

IV. Probable Effects

FTA, SEPTA, and BARTA will evaluate, in the MIS/DEIS, all significant social, economic, and environmental impacts at a level of detail sufficient to identify alternatives and issues to be addressed in the EIS. Among the primary transportation issues to be evaluated in the MIS/DEIS are the expected increase in transit ridership including recreational and work trips, the expected increase in mobility for the transit dependent population, the support of the region's air quality goals, the economic benefits, satisfying the overall transportation needs of the Corridor, the capital outlays needed to construct the project, the cost of operating and maintaining the facilities created by the project, and the financial impacts on the funding agencies. Potentially affected environmental and social resources to be evaluated in the MIS/DEIS include, land use and neighborhood impacts, residential and business displacements and relocations, traffic and parking impacts near stations and along the alignments, visual impacts, noise and vibration impacts, major utility relocation impacts, impacts on cultural and archaeological resources, and impacts on wetlands and parklands. Impacts on air quality, water quality, and hazardous sites will also be covered. The impacts will be evaluated both for the construction period and for the long-term period of operation. Measures to mitigate significant adverse impacts will be considered.

V. FTA Procedures

The MIS/DEIS will review alternatives on the basis of conceptual engineering, assess the social, economic, and environmental impacts of the proposed alternatives, and consider means of minimizing and mitigating any adverse impacts associated with the alternatives. After its publication, the MIS/DEIS will be available for public review and comment, and public hearings will be held. On the basis of the MIS/DEIS and comments received, SEPTA and BARTA will select a Locally Preferred Alternative that will be carried into the Final EIS. Following this action by SEPTA and BARTA, SEPTA and BARTA will request FTA authorization to proceed with the Final EIS and to initiate preliminary engineering activities.

Issued on: January 7, 1999.

Sheldon A. Kinbar,

Regional Administrator.

[FR Doc. 99–652 Filed 1–11–99; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Community Development Financial Institutions Fund Open Meeting of the Community Development Advisory Board

AGENCY: Community Development Financial Institutions Fund, Department of the Treasury.

ACTION: Notice of open meeting.

SUMMARY: This notice announces the next meeting of the Community Development Advisory Board which provides advice to the Director of the Community Development Financial Institutions Fund.

DATES: The next meeting of the Community Development Advisory Board will be held on Friday, January 29, 1999 at 10:00 a.m.

ADDRESSES: The Community Development Advisory Board meeting will be held at the Treasury Executive Institute, 1255 22nd Street, NW., Suite 500, Washington, DC.

FOR FURTHER INFORMATION CONTACT: The Community Development Financial Institutions Fund (the ''Fund''), U.S. Department of Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC, 20005, (202) 622–8662 (this is not a toll free number). Other information regarding the Fund and its programs may be obtained through the Fund's website at http://www.treas.gov/cdfi.

SUPPLEMENTARY INFORMATION: Section 104(d) of the Community Development Banking and Financial Institutions Act of 1994 (12 U.S.C. 4703(d)) established the Community Development Advisory Board (the ''Advisory Board''). The charter for the Advisory Board has been filed in accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. App.), and with the approval of the Secretary of the Treasury.

The function of the Advisory Board is to advise the Director of the Fund (who has been delegated the authority to administer the Fund) on the policies regarding the activities of the Fund. The Fund is a wholly owned corporation within the Department of the Treasury. The Advisory Board shall not advise the Fund on the granting or denial of any particular application for monetary or non-monetary awards. The Advisory Board shall meet at least annually.

It has been determined that this document is not a major rule as defined in Executive Order 12291 and therefore regulatory impact analysis is not required. In addition, this document does not constitute a rule subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

The next meeting of the Advisory Board, all of which will be open to the public, will be held at the Treasury Executive Institute, located at 1255 22nd Street, NW., Suite 500, Washington, DC, on Friday, January 29, 1999 at 10:00 a.m. The room will accommodate 30 members of the public. Seats are available on a first-come, first-served basis. Participation in the discussions at the meeting will be limited to Advisory Board members and Department of the Treasury staff. Anyone who would like to have the Advisory Board consider a written statement must submit it to the Fund, at the address of the Fund specified above in the For Further Information Contact section, by 4:00 p.m., Wednesday, January 27, 1999.

The meeting will include a report from Director Lazar on the activities of the CDFI Fund since the last Advisory Board meeting, including programmatic, fiscal and legislative initiatives for the year 1999.

Authority: 12 U.S.C. 4703; Chapter X, Pub. L. 104–19, 109 Stat. 237.

Dated: January 6, 1999.

Ellen Lazar,

Director, Community Development Financial Institutions Fund.

[FR Doc. 99–633 Filed 1–11–99; 8:45 am]

BILLING CODE 4810–70–P

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition Determinations: ''Francis Bacon: A Retrospective Exhibition''

AGENCY: United States Information Agency.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 F.R. 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 F.R. 27393, July 2, 1985), I hereby determine that the objects on the list specified below, to be included in the exhibit ''Francis Bacon: A Retrospective Exhibition,'' imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to a loan agreement with the foreign lender. I also determine that the exhibition or display of the listed exhibit objects at the Yale Center for British Art, New Haven, Connecticut, from on or about January 23, 1999 to on or about March 21, 1999, the Minneapolis Institute of Arts, Minneapolis, Minnesota, from on or about April 8, 1999 to on or about May 27, 1999, the Fine Arts Museums of San Francisco: California Palace of the Legion of Honor, San Francisco, California, from on or about June 13, 1999 to on or about August 2, 1999, and the Modern Art Museum of Forth Worth, Fort Worth, Texas, from on or about August 20, 1999 to on or about October 15, 1999, is in the national interest. Public Notice of these determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For a copy of the list of imported exhibit objects or for further information, contact Lorie J. Nierenberg, Assistant General Counsel, Office of the General Counsel, 202/619–6084, and the address is Room 700, U.S. Information Agency, 301 4th Street, SW, Washington, DC 20547–0001.

Dated: January 6, 1999.

R. Wallace Stuart,

Deputy General Counsel.

[FR Doc. 99–679 Filed 1–11–99; 8:45 am]

BILLING CODE 8230–01–M

UNITED STATES INFORMATION AGENCY

Meeting of the Cultural Property Advisory Committee

AGENCY: United States Information Agency.

ACTION: Notice of Meeting of the Cultural Property Advisory Committee.

The Cultural Property Advisory Committee will meet on Thursday, January 28, 1999, from approximately 8:30 a.m. to approximately 3 p.m., at the U.S. Information Agency, Room 840, 301 4th St., SW, Washington, DC, to continue its review of a cultural property request from the Government of the Republic of Cyprus to the Government of the United States seeking protection of certain archaeological and/or ethnological materials. A portion of the meeting, from approximately 8:30 a.m. to approximately 9:30 a.m., will be open to interested parties wishing to provide comment that may be relevant to this request. The Cyprus request, submitted under Article 9 of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, is being considered in accordance with the provisions of the Convention on Cultural Property Implementation Act (19 U.S.C. 2601 et seq., Pub. L. 97–446). Since review of this matter by the Committee will involve information the premature disclosure of which would be likely to significantly frustrate implementation of proposed action, the meeting from approximately 9:30 a.m. to approximately 3:00 p.m. will be closed pursuant to 5 U.S.C. 552b(c)(9)(B) and 19 U.S.C. 2605(h). Seating is limited. Persons wishing to attend the open portion of the meeting on January 28, must notify cultural property staff at (202) 619–6612 no later than 5 p.m. (EST) Tuesday, January 26, 1999, to obtain security clearance for admission into the USIA building.

Dated: January 6, 1999.

Penn Kemble,

Deputy Director, United States Information Agency.

Determination to Close the Meeting of the Cultural Property Advisory Committee, January 28, 1999

In accordance with 5 U.S.C. 552b(c)(9)(B), and 19 U.S.C. 2605(h), I hereby determine that a portion of the Cultural Property Advisory Committee meeting on January 28, 1999, approximately 9:30 a.m. to approximately 3 p.m. at which there will be deliberation of information the premature disclosure of which would be likely to significantly frustrate implementation of proposed actions, will be closed.

Dated: January 6, 1999.

Penn Kemble,

Deputy Director, United States Information Agency.

[FR Doc. 99–661 Filed 1–11–99; 8:45 am]

BILLING CODE 8320–01–M

Corrections

Federal Register

Vol. 64, No. 7

Tuesday, January 12, 1999

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Forest Service

Morrison Creek, Medicine Bow/Routt National Forest, Routt County, Colorado

Correction

In notice document 98–34459, beginning on page 71884, in the issue of Wednesday, December 30, 1998, make the following corrections:

1. On page 71885, in the third column, in the **SUPPLEMENTARY INFORMATION** section, in the third line, ''areas'' should read ''acres''.

2. On the same page, in the third column, in the **SUPPLEMENTARY INFORMATION** section, in the fifteenth line, ''areas'' should read ''acres''.

[FR Doc. C8–34459 Filed 1–11–99; 8:45 am]

BILLING CODE 1505–01–D

COMMODITY FUTURES TRADING COMMISSION

Coffee, Sugar & Cocoa Exchange, Inc. Petition for Exemption From the Dual Trading Prohibition Set Forth in Section 4j(a) of the Commodity Exchange Act and Commission Regulation 155.5

Correction

In notice document 98–34554, beginning on page 71896, in the issue of Wednesday, December 30, 1998, make the following corrections:

1. On page 71896, in the first column, under **FOR FURTHER INFORMATION CONTACT:**, in the second line, ''Andersen'' should read ''Andresen''.

2. On the same page, in the same column, under **SUPPLEMENTARY INFORMATION:**, in the eighth line, ''its'' should be added after ''for''.

3. On the same page, in the same column, in footnote 1, in the fifth line, ''155.5(a)99)'' should read ''155.5(a)(9)''.

4. On the same page, in the second column, the fourth full paragraph should read as set forth below:

''•Actions taken in response to the Commission's November 1994 *Report to Congress on Futures Exchange Audit Trails*, June 1995 *Report on Audit Trail Accuracy and Sequencing Tests* (''Audit Trail Report''), and August 12, 1996 *Report on Audit Trail Status and Re–Test*;''

5. On the same page, in the third column, in the 18th line, ''CSCS's'' should read ''CSCE's''.

6. On the same page, in the same column, in footnote 7, in the 18th line, ''Commission'' should read ''Commission,''.

7. On page 71897, in the first column, in the fourth line, ''CSCS's'' should read ''CSCE's''.

8. On the same page, in the same column, in the third full paragraph, in the third line from the bottom, end quotation marks should be added after ''petition''.

9. On the same page, in the second column, in the first full paragraph, in the third line from the bottom, ''no'' should read ''not''.

10. On the same page, in the same column, in the second full paragraph, in the first line, ''CSCS'' should read ''CSCE''.

11. On the same page, in the same column, in footnote 10, in the first line, ''further'' should read ''Further''.

12. On the same page, in the third column, in the first line, ''CSCS's'' should read ''CSCE's''.

13. On the same page, in the same column, in the first full paragraph, in the first line, ''system'' should read ''System''.

14. On the same page, in the same column, in footnote 12, in the third line, ''3'' should be added after ''indicator''.

15. On the same page, in the same column, in footnote 13, in the eighth line, ''to the extent practicable'' should read '', to the extent practicable,''.

16. On the same page, in the same column, in footnote 13, in the second, third and fourth lines from the bottom, ''Instead, the Exchange plans to use ASTRS on a periodic basis as a means to determine the accuracy rate, with ASTRS.'' should be removed.

17. On page 71898, in the first column, in the fourth line, ''met'' should read ''meets''.

18. On the same page, in the same column, in the first full paragraph, in the fourth line from the bottom, ''and'' should read ''with''.

19. On the same page, in the second column, in 11th line, ''minutes'' should read ''minute''.

20. On the same page, in the same column, in the 13th line, ''cocoa'' should read ''Cocoa''.

21. On page 71899, in the second column, in the fifth line from the bottom, ''exemption,'' should read ''exemption.''.

[FR Doc. C8–34554 Filed 1-11-99; 8:45 am]

BILLING CODE 1505–01–D

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request; Extension

Correction

In notice document 98–34406, beginning on page 71645, in the issue of Tuesday, December 29, 1998, make the following corrections:

1. On page 71646, in the first column, under the heading **SUPPLEMENTARY INFORMATION:**, in the second line from the bottom, ''rule'' should read ''Rule''.

2. On page 71646, in the second column, in the first full paragraph, in the 15th line from the bottom, after ''and'' insert ''the''.

3. On page 71646, in the second column, in the second full paragraph, in the fourth line from the bottom, after ''(91,735)'' insert ''hours);''.

4. On page 71646, in the third column, the heading '' **A Testing**''should read '' **A. Testing**''.

5. On page 71646, in the third column, in the second full paragraph, in the ninth line ''his'' should read ''this''.

6. On page 71648, in the second column, in the first full paragraph, in the 11th line from the bottom, ''on'' should read ''an''.

7. On page 71648, in the second column, in the fourth full paragraph, in the seventh line from the bottom, ''there'' should read ''their''.

8. On page 71648, in the second column, in the fourth full paragraph,in the second line from the bottom, ''businesses'' should read ''business''.

9. On page 71648, in the third column, in the third full paragraph, in the first line ''also'' should read ''labor''.

10. On page 71648, in the third column, in designated paragraph 3., in

the third line ''[798'' should read ''[789''.

11. On page 71649, in the first column, in the seventh line, ''providing'' should read ''procuring''.

[FR Doc. C8–34406 Filed 1-11-99; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Tuesday
January 12, 1999

Part II

Environmental Protection Agency

40 CFR Part 63

Approval of State Programs and Delegation of Federal Authorities; Proposed Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[FRL–6212–3]

RIN 2060–AG60

Approval of State Programs and Delegation of Federal Authorities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed amendments; notice of public hearing.

SUMMARY: The EPA is proposing to change the Agency's current procedures for delegating to State, local, territorial, and Indian tribes as defined in 40 CFR 71.2 or agencies (i.e., S/L's) the authority to implement and enforce Federal air toxics emissions standards and other requirements. Specifically, these regulatory amendments propose to revise procedures and criteria for approving S/L rules, programs, or other requirements that would substitute for Federal emissions standards or other requirements for hazardous air pollutants (HAP) established under section 112 of the Clean Air Act (Act). Section 112(l) of the Act authorizes us to approve S/L programs when S/L alternative requirements are demonstrated to be no less stringent than the rules we promulgate.

These amendments would increase the flexibility of our existing regulations in 40 CFR part 63, subpart E that implement section 112(l) of the Act. They would provide a greater number of approval processes from which S/L's can choose, increase the flexibility S/L's have to demonstrate equivalency for their alternative requirements, and provide options that will expedite the approval process. In addition, the policy guidance in this notice clarifies what S/L's must or can do to obtain delegated authority under subpart E, including how they can demonstrate equivalency for alternatives to Federal requirements.

These changes are in response to requests we received from State and local air pollution control agencies to reconsider our existing regulations in light of implementation difficulties they have experienced or anticipated. We believe this effort is consistent with the President's regulatory ''reinvention'' initiative, and it will result in less burden to S/L's, regulated industries, and the Federal Government without sacrificing the emissions reduction and enforcement goals of the Act. These amendments reduce the potential for redundant or conflicting air regulations on industry while they accommodate a wider variety of S/L program needs.

This rulemaking addresses requirements that apply to S/L's, should they choose to obtain delegation or program approval under section 112(l). (Obtaining delegation under section 112(l) is voluntary). This rulemaking does not include any requirements that apply directly to stationary sources of HAP or small businesses that emit HAP.

DATES: *Comments.* Comments must be received on or before March 15, 1999.

Public Hearing. Anyone requesting a public hearing must contact the EPA no later than January 26, 1999.

ADDRESSES: *Comments.* Comments should be submitted (in duplicate, if possible) to: Air and Radiation Docket and Information Center (6102), Attention Docket Number A–97–29, Room M–1500, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. The EPA requests a separate copy also be sent to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).

Comments and data may also be submitted electronically by following the instructions listed in Supplementary Information.

Public Hearing. If a public hearing is held, it will be held at the EPA's Office of Administration Auditorium, Research Triangle Park, North Carolina. Persons interested in attending the hearing or wishing to present oral testimony should notify the contact person listed below.

Docket. Docket No. A–97–29, containing information relevant to this proposed rulemaking, is available for public inspection and copying between 8:00 a.m. and 5:30 p.m., Monday through Friday, at the EPA's Air and Radiation Docket and Information Center (6102), 401 M Street, S.W., Washington, D.C. 20460; telephone (202) 260–7548. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. Tom Driscoll, Integrated Implementation Group, Information Transfer and Program Integration Division (MD–12), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone (919) 541–5135; facsimile (919) 541–5509, electronic mail address ''driscoll.tom@epa.gov.''

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially affected when the EPA takes final action on this proposed rule are S/L governments that voluntarily take delegation of section 112 rules, emissions standards, or requirements. The final action on this proposal will not regulate emissions sources directly. These categories and entities include:

Category	Examples
S/L governments	S/L governments that voluntarily request approval of rules or programs to be implemented in place of Act section 112 rules, emissions standards or requirements or voluntarily request delegation of unchanged section 112 rules.

This list is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by final action on this proposal. This list contains the types of entities that EPA is now aware could potentially be regulated by final action on this proposal. Other types of entities not included in the list could also be regulated. The procedures and criteria for requesting and receiving approval of these S/L government rules or programs or voluntarily requesting delegation of section 112 rules are in § 63.90 through § 63.97, excluding § 63.96, of this subpart.

Electronic Access and Filing Addresses

This notice, the proposed regulatory texts, and other background information are available in the docket and by request from the EPA's Air and Radiation Docket and Information Center (see **ADDRESSES**), or access through the EPA web site at: http://www.epa.gov/ttn/oarpg.

Electronic comments on the proposed National Emission Standard for Hazardous Air Pollutants (NESHAP) may be submitted by sending electronic mail (e-mail) to: a-and-r-docket@epamail.epa.gov. Submit comments as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on a diskette in WordPerfect 5.1 or 6.1 or ASCII file format. Identify all comments and data in electronic form by the docket number

(A–97–29). No confidential business information should be submitted through electronic mail. You may file comments on the proposed rule online at many Federal Depository Libraries.

Outline

The information presented in this preamble is organized as follows:

I. Purpose and Summary

One of the reasons Congress created section 112(l) of the Act was to recognize that many S/L's already had programs or regulations in place to reduce emissions of toxic air pollutants, and that some S/L's might wish to implement their programs or regulations in place of otherwise applicable section 112 standards. After promulgation of the initial subpart E regulations, some S/L's voiced the view that subpart E would be more useful if we could allow S/L's more flexibility in implementing their programs in place of section 112 standards. Based on these comments, we decided to investigate ways to provide more flexibility, particularly through the use of a greater variety of regulatory pathways, so long as the result would clearly be emissions reductions equivalent to the Federal standard being replaced.

During the process of ''reinventing'' the subpart E regulations, we have solicited and responded to commenters through several different routes. First, we conducted two stakeholder meetings to assess the concerns not only of S/L's, but also of industries indirectly affected by the subpart E regulations and environmental/public interest groups. We also benefited from the input of issue work groups comprised of representatives from the States, EPA Regions, and other EPA offices. We used input from the stakeholder meetings, as well as other meetings with S/L's, to create a draft preamble and regulatory amendments which contained changes resulting from several commenters' suggestions. We placed this draft on the Internet and solicited comments, which then resulted in additional changes which we believe will fulfill our goal of making the delegation of the section 112 standards easier, without sacrificing environmental protection.

Another way that we have involved stakeholders is through the Sacramento Protocol effort. Officials from the California Air Resources Board (CARB), the South Coast Air Quality Management District (SCAQMD), and the EPA Headquarters and Region IX Offices collaborated to analyze five SCAQMD rules to determine whether they would achieve the same emissions reductions as the otherwise applicable section 112 standards. We discuss the results of the Sacramento Protocol in section X., of this preamble.

These proposed changes to the subpart E regulations will provide more flexibility in both accepting delegation of the section 112 standards and implementing approved alternative standards. In order to provide more flexibility to S/L's, we are proposing several broad-based changes: (1) Allowing more approval options; (2) allowing use of holistic demonstrations to evaluate the stringency of S/L rules; and (3) providing more flexibility in monitoring, reporting, and recordkeeping (MRR).

First, to provide more flexibility and clarity, we have taken § 63.94, ''Approval of a State program that substitutes for section 112 emissions standards,'' and split it into two sections: § 63.94, Equivalency by Permit (EBP) and § 63.97, State Program Approval (SPA). The SPA option addresses approval of a broad variety of regulatory and enforcement vehicles. The EBP option could be used to expedite the section 112(l) review process significantly in those cases where just a handful of sources required to obtain permits under title V of the Act are affected by delegation of a section 112 standard to a S/L (for example where a source category consists of just a few sources in a State).

We have included partial approval as another way to increase the flexibility S/L's will have when accepting delegation of the section 112 standards. When using partial approval, a S/L would only accept delegation for part of its program or its rule.

We also intend to add flexibility by allowing S/L's to implement their

delegated standards through a greater variety of regulatory vehicles. The original subpart E regulations only allowed implementation of alternative rules through rulemaking or title V permits. However, we are proposing to expand the options for the implementation of alternative S/L rules by allowing S/L's to implement the delegated standards through rulemaking, title V permits, S/L permits, general permits, permit templates, and administrative orders.

In addition, we intend to increase the ability of S/L's to demonstrate that their standards are equivalent to the otherwise applicable section 112 standards by adopting a holistic approach to evaluating S/L standards. In other words, we would evaluate S/L standards as a whole to determine whether they would achieve equal or better emissions reductions than the otherwise applicable section 112 standard.

Finally, we propose to increase the amount of flexibility S/L's would have in comparing their compliance assurance measures to the compliance assurance measures in the otherwise applicable section 112 standard. Section X.D.3. of this preamble contains a detailed discussion of how we would compare the compliance assurance measures in an alternative S/L standard to the compliance assurance measures in the otherwise applicable section 112 standard. In general, we want to guarantee that S/L compliance assurance measures will ensure the same rate of compliance that our compliance assurance measures would ensure. Furthermore, we are proposing to allow the process developed under the Sacramento Protocol to be used as a supplement to the overall evaluation of S/L standards.

II. What Is the Subject and Purpose of This Rulemaking?

A. Reasons for Revisiting Section 112(l) Regulations

Before the Act was amended in 1990 (1990 Amendments), many S/L's developed their own programs for the control of air toxics (i.e., HAP) from stationary sources. Some of these S/L programs have now been in place for many years and, for some of the source categories regulated by Federal emissions standards under section 112 of the Act, the S/L programs may have succeeded in reducing air toxics emissions to levels at or below those required by the Federal standards. For purposes of this discussion, the Federal emission standards established under section 112 authority are codified in 40 CFR part 63. These standards are referred to as NESHAP.

These programs, developed to address specific S/L needs, often differ from the Federal rules we develop under section 112. As a result, S/L programs may result in controls or other requirements that, on the whole, are more stringent than, equivalent to, or less stringent than controls resulting from the corresponding Federal emissions standards in terms of the emissions reductions they achieve.

The U.S. Congress was very aware of S/L air toxics programs in the course of developing the 1990 Amendments to the Act. Seeking to preserve these programs, Congress included provisions in section 112(l) that allow us to recognize S/L's air toxics rules or programs in place of some or all of the corresponding Federal section 112 requirements. In other words, we may approve S/L rules or programs if they meet certain criteria (such as demonstrating adequate resources, legal authorities, level of control, and compliance and enforcement measures) and allow them to substitute for part 63 NESHAP regulations established under sections 112(d), 112(f), or 112(h) (or other section 112 requirements such as the Risk Management Program addressed in section 112(r) and 40 CFR part 68). In addition, section 112(l) allows us to delegate to S/L's the authority to implement and to enforce part 63 NESHAP exactly as we promulgate them, that is, without any changes.

Thus, a S/L may obtain delegated authority to implement and enforce a NESHAP in either of two circumstances: (1) when the S/L has taken delegation for unchanged Federal standards, a process called ''straight'' delegation, or (2) when the S/L obtains approval for rules or other requirements that substitute for the Federal NESHAP requirements. Under section 112(l), submission of any rules or programs by S/L's for approval and delegation is voluntary. If S/L's do not obtain approval or delegation, we continue to have primary authority and responsibility to implement and to enforce section 112 regulations.

Overall, the goal of section 112(l) is to allow S/L regulators to implement and enforce their programs (or rules) to control emissions of HAP from stationary sources, provided those programs achieve results that are equivalent to the Federal program. We believe that Congress intended S/L's to be the primary authorities responsible for carrying out the mandates of the Federal air toxics program. Where S/L air toxics regulations control emissions of HAP as stringently as NESHAP, we believe that it is Congress's intention in section 112(l) to integrate these programs with the Federal air toxics program as it was revised in 1990. (S/L's may also have volatile organic compounds (VOC), particulate matter (PM), or lead (Pb) regulations developed under section 110 of the Act that indirectly control emissions of HAP and that may, in some cases, be substituted for section 112 requirements.)

Section 112(l) allows the integration of Federal and S/L programs in order to minimize the potential for ''dual regulation.'' Dual regulation refers to a situation in which sources of HAP are subject simultaneously to S/L and Federal requirements that overlap, conflict, or are otherwise duplicative. By working together to minimize the potential for dual regulation, we and our S/L co-regulators hope to reduce unnecessary burden associated with (1) complying with section 112 air toxics control requirements, and (2) issuing permits and otherwise implementing or enforcing those requirements. We consider burden ''unnecessary'' when it does not materially contribute to assuring that sources of HAP achieve the emissions reduction goals established by our Federal section 112 requirements, or it does not contribute toward assuring compliance with those requirements.

Under section 112(l)(2) of the Act, we are required to publish ''guidance'' that governs how S/L's may develop and submit, and how we may approve, S/L air toxics rules or programs that meet the goals of the Act and the Federal air toxics program. On November 26, 1993, we finalized regulations that carried out this mandate. (See 58 FR 62262, Approval of State Programs and Delegation of Federal Authorities, Final rule). The November 26, 1993 regulations, which can be found in 40 CFR part 63, subpart E, provide regulatory ''guidance'' regarding approval of S/L rules or programs that can be implemented and enforced in place of Federal section 112 rules as well as the delegation of our authorities and responsibilities associated with those rules. Under subpart E, such agencies may obtain approval from us to implement and enforce provisions of their own air pollution control programs in lieu of federally promulgated NESHAP and other section 112 requirements for stationary sources. Once approved, S/L rules and applicable requirements resulting from those rules are considered federally enforceable and substitute for the Federal requirements that would otherwise apply to those stationary sources. Overall, the subpart E

regulations assure that all sources of HAP that are subject to regulation under section 112 achieve the emissions reductions that are intended by the Federal emissions standards or other requirements.

The current subpart E provides several different processes (that we also refer to as options) that a S/L may pursue to obtain delegation or program approval. A S/L would pursue one or more of these delegation/approval processes based on the particular programmatic needs and goals of that agency. A S/L may ''mix and match'' the various processes provided in subpart E to minimize the overall burden associated with program approval and to obtain the desired delegation outcome. In addition to providing the procedural requirements for delegation and program approval, subpart E describes the necessary criteria and other requirements a S/L rule or program must meet in order for us to approve it.

After subpart E was promulgated, several S/L's raised concerns to us about making these regulations more workable. Since August 1995, we have been engaged in discussions with S/L representatives to understand their concerns and to rethink how subpart E might be better structured to accomplish its goals. These discussions have focused on and benefited from experiences to date actually implementing the approval processes included in subpart E. Based on these experiences and the relative maturity of the air toxics and the title V operating permits programs since promulgation of the subpart E rules in 1993, we believe it is appropriate at this time to revise the subpart E regulations.

Thus, in this notice, we are proposing to amend the existing subpart E regulations to make them easier to use. One goal of this effort is to introduce additional flexibility into the subpart E approval processes and criteria in order to accommodate a wider variety of S/L program needs, without sacrificing the emissions reduction and enforceability goals of the Act. Through this effort, we hope to provide additional flexibility to S/L in how they accept delegation for the section 112 program, including how they are required to establish the equivalency of their alternative requirements. We believe this will result in less overall burden to S/L in seeking approval for delegation requests, to us in approving such requests, and to regulated industries in complying with the array of S/L and Federal regulations to which they are subject. In making it easier for S/L to obtain delegation (and in minimizing disruption of S/L programs), we hope to achieve the second critical goal of this effort to revise subpart E, to further minimize the likelihood of dual regulation of stationary sources.

B. Legal and Policy Framework for Revising Section 112(l) Regulations

In proposing revisions to the subpart E regulations, we have provided as much additional flexibility as we believe is appropriate, both in light of the statute and given our need to assure the American public that they are getting the same or better environmental protection from the S/L requirements that would replace the Federal section 112 requirements. We believe that the flexibility provided in the subpart E delegation/approval processes cannot compromise the environmental results or the enforceability of the otherwise applicable Federal requirements.

Equivalency demonstrations that S/L's submit for specific alternative section 112 requirements must show that the alternative requirements achieve the emissions reductions required by the otherwise applicable Federal requirements. They also must demonstrate equivalency on an affected source basis.[1] However, this does not mean that S/L's must demonstrate ''line-by-line'' equivalency with the section 112 requirements.

As a legal matter, only the EPA has the authority to approve alternative section 112 requirements that apply to a category of sources for which we have promulgated Federal emissions standards. In other words, we may not delegate to S/L's the authority to make findings of equivalency between their programs' requirements and the requirements of the otherwise applicable Federal standards.

In these rule revisions, we are proposing that the ''test'' for equivalency between the S/L and Federal requirements should be the same no matter which delegation/approval option a S/L chooses to pursue among the options that allow alternative requirements to be substituted for Federal requirements. By ''test'' we mean the criteria that we would use to determine whether S/L requirements are as stringent as ours in terms of the effect they would have on achieving the required emissions reductions, assuring compliance, and enabling appropriate enforcement actions.

Before discussing the proposed changes to subpart E, we thought it would be useful to identify who is subject to this rulemaking, describe the process that was used to arrive at the decisions in this package, review background on the existing structure and content of subpart E, and summarize the key S/L concerns that we have addressed in this and previous actions.

[1] Affected source is a defined term in § 63.2 of the part 63 General Provisions. It refers to the portion of a stationary source that is regulated by a Federal section 112 emissions standard or requirement.

III. Who Is Subject to This Rulemaking?

This rulemaking addresses requirements that apply to ''States,'' should they choose to obtain delegation or program approval under section 112(l) of the Act. Submission of rules or programs by ''States'' for approval and delegation under section 112(l) is voluntary. The definition of ''State'' in subpart E covers all non-Federal authorities, including local air pollution control agencies, statewide programs, Indian Tribes, and U.S. Territories. Because these authorities are the primary intended audience for this regulation, from this point on we use ''you'' or ''your'' to address our comments directly to any or all of these authorities. In addition, we may also refer to these authorities as S/L. Note, however, that any requests for comment on these proposed amendments are directed to the public-at-large, not just S/L.

Consistent with the existing subpart E regulations that govern section 112(l) delegations and approvals, this rulemaking does not include any requirements that apply directly to stationary sources of HAP. We regulate HAP sources by developing NESHAP and other types of requirements under section 112. The subpart E regulations that are the subject of this rulemaking merely establish criteria and procedures for determining the governmental agency that will have primary responsibility within a jurisdiction for implementing and enforcing our emissions standards (and other substantive section 112 requirements), and they establish the processes by which you may implement regulations that, while not identical to our emissions standards, achieve the same or better results.

IV. What Process Was Used To Arrive at the Decisions in This Rulemaking?

In August 1995, S/L air pollution control program officials, presented to us their views as to why the current subpart E rule needs to be revised. They indicated that subpart E does not provide sufficient flexibility for you to use its delegation options, and that the requirements for establishing that your programs result in equivalent or better emissions reductions are too

burdensome. During the succeeding 2 years, we held numerous discussions with representatives of S/L air pollution control program officials to better understand their views and to develop options for addressing their concerns while still assuring that the requirements of the Act are met. After developing some approaches for responding to S/L air pollution control program officials' concerns, we involved a wider group of stakeholders, e.g., industry and public interest groups, to alert them of our plans and to ask for their input. For example, we held meetings with the Toxics/Permitting/ New Source Review Subcommittee of the Clean Air Act Advisory Committee in Washington, DC, with stakeholders in Los Angeles, California on December 5 and 6, 1996, and with stakeholders in Washington, DC on February 26, 1997 and July 9 and 10, 1997 to gather their input. We also undertook a study with CARB and SCAQMD to analyze emission reductions of their rules compared with the otherwise applicable section 112 standards.

V. How Do the Delegation Options Currently in Subpart E Work?

A. Four Ways To Obtain Delegation Under the Current Subpart E

The following discussion explains the delegation options currently available to you under the existing subpart E regulations. Sections VII. through X. of the preamble, below, explain how we are proposing to modify and expand these delegation options to give you more choices in how you may seek delegation for one or more section 112 emissions standards or requirements.

Subpart E as currently written contains four ways for you to obtain delegation. You may use any one or any combination of these options in your request for approval of your rules, authorities, or programs. (If you are accepting delegation of all Federal section 112 rules without changes, streamlined delegation mechanisms are available. See the original subpart E proposal preamble, 58 FR 29298, May 19, 1993, and the direct final amendments in 61 FR 36295, July 10, 1996.) Under each of these delegation options, you must demonstrate that each of your rules, standards, or requirements (as appropriate) for an affected source is no less stringent than the Federal rule, emissions standard, or requirement that would otherwise apply to that same affected source.

The four ways to obtain delegation are listed.

1. *Unchanged Federal Standards*—''Straight'' delegation to implement an unchanged Federal standard or requirement. Under this process, you may receive delegation for Federal standards and requirements that are unchanged from the promulgated requirements, as well as delegation of authority for unchanged rules and standards that we will issue in the future. These provisions are addressed in § 63.91 and in various guidance memoranda and documents, including ''Interim Enabling Guidance for the Implementation of 40 CFR Part 63, Subpart E'' (EPA–453/R–93–040, November 1993).

2. *Rule Adjustment*—Delegation to implement a Federal standard through approval of your rule (or rules) that adjusts a Federal rule in minor ways that are already listed in subpart E, § 63.92. Each adjustment taken individually must be no less stringent than the corresponding requirement in our standard. If your rule meets the criteria listed in § 63.92, you can receive approval to replace our rule with yours very quickly.

3. *Authority Substitution*—Delegation to implement a Federal standard through approval of your rule (or rules, or other authorities) that adjusts a Federal rule in significant ways that are not predefined in subpart E and are no less stringent. Taken as a whole, the adjustments must result in rules (or other authorities) that are equivalent to, or no less stringent than, the Federal standard in terms of the emissions reductions that they require. These provisions are addressed in § 63.93.

4. *Program Approval*—Delegation to implement some or all Federal emissions standards through development of terms and conditions in 40 CFR title V operating permits, rather than through approval of your substantive rules. First, through an ''up-front'' approval, we ratify your commitments to develop appropriate permit terms and conditions; later, we review the proposed permits for sources affected by the NESHAP. Through the title V permitting process you may change requirements in the Federal emissions standards, provided that the results of each change are equivalent to (i.e., unequivocally no less stringent than) the corresponding Federal requirements and you demonstrate the equivalency of your alternative requirements by presenting the proposed permit terms and conditions in the ''form'' of the Federal standard. By ''form'' of the Federal standard, we mean the terms and units of measurement in which the requirements are expressed. These provisions are addressed in § 63.94.

B. General Approval Criteria for Delegations Under the Current Subpart E

To obtain delegation under any of these approval processes, you must demonstrate that you have met certain basic approval criteria that are listed in § 63.91 as well as any additional process-specific approval criteria that are included in the sections that address the delegation mechanisms that you choose to pursue. To obtain approval for your rule or program, § 63.91 requires you to demonstrate to us that you have adequate legal authority and resources to implement and enforce your rule or program upon approval. You must also demonstrate that your rule or program assures that all sources within your jurisdiction will comply with each applicable section 112 rule. In addition, you must provide an expeditious implementation schedule, a plan that assures expeditious compliance by all sources subject to the rule or program, and a copy of each of your statutes, regulations, and other requirements that contain the appropriate provisions granting authority to implement and enforce your rule or program upon approval. In general, title V program approval is sufficient to demonstrate that you have satisfied subpart E's general approval criteria in § 63.91, at least for sources permitted under your title V program.

C. Specific Approval Criteria and Administrative Process Requirements for Delegations Under the Current Subpart E

1. § 63.91 ''Straight'' Delegation

Under the ''straight'' delegation option in § 63.91, you may implement Federal section 112 requirements without changes. You may use this option when you want to accept delegation of an existing or a future Federal section 112 standard as promulgated. The approval process under § 63.91 consists of notice and comment rulemaking in the **Federal Register**. Upon approval of your request for delegation of Federal section 112 rules as promulgated (there are some variations for section 112(r) accidental release programs), we would publish the approval in the **Federal Register** and incorporate it, directly or by reference, in the appropriate subpart of part 63. In addition, you can establish a mechanism for future delegation of section 112 standards as promulgated (e.g., automatic or adoption by reference) that is suitable for your State's method of adopting regulations. Future delegations of promulgated section 112 rules would not have to go

through an additional **Federal Register** public notice and comment. This mechanism can be similar to the process established under EPA's 1983 guidance in the ''Good Practice Manual for New Source Performance Standards (NSPS) and NESHAP.''

Alternatively, you could choose to submit separate § 63.91 requests for delegation of each specific 112 requirement. If no adverse comments are expected, we can do direct final rulemaking to streamline the delegation of these section 112 requirements. Under this option, the **Federal Register** notice would state something like ''* * * unless adverse comments are received, this action will be considered final in 21 days.''

For additional detail on how this and the other current subpart E delegation options work, see ''Interim Enabling Guidance for the Implementation of 40 CFR Part 63, Subpart E'' (EPA–453/R–93–040, November 1993).

2. § 63.92 Rule Adjustment

Under the rule adjustment option in § 63.92, we can approve one (or more) of your rules that is structurally very similar to, and is clearly at least as stringent as, the Federal rule for which you want to substitute your rule(s). Under this option, you may only make an adjustment to the Federal rule that results in emissions limits and other requirements that are clearly no less stringent, on an affected source basis, than the Federal rule. There can be no ambiguity regarding the stringency of any of the proposed adjustments. Section 63.92 includes a list of rule adjustments that may be approved under this option—for example, lowering a required emissions rate or subjecting additional emissions points within a source category to control requirements. We consider all of these adjustments to result in requirements that are more stringent than the corresponding Federal requirements. In addition, your rule must have undergone public notice and provided an opportunity for public comment in your jurisdiction before you submit it to us for approval. If we find that the necessary criteria are met, we would approve your rule with adjustments, and it becomes federally enforceable in lieu of the otherwise applicable section 112 rule. Upon approval, your rule would be published in the **Federal Register** and incorporated directly or by reference into part 63, without additional notice and opportunity for comment.

3. § 63.93 Substitution of Authorities

Under § 63.93, substitution of authorities (which is commonly referred to as the rule substitution option), we can approve substitution of one (or more) of your rules or requirements for a Federal rule, where your rule is structurally different from the corresponding Federal rule. Under this section, we also may approve a rule that is different from the Federal rule in ways that do not qualify for approval under § 63.92—that is, in ways that are not ''unambiguously no less stringent.'' This situation might arise when you submit a rule that was written independently of the Federal rule or when, for example, your rule achieves equivalent emissions reductions, but with a combination of levels of control and compliance and enforcement measures not addressed in or by the Federal rule. (Level of control and compliance and enforcement measures are terms that are defined in § 63.90.) Any rules or other requirements that you submit under this section must be enforceable under your State law.

Under the existing subpart E rule language, authorities that you may submit for approval under this section include the following:

(1) S/L rules or other requirements enforceable under State law; or

(2) In the case of alternative work practice standards, specific title V or part 71 permit terms and conditions for the source or set of sources in the source category for which you are requesting approval under subpart E. The permit terms and conditions must address control requirements as well as compliance and enforcement measures.

Under § 63.93, you must make a detailed demonstration that your rule (or other authorities) would achieve equal or greater emissions reductions (or other measure of control stringency where appropriate) for each affected source regulated by the Federal section 112 rule. Upon receipt of a complete request for approval of a substituted rule (or other authorities), we would conduct a rulemaking to request public comments on the proposed substitution. If we find that your demonstration is satisfactory and the public comments do not dissuade us, we would approve your rule, publish it in the **Federal Register**, and incorporate it directly or by reference into part 63. Your approved rule and/or requirements would be federally enforceable and they would replace the otherwise applicable Federal rule in your jurisdiction for the affected sources.

The approval criteria in § 63.93(b)(2) require that, in any request for approval under this section, you provide detailed documentation that your authorities contain or demonstrate:

(1) Applicability criteria that are no less stringent than those in the respective Federal rule. Applicability criteria is also a term that is defined in § 63.90;

(2) Levels of control and compliance and enforcement measures that would achieve emissions reductions from each affected source that are no less stringent than would result from the otherwise applicable Federal standard;

(3) A compliance schedule that assures that each affected source is in compliance no later than would be required by the otherwise applicable Federal rule; and

(4) Additional criteria specified in § 63.93(b)(4) that are not repeated here.

To obtain approval under § 63.93, you must demonstrate that you have satisfied the approval criteria in § 63.93(b) in addition to the approval criteria in § 63.91(b). As we mentioned earlier, you may usually demonstrate that you have satisfied § 63.91(b) if you have an approved title V or part 71 operating permits program. In addition, once you have demonstrated that you have satisfied the § 63.91(b) criteria under a § 63.93 approval action, you generally would not have to repeat the § 63.91(b) demonstration when you submit additional rules for approval in the future, provided that your approved resources, authorities, and other program elements are still adequate to implement and enforce the rules for which you are seeking delegation, and provided that you are not seeking delegation for rules that affect sources that your original program approval did not address (e.g., area sources). Another example of a situation in which you may need to resubmit § 63.91(b) approval elements is when you submit for approval an alternative compliance and enforcement strategy that involves a more resource-intensive inspection program than the one previously approved.

4. § 63.94 Program Approval

Under the current program approval option in § 63.94, we may approve your program so that you can substitute alternative requirements for one, some, or all section 112 emissions standards through the title V or permitting process. Currently, this option is available only for sources that will be permitted under title V.

For approval to implement and enforce your program in place of the otherwise applicable Federal section 112 emissions standards, you must

make a number of legally binding commitments:

(1) First, you must commit to regulating every source that would have been regulated by the Federal section 112 emissions standards for which your program is intended to substitute;

(2) Second, you must provide assurance that the level of control and compliance and enforcement measures in each 40 CFR title V permit you issue for these sources is at least as stringent as those that would have resulted from the otherwise applicable Federal emissions standards;

(3) Finally, you must commit to expressing the 40 CFR title V operating permits conditions in the ''form'' of the otherwise applicable Federal standard. This means that you must commit to translating your standards from the ''form'' you have used in your rules to the Federal ''form'' so that operating permits conditions are expressed in the same terms and units of measure and include the same monitoring and test procedures as in the Federal rule or federally approved alternatives. This means that you must use monitoring and testing methods which we have approved for application under the Federal rule.

To approve these commitments and identify the list of sources or source categories for which you intend to use this option, we would do a notice and comment rulemaking in the **Federal Register**. We refer to this rulemaking as the ''up-front'' approval. Our approval of alternative requirements for specific sources would take place during the title V permit issuance process. Thus, beyond the ''up-front'' approval of your commitments and other legal authorities, under this option we do not conduct rulemaking to approve your alternative, source-specific requirements.

This mechanism, including the ''form'' of the standard approval criterion in § 63.94(b)(2)(D), was intended to provide us with an opportunity for expedited review of your alternative requirements in the form of title V permit terms and conditions during the permit issuance process, instead of requiring us to examine and approve source category rules through the authority (rule) substitution option in § 63.93. The title V permit issuance process includes opportunities for public and EPA review, and for EPA objection, of the proposed alternative S/L requirements; therefore, it can serve as the approval mechanism in lieu of Federal rulemaking under this option. In addition, the permit itself acts as the Federal enforcement mechanism under this option. Upon our approval of the proposed permit, the alternative requirements become federally enforceable and replace the otherwise applicable Federal section 112 requirements for that particular standard (or standards) for that particular source.

The program substitution option as currently written allows you to substitute an entire program of alternative air toxics rules for all or some of the Federal section 112 rules. This type of situation might arise if you have a mature air toxics program with many regulations affecting source categories regulated by Federal section 112 standards. If we approve your program under this option, you can implement and enforce alternative NESHAP requirements for specific emissions standards that are identified in the ''up-front'' program approval. These emissions standards and/or requirements may have been established under sections 112(d), 112(f), 112(h), or other section 112 provisions.

D. Federal Enforceability of Approved Requirements

Our promulgated section 112 standard is the applicable and federally enforceable standard until we approve your rule or program to take its place following the procedures and criteria in subpart E. Your rule or program requirements become the applicable and federally enforceable standard starting on the date of approval of your rule, program, or other requirement (or in the case of § 63.94 program approval, starting on the date of permit issuance). Under subpart E, § 63.91(a)(6), the date of approval is the date of publication in the **Federal Register**. After the approval date, our promulgated standard is no longer applicable or enforceable for the sources in your jurisdiction.

Although you become the primary implementation and enforcement authority when you accept delegation for a section 112 emissions standard, we continue to have concurrent authority to enforce the standard which, depending on the delegation mechanism you used, may be either your approved rule or the unchanged Federal standard. In other words, after we approve your rule or program, we still have the authority to enforce the complete emissions standard, including any ''alternative'' requirements arising from your rule or program. This authority is spelled out in section 112(l)(7) of the Act and § 63.90 and § 63.97 of the proposed rule. Nothing in these amendments changes our interpretation of section 112(l)(7), or how it is implemented through subpart E.

E. Purpose of Up-Front Approval for All Subpart E Delegation Options

No matter which subpart E delegation option(s) you pursue, you must demonstrate that you have satisfied the general delegation/approval criteria contained in § 63.91(b). In addition, under the current rule, to obtain delegation/approval under a particular option in § 63.92, § 63.93, § 63.94, or § 63.95, you must demonstrate that you have satisfied the additional approval criteria specified in the relevant section.

The rulemaking we conduct under each subpart E delegation option to codify our finding that you have satisfied the up-front approval criteria serves several critical functions under section 112(l). First, the process of approving the up-front portion of your program assures that you have met the delegation criteria in section 112(l)(5) (as codified in § 63.91(b)), that is, that you have demonstrated adequate authority and resources, an expeditious implementation schedule, an adequate enforcement strategy, and that your program is likely to satisfy the objectives of the Act. (To the extent that these have already been satisfied through a title V program approval, you need not resubmit information demonstrating that you meet the § 63.91(b) criteria. As we explain later, we believe that title V program approval often is sufficient to demonstrate that you have met the § 63.91(b) criteria.)

Second, our section 112(l) approval of your program provides the legal foundation by which section 112 requirements may be replaced by your alternative requirements such that your requirements become the federally enforceable requirements in lieu of the applicable Federal requirements. By acting on your program as a whole, we are satisfying certain prerequisites for removing the Federal requirements from the list of applicable requirements to which sources are subject for enforcement purposes (and that must be accounted for in sources' title V permits). The up-front approval component under the subpart E approval processes is necessary for you to apply your alternative requirements to section 112-affected sources and have those requirements be considered federally enforceable.

Third, the up-front approval step provides for an orderly way of identifying which authorities have been delegated to you in relation to specific Federal emissions standards or requirements. Delineation is necessary for us, the public, and the regulated community to ascertain readily what requirements apply to each affected

source. Without this process, there is no way to distinguish legally and practicably which emissions standards or requirements apply to each affected source and which agency has primary implementation and enforcement authority for each affected source. (It is particularly important to clarify which agency has primary enforcement authority for Federal requirements as they apply to particular sources before those requirements are incorporated into sources' title V permits.) This is why we require you to specifically request in your submission for approval the Federal section 112 authorities for which you are seeking delegation. It would be assumed that all other existing (i.e., promulgated) or future Federal requirements not cited are not delegated to you.

If, in the future, you would like to expand the coverage of your approved program to include additional Federal requirements, you must repeat the up-front approval step to identify those requirements, the affected source categories, and any additional information that we need to approve by rulemaking to allow you to implement and enforce your alternative requirements for those categories. You would also be required to certify that nothing in your program has changed in any way that affects your ability to meet the § 63.91(b) approval criteria.

This is not to say, however, that you must resubmit information that you have already submitted and had approved under title V. Previously, in the subpart E promulgation preamble (see 58 FR 62271–72), we stated that ''the information which must be submitted by a State under part 70 encompasses the information required under section 112(l)(5) for approval of State programs that seek only to implement and enforce Federal standards exactly as promulgated,'' and ''for part 70 sources, part 70 approval also constitutes approval under section 112(l)(5) of the State's programs for delegation of section 112 standards that are unchanged from Federal standards as promulgated.'' This means that, for delegation requests under the existing subpart E regulations where the § 63.91(b) approval criteria are the only criteria that you must satisfy, i.e., for ''straight'' delegation situations, you can demonstrate that you have satisfied the § 63.91(b) criteria by demonstrating title V program approval (for the sources for which you are accepting delegation that are covered by your title V program). In the preamble to the existing subpart E rule, we did not make clear that, under the existing subpart E regulations, title V program approval could be considered sufficient to demonstrate that you have satisfied the section 63.91(b) criteria for delegation requests other than ''straight'' delegations.

F. EPA Can Withdraw Approval If a S/L Is Inadequately Implementing or Enforcing Its Approved Rule or Program

Section 63.96 in subpart E addresses what happens if we find that you are not implementing or enforcing your approved rule or program according to the criteria you agreed to when you obtained delegation. Section 63.96 lays out procedures and criteria that address program corrections and program withdrawals. For example, at any time after we approve your rule or program we may ask you to provide us with information that shows how you are implementing and enforcing the rule or program. If we have reason to believe that you are not adequately implementing or enforcing your approved rule or program (or that the approved rule or program is not as stringent as the otherwise applicable Federal rule, emissions standard, or requirements, or that you no longer have adequate authorities and resources to implement and enforce), we would inform you in writing of our findings and the basis for them. You then have an opportunity to correct the deficiencies and to inform us of the corrective actions you have undertaken and completed. If we find that your actions are not adequate to correct the deficiencies, we would notify you that we intend to withdraw approval of your previously approved rule or program (or part of it). The withdrawal process includes opportunities for a public hearing and a public comment period.

Based on public comments received, and your reaction to them, we may notify you of changes or actions that we think are needed to correct your rule or program deficiencies. If you do not correct these deficiencies within 90 days, we would withdraw approval of your federally enforceable rule or program. Upon withdrawal, your rule is no longer federally enforceable and the Federal rule that it had replaced again becomes the federally enforceable set of applicable requirements for the subject sources. With the withdrawal notice, we would publish an expeditious schedule for the sources subject to your previously approved rule or program to come into compliance with the applicable Federal requirements. You would need to revise the title V operating permits for any sources that were subject to your previously approved rule or program.

Section 63.96 also provides that you may submit a new rule or program (or portion) for approval after we have withdrawn approval of your rule or program (or portion). You may also voluntarily withdraw from an approved rule or program (or portion) by notifying us and all subject sources and by providing notice and opportunity for public comment within your jurisdiction. If you voluntarily withdraw from approval, we would publish an expeditious timetable for sources to come into compliance with the applicable Federal requirements and you would revise their title V operating permits to reflect the new requirements.

VI. What Concerns Have S/L's Raised Regarding the Current Subpart E Delegation Options and What Actions Has EPA Taken To Address These Concerns?

A. S/L Issues With Subpart E

On August 14, 1995, S/L air pollution control program officials presented us with a list of issues and implementation difficulties that they associate with subpart E's requirements. This list was compiled by S/L representatives based on their actual experiences with subpart E and on anticipated difficulties with forthcoming submissions for approval. As we understand their concerns, some of their major issues are that subpart E appears to require a ''line-by-line'' equivalency demonstration between your requirements and ours, and that you must present your alternative requirements in the ''form'' of the Federal standard. ''Form'' of the standard refers to the terms, such as units of measure, in which emissions limits and compliance and enforcement measures are expressed. (For example, if a certain Federal emissions standard requires an emissions limit of 5 pounds per hour of a HAP from a particular piece of equipment, you would have to express an emissions limit resulting from your programs' requirements in the same units, i.e., pounds per hour, and the actual limit would have to be 5 or fewer pounds per hour in order to be no less stringent than the Federal standard.)

We think these concerns arise from language in § 63.94 that requires separate equivalency demonstrations for emissions limits, compliance and enforcement measures (MRR), and compliance dates. These provisions were included because we believed it would simplify and speed our and the public's analysis that your program's alternative requirements achieve the same or better results than our rules or programs; without these provisions, we believe we would not have the resources to perform this analysis during our 45-

day review period for each permit. Our understanding is that they believe these provisions limit your flexibility to substitute your requirements for the Federal requirements. They asked us to remove the ''form'' of the standard and line-by-line equivalency requirements from subpart E. This is the key issue we addressed through these regulatory amendments and clarifications to subpart E.

Another one of their concerns with subpart E as it is currently structured pertains to the length of the approval process for a rule substitution under § 63.93. Section 63.93 allows us to take up to 180 days to review and act on your submittal, consistent with section 112(l)(5) of the Act, which allows us 180 days to approve or disapprove a ''program.'' They expressed concern that the 180-day review period may cause delays for the regulated community, and they requested that we explore ways to expedite the approval process.

They also expressed concern that the program approval option in § 63.94 does not include a mechanism for you to accept delegation of the Federal requirements for section 112 area sources that are not required to obtain title V operating permits. You asked us to revise subpart E so that a mechanism is available to delegate changed Federal standards for both title V and non-title V sources.

They also asked us to clarify how you may substitute alternative work practice standards (WPS) for federally promulgated WPS under section 112(l). One of their concerns relates to the equivalency criteria for ''nonquantifiable WPS,'' that is, those WPS for which the expected emissions reductions or specific performance requirements cannot be quantified.

They reiterated their concern about the potential for dual regulation if you are unable to demonstrate equivalency and obtain approval to implement and enforce your rules or programs in place of ours. As we mentioned earlier, dual regulation describes the situation where sources must comply simultaneously with overlapping, redundant, inconsistent, or incompatible S/L and Federal requirements. While we do not think this situation will occur very frequently, we agree that it should be avoided wherever possible.

On October 30, 1997, the California Air Resources Board (CARB) presented us with detailed comments on an initial draft of these proposed rule revisions. In general, they suggested expanding the universe of acceptable regulatory vehicles that you could use to substitute for Federal standards. Our detailed response, including clarification of what regulatory vehicles may and may not be used under what circumstances, is contained in section VI.B.2. below.

B. What Actions Have EPA Taken To Address S/L's Concerns?

This section describes the rule changes and policy clarifications that we are making, or have already made, in response to your comments and suggestions.

1. Summary of Flexibility Added to Subpart E Prior to These Proposed Amendments

Even before this rulemaking action, we took several steps to address your concerns. As a first step, through a direct final **Federal Register** notice that was published on July 10, 1996 (see 61 FR 36295, ''Approval of State Programs and Delegation of Federal Authorities,'' Direct final rule), we made various changes to the rule language in subpart E. Because there were no adverse comments, the direct final rule became effective on August 19, 1996. That rulemaking effected the following changes:

(1) It deleted a duplicative requirement in § 63.93 that sources report the results of all required monitoring or testing at least every 6 months under an approved S/L rule or program. This requirement was duplicative of reporting requirements already included in individual NESHAP standards and the title V permit program regulations.

(2) It clarified the process for ''straight'' delegation of future NESHAP standards through a single, advance program approval.

(3) It established the regulatory framework under which you can obtain section 112(l) approval for S/L programs that create federally enforceable limits on sources' potential to emit HAP.

(4) It delayed the requirement that you coordinate with the Chemical Safety and Hazard Investigation Board (established by section 112(r)) until the board is convened.

In addition, since August 1995, we issued two policy memoranda to clarify the flexibility that we believe already exists under § 63.93 for making equivalency determinations between S/L and Federal rules. (See, (1) ''Section 112(l) Submittal Equivalency Determination—Recordkeeping Requirements, John S. Seitz, Director, Office of Air Quality Planning and Standards (MD–10) to David Howekamp, Director, Air and Toxics Division, Region IX, June 26, 1995.'' and (2) ''Clarification to the June 26, 1995 Memorandum, 'Section 112(l) Submittal Equivalency Determinations—Recordkeeping Requirements', John S. Seitz, Director, Office of Air Quality Planning and Standards (MD–10), Regional Air Division Directors, November 26, 1996.'' Both memos are located in the docket.) These memoranda clarified our interpretation of the ''holistic'' approval criteria in § 63.93(b)(2) as it is currently written. Essentially, we stated that, in order to demonstrate the equivalency of your substitute rules (or other requirements or authorities) with one of our NESHAP standards, you must demonstrate that your rule would result in equivalent emissions reductions. Provided you can demonstrate that the level of control and MRR of your rule, when taken as a whole, result in equivalent or better overall emissions reductions, and provided that your requirements do not compromise Federal enforceability, the existing subpart E regulations allow us to approve your compliance measures even when they differ from our rules in form and stringency. In other words, line-by-line equivalency with the Federal rule for MRR is not required if your alternative rule as a package is demonstrated to be as stringent as the Federal standard. However, we would not approve a less stringent emission limit with very stringent MRR. Your emission limits must be as stringent as the Federal emission limits. In the November 26, 1996 memorandum, we further clarified that, under a § 63.93 approval, line-by-line equivalency is not required to obtain approval. In addition, we stated our intention that the flexibility discussed in the June 26, 1995 memorandum regarding the record retention period be granted ''when evaluating any alternative compliance measures, including recordkeeping and reporting requirements, provided that Federal enforceability is not diminished in this process.''

2. Summary of Flexibility Added to Subpart E Through These Proposed Amendments

Through this action, we are proposing various regulatory changes to subpart E to provide additional flexibility to you in how you may accept delegation for the Federal section 112 program, including how you are required to establish the equivalency of your alternative requirements. These changes augment the flexibility already provided in our July 10, 1996 rulemaking. In addition to proposing regulatory changes, we are providing new policy guidance that clarifies: (1) Our interpretations of the existing regulations and guidance documents; (2) our expectations regarding the equivalency demonstration process; (3)

our expectations regarding equivalency demonstrations for alternative work practice standards and General Provisions; and (4) the types of situations that each subpart E delegation/approval option is designed to address. That is, we have clarified when we think it is appropriate for you to pursue a delegation request under each option according to the circumstances in your jurisdiction.

Overall, the revised subpart E regulation and accompanying policy guidance provide the following additional flexibility:

(1) more substitution options;

(2) holistic equivalency demonstration (covering both emissions limits and MRR) showing that the S/L rules and requirements, seen as a whole, are equivalent to the Federal MACT standards, rather than a line-by-line equivalency determination and ''form of the standard'' requirement;

(3) same equivalency demonstration test for the rule substitution, equivalency by permit (EBP), and SPA options (which are discussed at length in the next section);

(4) expedited processes for approving alternative section 112 requirements under the new EBP and SPA processes;

(5) mechanisms for approving and implementing alternative section 112 requirements for area sources;

(6) increased options in regulatory vehicles for alternatives (which are discussed later in this section);

(7) approval of some kinds of alternative work practice standards without having to quantify their effect on emissions; and

(8) approval of alternative General Provisions (as found in 40 CFR part 63, subpart A) based on a tiered classification scheme that allows for different approval criteria depending on the nature of the General Provisions requirement.

We have also added an option to this rule to partially approve S/L rules or programs. We believe that if the majority of your rule or program submitted for approval under section 112(l) meets the subpart E criteria, then you should get approval of that portion of the rule or program that meets the requirements. This option provides an additional means to minimize the dual regulation effect that the original subpart E rulemaking was designed to address. Therefore, a program that you submit under this subsection may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements, but may not include authority to set standards less stringent than those promulgated by the EPA.

In their current form, subpart E provisions limit us to a binary choice of either complete approval or complete disapproval. In other words, if you make an adequate equivalency demonstration for your S/L rule in its entirety, we would grant full approval of your rule or program to be used in place of the corresponding Federal requirement. However, if any part of the demonstration is found lacking, we would disapprove the submittal in its entirety.

We believe that partial approval of your air toxics rules and programs and accidental release prevention programs (ARPP) is reasonable, is authorized by statute, and is a viable policy option. Section 112(l)(1) of the Act specifically allows for either ''partial or complete delegation'' of EPA's authorities and responsibilities. In addition, this partial approval option will facilitate implementation of section 112(l) in circumstances where it would make good sense, as discussed further below.

Under this approval option, you would submit your S/L rule or program for our approval. If we find that a separable portion of your rule fails to meet any of the criteria of sections 63.92, 63.93, 63.94, 63.95, or 63.97, then we would not approve that portion of your rule or program. We are proposing to define ''separable portion'' as a section(s) of a rule or a portion(s) of a program which can be acted upon independently without affecting the overall integrity of the rule or program as a whole. We could still approve the remaining portion, provided that we determine that such partial approval would not unduly confuse the regulated sources or public nor confuse the delegation process itself. The Federal rule would continue to apply in place of the portion of your rule that was disapproved.

For example, we would consider the scenario where you only wished to implement and enforce NESHAP standard(s) adopted by reference into S/L law, but only as these standards apply to title V sources, as a separable portion that we could delegate to you.

To add a twist to the example in above, if we determine that the criminal enforcement provisions in your rule are not applicable to covered area sources, then we would approve the rest of your submittal and deny delegation of the rule as to criminal enforcement for area sources.

Again, in this case, all criminal enforcement of area sources would be our responsibility, and you would refer all such matters to the appropriate Regional Office for investigation and resolution. You should not have to resubmit the entire proposal with reference to the criminal enforcement for area sources removed, merely so that we could approve the whole package. We would also specify which portions of the S/L rule or program are not approvable. This is another case where it is much more efficient for both you and us for us to allow for partial approval.

Another situation where partial approval could be used is where your rule or program covers a subcategory or subcategories of the source affected by a Federal standards, but not necessarily all sources covered by that standard. These must be logical and compelling subcategories (for example, hard but not decorative chrome plating, or storage tanks of a particular size at several different types of facilities).

There are cases where we believe that partial approval is inappropriate. An example is the case where the test methods in the alternative rule are inadequate. Since the test methods are linked to, and are thus an integral part of, the specific level of control of a standard, we cannot deem the test methods a ''separable portion.'' Consequently, we could not approve part of a submittal that specifies the level of control and disapprove the part that specifies the test methods associated with that level of control.

If you submit a rule or program with deficient MRR, then your rule or program could be partially disapproved as to these areas of deficiency. At some point, however, sources and governmental agencies may become confused if there are too many separate provisions, some of which are delegated and others not. If we determine that there are too many areas of deficiency or if separating the responsibilities between the Federal and State Government would be too cumbersome, then we may disapprove your whole rule or program and ask that it be resubmitted in a form that is closer to complete approval with only a few areas that must be disapproved. We are under no duty to approve rules or programs in part. We reserve the right to disapprove your rules and programs entirely, if in our judgment, partial approval is not workable.

If you, in preconsultation with us, are aware of the deficiencies in your submittal, you can merely leave the deficient parts out. In this case, your submittal would include reference to any deficiencies. As a practical matter, all parties will not be aware of all deficiency issues that may arise in the course of a review. That is why partial

approval authority allows us to selectively approve the satisfactory portions of the submittal and is therefore, a more efficient mechanism. We are soliciting comments on appropriate uses of the partial approval option.

We have received recent comments from CARB, who suggested expanding the universe of acceptable regulatory vehicles that you could use to substitute for Federal standards when regulatory adjustments therein are fairly straightforward. The following are our positions on the use of each of those specific suggestions:

(1) *Proposed rules:* Proposed rules cannot be used to substitute for Federal standards, simply because proposed rules are subject to change, and there is no process for us to review those changes after we have approved substitution of your proposed rule.

(2) *Permits:* (a) *Title V Permit Conditions:* You may use title V permit conditions to substitute for a Federal standard under any of the options outlined in this rule, except for rule adjustment (§ 63.92). However, as we explain in section 8.C. below, you may only use a maximum of five title V permits to substitute for each Federal maximum achievable control technology (MACT) standard, unless you choose to develop General permits under the SPA option.

(b) *General Permit Conditions:* You may use General permit conditions under title V for any number of sources under the SPA option outlined in § 63.97 of this rule. The great advantage of using General permit conditions is that we would approve specific permit terms and conditions up-front, through the subpart E approval process, and you would not then need to go through rulemaking at the S/L level. Of course, the General Permit must establish specific terms and conditions for all emissions points and compliance measures covered by the Federal MACT standard and any other applicable requirements.

(c) *Permit Templates:* As we understand it, a permit template is different from a general permit in that the permit template would contain an outline for what each permit should look like, but would not contain specific permit terms and conditions for each emissions point. Therefore we believe that you could use permit templates under the SPA option, provided that we approve both the permit template and the individual permits, in order to make the individual permits federally enforceable. Because we would need to approve individual permits, we believe, consistent with our equivalency by permit approach, that permit templates should only be used for five or fewer sources in a source category. However, we request comment on how we could allow use of permit templates for more sources in a source category.

(d) *Previously-Issued S/L Permit Conditions:* As with title V permits, you may substitute previously-issued S/L permit conditions for a Federal standard for five or fewer sources in a source category. These previously-issued permits do not have to be initially federally enforceable to be submitted for approval, because our approval and subsequent rulemaking will confer Federal enforceability on them. Either the SPA option (§ 63.97) or rule substitution option (§ 63.93) may be used to approve these permits, but not the rule adjustment option (§ 63.92). The rule adjustment option only pertains to minor pre-approved changes to Federal standards through S/L rulemaking. In addition, if a previously-issued S/L permit is used to substitute for a Federal standard, and is later modified, that modification must be subject to both public and EPA review.

(e) *Enforcement Orders:* A S/L level enforcement order, such as a board order in California, could be allowed, only so long as the enforcement order contains enough specific detail to meet our requirements for demonstrating equivalency (for example, the enforcement order should contain a level of detail comparable to the detail contained in a title V permit). In addition, you must provide legal assurance that the enforcement order will automatically be translated to a permit after it expires. We are seeking comments on the use of enforcement orders as a mechanism to demonstrate equivalency with federal standards.

(3) *Subcategorization:* In CARB's comments, they suggest that different approval options could be used for different subcategories of sources within a source category regulated by a Federal MACT standard. We agree, within certain limits. You must create logical and compelling subcategories of sources that are clear and simple to delineate and understand, such as area versus major sources, new versus existing sources, or different source types within a Federal source category or NESHAP (for example, hard versus decorative chromium electroplating). In addition, our proposed revisions to § 63.91 allow for partial approval of S/L rules (see discussion in section VII.C.2. below), which we would envision as being similar to subcategorization.

(4) *Direct Final Rulemaking:* You have requested that we use direct final rulemaking, rather than the usual procedures of separate proposed and final rules, in approving substitute S/L authorities. You say using direct final rulemaking would greatly expedite the approval process. Direct final rulemakings are generally only used when adverse comments are not expected. That determination must be made on a rule-by-rule basis, so a generic provision in subpart E that requires the use of direct final rulemakings in a wide variety of circumstances would be inappropriate. However, on a rule-by-rule basis, we will continue to evaluate the appropriateness of direct final rulemaking.

(5) *Title V Approval in lieu of Rulemaking:* You have requested that we allow use of the title V permit approval process as a way of avoiding up-front S/L rulemaking for all options under subpart E. We believe we can only provide this mechanism under § 63.94 (the equivalency by permit option). A proposed title V permit is approved if EPA does not act on it within 45 days; therefore the possibility exists that a S/L could substitute its requirements for a Federal standard without adequate EPA review. The equivalency by permit process is limited to five or fewer sources, which provides greater assurance to us that we will be able to review all permit changes within 45 days.

3. Sacramento Protocol

One issue you have raised is the length of time and the amount of effort required to demonstrate equivalency with Federal requirements. In July 1997, we entered into a delegation and program integration initiative, called the Sacramento Protocol, with the CARB and the South Coast Air Quality Management District (SCAQMD) to determine whether identified State and District air pollution control requirements are technically equivalent to the requirements found in five Federal NESHAPs, and whether the demonstration of equivalency could be developed quickly. The five Federal NESHAPs selected for the initiative were:

Chromium Electroplating
Secondary Lead Smelting
Aerospace Manufacturing
Gasoline Distribution
Wood Furniture Manufacturing

The Sacramento Protocol team developed a process to evaluate the requirements of the five NESHAP. The first step in the process was to prepare tables that compared the SCAQMD/CARB requirements and the NESHAP requirements. After review of the tables,

EPA identified questions and potential issues for which we needed more information. We went to Southern California to observe inspections of sources in these categories, which allowed the team members to evaluate, ''in the field,'' the differences between the S/L and Federal requirements. The inspections also provided us an opportunity to evaluate SCAQMD permits and their associated conditions, the permit evaluation process, inspection staff capability, the inspection process, source compliance status, and local rule structure.

As a part of the inspections, the team expanded and added further detail to the regulation comparison tables. After completing the comparisons between the S/L requirements and the NESHAP requirements, the team made one of four conclusions regarding each of the NESHAP requirements in relation to the corresponding S/L requirements. First, the team found many of the CARB and SCAQMD requirements to be directly equivalent to the NESHAP requirements. Second, a similar number of CARB and SCAQMD requirements could be made equivalent to the NESHAP requirements by making changes or revisions to the applicable permits or rules. Third, for some NESHAP requirements, the end result of the comparison appeared equivalent, but there remained some uncertainty about the determination. Consequently, the team recommended specific conditions to ensure equivalency and, with these conditions, viewed the requirements as technically equivalent. However, in recognition that the equivalency decisions reached in this effort may set a precedent for future decisions, the team believed that these issues should be referred to CARB and EPA management for final resolution. Fourth, for some requirements the team ''agreed to disagree.'' The disagreements centered on differences of opinion about the equivalency of a substitute requirement or on the necessity of a particular NESHAP requirement.

Most of this work, including completing the equivalency demonstration, was completed within 2 months. We believe the Sacramento Protocol initiative clearly shows that equivalency demonstrations can be evaluated in a timely fashion if they contain all the elements needed in a regulation comparison table. Other ways to streamline this process include keeping the EPA Regional Offices apprised of your intentions, and contacting the EPA Regional Offices prior to the submittal of an equivalency demonstration when you know that there may be significant issues with your submittal.

The Sacramento Protocol initiative was also beneficial in providing us with experience in evaluating S/L equivalency demonstrations and in teaching us more about how the rule substitution process works. We also believe that we learned where we could provide additional flexibility for alternative requirements. As part of this learning experience, we decided that our position on work practice standards could be modified (see section X.E. below). We also worked with CARB and SCAQMD in determining how rule effectiveness studies and frequent inspection programs could be substituted for some MRR requirements. For more information concerning the Sacramento Protocol, you may obtain a copy of ''The Sacramento Protocol Final Report'' by contacting Mr. Tom Driscoll at the address and telephone number referenced earlier. This report is also on EPA's TTN website, also referenced earlier.

C. Summary of Proposed Regulatory Changes to Subpart E

As we previously discussed, subpart E as currently promulgated provides four ways to receive delegation for section 112 regulations:

(1) § 63.91 delegation of unchanged Federal standards;
(2) § 63.92 rule adjustment;
(3) § 63.93 authorities substitution; and
(4) § 63.94 program substitution.

In this proposed rulemaking we are proposing that there be five ways to receive delegation:

(1) § 63.91 delegation of unchanged Federal standards;
(2) § 63.92 rule adjustment;
(3) § 63.93 substitution of authorities;
(4) § 63.94 equivalency by permit (EBP); and
(5) § 63.97 program approval.

Table 1 compares the current structure of subpart E in terms of the content of each section to the structure we are proposing in these regulatory amendments. The primary changes we are proposing are to replace the current program substitution process in § 63.94 with the new EBP process and to add the new SPA process to § 63.97.[2] One way to think of these amendments is that we divided the former program substitution process into two separate, but related, new approval options: the EBP process, which is similar in effect to the existing program substitution process except that it may be used only for a small number of sources per source category, and the SPA process, which covers a large number of sources and is similar to the rule substitution process. These process options are discussed and compared in detail in sections VIII. and IX. of this preamble. In addition, we are proposing a number of minor changes to other sections to support these more significant regulatory amendments.

1. Proposed Changes to § 63.90

For § 63.90 we are proposing to add and modify a number of subpart E's definitions. We are proposing to revise the definition for ''level of control'' to say, ''Test methods and associated procedures and averaging times are integral to the level of control'' in order to make explicit that test methods and associated procedures and averaging times must be considered in assessing the emissions limitation portion of the level of control and that they are not part of compliance and enforcement measures. We are also proposing to revise the definition of ''compliance and enforcement measures'' to delete reference to test methods and procedures.

[2] Although we would prefer to have all the delegation process options appear in sequential sections of subpart E, we have intentionally skipped over sections 63.95 and 63.96 in order to avoid disrupting existing citations to these sections in other regulatory text and guidance materials. We believe that, on the whole, the approach we are proposing will be less confusing and less burdensome to implement.

TABLE 1.—STRUCTURE OF SUBPART E BEFORE AND AFTER PROPOSED REGULATORY CHANGES

Section No. in 40 CFR part 63, subpart E	Title and content of section in existing regulations	Title and content of section in proposed new regulations
63.90	Program Overview	Program Overview
63.91	Criteria Common to all approval options	Criteria Common to all approval options
63.92	Approval of a S/L rule that adjusts a section 112 rule	Approval of a S/L rule that adjusts a section 112 rule
63.93	Approval of S/L authorities that substitute for a section 112 rule.	Approval of S/L authorities that substitute for a section 112 rule
63.94	Approval of a S/L program that substitutes for section 112 emissions standards.	Approval of S/L permit terms and conditions that substitute for section 112 emissions standards
63.95	Additional approval criteria for Federal accidental release prevention programs.	Additional approval criteria for Federal accidental release prevention programs
63.96	Review and withdrawal of approval	Review and withdrawal of approval
63.97	[Reserved]	Approval of a State program that substitutes for section 112 requirements
63.98	[Reserved]	[Reserved]
63.99	Delegated Federal authorities	Delegated Federal authorities

We are proposing to add a definition for ''alternative requirements'' because this term is used throughout the amendments to subpart E. We are requesting comment on whether this definition is useful and whether it is complete in its current wording. We have also revised the definition for ''program'' to make it more appropriately reflect how this term is used throughout the subpart E regulations as they exist, and as we are proposing to amend them.

We are also proposing to add a definition to that subsection for the term ''partial approval,'' and to amend the existing definition of ''approval'' in § 63.90(a) to make it consistent with the proposed definition of ''partial approval.'' We are seeking comment on these changes. In addition, we are adding new definitions for ''minor * * *,'' ''intermediate * * *,'' and ''major changes to a test method,'' and ''minor * * *,'' ''intermediate * * *,'' and ''major changes to monitoring'' to help explain which General Provisions discretionary authorities may be delegated to S/L's under § 63.91 (see section VI.C.2. below).

Finally, we are proposing to add a new paragraph to § 63.90 to address how tribal governments may apply for delegation pursuant to the Tribal Air Rule in 40 CFR part 49.

2. Proposed Changes to § 63.91

In § 63.91(b), we clarify that you may cite or refer to documents that you are required to submit for an approval under this subpart when these documents are readily accessible to us and to the public. This would save you the trouble of having to submit hard copies of documents that we already have or that we may obtain in other ways, for example, electronically.

We have also added a paragraph to address what S/L's must do to update their section 112(l) approvals when we amend, repeal, or revise previously promulgated Federal section 112 requirements that affect sources. Section 63.91(c)(3) would require that if we revise a MACT standard upon which you have based an equivalency demonstration for a S/L rule, program, or permit, then you must revise that equivalency demonstration within 90 days. We also propose to apply the same review procedures to a revised equivalency demonstration as we would use for an initial submittal under section 112(l). We request comment on these requirements. We also request comment on whether you believe there is a need for us to notify you, at the time when we revise a MACT standard, of the need for you to submit a revised equivalency demonstration.

As discussed above in section VI.B.2, we are providing a mechanism for partial approval of a S/L rule or program. We propose to edit § 63.91(a) and to insert § 63.91(d)(2) to provide for such a partial approval of a S/L's air toxics and ARPP authorities. The EPA is seeking comments on this proposed edit and specifically on the approach described.

Section 63.91(b)(1) currently requires you to provide a written finding that you have the legal authority necessary to implement and enforce your S/L rule and to assure compliance by all sources. At a minimum, you must: (1) have enforcement authorities that meet the requirements of 40 CFR 70.11; (2) have authority to request compliance information; (3) have authority to inspect sources and records; and (4) retain enforcement authority, if you, the S/L, delegate authorities to a local agency, unless the local agency has authorities that meet section 70.11. Section 63.91(b)(6) currently contains similar language that requires you to satisfy criteria (1) and (4) above. We originally included § 63.91(b)(6) to ensure that a S/L did not receive approval for rules or programs if it lacked sufficient enforcement authority.

We now believe, however, that § 63.91(b)(1) ensures the sufficiency of S/L enforcement authorities and that § 63.91(b)(6) is an unnecessary and redundant provision. Consequently, we propose to delete § 63.91(b)(6), and seek comments on the proposed deletion of this duplicative requirement.

Under the Part 63 General Provisions, the EPA Administrator has the authority to approve certain types of alternatives, or to make other decisions under the General Provisions and the subparts. Questions have been raised as to whether you may make the same discretionary decisions when S/L are delegated the General Provisions. Section 63.91, as promulgated in 1993, did not delineate which discretionary authorities are delegated to you when you take ''straight'' delegation of the General Provisions. Therefore § 63.91(e)(1) to (e)(3) of this proposal clarify which discretionary authorities may be delegated to you through ''straight'' delegation of the General Provisions.

These provisions address your authority to make source-specific decisions only, not source-category wide decisions. If you wish to make discretionary decisions on a source-category-wide basis under the General Provisions, then, as with other part 63 requirements, you would need to use one of the other section 112(l) delegation processes to substitute your own rule or program for a Federal rule or rules.

These new provisions provide clarity about those specific General Provisions

authorities that would be nationally significant or would alter the stringency of an underlying standard and thus, would not be delegated to you. We believe that clarifying the delegation policy of the General Provisions' authorities will help promote national consistency.

These new provisions are intended to be generally consistent with previous policies developed for both New Source Performance Standards (NSPS) under part 60, and for changes to State implementation plans (SIP). Past guidance issued for NSPS discretionary changes has permitted delegation to S/L's of all the Administrator's authorities except those that require Federal rulemaking, or those for which Federal oversight is critical to ensuring national consistency in the application of Standards. (However, such delegations generally do not give S/L's the authority to issue interpretations of Federal law that are subsequently binding on the Federal Government). Current SIP policy, as reflected in ''White Paper Number 2 for Improved Implementation of the Title V Operating Permits Program [3],'' permits you to alter SIP requirements so long as the alternative requirements are shown to be equally stringent and are within a pre-approved protocol (and so long as public review is provided and EPA approval is obtained).

The Part 63 General Provisions include 15 specific types of determinations for which the Administrator may make discretionary decisions on a source-specific basis. When the General Provisions are delegated to a S/L agency, such discretion may be appropriately delegated to the S/L agency, provided the stringency of the underlying standard would not be compromised and/or decisions such as an approved change would not be nationally significant.

We have divided the General Provisions discretionary authorities into two groups, based upon the relative significance of each discretionary type of decision. Category I contains those authorities which can be delegated. We believe that the EPA Regional Office does retain the authority to request review of these decisions, although we expect that this authority will be exercised infrequently. Category II contains those authorities which cannot be delegated.

In general, we believe that where possible, authority to make decisions which are not likely to be nationally significant or to alter the stringency of the underlying standard, such as minor changes to test methods, should be delegated to you. (Note, however, that the authority to approve decreases in sampling times and volumes when necessitated by process variables has typically been delegated in conjunction with the minor changes to test methods, but these types of changes are not included within the scope of minor changes defined in § 63.90.) Therefore, minimal EPA involvement is required. Section 63.91(e)(1)(ii) lists the authorities in category I, i.e., those authorities which may be delegated.

Section 63.91(e)(3)(ii) lists the authorities in category II, which includes those decisions which generally may result in a change to the stringency of the underlying standard, which is likely to be nationally significant, or which may require a **Federal Register** notice. These authorities, therefore, will always be retained by the EPA, and may not be delegated to you.

3. Proposed Changes to § 63.92

We have retained the provisions of § 63.92 without significant changes.

4. Proposed Changes to § 63.93

Proposed changes to § 63.93 are discussed in detail in section VII.4. of this preamble. The significant change we are proposing is to delete § 63.93(a)(4)(ii), which specifies certain authorities that may be approved under this section. We believe this change will not affect the usefulness of this section to you.

5. Proposed Changes to § 63.94

Table 2 summarizes the flexibility offered under the new equivalency by permit process compared with the existing program substitution process.

6. Proposed Changes to § 63.95

Proposed changes to § 63.95 are discussed in detail in section XI. of this preamble. The major changes being proposed include revisions needed to make these requirements consistent with the part 68 requirements, which implement the ARPP. We are also proposing to clarify the authority of S/L's to have more stringent standards, including lists with additional chemicals or lower thresholds. Finally, we propose that S/L's may continue to request delegation for a full or partial program, for a defined universe of sources, so long as you accept delegation of the entire section 112(r) program for that defined universe.

7. Proposed Addition to § 63.97

Table 3 summarizes the flexibility offered under the new SPA process compared with the existing program substitution and rule substitution processes.

D. Policy Guidance Provided in the Preamble

This preamble provides policy guidance on the following topics:

TABLE 2.—COMPARISON BETWEEN FLEXIBILITY UNDER EXISTING AND AMENDED SUBPART E FOR EQUIVALENCY BY PERMIT PROCESS

Element of equivalency by permit approval process	Existing rule requires . . .	New rule would allow or require . . .
Equivalency demonstrations for alternative section 112 requirements.	• Permit terms and conditions in the form of the Federal standard (63.94). • Line-by-line equivalency for levels of control and compliance and enforcement measures (63.94).	• Permit terms and conditions not necessarily in the form of the Federal standard. • Holistic equivalency for levels of control and compliance and enforcement measures.
Up-front approval	• Up-front approval on S/L authorities, commitments, and eligible source categories—180 days with rulemaking..	• Up-front approval on S/L authorities and eligible sources. • No S/L rulemaking needed to establish commitments. • Expedited up-front approval process–90 days with rulemaking.

[3] Memorandum from Lydia Wegman, Deputy Director, OAQPS, to Regional Air Division Directors, March 5, 1996.

TABLE 2.—COMPARISON BETWEEN FLEXIBILITY UNDER EXISTING AND AMENDED SUBPART E FOR EQUIVALENCY BY PERMIT PROCESS—Continued

Element of equivalency by permit approval process	Existing rule requires . . .	New rule would allow or require . . .
Approval of alternative requirements.	• That a title V permit be used to substitute S/L requirements for Federal requirements..	• That a title V permit be used to substitute S/L requirements for Federal requirements. • EPA review and approval required for all alternative requirements, before public review of permit—90 days without rulemaking.
	• EPA and public review and comment during the permit issuance process. Affirmative EPA approval not required—45 days.	• EPA and public review and comment during the permit issuance process. Affirmative EPA approval not required—45 days.
Section 112 program applicability ..	• Permit terms to be substituted for emissions standards established under sections 112 (d), (f), or (h) or other section 112 provisions.	• Permit terms to be substituted for section 112 (d), (f), or (h) emissions standards.

TABLE 3.—COMPARISON BETWEEN FLEXIBILITY UNDER EXISTING AND AMENDED SUBPART E FOR STATE PROGRAM APPROVAL PROCESS

Element of state program approval process	Existing rule requires . . .	New rule would allow or require . . .
Equivalency demonstrations for alternative section 112 requirements.	• Permit terms and conditions in the form of the Federal standard (63.94). • Line-by-line equivalency for levels of control and compliance and enforcement measures (63.94).	• Permit terms and conditions not necessarily in the form of the Federal standard. • Holistic equivalency for levels of control and compliance and enforcement measures.
Up-front approval	• Up-front approval on S/L authorities, commitments, and eligible source categories—180 days with rulemaking (63.94).	• Up-front approval on authorities, source categories, generic requirements, implementation mechanisms—90 or 180 days with rulemaking.
Approval of alternative requirements.	• EPA/public review and approval required for all alternative requirements—180 days with rulemaking (63.93). • Substitutions on a source category basis	• EPA/public review and approval required for all alternative requirements—180 days with rulemaking • Substitutions on a source category basis.
Area source mechanisms	• Substitutions for area source requirements by rule (63.93) or title V permit when sources are permitted under title V (63.94).	• Substitutions for area source requirements on a source category basis through S/L enforceable mechanisms other than rules or title V permits. Alternative requirements must be approved by rulemaking—180 days.
Section 112 program applicability ..	• Substitutions for emissions standards established under section 112 (d), (f), or (h) or other section 112 provisions (63.94).	• Substitutions for emissions standards established under section 112 (d), (f), or (h) or other section 112 provisions.

(1) Our interpretations of existing regulations and guidance (e.g., the holistic equivalency demonstration test);

(2) Our expectations regarding your submittal under the equivalency demonstration process;

(3) Our expectations regarding equivalency demonstrations for alternative work practice standards and general provisions;

(4) How the delegation/approval options work and compare with each other, and the S/L situations they are designed to address;

(5) Functions of the up-front approval process in subpart E delegation options; and

(6) Use of title V program approval to demonstrate that § 63.91(b) criteria have been met.

E. Policy Guidance Provided Outside the Preamble

Currently, we are developing guidance which will clarify in much greater detail than the discussions provided in this preamble regarding what we are looking for from you when you submit alternative requirements for an equivalency demonstration. As part of this guidance, we intend to provide a model equivalency demonstration package that contains all the elements that are required in an equivalency demonstration for a rule substitution and examples of how we would evaluate equivalency for specific hypothetical requirements. We are also developing guidance on demonstrating equivalency of WPS that would provide examples of quantifiable and nonquantifiable part 63 WPS standards, what we might approve as alternatives, and our rationale for the approval. Finally, we are preparing General Provisions guidance that expands on the guidance provided in this preamble and explains the criteria for how we would determine equivalency with each part 63 General Provisions requirement. We are seeking comments from you about what other kinds of guidance would be most helpful.

VII. How Do the Revised Delegation Processes Work?

A. § 63.93 Substitution of Authorities

In section VI.C.3. of the preamble, we presented a detailed discussion about the administrative process requirements and equivalency criteria for obtaining delegation/approval under the substitution of authorities process in § 63.93. Because we believe that the approval criteria included in § 63.93 already allow for a ''holistic'' review of substituted rules and authorities, we do not believe that any regulatory changes to these criteria are necessary. Thus, this proposal has not changed the equivalency criteria in this option. Because we are not proposing in this rulemaking to amend any aspects of the approval process or criteria under sections 63.93(a) and (b), the previous

discussion in section VI.C.3. is still relevant.

In the following discussion we clarify and request comment on what types of authorities you may substitute for section 112 rules under § 63.93, and we explain our rationale for proposing to amend rule language that deals with this topic.

Under § 63.93 as written, we can approve one (or more) of your rules that is structurally different from the Federal rule for which you wish to substitute your rule(s), or we may approve a rule that is different from the Federal rule in ways that do not qualify for approval under § 63.92. § 63.93 as written also allows us to approve certain authorities (other than rules) that substitute for a section 112 rule when these differ in form from the Federal section 112 rule. Under the existing rule language in sections 63.93(a)(4)(i) and (a)(4)(ii), authorities that you may submit for approval under this section include:

(1) Rules or other requirements enforceable under S/L law that would substitute for a section 112 rule; or

(2) Specific title V permit terms and conditions for the source or set of sources in the category for which you are requesting approval when (a) the permit terms would substitute for standards promulgated under section 112(h); (b) we have determined that your work practice, design, equipment, or operational requirements are adequate under the provisions of the Federal standard; and (c) you have an approved program under sections 63.94.

We have reevaluated these provisions in light of the other changes we are proposing to the delegation processes under subpart E and we think that certain changes to these provisions may be warranted. First, we are proposing to delete the provisions of § 63.93(a)(4)(ii) (that deal with specific title V permit terms and conditions that would substitute for standards promulgated under section 112(h)) because we believe it is no longer necessary to have a provision in § 63.93 for approval of alternative section 112(h) requirements that differ in form from the Federal standard. Specifically,

(1) section 63.94 as amended would no longer require up-front approval of legally binding S/L commitments, so these commitments should not be a prerequisite for obtaining approval under § 63.93;

(2) Section 63.94 as amended would require the same equivalency test as § 63.93 (i.e., you would no longer be required to submit permit terms and conditions in the form of the Federal standard and make a line-by-line equivalency demonstration), so that § 63.94's equivalency criteria should not be a prerequisite for obtaining approval under § 63.93;

(3) Section 63.94 as amended would require you to specify in your up-front approval each source or source category (with five or fewer sources in a category) for which you will submit alternative requirements for approval in the future (in general [4]), but this requirement is not necessary for obtaining approval under § 63.93; and

(4) Under our revised policy for demonstrating equivalency with WPS, we are no longer requiring that alternative WPS be expressed in the same form as the Federal standard. (See the discussion in section XI.E. of this preamble for a complete discussion of our rationale.)

Under the proposed rule revisions, § 63.93(a)(4) would read as follows: ''Authorities submitted for approval under this section shall include State rules or other requirements enforceable under State law that would substitute for a section 112 rule.''

Second, § 63.93(a)(4)(i) specifies that you may submit for approval under this section rules or other requirements enforceable under S/L law that would substitute for a section 112 rule. We request comments from you and other interested stakeholders to help us understand and clarify what enforceable authorities other than S/L rules may practicably be substituted under this option (including authorities that would substitute for section 112(r) requirements). As a policy matter, we believe it is appropriate to limit our review and approval under § 63.93 to authorities that are applied on a source category-wide basis, rather than to individual sources (except when you only have one source in a source category).[5] In our proposed scheme of amended delegation options, § 63.93's purpose is to allow us to approve your alternative rules on a rule-by-rule basis when you wish to substitute rules for a relatively limited number of source categories (compared with the SPA process). Depending on the comments that we receive, we may delete reference to ''other requirements'' from the description of authorities that may be approved under this section, change § 63.93(a)(4) to read ''Authorities submitted for approval under this section shall include State rules (i.e., rules that are enforceable under State law for categories of sources) that would substitute for a section 112 rule,'' and change the title of § 63.93 to ''Approval of a State rule that substitutes for a section 112 rule.''

We are also clarifying that we believe you can implement alternative compliance and enforcement strategies, on a rule-by-rule basis, within the context of the existing regulations in § 63.93. This approach is discussed in section X.C., ''Using compliance evaluation studies in equivalency demonstrations.''

B. § 63.97 State Program Approval Process

To address some of your concerns with the existing substitution options in subpart E, we developed the SPA process which, in this rulemaking, we are proposing to add to § 63.97. Although § 63.97 numerically follows § 63.94 in which we address the new EBP process, we have chosen to discuss the SPA process before the EBP process to enhance the overall clarity of the next sections of the preamble.

1. Background

In your comments and suggestions to us, you requested that we explore ways to approve your alternative requirements in a more expeditious manner. You also asked us to add more flexibility to the program substitution process so you are not restricted to putting alternative requirements into title V permits. This would allow you to address area sources that are not covered by your title V programs. Finally, you asked us to eliminate the requirements for line-by-line equivalency demonstrations and the ''form'' of the Federal standard in § 63.94 as it is currently structured. This would give you more flexibility in how you can demonstrate that your requirements are at least as stringent as the Federal requirements.

The new SPA process addresses these concerns. Compared with the existing program approval process in § 63.94, the SPA process provides you with additional flexibility by eliminating the ''form'' of the standard and modifying equivalency requirements. Compared with the existing rule substitution process in § 63.93, it has the potential to minimize the time and burden

[4] This is generally the case, except when you submit your draft permit terms and conditions at the same time that you submit your request to use the equivalency by permit process. Regardless of the timing of when you submit your permit terms and conditions under revised § 63.94, the ''up-front approval'' step in this process only covers your demonstration of resources and authorities under title V/§ 63.91(b) and your identification of sources that you will cover under this delegation process.

[5] Also, under § 63.93, each approval action covers both the generic § 63.91(b) approval criteria and the substantive alternative requirements that you will implement and enforce in lieu of the Federal requirements for a specified source category. You cannot obtain approval under § 63.93 unless you submit the enforceable conditions for that source category with your § 63.93 submittal.

associated with approving your alternative requirements, especially in situations where you have a well-developed program with many comparable requirements that apply to sources subject to Federal emissions standards. The SPA process would allow you to obtain approval up-front, and at one time, for generic alternative requirements that you wish to apply to more than one source category (e.g., S/L general provisions, work practice standards, or equipment standards). The SPA process also would allow you to bundle groups of regulations or requirements and submit them at one time for more efficient processing, or you could submit requirements arising from multiple S/L rules to substitute for requirements in a single NESHAP or other Federal section 112 regulation. The SPA process would allow you to substitute your alternative requirements for Federal area source requirements using S/L-enforceable mechanisms other than source category-wide rules. And, finally, the SPA process would allow you to substitute your alternative requirements for Federal section 112 requirements arising from section 112(f), the residual risk program, section 112(k), the urban area source program, section 112(m), the Great Waters program, and others.

2. The Proposed State Program Approval Process

The SPA process, which would be codified in new § 63.97, is intended to provide an additional process option for you to obtain approval of alternative requirements. The proposed SPA process is a two-step process that we believe could expedite our approval of your alternative requirements, provide you with more flexibility to submit your alternative requirements in the future as the Federal regulations are promulgated, and provide a more ''holistic'' approach for determining whether or not an alternative requirement assures compliance with the Federal standard or other requirement. (For a discussion on how we will determine equivalency, see section X.)

Under the proposed SPA process, you could seek approval for a program to be implemented and enforced in lieu of specified existing or future section 112(d), section 112(f), or section 112(h) emissions standards. In addition, you may seek programmatic approval to substitute your alternative requirements for requirements under sections 112(k), 112(m), 112(n), and 112(c)(6), but only after we have promulgated regulations implementing those programs. You may not seek approval under this process to implement and enforce alternative section 112(r) requirements (that address section 112's Risk Management Program); alternative section 112(r) requirements may be submitted under §§ 63.92, 63.93, and 63.95 of subpart E.

The proposed SPA process consists of two steps. In the first step, you submit to us, and we approve your up-front program. Up-front approval involves assuring that you have adequate authorities and resources to implement and enforce your proposed substitute provisions, as well as informing us of which source categories your program covers. The up-front program approval consists of mandatory and optional elements. The optional elements allow you to customize the program approval to suit your particular needs, and they allow you to speed the flow of the subsequent steps. The up-front approval takes place via notice and comment rulemaking in the **Federal Register** and, as proposed, it may take a maximum of 90 or 180 days to complete, depending on the complexity of your submittal. In the second step, you submit to us, and we approve your specific alternative requirements. These alternative requirements may be submitted in the form of rules, permits, or requirements in other enforceable mechanisms for major and/or area sources but, as in § 63.93, they must be enforceable as a matter of S/L law before you can submit them for approval. Also, as in § 63.93, in step two of the SPA process, we approve your alternative requirements through notice and comment rulemaking in the **Federal Register**, and this process, as proposed, may take up to 180 days to complete. Following completion of the SPA process, your approved alternative requirements must be incorporated correctly into title V permits, where required.

Both steps one and two are critical steps in the SPA process. In these steps, we approve your authorities to substitute your alternative requirements for Federal requirements, and your alternative requirements become federally enforceable. (Until we approve your alternative requirements, the otherwise applicable Federal requirements continue to apply.) It is important to note, however, that steps one and two need not take place separately in time. You may submit your program approval elements and your alternative requirements for simultaneous approval, for section 112 requirements that are already promulgated at the time of your submittal.

Alternatively, you may submit your alternative requirements at a future date (or multiple future dates), after the up-front approval has been completed, for section 112 requirements that are not already promulgated or for which you do not choose to substitute requirements at the time of your up-front approval. Each time you submit your alternative requirements at a future date after your up-front program submittal, we would repeat the approval process under step two. (It is not necessary to repeat the § 63.91(b) demonstration and approval if the basis for your earlier program approval has not changed.)

Under the SPA process, as for all the subpart E delegation/approval processes, we act on your program by taking public comment on your program submittal and promulgating a rule amending part 63 to incorporate your program. (This was discussed in the original subpart E proposal preamble at 58 FR pages 29297–98.) Because we are required to publish a **Federal Register** notice to approve your program, we believe it is appropriate to allow for at least a 90-day period for the up-front approval step for submittals that do not contain any alternative requirements, and the full 180 day-period for the up-front approval step for submittals that do contain alternative requirements. These time periods are consistent with the time periods allowed or proposed for comparable review and approval steps for the other substitution options in subpart E.

However, to address your concerns about how long it takes to receive subpart E approval, we are committed to processing these approvals as expeditiously as possible (i.e., in less than 90 or 180 days if possible). We are particularly interested in receiving comments on whether an approval can take place in less than 180 days in situations where the submittal includes alternative requirements (especially when the equivalency comparison is complex). We are also interested in your thoughts about whether and how both steps of the SPA process could be completed in a combined total of 180 days, even when the alternative requirements are submitted at a future date after the up-front program approval has been completed. One suggestion is to delay rulemaking on the up-front program approval until future rulemaking takes place for approval of the alternative requirements; although up-front rulemaking would be delayed, we could still evaluate your submittal and prepare for the future rulemaking. (To help you develop your comments, we refer you to timelines describing how steps in the approval process would play out during the 180-day period. These are included in the document entitled ''Interim Enabling Guidance for the Implementation of 40

CFR part 63, subpart E,'' EPA–453/R–93–040, November 1993. This document is included in the docket.)

In addition, to address your concerns about how long it takes to receive subpart E approval, we have shortened the up-front approval period to 90 days when your submittal does not contain any alternative requirements. To accommodate the administrative process steps that are required to take place during this period, we shortened the individual time periods that are allowed or required for us to publish the proposed **Federal Register** notice (from 45 to 21 days), for the public to comment (from 30 to 21 days), for you to respond to the public comments (from 30 to 14 days), and for us to prepare and publish the final **Federal Register** notice (to about 30 days). We request comment on whether these proposed time periods are feasible, adequate, and acceptable for this purpose, given that we are trying to balance our desire to expedite the approval process with our interest in allowing the public sufficient time to comment. We have carried over this approach to the EBP up-front approval process as well, and we are also requesting comments on the application of this approach in that context.

Based on our experience reviewing your alternative requirements under the existing subpart E, we strongly recommend that you take steps under the up-front portion of the SPA process to streamline the review process for your alternative requirements. The following discussion on up-front approval elements and criteria suggests how your submittal could contribute toward simplifying and streamlining the process. Alternatively, we recommend that you work with your EPA Regional Office in advance of any formal submittal under the SPA process to get early feedback on the approvability of your submittal elements. At its discretion, your Regional Office may offer you a preliminary assessment of your submittal, and it can advise you on how your submittal may be improved, so that the formal approval process proceeds smoothly and expeditiously. Your Regional Office also may be willing to work with you to find mutually acceptable ways to shorten the review process. For example, you could discuss what you will include in your equivalency submittal package, the equivalency demonstration criteria you will follow, and the style and format of your supporting analyses and documentation, so that the Regional Office is likely to consider your step two submittal complete; or you could discuss ways to speed the administrative aspects of the approval process. While we have eliminated the requirement to express your alternative requirements in the form of the Federal standard, expressing them this way would make the review and approval of your requirements go more easily and quickly.

a. Step one: Up-front approval. i. Up-front approval elements and criteria—The up-front approval step serves several critical functions under the SPA process. As discussed earlier in this preamble: (1) it assures that you have met the delegation criteria in section 112(l)(5) and § 63.91(b); (2) it provides the legal foundation by which section 112 requirements may be replaced by your alternative requirements (whether they arise from an enforceable S/L rule or permit terms and conditions) such that your requirements become the federally enforceable requirements in lieu of the applicable Federal requirements; and (3) it provides for an orderly way of identifying which authorities have been delegated to you in relation to specific Federal emissions standards or requirements. In addition, the SPA up-front approval gives you the opportunity to implement alternative compliance and enforcement strategies (such as through the compliance evaluation study approach discussed in section XI.C. of this preamble). You also could obtain approval to implement and enforce alternative requirements that apply generically to more than one category of sources, and you could specify which enforceable mechanisms you will use to substitute alternative requirements for area sources. Our intent is that our one-time, up-front review and approval of these program elements will streamline the subsequent review of your (additional) alternative requirements for section 112 rules.

As a first step, as in the existing § 63.94, you would submit certain elements of your program for up-front approval. The up-front program submittal under the SPA process must include, at a minimum, the following two elements:

(1) § 63.91(b) demonstration. The first element is a demonstration of how you have satisfied the criteria in § 63.91(b) that address the basic adequacy of your program to accept delegation to implement and enforce Federal section 112 requirements. These criteria ensure that you have adequate authorities and resources to implement and enforce the substituted provisions, including the authorities and resources to implement your area source program. Title V program approval may be sufficient to demonstrate that you have satisfied the § 63.91(b) criteria for sources covered by your title V program; and

(2) Identification of source categories and/or Federal section 112 requirements. The second element is an identification of the source categories and/or the Federal section 112 requirements for which you will accept delegation and for which you intend to substitute requirements at that time or in the future. (Note, however, that you cannot substitute requirements for a Federal requirement until it is promulgated.)

In addition, depending on the design and complexity of your program and what you want to achieve by substituting your program under the SPA process, you may submit for approval one or more of the following elements:

(3) Generic program requirements. You may obtain approval in this step for generic alternative requirements that you intend to apply to one or more source categories, e.g., if you have a different approach to implementing the startup, shutdown, and malfunction plan required in § 63.6(e) of the part 63 General Provisions, or if you have a different approach generally from the Federal requirements for recordkeeping and reporting, preconstruction review, or any number of other ''general provisions.'' In addition to general provisions, which are often administrative in nature, you could obtain generic approval for substantive control regulations (e.g., design, equipment, or performance standards) that apply to more than one source category and reduce emissions of HAP.

You could do a generic equivalency demonstration for these requirements at this early stage in the SPA process. This early demonstration of equivalency would help to expedite our review and approval of your subsequent submittals for promulgated Federal regulations, and it would allow the public to comment on the general applicability of these approaches.

(4) Enforceable mechanisms for area source requirements. The next element is a description of the mechanism(s), that is enforceable as a matter of S/L law, that will be used to make your alternative requirements for area sources federally enforceable when they are approved during step two. In addition, you must include a demonstration that you have adequate resources and authorities to implement and enforce these mechanisms (or the requirements they generate).

Under the SPA process you may use S/L enforceable mechanisms, such as S/L operating permits programs other than title V programs, to develop and submit

for approval alternative requirements for area sources. A thorough discussion of this topic follows.

(5) Alternative compliance and enforcement strategies. In addition, if you elect to implement protocols that establish alternative compliance and enforcement strategies (such as performing compliance evaluation studies, which are discussed in section XI.C., below), we must approve your proposal through rulemaking in the up-front approval step. This approval may require you to supplement your previous § 63.91(b) demonstration if you need additional resources, authorities, or requirements to implement the alternative strategies.

The advantage of including information from elements (3) or (5) in your up-front submittal is that it would allow significant aspects of your equivalency demonstration for specific Federal section 112 requirements to be addressed and worked out generically and in advance of our and the public's review of your alternative requirements during the subsequent step two phase. Consequently, it can result in a decrease in the time it would otherwise take to review and approve your regulations or permits for one or more source categories. In fact, we believe that the benefits from developing these up-front understandings may be significant, and we think this is one of the major advantages of pursuing the SPA option.

ii. Process for making area source requirements federally enforceable—One way that the SPA process is more flexible than the existing program substitution process in subpart E is that the SPA process may be implemented more readily for area sources. (The existing program substitution process in § 63.94 may be implemented for area sources, but only if you will be permitting those sources under your title V program. We understand that, in the near term, most title V programs in the country will not cover the part 63 area sources that we deferred from permitting. Nothing in this discussion, however, is intended to deter you from using title V programs to permit area sources.) We are proposing that, as part of the up-front SPA approval process, you may submit a plan to implement your programs for area sources, in addition to your plan for major sources. In this plan you would identify the legally enforceable mechanism(s) that you would use to implement and enforce your area source requirements. These legally enforceable mechanisms may be either source category rules or general permits (or a similar type of approach) that are specific to a source category and are issued through a non-title V S/L permitting (or similar) program. In either case, in step two we could approve these rules or permits, that are already enforceable as a matter of S/L law, in the same way that we can approve major source rules, that is, through notice and comment rulemaking in the **Federal Register**. Whether you regulate area sources through source category-wide rules, general permits, or another enforceable mechanism, these rules become federally enforceable upon approval of the specific alternative requirements in step two. We are requesting comment on types of S/L enforceable mechanisms other than rules and permitting programs that you may wish to use for this purpose and specific descriptions of how you would use these mechanisms.

We are also requesting comment on the types of criteria that an enforceable S/L mechanism must satisfy, if any, to be acceptable as a source of alternative requirements that may be approved under section 112(l). For example, we are requesting comment on whether, as a condition of obtaining approval for area source requirements submitted through a non-rule mechanism, the public within a S/L jurisdiction should have adequate notice and opportunity to submit written comment to the S/L during the process of developing the enforceable terms and conditions that would become the approved alternative requirements. Such programs obviously must have authority to cover the sources in the source category, and individual HAP, if any, for which you are requesting § 63.97 approval, and you must have authority and resources to implement and enforce the program's requirements. These criteria would be satisfied by the § 63.91(b) component of the up-front approval. We would like your comments on whether we should establish any additional specific approval criteria for such programs through these amendments to subpart E.

For the revised regulation, we plan to review and approve general permits, rules, requirements, or permit templates developed under authority of your enforceable mechanism for area sources (or your title V authority for major or area sources). We intend that § 63.97 substitutions of requirements be applied on a source category-wide basis, rather than to individual sources (except when you only have one source in a source category). Each general permit or other approved mechanism would take the place of a source category rule submitted for approval under this option. As we explain in section VIII.C., which describes the equivalency by permit process, we believe the use of permits for demonstrating alternative requirements must be limited to be implemented practicably, because of the burden associated with reviewing individual permits containing alternative section 112 requirements expressed in a form that is different from that in the underlying standard. Otherwise, we believe this approach will overtax your ability to administer your programs and our ability to review your permits within the specified time limits. This, in turn, could delay the program approval process and adversely impact sources generally.

Therefore, except when you have only one source in a source category (or possibly in other limited circumstances described below), you must submit for review and approval general permits, rules, requirements, or permit templates for either major or area sources. You may submit more than one such mechanism for each source category (or class of sources in a source category, e.g., major sources) provided the collection of submittals ensures that all of the otherwise applicable Federal section 112 requirements in the emissions standard and all sources for that source category are addressed. We are taking comment on this approach.

Your program for area sources need not apply to sources subject to Federal standards for which you are not taking delegation under this approval option. These sources would be subject to Federal standards or your alternative requirements established under a different subpart E option. However, your area source program must assure compliance with all Federal section 112 emissions standards and requirements for which you accept delegation under the SPA process.

Furthermore, to reduce the burden associated with implementing an enforceable area source mechanism under subpart E, we are clarifying that you may specify as part of your up-front subpart E program approval that only the permit terms and conditions that are established to substitute for Federal section 112 requirements need to undergo public and EPA review and become federally enforceable through step 2 of the SPA process. We hope that this minimizes disruption to your existing programs by allowing you to maintain the rest of your program as is, or as S/L-enforceable only.

b. Step two: Approval of alternative section 112 requirements. After or during the up-front approval, in step two of the SPA process, you would submit to us the alternative requirements that you propose to substitute for Federal section 112 requirements, and we would approve or disapprove those requirements. We

would review and (dis)approve your alternative requirements for each source category for which you wish to receive delegation to implement alternative requirements. If we disapprove your substitution request, you would proceed to implement the Federal rules.[6] For part 63 NESHAP or other Federal requirements that are already promulgated at the time of your up-front submittal, step two may be combined with step one, or it may occur after step one, depending on the status of your existing rules or authorities. To be submitted for approval, your alternative requirements must be enforceable as a matter of S/L law; they may take the form of enforceable regulations, general permit terms or conditions, administrative orders, board orders, or other legally enforceable mechanisms in your jurisdiction. If the actual requirements originate from policies instead of regulations, they may only be submitted to us if they are included in an enforceable mechanism such as a permit.

Furthermore, the alternative requirements that you submit for a particular NESHAP or other Federal requirement must apply to the entire source category or subcategory. Under the SPA process, as under the § 63.93 process for substitution of rules, we will only review and approve alternative requirements that do not require a source-specific evaluation to determine their equivalency. This means that, if you are using a permitting mechanism to make your requirements enforceable for a source category, you could only submit general permits. (Earlier we asked for comment on the feasibility and desirability of creating limited exceptions to this policy.)

After we have determined whether your alternative requirements are acceptable, the public would have 21 days to comment on your proposed alternative requirements and our evaluation of them through a notice and comment rulemaking published in the **Federal Register**. Then, after considering the public comments and your responses to them, we would act on your submittal by notifying you in writing as to whether we have approved or disapproved your request for substitution. We would also publish our findings in a final **Federal Register** notice. Because your alternative requirements do not become federally enforceable or replace the otherwise applicable Federal section 112 requirements until the final **Federal Register** notice is published, we strongly recommend that you begin your SPA approval process under step two in plenty of time to receive approval before the first substantive compliance date for the otherwise applicable Federal requirements. (By substantive compliance date we mean a date by which the source is required to comply with provisions to install and operate control equipment, make process changes, or take other physical steps that reduce emissions of HAP to the atmosphere.) For sources that need a long lead time to come into compliance with your requirements or the otherwise applicable NESHAP requirements, more than two years may be needed. We recommend that you develop suitable timelines for implementing the SPA process steps with your EPA Regional Office at the time of up-front approval, or as early in the process as possible.

During the course of developing this proposed rulemaking, some of you suggested that a 45-day review period (similar to the 45-day review period for proposed title V operating permits) should be adequate for acting on alternative section 112 requirements under the SPA process. However, because of the potential complexity of equivalency demonstrations, the application of approved alternatives to all sources or groups of sources within the affected source category or subcategory within your jurisdiction, and the need to do a rulemaking to approve your source category-wide alternative requirements, we believe that 45 days is not adequate as the maximum allowable review period.

In developing the SPA process, we explored options under which we could approve your alternative requirements in step two without the need for additional Federal rulemaking, but the Act prohibits that. 42 U.S.C. § 7697(d). See also, Administrative Procedures Act, 5 U.S.C. §§ 551, 553. Under the APA, Agency actions of general applicability and future effect designed to implement the law are considered rules and must undergo rulemaking. Approvals of your source category or subcategory applicable alternative requirements, which will be implemented and enforced in lieu of the Federal section 112 standards, fall within the above description of a ''rule.'' Consequently, we must undergo a rulemaking to grant such an approval.

c. Incorporation of alternative requirements into title V permits. Following completion of step two of the SPA process, you would incorporate the new federally applicable requirements into title V permits for sources that are required to have such permits. This action is important for several reasons relating to section 112(l) substitutions of requirements. First, we and the public have an opportunity to ensure that the approved alternative section 112 requirements are implemented correctly via the permit issuance process. Second, the permit is a publicly available repository of the requirements that apply to an affected source. We, you, the affected source, and the public all have access to the same information about what is required from that source.

Although we and the public have an additional opportunity to review your alternative section 112 requirements during the permit issuance process, this is not an opportunity to ''second guess'' the approval of those requirements that took place during the step two review. The purpose of the review during the permit issuance process is to ensure that the terms and conditions of previously approved alternative requirements are incorporated properly into the permit.

3. Changes to Previously Approved Alternative Requirements

After we have approved your alternative requirements (rules or permit terms), if your alternative requirements then change in any way that would change the approved section 112 provisions, you must resubmit your rules or permits to us for reapproval in order for your new alternative requirements to become federally enforceable in place of the set of alternative requirements we previously approved. Subsequently, if relevant, you must open and revise any federally enforceable permits (or permit terms) that contain these alternative section 112 requirements to bring them up to date with your revised, approved alternative requirements. In other words, you must repeat step two and revise your title V permits whenever your underlying regulations, policies, or permits change so that your subpart E-approved rules and permits correctly reflect your most current requirements for those affected sources. As a matter of Federal enforceability, until we approve your revised alternative requirements under step two, sources remain subject to the applicable alternative section 112 requirements that we approved previously. If your alternative requirements originate from source category rules, you must first submit those rules to us, as in step two, to obtain our approval that the changed rules satisfy the equivalency demonstration criteria.

If your alternative requirements originate from policies that result in permit terms and conditions, rather than from enforceable rules, if you make any

[6] Under your approved up-front program, you would already have been delegated the authority to implement and enforce those Federal requirements.

changes to those policies, or if you implement those policies differently from how they are expressed in the approved permit terms and conditions, you must submit the revised permit terms and conditions, as in step two, to obtain our approval that the changed permit terms satisfy the equivalency demonstration criteria.

4. Criteria for Demonstrating Equivalency of Alternative Requirements

Under proposed § 63.97(d), each individual submittal for specific alternative requirements must:

(1) Identify the specific conditions that sources in the source category must comply with under your requirements, including which of these are alternative requirements that you want to implement and enforce in lieu of the otherwise applicable Federal requirements. You must submit copies of all S/L rules, regulations, permits, implementation plans, or other enforceable mechanisms that contain the entire set of requirements for which you are seeking approval, including any alternative requirements, or if these documents are readily available to us and the public, you may cite the relevant portions of the documents or indicate where they are available;

(2) Identify how these conditions are the same as or different from the relevant Federal requirements through a side-by-side comparison of your requirements and ours. Your submittal must contain sufficient detail for us to be able to make a determination of equivalency between your alternative requirements and the Federal requirements;

(3) Provide detailed information that supports and justifies why you believe that your alternative requirements, taken as a whole, are no less stringent than the otherwise applicable Federal requirements, that is, how they meet the equivalency criteria specified in § 63.93(b). For example, this equivalency demonstration must demonstrate how your requirements will achieve equivalent or greater emissions reductions compared to the Federal requirements for each affected source.

We would then evaluate the specific alternative requirements by using the equivalency ''test'' contained in § 63.93(b). Section XI. of the preamble contains a complete discussion on how we would conduct an equivalency evaluation under the criteria of § 63.93(b) to ensure that the alternative requirements are no less stringent, taken as a whole, than the otherwise applicable Federal requirements. (In the future, we may supplement this discussion with additional guidance.)

C. § 63.94 Equivalency by Permit Approval Process

1. Overview and Purpose of an Equivalency by Permit Process

Because of issues you raised about the current program substitution process in § 63.94, we are proposing to revise § 63.94 to create an equivalency by permit (EBP) approval process which does not include a requirement for you to submit your alternative requirements in the form of the Federal standard. The proposed EBP process would allow you to substitute, for a limited number of sources, alternative requirements and authorities that take the form of permit terms and conditions instead of source category regulations. Under this three-step process, you could seek approval to implement alternative section 112(d), section 112(h), or section 112(f) requirements that would be enforced in lieu of part 63 emissions standards by submitting permit terms and conditions that satisfy subpart E's equivalency demonstration criteria. Once approved, these permit terms and conditions would be included in a title V permit, through the appropriate title V permit issuance process, to replace the otherwise applicable Federal requirements. This process satisfies your request for a means of obtaining delegation for a few sources without having to go through rulemaking at the S/L level to establish source category-specific regulations. It also allows you to substitute alternative requirements on a source-specific basis for area sources when those sources are permitted under title V.

The proposed EBP process accomplishes similar objectives to those that the current § 63.94 is intended to accomplish; however, the EBP process provides flexibility beyond that now in § 63.94 by allowing a ''holistic'' approach for determining equivalency between your alternative requirements and the Federal emissions standards. The proposed EBP process differs from the current process in § 63.94 in that it does not require you to present your permit terms and conditions in the form of the Federal standard in order to demonstrate equivalency (although doing so may greatly reduce the time it takes to approve your alternative requirements). Rather, it relies on the same equivalency demonstration ''test'' that is currently in § 63.93(b) for rule substitutions and that we are proposing for the § 63.97 SPA process.

To balance this additional flexibility, we are proposing to add a process step (i.e., step two, in which we review your draft permit terms and conditions before they are included in proposed permits) and limit the scope of applicability of the EBP process (i.e., allow the EBP approach for 5 or fewer sources in a source category that is affected by a NESHAP for which you want to substitute alternative requirements). These ''checks and balances'' would ensure that the results of EBP implementation are comparable to the results that would be achieved through the other subpart E processes in terms of the types of alternative requirements that could be approved, the opportunities for public and EPA review of alternative requirements, and the overall burden that would be associated with implementing this approach (for you, for us, and for regulated sources). In addition, the checks and balances would provide assurance that the proper emission reductions are achieved. These concepts are explained further in the remainder of this section of the preamble.

Essentially, the EBP process is appropriate when a source-specific analysis is necessary to determine the effect of the alternative requirements. In general, it is appropriate when you do not already have S/L standards that apply to source categories regulated by part 63 emissions standards. For example, EBP could be appropriate for SIP-approved rules that regulate HAP indirectly. Alternative requirements may also arise from health-based or technology-based rules that generate source-specific requirements based on a source's operations, location, construction or modification activities, etc. Because each of these situations requires a source-specific analysis, general permits would not be appropriate under the EBP process.

The EBP process is similar to (but not the same as) the title V permit streamlining process we developed for minimizing duplication among multiple applicable requirements that apply to the same emissions point at a source. (For guidance on permit streamlining, see our March 5, 1996 policy guidance document entitled ''White Paper Number 2 for Improved Implementation of the Title V Operating Permits Program,'' commonly called White Paper 2, which can be found on our website at *http://www.epa.gov/ttn/oarpg/t5wp.html*.) Through title V permit streamlining, a source may elect to consolidate multiple applicable requirements into a single set of applicable requirements that assure compliance with each of the ''subsumed'' requirements to the same extent as would be achieved by having

the source comply with each requirement independently. Through the EBP process, you (as the permitting authority) may have Federal section 112 requirements replaced with your approved alternative requirements that are no less stringent than the section 112 requirements that they replace. Sources subject to the title V operating permits programs must continue to meet the requirements of that program in addition to the requirements of subpart E.

The EBP process differs from the rule substitution and the SPA processes in that three steps are required under EBP to obtain our approval for your alternative requirements. While all of the substitution options require Federal rulemaking action to approve your program elements (i.e., the § 63.91(b) criteria and any other up-front approval elements) and a step where we review and (dis)approve your alternative requirements, the EBP process also requires a final step where we review and (dis)approve how those alternative requirements are incorporated into title V permit terms and conditions. In the other substitution options, your alternative requirements are approved by rulemaking and become federally enforceable after the second step. In the EBP process, after approval of the S/L alternative requirements, you must incorporate the approved permit terms and conditions into Title V permits.

The EBP and SPA processes also differ in that the scope of applicability for EBP is narrower than the scope for SPA. Under the SPA process you submit and we approve alternative requirements that apply to entire source categories; this approach may impact numerous sources in many source categories. In contrast, under the EBP process, you submit and we approve alternative requirements that apply to a small number of individual sources in a category. These sources may or may not comprise all the sources in that category in your jurisdiction. (If they do not comprise all your sources in that category, you must accept delegation for the remainder of your sources in the category under a different subpart E delegation process.)

2. Steps in the Proposed Equivalency by Permit Process

a. Step one: Up-front approval. As a first step you would submit certain elements of your program for up-front approval (as in the existing § 63.94 and the proposed SPA processes). The purpose of the up-front submittal is for you to demonstrate that you have satisfied the basic § 63.91(b) criteria for obtaining delegation, demonstrate that you have an approved title V permit program to implement the EBP approach, and identify the sources in the source categories for which you wish to use the EBP approach. (You may identify sources for which part 63 emissions standards will be established in the future.)

In discussing the form that an EBP process could take, some of you have suggested that an up-front approval would be redundant when you already have an approved title V program. We disagree, at least in part. As we already discussed for the SPA process, the State-specific up-front approval for an EBP program serves critical functions under section 112(l) including ensuring that you meet the § 63.91(b) criteria for delegation, providing a legal foundation for you to replace the otherwise applicable Federal NESHAP requirements in your permits with your alternative, federally enforceable requirements, and delineating the specific sources and Federal emissions standards for which you have accepted delegation. Also, as in the SPA process, the up-front approval step allows us to verify that you have adequate resources and authorities to implement your alternative section 112 requirements through your approved implementation mechanism, which in this case is your title V permit program. As we have mentioned previously, title V program approval generally is sufficient to demonstrate that you have satisfied the § 63.91(b) criteria for the sources covered by your title V program, but it is not sufficient to satisfy the other purposes of the up-front approval.

Section 63.94(b) of the proposed rule, which contains the criteria for up-front approval, differ from the approval criteria currently in § 63.94(b) in that they no longer require you to make legally binding commitments to express your title V permit terms and conditions in the form of the Federal standard.

In addition, they no longer can be construed to require you to demonstrate equivalency in a line-by-line manner. The new second step in the EBP process, where we review and approve your alternative requirements, replaces the up-front commitments. In this step we have the opportunity to evaluate your alternative permit terms and conditions the same way we would evaluate your alternative rules under the rule substitution or SPA processes, so the up-front, legally binding commitments are no longer necessary to implement this option.

We are proposing that you submit for approval under the EBP process an up-front package that, in addition to including a written request to use the EBP process:

(1) Identifies the existing or future Federal NESHAP standards to be replaced;

(2) Specifies the specific sources to be covered for each NESHAP standard (not to exceed five sources per source category) as well as the process you will use to accept delegation for the other sources in the source category in your jurisdiction; and

(3) Demonstrates that you have an EPA-approved title V program for the sources for which you wish to use the EBP process.

Because the up-front EBP submittal elements do not contain alternative requirements, we are proposing that we could take a maximum of 90 days to review (following a determination that the submittal is complete) and (dis)approve the program you submitted up-front, including the opportunity during this period for public comment during the rulemaking on your submittal. Through a proposed rulemaking notice in the **Federal Register**, we would inform the public of and request comments on your desire to use the EBP process for the source categories and sources that you have identified. This notice would also inform the public that they may provide comments on specific equivalent alternative requirements during the comment period for individual draft permits. Assuming the public comments are favorable, as for all the subpart E processes, we would promulgate a rule amending part 63 to incorporate your program. Our proposed timeline for the 90 days is the same as for the simple up-front approval process in SPA.

If you submit alternative requirements (in the form of permit terms and conditions) at the same time you submit your up-front program, we could evaluate them on approximately the same 90-day timeline we use to approve your up-front program (though they do not have to undergo rulemaking), but we could not approve your alternative requirements until your up-front approval becomes effective (at the time of publication in the **Federal Register**). After your up-front approval has been completed, if you wish to implement the EBP process for individual sources or sources in source categories that are not already identified as part of your approved EBP program, you would need to repeat the up-front approval process to add those sources to your program. As part of your resubmittal for program approval, you would not have to repeat the portions of the demonstration that pertain to the § 63.91(b) program approval criteria, provided that your

former demonstration is still adequate to show that you have the resources, authorities, and other program elements necessary to implement the EBP program for the additional sources. Finally, nothing precludes you from obtaining up-front approval simultaneously under more than one subpart E substitution process, e.g., SPA and EBP. We are eager to work with you to streamline the administrative aspects of obtaining subpart E approval to the maximum degree possible within the framework of these regulations.

If we disapprove your program approval request, the Federal emissions standards or requirements remain the applicable requirements for those sources. You would proceed to implement the Federal rules for those sources that are covered by your title V program.

b. Step two: Approval of alternative NESHAP requirements. After we approve your program you may proceed to implement step two, the development and submittal of the draft permit terms and the equivalency demonstrations themselves. In step two of the EBP process, we would review and approve your alternative requirements for each source for which you have received delegation under the EBP process. For Federal standards that are already promulgated at the time of your up-front submittal, step two may take place concurrently with step one, or it may occur after step one. The purpose of step two is for us to evaluate and approve the actual draft permit terms and conditions that you are proposing to include in permits for these sources to replace the otherwise applicable Federal NESHAP requirements.

In step two of the EBP process, you would submit to us the specific draft permit terms and conditions that you propose to substitute for Federal section 112 requirements, and we would approve or disapprove those terms and conditions. If practical, we prefer that you submit just the terms and conditions that would substitute for the Federal section 112 requirements, thereby omitting any State-only requirements, and that this submittal take place well before you prepare the complete draft permits for the affected sources, so that the terms you include in the complete draft permits reflect the comments you receive from us on your alternative section 112 requirements. However, in some situations it may be appropriate for you to submit complete draft permits at this step, and it may speed the overall permit issuance process when time is of the essence. Your submittal must include the complete set of draft permit terms and conditions that substitute for the Federal NESHAP, an identification of which terms contain alternative requirements, and your supporting documentation for your equivalency demonstration. Additional information on the criteria you may use to demonstrate equivalency for alternative requirements is located in section VII.C.4. of this preamble. After considering your submittal, we would notify you in writing (which may be done electronically) as to whether we have approved or disapproved your alternative requirements. We may approve your submittal on the condition that you make certain changes to the permit terms and conditions that we identify.

We are proposing that we could take up to 90 days after receiving a complete submittal to review and either approve or disapprove your permit terms and conditions. We are proposing that this review period take no more than 90 days because we are not required to do a rulemaking following our evaluation. However, we think 90 days is an appropriate amount of time to review your alternative requirements because this step is essentially the same as our review of your rules or issued permits under the rule substitution or SPA processes. Each individual permit under the EBP process is like a substituted rule. We are seeking comments on whether more or less time should be allowed for this approval step. Regardless, in any particular situation, we may not need to take the maximum amount of time allocated for our review when you provide complete, well-documented information and demonstrations in your submittal. For example, we may require less time to review and approve your alternative requirements when you submit your permit terms and conditions in the form of the Federal standard and/or your requirements are no less stringent than the Federal NESHAP requirements on their face.

Furthermore, we believe it is appropriate to require an EPA review period for your alternative requirements that takes place separately from and in advance of our opportunity under title V to review your proposed permits, and we believe this review period must be long enough to allow us adequate time to complete our evaluation. The 90-day period we are proposing for the EBP process is consistent with the amount of time we would have under the other subpart E substitution options to evaluate your alternative rules or permit terms (not including the time needed to do rulemaking), and we think that up to 90 days will be needed to complete our evaluation of your alternative requirements, which would be comparable to a rule substitution evaluation for each permit. Therefore, we think the 45-day review period provided for under title V is not adequate for this purpose. In addition, we are not required under title V to review your proposed permit before it can be issued, but under subpart E we must have an affirmative opportunity to approve or disapprove your alternative requirements for them to replace the otherwise applicable Federal requirements. The second step of the EBP process satisfies the need under section 112(l) for a mandatory requirement that we review and approve your alternative requirements.

After reviewing our comments on your draft permit terms and conditions, you would make adjustments as necessary and develop a complete draft permit for public review and comment under the title V regulations. Under these revisions to subpart E, in your notice of draft permit availability to the public, you must identify where the alternative requirements appear and specifically solicit comments on those requirements. In notifying the public, you must follow the public notification procedures of your approved title V program. The draft permit terms and conditions must also be accompanied by comprehensive supporting documentation that demonstrates how they satisfy the criteria for equivalency. We are calling this supporting documentation the ''equivalency demonstration,'' and it must conform to the guidance for demonstrating equivalency that we have provided in section XI. of this preamble. Under title V, you are required to provide an opportunity for a public hearing on the draft permit as well as a comment period of at least 21 days.

When we approve your program's alternative requirements, those requirements may replace the corresponding Federal requirements and become the federally enforceable requirements applicable to the affected sources. Your alternative requirements would become federally enforceable at the time of permit issuance. If we disapprove your alternative requirements, you would proceed to implement the Federal rules for sources covered by your title V program. To gain approval to implement the EBP process for a subset of sources in a category in your jurisdiction, you must accept delegation for the remainder of the sources in the category through another subpart E process, such as straight delegation. Your alternative requirements may not become federally

enforceable when the permit issues unless and until we approve them during step two. We have added rule language to this effect to prevent alternative requirements from inadvertently becoming federally enforceable if, for some reason, you include them in your proposed permits without our explicit approval and if, for some reason, we fail to object to those permits.

c. Step three: Incorporation into title V permits. After we have approved your draft permit terms and conditions as equivalent, you would incorporate them into proposed title V permits using the appropriate permit modification process. As required under title V, you would send the proposed permits to us for our review and approval and we would have up to 45 days to object to the proposed permit. In accordance with title V, if we object in writing to the issuance of the proposed permit, you would be unable to issue the permit. However, if we have approved your alternative requirements in step two, and if we do not object to the proposed permit, when the permit is issued your alternative requirements would become the federally applicable requirements in lieu of the Federal NESHAP standard(s). Under EBP, compliance with the set of § 63.94 alternative requirements would be considered compliance with all of the applicable NESHAP requirements that are replaced by that set of alternative requirements.

This step is critical for several reasons. First, under the EBP process, the permit issuance process is the legal mechanism (that replaces notice and comment rulemaking) for making your alternative requirements federally enforceable in lieu of the otherwise applicable Federal section 112 requirements. Second, we and the public have an opportunity to ensure that the approved alternative section 112 requirements are implemented correctly via the permit issuance process. To enhance this opportunity, the notice of permit availability and the permit must flag that the permit contains alternative section 112 requirements, and the approved equivalency demonstration for that set of requirements must be attached to each draft, proposed, and final permit. Third, the permit is *the* publicly available repository that contains the alternative section 112 requirements that apply to an affected source. Our letter of approval to you in step two may not necessarily be readily accessible to the public and, although it contains approved alternative requirements, it does not contain the applicable requirements for that source, as defined in title V. Through the permit document, we, you, the affected source, and the public all have access to the same information about what is required from that source.

Although we have an additional opportunity to review your alternative section 112 requirements during the permit issuance process, this should not be viewed as an opportunity to ''second guess'' the approval of those requirements that took place during the step two review. The purpose of our 45-day review with regard to the alternative section 112 requirements is to ensure that the previously approved permit terms and conditions are incorporated properly into the permit.

3. Program Approval Criteria

Because of the time necessary for us to review title V permits containing alternative NESHAP requirements expressed in a form that is different from that in the underlying Federal standard, we believe this process should be applied in a given jurisdiction only to relatively few sources. We believe that widespread use of the EBP process could hamper your ability to administer your title V operating permits programs, and it could overtax our resources for reviewing permits. This, in turn, could delay permit issuance for sources generally. Because of our concern about the potential burden associated with this process, we are proposing to limit the number of sources that could use EBP. We are proposing that you may participate in the EBP process for five or fewer sources in your jurisdiction that are subject to a promulgated Federal NESHAP. For five or fewer sources within a source category, we should be able to review each individual equivalency demonstration within the proposed timeframe. As we mentioned previously, if you have more than five sources subject to a NESHAP for which you want to substitute alternative requirements, you should use a process other than EBP.

We recognize that our selection of five or fewer sources in a category is a subjective decision based on our assessment of the burden that will be associated with preparing and reviewing individual permits with equivalency demonstrations (which could be comparable to five rule substitutions). Therefore, we are seeking comment on our proposal to include in § 63.94 a defined maximum number of sources in a category for which you could use the EBP process. We are also seeking comment on whether a number other than five would be acceptable; whether there should be a defined maximum number of sources in all categories taken together for which you could use the EBP process; or whether the maximum number for each category and/or the total number of sources for all categories should be a matter that is negotiated between you and the Regional Office during the up-front approval. We would appreciate detailed justification for any responses that you provide to these questions.

In addition to having approved permit programs and a limited number of sources in a NESHAP-affected source category, two additional conditions need to be satisfied in order for you to submit equivalent alternative requirements in step two. First, a Federal NESHAP standard must have been promulgated. Equivalent alternatives cannot be developed without having a basis for comparison. (This is true for all the substitution options.) Second, your equivalent alternative requirements must be specific to the sources to which they will apply. In general, the EBP process is designed to address situations where you lack a rule or combination of rules the effect of which would be comparable to the NESHAP for which they would substitute. Should you have other rules or a combination of rules the effect of which would be comparable to the Federal NESHAP, you should investigate the use of alternative subpart E processes such as rule substitution or SPA, or permit streamlining as described in White Paper 2. Examples of S/L requirements that are suitable as the basis for developing permit terms and conditions under the EBP process are source-specific SIP requirements and ambient concentration limits derived from health-based rules.

In order to ensure that permits are issued in time to avoid potential dual regulation on NESHAP-affected sources, we strongly recommend that you give us your step two submittal at least 1½ to 2 years in advance of the first substantive compliance date for a NESHAP. (By substantive compliance date we mean a date by which the source is required to comply with provisions to install and operate control equipment, make process changes, or take other physical steps that reduce emissions of HAP to the atmosphere.) We think that 1½ to 2 years is an appropriate amount of time to implement steps two and three of the EBP process for a typical title V permit issuance process. During the first 3 months we would approve or disapprove your alternative requirements. During the remainder of the time you would issue the title V permit and sources would take steps as necessary to comply with the new

applicable requirements. For sources affected by simple NESHAP standards (or with very simple permits), and for submittal of alternative requirements that are not significantly different from the NESHAP requirements, a timeframe shorter than 2 years may be adequate. For sources that need a long lead time to come into compliance with your requirements or the otherwise applicable NESHAP requirements, more than 2 years may be needed. We recommend that you develop suitable timelines for implementing the EBP process steps with your EPA Regional Office at the time of up-front approval, or as early in the process as possible. Before final permits are issued under the EBP option, sources are subject to all applicable Federal NESHAP requirements.

4. Criteria for Demonstrating Equivalency for Alternative Requirements

Each submittal of permit terms and conditions for a source must:

(1) Identify the specific, practicably enforceable conditions with which the source must comply;

(2) Identify how these conditions are the same as or different from the relevant Federal requirements through a side-by-side comparison of your requirements and ours;

(3) Provide detailed information that supports and justifies your belief that your alternative requirements meet the equivalency ''test'' in § 63.93(b). Your submittal must contain sufficient detail to allow us to make a determination of equivalency between your requirements and ours.

We would then evaluate the specific alternative requirements (i.e., permit terms and conditions) using the equivalency evaluation criteria in § 63.93(b) and discussed in section XI. of this preamble and any guidance we develop to supplement the preamble. We believe that the compliance evaluation study approach to demonstrating equivalency for alternative compliance and enforcement measures described in section X.C. is not appropriate for the EBP process, but we are taking comment on whether this approach could be implemented effectively under this process.

5. Changes to Previously Approved Alternative Requirements

After we have approved your alternative requirements (permit terms and conditions) in step two, if your alternative requirements change in any way that would change the approved section 112 provisions, you must resubmit your permit terms to us for reapproval in order for your new alternative requirements to become federally enforceable in place of the set of alternative requirements we previously approved. Subsequently, you must open and revise the title V permits that contain these alternative section 112 requirements using the appropriate permit modification process to bring them up to date with your revised, approved alternative requirements. In other words, you must repeat step two and revise your title V permits whenever your underlying regulations, policies, or permits change so that your subpart E-approved permit terms correctly reflect your most current requirements for those affected sources. As a matter of Federal enforceability, until we approve your revised alternative requirements under step two, sources remain subject to the applicable alternative section 112 requirements that we approved previously. If your alternative requirements originate from policies that result in permit terms and conditions, rather than from enforceable rules, if you make any changes to those policies, or if you implement those policies differently from how they are expressed in the approved permit terms and conditions, you must submit the revised permit terms and conditions, as in step two, to obtain our approval that the changed permit terms satisfy the equivalency demonstration criteria.

6. How Equivalency by Permit Compares With Title V Permit Streamlining

Under the proposed EBP process, you would be able to use your title V permitting process to adjust and replace one or more applicable Federal NESHAP standards with your equivalent alternative requirements. This allows you, as the permitting authority, to substitute your alternative requirements for similar part 63 NESHAP requirements and make your alternative requirements federally enforceable. Substitution of requirements under EBP is similar, but not identical to ''streamlining'' under White Paper 2, however, as the following discussion makes clear.

While the process in White Paper 2 allows permitting authorities as well as sources to initiate streamlining, streamlining under White Paper 2 can only be implemented when the permit applicant consents to its use (see White Paper 2, page 2). Under the EBP process, you would be allowed to initiate the substitution process, for example, by identifying in the permit application the individual NESHAP standards for which you want to substitute your alternative requirements, and you could do so without a source's consent. (You could not replace Federal requirements with your alternative requirements, however, until we approve your alternative requirements in writing during step two of the EBP process.)

The purpose of streamlining under White Paper 2 is to synthesize the conditions of multiple applicable requirements into a single new permit term (or set of terms) that will assure compliance with all of the requirements. Under White Paper 2, the applicable requirements that are not selected as the set of streamlined requirements remain in effect. Streamlining subsumes, rather than replaces, the nonstreamlined requirements. This means that a source subject to enforcement action for violation of a streamlined applicable requirement could potentially also be subject to enforcement action for violation of one or more subsumed applicable requirements.

Under the EBP process, however, your equivalent alternative set of applicable requirements replaces the NESHAP requirements. This means that once the equivalent alternative requirements are included in an approved federally enforceable operating permit, the replaced NESHAP requirements are no longer relevant for compliance and enforcement purposes.

In order to demonstrate the adequacy of proposed streamlined requirements under White Paper 2, a source must demonstrate that the most stringent of multiple applicable emissions limitations for a specific regulated air pollutant (or class of pollutants) on a particular emissions unit (or collection of units) has been selected. The MRR requirements associated with the most stringent emissions limitation are presumed appropriate for use with that streamlined emissions limit, unless reliance on that MRR would diminish the ability to assure compliance with the streamlined requirements. Under EBP, you must demonstrate that your alternative emissions limitation is as at least as stringent as the otherwise applicable Federal emissions limitation for a specific HAP (or class of HAP) for a particular affected source. Your alternative MRR requirements may be approved if they meet the ''holistic'' equivalency test for subpart E equivalency determinations.

Under White Paper 2, there is no limit on how many and which applicable requirements can be streamlined. Under White Paper 2, streamlining is not limited to the requirements arising from any particular program; all applicable requirements are eligible for streamlining. In contrast, under subpart E's EBP process, replacement is limited

only to Federal NESHAP standards by equivalent alternative requirements—only the Federal NESHAP standards are replaced, not subsumed, by the equivalent alternative requirements established through the EBP process. Note that after getting approval for equivalent alternative requirements for section 112(l) purposes, nothing prevents further streamlining of these requirements with other applicable requirements under the process and criteria provided in White Paper 2. However, when you seek to replace a Federal section 112 standard during the title V permit issuance process under § 63.94, streamlining must take place by meeting both the criteria of § 63.94 and, except where contradictory, the criteria of White Paper 2 (see White Paper 2, page 18).

Under White Paper 2, applicable requirements that are not selected as the most stringent, i.e. those that are ''unused,'' during the streamlining process must be mentioned in the source's title V operating permit under the permit shield section, if your program offers a shield, or in the statement of basis section. This approach ensures that all applicable requirements are accounted for in a single document, including those subsumed by streamlining, and that the public and enforcement agencies are able to assess compliance with subsumed requirements quickly. We are not requiring a similar approach for the EBP process. Rather, we believe it would be adequate if the equivalency demonstration simply accompanies draft and final permits. If the alternative requirements correctly replace the Federal NESHAP requirements in the permit, there would be no need to assess compliance with the replaced standards.

VIII. How Do the Revised Delegation Processes Compare?

This section discusses similarities and differences among the rule substitution process, the SPA process, and the EBP process as we are proposing them in this rulemaking. The discussion compares these options in terms of what they require, which steps are most critical, and where and how they provide flexibility for you to obtain approval. Differences exist among the three processes in terms of the section 112 programs or sources that they cover, the requirements for up-front program approval, and the requirements and procedures for approval of your alternative requirements (including what form your alternative requirements must take before you can submit them to us). The three processes are similar in terms of the ''test'' that you must meet to demonstrate the equivalency of alternative requirements and in terms of when we and the public have an opportunity to comment on your submittal. All of these factors may affect your selection of delegation options under subpart E.

A. What Section 112 Programs or Sources are Covered by Each Process?

You may use the rule substitution and EBP processes to substitute your alternative requirements for Federal rules and requirements established under sections 112(d), 112(f), and 112(h). (§ 63.93 may also be used to substitute your alternative requirements for Federal section 112(r) requirements.) We are also proposing that the SPA process cover additional Federal requirements established under other section 112 provisions, but only after we have promulgated regulations implementing those programs. You may not seek approval under the SPA process to implement and enforce alternative section 112(r) requirements that address section 112's Risk Management Plan (RMP).

You may use the rule substitution and SPA processes to substitute your alternative requirements for any number of Federal requirements that apply to an unlimited number of sources in a source category. You may use the EBP process to substitute your alternative requirements for five or fewer sources in a source category regulated by a NESHAP. We are seeking comment on whether the total number of sources for all source categories should be limited. (Currently, as we are proposing to amend § 63.94, we are not proposing to limit the number of source categories for which you could use the EBP process.)

B. What Is Required for Up-Front Approval?

All three processes require an up-front approval to ensure, at a minimum, that you have satisfied the § 63.91(b) program approval criteria. The up-front approval takes the form of an EPA rulemaking, through notice and comment in the **Federal Register**. It can take 90 to 180 days for us to complete this process from the date that we receive a complete request for approval, depending on whether we are approving alternative requirements at the same time.

The rule substitution process requires the least in terms of an up-front approval, the EBP process requires somewhat more, and the SPA process may require even more (depending on the nature of your program). In addition to the § 63.91(b) criteria (which, in general, may be satisfied for title V sources by demonstrating title V program approval):

(1) For the SPA and EBP processes you obtain up-front approval for current and future Federal standards or requirements for which you intend to substitute alternative requirements. In your up-front submittal (in step one) you would identify the Federal requirements and the source categories they regulate. (For EBP you would need to identify individual sources.)

Because the rule substitution process collapses the up-front approval and the approval of alternative NESHAP requirements into the same step, the identification of particular NESHAP for which you will be substituting requirements takes place at the time the rule substitution request is approved during that step. It is not possible under the rule substitution process to obtain advance approval to substitute requirements for NESHAP that are not yet promulgated; however, it is possible to obtain future approval for additional alternative NESHAP requirements without having to repeat the § 63.91(b) program approval criteria demonstration.

(2) For the SPA process you obtain up-front approval to implement area source requirements using an enforceable area source mechanism such as a general permit issued under a S/L-enforceable permitting program. Under both SPA and the rule substitution process, you may obtain delegation to implement alternative area source requirements through approved alternative requirements that cover categories of area sources.

(3) For the SPA process, which covers programs of broad applicability under section 112, you may obtain up-front approval for generically applicable alternative requirements such as ''general provisions'' or equipment leak standards. Generically applicable requirements apply to more than one source category for which you will be obtaining delegation.

(4) For the SPA process you must obtain up-front approval to implement a protocol that establishes an alternative compliance strategy in place of MRR requirements for one or more part 63 emissions standards, i.e., the compliance evaluation study approach outlined later in the preamble in section X.C. The proposed up-front approval criteria for the EBP process (see revised § 63.94(b)) are simpler and more streamlined than the existing approval criteria in § 63.94(b) and the proposed new approval criteria for SPA in § 63.97(b).

In the same vein, the proposed up-front approval criteria for the SPA

process (see proposed § 63.97(b)) are potentially more extensive than the existing approval criteria in sections 63.94(b) and 63.93(b). This is because we may approve your use of area source mechanisms, approve generic alternative requirements, or approve protocols for establishing alternative compliance and enforcement strategies. Depending on which program elements you get approved during this step, we believe it may be possible to expedite the subsequent rulemaking to approve your alternative requirements. Thus, in exchange for the effort involved in seeking program approval under § 63.97, you may obtain approval for your alternative requirements in less time than it would otherwise take.

We are clarifying in this notice that, in general, all S/L's that have received interim or final title V program approval have satisfied the § 63.91(b) approval criteria for title V sources. This clarification establishes that, for all the delegation options under subpart E, if you have received title V program approval, you need not necessarily repeat the § 63.91(b) demonstration of adequate resources and authorities in your up-front submittal, at least for title V sources. If you are implementing a program or rule for area sources, however, you would have to demonstrate that you have met the Section 63.91(b) criteria for those source categories and program mechanisms. Also, for example, if you seek to obtain approval to implement the compliance evaluation study approach discussed in section X.C., you may have to update your § 63.91(b) approval.

C. What Is Required To Demonstrate That Alternative Requirements Are Equivalent?

All three approval processes rely on the same ''test'' for determining whether your alternative requirements are no less stringent than the Federal requirements, and they rely on the same protocol for preparing equivalency demonstrations. Each submittal of alternative requirements must be accompanied by an equivalency demonstration package that provides the technical justification and supporting information we need to evaluate your requirements. Very briefly, the test for equivalency is whether, taken as a whole, the levels of control and compliance and enforcement measures in your alternative requirements achieve equivalent or better emissions reductions compared with the otherwise applicable Federal requirements at each affected source, and compliance dates must be no later than those for the Federal requirements. The next section of the preamble, which is entitled ''How will EPA determine equivalency for S/L alternative NESHAP requirements?,'' explains how we would apply this test.

D. What Is Required for EPA Approval of Alternative Requirements?

For the rule substitution process we approve your alternative requirements by doing rulemaking in step one. For the SPA process, we approve your alternative requirements by doing rulemaking in step two. The rulemaking step is the critical step in these processes in terms of making your alternative requirements federally enforceable to replace the NESHAP requirements. In the EBP processes we approve your alternative requirements in step two by notice to you in writing. Rulemaking is not required for step two approval of your alternative requirements. (For SPA and EBP, approval of alternative requirements can take place at the same time as the up-front approval, provided the Federal section 112 requirements are promulgated and you are able to submit your alternative requirements at the time of up-front approval. You can think of this as simultaneously combining step two with step one, as generally happens under the rule substitution process.)

The SPA and EBP processes differ in terms of which step is the critical step. Step two is the critical step in the SPA process because this is when your alternative requirements become federally enforceable to replace the section 112 requirements. For EBP, which is implemented only through title V permitting programs, your alternative requirements become federally enforceable and replace the NESHAP requirements in step three, when the permits are issued. This is why it is critical for us to have an opportunity to affirm or object to each permit in the EBP process.

When your alternative requirements become federally enforceable through issued permits, the requirements may only be incorporated into permits and considered federally enforceable if they have already been approved by us. This eliminates the possibility that alternative NESHAP requirements could become federally enforceable by ''default'' if we fail to object to a permit during our review period. The purpose of the permit review step from a section 112(l) approval perspective is to ensure that the permit accurately incorporates the approved alternative requirements.

The EBP process allows your alternative requirements to replace the otherwise applicable Federal section 112 requirements so that the Federal requirements are no longer relevant for compliance and enforcement purposes. This goes beyond White Paper Number 2's streamlining guidance, which requires unused streamlined requirements to be subsumed, rather than replaced, in the permit.

For both the rule substitution and the SPA processes, your alternative requirements must be submitted in a form that is enforceable as a matter of S/L law and that applies to an entire source category or subcategory unless you use the partial approval option. For SPA these authorities may consist of rules or general permit terms and conditions. We will not do source-specific reviews of alternative requirements under these processes even with partial approvals (except under rare circumstances, e.g., you only have one source in a category). For the EBP process, your alternative requirements must be submitted in the form of source-specific permit terms and conditions. We will only do source-specific reviews of alternative requirements under this process. An advantage of the EBP process is that you need not undertake a source category rulemaking or general permitting process at the S/L level before submitting alternative requirements for approval.

When the basis for your alternative requirements is S/L policies, as opposed to enforceable regulations or rules, you may only submit such alternative requirements when they are incorporated into enforceable rules or permits (or other enforceable mechanisms). If and when you revise your policies in a way that would change any alternative section 112 requirements that we have already approved, you must revise and resubmit your requirements for another approval that allows us and the public to ensure that the subpart E equivalency criteria are still satisfied for those requirements.

E. When Do EPA and the Public Have an Opportunity To Comment on S/L Submittal?

For all subpart E delegation processes, we and the public are provided an opportunity to comment during the up-front approval step as well as during the subsequent steps to approve alternative requirements and ensure that they are accurately reflected in title V operating permits. For the up-front approval step, which always involves rulemaking in the **Federal Register**, the public comment period must last for a minimum of 21 days. The 21-day minimum public comment period is also required for any other rulemaking activities. This includes the approval of

substituted rules and authorities (i.e., alternative requirements) under the rule substitution process in § 63.93. Our review period, including the consideration of public comments and publication in the **Federal Register**, may not exceed 90 days for any approval that does not involve rulemaking on alternative requirements, and 180 days for any approval step that does involve rulemaking on alternative requirements.

For the SPA process, the opportunity for us and the public to review and comment on your alternative requirements may take place with the up-front approval, or it may happen during the subsequent step. The timing of this review depends on the status of your program and regulations, on our promulgated rules, and on when you submit your alternative requirements. Because this activity requires **Federal Register** rulemaking, we are proposing that our review period for this step can take up to 180 days.

For the EBP process, the opportunity for us to review and comment on your alternative requirements may take place roughly at the same time as the up-front approval, or it may happen during the subsequent step. (However, we cannot approve your alternative requirements until we approve your request for delegation under the EBP process.) Again, the timing of this review depends on the status of your program, on our promulgated rules, and on when you submit your permit terms and conditions. Because this activity does not require **Federal Register** rulemaking, we are proposing that our review period for this step can take up to 90 days. Under title V, the public would have 30 days to review and comment on the complete draft title V permits after we have approved or disapproved your alternative permit terms and conditions. Also under title V, you must provide a 45-day period for us to review and object to each proposed permit before it is issued (and for us to review and object to each permit revision that amends, repeals, or revises previously approved section 112 requirements). The purpose of our and the public's review of each permit during the 45-day period is to ensure that the permit terms and conditions accurately reflect the substance of any approved alternative requirements.

IX. How Should a S/L Decide Which Delegation Process(es) To Use?

This section discusses how the similarities and differences among the rule substitution process, the SPA process, and the EBP process (as we are proposing them in this rulemaking) may affect your selection of delegation options under subpart E. By expanding the number of delegation processes available under subpart E and by increasing their ease of use, we hope to provide you with as much flexibility as we can in accepting delegation for Federal section 112 requirements. Your selection of delegation processes will depend on the structure of your program including the nature of your industries, the needs of your legislature, and the maturity of your program with regard to air toxics (or related) regulations. To choose the most appropriate processes, we invite you to consider what each option is designed to address and the tradeoffs among the options.

All the processes offer the same flexibility by allowing approval of alternative MRR requirements. Furthermore, if your rule contains a stricter emissions standard compared with the Federal standard, we can accept a less stringent package of MRR requirements. Such flexibility allows you to submit MRR requirements that differ from the Federal MRR requirements.

A. § 63.93 Substitution of Rules or Authorities

The rule substitution option in § 63.93 addresses situations where you have a few source categories for which you want to substitute alternative source category rules or other enforceable authorities for major and/or area sources. The alternative requirements that you submit to us for approval must already be enforceable under your S/L law in the form of regulations or comparable enforceable requirements (such as permit terms). This program may impact numerous sources in a source category or across the source categories for which you substitute rules.

The rule substitution option offers several advantages. First, it allows your alternative requirements to become federally enforceable and replace the otherwise applicable Federal requirements upon our approval of your rules. Second, it involves somewhat less up-front effort to substitute alternative requirements than the EBP or SPA options (potentially significantly less compared with SPA). Third, it can be applied to an unlimited number of sources or source categories including area sources. A disadvantage of the rule substitution option is that it may entail a longer total review and approval process for each rule compared to step two of the SPA process. This is because we review each of your rules on an individual basis. Thus, this option could be administratively more burdensome to us and to you in developing and reviewing multiple rules. Nevertheless, you may decide that substituting your own S/L requirements (e.g. toxic, VOC, or PM rules) on a rule-by-rule basis both provides the best approach for reducing dual regulation and achieving the required emissions reductions most efficiently.

B. § 63.94 Equivalency by Permit

In other situations, where you have only a few sources for which you want to substitute alternative requirements (or a few sources in each of a few source categories) and you do not already have source category rules that regulate these sources, it may make sense to use the EBP process. An advantage of the EBP process is that you may submit alternative requirements in the form of title V permit terms and conditions; this allows you to bypass the sometimes lengthy process of developing source category rules, which may not be an efficient use of your resources for just a few sources. Disadvantages of the EBP process are that it may be used only for five or fewer sources in a category and only when a source-specific analysis is required to do an equivalency demonstration; also, general permits are not allowed under this option.

C. § 63.97 State Program Approval

If you decide to substitute alternative source category rules (or enforceable authorities or general permit terms) for a large number of Federal section 112 rules, then the SPA process may be appropriate for you. This situation might arise if you decide to develop an entire air toxics program, or if you already have a mature air toxics program, with many regulations affecting source categories regulated by Federal section 112 standards. (This delegation process may impact numerous sources in a source category or across the source categories for which you substitute rules.) The SPA process is appropriate in these situations because it can eliminate the redundant review of generic requirements that apply to multiple source categories each time we review your alternative requirements for a new source category; thus, it has the potential to shorten the review period for the specific alternative requirements because some aspects of the approval would have been worked out in advance.

Another advantage provided by the SPA process is that it allows you to substitute your area source requirements for Federal area source requirements using source category rules or other enforceable mechanisms such as Federally Enforceable State Operating Permit (FESOP) general permits. Also,

like the rule substitution process, the SPA process allows your alternative requirements to become federally enforceable and replace the otherwise applicable Federal requirements upon our approval of your rules or permits. A disadvantage of the SPA process is that it may entail a more complex submittal and review process for the up-front approval during step one compared with the EBP and rule substitution processes. We believe this level of effort will be administratively efficient, however, for developing and submitting multiple rules. Finally, the SPA program covers section 112 requirements that we may develop in the future under other sections besides sections 112(d), (112(f), and 112(h), and it allows you to develop protocols to establish alternative compliance and enforcement strategies.

At the time you submit your program for up-front approval, your alternative requirements do not yet need to be developed or enforceable; however, when you submit your alternative requirements to us for approval in step two, they must already be enforceable under your S/L law in the form of regulations, general permit terms, or requirements in another enforceable mechanism.

X. How Will EPA Determine Equivalency for S/L Alternative NESHAP Requirements?

A. Introduction

Before we can approve your alternative requirements in place of a part 63 emissions standard, you must submit to us detailed information that demonstrates how your alternative requirements compare with the otherwise applicable Federal standard. This applies whether your alternative requirements take the form of a S/L regulation, the terms and conditions of specific permits, or any other format. This section addresses what information you must submit and how we would decide whether to approve that submittal. It also pertains to the information that you could submit for approval under the SPA process as part of the optional up-front program elements.

In order to evaluate your submittal in a timely way, we would expect you to develop and submit a side-by-side comparison of your requirements and the Federal rule. This comparison would cover specific elements pertaining to the applicability of the standard to subject sources, the emissions limit (and its associated requirements such as test methods, averaging times, and work practice standards), which constitutes the level of control, the compliance and enforcement measures (MRR), and associated requirements established in the part 63 General Provisions. (We intend to provide examples of such submittal in forthcoming guidance). The details of the submittal would then be organized according to these elements. Your submittal could be based on S/L policies that are not necessarily enforceable as a matter of S/L law, so long as they are then made federally enforceable through the 112(l) approval process. Fundamentally, you must demonstrate that your alternative requirements will achieve the same (or more) emissions reductions of the same pollutants from the same sources that will be regulated by the Federal standard and that they will achieve the reductions no later than the Federal standard. Also, our ability to enforce the alternative requirements to the section 112 standard must not be diminished.

The expectations, guidelines, and requirements discussed in this section would apply to the rule substitution, SPA, and equivalency by permit approval processes we are proposing for revised subpart E. The complexity of any particular submittal would depend, however, on the process option you select, the complexity of the regulations that are being compared, and the degree to which your requirements differ from the Federal requirements. (However, the criteria for evaluating the equivalency of your submittal would be the same under each process option.) You must demonstrate to us that your alternative requirements adequately achieve the emissions reduction and enforceability results of the Federal standards and this burden typically is proportional to how much your requirements deviate from the Federal requirements for which they would substitute.

The remainder of this section is organized as follows. Section X.B., below, addresses our thinking regarding equivalency demonstrations that involve alternative levels of control and compliance and enforcement measures (including a discussion on how compliance evaluation studies may be used to establish alternative compliance and enforcement measures in section X.C.). This discussion is followed by a more comprehensive description of the equivalency demonstration process under subpart E in section X.D. Finally, in section X.E. we address specific issues associated with demonstrating equivalency for work practice standards and General Provisions.

B. Equivalency of Alternative Levels of Control and Compliance and Enforcement Measures

You told us that you believe the equivalency test in subpart E should be flexible enough to accommodate approaches other than a line-by-line equivalency of compliance and enforcement measures (that is, MRR requirements) between your rules and the Federal rules. In your view, line-by-line equivalency would preclude approving S/L approaches to compliance assurance and enforcement that rely on fewer MRR responsibilities for sources and greater inspection frequencies by permitting authorities (or other elements, e.g., operator training) in your programs. You believe these approaches can produce equivalent results compared with the otherwise applicable Federal MRR requirements.

Your views highlight differences in philosophy and approach regarding compliance assurance and enforcement between our respective programs. While we believe that vigorous inspection programs are vital to environmental protection programs, we do not believe that they replace completely the need for adequate documentation by sources of what air emissions (and operation, maintenance, and corrective activities) have occurred since an inspector was last present at those sources.[7] While we recognize that having a field presence is an effective way to assure compliance, we continue to find compelling reasons to limit how NESHAP MRR may be modified through the section 112(l) equivalency process to reduce the NESHAP MRR schemes. We believe that using a frequent inspection program can substitute for some but not all compliance and enforcement measures. We are seeking comment on the use of a frequent inspection program as a substitute for some compliance and enforcement measures.

Earlier, in section VI.C.3. of this preamble, we clarified that we believe that flexibility to approve alternative

[7] The MRR requirements in part 63 NESHAP serve the following purposes:

(a) To ensure that process operators are provided information sufficient for them to know whether the process is operating in compliance with applicable requirements;

(b) To provide a source of information for plant managers, corporate managers, and corporate environmental compliance personnel to be able to review and ascertain whether facility operations are in compliance with applicable requirements;

(c) To provide sufficient information for State or Local program and Federal inspectors to ascertain the degree of facility compliance at times other than the period of an onsite inspection; and

(d) To provide sufficient evidence to document the compliance status of a facility for law enforcement purposes.

compliance and enforcement approaches is already available in § 63.93, and that we intend to write sections 63.94 and 63.97 in a similar way to comport with the language in § 63.93(b). Therefore, we are not proposing changes to the ''test'' in § 63.93(b), but we are proposing rule revisions to other subpart E sections to achieve the flexibility afforded by § 63.93(b).

On a practical level, given the continuing need to do more with fewer resources, S/L air pollution control enforcement offices may find that they have fewer inspectors in the field and/or fewer travel dollars to deploy the inspectors they do have. The development of new section 112 standards that affect tens of thousands of sources nationwide will put an even greater strain on S/L and Federal inspection forces. You should be aware that once you agree to substitute more frequent inspections for some MRR, you must continue that higher frequency of inspections to ensure that your equivalency determination remains valid.

Furthermore, traditionally we have relied on you to be the first authority to address violations. In doing so, you may take a year or more to identify and address a violation. If you are unable to achieve a satisfactory resolution, we may be called upon to assist you with a Federal enforcement action. In some cases we may overfile as part of our Federal oversight responsibility. If we are to conduct our oversight duties, we must have sufficient evidence to review. Years after a violation has occurred, it is likely that the most reliable source of information will be a source's monitoring records that clearly demonstrate violations.

Because we may not initiate a Federal enforcement action for several years after alleged violations have occurred, we require that sources' records be retained for at least five years, the statutory maximum generally allowed for Federal actions pursuant to 28 U.S.C. Section 2462. (This is consistent with requirements for all major and area sources who must obtain operating permits under title V of the Act). In determining if the alleged violations are one-time violations or are part of a continuing pattern of violations, we and the courts must have records spanning a significant period of time to assess the history of violations at a source. Thus, the five-year record retention requirement that applies under the title V operating permits program and the part 63 emissions standards is critical to our enforcement efforts, and we will not modify this requirement through the section 112(l) approval process.

The current standard for approvability for substituted rules under subpart E § 63.93(b)(2) is that the levels of control and MRR must ''result in emissions reductions from each affected source * * * that are no less stringent than would result from the otherwise applicable Federal rule.'' What this means as a practical matter is that if the emissions limitation in your submittal is more stringent than the emissions limitation in the Federal NESHAP standard, then the MRR in your submittal can be slightly less stringent than the MRR in the Federal rule. We cannot approve gross deficiencies in compliance and enforcement measures, however. Similarly, if the emissions limitation in your rule is identical to that in the Federal rule or it is different but equal in stringency, your MRR package can be different from the NESHAP MRR, but it must, in total, be no less stringent than the NESHAP's compliance and enforcement provisions. This means that some provisions in your MRR package can be less stringent than the NESHAP if they are balanced by something in your MRR package that is more stringent or more protective. For example, your monitoring could be more stringent and your reporting frequency less stringent, so long as the end result is equivalency.

We explained this approach in our November 26, 1996 memorandum on this topic. This memo clarified that we will evaluate your submittal taken as a whole, that is, we will consider the stringency of the level of control and the stringency of the compliance and enforcement measures together. We must review the components individually, but we will evaluate the sum of all the parts to determine if your submittal is no less stringent than the Federal NESHAP. Note that we are not proposing that less stringent emissions standards may be balanced by more stringent MRR. Thus, we believe you already have flexibility under the existing language of § 63.93 to adjust the compliance and enforcement measures in a manner that will allow for ''less stringent'' MRR, if it is balanced by a more stringent level of control.

As promulgated in 1993, the equivalency language in § 63.94 (program substitution) specifies that, taken individually, your level of control must be no less stringent than the Federal NESHAP, and your compliance and enforcement provisions must be no less stringent than the Federal NESHAP. In addition, § 63.94 as promulgated requires you to put your requirements in the form of the Federal standard. This language does not allow the same flexibility as the language in § 63.93. It does not allow the same flexibility to balance less stringent MRR provisions against a more stringent level of control, and it does not allow the same flexibility within the MRR component to balance MRR provisions against each other. For example, you could not submit monitoring that is more stringent and reporting that is less stringent, or some other combination of adjustments, so that the end result is equivalency with the Federal MRR provisions.

In response to your requests for greater flexibility in the subpart E equivalency process overall, we are proposing in this rulemaking to create § 63.97, the new SPA process, to mirror the equivalency approach in § 63.93. We are also proposing to extend the § 63.93 approach to the equivalency by permit process in amended § 63.94.

Additionally, under these new provisions we would allow you to substitute other types of compliance assurance and enforcement measures to balance less stringent MRR measures in your substitution packages when it is unclear whether your initial submittal is equivalent to the Federal rule. For example, you may choose to include a guarantee of high levels of compliance to be determined by annual audits or rule effectiveness studies, the exact nature of which you would need to negotiate with us (see the discussion on compliance evaluation studies in section X.C., below). Or, for example, you may offer to put all compliance reports from affected sources on an electronic bulletin board available free to the public in return for less frequent reporting.

You and other affected parties should be aware of the difficulty of comparing a more stringent level of control with less stringent MRR or, where levels of control are equal, of comparing more and less stringent MRR and/or entirely different enhancements to the compliance assurance package as mentioned above. Deciding how much flexibility we can allow on MRR provisions is not an exact science. We do not now have a ''common currency'' or ''rate of exchange'' that is generally applicable to all standards. Therefore, we are not prepared at this time to define precisely how increases in stringency may be traded for some other kind of decreases in stringency. Where we are not convinced that your package is equivalent, you may need to offer additional improvements in your program or enhanced documentation to assist us in reaching the conclusion that your rule or program is equivalent. For

more detailed discussion of these issues, please see section X.D.3. below.

We seek comment on all aspects of this discussion. Because the determination of equivalency is not an exact science, we are seeking comment on how to make these criteria more precise.

C. Using Compliance Evaluation Studies in Equivalency Demonstrations

In conjunction with stakeholders from California, we have developed a proposed approach for using compliance evaluation studies in subpart E rule substitutions to establish equivalency for MRR provisions. We believe this approach can be implemented within the context of the existing regulations for the rule substitution process under § 63.93 (on a rule-by-rule basis) and for the proposed SPA process. We intend to provide formal guidance in the near future to implement this approach fully. The following discussion summarizes only the highlights of the proposed approach.

Upon promulgation of a 40 CFR part 63 Federal standard, you would evaluate the level of control, WPS, and MRR in the Federal standard and prepare a submittal with your alternative requirements that you believe are adequate, as a package, to demonstrate equivalency with the Federal requirements and to allow Federal enforcement actions on sources that would otherwise be subject to the Federal standard. If differences exist between the Federal standard MRR requirements and your alternative MRR and it is unclear whether your requirements are equivalent to the Federal requirements, you may offer to add to your package a commitment to perform compliance evaluation studies. This commitment would allow you to demonstrate that your requirements satisfy the approval criteria of § 63.93(b). We would then take public comment on your rule substitution package through formal notice in the **Federal Register** and either approve or deny the rule substitution request that includes an approved plan for performing the compliance evaluation studies. If approved, we would require that you perform compliance evaluation studies as frequently as every year or two in perpetuity.

The compliance evaluation study for any source category in a part 63 NESHAP standard would consist of compliance assessments that would take place before and after we approve your program. In the pre-approval assessment, you would demonstrate to us that your existing MRR requirements, either alone or in conjunction with appropriate amendments, are achieving, or are likely to achieve, a high degree of compliance with the NESHAP requirements to apply controls and achieve the NESHAP-specified emissions reductions. In the post-approval assessment, you would demonstrate the rate of compliance for the source category (based on compliance with your approved alternative requirements), the cause of noncompliance, if any, and you would explain whether the noncompliance is related to your alternative MRR provisions. This compliance rate information would be evaluated to determine, to the degree possible, if implementing the part 63 NESHAP MRR compliance provisions that were not included in your alternative rule would be likely to result in an improved compliance rate. The details for both phases of the compliance evaluation study would be worked out with us in advance of their implementation and, if acceptable, they would be approved, after public comment, in the **Federal Register** as part of your rule substitution package.

Any approval of a package that includes the compliance evaluation study approach would be conditioned on (1) you actually performing your commitments related to the compliance evaluation study, (2) a finding through the post-approval compliance assessment of no significant noncompliance, and (3) a finding through the post-approval compliance assessment that your MRR provisions did not contribute significantly to the noncompliance rate that is determined. If any of these conditions are not satisfied, and adjustments to your program and regulations do not correct these deficiencies, we may disapprove your program in accordance with withdrawal provisions in § 63.96. We seek comment on this discussion and the use of compliance evaluation studies in equivalency demonstrations.

D. Proposed Process for Determining Equivalency Under Subpart E

Because of the complexities involved in determining whether your alternative requirements are no less stringent, on the whole, compared with Federal section 112 requirements, we are requiring that you provide detailed demonstrations in your submissions when your requirements are different from those in the otherwise applicable Federal rules.

You must provide in your submittal a side-by-side comparison of your alternative requirements and the Federal requirements for which they would substitute. Your submittal must contain all the detail we need to determine equivalency. If you will be using more than one rule to obtain equivalency for a particular Federal rule, then you must attach each of your rules to your submittal and you must indicate the relevant requirements of each rule in the side-by-side comparison. You must also include all other documents containing requirements that are part of your equivalency demonstration, such as any relevant portions of your approved SIP. (If you are certain that these documents are readily available to your EPA Regional Office and the public, it may be sufficient to merely cite the relevant portions of the documents or say where they are available, e.g., give an Internet address.) You must submit all the information that is necessary to demonstrate whether your alternative requirements achieve the emissions reductions called for in the Federal standard.

Even if your rules or policies specify that your alternative requirements must be as stringent as the Federal section 112 requirements, you must still perform the complete equivalency demonstration as described in this section for each individual Federal requirement for which you wish to substitute requirements. Each of the following elements must be addressed in the equivalency demonstration.

1. Applicability

Your alternative standard, regulation, or permit terms and conditions must cover all of the affected sources covered by the Federal NESHAP standard. Your standard must not contain any exemptions that do not also appear in the Federal rule. For example, you may currently have rules that exempt particular affected sources, such as those emitting particular pollutants, those performing a particular type of operation (e.g., research and development), or those that are below a size cutoff specified in the Federal rule. We cannot consider a rule containing such exemptions to be equivalent (unless the Federal rule provides for the same or broader exemptions). Similarly, we cannot consider a rule to be equivalent if it does not control each of the HAP controlled by the Federal standard to the same degree that the Federal standard requires.

In addition, as we explained in the original subpart E proposal preamble at 58 FR 29303, ''except as expressly allowed in the otherwise applicable Federal emissions standard, any forms of averaging across facilities, source categories, or geographical areas, or any forms of trading across pollutants, will be disallowed for a demonstration of

stringency * * *.'' Any State rule must be demonstrated to be no less stringent than an otherwise applicable Federal rule for any affected source subject to the Federal rule rather than, on average, across sources. This does not mean that a State's submittal must necessarily include a separate demonstration of stringency for each individual affected source within a State. Rather, a State must demonstrate that its rule could reasonably be expected to be no less stringent for any affected source within the State, reflecting knowledge of the number, sizes, and operating characteristics of that kind of source within the State subject to the relevant State rule. A worst case analysis may reasonably suffice in some such demonstrations.''

2. Level of Control

Your emissions limitation cannot be considered equivalent unless it results in emissions reductions equal to or greater than the emissions reductions required by the Federal NESHAP standard for each affected source. This is a fundamental point, and it is the basis for many of the requirements outlined in this section. The documentation associated with your submittal must clearly demonstrate equivalency. Emissions must be equivalent to the NESHAP emissions at all production levels and all modes of operation.

Test methods and averaging times are integral parts of the emissions limit equivalency determination. We cannot make decisions on the equivalency of your level of control without considering the test method(s) and averaging time(s) associated with both the NESHAP and your rules. In addition, the term ''emissions limit'' as it is used here includes either a numerical emissions limitation or a work practice standard.

The subpart E rule allows for flexibility on those elements where you can reasonably show that the outcome of your rule will be emissions reductions that are equal to or greater than the emissions reductions required by the Federal emissions standard. Subpart E does not allow for an outcome where there would not clearly be equivalent emissions reductions. The following criteria follow from this point:

a. Form of the standard and burden of demonstration. The form of your rule (or permit terms and conditions) does not have to mirror the form of the Federal standard. However, because it is difficult to compare rules that have different formats, your emissions reductions need to be quantified in a way comparable to the Federal standard, and must be equivalent or better. In addition, as we mentioned earlier, the detail you provide in your demonstration should fully account for the ways in which, and the degree to which, your requirements differ from the Federal requirements.

b. Scope of applicability demonstration. Your standard must show equivalency on an affected source-by-affected source basis. This means that you need not demonstrate that your standard equivalently covers all the emissions points in the NESHAP affected source the same way that the Federal NESHAP covers them (unless the NESHAP defines an affected source as an individual emission point), but that the emissions reductions that would be achieved from each affected source is equivalent to the emissions reductions that would have been achieved by the otherwise applicable part 63 emissions standard.

c. Scope of pollutants covered. We may approve an alternative rule which covers classes of pollutants, rather than individual pollutants (e.g., VOC vs. specific HAP), but only if you can demonstrate that your rule's effect is to control each of the HAP in the Federal standard to the same degree as the Federal standard requires.

d. Control efficiency. The control efficiency at which your standard requires the pollution control equipment to operate must be as stringent as the analogous control efficiency required by the Federal standard.

e. Performance test methods. Your alternative requirements must state how compliance is to be determined and the appropriate test method to be used. (The section 112(l) approval of your performance test method is valid only for the explicit purpose for which it is intended). The performance test method required by your rule must ensure that the control equipment or other control strategy performs well enough to achieve the same emissions reductions required by the Federal rule. The performance test method in your alternative requirements would be evaluated and approved holistically as part of a package that includes your emissions limit, averaging time, applicability criteria, and work practice standards.

f. Averaging times. Your rule must explicitly contain the averaging time associated with each emissions limit (e.g., instantaneous, 3-hour average, daily, monthly, or longer). The averaging times in your rule must be sufficient to assure the emissions reductions that your rule requires, and they must be sufficient to assure compliance with the limitations required in the otherwise applicable Federal requirements.

Your alternative requirements must state explicitly those records that sources are required to keep to assess compliance with the associated time frame for the requirements. You must require records that are commensurate with the applicable regulatory requirements and they must be available for inspection upon request.

g. Work practice standards. If your rule incorporates work practice requirements which are different from those required by the Federal rule, then you must show that your work practice requirements result in emissions reductions that are equivalent to the Federal requirements in cases where the work practice requirements are related to emissions reductions. In cases where the work practice standards are related to compliance and enforcement measures (MRR), your compliance and enforcement requirements, including these work practices, must be equivalent to the Federal compliance and enforcement measures as a whole or equivalent to the Federal regulation as a whole. (See the additional discussion on work practice standards in section X.E. below.)

h. Compliance dates. Your rule or permit terms must specify compliance dates for your alternative requirements. The compliance dates must be sufficiently expeditious to ensure that each affected source is in compliance no later than would be required by the otherwise applicable Federal rule.

3. Compliance and Enforcement Measures

You will need to submit a detailed description of the compliance and enforcement measures (MRR) required by your rule as part of the side-by-side comparison of your rule and the Federal rule for which it would substitute. We have already stated that the level of control in your rule must be at least as stringent as the level of control in the Federal rule. In addition, in order for equivalency to be granted, the level of control and MRR of your rule, taken together as a whole, must be equivalent to the level of control and MRR of the Federal rule, taken together as a whole. This means that equivalency can be granted under two possible scenarios:

a. If your level of control is equal to the Federal emissions limit, then the sum of your MRR requirements must be as stringent as the sum of the Federal MRR requirements.

This means that you must require MRR that, on the whole, is equivalent to the requirements in the Federal rule. If

your requirements are different from the Federal requirements, but are still considered close to equivalency with the Federal requirements, and it is difficult to demonstrate equivalency definitively, then you may pursue alternative compliance and enforcement strategies through the compliance evaluation study approach discussed above.

b. If your level of control is more stringent than the Federal level of control, then the sum of your MRR requirements can be less stringent than the sum of the Federal MRR requirements, so long as your rules and requirements, seen as a whole, are equivalent to the Federal MACT standard's combination of emission limits, MRR, and other requirements.

This means that your rule as a whole must be equivalent to the Federal rule.

For either scenario a. or b., we believe there are limits to the differences in MRR that we would accept in an equivalency demonstration. We believe that your alternative requirements must, at a minimum, meet one or both of the following tests:

i. S/L MRR requirements are no less stringent than Federal MRR; or

ii. S/L MRR requirements assure compliance with the level of control or work practice standards to the same degree as the Federal requirements.

In order to satisfy either of the tests above when you might not otherwise be able to demonstrate equivalency, there may be additional measures of assurance that could, in sum, bring your MRR requirements up to equivalency. For example, we could consider accepting requirements for additional training for operators, a program of frequent inspections, a requirement of public or electronic posting of compliance reports, a State audit program, systems to alert operators to exceedances (lockout systems which shut down operations if you begin operating out of compliance could substitute for some MRR), or other similar measures.

We believe that MRR is a critical component of any standard. MRR helps to reduce pollution by alerting the operator to abnormal conditions, so that corrective action can be quickly taken to reduce pollution. Additionally, MRR helps to ensure that there is a record of compliance, or non-compliance, which the enforcement agency can use. This record of data which would lead to enforcement provides an incentive for sources to stay sufficiently below the level of mandated emissions so as to avoid enforcement, thus further reducing pollution.

It is possible that a S/L with a less stringent emissions limitation could in actual practice achieve greater cleanup than the Federal MACT because of the vigor of their enforcement program. While that might be a good result for the environment, what matters more for the purposes of the comparison required by section 112(l) is that the standards, seen as a whole, are equivalent. However, we will not accept S/L emission limits that are less stringent.

The language in section 112(l)(5)(A) of the Act, which discusses the basis for approval or disapproval, says that the Administrator shall disapprove a S/L program if the authorities are not adequate to assure compliance. We interpret this section to mean that even if some lesser degree of MRR than the MACT's MRR is in a S/L rule, which must be balanced by a more stringent emissions requirement in order for the standard as a whole to be seen as equivalent, at no point can the S/L MRR package be inadequate to assure compliance by all sources within the S/L's jurisdiction with each applicable standard. In essence, this phrase in the Act is establishing a bottom line below which no MRR submittal is approvable.

Some of you have objected to the general inability to characterize tradeoffs in such a balancing of emissions limits and MRR. However, the same is true of trading off increased inspections, extensive compliance assistance and inspector training for less MRR, as California has proposed. How do we assess these tradeoffs? There is no exact answer. We must exercise judgment by weighing all the facts, and use wisdom and common sense to make as fair an assessment as possible.

With that in mind, we may still consider an extensive inspection program as complementing and assisting with operator conducted monitoring. However, it should be understood that we expect that all S/L's will have an inspection program as an integral part of the resources devoted to implementing the program. An inspection program should be truly superior in order to justify a reduction in MRR. For example, we would ask you to show us an inspection checklist that you will use for each inspection; also, inspections should be frequent, such as twice yearly. However, an accurate record of compliance activity when the inspector is not present, with good MRR, is the best measure of ongoing compliance.

Finally, we also believe there are some ''bottom line'' conditions that are absolutely necessary to satisfy any of these tests, and that substitute rule (or set of requirements) must contain these conditions. Some of these conditions are:

a. We cannot approve your alternative rules if they allow you to exercise ''Director's discretion'' to change any approved requirements once we have granted equivalency and completed the subpart E approval process. (However, you may be able to develop source-specific alternative requirements through other mechanisms such as obtaining delegated authority under the part 63 General Provisions (see discussion in section X.D.4. below) for some of our discretionary provisions or streamlining a source's permit conditions following the guidance in White Paper 2.)

b. Major sources must retain records for at least 5 years.

c. Your submittal must sufficiently document and support any requirements that are different from Federal NESHAP requirements.

4. General Provisions

Your submittal must address all of the relevant General Provisions in part 63, subpart A and demonstrate that your rule or set of other requirements contains the same or equivalent provisions. In order to ensure that the review process is workable and timely, it is essential that your submittal address each requirement in the General Provisions and discuss any differences between a proposed alternative and the General Provisions. Mere references to other S/L rules or other requirements or to the fact that such matters are handled in sources' permits are not sufficient to demonstrate equivalency (although demonstrations may be made through permit terms and conditions). For example, saying that the General Provisions' intent is satisfied by ''State rule 452,'' is incomplete without an explanation of the relevant features of rule 452 that address the individual General Provisions requirements, and submission of a copy of rule 452 as part of your section 112(l) submittal. Similarly, an assumption that the permit writer will automatically include quality control requirements for monitors, for example, is not acceptable. The requirements must be in the form of a S/L rule or enforceable permit terms and conditions.

Furthermore, alternative requirements based on policies or other mechanisms that are not regulations or rules formally adopted under S/L law are only approvable so long as you understand that they become federally enforceable when we approve them under 112(l).

Section X.F. below contains a more comprehensive discussion of how we would determine equivalency between

S/L requirements and the General Provisions to part 63.

5. Relationship to Other Clean Air Act Requirements

Section 63.91(f) establishes that any S/L alternative approved under section 112(l) of the Act must not override the requirements of any other applicable program or rule under the Act or under S/L law. For example, a source subject to a section 112 NESHAP standard may also be subject to controls for criteria pollutants such as best available control technology (BACT), reasonably available control technology (RACT), or fifteen percent VOC reduction under a SIP, or be subject to other S/L-level rules. We expect that S/L's will submit, for approval as alternatives to section 112 standards, rules which were established to comply with some of these VOC or other criteria pollutant reduction requirements. Nothing in this rule should be construed as allowing sources to avoid any of those otherwise applicable requirements. In fact, we expect that the section 112(l) process, by allowing S/L's to substitute already-established requirements for section 112 rules, might help S/L's and sources avoid having to implement requirements that are duplicative across Federal and S/L programs.

E. Equivalency of Alternative Work Practice Standards

Under section 112(h) of the Act, if it is not technologically or economically feasible to establish a numerical emissions limitation when setting an emissions standard under sections 112(d) (maximum achievable control technology standards) or 112(f) (residual risk standards), we have authority to establish design, equipment, work practice, or operational standards, or combinations of these, so long as they are consistent with the provisions of sections 112(d) and (f). In addition, we are required to establish requirements that will ensure the proper operation and maintenance of any design or equipment element we establish in a WPS, the general term that applies to section 112(h) standards.

One of the issues you brought to our attention is that the equivalency demonstration requirements for alternative WPS in subpart E are not clear. You asked us to clarify how you may substitute alternative WPSs for federally promulgated WPS under section 112(l). The following discussion responds to this request by explaining our interpretation of what is required under the Act to substitute alternative requirements for Federal WPS and what flexibility exists under subpart E to implement this interpretation.

For the purpose of equivalency demonstrations under section 112(l), we consider work practice standards as part of the level of control in some cases and as part of the compliance and enforcement provisions in other cases. For example, the equipment leak provisions in several NESHAP, requiring sources to monitor valves, connectors, and other equipment, are considered WPS that reduce HAP emissions. Another example of a WPS that reduces emissions is the requirement in the Halogenated Solvent Degreaser NESHAP to store used rags, that are contaminated with HAP solvent, in barrels with tight fitting lids. These examples contrast with administrative-type WPS which a source performs to measure and/or document its emissions reductions, process operations and maintenance, etc. for the purposes of determining compliance and establishing a record for enforcement actions. This latter type of activity falls into the category of compliance and enforcement measures, or MRR. An example of a WPS that would be considered a compliance and enforcement measure is the Wood Furniture Manufacturing NESHAP requirement to develop a work practice implementation plan.

One of your concerns about WPS equivalency demonstrations relates to the distinction between ''quantifiable WPS'' and ''nonquantifiable WPS.'' Quantifiable WPS are those WPS for which the expected emissions reductions can reasonably be measured, e.g., for leak detection and repair requirements. (Quantifiable WPS may relate directly to an emissions limitation or have specific performance requirements that are measurable or quantifiable such as a capture efficiency.) Nonquantifiable WPS are those for which it is impossible to measure the expected emissions reductions (or establish specific performance requirements that are measurable or quantifiable), e.g., a requirement to place solvent soaked rags in covered containers, or a requirement to develop and implement an operation and maintenance (O&M) plan.

It is your belief that WPS should be separated into quantifiable and non-quantifiable emissions as a way of differentiating between those WPS that are tied to emissions standard and those WPS that are tied to compliance and enforcement measures. Although we agree that we should clearly differentiate between WPS tied to emissions reductions and those tied to compliance and enforcement measures, we do not agree that only quantifiable WPS are tied to emission standards. As indicated above, some WPS that are nonquantifiable are also tied to emissions reductions. We believe that differentiating between WPS on the basis of whether or not it is tied to emissions reductions is sufficient.

For all WPS that are identified as tied to the level of control or emissions reductions component of an emissions standard, we believe that any equivalency demonstration for WPS must address WPS in essentially the same manner as level of control, that is, based on a ''no less stringent'' test in terms of emissions reductions achieved. This interpretation is supported by section 112(h)(3), which allows alternative WPS to be established on a source-specific basis if an owner or operator can demonstrate to our satisfaction that ''an alternative means of emissions limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved'' under the Federal WPS for which the alternative is being proposed.

Any alternative WPS requirements that you submit must meet the ''no less stringent'' test and/or must match the effect of the corresponding Federal WPS in terms of the results they are intended to achieve. In other words, our interpretation of the ''no less stringent'' test for determining equivalency is whether your WPS achieve, in our best engineering judgement, the same emissions reductions as the Federal WPS, and we would make this determination based on an evaluation of whether your WPS meet the same objectives or intent as the Federal WPS. In addition, any alternative WPS that you propose for approval must be enforceable as a practical matter. We believe that no changes to subpart E are needed to implement this interpretation.

For WPS that are part of the emissions limitation component of the Federal standard, the alternative requirements you propose to implement in lieu of a part 63 emissions standard must address every WPS in that Federal standard. This means that each Federal WPS must have an equivalent counterpart in your requirements, or for the WPS for which you do not propose alternative requirements, you must implement the Federal WPS for that source or source category. Once equivalency for the emissions limitation component of that standard is established, including the complete WPS component, we may evaluate the equivalency of your entire submittal, including the MRR component, according to the ''holistic'' equivalency test described above in

subsection D. of this section of the preamble. For WPS that are identified as part of the compliance and enforcement measures, there is more flexibility on how equivalency may be demonstrated. For more discussion on demonstrating equivalency of compliance and enforcement measures, see the discussion in section X.B. above.

One approach to expediting your subpart E approval and to simplifying implementation of section 112 requirements in your jurisdiction is to develop generic alternative WPS rules that are similar in function to the General Provisions WPS requirements in subpart A of part 63. These would apply to all (or many) source categories for which you seek to substitute alternative requirements. Because part 63 emissions standards generally have been promulgated without information supporting the derivation of their WPS and the associated expected emissions reductions, this information is not often available as a basis for equivalency demonstrations under subpart E. Therefore, we are proposing as a matter of implementation guidance that, when this information is absent, best engineering judgement be used to establish the expected results from or intent of the WPS for which you seek equivalency. To assist us in making these judgements, we expect you to provide whatever information is needed and in a sufficient level of detail to make an effective comparison. We request comment on whether additional guidance is needed to implement this approach and, if so, the form that such guidance should take.

In the original subpart E proposal preamble (see 58 FR 29306), we indicated that alternative design, equipment, work practice, or operational standards established under section 112(h) must be expressed in the same form of the Federal standard under the § 63.94 program approval option or they could not be approved (except for the provisions of § 63.93(a)(4)(ii)). In situations where a Federal standard does not contain a numerical emissions limit, and instead specifies some sort of equipment, work practice, or operational requirements, it is less clear what it means to express a level of control in the same form as the Federal standard. Effectively, this means that, depending on the form of the Federal standard, it might not be possible to express some S/L requirements in the same form, in which case the Federal requirements would remain the applicable requirements.

We believe that the existing language in § 63.93(b)(2), which contains the holistic equivalency test we are proposing to apply to equivalency demonstrations under sections 63.93, 63.94, and 63.97, is sufficiently flexible for us to approve alternative WPS requirements as we have described. We also believe this language gives you sufficient flexibility to substitute reasonable alternatives to the Federal WPS and that providing specific guidance and examples for demonstrating equivalency would be more beneficial than adding regulatory language. We are seeking comments, however, on whether the language in § 63.93(b)(2) is too restrictive in this regard, what specific text changes might be warranted, and how such text changes would clarify the rule or make it more workable. We intend to develop guidance to better define these equivalency criteria and the information we would need from you to evaluate your equivalency demonstrations for WPS.

F. Equivalency of Alternative General Provisions

The purpose of this discussion is to clarify how you should demonstrate equivalency for the part 63 General Provisions contained in 40 CFR part 63, subpart A.[8] In this rulemaking we neither propose to change any rule language in subpart A, nor to take comment on the General Provisions themselves. Rather, we are taking comments on our guidelines for demonstrating equivalency for the General Provisions as we present them in this preamble.

In addition, we intend to issue guidance that more fully explains the guidelines discussed below and our intended application of them in reviewing individual submittal. This guidance should be helpful to you in developing submittal that adequately address our equivalency criteria and demonstration guidelines. We view the development of these guidance materials as an ongoing process that will reflect the evolution of our policy as we resolve questions and issues that arise in future submittal.

The body of the guidance will be a table that categorizes each individual requirement in the General Provisions according to a simple classification scheme that is introduced below.

1. Function and Importance of the General Provisions

The General Provisions for part 63 NESHAP contain the common administrative and technical framework for all emissions standards established under section 112. Rather than reproducing common elements in each standard, we have used the General Provisions to present these common requirements in one place, subpart A of part 63. The General Provisions contain requirements that pertain to the administrative and the compliance-related aspects of implementing NESHAP. For example, the General Provisions include administrative procedures and criteria for determining the applicability of standards, responding to other requests for determinations, granting extensions of compliance, and approving sources' requests to use alternative means of compliance from that specified in an individual standard. Compliance-related provisions spell out the responsibilities of sources to comply with the relevant emissions standards and other requirements. These provisions include compliance dates, operation and maintenance requirements, methods for determining compliance with standards, procedures for emissions (performance) testing and MRR requirements.

The General Provisions apply presumptively to every subpart of part 63, unless specifically overridden in an individual subpart. Part 63 subparts typically include tables that make explicit which General Provisions requirements have been overridden or replaced for that standard.

The General Provisions approach eliminates redundancy in administrative and compliance-related requirements that are common to all section 112 standards, and it ensures that a baseline level of consistency will be maintained among individual NESHAP. Because the General Provisions are a cornerstone to every section 112 emissions standard, every S/L submittal under subpart E must address how your alternative requirements compare in effect to the General Provisions.

2. Demonstration of Equivalency Between S/L Rules or Programs and the General Provisions

Some of you are concerned that any equivalency demonstration would require a line-by-line showing that your requirements are equivalent to the General Provisions. Instead, you have argued that you should be able to demonstrate generally that a combination of your rules and policies accomplishes the intent of the General Provisions and that this general showing should be sufficient for an equivalency demonstration.

We believe that a general showing of intent is not sufficient to demonstrate equivalency under section 112(l) for the

[8] The General Provisions were promulgated on March 16, 1994 (59 FR 12408).

General Provisions. The General Provisions are an integral part of each part 63 NESHAP, and we consider them to be just as important as the requirements in a source category-specific NESHAP when we evaluate an equivalency demonstration. However, at the same time, we think a line-by-line equivalency demonstration is not necessary for every General Provisions requirement. Rather, we think the General Provisions can be classified into distinguishable categories of requirements that would require different criteria to evaluate their equivalency. The level of rigor associated with an equivalency demonstration for a particular General Provisions requirement would depend on which category it is in. We have outlined this process in the following paragraphs and in an associated guidance document.

3. General Provisions Categories Simplify Equivalency Determinations

The individual requirements in the General Provisions can be classified into one of three categories:

(1) Substantive requirements,

(2) Quality assurance/quality control requirements, and

(3) Administrative requirements.

''Substantive requirements'' is the most restrictive category and consists of those requirements that are based on statutory requirements or on key (fundamental) EPA policies. An example of a statutory requirement is the requirement for new sources to comply with promulgated standards on the promulgation date, or upon startup if the startup date is later than the promulgation date. The 5-year record retention requirement for major sources is a cornerstone of our compliance assurance and enforcement program. We would be unlikely to approve alternatives to any of the requirements in this class. However, under some circumstances we may approve an alternative requirement, but we would require a detailed showing based on case-specific factors to demonstrate that the alternative requirement is justified. The test for this category is ''equivalence''—the alternative requirement must be as stringent as Federal requirement on a one-to-one basis.

In the second class of requirements, called ''quality assurance/quality control requirements,'' we would judge whether the requirement in the General Provisions is related to an important policy and/or guidance that is required of every standard. In this case, your regulatory language could differ, but a requirement that achieves the same intent must be included in all substituted rules. In our judgement, requirements that fall into the category of ''quality assurance/quality control'' directly impact the level of control and our ability to determine compliance. For example, the General Provisions require sources to develop detailed startup, shutdown, and malfunction (SSM) plans for operating and maintaining sources during periods of SSM. The essential standard is that sources, including their process and air pollution control equipment, must be operated and maintained in a manner consistent with good air pollution control practices for minimizing emissions to the levels required by the standards. However, there are many acceptable ways to implement the general requirements to develop SSM plans and programs of corrective action. Therefore, for the ''quality assurance/quality control'' category, your alternative requirements need not be identical to the corresponding General Provisions. For us to find that your alternative requirements are no less stringent, we would require that they satisfy the intent and the enforceability of the requirements as written in the Federal rules. Like ''substantive requirements,'' for ''quality assurance/quality control'' requirements you must have equivalent provisions in the rules or other requirements you submit to us for approval.

An example of another situation where we could be flexible in granting equivalency for requirements in the second category is the preconstruction review requirements found in § 63.5. Section 63.5 implements the requirement in section 112(i)(1) of the Act that we (or a delegated agency) review sources' plans for major construction or reconstruction activities to determine that new and reconstructed major sources can comply with promulgated NESHAP when they start up. We are sensitive to the fact that you already have preconstruction review programs and that section 112 sources may be required to undergo preconstruction review for other purposes such as major or minor new source review. We believe we can find your existing programs to be as stringent as the requirements of § 63.5 provided they achieve similar results as § 63.5 would achieve. For affected sources, this also would eliminate the burden of having to go through two similar preconstruction review processes.

We consider the final category, ''administrative requirements,'' to be the most flexible in terms of your opportunities to make adjustments in your rules or programs. ''Administrative requirements'' relate primarily to program management. For example, § 63.10(a) allows sources to streamline their reporting requirements by requesting adjustments to their reporting schedules. Because this provision is not essential to implementing NESHAP, and because the particular form its process requirements take is not essential to implementing the intent of the provision as a whole, you have discretion to eliminate it altogether or to substitute an alternative process that meets the same intent. In either case, the resulting package must be as stringent or more stringent than the Federal requirements. While some ''administrative requirements'' may be necessary to implement the Federal NESHAP the way we think they should be implemented, in general for this category of General Provisions, you have considerable flexibility to alter the form of the requirements.

The following table provides some additional examples of how we categorize various General Provisions requirements according to the classification scheme we just described. In the table, ''substantive requirements'' are indicated by an ''A,'' ''quality assurance/quality control requirements'' are indicated by a ''B,'' and ''administrative requirements'' are indicated by a ''C'' under the column labeled ''Equivalency Determination.'' A complete classification scheme for all the General Provisions requirements will be provided in the guidance document referenced above.

4. How Would the Equivalency Demonstration Process Be Implemented for the General Provisions?

Each of your submittals that contain alternative requirements must contain an equivalency demonstration for the pertinent General Provisions (unless your rules or permit terms implement the part 63 General Provisions unchanged). In order to ensure that the review process is workable and timely, it is essential that your submittal specifically address each requirement in the General Provisions and discuss any differences between a proposed alternative and the General Provisions.

To demonstrate equivalency for ''substantive requirements,'' you would need to demonstrate that they are equivalent (i.e., as stringent as the corresponding Federal requirement) on a one-to-one basis. For example, the requirement within a standard to do a compliance demonstration (e.g., a performance test) is a fixed requirement that you would need to reflect in your section 112(l) submittal. However,

within the limits of the associated requirements classified as either ''quality assurance/quality control'' or ''administrative,'' we would have discretion in determining overall equivalency, and we may be able to determine equivalency holistically, by considering more than one requirement at a time.

EXAMPLES OF GUIDANCE: GENERAL PROVISIONS EQUIVALENCY CRITERIA

Part 63 General Provisions Reference	Summary of section(s)	Equivalency determination	Comments
63.1(a)(6)	How to obtain source category list or schedule.	C	Not related to statutory requirement or fundamental policy. Purely informational.
63.1(a)(7)	Subpart D contains procedures for obtaining an extension of compliance with a relevant standard through an early reduction of emissions of HAP pursuant to section 112(i)(5) of the Act. Refers to subpart D for extension of compliance through an early reduction program pursuant to Section 112(i)(5).	C	Informational. Cross references other parts of the CFR.
63.1(a)(12)	Time periods or deadlines may be changed if owner or operator and administrator agree, according to procedures in notification requirements (63.9(i)).	C	Section provided for convenience. Not essential to an alternative program.
63.1(b)(3)	Stationary source emitting HAP, but not subject to this part, shall keep a record of applicability determination on site for 5 years, or until the source changes its operations.	B	Fundamental EPA policy. Needed for enforcement purposes. Flexibility in form of applicability records possible.
63.4(a)(1)—Prohibited Activities	Affected source should not operate in violation of provisions of this part unless granted an extension of compliance.	A	Key statutory requirements.
63.5(b)(3)	Source must obtain written approval prior to constructing a new or reconstructing an existing major source after promulgation has occurred, even if the S/L does not have an approved permit program.	A	Approval prior to construction is a key statutory requirement.
63.5(d)(4)	Allows the Administrator to request additional information after submittal of application.	B	Program must allow Administrator opportunity to request clarifications/more information.
63.5(e)—Approval of Construction or Reconstruction Procedures.	Lists procedures for approval of construction or reconstruction process if Administrator determines it will not violate part 63 standards.	B	Form of program may vary.
63.6(b)(1)—Compliance Dates	If initial startup occurs before effective date of part 63 standard, source must comply by effective date of the standard.	A	Alternative compliance dates must be no later than the compliance dates in the NESHAP.

We are seeking comments on ways to streamline the review process for alternative General Provisions requirements while ensuring that we will receive sufficient information to conduct a review that results in the approval of appropriate alternative General Provisions.

XI. How Will the Section 112(r) Accidental Release Program Provisions of Subpart E Change and How Will These Changes Affect the Delegation of the RMP Provisions?

We are proposing revisions to sections 63.90 and 63.95 to reflect the final rules that have been promulgated to implement the accidental release program required by section 112(r). When subpart E was promulgated in 1993, the section 112(r) rules were not yet final. The section 112(r) rules were subsequently promulgated on January 31, 1994 (list of regulated substances) (59 FR 4478) and June 20, 1996 (risk management programs or RMP) (61 FR 31668) in 40 CFR part 68. These rules require the development and implementation of a risk management program by sources that store or contain onsite more than a threshold quantity of a hazardous substance listed in § 68.130. This list is not the same as the section 112(b) hazardous air pollutant list.

Part 68 also requires that a RMP be submitted to a central location in a method and format to be specified by us. With help from representatives of industry, State and local governments, environmental groups, and academia, we are developing a system for electronic submission of RMPs to reduce paperwork burdens and facilitate data management. Under this system, facilities covered by the Risk Management Program rule would submit their RMPs to us and we would then distribute the RMPs to the entities that are designated by section 112(r)(7)(B)(iii) to also receive them—S/Ls and the Chemical Safety and Hazard Investigation Board (established under section 112(r)(6) of the Act). Further, we would also make the RMPs available to the public under section 114(c) of the Act, as provided by section 112(r)(7)(B)(iii).

We are proposing to revise sections 63.90 and 63.95 to make the requirements for delegation consistent with the final part 68 rules and our plan for an electronic submission system for RMPs. Specifically, we are proposing to add to § 63.90 a statement that the authorities in the RMP provisions of part 68, subpart G, will not be delegated to you. The system of electronic submission of RMPs is feasible only if all RMPs include the data elements prescribed by subpart G and are submitted in the same format.

You could still require submission of additional information under your own program, and could include those additional information requirements in the program you submit to us for approval under part 63. We will consider your request to include S/L information requirements in our electronic RMP submission program for use by covered facilities in that S/L's jurisdiction. Our approval of your program through a subpart E delegation process would make those additional requirements federally enforceable. However, inclusion of additional S/L requirements potentially raises technical and legal issues that we would need to address in deciding to what extent we could accommodate such requests. In any event, any of your information requirements included in our electronic submission program would be in addition to the standard data required under part 68 subpart G.

With respect to listing chemicals for coverage by the RMP program, we are proposing to add § 63.90(c)(1)(ii) to clarify that the authority to amend the list of chemicals and the related thresholds will not be delegated to you as part of a section 112(l) delegation. You may still adopt a risk management program more stringent than ours that lists additional chemicals or sets lower thresholds for regulated substances which we could approve if submitted as part of the S/L delegation request. If, however, a S/L subsequently changes its list of chemicals or the related thresholds after we have approved their program, the changes would have to be submitted to us before they could become part of the program that we have approved and made federally enforceable.

We are also proposing to revise § 63.95 to make it consistent with the requirements of the final RMP rule. The revisions would eliminate the requirements for your programs to register or receive RMPs from covered facilities and to make RMPs available to the public consistent with the provisions of section 114 of the Act. Registration information has been made part of the RMP prescribed by subpart G, the authorities of which, as noted above, we are not delegating to you. You could require additional registration information, but you may not change the registration information that subpart G requires. You could also require that covered facilities in your jurisdiction send a copy of their RMPs to the S/L, as well as to us, but you could not relieve covered facilities from the obligation in subpart G to send their RMPs to us. You may also provide public access to RMPs consistent with the provisions of Act section 114, but since we will be providing such public access, you need not duplicate that function in order to obtain approval of your program. You will continue to be required to review RMPs and provide technical assistance to sources.

We are also proposing to eliminate the requirements for coordination mechanisms with the Chemical Safety and Hazard Investigation Board, state emergency response commissions, local emergency planning committees, and air permitting authorities. Although we encourage S/Ls that take delegation to coordinate with these groups, we do not believe that it should be a requirement for gaining delegation or for having an equivalency demonstration approved. Part 68 already lists the responsibilities of air permitting agencies in relation to part 68; coordination between the permitting agency and the delegated agency will follow naturally from those provisions. We are also proposing to delete the reference to a ''core program'' in § 63.95(c) because the elements referenced as the core program have been deleted.

The proposed § 63.95 continues to say that you may request delegation for a full or partial program. Full delegation means you take over the entire section 112(r) program for all covered sources in your jurisdiction. Partial delegation means you take the entire section 112(r) program for title V permitted sources only, or the entire program for some discrete universe of sources covered by the section 112(r) rule. In other words, under partial delegation, you may request implementation authority for a defined universe of sources, but may not take less than the entire section 112(r) program for that defined universe.

XII. Administrative Requirements for This Rulemaking

A. Public Hearing

A public hearing will be held, if requested, to discuss the proposed standards in accordance with the Administrative Procedures Act. Persons wishing to make oral presentations on the proposed standards should contact EPA (see **ADDRESSES**). To provide an opportunity for all who may wish to speak, oral presentations will be limited to 15 minutes each. Any member of the public may file a written statement on or before March 15, 1999. Written statements should be addressed to the Air and Radiation Docket and Information Center (see **ADDRESSES**), and refer to docket number A–97–29. A verbatim transcript of the hearing and written statements will be placed in the docket and be available for public inspection and copying, or be mailed upon request, at the Air and Radiation Docket and Information Center (see **ADDRESSES**).

B. Docket

The docket for this regulatory action is docket number A–97–29. The docket is an organized and complete file of all the information considered by the EPA in the development of this rulemaking. The docket is a dynamic file, because material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the proposed and promulgated standards and their preambles, the contents of the docket will serve as the record in case of judicial review [See section 307(d)(7)(A) of the Act.]

C. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the EPA must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) on the basis of the requirements of the Executive Order in addition to its normal review requirements. The Executive 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.

Although this proposed rule will not have an annual effect on the economy of $100 million or more, and therefore is not considered economically significant, EPA has determined that this rule is a ''significant regulatory action'' because it contains novel policy issues. This action was submitted to OMB for review as required by Executive Order 12866. Any written comments from OMB to the EPA and any written EPA response to any of

those comments will be included in the docket listed at the beginning of this notice under **ADDRESSES.** In addition, consistent with Executive Order 12866, the EPA consulted extensively with S/L's, the parties that will most directly be affected by this proposal. Moreover, the Agency has also sought involvement from industry and public interest groups as described herein.

D. Enhancing the Intergovernmental Partnership Under Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local, and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

Today's rule does not create a mandate on State, local, or tribal governments. The rule does not impose any enforceable duties on these entities. Specifically, they are not required to purchase control systems to meet the requirements of this rule. Also, in developing this rule, EPA consulted with States to enable them to provide meaningful and timely input in the development of this rule. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

E. Consultation and Coordination With Indian Tribal Governments Under Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Because this rule implements a voluntary program, it imposes no direct compliance costs on these communities. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

F. Paperwork Reduction Act

EPA has submitted to OMB requirements for collecting information associated with the proposed standards (those included in 40 CFR part 63, subpart E) for approval under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* EPA has prepared an Information Collection Request (ICR) (ICR No. 1643.03), and you may get a copy from Sandy Farmer by mail at OPPE Regulatory Information Division, U.S. Environmental Protection Agency (2137), 401 M Street, S.W., Washington, DC 20460, by email at farmer.sandy@epa.gov, or by calling (202) 260–2740. A copy may also be downloaded off the Internet at http://www.epa.gov/icr.

This information is needed and used by EPA to determine if the State, local or Tribal government submitting an application has met the criteria established in the 40 CFR Part 63, Subpart E amended rule. This information is necessary for the Administrator to determine the acceptability of approving the affected entity's rules or programs in lieu of the Federal rules or programs. The collection of information is authorized under 42 U.S.C. 7401–7671q.

The total 3-year burden of the collection is estimated at 1,468,989 hours. The estimated average annual burden is 489,663 hours, 3,856 hours per respondent, and 104 hours per response. EPA has estimated that 127 State/local agencies will request delegation of 35 MACT standards each using the various delegation options. In addition, the 127 agencies will use the accidental release prevention program on a one-time only basis during the first 2 years of the collection. The cost burden of this response is limited to the labor costs of agency personnel to comply with the notification, reporting, and recordkeeping elements of the proposed rule. These costs are estimated at $45.8 million for the 3-year collection period and $15.3 million on average for each year of the collection period. There are no capital, startup or operation costs associated with the proposed rule.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal Agency. This includes the time needed to review instructions, process and maintain information, and disclose and provide information; to adjust the existing ways to comply with any previously applicable instructions and requirements; to train personnel to respond to a collection of information; to search existing data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggesting methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, OPPE Regulatory Information Division, U.S. Environmental Protection Agency (2137), 401 M Street, Washington, DC 20460, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, marked ''Attention: Desk Office for EPA.'' Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after January 12, 1999, a comment to OMB is best assured of having its full effect if OMB receives it by February 11, 1999. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

G. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (Public Law 96–354, September 19, 1980), whenever an agency publishes a rule of general applicability for which notice of proposed rulemaking is required, it must, except under certain circumstances, prepare a Regulatory Flexibility Analysis that describes the impact of the rule on small entities (i.e., small businesses, organizations, and governmental jurisdictions). That analysis is not necessary if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

EPA believes that there will be little or no impact on small entities as a result of the promulgation of this proposed rule. State and Local governments are the only entities affected by this action and EPA expects that most or all of the governments which would have the authority to accept partial or complete delegation under section 112(l) of the Act are those whose populations exceed 50,000 persons and are, thus, not considered ''small.'' Accordingly, because few or none of the affected entities are expected to be small entities, and because the regulatory impacts will be insignificant, pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

H. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objects of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, EPA must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for S/L governments or the private sector. Because the proposed rule, if promulgated, is estimated to result in the expenditure by S/L governments of significantly less than $100 million in any one year, EPA has not prepared a budgetary impact statement or specifically addressed the selection of the least costly, most effective, or least burdensome alternative. Because small governments will not be significantly or uniquely affected by this rule, EPA is not required to develop a plan with regard to small governments. Moreover, this action proposes amendments to a rule that is voluntary for S/L governments, so it does not impose any mandates on those entities. Therefore, the requirements of the Unfunded Mandates Act do not apply to this section. Nonetheless, the EPA has encouraged significant involvement by State and local governments, as detailed throughout this preamble.

I. Protection of Children From Environmental Health Risks and Safety Risks Under Executive Order 13045

Executive Order 13045 applies to any rule that EPA determines (1) economically significant as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonable alternatives considered by the Agency.

This proposed rule is not subject to Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), because it is not an economically significant regulatory action as defined by Executive Order 12866.

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Pub L. No. 104–113, § 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The proposed rule does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

The section 112(l) rule is merely a procedural screen through which substantive air toxics standards are delegated and is not susceptible to the use of VCS. If any of the Federal air toxics standards delegated through section 112(l) have VCS, then the section 112(l) rule will assure that the comparable S/L standard has equivalent requirements. The section 112(l) rule itself, however, is not a vehicle for the application of VCS.

XIII. Statutory Authority

The statutory authority for this proposal is provided by sections 101, 112, 114, 116, and 301 of the Act as amended (42 U.S.C. 7401, 7412, 7414, 7416, and 7601). This rulemaking is also subject to section 307(d) of the Act (42 U.S.C. 7407(d)).

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Intergovernmental Relations, Reporting and recordkeeping requirements.

Dated: December 22, 1998.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble title 40, chapter 1 of the Code of Federal Regulations is proposed to be amended as follows:

PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

2. Amend § 63.90 as follows:

a. Redesignate paragraph (c) as paragraph (d), paragraphs (d) and (e) as (e) and (f), respectively, and newly redesignated paragraphs (d)(1)(iii) through (d)(1)(v) as (d)(1)(iv) through (d)(1)(vi), respectively;

b. Add definitions in paragraph (a) in alphabetical order for ''alternative requirements,'' ''intermediate change to monitoring,'' ''intermediate change to test method,'' ''major change to monitoring,'' ''major change to test method,'' ''minor change to monitoring,'' ''minor change to test method,'' ''partial approval,'' ''State agency,'' and ''title V operating permit programs.'' Also, add paragraphs (c) and (d)(1)(iii); and

c. Revise the § 63.90 introductory text, the definitions in paragraph (a) for ''applicability criteria,'' ''approval,'' ''compliance and enforcement measures,'' ''level of control,'' and ''program,'' and newly designated paragraphs (d)(1)(ii), (d)(1)(iv) through (vi), (e), and (f).

§ 63.90 Program overview.

The regulations in this subpart establish procedures consistent with section 112(l) of the Clean Air Act (Act) (42 U.S.C. 7401–7671q). This subpart establishes procedures for the approval of State rules, programs, or other requirements such as permit terms and conditions to be implemented and enforced in place of certain otherwise applicable section 112 Federal rules, emission standards, or requirements (including section 112 rules promulgated under the authority of the Act prior to the 1990 Amendments to the Act). The authority to implement and enforce section 112 Federal rules as promulgated without changes may be delegated under procedures established in this subpart. In this process, States may seek approval of a State mechanism for receiving delegation of existing and future unchanged section 112 standards. This subpart also establishes procedures for the review and withdrawal of section 112 implementation and enforcement authorities delegated through this subpart. This subpart clarifies which General Provisions authorities can be delegated to States. This subpart also establishes procedures for the approval of State rules or programs to establish limitations on the potential to emit pollutants listed or pursuant to section 112(b) of the Act.

(a) * * *

Alternative requirements means the applicability criteria, level of control requirements, compliance and enforcement measures, test methods and monitoring requirements, work practice standards, and compliance dates for a source or source category that a State submits for approval and, after approval, implements and enforces for affected sources in lieu of otherwise applicable Federal section 112 requirements.

Applicability criteria means the regulatory criteria used to define all affected sources subject to a specific section 112 rule.

Approval means a determination by the Administrator that a State rule, program, or requirement meets the criteria of § 63.91 and the additional criteria of either § 63.92, § 63.93, § 63.94, or § 63.97 as appropriate. For accidental release prevention programs, the criteria of § 63.95 must be met in addition to the criteria of § 63.91. This is considered a ''full approval'' for the purposes of this subpart. Partial approvals may also be granted as described in this subpart.

Compliance and enforcement measures means requirements within a rule, program, permit, or other enforceable mechanism relating to compliance and enforcement, including but not necessarily limited to monitoring methods and procedures, recordkeeping, reporting, compliance plans, inspection, entry, sampling, or accidental release prevention oversight.

Intermediate change to monitoring means a modification to federally required monitoring involving ''proven technology'' (generally accepted by the scientific community as equivalent or better) that is applied on a site-specific basis and that may have the potential to decrease the stringency of the associated emission limitation or standard. Though site-specific, an intermediate change may set a national precedent for a source category and may ultimately result in a revision to the federally required monitoring. Examples of intermediate changes to monitoring include, but are not limited to:

(1) Use of a parameter monitoring approach in lieu of continuous emission monitoring system (CEMS);

(2) Decreased frequency for parameter monitoring;

(3) Changes to quality control requirements for parameter monitoring; and

(4) Use of an electronic data reduction system in lieu of manual data reduction.

Intermediate change to test method means a within-method modification to a federally enforceable test method involving ''proven technology'' (generally accepted by the scientific community as equivalent or better) that is applied on a site-specific basis and that may have the potential to decrease the stringency of the associated emission limitation or standard. Though site-specific, an intermediate change may set a national precedent for a source category and may ultimately result in a revision to the federally enforceable test method. In order to be approved, an intermediate change must be validated according to EPA Method 301 (Part 63, Appendix A) to demonstrate that it provides equal or improved accuracy or precision. Examples of intermediate changes to a test method include, but are not limited to:

(1) Modifications to a test method's sampling procedure including substitution of sampling equipment that has been demonstrated for a particular sample matrix, and use of a different impinger absorbing solution;

(2) Changes in sample recovery procedures and analytical techniques, such as changes to sample holding times and use of a different analytical finish with proven capability for the analyte of interest; and

(3) ''Combining'' a federally-required method with another proven method for application to processes emitting multiple pollutants.

Level of control means the degree to which a rule, program, or requirement requires a source to limit emissions or to employ design, equipment, work practice, operational, accident prevention or other requirements or techniques (including a prohibition of emissions) for:

(1)(i) Each hazardous air pollutant, if individual pollutants are subject to emission limitations, and

(ii) The aggregate total of hazardous air pollutants, if the aggregate grouping is subject to emission limitations, provided that the rule, program, or requirement would not lead to an increase in risk to human health or the environment; and

(2) Each substance regulated under section 112(r). Test methods and associated procedures and averaging times are integral to the level of control.

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Major change to monitoring means a modification to federally required monitoring that uses unproven technology or procedures or is an entirely new method (sometimes necessary when the required monitoring is unsuitable). A major change to a test method may be site-specific or may apply to one or more source categories and will almost always set a national precedent. Examples of major changes to a test method include, but are not limited to:

(1) Use of a new monitoring approach developed to apply to a control

technology not contemplated in the applicable regulation;

(2) Use of a predictive emission monitoring system (PEMS) in place of a required continuous emission monitoring system (CEMS);

(3) Use of alternative calibration procedures that do not involve calibration gases or test cells;

(4) Use of an analytical technology that differs from that specified by a performance specification; and

(5) Use of alternative averaging times for reporting purposes.

Major change to test method means a modification to a federally enforceable test method that uses unproven technology or procedures or is an entirely new method (sometimes necessary when the required test method is unsuitable). A major change to a test method may be site-specific or may apply to one or more source categories and will almost always set a national precedent. In order to be approved, a major change must be validated according to EPA Method 301 (Part 63, Appendix A). Examples of major changes to a test method include, but are not limited to:

(1) Use of an unproven analytical finish;

(2) Use of a method developed to fill a test method gap;

(3) Use of a new test method developed to apply to a control technology not contemplated in the applicable regulation; and

(4) Combining two or more sampling/analytical methods (at least one unproven) into one for application to processes emitting multiple pollutants.

Minor change to monitoring means:

(1) A modification to federally required monitoring that:

(i) Does not decrease the stringency of the compliance and enforcement measures for the relevant standard;

(ii) Has no national significance (e.g., does not affect implementation of the applicable regulation for other affected sources, does not set a national precedent, and individually does not result in a revision to the monitoring requirements); and

(iii) Is site-specific, made to reflect or accommodate the operational characteristics, physical constraints, or safety concerns of an affected source.

(2) Examples of minor changes to monitoring include, but are not limited to:

(i) Modifications to a sampling procedure, such as use of an improved sample conditioning system to reduce maintenance requirements;

(ii) Increased monitoring frequency; and

(iii) Modification of the environmental shelter to moderate temperature fluctuation and thus protect the analytical instrumentation.

Minor change to test method means:

(1) A modification to a federally enforceable test method that:

(i) Does not decrease the stringency of the emission limitation or standard;

(ii) Has no national significance (e.g., does not affect implementation of the applicable regulation for other affected sources, does not set a national precedent, and individually does not result in a revision to the test method); and

(iii) Is site-specific, made to reflect or accommodate the operational characteristics, physical constraints, or safety concerns of an affected source. Examples of minor changes to a test method include, but are not limited to field adjustments in a test method's sampling procedure, such as a modified sampling traverse or location to avoid interference from an obstruction in the stack, increasing the sampling time or volume, use of additional impingers for a high moisture situation, accepting particulate emission results for a test run that was conducted with a lower than specified temperature, substitution of a material in the sampling train that has been demonstrated to be more inert for the sample matrix, and changes in recovery and analytical techniques such as a change in quality control/quality assurance requirements needed to adjust for analysis of a certain sample matrix.

Partial approval means that the Administrator approves under this subpart:

(1) A State's legal authorities that fully meet the criteria of § 63.91(b) (2), (3), (4), and (5), and substantially meet the criteria of § 63.91(b)(1) as appropriate, or

(2) A State rule or program that meets the criteria of § 63.92, § 63.93, § 63.94, § 63.95, or § 63.97 with the exception of a separable portion of that State rule or program which fails to meet those criteria. A separable portion of a State rule or program is defined as a section(s) of a rule or a portion(s) of a program which can be acted upon independently without affecting the overall integrity of the rule or program as a whole.

Program means, for the purposes of an approval under this subpart, a collection of State authorities, resources, and other requirements that satisfy the criteria of § 63.91(b) and §§ 63.94(b), 63.95(b), and/or 63.97(b), as appropriate.

State agency, for the purposes of this rule, includes State and local air pollution agencies, Indian tribes as defined in § 71.2 of this chapter, and territories of the United States to the extent they are or will be delegated NESHAP under the Clean Air Act.

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Title V operating permit programs means the 40 CFR part 70 permitting program and the delegated Indian tribal programs under 40 CFR part 71.

* * * * *

(c) *Tribal authority.* (1) A tribal authority may submit a rule or program under this subpart, provided that the tribal authority has received approval, under the provisions of part 49 of this chapter, for administering Federal rules under section 112 of the Act.

(2) A tribal authority's submittal must be consistent with the provisions of part 49 of this chapter.

(d) * * *

(1) * * *

(ii) The authority to add or delete substances or to change threshold quantities from the list of substances in § 68.130 of this chapter;

(iii) The authority to add or delete requirements from part 68, subpart G of this chapter;

(iv) The authority to delete source categories from the Federal source category list established under section 112(c)(1) or to subcategorize categories on the Federal source category list after proposal of a relevant emission standard;

(v) The authority to revise the source category schedule established under section 112(e) by moving a source category to a later date for promulgation; and

(vi) Any other authorities determined to be nondelegable by the Administrator.

* * * * *

(e) *Federally-enforceable requirements.* All rules, programs, State or local permits, or other requirements approved under this subpart and all resulting title V operating permit conditions are enforceable by the Administrator and citizens under the Act.

(f) *Standards not subject to modification or substitution.* With respect to radionuclide emissions from licensees of the Nuclear Regulatory Commission or licensees of Nuclear Regulatory Commission Agreement States which are subject to part 61, subparts I, T, or W of this chapter, a State may request that the EPA approve delegation of implementation and enforcement of the Federal standard pursuant to § 63.91, but no changes or modifications in the form or content of the standard will be approved pursuant to § 63.92, § 63.93, § 63.94, or § 63.97.

4. Amend § 63.91 as follows:

a. Revise paragraph (a) introductory text, the first sentence of (a)(1), (a)(3)

through (a)(6), (b) introductory text, (b)(1) introductory text, (b)(1)(i), (b)(2), (b)(3) introductory text, (b)(3)(iii), (b)(4), (b)(5), and (c);

b. Add paragraphs (d), (e), and (f); and

c. Remove paragraph (b)(6).

§ 63.91 Criteria common to all approval options.

(a) *Approval process.* To obtain approval under this subpart of a rule, program, or requirement that is different from the Federal section 112 rule or requirement, the criteria of this section and the criteria of either § 63.92, § 63.93, § 63.94, or § 63.97 must be met. For approval of State programs to implement and enforce Federal section 112 rules as promulgated without changes (except for accidental release programs), only the criteria of this section must be met. This includes State requests for up-front approval of their mechanism for taking delegation of future unchanged Federal section 112 standards and requirements as well as approval to implement and enforce unchanged Federal section 112 standards and requirements on a rule-by-rule basis. To obtain partial approval under this subpart, a State request must meet the criteria in paragraph (d) of this section. This includes State requests for up-front approval of their mechanism for taking delegation of future unchanged Federal section 112 standards and requirements as well as approval to implement and enforce unchanged Federal section 112 standards and requirements on a rule-by-rule basis. For approval of State rules or programs to implement and enforce the Federal accidental release prevention program as promulgated without changes, the requirements of this section and § 63.95 and either § 63.92 or § 63.93 must be met. The Administrator may, under the authority of section 112(l) and this subpart, also approve a State program designed to establish limits on the potential to emit of pollutants listed pursuant to section 112(b) of the Act. For a State's initial request for approval, and except as otherwise specified under § 63.92, § 63.93, § 63.94, § 63.95 or § 63.97, for a State's subsequent requests for approval, the approval process will be the following:

(1) Upon receipt of a request for approval, the Administrator will review the request for approval and notify the State within 30 days of receipt whether the request for approval is complete according to the criteria in this subpart.

* * *

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(3) If, after review of public comments and any State responses to comments submitted to the Administrator within 21 days of the close of the public comment period, the Administrator finds that the criteria of this subpart are met, the Administrator will approve the State rule, program, or requirement, publish it in the **Federal Register**, and incorporate it directly or by reference, in the appropriate subpart of part 63. Authorities approved under § 63.95 will be incorporated pursuant to requirements under section 112(r).

(4) Within 180 days of receiving a complete request for approval, the Administrator will either approve, partially approve, or disapprove the State rule, program, or requirement.

(5) If the Administrator finds that any of the criteria of this section are not met, or any of the criteria of § 63.92, § 63.93, § 63.94, § 63.95, or § 63.97 under which the request for approval was made are not met, the Administrator will disapprove the State rule, program, or requirement. If a State rule, program, or requirement is disapproved, the Administrator will notify the State of any revisions or additions necessary to obtain approval. Any resubmittal by a State of a request for approval will be considered a new request under this subpart.

(6) If the Administrator finds that all of the criteria of this section are met and all of the criteria of § 63.92, § 63.93, § 63.94, § 63.95, or § 63.97 are met, the Administrator will approve the State rule, program, or requirement. This approval delegates to the State the authority to implement and enforce the approved rule, program, or requirement in lieu of the otherwise applicable Federal rules, emission standards or requirements. The approved State rule, program, or requirement shall be federally enforceable from the date of publication of approval, except for § 63.94 where the approved State permit terms and conditions shall be federally enforceable on the date of issuance or revision of the title V permit. In the case of a partial approval under paragraph (d)(1) of this section, only those authorities of the State request found to meet the requirements of this section will be approved; the remaining Federal authorities remain in full force and effect. For partial approvals under paragraph (d)(2) of this section, only the portion of the State rule that is approved will be federally enforceable; the remainder continues to be State enforceable only. When a State rule, program, or requirement is approved by the Administrator under this subpart, applicable title V permits shall be revised according to the provisions of § 70.7(f) of this chapter. When a State program is approved, partially or in whole, operating permit conditions resulting from any otherwise applicable Federal section 112 rules, emission standards or requirements will not be expressed in the State's title V permits or otherwise implemented or enforced by the State or by the EPA unless and until authority to enforce the approved State rule, program, or requirement is withdrawn from the State under § 63.96. In the event approval is withdrawn under § 63.96, all otherwise applicable Federal rules and requirements shall be enforceable in accordance with the compliance schedule established in the withdrawal notice and relevant title V permits shall be revised according to the provisions of § 70.7(f) of this chapter.

(b) *Criteria for approval.* Any request for approval under this subpart shall meet all section 112(l) approval criteria specified by the otherwise applicable Federal rule, emission standard, or requirements, all of the approval criteria of this section, and any additional approval criteria in the section in this subpart under which the State's request for approval is made. If any of the State documents that are required to support an approval under this subpart are readily available to the EPA and to the public, the State may cite the relevant portions of the documents or indicate where they are available (e.g. by providing an Internet address) rather than provide copies. The State shall provide the Administrator with the following items:

(1) A written finding by the State Attorney General (or for a local agency or tribal authority, the General Counsel with full authority to represent the local agency or tribal authority) that the State has the necessary legal authority to implement and to enforce the State rule, program, or requirement upon approval and to assure compliance by all sources within the State with each applicable section 112 rule, emission standard, or requirement. For full approval, the State must have the following legal authorities concerning enforcement and compliance assurance:

(i) The State shall have enforcement authorities that meet the requirements of § 70.11 of this chapter, except that tribal authorities shall have enforcement authorities that meet the requirements of part 49 of this chapter, the Tribal Air Rule.

* * * * *

(2) A copy of State statutes, regulations and requirements that contain the appropriate provisions granting authority to implement and enforce the State rule, program, or requirement upon approval.

(3) A demonstration that the State has adequate resources to implement and

enforce all aspects of the rule, program, or requirement upon approval (except for authorities explicitly retained by the Administrator, such as those pursuant to paragraph (d) of this section or pursuant to part 49 of this chapter), which includes:

* * * * *

(iii) A description of the agency's capacity to carry out the State program, including the number, occupation, and general duties of the employees.

(4) A schedule demonstrating expeditious State implementation of the rule, program, or requirement upon approval.

(5) A plan that assures expeditious compliance by all sources subject to the State rule, program, or requirement upon approval. The plan should include at a minimum a complete description of the State's compliance tracking and enforcement program, including but not limited to inspection strategies.

(c) *Revisions.* Within 90 days of any State amendment, repeal or revision of any State rule, program, or requirement supporting an approval, the State must provide the Administrator with a copy of the revised authorities and meet the requirements of either paragraph (c)(1) or (c)(2) of this section.

(1)(i) The State shall provide the Administrator with a written finding by the State Attorney General (or for a local agency or tribal authority, the General Counsel with full authority to represent the local agency or tribal authority) that the State's revised legal authorities are adequate to continue to implement and to enforce all previously approved State rules and the approved State program (as applicable) and adequate to continue to assure compliance by all sources within the State with approved rules, the approved program, or other requirements (as applicable) and each applicable section 112 rule, emission standard or requirement.

(ii) If the Administrator determines that the written finding is not adequate, the State shall request approval of the revised rule, program, or requirement according to the provisions of paragraph (c)(2) of this section.

(2) The State shall request approval under this subpart for any revised rule, program, or requirement.

(i) If the Administrator approves the revised rule, program, or requirement, the revised rule, program, or requirement will replace the previously approved rule, program, or requirement.

(ii) If the Administrator disapproves the revised rule, program, or requirement, the Administrator will initiate procedures under § 63.96 to withdraw approval of any previously approved rule, program, or requirement that may be affected by the revised authorities.

(iii) Until such time as the Administrator approves or withdraws approval of a revised rule, program, or requirement, the previously approved rule, program, or requirement remains federally enforceable and the revised rule, program, or requirement is not federally enforceable.

(3)(i) If the EPA amends, or otherwise revises a promulgated section 112 rule, emission standard, or requirement for which the State has received delegation to implement and enforce unchanged or for which the State has an approved alternative rule, program, or other requirement under this subpart E, then the State shall submit to the EPA a revised equivalency demonstration within 90 days.

(ii) The revised equivalency demonstration will be reviewed and approved or denied according to the procedures set forth in this section and § 63.91, § 63.92, § 63.93, § 63.94, § 63.95, or § 63.97, whichever are applicable.

(d) *Partial approval.* (1) If a State's legal authorities submitted under this subpart substantially meet the requirements of paragraph (b)(1) of this section, but are not fully approvable, the Administrator may grant a partial approval with the State's consent. The State should specify which authorities in paragraph (b)(1) of this section are not fully approvable. The EPA will continue to implement and enforce those authorities under paragraph (b)(1) of this section that are not approved. If a State fails to satisfy any of the other requirements in paragraph (b) of this section, the submittal will be disapproved.

(2) If a rule or program submitted under this subpart meets the requirements of § 63.92, § 63.93, § 63.94, § 63.95, or § 63.97 as appropriate, with the exception of a separable portion of that rule or program, a State may remove that separable portion of its rule or program. The State must specify which aspect of the rule or program is deficient. Alternatively, the Administrator may remove that separable portion with the State's consent. The Administrator may then grant a partial approval of the portion of the rule or program that meets the requirements of this subpart.

(3) If EPA determines that there are too many areas of deficiency or that separating the responsibilities between Federal and State government would be too cumbersome and complex, then the EPA may disapprove the submittal in its entirety. The EPA is under no duty to approve rules or programs in part. The EPA reserves the right to disapprove rules and programs entirely if, in the EPA's judgement, partial approval is not workable.

(e) *Delegable Authorities.* A State may exercise certain discretionary authorities granted to the Administrator under subpart A of this part, but may not exercise others, according to the following criteria:

(1)(i) A State may ask the appropriate EPA Regional Office to delegate any of the authorities listed as ''Category I'', in paragraph (e)(1)(ii) of this section, below. The EPA Regional Office will delegate any such authorities at their discretion. The EPA Regional Office may request to review an opportunity to review any State decision pursuant to the authorities listed in paragraph (e)(1)(ii) of this section.

(ii) ''Category I'' shall consist of the following authorities:

(A) Section 63.1, Applicability Determinations,

(B) Section 63.6(e), Operation and Maintenance Requirements—Responsibility for Determining Compliance,

(C) Section 63.6(f), Compliance with Non-Opacity Standards—Responsibility for Determining Compliance,

(D) Section 63.6(h), Compliance with Opacity and Visible Emissions Standards—Responsibility for Determining Compliance,

(E) Sections 63.7(c)(2)(i) and (d), Approval of Site-Specific Test Plans,

(F) Section 63.7(e)(2)(i), Approval of Minor Alternatives to Test Methods,

(G) Section 63.7(e)(2)(ii) and (f), Approval of Intermediate Alternatives to Test Methods,

(H) Section 63.7(e)(iii), Approval of Shorter Sampling Times and Volumes When Necessitated by Process Variables or Other Factors,

(I) Sections 63.7(e)(2)(iv), (h)(2), and (h)(3), Waiver of Performance Testing,

(J) Sections 63.8(c)(1) and (e)(1), Approval of Site-Specific Performance Evaluation (monitoring) Test Plans,

(K) Section 63.8(f), Approval of Minor Alternatives to Monitoring,

(L) Section 63.8(f), Approval of Intermediate Alternatives to Monitoring, and

(M) Section 63.9 and 63.10, Approval of Adjustments to Time Periods for Submitting Reports.

(2)(i) A State may not exercise any of the discretionary authorities listed as ''Category II'' in § 63.91(e)(3)(ii).

(ii) ''Category II'' shall consist of the following authorities:

(A) Section 63.6(g), Approval of Alternative Non-Opacity Emission Standards,

(B) Section 63.6(h)(9), Approval of Alternative Opacity Standards,

(C) Sections 63.7(e)(2)(ii) and (f), Approval of Major Alternative Test Methods, and

(D) Section 63.10(f), Waiver of Recordkeeping—all.

(f) *Relationship to Other Standards.* No rule shall be approved under the provisions of this subpart that would override the requirements of any other applicable program or rule under the Clean Air Act or under State law.

5. Amend § 63.92 by revising the first sentence of paragraph (a)(1) and paragraph (a)(2) to read as follows:

§ 63.92 Approval of a State rule that adjusts a section 112 rule.

* * * * *

(a) *Approval process.*

(1) If the Administrator finds that the criteria of this section and the criteria of § 63.91 are met, the Administrator will approve the State rule, publish it in the **Federal Register** and incorporate it, directly or by reference, in the appropriate subpart of part 63, without additional notice and opportunity for comment. * * *

(2) If the Administrator finds that any one of the State adjustments to the Federal rule is in any way ambiguous with respect to the stringency of applicability, the stringency of the level of control, the stringency of the compliance and enforcement measures, or the stringency of the compliance dates for any affected source or emission point, the Administrator will disapprove the State rule.

* * * * *

6. Amend § 63.93 by revising the first sentence of paragraph (a)(2), paragraphs (a)(3), (a)(4), (a)(5), (b)(4) introductory text, and (b)(4)(ii) to read as follows:

§ 63.93 Approval of State authorities that substitute for a section 112 rule.

* * * * *

(a) * * *

(2) If, after review of public comments and any State responses to comments submitted to the Administrator within 21 days of the close of the public comment period, the Administrator finds that the criteria of this section and the criteria of § 63.91 are met, the Administrator will approve the State authorities under this section, publish the approved authorities in the **Federal Register**, and incorporate them directly or by reference, in the appropriate subpart of part 63. * * *

(3) If the Administrator finds that any of the requirements of this section or § 63.91 have not been met, the Administrator will partially approve or disapprove the State authorities. For any disapprovals, the Administrator will provide the State with the basis for the disapproval and what actions the State can take to make the authorities approvable.

(4) Authorities submitted for approval under this section shall include State rules or other requirements enforceable under State law that would substitute for a section 112 rule.

(5) Within 180 days of receiving a complete request for approval under this section, the Administrator will either approve, partially approve, or disapprove the State request.

(b) * * *

(4) At a minimum, the approved State rule(s) must include the following compliance and enforcement measures. (For rules addressing the accidental release prevention program, minimum compliance and enforcement provisions are described in § 63.95.)

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(ii) If a standard in the approved rule is not instantaneous, a maximum averaging time must be established.

* * * * *

7. Revise § 63.94 to read as follows:

§ 63.94 Approval of State permit terms and conditions for a section 112 rule.

Under this section a State may seek approval of a State program to be implemented and enforced in lieu of specified existing and future Federal emission standards or requirements promulgated under section 112(d), section 112(f) or section 112(h), for those affected sources permitted by the State under part 70 or part 71 of this chapter.

(a) *Up-front approval process.* (1) Within 21 days after receipt of a complete request for approval of a State program under this section the Administrator will seek public comment for 21 days on the State request for approval. The Administrator will require that comments be submitted concurrently to the State.

(2) If, after review of all public comments, and State responses to comments submitted to the Administrator within 14 days of the close of the public comment period, the Administrator finds that the criteria of paragraph (b) of this section and the criteria of § 63.91 are met, the Administrator will approve the State program. The approved program will be published in the **Federal Register** and incorporated directly or by reference in the appropriate subpart of part 63.

(3) If the Administrator finds that any of the criteria of paragraph (b) of this section or § 63.91 have not been met, the Administrator will partially approve or disapprove the State program. For any disapprovals, the Administrator will provide the State with the basis for the disapproval and what action the State can take to make the programs approvable.

(4) Within 90 days of receiving a complete request for approval under this section, the Administrator will either approve, partially approve, or disapprove the State request.

(b) *Criteria for up-front approval.* Any request for program approval under this section shall meet all of the criteria of this paragraph and § 63.91 before approval. The State shall provide the Administrator with:

(1)(i) An identification of all specific sources in source categories listed pursuant to subsection 112(c) for which the State is seeking authority to implement and enforce alternative requirements under this section. The State's list may not exceed five sources in any single source category.

(ii) If the identified sources in any source category comprise a subset of the sources in that category within the State's jurisdiction, the State shall request delegation for the remainder of the sources in that category that are required to be permitted by the State under part 70 or part 71 of this chapter. The State shall request delegation for the remainder of the sources in that category under another section of this subpart.

(2) An identification of all existing and future section 112 emission standards for which the State is seeking authority under this section to implement and enforce alternative requirements.

(3) A demonstration that the State has an approved title V operating permit program and that the program permits the affected sources.

(c) *Approval process for alternative requirements.* (1) After promulgation of a Federal emission standard for which the State has program approval to implement and enforce alternative requirements in the form of title V permit terms and conditions, the State shall provide the Administrator with draft permit terms and conditions that are sufficient, in the Administrator's judgement, to allow the Administrator to determine equivalency. The permit terms and conditions shall reflect all of the requirements of the otherwise applicable Federal section 112 emission standard(s) including any alternative requirements that the State is seeking to implement and enforce.

(2) The Administrator will notify the State within 30 days of receipt of a request for approval of alternative requirements under this paragraph as to whether the request for approval is complete according to the criteria in paragraph (d) of this section. If a request

for approval is incomplete, in his or her notification to the State, the Administrator will specify the deficient elements of the State's request.

(3) If, after evaluation of the draft permit terms and conditions that were submitted by the State, the Administrator finds that the criteria of paragraph (d) of this section have been met, the Administrator will approve the State's alternative requirements (by approving the draft permit terms and conditions) and notify the State in writing of the approval. The Administrator may approve the State's alternative requirements on the condition that the State makes certain changes to the draft permit terms and conditions and includes the changes in the complete draft, proposed, and final title V permits for the affected sources. If the Administrator approves the alternative requirements on the condition that the State makes certain changes to them, the State shall make those changes or the alternative requirements will not be federally enforceable when they are included in the final permit, even if the Administrator does not object to the proposed permit. Unless and until the Administrator affirmatively approves the State's alternative requirements (by approving the draft permit terms and conditions) under this paragraph, and those requirements (permit terms) are incorporated into the final title V permit for any affected source, the otherwise applicable Federal emission standard(s) remain the federally enforceable and federally applicable requirements for that source. The approved alternative requirements become federally enforceable for that affected source from the date of issuance (or revision) of the source's title V permit. The Federal emission standard(s) remain in full force and effect for any covered source that does not have an alternative permit approved by the Administrator.

(4) If, after evaluation of the draft permit terms and conditions that were submitted by the State, the Administrator finds that the criteria of paragraph (d) of this section have not been met, the Administrator will disapprove the State's alternative requirements and notify the State in writing of the disapproval. In the notice of disapproval, the Administrator will specify the deficient or nonapprovable elements of the State's alternative requirements. If the Administrator disapproves the State's alternative requirements, the otherwise applicable Federal emission standard(s) remain the applicable, federally enforceable requirements for those affected sources.

(5) Within 90 days of receiving a complete request for approval under this paragraph, the Administrator will either approve, partially approve, or disapprove the State's alternative requirements.

(6) Nothing in this section precludes the State from submitting alternative requirements in the form of title V permit terms and conditions for approval under this paragraph at the same time the State submits its program to the Administrator for up-front approval under paragraph (a) of this section, provided that the Federal emission standards for which the State submits alternative requirements are promulgated at the time of the State's submittal. If the Administrator finds that the criteria of § 63.91 and the criteria of paragraphs (b) and (d) of this section are met, the Administrator will approve both the State program and the permit terms and conditions within 90 days of receiving a complete request for approval. Alternatively, following up-front approval, the State may submit alternative requirements in the form of title V permit terms and conditions for approval under this paragraph at any time after promulgation of the Federal emission standards.

(d) *Approval criteria for alternative requirements.* Any request for approval under this paragraph shall meet the following criteria. Taken together, the criteria in this paragraph describe the minimum contents of a State's equivalency demonstration for a promulgated Federal section 112 emission standard. To be approvable, the State submittal must contain sufficient detail to allow the Administrator to make a determination of equivalency between the State's alternative requirements and the Federal requirements. Each submittal of alternative requirements in the form of draft permit terms and conditions for an affected source shall:

(1) Identify the specific, practicably enforceable terms and conditions with which the source would be required to comply upon issuance or revision of the title V permit. The State shall submit permit terms and conditions that reflect all of the requirements of the otherwise applicable Federal section 112 emission standard(s) including any alternative requirements that the State is seeking to implement and enforce. The State shall identify for the Administrator the specific permit terms and conditions that contain alternative requirements.

(2) Identify specifically how the alternative requirements in the form of permit terms and conditions are the same as or differ from the requirements in the otherwise applicable Federal emission standard(s) (including any applicable requirements in subpart A or other subparts or appendices of this part). The State shall provide this identification in a side-by-side comparison of the State's requirements in the form of permit terms and conditions and the requirements of the Federal emission standard(s).

(3) The State shall provide the Administrator with detailed documentation that demonstrates the State's belief that the alternative requirements meet the criteria specified in § 63.93(b), i.e., that the alternative requirements are at least as stringent as the otherwise applicable Federal requirements.

(e) *Incorporation of permit terms and conditions into title V permits.* (1) After approval of the State's alternative requirements under this section, the State shall incorporate the approved permit terms and conditions into title V permits for the affected sources. The State shall issue or revise the title V permits according to the provisions contained in § 70.7 or § 71.7 of this chapter.

(2) In the notice of draft permit availability, and in each draft, proposed, and final permit, the State shall indicate prominently that the permit contains alternative section 112 requirements. In the notice of draft permit availability, the State shall specifically solicit public comment on the alternative requirements. In addition, the State shall attach all documents supporting the approved equivalency determination for those alternative requirements to each draft, proposed, and final permit.

8. Revise § 63.95 to read as follows:

§ 63.95 Additional approval criteria for accidental release prevention programs.

(a) A State submission for approval of a 40 CFR part 68 program must meet the criteria and be in accordance with the procedures of this section, § 63.91, and, where appropriate, either § 63.92 or § 63.93.

(b) The State part 68 program application shall contain the following elements consistent with the procedures in § 63.91 and, where appropriate, either § 63.92 or § 63.93:

(1) A demonstration of the State's authority and resources to implement and enforce regulations that are no less stringent than the regulations 40 CFR part 68, subparts A through F and § 68.200;

(2) Procedures for:

(i) Reviewing risk management plans; and

(ii) Providing technical assistance to stationary sources, including small businesses.

(3) A demonstration of the State's authority to enforce all part 68 requirements including an auditing strategy that complies with 40 CFR part 68.220.

(c) A State may request approval for a complete or partial program.

9. Amend § 63.96 by revising paragraphs (a)(1) introductory text, (a)(1)(i) through (a)(1)(v), (a)(2), the first sentence of (b)(1), the last sentence of (b)(2) introductory text, (b)(2)(ii), (b)(2)(iii), (b)(3), the first sentence of (b)(4), the first sentence of (b)(4)(i) introductory text, (b)(4)(ii) through (b)(4)(iv), (b)(6), (b)(7) introductory text, (b)(7)(i), and (b)(7)(ii) to read as follows:

§ 63.96 Review and withdrawal of approval.

(a) * * *

(1) The Administrator may at any time request any of the following information to review the adequacy of implementation and enforcement of an approved rule, program, or other section 112 requirement and the State shall provide that information within 45 days of the Administrator's request:

(i) Copies of any State statutes, rules, regulations, authorities, or other requirements that have amended, repealed or revised the approved State rule, program, or requirement since approval or since the immediately previous EPA review;

(ii) Information to demonstrate adequate State enforcement and compliance monitoring activities with respect to all approved State rules, programs, or requirements and with all section 112 rules, emission standards, or requirements;

(iii) Information to demonstrate adequate funding, staff, and other resources to implement and enforce the State's approved rule, program, or requirement;

(iv) A schedule for implementing the State's approved rule, program, or requirement that assures compliance with all section 112 rules and requirements that the EPA has promulgated since approval or since the immediately previous EPA review,

(v) A list of title V or other permits issued, amended, revised, or revoked since approval or since the immediately previous EPA review, for sources subject to a State rule, program, or requirement approved under this subpart.

* * * * *

(2) Upon request by the Administrator, the State shall demonstrate that each State rule, program, or requirement applied to an affected source or category of sources is achieving equivalent or greater emission reductions as the otherwise applicable Federal rule, emission limitation, or standard.

(b) * * *

(1) If the Administrator has reason to believe that a State is not adequately implementing or enforcing an approved rule, program, or requirement according to the criteria of this subpart or that an approved rule, program, or requirement is not achieving emission reductions that are equivalent to or greater than the otherwise applicable Federal rule, emission standard or requirements, the Administrator will so inform the State in writing and will identify the reasons why the Administrator believes that the State's rule, program, or requirement is not adequate. * * *

(2) * * * If the State does not correct the identified deficiencies within 90 days after receiving revised notice of deficiencies, the Administrator shall withdraw approval of the State's rule, program, or requirement upon a determination that:

* * * * *

(ii) The State is not adequately implementing or enforcing the approved rule, program, or requirement, or

(iii) An approved rule, program, or requirement is not achieving emission reductions that are equivalent to or greater than the otherwise applicable Federal rule.

(3) The Administrator may withdraw approval for part of a rule, program, or requirement, or for an entire rule, program, or requirement.

(4) Any State rule, program, or requirement, or portion thereof for which approval is withdrawn is no longer federally enforceable. * * *

(i) Upon withdrawal of approval, the Administrator will publish an expeditious schedule for sources subject to the previously approved State rule, program, or requirement to come into compliance with applicable Federal requirements. * * *

(ii) Upon withdrawal, the State shall reopen, under the provisions of § 70.7(f) or § 71.7(l) of this chapter, the title V permit of each source subject to the previously approved rules, programs, or requirements in order to assure compliance through the permit with the applicable requirements for each source.

(iii) If the Administrator withdraws approval of State rules, programs, or requirements applicable to sources that are not subject to title V permits, the applicable State rules, programs, or requirements are no longer federally enforceable.

(iv) If the Administrator withdraws approval of a portion of a State rule, program, or requirement, other approved portions of the State rule, program, or requirement that are not withdrawn shall remain in effect.

* * * * *

(6) A State may submit a new rule, program, or requirement, or portion thereof for approval after the Administrator has withdrawn approval of the State's rule, program, or requirement, or portion of a rule, program, or requirement. The Administrator will determine whether the new rule, program, or requirement or portion thereof is approvable according to the criteria and procedures of § 63.91 and § 63.92, § 63.93 or § 63.94, § 63.95, or § 63.97, as appropriate.

(7) A State may voluntarily withdraw from an approved State rule, program, or requirement or portion thereof by notifying the Administrator and all affected sources subject to the rule, program, or requirement and providing notice and opportunity for comment to the public within the State.

(i) Upon voluntary withdrawal by a State, the Administrator will publish a timetable for sources subject to the previously approved State rule, program, or requirement to come into compliance with applicable Federal requirements.

(ii) Upon voluntary withdrawal, the State must reopen and revise the title V permits of all sources affected by the withdrawal as provided for in this section and § 70.7(f) and § 71.7(f) of this chapter, and the Federal rule, emission standard, or requirement that would have been applicable in the absence of approval under this subpart will become the applicable requirement for the source.

* * * * *

10. Add § 63.97 to read as follows:

§ 63.97 Approval of a State program that substitutes for section 112 requirements.

Under this section, a State may seek approval of a State program to be implemented and enforced in lieu of specified existing or future Federal emission standards or requirements promulgated under sections 112(d), 112(f), or 112(h). A State may not seek approval under this section for a program that implements and enforces section 112(r) requirements.

(a) *Up-front approval process.* (1) Within 21 days after receipt of a complete request for approval of a State program submitted only under paragraph (b)(1) of this section, the Administrator will seek public comment for 21 days on the State request.

(2) Within 45 days after receipt of a complete request for approval of a State program submitted under both paragraphs (b)(1) and (b)(2) of this

section, the Administrator will seek public comment for a minimum of 21 days on the State request.

(3) The Administrator will require that comments be submitted concurrently to the State.

(4) If, after review of all public comments, and State responses to comments submitted to the Administrator within 14 days of the close of the public comment period in the case of submittals only under paragraph (b)(1), or 30 days of the close of the public comment period in the case of submittals under both paragraphs (b)(1) and (b)(2), the Administrator finds that the criteria of paragraph (b) of this section and the criteria of § 63.91 are met, the Administrator will approve or partially approve the State program. The approved State program will be published in the **Federal Register** and incorporated, directly or by reference, in the appropriate subpart of part 63.

(5) If the Administrator finds that any of the criteria of paragraph (b) of this section or § 63.91 have not been met, the Administrator will partially approve or disapprove the State program.

(6) The Administrator will either approve, partially approve, or disapprove the State request:

(i) Within 90 days after receipt of a complete request for approval of a State program submitted under paragraph (b)(1) of this section; or

(ii) Within 180 days after receipt of a complete request for approval of a State program submitted under both paragraphs (b)(1) and (b)(2) of this section.

(b) *Criteria for up-front approval.* Any request for program approval under this section shall meet all of the criteria of this paragraph and § 63.91 before approval.

(1) For every request for program approval under this section, the State shall provide the Administrator with an identification of the specific source categories listed pursuant to section 112(c) and an identification of all existing and future section 112 emission standards or other requirements for which the State is seeking authority to implement and enforce alternative requirements under this section.

(2) In addition, the State may provide the Administrator with one or more of the following program elements for approval under this paragraph:

(i) Alternative requirements in State rules, regulations, or general permits (or other enforceable mechanisms) that apply generically to one or more categories of sources and for which the State seeks approval to implement and enforce in lieu of specific existing Federal section 112 emission standards or requirements. The Administrator may approve or disapprove the alternative requirements in these rules, regulations, or permits when she approves or disapproves the State's up-front submittal under this paragraph. In the future, after new Federal emission standards or requirements are promulgated, the State may extend the applicability of approved generic alternative requirements to additional source categories by repeating the approval process specified in paragraph (a) of this section. To be approvable, any request for approval of generic alternative requirements during the up-front approval process shall meet the criteria in paragraph (d) of this section.

(ii) A description of the mechanism(s) that is (are) enforceable as a matter of State law that the State will use to implement and enforce alternative requirements for area sources. The mechanisms that may be approved under this paragraph include, but are not limited to, rules, regulations, and general permits that apply to categories of sources. The State shall demonstrate to the Administrator that the State has adequate resources and authorities to implement and enforce alternative section 112 requirements using the State mechanism(s).

(c) *Approval process for alternative requirements.* (1) After promulgation of a Federal emission standard or requirement for which the State has program approval under this section to implement and enforce alternative requirements, the State shall provide the Administrator with alternative requirements that are sufficient, in the Administrator's judgement, to allow the Administrator to determine equivalency under paragraph (d) of this section. The alternative requirements shall reflect all of the requirements of the otherwise applicable Federal section 112 emission standard or requirement, including any alternative requirements that the State is seeking to implement and enforce. Alternative requirements submitted for approval under this paragraph shall be contained in rules, regulations, general permits, or other mechanisms that apply to and are enforceable under State law for categories of sources. State policies are not approvable under this section unless and until they are incorporated into specific, enforceable, alternative requirements in rules, permits, or other mechanisms that apply to categories of sources.

(2) The Administrator will notify the State within 30 days of receipt of a request for approval under this paragraph as to whether the request for approval is complete according to the criteria in paragraph (d) of this section. If a request for approval is incomplete, in his or her notification to the State, the Administrator will specify the deficient elements of the State's request.

(3) Within 45 days after receipt of a complete request for approval under this paragraph, the Administrator will seek public comment for a minimum of 21 days on the State request for approval. The Administrator will require that comments be submitted concurrently to the State.

(4) If, after review of public comments and any State responses to comments submitted to the Administrator within 21 days of the close of the public comment period, the Administrator finds that the criteria of paragraph (d) of this section and the criteria of § 63.91 are met, the Administrator will approve the State's alternative requirements. The approved alternative requirements will be published in the **Federal Register** and incorporated, directly or by reference, in the appropriate subpart of part 63.

(5) If the Administrator finds that any of the requirements of paragraph (d) of this section or § 63.91 have not been met, the Administrator will partially approve or disapprove the State's alternative requirements. For any disapprovals, the Administrator will provide the State with the basis for the disapproval and what action the State can take to make the alternative requirements approvable.

(6) Within 180 days of receiving a complete request for approval under this paragraph, the Administrator will either approve, partially approve, or disapprove the State request.

(7) Nothing in this section precludes the State from submitting alternative requirements for approval under this paragraph at the same time the State submits its program to the Administrator for up-front approval under paragraph (a) of this section, provided that the Federal emission standards or requirements for which the State submits alternative requirements are promulgated at the time of the State's submittal. If the State submits alternative requirements for approval at the same time the State submits its program for approval, the Administrator will have 45 days, rather than 30 days, after receiving a complete request for approval to seek public comment on the State request. If the Administrator finds that the criteria of § 63.91 and the criteria of paragraphs (b) and (d) of this section are met, the Administrator will approve both the State program and the alternative requirements within 180 days of receiving a complete request for approval. Alternatively, following up-

front approval, the State may submit alternative requirements for approval under this paragraph at any time after promulgation of the Federal emission standards or requirements.

(d) *Approval criteria for alternative requirements.* Any request for approval under this paragraph shall meet the following criteria. Taken together, the criteria in this paragraph describe the minimum contents of a State's equivalency demonstration for a promulgated Federal section 112 emission standard or requirement. To be approvable, the State submittal must contain sufficient detail to allow the Administrator to make a determination of equivalency between the State's alternative requirements and the Federal requirements. Each submittal of alternative requirements for a category of sources shall:

(1) Include copies of all State rules, regulations, permits, implementation plans, or other enforceable mechanisms that contain the alternative requirements for which the State is seeking approval. These documents shall also contain requirements that reflect all of the requirements of the otherwise applicable Federal section 112 emission standard(s) or requirement(s) for which the State is not submitting alternatives. The State shall identify for the Administrator the specific requirements with which sources in a source category are required to comply including the specific alternative requirements.

(2) Identify specifically how the alternative requirements are the same as or differ from the requirements in the otherwise applicable Federal emission standard(s) or requirement(s) (including any applicable requirements in subpart A or other subparts or appendices of this part). The State shall provide this identification in a side-by-side comparison of the State's requirements and the requirements of the Federal emission standard(s) or requirement(s).

(3) The State shall provide the Administrator with detailed documentation that demonstrates the State's belief that the alternative requirements meet the criteria specified in § 63.93(b) of this subpart, i.e., that the alternative requirements are at least as stringent as the otherwise applicable Federal requirements.

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Tuesday
January 12, 1999

Part III

Department of the Interior

Office of Hearings and Appeals
Minerals Management Service

30 CFR Part 208, et al.
43 CFR Part 4
Appeals of MMS Orders; Proposed Rules

DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals

Minerals Management Service

30 CFR Parts 208, 241, 242, 243, 250, and 290

43 CFR Part 4

RIN 1010–AC21

Appeals of MMS Orders

AGENCIES: Office of Hearings and Appeals (OHA) and Minerals Management Service (MMS), Interior.

ACTION: Proposed rulemaking.

SUMMARY: The Office of Hearings and Appeals and the Minerals Management Service propose to amend their rules governing the appeal of orders from both the MMS's Royalty Management Program and MMS's Offshore Minerals Management Program. Also included in this proposed rulemaking are new regulations governing the issuance of royalty orders and the ability of appellants in royalty appeals to demonstrate financial solvency in lieu of posting a surety in accordance with the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, and new regulations to collect processing fees.

DATES: Comments must be submitted on or before March 15, 1999. MMS will publish a separate document notice in the **Federal Register** indicating date and location of a workshop regarding this proposed rulemaking.

ADDRESSES: Written comments regarding this proposed rule should be sent to David S. Guzy, Chief, Rules and Publications Staff, at the following addresses.

For comments sent via the U.S. Postal Service use: Minerals Management Service, Royalty Management Program, Rules and Publications Staff, P.O. Box 25165 MS 3021, Denver, CO 80225–0165. Courier or overnight delivery address is: Building 85, Room A–613, Denver Federal Center, Denver, CO 80225; or e-mail RMP.comments@mms.gov.

FOR FURTHER INFORMATION CONTACT: David S. Guzy, Chief, Rules and Publications Staff, telephone (303) 231–3432, FAX (303) 231–3385, e-Mail David.Guzy@mms.gov.

SUPPLEMENTARY INFORMATION: We will post public comments after the comment period closes on the Internet at http://www.rmp.mms.gov or contact David S. Guzy, Chief, Rules and Publications Staff, telephone (303) 231–3432, FAX (303) 231–3385.

I. General Background

In May 1994, MMS began a comprehensive review of its administrative appeals process, particularly as it relates to appeals involving orders or decisions issued by the Royalty Management Program (RMP). As part of that review, MMS held several informal meetings with State, tribal, and industry representatives to discuss the problems and possible solutions within the appeals process. The principal problems identified included the length of the appeals process, sometimes taking several years to resolve a case, and the excessive costs of the process to both MMS and appellants.

On August 13, 1996, the President signed the Federal Oil and Gas Royalty Simplification and Fairness Act, Pub. L. 104–185, as corrected by Pub. L. 104–200 (RSFA). Section 4 of RSFA amended the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1701 *et seq.*, and added a new FOGRMA § 115(h), 30 U.S.C. 1724(h), governing the Department's process for resolving appeals of MMS orders or decisions involving royalties and other payments due on Federal oil and gas leases. For appeals involving Federal oil and gas leases covered by this new provision, the Department has 33 months from the date a proceeding is commenced to complete all levels of administrative review. If the Department does not decide the appeal within 33 months, the appeal is deemed decided either for or against the Department, depending on the type of order and the monetary amount at issue in the appeal. The 33-month deadline does not apply to appeals involving Indian leases or Federal leases for minerals other than oil and gas. As a result of this MMS review and the new legislation, MMS announced a proposed rule in the **Federal Register** on October 28, 1996. The proposed regulation provided for amendments to 30 CFR part 290. On December 31, 1997, MMS announced that it intended to withdraw the October 28, 1996, proposed rule when it published a revised notice of proposed rule responding to the Royalty Policy Committee (RPC) report. 62 FR 68244. Accordingly we hereby withdraw the October 28, 1996, proposed rule.

In 1995, the Department of the Interior (DOI) established a RPC under the Minerals Management Advisory Board. The RPC's purpose is to provide advice to the Secretary on the Department's management of Federal and Indian mineral leases, revenues, and other minerals-related policies. The RPC includes representatives from States, Indian tribes and allottee organizations, minerals industry associations, Federal agencies and the public. At the RPC's first meeting in September 1995, it established eight Subcommittees, including the Appeals and Alternative Dispute Resolution (ADR) Subcommittee (Subcommittee). The Subcommittee was created to make recommendations to the RPC to improve the processes involving appeals and alternative dispute resolution. Membership in the Subcommittee included eleven representatives from industry, five representatives from States, and two representatives from Indian tribes. In addition to the voting members, the Subcommittee benefitted from the participation of several other persons as non-voting members and of two employees of MMS as staff to the Subcommittee. The Subcommittee agreed that the principal purpose of the MMS administrative appeals process should be the expeditious and independent review of appeals.

The Subcommittee recognized that the MMS appeals process had been under criticism and serious review since 1994 and believed that substantial reform was needed. Some of the problems the Subcommittee identified in the existing appeals process were:

1. Lack of timely resolution;
2. Lack of clarity in some orders;
3. Perceived lack of independence and unfairness of MMS Director-level appeals decisions due to the internal clearance process and communication within the Department between those involved in making the initial decision and those involved in making the decision on appeal;
4. Policy uncertainty—some orders issued without MMS having clearly decided and explained policy issues;
5. Inability of the appellant to determine what the administrative record for the order contains;
6. Allegedly conflicting roles of the Solicitor's Office in satisfying institutional needs (assisting in setting policy and overall litigation strategy) and acting as a legal advocate for MMS; and
7. Duplication of effort between the MMS Director and Interior Board of Land Appeals (IBLA) levels of review.

Throughout its review of the appeals process, the Subcommittee insisted that its recommendations needed to meet certain principles. Any changes in the process:

1. Could not substantially harm the position of MMS;
2. Would need to ensure that the process would be completed within 33 months;

3. Should encourage the parties to develop the facts, clarify the issues, and resolve disputes at the earliest possible opportunity;

4. Would have to reduce the costs of the process to the participants;

5. Would clarify the role of Indian lessors as parties; and

6. Would clarify delegated State participation.

The RPC unanimously adopted and approved the recommendation of the RPC Appeals and ADR Subcommittee and submitted a report (RPC Report) to the Secretary of the Interior on March 27, 1997. The RPC Report recommended a number of specific steps involving both appeals and ADR processes. The RPC recommended changing the current two-stage appeals process into a one-stage IBLA administrative appeal process designed to solve the problems and meet the principles identified above. The Subcommittee recommended that:

1. MMS resolve all fundamental policy questions before it or a delegated State issues an order;

2. DOI encourage the resolution of disputes without completing the formal administrative appeals process;

3. DOI clarify the standing of Indian lessors and ''States concerned'' with respect to the administrative appeals process;

4. DOI change the structure of the administrative appeals process, so that appeals of MMS, State, or tribal orders are taken to the IBLA, under a special set of rules applicable to royalty appeals; and

5. DOI specify the differences in appeals involving Indian leases and Federal leases for minerals other than oil and gas because the provisions of RSFA do not apply to those leases.

On September 22, 1997, the Secretary accepted the RPC Report for implementation with some changes and clarifications. This proposed rule is based primarily on the RPC Report and the changes and clarifications identified in the Secretary's letter dated September 22, 1997.

To implement the RPC recommendations, as modified by the Secretary's letter, MMS formed a regulation writing team comprised of representatives from MMS, the IBLA, the Office of the Solicitor, and State audit offices. That team drafted the proposed rule with the goal of developing an appeals process implementing the RPC's recommendations in accordance with the Secretary's changes and clarifications.

During the drafting process, the team members heard concerns about whether the result of the recommendations of the RPC will actually advance the RPC's primary goal: namely, timely and efficient resolution of appeals. The pre-briefing procedures in the proposed rule are complex in order to meet the following goals:

(1) Implement RSFA provisions setting time limits on appeals and requiring at least one settlement conference for each appeal;

(2) Respond to other RSFA provisions regarding orders and the roles of lessees when their designees receive orders;

(3) Coordinate RSFA time limits with other provisions of the rule; and

(4) Respond to recommendations of the RPC involving enhanced participation of Indian lessors and delegated States in the appeals process; continued ability of the MMS Director to recommend whether to concur with, modify or rescind orders; and continued ability of Assistant Secretaries to decide appeals.

An example of a scenario illustrating the complexity of the proposed rule would be when the MMS Director modifies an order and the delegated State disagrees with the modification and intervenes. Assume in the example that both the appellant and MMS wish to file documents not contained in the record they certified under § 4.919 or to add issues not contained in the ''Joint Statement of Facts and Issues'' (this is often the case under the current process and is possible under the proposed appeals process). As a result of the expedited briefing process under the proposed rule, in the example, MMS and the delegated State would each file up to seven substantive documents (i.e. briefs, replies, responses, requests, surreplies), and the appellant would file up to six substantive documents, all in less than four months. The IBLA may have to issue two orders regarding the record prior to its final decision, and to consider up to twenty substantive pleadings in order to arrive at its final decision. (The current process usually involves three or four substantive pleadings and a single decision by the IBLA.) While this example does not reflect the proposed process in its simplest form, even more complicated processes are possible. Therefore, in cases such as this example, the pre-briefing procedures and more formal IBLA processes described in this proposed rulemaking will add expense to the appeal process for both appellants and MMS.

In recent years under the existing process the MMS Director has been deciding an average of approximately 213 appeals per year. Approximately 75 of these (35%) are appealed to IBLA. Thus, under the current process, a minority of MMS Director's decisions are appealed to IBLA.

Also, in recent years, we estimate that it has taken the IBLA, on average, about 18 months to issue a decision (counting from the date an MMS royalty appeal is fully briefed and ripe for decision). This number is based on data from the IBLA's docketing system.

The proposed rule is likely to increase the IBLA's workload, on average, for individual royalty appeals. Under the proposed rule, the IBLA would have to issue a decision in every appeal that is not resolved or settled by MMS and the appellant or decided by an Assistant Secretary. Even assuming that the IBLA's docket load does not increase under the proposed rule, the IBLA will have to issue a decision in a royalty appeal every 6 days in order to meet the 33-month deadline. This figure is based on 75 royalty appeals per year to the IBLA and 430 days to decide those appeals (20 months less weekends and holidays). It does not include the 130 royalty appeals currently pending before the IBLA, of which 81 are subject to RSFA's 33-month deadline.

Any additional workload also could affect IBLA's ability to timely decide appeals affecting Bureau of Land Management (BLM) and Office of Surface Mining programs, as well as appeals of royalty issues which are not subject to RSFA's 33-month deadline. The Department's Office of the Inspector General (OIG) is currently conducting an audit that is expected to address the timeliness of IBLA's disposition of MMS royalty appeals. OIG is expected to issue a draft audit report before this rule becomes final, and its report may provide information that would be useful in evaluating the implications of this proposed rule as well as any possible alternative proposals.

We recognize that there are deficiencies in the current process. We encourage comments on whether and how the procedures recommended in the RPC Report might serve to, or be modified to, make the appeal process more efficient and effective. We invite comment on whether alternatives to the proposed rule might reach the goal of the Royalty Policy Committee by a simpler route than the processes set forth in the proposed rulemaking.

We specifically request comment on whether, as an alternative to the procedures described in this proposed rulemaking, the current two-level administrative appeal process should be retained, with amendments. These amendments would:

(a) Implement the RSFA requirements for settlement conferences and default

decisions if appeals are not resolved within 33 months of their commencement (similar to those contained in this rulemaking under §§ 4.906, 4.907, 4.911–4.913, 4.924–4.926, 4.950, 4.951, 4.954, 4.956, 4.957, and 4.970–4.972);

(b) Establish procedures for lessees to appeal notices sent to designees; and

(c) Incorporate internal time constraints for appeals pending before the MMS Director to ensure that the Department decides appeals within the RSFA 33-month deadline, such as those previously proposed, *see* 61 FR 33607 (1996).

However, retaining the current process, with amendments, might not address other goals of the RPC.

Several portions of this proposed rule would implement the RPC recommendations. First, the new proposed 43 CFR part 4, subpart J would establish a new procedure for appeals of royalty orders. The current regulations at 30 CFR part 290 and 43 CFR part 4, subpart E would no longer apply to appeals of royalty orders. Under the new proposed process, MMS's role would be limited to record development and settlement discussions at an early stage of the process and to deciding whether to modify or rescind orders prior to argument at the IBLA or to an Assistant Secretary. The IBLA (or an Assistant Secretary) would decide cases under a new, modified IBLA appeals process, and RSFA time limits would be imposed on appeals that are subject to that Act.

Second, the new proposed 30 CFR part 242 would establish procedures for orders that MMS and delegated States issue. The new part 242 would respond to the RPC recommendations on how MMS and delegated States should communicate their preliminary audit findings and issue orders. *See* RPC Recommendations at paragraphs 5–7. The general principle behind this part is that MMS and delegated States should clearly communicate specific information about the basis for orders. This part also would establish procedures for Indian lessors to request formally that MMS take actions with respect to their leases. That would help to implement the RPC recommendation that the new regulations clarify the standing and role of Indian lessors in the appeals process. *See* RPC Report at page 10. In addition, this part would incorporate certain RSFA provisions regarding orders and orders to perform restructured accounting and regarding notifying lessees when orders are sent to the persons designated by the lessees to pay their royalties. Finally, this part would incorporate appeals and service requirements that currently are found at 30 CFR part 243.

Third, the proposed revision of 30 CFR part 243 would implement changes that RSFA made to requirements for staying orders pending appeal. RSFA § 4(a) amended FOGRMA to add a new § 115(l), 30 U.S.C. 1724(l), ''Stay of Payment Obligation Pending Review.'' Section 115(l) allows any person (as that term is defined by FOGRMA § 102 (12)), who MMS or a delegated State orders to pay any obligation (other than an ''assessment'') subject to RSFA, to demonstrate that the person is ''financially solvent.'' Under the proposed rule, if MMS determines that the person is financially solvent, the person is entitled to a stay of an order (other than one to pay an assessment) without posting a bond or other surety instrument pending an administrative or judicial proceeding. If the person is unable to demonstrate financial solvency, the Secretary will require a bond or other surety instrument satisfactory to cover the obligation. The proposed regulations would explain the process and standards for demonstrating financial solvency. As part of those proposed regulations, MMS also is rewriting 30 CFR part 243 in ''plain language'' and revising it to eliminate references to 30 CFR part 290.

Because MMS is eliminating appeals to the MMS Director under 30 CFR part 290 for RMP orders, MMS rewrote that part to only refer to appeals of the MMS Offshore Minerals Management Program (OMM). MMS determined that it would be advantageous to amend its process for appeals from decisions by officials of OMM at the same time it proposes the revisions to the RMP appeals process. The proposed OMM appeals process is patterned after the process the BLM uses for appeals of BLM officials' decisions because they have similar responsibilities with respect to onshore Federal and Indian trust lands. We request comments on whether we should adopt this process for offshore appeals or whether we should retain the current process.

The Departmental team that drafted the proposed appeals rule received public input initially from the Royalty Policy Committee, as described above, and also conducted two public workshops and five outreach sessions with Indian tribes and individual Indian mineral owners. The two public workshops were held in Denver, Colorado on January 27, 1998, and March 30, 1998. These workshops were announced in the **Federal Register** (62 FR 68244, December 31, 1997, and 63 FR 11634, March 10, 1998) and were attended primarily by representatives of natural gas, oil, and coal producers, including representatives both of large integrated producers and of smaller independent producers. The team distributed to workshop participants copies of preliminary drafts of the proposed rule prior to the sessions, thereby providing participants an opportunity to prepare specific questions, suggestions, and comments.

The five outreach sessions with Indian lessors were as follows:

- *April 29, 1998,* Canadian, Oklahoma, Muskogee Area Office. This outreach meeting was attended by representatives of the Cherokee Nation, Choctaw Nation, and Creek Nation, as well as many individual Indian mineral owners and heirs. BIA Area Office and Agency staff also attended;
- *May 19, 1998,* Bismarck, North Dakota, Aberdeen and Billings Area Offices. BIA Agency representatives from Cheyenne River, Fort Berthold and Standing Rock attended this meeting. In addition, tribal members from the Three Affiliated Tribes (Mandan, Arikara, and Hidatsa) from Fort Berthold attended;
- *May 20, 1998,* El Reno, Oklahoma, Concho Agency. This outreach meeting was attended by individual Indian mineral owners from the Concho and Anadarko areas. BIA Area Office and Agency staff also attended;
- *June 12, 1998,* Scottsdale, Arizona, tribal members of the State and Tribal Audit Committee. This outreach meeting was attended by representatives of the Blackfeet Nation, Navajo Nation, Shoshone and Arapaho Tribe, Southern Ute Indian Tribe, and Ute Mountain Ute Tribe; and
- *July 7, 1998,* Denver, Colorado, Indian Energy and Minerals Conference. Attendees included representatives from various BIA Area Offices and Agencies, as well as representatives of the following Tribes: Alabama and Coushatta Tribes, Assiniboine and Sioux Tribes, Burns Paiute Reservation Tribe, Choctaw Nation of Oklahoma, Eastern Shoshone Tribe, Jicarilla Apache Tribe, Navajo Nation, Osage Tribe, Shoshone Nation, Southern Ute Tribe, Three Affiliated Tribes, and Ute Mountain Ute Tribe.

At these sessions, the team members described the rule and its anticipated effects on Indian lessors and received comments from individual Indian mineral owners, tribal representatives, and MMS and BIA representatives about how best to structure the rule to protect Indian trust resources.

As discussed below in the applicable Section-by-Section analysis, this rulemaking also would propose to

charge reasonable processing fees where appropriate.

II. Section-by-Section Analysis, 43 CFR Part 4, Subpart J

Section 4.901 What is the Purpose of This Subpart?

This section would state that the purpose of this subpart is to explain the procedures for appeals of MMS or delegated State orders, and MMS decisions not to issue orders under 30 CFR part 242, concerning reporting to the MMS RMP and the payment of royalties and other payments due under leases subject to this subpart. This subpart would replace 30 CFR part 290 with respect to appeals of RMP and delegated State actions regarding royalties and other payments. The regulation at 30 CFR part 290 would only apply to appeals of MMS OMM actions regarding offshore lease operational obligations, not to actions regarding royalties and other payments.

Section 4.902 What Leases are Subject to This Subpart?

This section would explain that this subpart applies to all Federal mineral leases onshore and on the Outer Continental Shelf (OCS), and to all federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands regardless of the statutory authority under which the lease was issued or maintained. See Section-by-Section analysis for § 4.903 for an explanation of the definition of ''lease.'' However, some procedures under this rule would apply only to Federal oil and gas leases because the RSFA requirement for deciding appeals within 33 months, 30 U.S.C. 1724(h), applies only to such leases. Accordingly, those procedures would specifically state that they do not apply to Federal solid mineral and geothermal leases, or Indian leases.

Section 4.903 What Definitions Apply to This Subpart?

This section would explain the definitions that you will need to know for this subpart. However, other definitions in this part, or 30 CFR Chapter II, which are not specifically defined in this proposed rule, and do not conflict with definitions in this proposed rule, also would apply.

Affected would mean, with respect to delegated States and States concerned, that the appeal concerns an order regarding a Federal onshore or Outer Continental Shelf lease, within a State's borders or offshore of the State, from which the State, or a political subdivision of the State, receives a statutorily-prescribed portion of the royalties; and, with respect to Indian lessors, that the appeal concerns an order regarding the Indian lessor's federally-administered mineral lease. This definition is intended to distinguish between States concerned, delegated States, and Indian lessors that are directly affected by the action (or inaction) under appeal, and those that are either only indirectly affected or that are merely interested in the appeal's outcome.

Assessment would mean any fee or charge levied or imposed by the Secretary or a delegated State other than: (1) the principal amount of any royalty, minimum royalty, rental, bonus, net profit share or proceed of sale; (2) any interest; or (3) any civil or criminal penalty.

Delegated State would mean a State to which MMS has delegated authority to perform royalty management functions pursuant to an agreement or agreements under regulations at 30 CFR part 227. This definition is essentially the same as that under RSFA § 2(1), adding FOGRMA § 3, 30 U.S.C. 1702(22).

Designee would mean the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf. This definition is essentially the same as that under RSFA § 2(1), adding FOGRMA § 3(24), 30 U.S.C. 1702(24). Accordingly, the definition would cite the rule implementing the requirements of RSFA § 6(g), amending FOGRMA § 102(a), 30 U.S.C. 1712(a), which allows lessees to designate another person to pay royalties on their behalf by written notice filed with MMS. Thus, this definition would apply only to appeals involving royalties and other payments due on production from Federal oil and gas leases after September 1, 1996, because RSFA applies only to such payments.

IBLA would mean the Interior Board of Land Appeals.

Indian lessor would mean an Indian tribe or individual Indian mineral owner with a beneficial or restricted interest in a property that is subject to a lease issued or administered by the Secretary on behalf of the tribe or individual Indian mineral owner.

Lease would mean any contract, net profit share arrangement, joint venture, or other agreement authorizing exploration for or extraction of any mineral, regardless of whether the instrument is expressly denominated as a ''lease.'' This would include all agreements the Secretary approves under the Indian Mineral Development Act, 25 U.S.C. 2101 *et seq.*

Lessee would mean any person to whom the United States, or the United States on behalf of an Indian tribe or individual Indian mineral owner, issues a lease subject to this subpart, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this subpart has been assigned. This definition is essentially the same as that under RSFA § 2(1), amending FOGRMA § 3(7), 30 U.S.C. 1702(7), and would include owners of operating rights. RSFA defines ''lessees'' to include holders of operating rights. However, RSFA does not apply to Federal oil and gas leases for production prior to September 1, 1996, other Federal solid mineral and geothermal leases, and Indian leases. Therefore, we did not separately define operating rights owners or operators because recipients of orders not subject to RSFA may appeal under this rule regardless of whether they are a ''lessee'' under RSFA.

Monetary obligation would mean any requirement to pay or to compute and pay any obligation in any order. We included this definition because Congress did not define ''monetary obligation'' in RSFA for purposes of the default decision rule in 30 U.S.C. 1724(h), which §§ 4.956 and 4.972 would implement. Under this definition, ''monetary obligation'' would include amounts that MMS or delegated States assert that lessees, designees, and payors owe, as well as amounts that lessees, designees, and payors assert are owed to them (for example refunds of alleged overpayments). The definition of ''monetary obligation'' would include amounts due as a result of orders to compute and pay because there is no indication that Congress intended to restrict its meaning to only an ''order to pay'' a specifically stated amount. Moreover, orders to compute and pay usually contain an ''order to pay'' additional royalty amounts due based on the test leases and months.

This definition also would clarify what constitutes a single monetary obligation as opposed to separate monetary obligations when an order covers multiple issues. Paragraph (1) would state that if an order asserts a monetary obligation arising from one issue or type of underpayment that covers multiple leases or production months, the total obligation for all leases or production months involved constitutes a single monetary obligation. For example, assume MMS issued an order to you determining that you underpaid royalties on Lease Nos. A, B, and C, for production months January 1, 1996, through December 31, 1996, because you failed to pay royalties on

tax reimbursements that are part of your gross proceeds. The amount owed under that order would constitute one monetary obligation, not three (one for each lease), or twelve (one for each production month), or thirty-six (one for each production month for each lease).

Paragraph (2) would state that if an order asserts monetary obligations arising from different issues or types of underpayments for one or more leases, the obligations arising from each separate issue, subject to paragraph (1), constitute separate monetary obligations. For example, assume the same facts as described under paragraph (1). However, also assume that the order determines that you underpaid royalties on the same leases for the same production months because you improperly calculated a gas processing allowance. In that situation, the gross proceeds issue described in paragraph (1) would constitute one monetary obligation, and the processing allowance issue would constitute another monetary obligation.

Subparagraph (3) would state that if an order asserts a monetary obligation with a stated amount of additional royalties due, plus an order to perform a restructured accounting arising from the same issue or cause as the specifically stated underpayment, the stated amount of royalties due plus the estimated amount due under the restructured accounting, subject to paragraphs (1) and (2), together constitute a single monetary obligation. For example, assume the same facts as described under paragraph (1). Also assume that the order requires you to perform a restructured accounting on all of your leases to determine whether you underpaid royalties on those leases because you failed to pay royalties on tax reimbursements. That order would constitute one monetary obligation. However, assuming the same facts as described under paragraphs (1) and (2), if the order also required you to perform a restructured accounting on all of your leases to determine whether you calculated the proper processing allowance, then the gross proceeds issue described in paragraph (1), together with the requirements to perform a restructured accounting on tax reimbursements, would constitute one monetary obligation, and the processing allowance issue, together with the order to perform a restructured accounting on the processing allowance issue, would constitute another monetary obligation.

Nonmonetary obligation would mean only any duty of a lessee or its designee to deliver oil and gas in kind, or any duty of the Secretary to take oil and gas royalty in kind. This definition is consistent with the definition of ''obligation'' under RSFA § 2(1), adding FOGRMA § 3(25), 30 U.S.C. 1702(25), because these obligations are the only two under the statutory definition that are ''nonmonetary.'' Thus, for example, orders to report or produce information and denials of requests for exceptions from various reporting requirements would not be ''nonmonetary obligations'' because they are not defined as ''obligations'' under RSFA.

Notice of order would mean the notice under 30 CFR part 242 that MMS or a delegated State would provide to a lessee stating that MMS or the delegated State has issued an order to the lessee's designee. As stated above, RSFA allows lessees to designate another person to pay royalties on their behalf by written notice filed to MMS. 30 U.S.C. 1712(a). However, only lessees, not their ''designees,'' are liable for any payment obligations. Id. Thus, if MMS issues a written order to pay to a designee, RSFA's definition of ''order to pay'' requires MMS to serve a notice of that order on that designee's lessee. 30 U.S.C. 1702(26), as added by RSFA § 2(1).

Obligation would mean:

(1) A lessee's, designee's or payor's duty to:

(i) Deliver royalty-in-kind; or

(ii) Make a lease-related payment, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, interest, penalty, civil penalty, or assessment; and

(2) The Secretary's duty to:

(i) Take oil or gas royalty in kind; or

(ii) Make a lease-related payment, refund, offset, or credit, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or interest. This definition is essentially the same as that under RSFA § 2(1), adding FOGRMA § 3(25), 30 U.S.C. 1702(25).

Order would mean any document issued by the MMS Director, officials of the MMS RMP, or a delegated State that contains mandatory or ordering language that requires the recipient of an order to do any of the following for any lease subject to this subpart: report, compute or pay royalties or other obligations, report production, or provide other information. The proposed rule would refer to 30 CFR part 242, which is being proposed in this same **Federal Register** Notice, to refer appellants to the standards for issuing orders contained in that part.

The purpose of this definition is to establish the types of orders that are appealable under this subpart. This section would define what actions are appealable orders and what actions are not appealable orders. Only certain written orders, instructions or other actions by the MMS Director, RMP officials, or a delegated State concerning the reporting and payment of royalties and other payments due under leases subject to this proposed subpart would be appealable ''orders'' under this proposed rule.

Orders would have to include mandatory or ordering language. For example, if you received a written instruction or other action by the MMS Director, RMP, or a delegated State that contained language such as ''you must pay,'' ''you must recalculate and pay,'' ''you are ordered to pay,'' ''you are ordered to recalculate and pay,'' ''you may not take this credit,'' or ''you may not use this exception,'' that would be considered mandatory or ordering language and the order would be appealable under this proposed rule.

Under paragraph (1), orders would include but not be limited to:

(i) An order to pay. Order to pay would be defined under 30 CFR part 242, proposed in this same rulemaking, and that definition would essentially be the same as that under RSFA § 2(1), adding FOGRMA § 3(26), 30 U.S.C. 1702(26);

(ii) An MMS or delegated State decision to deny a lessee's, designee's, or payor's written request that MMS make a payment, refund, offset, or credit of money to the lessee or designee related to the principal amount of any royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or any interest or assessment related to a lease obligation. These are MMS's ''obligations'' as defined under RSFA, § 2(1), adding FOGRMA § 3(25)(A), 30 U.S.C. 1702(25)(A). Thus, for example, if a lessee or designee believes MMS has improperly denied a refund of a claimed overpayment, the lessee or designee may appeal that denial. However, although a lessee would have standing to file an administrative appeal concerning an MMS decision not to take royalty-in-kind, we do not believe that the lessee would have any substantive basis for the appeal because the decision whether to take royalty-in-kind is committed to the Secretary's discretion by law. 30 U.S.C. 192;

(iii) A denial of a request for an exception from any valuation and reporting requirement;

(iv) An order to perform restructured accounting. Orders to perform restructured accounting would be defined under 30 CFR part 242, proposed in this same rulemaking, and that definition would be consistent with the description in RSFA § 4(a), adding FOGRMA § 115(d)(4)(B)(i), 30 U.S.C.

1724(d)(4)(B)(i). However, an order to perform a restructured accounting that requires the recipient to provide schedules of recalculations would not be considered an order to provide documents or information under this proposed rulemaking. *See* RSFA, § 4(a), adding FOGRMA § 115(d)(4)(C), 30 U.S.C. 1724(d)(4)(C), which provides that ''[a]n order to perform a restructured accounting shall not mean or be construed to include any other action by or on behalf of the Secretary or a delegated State;''

(v) An order to file a report related to any royalty or other lease obligation under 30 CFR part 210 or 216; and

(vi) An order to provide documents or information. This section also would make clear that orders to perform a restructured accounting are not ''orders to provide documents or information.'' As discussed below, under proposed § 4.905, an order to provide documents or information is not appealable under this subpart if it is issued by the Associate Director for Royalty Management or by someone to whom that Associate Director has delegated the authority to issue orders to provide documents or information that are final for the Department.

This section also would state what MMS or delegated State actions would not constitute ''orders.'' As a threshold matter, actions that the MMS OMM takes regarding offshore lease operational obligations would not be appealable ''orders'' under this proposed rule. For example, OMM actions that allocate production or otherwise affect production volume would not be appealable ''orders'' under this subpart even if they could affect royalty calculations. Those orders would be appealable under 30 CFR part 290.

Under paragraph (2)(i), orders would not include non-binding requests, information, and guidance such as:

(A) A Preliminary Determination Letter issued under proposed 30 CFR 242.102. These are commonly called ''issue letters'' and do not contain mandatory or ordering language. Rather, they inform the recipient that MMS has made a preliminary determination, and invite responses to that determination prior to issuance of an appealable ''order'';

(B) Advice or guidance on how to report or pay, including a valuation determination, unless it contains mandatory or ordering language. For example, assume that you have asked MMS whether it believes that you are properly valuing your production under a particular regulation. Also assume that MMS responds that under its interpretation of the regulations, it does not believe that you are properly valuing your production. That guidance would not be appealable. However, if you ignored MMS's guidance, and continued valuing your production using your valuation method, MMS could later issue an order stating that you must pay additional royalty because MMS has determined that you improperly valued that production. In such instances, you could appeal that order; and

(C) A policy determination. For example, a general letter to royalty payors advising them of RMP's interpretation regarding a particular issue—such as the RMP May 3, 1993, ''Dear Payor Letter'' on the royalty consequences of gas contract settlements—would not be appealable.

The Department does not consider such documents ''orders'' because they do not require anyone to take any specific action. However, if a valuation determination or a letter to payors includes mandatory language requiring a person to take a specific action with respect to a mineral lease administered by the Secretary, then it is an order. In addition, a person's failure to follow guidance or policy determinations would not preclude that person from later appealing an ''order'' with mandatory language requiring the person to follow such guidance.

Paragraph (ii) would state that subpoenas also would not be considered ''orders.'' Subpoenas are enforceable directly by the United States Government in federal district court under 30 U.S.C. 1717(b), and are not subject to administrative appeal. Therefore, they are not appealable ''orders.''

Under paragraph (2)(iii), orders to pay that MMS issues to refiners or other persons involved in disposition of royalty taken in kind would not be classified as ''orders'' under this subpart, because those orders arise out of contracts for sale of royalty-in-kind (RIK) production and not out of obligations under leases subject to this subpart. *See* related changes to 30 CFR part 208 in this same notice.

Party would mean MMS, any person who files a Notice of Appeal, and any person who files a Notice of Joinder or Intervention Brief in an appeal under this subpart. This definition is necessary because ''parties'' have certain rights and obligations under this proposed rulemaking that other participants in the appeals process do not.

Payor would mean any person responsible for reporting and paying royalties for:

(1) Federal oil and gas leases for production before September 1, 1996;

(2) Federal mineral leases other than oil and gas leases; and

(3) Leases on Indian lands subject to this Subpart. This definition is necessary because the term ''designee'' is used for Federal oil and gas leases subject to RSFA, and ''payor'' is used for leases not subject to RSFA. In addition, designees have certain requirements under this proposed rulemaking, such as serving their Notice of Appeal on their lessee(s) under § 4.907(d).

Reporter would mean a person who submits reports for leases subject to this subpart regardless of whether that person has payment responsibility.

State concerned would mean the State that receives a statutorily-prescribed portion of the royalties from a Federal onshore or Outer Continental Shelf lease. This definition is modeled after the corresponding definition under RSFA, § 2(1), adding FOGRMA § 3(31), 30 U.S.C. 1702(31).

Section 4.904 Who May File an Appeal?

Under paragraph (a), if you receive an order, as defined under this subpart, you could appeal that order if the order adversely affects you, except as provided under § 4.905.

Under paragraph (b), if you are a lessee and you receive a Notice of Order, you would have three options under this proposed rule regarding appealing the order issued to your designee. First, you could appeal the order yourself. If you chose to appeal the order yourself, you could make your own arguments in the appeal as an appellant, regardless of whether your designee also appeals the order or makes those arguments.

Second, you could join in your designee's appeal under § 4.908. We added the joinder provision to protect lessees should the designee decide during some part of the appeals process that it no longer wishes to pursue the appeal. If you chose to join your designee's appeal under § 4.908, you would be deemed to appeal the order jointly with the designee, but the designee would have to fulfill all requirements imposed on appellants under this subpart. Thus, you could not file any submissions or pleadings separately from the designee. The purpose of limiting pleadings to designees is to prevent numerous duplicative submissions by multiple lessees of a single designee.

Third, you could neither appeal nor join, but instead rely on your designee's appeal. However, if you chose this option, your designee's actions with

respect to the appeal, and any decisions in the appeal, would bind you. In other words, if your designee lost the appeal, you could not reappeal the same order. Likewise, if your designee discontinued its appeal, you could not reappeal the same order or continue the appeal for the designee.

Under paragraph (c), if you are an Indian lessor, you could file an appeal of any MMS decision not to issue an order under 30 CFR part 242 that adversely affects you. Part 242, also proposed in this **Federal Register** Notice, would explain the process for Indian lessors to request that MMS issue an order. This paragraph would implement the RPC Report's recommendation that we clarify the appeal rights of Indian lessors. RPC Report, page 10. Note, however, that States could not appeal orders or decisions not to issue orders. Delegated States could intervene under § 4.934 in an appeal of an order. We decided not to allow States to appeal orders or decisions not to issue orders because, unlike Indian lessors, States do not have a property interest in leases. In addition, States can request authority to issue orders pursuant to an agreement or agreements under MMS's regulations at 30 CFR part 227.

Section 4.905 What May I Not Appeal Under This Subpart?

This section would state that you could not appeal:

(a) An action that is not an order, as defined in this subpart;

(b) An order to provide documents or information issued under 30 CFR 242.104(b)(4) by the Associate Director for Royalty Management, or any person to whom that Associate Director has delegated the authority to issue such orders that are final for the Department. We propose to make these orders final for the Department because: (1) courts have consistently upheld MMS's authority to issue orders to produce documents and information, *see Shell Oil Co. (On Reconsideration,* 132 IBLA 354 (overruling *Shell Oil Co.*, 130 IBLA 93), *aff'd, Shell Oil Co.* v. *Babbitt,* 945 F. Supp 792 (D. Del. 1996), *aff'd,* 125 F.3d 172 (3d Cir. 1997); *Santa Fe Energy Products Co.,* 127 IBLA 265 (1993), *aff'd Santa Fe Energy Products Co.* v. *McCutcheon,* No. 94–C–535, slip op., (D. Colo. Mar. 30, 1995), *aff'd,* 90 F.3d 409 (10th Cir. 1996); and (2) it would avoid the delay caused by administrative appeals of such orders. Delays associated with these types of orders are particularly detrimental because they interfere with MMS's and delegated States' ability to determine whether additional royalties or other payments may be due. Accordingly, we propose to make such orders subject to judicial review directly. However, if the order is issued by a person other than the Associate Director for Royalty Management, or a person delegated the authority to issue such final orders, then it would be appealable under this subpart.

(c) A determination of the surety amount or financial solvency under 30 CFR part 243, subparts B or C. These determinations are final for the Department and are not subject to administrative appeal.

Section 4.906 When Must I File an Appeal?

You would have to file your appeal with MMS as required under § 4.960 within 60 days after MMS or a delegated State serves the order or Notice of Order, or MMS serves a decision not to issue an order under 30 CFR part 242. An order, Notice of Order, or decision not to issue an order would be considered served as provided under 30 CFR 242.305.

Formerly, appeals of MMS RMP orders had to be filed within 30 days of the person's receipt of the order. This rule extends the time in which to appeal to 60 days from receipt, as the RPC Report recommended. The 60 day time frame also implements the requirement under RSFA, § 4(a), adding FOGRMA § 115(d)(4)(B)(ii)(V), 30 U.S.C. 1724(d)(4)(B)(ii)(V), that orders to perform a restructured accounting ''provide the lessee or its designee 60 days within which to file an administrative appeal of the order. * * *.''

Unlike other appeals to IBLA, which are filed with the office that issued the decision being appealed (see 43 CFR 4.411), these appeals would be filed with a centralized office in MMS called the MMS Dispute Resolution Division (DRD). We chose this centralized approach to ensure accurate documentation of receipt, to facilitate collection of processing fees, and to minimize delays in initiating record development and settlement efforts. In effect, the DRD would receive the appeals on behalf of the MMS or delegated State office that issued the order being appealed.

We would eliminate the grace period for filing formerly included under 30 CFR 290.5(b) (mailed within the 30 day appeal period and received within 10 days of the 30th day). Instead, we would extend the time period within which to file to 60 days, with no exceptions or grace periods. However, to make filing easier, we would allow filing by telefax, and we plan to centralize the docketing function to ensure that employees are present during business hours to receive appeals. We specifically request comments on what methods of filing we should accept and ways we could provide appellants with documentation of the receipt date other than a return receipt card.

Section 4.907 How Must I File an Appeal?

Under paragraph (a) of this proposed section, for an appeal to be considered filed, the MMS DRD would have to receive the appellant's Notice of Appeal, Preliminary Statement of Issues, and Processing Fee within the time required under § 4.906.

The written Notice of Appeal would have to include a copy of the order, or MMS decision not to issue an order, that the appellant is appealing. Appellants would not be allowed to extend the 60-day period for MMS to receive their Notice of Appeal.

The written Preliminary Statement of Issues would have to state the issues the appellant will raise on appeal. The RPC Report recommended requiring a Preliminary Statement of Issues. The Secretary, in his September 22, 1997, letter to the RPC, modified that RPC Report recommendation to state that appellants must ''specifically identify their legal and factual disagreements with the MMS action.'' However, he stated that it need not be a legal brief or include the level of detail appellants currently provide in a Statement of Reasons to the MMS Director. The Secretary stated that the purpose of the Preliminary Statement of Issues is to ''ensure productive, well-informed record development and settlement efforts.'' Moreover, MMS or the delegated State will have stated the facts and law or regulations relied upon in issuing the order. Thus, it is imperative that the appellant specifically identify the factual and legal disagreements the appellant has with an order so that MMS can properly evaluate the appellant's position. For example, a blanket statement that the appellant disagrees with the order, without stating the legal or factual basis for the disagreement, would not be sufficient information for MMS to determine whether the appellant's position has merit, or to respond to the appellant. Nor would a list of issues, without some explanation of how the facts of the appeal raise those issues, be sufficient. Therefore, the proposed rule would require appellants to specifically identify the legal and factual disagreements they have with the order, or MMS decision not to issue an order, they are appealing. See Appendix A for

an example of a Preliminary Statement of Issues.

In addition to helping MMS and the appellant prepare for the record development and settlement conferences, this requirement would would help highlight those appeals in which it would be appropriate for the MMS Director to take action to rescind or modify the order. This is particularly important because appellants would not be required to provide a Statement of Reasons which comprehensively briefs their legal position until after the MMS Director has the opportunity to rescind, modify, or concur with the order. Accordingly, it is in the appellant's best interest to set out the issues and disagreements specifically, because it will help to save litigation time and expense before the IBLA.

The nonrefundable processing fee would be $150. You would have to pay the processing fee as required under § 4.965 or seek a fee waiver or reduction under § 4.966. Our analysis leading to the choice of $150 as the processing fee at this stage of the appeal is in the Section-by-Section analysis for § 4.965 of this proposed rule. Indian lessors would not have to pay the processing fee.

Unlike the Notice of Appeal, you would be allowed to request an automatic extension of time of up to 60 days to file the Preliminary Statement of Issues and to pay the processing fee. Any such request would have to be in writing and be received by MMS within the time allowed for filing the appeal. After the automatic extension, you could request additional extensions subject to agreement by MMS.

Under paragraph (b), you would have to serve your Notice of Appeal, Preliminary Statement of Issues, and any attached documents as required under § 4.962.

Under paragraph (d), if you are a designee, when you file your appeal under paragraph (a), you would have to serve your Notice of Appeal on the lessees who MMS identifies under proposed 30 CFR 242.105(a)(5)(i) in the order you appealed. We included this requirement because lessees would have to join an appeal under § 4.908(a) within 30 days after they receive the designee's Notice of Appeal. Thus, it is imperative that designees timely serve lessees with the Notice of Appeal.

Section 4.908 If I am a Lessee, Can I Join a Designee's Appeal?

Under this section, if you are a lessee, and your designee files an appeal under § 4.904, you could join in that appeal within 30 days after you received your designee's Notice of Appeal. You could join that appeal by filing a Notice of Joinder with the MMS DRD as required under § 4.960. We added the joinder provision to protect lessees by giving them the ability to continue the appeal if the designee decides during some part of the appeals process that it no longer wishes to pursue the appeal. As stated above, we included a requirement under § 4.907(c) that designees timely serve lessees with the Notice of Appeal to facilitate the joinder process. Lessees also would be required to serve their Notice of Joinder on all parties to the appeal and other persons as required under § 4.962.

Finally, lessees that neither appeal nor join in their designee's appeal would be bound by their designee's actions with respect to the appeal and any decisions in the appeal. In other words, if a lessee neither appealed nor joined its designee's appeal, and the designee did not pursue the appeal, or lost the appeal, the lessee could not continue that appeal either in the Department or in district court.

Section 4.909 What is the Effect of Joining an Appeal?

Under this section, if you joined in an appeal under § 4.908, you would be deemed to appeal the order jointly with the designee. However, as discussed in the Section-by-Section analysis for § 4.904, the designee would have to fulfill all requirements imposed on appellants under this subpart. Thus, if you joined in your designee's appeal, you could not file submissions or pleadings separately from the designee. As discussed above, we limited the submission of pleadings to designees to prevent numerous duplicative submissions by multiple lessees of a single designee.

Finally, a lessee who has joined an appeal under § 4.908 could continue an appeal as an appellant if the designee notified the lessee under § 4.910(a) that it no longer wanted to pursue the appeal. If the lessee wanted to continue the appeal, then it would become the ''appellant'' and would have to meet all requirements of this subpart.

Section 4.910 What Must a Designee do if it Decides to Discontinue an Appeal?

Under this section, if you are a designee and you decide to discontinue participation in the appeal at any time, you would have to serve written notice on all lessees who have joined in the appeal under § 4.908, and on the office or officer with whom any subsequent submissions or pleadings must be filed, no later than 30 days before the next submission or pleading is due. The purpose of serving your lessee if you wish to discontinue the appeal is to give the lessee notice to allow the lessee to continue the appeal in your place under § 4.909(d). You also would have to serve the office where the next pleading is due to allow that office to close the appeal if a lessee does not continue the appeal under § 4.909(d). Additionally, you would have to serve your notice on all parties to the appeal and other persons as required under § 4.962.

Section 4.911 When Does My Appeal Commence?

This section would explain when your appeal commences for purposes of the period in which the Department must issue a final decision in your appeal under 30 U.S.C. 1724(h)(1) and § 4.956 of this proposed rule, or which the Department uses as guidance to track your appeal under § 4.948.

As explained above, under § 4.907(a), the date your appeal would be considered filed would be the date the MMS DRD receives all three items you must file under § 4.907(a)—the Notice of Appeal, Preliminary Statement of Issues, and processing fee. Thus, paragraph (a) of this section would provide that your appeal commences on the date the MMS DRD receives the last of all the items you must file under § 4.907(a).

RSFA did not define ''commencement'' for purposes of the required time for the Department to issue a final decision under RSFA § 4(a), adding FOGRMA § 115(h), 30 U.S.C. 1724(h). RSFA states that:

> The Secretary shall issue a final decision in any administrative proceeding, including any administrative proceeding pending on the date of enactment of this section, within 33 months from the date such proceeding was commenced or 33 months from the date of such enactment, whichever is later.

RSFA § 4(a), 30 U.S.C. 1724(h)(1). An ''administrative proceeding'' is defined under RSFA as ''any Department of the Interior agency process in which a demand, decision or order issued by the Secretary or a delegated State is subject to appeal or has been appealed.'' RSFA § 2, adding FOGRMA § 3(18), 30 U.S.C. 1702(18). RSFA did define ''commence'' ''with respect to a judicial proceeding'' and ''with respect to a demand.'' 30 U.S.C. 1702(20). However, the definition of ''commence'' under 1702(20) clearly does not encompass ''administrative proceedings'' under 30 U.S.C. 1724(h)(1) or 1702(18). Rather, ''commence'' under § 1702(20) deals with the ''commencement'' of judicial proceedings or demands for purposes of the RSFA seven-year limitations period under RSFA § 4(a), adding FOGRMA

§ 115(b), 30 U.S.C. 1724(b). Accordingly, it is necessary for us to define ''commencement'' in this proposed rule for purposes of § 1724(h).

We believe it is more efficient to define ''commencement'' as the date all three items are filed, rather than defining ''commencement'' as the date when the appellant files the Notice of Appeal and then requiring the appellant to seek extensions for all other items required to actually commence the appeal. In addition, we cannot begin to process an appeal until the appellant tells us what issues the appellant is raising on appeal in its Preliminary Statement of Issues. Thus, if you requested an automatic extension of time of 60 days within which to file your Preliminary Statement of Issues, even though you filed your Notice of Appeal and paid your processing fee, your appeal would not ''commence'' until we received your Preliminary Statement of Issues. The same would be true for processing fees so that if you requested an automatic extension of time of 60 days within which to pay your fee, your appeal would not commence until the date we received your processing fee.

Paragraph (c) would tell you when your appeal commences if you requested a fee waiver or reduction under § 4.966. In such instances, your appeal would not commence (assuming you already filed your Preliminary Statement of Issues) until the date the MMS DRD either: (1) grants your request for a waiver; (2) receives the reduced fee if the MMS DRD grants your request for a reduction in the fee; or (3) receives the entire fee if the MMS DRD denies your request for a reduction in the fee.

Section 4.912 When Does My Appeal End?

This section would explain that your appeal ends on the same day of the month of the 33rd calendar month after your appeal commenced under § 4.911, plus the number of days of any applicable time extensions. Thus, if your appeal commenced on January 1, 1998, and you requested an extension of time under § 4.958 of 60 days within which to file your Statement of Reasons, your appeal would ''end'' on November 30, 2000 (January 1, 1998 to October 1, 2000 (33 months), plus 60 days).

If the 33rd calendar month after your appeal commenced does not have the same day of the month as the day of the month your appeal commenced, then the initial 33-month period ends on the last day of the 33rd calendar month. For example, if your appeal commenced on the 31st of a month, but would end 33 months later in a month with only 30 days, your appeal would end on the 30th day of the 33rd month, not on the first day of the 34th month.

Section 4.913 What if a Due Date Falls on a Day the Department or Relevant Office is Not Open for Business?

This section would explain that if a due date required under this subpart falls on a day the relevant office is not open for business (such as a weekend, Federal holiday, or shutdown), then due date would be the next day the relevant office is open for business. Thus, if your Statement of Reasons was due on December 25, 1998, a Federal holiday falling on a Friday, you would be required to file it at the latest on Monday, December 28, 1998. Likewise, if the IBLA is required to issue a decision on December 25, 1998, the IBLA would be required to issue the decision on Monday, December 28, 1998.

Section 4.914 What Will MMS Do After It Receives My Appeal?

This section would explain what the MMS DRD will do with your appeal after it is received.

Paragraph (a) would explain that when MMS receives your appeal, it will date stamp each document received (e.g., your Notice of Appeal and Preliminary Statement of Issues, or request(s) for extension of time to file your Preliminary Statement of Issues and/or processing fee). Date stamping would document whether the appeal is timely filed and be used to calculate the commencement and ending of the appeal. The MMS DRD also would document receipt of your processing fee using any method it deems appropriate for the method of payment. Payments by check would be date stamped on the day received unless received after normal business hours, in which case the date received would be the next business day. For payments by Electronic Funds Transfer, MMS could rely on reports, statements, or online inquiries through an Automated Clearing House or Federal Reserve Wire network.

Paragraph (b) would state that the MMS DRD will decide whether your appeal is filed on time. If the MMS DRD did not receive your Notice of Appeal, Preliminary Statement of Issues, and processing fee, or your request for extension of time to file your Preliminary Statement of Issues or processing fee, or your request for a waiver or fee reduction, by 5:00 p.m. (local time of the MMS DRD) on the 60th day after you received the order, Notice of Order, or MMS decision not to issue an order, your appeal would not be timely filed and would not be considered. In such instances, MMS would notify you under paragraph (c) that your appeal was not timely filed.

The RPC Report recommended that we notify appellants whether their appeal is timely filed within 10 days of the Department's receipt of an appeal. However, we decided not to impose a time requirement in this proposed rulemaking because, although we expect we would usually meet such a 10-day time frame, problems could arise which need further investigation to determine whether the appeal was timely filed. To avoid disputes over the consequences of any such delay, and because there is no significant consequence to any party, we decided to omit the 10-day requirement.

Although appeals would not be under the jurisdiction of MMS, the designated office in MMS would determine whether the appeal was timely filed. This is consistent with other IBLA regulations where appeals are initially filed with the office that issued the decision or order under appeal, and those offices determine whether the appeals are timely filed. *See e.g.,* 43 CFR 4.470.

If your appeal was timely filed, MMS would provide you with a docket number for you to use in future correspondence related to your appeal. The docket number would not be an MMS docket number but, instead, would be a Departmental number. Thus, unlike the past appeals process wherein MMS assigned your appeal an MMS docket number, and the IBLA assigned it an IBLA docket number, you would use the Departmental docket number MMS assigns your appeal through the entire appeal process. This is because it is administratively simpler for both MMS and IBLA to track an appeal through a coordinated docketing system. With its notification of your docket number, MMS would also include instructions regarding scheduling a record development conference and settlement conference.

Section 4.915 How Will MMS Schedule Record Development Conferences?

Paragraph (a) would provide that if you file an appeal under this subpart, MMS will schedule you to attend at least one record development conference within 60 days of the commencement of your appeal under § 4.911. You would be allowed to extend this 60-day period under § 4.958.

Paragraph (b) would provide that you may request that record development conferences take place via telephone, video conference, or in person.

Paragraph (c) would provide that MMS will determine the time and

location of record development conferences and whether record development conferences will take place via telephone, video conference, or in person. MMS would not require you to travel without your agreement.

Section 4.916 Who Must and Who May Participate in Record Development Conferences?

This section would explain who must and who may participate in record development conferences. Our goal is to allow interested affected persons that have an ability to provide useful information, views, or insights to participate in record and issue development.

Paragraph (a) would state that appellants and relevant MMS offices must participate in record development conferences. We believe that those persons must participate because they are the ones with the facts and documentation necessary to develop the record.

Because other interested persons may wish to participate in record development conferences, paragraph (b) would state that an affected delegated State or affected State concerned, an affected Indian lessor, and a lessee, designee, payor, or reporter, if not an appellant, could participate in the record development conferences.

Paragraph (c) would state that any person who refuses to participate in any record development conference as required under paragraph (a) could not file any documents and materials for the record. Under paragraph (d), any person who may participate as allowed under paragraph (b) but doesn't participate in any record development conferences may not file any documents or materials for the record. This means that those parties could not file any documents, at any time, including under § 4.923. The purpose of paragraphs (c) and (d) is to ensure that the record is as complete as possible by the end of the record development process, rather than to allow persons who could or should have participated in that process to add to the record at a later date.

Section 4.917 How Will I Receive Notification of Record Development Conferences?

The purpose of this section would be to identify who in the Department has responsibility for notifying the various participants of the record development conferences. Because MMS would have such information, it would have the primary notification responsibility. Thus, paragraph (a) would explain that after MMS schedules any record development conference under § 4.915, MMS will notify the appellant, lessees that joined under § 4.908, the office that issued the order, affected delegated States, the persons that affected States concerned identify under § 4.961, and affected Indian tribes or appropriate BIA offices of any record development conference.

MMS would not be responsible for notifying individual Indian mineral owners that they may attend record development conferences because it does not have the information necessary to contact those persons. However, BIA does have that information. Thus, paragraph (b) would provide that the appropriate BIA office that MMS notifies under paragraph (a) would make available whatever notice to individual Indian mineral owners it deems appropriate by any method it deems appropriate. This proposal was based on the assumption that area BIA offices are in the best position to know what type of notice would be useful. For example, such notice could be in the form of notice in a local paper, or posting notice on the internet that individual Indian mineral owners could access at their local BIA office. We request comments on the most appropriate way to provide useful notice to individual Indian mineral owners about matters that may affect their revenues.

Section 4.918 How Will the Parties to the Appeal Develop the Record During the Record Development Conferences?

The goals of the record development conference would be to (1) identify and narrow the facts and issues that are in dispute in the appeal, (2) agree to the extent possible on the facts and issues, and (3) provide both sides the opportunity to put into the record documents and other evidence that are relevant to the disputed facts and issues. Although the proposed rule requires a minimum of one record development conference, MMS envisions a record development ''process,'' the goal of which is to have a complete record that all parties can agree upon. Accordingly, we used the plural ''conferences'' because we believe that there may be several record development conferences in the more factually complex cases as part of the entire record development process.

At the record development conferences, the parties would have to identify all documents and evidence that are relevant to disputed legal or factual issues involved in the appeal or that demonstrate material facts. The purpose of this provision is to make it clear that the parties must bring forward relevant information at this stage of the appeal, rather than waiting until later in the process.

Relevant information would include information adverse to the party's position on appeal that the party is aware of, and that was considered in determining the party's position, that is not privileged or prohibited by law. However, this would not create an affirmative duty to seek out information adverse to the party's position that was not considered as part of determining its position.

The requirement to provide information would not, however, preclude a party from adding to the record at a later date in circumstances where the party reasonably would not have known about the information or its relevance to the case. In such instances, the party could request that the IBLA allow it to supplement the record later under § 4.923.

Section 4.919 What Will the Parties Do If They Agree on the Record Contents?

This section would require the parties to compile for the record all material information relevant to the appeal and to file a Joint Statement of Facts and Issues and a certification that the record is complete. We believe this section is largely consistent with the RPC Report recommendations because: (1) parties would file a Joint Statement of Facts and Issues (see RPC Report paragraph 19.d); (2) the record would have to include ''evidence in the work papers or otherwise in the control of either party that bears upon the disputed facts or issues'' (see RPC Report at paragraph 19.e); and (3) parties would attempt to agree on evidence to be provided as part of the record (see RPC Report paragraph 19.f).

Although MMS would usually be responsible for assembling the record and drafting a Joint Statement of Facts and Issues, all parties would be expected to be actively involved in the process, and the parties could agree to allocate the responsibility differently. Thus, the appellant or a delegated State could assemble the record or draft the Joint Statement of Facts and Issues. Accordingly, under paragraph (a), if the parties to the appeal agree on the contents of the record and the facts and issues on appeal, MMS would be responsible for (1) compiling all documents and materials to be included in the record, (2) drafting a Joint Statement of Facts and Issues, and (3) filing the record, Joint Statement of Facts and Issues, and certification that the record is complete, with the MMS DRD within 30 days after the end of the record development conferences. The parties could file the certification jointly

or individually, but the MMS DRD would have to receive all parties' certifications before it will deem the record complete. When MMS deems the record complete it would send notice to all parties that the record is complete. Thus, under the proposed rule, parties would only be able to add to the record at later stages of the process if they submit a request to the IBLA under § 4.923 to add to the record with an explanation of why they did not add the information during the record development process. The RPC recommended both certification, RPC Report paragraph 19.d., and admission to the record of additional information after certification only upon a showing of ''good cause'' to the IBLA. RPC Report paragraph 25.

We believe that requiring certification of the record will increase the incentive for appellants and MMS to take the record development process seriously and to bring forward all evidence and issues during record development. Having a complete record early in the process will provide several benefits. First, we believe that this can help to filter out many cases at an early stage before the process of briefing to the IBLA begins. Facts and issues brought up early in the process can help either or both sides to see any errors in their positions, which can facilitate early resolution of the case. Second, identifying facts and issues at the record development stage will facilitate settlement discussions, which also can obviate the need for more costly briefing to and decision by the IBLA. Third, for cases that proceed to briefing before the IBLA, we think that the briefing will be faster and more efficient if the parties are aware of the facts and issues on appeal before briefing begins. Front-loading the record-development process as proposed here is intended to support efforts to decide appeals faster and to meet the time frames set out elsewhere in this rule. However, we understand that there may be cases where parties identify new issues or facts that are relevant to the case after they have certified the record. In such cases, the parties could petition IBLA under § 4.923 to allow them to add the facts or issues to the record. We believe that § 4.923 will insure an opportunity to supplement the record in cases where the party can show a good reason for not identifying the facts or issues at an earlier stage.

We recognize that the proposed process for certifying the record at the record development stage could slow down the appeals process because the requirement to ask the IBLA for permission to make additional submissions, and explain to the IBLA the reason for the request, requires additional time and cost for the requesting party to prepare the request, and for the IBLA to act on that request. Additionally, the appeals process may become quite complicated and get bogged down in collateral disputes if the IBLA denies a party's request to add to the record, or if another party objects to the request. We further recognize that there may be practical difficulties in being able to assemble all the pertinent facts or materials in the time frame envisioned for the record development conferences, and we request comments on this question.

Moreover, one of the primary goals of the record development process is to develop a complete administrative record for any subsequent judicial review of the Department's ultimate decision. Accordingly, certifying that the record is complete at this early stage, and then requiring parties to ''request'' to add to the record, may be too onerous and ultimately contrary to the goal of administrative record development. Therefore, we specifically request comments on whether we should require parties to ''certify'' the record at this early stage, and then require the parties to separately request to add to the record at later stages of the appeals process. We also specifically request comments on other alternatives, including not requiring any certification and permitting documentary submissions at later stages of the appeals process.

Section 4.920 What Will the Parties Do If They Do Not Agree on the Record Contents?

This section would establish procedures for completing the record in the event the parties cannot agree on the record contents. If the parties to the appeal cannot agree on the contents of the record and the facts and issues on appeal, then under this section, in addition to submitting the material required under § 4.919, each party would have to prepare an Additional Statement of Facts and Issues and supporting documents for the record and file them with the MMS DRD within 30 days after the end of the record development conferences. In addition, each party would have to certify that the Additional Statement of Facts and Issues and supporting documentation it filed comprises the complete record, except as provided in § 4.923 of this subpart. The MMS DRD would have to receive all parties' certifications before it would deem the record complete. When the MMS DRD deemed the record complete it would send notice to all parties that the record is complete.

The RPC Report did not address the process for record development when parties cannot agree on the record and facts and issues in dispute. However, we wanted the record development process to be inclusive, rather than exclusive. We have included the process in this section in the proposed rule because, although it would not accomplish the goal of agreement on the record and issues, it would still accomplish the objective of producing as complete a record as possible as early as possible in the appeals process. This process also would avoid lengthy disputes in which the parties to the appeal would be arguing over what the appeal is about or what should be in the record.

Section 4.921 What Must MMS or I Do If the Record Contains Proprietary or Confidential Information?

This section would explain that if a party considers any of the documents or materials compiled under this subpart to contain proprietary or confidential information, that party would have to follow the procedures under 43 CFR 4.31 to have that information treated as such. On August 4, 1997, MMS proposed a separate rule on this subject (62 FR 16116), but MMS withdrew that proposal on December 31, 1997 (62 FR 68244). We decided to rely on existing procedures under 43 CFR 4.31 rather than create new procedures.

Section 4.922 What if MMS or I Need More time to Develop the Record?

As proposed, the time to complete the record development process would be 120 days, unless a party requested to extend the process. Thus, under this proposed section, if an appellant requires additional record development conferences (or additional time for any other part of the record development process, such as for filing a Joint or Additional Statement of Facts and issues or for certifying that the record is complete) after that time period, then the appellant would have to follow the procedures set out in § 4.958 to request an extension. The purpose of this paragraph is to ensure that the record development process is flexible enough to allow the parties to develop as complete a record as possible at this stage of the appeals process. We did not want to cut off the record development process but needed to make sure that the 33-month period in which to decide Federal oil and gas appeals did not continue to run if the appellant needed more time to complete the process.

Section 4.923 May Parties Supplement the Record or Statement of Facts and Issues After the Record is Deemed Complete?

As discussed above in the Section-by-Section analysis for § 4.919, although parties would have to certify that the record is complete at the end of the record development process, they could request to later add to the record under this section. The RPC Report stated that ''[a]bsent good cause, [appellants could] not raise new issues or facts that were not raised when the administrative record was developed'' in their Statement of Reasons. RPC Report at paragraph 22.d. The proposed rule would make that provision applicable to all parties with the objective of encouraging early record development.

We recognize that there will be situations where additional information or issues are identified after the record development conference. Thus, this section would allow parties to supplement the record at a later stage, provided that they can demonstrate adequate reasons to the IBLA. Accordingly, under paragraph (a), if you are a party, and you want to supplement the record or the Joint or Additional Statement of Facts and Issues at any time after MMS deems the record complete under §§ 4.919 or 4.920 through the time additional responsive pleadings are filed under § 4.944, you would have to file any additional material together with a written request for permission with the IBLA (or an Assistant Secretary who is deciding the appeal under § 4.937) to supplement the record or the Joint or Additional Statement of Facts and Issues. Paragraph (b) would state that a party's request would have to explain why the additional documents, evidence, facts or issues were not available or provided in the certified record or in the Joint or Additional Statement of Facts and Issues and why they are material to a decision on the appeal.

As previously discussed in connection with the proposed § 4.919, we recognize that this approach's practical result may be inefficient or counterproductive to the goal of administrative record development. We specifically request comments on whether we should require parties to request to add to the record, and explain that request, after the record development conferences are complete.

Paragraph (c) would provide that if you are an appellant, you would have to agree in writing to extend the period for the Department to issue a final decision in your appeal under 30 U.S.C. 1724(h)(1) by 45 days, and include that agreement with your request. The purpose of this paragraph is to ensure that the record development process is flexible enough to allow the parties to develop as complete a record as possible but make sure that the 33-month period in which to decide federal oil and gas appeals does not continue to run if the appellant needs additional time to add to the record.

We propose 45 days for the extension of time under paragraph (c) because that time frame would allow the IBLA to act on the request and other parties to respond to the additional submissions. Thus, paragraph (d) would provide that you must serve your request on all parties to the appeal. Paragraph (e) would provide that the IBLA would issue an order either granting or denying your request to supplement the record or Joint or Additional Statement of Facts and Issues under this section within 30 days of its receipt of your request. If the IBLA did not issue an order either granting or denying your request within 30 days of its receipt of your request, your request would be deemed granted. Then, under paragraph (f), if the IBLA granted a request or a request was deemed granted under paragraph (e), any party to the appeal could respond to a party's additional documents, evidence, facts or issues within 15 days of its receipt of the IBLA's order, or, if the IBLA did not issue an order, within 45 days of the party's receipt of the request.

Section 4.924 How Will MMS Schedule a Settlement Conference?

RSFA § 4(a), adding FOGRMA § 115(i), 30 U.S.C. 1724(i), requires that parties to disputed obligations under orders subject to RSFA ''hold not less than one settlement consultation.'' However, the RPC recommended we propose to make at least one settlement conference mandatory for all appeals, not just appeals involving Federal oil and gas production subject to RSFA. Our reason is that participation in a settlement conference imposes little additional burden on any party but may yield substantial benefits in terms of the time and expense of resolving the dispute. We seek comments on whether we should extend this RSFA requirement to all appeals. In particular we specifically request comments on whether this requirement should be mandatory for Indian appeals.

Accordingly, paragraph (a) would state that if you file an appeal under this subpart, MMS will schedule you to attend a settlement conference within 120 days of the commencement of your appeal under § 4.911. You would be allowed to extend this 120-day period under § 4.958. Thus, attendance at one settlement conference would be mandatory for all appeals. However, we would encourage as many settlement conferences as necessary to facilitate early resolution of disputes. We included the provision requiring an extension of the 33-month period because we did not want to cut off the settlement process, but needed to make sure that the 33-month period in which to decide federal oil and gas appeals did not continue to run if the appellant needed more time to complete the process.

Under paragraph (b), you could request that the settlement conference take place via telephone, video conference, or in person. However, under paragraph (c), MMS ultimately would determine the time and location of the settlement conference and whether the settlement conference will take place via telephone, video conference, or in person. MMS would not compel you to travel (*i.e.*, MMS might suggest that the conference be in person at a location remote from the appellant, but if the appellant chose not to travel, MMS would accommodate that choice).

To increase the flexibility and efficiency of the settlement and appeals process, MMS added paragraph (d) to provide that the settlement conference could be held as part of the record development conference scheduled under § 4.915 if you and MMS agree to do so. MMS believes that, in many instances, the record development conference and settlement conference would be concurrent because all necessary parties would be present to discuss the issues, facts, and possible early resolution of the dispute.

Section 4.925 Who Must and Who May Participate in the Settlement Conference?

This section would explain who must and who may participate in settlement conferences. Our goal is to allow interested affected persons that have an ability to provide useful information, views, or insights to participate in settlement conferences.

Paragraph (a) would state that appellants and relevant MMS offices must participate in settlement conferences, as required under RSFA § 4(a), adding FOGRMA § 115(i), 30 U.S.C. 1724(i).

Because States concerned and other interested persons may wish to participate in settlement conferences, paragraph (b) would state that affected delegated States or affected States concerned, affected Indian lessors, and a lessee, designee, payor, or reporter (if

not an appellant) may participate in the settlement conferences.

RSFA § 4(a), FOGRMA § 115(i), provides that for royalties due on production after September 1, 1996, ''the parties shall hold not less than one settlement consultation and the Secretary and the State concerned may take such action as is appropriate to compromise and settle a disputed obligation * * *.'' However, that language does not grant States authority to settle a dispute or give the State a ''veto'' over the Secretary settling a dispute. Rather, the Secretary must determine what is the appropriate action and has determined that it is not mandatory for States concerned to participate in settlement conferences. Thus, if States concerned want to participate, they could do so under paragraph (b).

Section 4.926 How will I Receive Notification of Settlement Conferences?

The purpose of this section is to identify who in the Department has responsibility for notifying the various persons of the settlement conferences. Because MMS would have such information, it would have the primary notification responsibility. Thus, paragraph (a) would explain that after MMS schedules a settlement conference under § 4.924, MMS will notify the appellant, lessees that joined under § 4.908, the office that issued the order, affected delegated States, the persons that affected States concerned identify under § 4.961, and affected Indian tribes or appropriate BIA offices of the settlement conference.

MMS would not be responsible for notifying individual Indian mineral owners that they may attend settlement conferences because it does not have the information necessary to contact those persons. However, BIA does have that information. Thus, paragraph (b) would provide that the appropriate BIA office that MMS notifies under paragraph (a) would make available whatever notice to individual Indian mineral owners it deems appropriate by any method it deems appropriate. This proposal was based on the assumption that area BIA offices are in the best position to know what type of notice would be useful. For example, such notice could be in the form of notice in a local paper, or posting notice on the Internet that individual Indian mineral owners could access at their local BIA office. We request comments on the most appropriate way to provide useful notice to individual Indian mineral owners about matters that may affect their revenues.

Section 4.927 May Parties Resolve an Appeal by Settlement or Using Third Party Neutrals After the Settlement Conference?

Although RSFA § 4(a), adding FOGRMA § 115(i), 30 U.S.C. 1724(i) requires at least ''one settlement consultation,'' MMS wants to make clear that it will engage in settlement negotiations whenever appropriate throughout the appeals process. Thus, paragraph (a) would provide that parties may resolve any appeal by settlement at any time before the Department has issued a final decision.

Under paragraph (b), any party could participate in settlement negotiations at any stage of the appeal. Also, MMS could use any personnel or officials it deems appropriate for settlement negotiations, including representatives of tribes and delegated States. Like the mandatory settlement conference, the Secretary has determined under this proposed rulemaking that it is not mandatory for States concerned to participate in settlement negotiations. However, MMS would consult with States concerned regarding any settlement negotiations and could invite States concerned to participate under this paragraph.

We are proposing paragraph (c) to provide for alternative dispute resolution options other than settlement negotiations. Accordingly, in addition to negotiated settlements, at any stage of the appeal, MMS could use third party neutrals under the Administrative Dispute Resolution Act, 5 U.S.C. 571 *et seq.*, if both MMS and the other parties to the appeal agreed to do so. Thus, parties would not be forced to refer disputes to an arbitrator or mediator. If MMS used third party neutrals, MMS could use the Alternative Dispute Resolution Official from the OHA, or persons named on the roster of third party neutrals that OHA maintains.

Section 4.928 What if I Need More Time to Consider Settlement?

This section would explain how to postpone any filing requirements and the deadline for the Department to issue a final decision in your appeal while settlement efforts are ongoing. To do this, you would have to obtain an extension under § 4.958. We included this provision because we did not want to cut off the settlement process but needed to make sure that the 33-month period in which to decide Federal oil and gas appeals did not continue to run if the appellant needed more time to complete the process.

Section 4.929 May the MMS Director Concur With, Rescind, or Modify an Order or Decision Not to Issue an Order that I Appealed?

One of the goals of the RPC was elimination of the current two-step royalty appeals process wherein an appellant must appeal to the MMS Director, brief that appeal, and receive a decision that is then appealable to the IBLA. Once at the IBLA, appellants must then brief the appeal to the IBLA.

To eliminate the two-step briefing process, yet allow MMS the opportunity to rescind or modify an order after record development, the RPC Report recommended that MMS prepare an internal recommendation on whether an order should be upheld, modified, or rescinded. RPC Report paragraph 21. The RPC Report then recommended that after appropriate consultation with States and tribes, the MMS Appeals Division could rescind or modify an order. *Id.* However, this process would have involved asking the IBLA to remand the appeal, which would be burdensome and time consuming. Also, the internal memorandum would not be shared with the appellant. In his letter of September 22, 1997, the Secretary stated that rather than writing an internal memorandum MMS would issue a letter decision to appellants with copies to appropriate Indian lessors and delegated States stating whether the MMS Director had modified or rescinded the order or decision not to issue an order.

Thus, under paragraph (a), although appeals are not to the MMS Director, this rule is proposing that the MMS Director, within 60 days of the date that the MMS DRD has received the record under §§ 4.919 or 4.920, may concur with, rescind, or modify the order or decision not to issue an order that you have appealed. We felt that MMS should have up to this point to unilaterally act on an order without leave of the IBLA. We also believe that the short 60-day time period within which the MMS Director would have to act was necessary because of the RSFA 33-month period within which to decide Federal oil and gas appeals and the Department's and RPC's desire to decide appeals more quickly than the current process. Although neither the RPC report nor the Secretary addressed the process for the MMS Director to concur with orders, we believe that in addition to issuing letters modifying or rescinding orders, as part of MMS's review practice, MMS should be authorized to issue letters concurring with orders.

The purpose of allowing the MMS Director to rescind or modify the order or decision not to issue an order would be to: (1) formally communicate our reasons for rescission or modification to appellants; (2) eliminate the need to request remand from the IBLA; (3) allow MMS an opportunity to review orders for accuracy and conformity with MMS policy prior to formal briefing to the IBLA; and (4) help resolve appeals or issues prior to formal briefing to the IBLA. The early resolution of appeals is particularly important given RSFA's 33-month time constraint.

Moreover, under the current appeals process, MMS appeals decisions and settlement agreements have resolved more than three-fourths of the complex appeals filed with MMS prior to appeal to the IBLA. MMS hopes that its ability to review and rescind or modify orders in this proposed rule, together with the settlement conferences, will yield a similar result.

The purpose of having the MMS Director affirmatively concur with orders is to speed up the appeals process and give appellants clear documentation of the concurrence (compared to ''deemed'' concurrences under paragraph (e), described below).

Paragraph (b) would provide that MMS will consult informally with the MMS office that issued the order or decision not to issue the order, and with affected tribes or affected delegated States that participated in the record development conference or the settlement conference before the MMS Director rescinds or modifies an order or decision not to issue an order under paragraph (a). This is substantially what the RPC Report recommended, RPC Report paragraph 21.a, except that MMS would not have to consult with affected tribes or affected delegated States that show no interest in the proceedings by failing to participate in the early part of the appeals process. MMS also would not be required to consult with States concerned. This would conserve MMS resources by eliminating the need to inform persons that did not issue the order, participate in the audit that resulted in the order, or participate in the appeals process. This would also encourage interested affected tribes and affected delegated States to participate early in the process and thereby produce more meaningful record development and settlement conferences. However, paragraph (c) would give MMS discretion to consult informally with other relevant MMS offices, States concerned, and affected Indian lessors before the MMS Director rescinds or modifies an order or decision not to issue an order.

Under the current appeals process, for appeals involving Indian leases, MMS prepares the decision, and the Deputy Commissioner of Indian Affairs signs the decision, after the Solicitor, Division of Indian Affairs, reviews the decision. In this proposed rule, the MMS Director would concur with, rescind or modify appeals involving Indian leases. We specifically request comment on what the extent of BIA involvement regarding such appeals should be. For example, should MMS be required to ''consult informally'' with appropriate BIA officials prior to acting on an order under paragraph (b), or should such consultation be at MMS's discretion under paragraph (c)?

Under paragraph (d), MMS would notify appellants in writing that the MMS Director has concurred with, rescinded or modified the order or decision not to issue an order they appealed. A notice of rescission or modification would state the reasons for the rescission or modification. However, we anticipate that these letters would be shorter and would include less written legal analysis than current MMS appeals decisions.

We included paragraph (e) to explain what happens if the MMS Director does not concur with, rescind or modify the order or decision not to issue an order within the 60-day time frame provided in paragraph (a). In such instances, the MMS Director would be deemed to have concurred with the order or decision not to issue an order that you have appealed.

Section 4.930 What Other Persons Will MMS Notify When the MMS Director Concurs With, Rescinds, or Modifies an Order or Decision Not to Issue an Order?

The purpose of this section is to identify the persons, other than the appellant that the Department will notify when the MMS Director concurs with, rescinds, or modifies an order or decision not to issue an order. This would include persons who would not otherwise be aware of such action because they did not receive an order, Notice of Order, or Notice of Appeal. Because MMS would have such information, it would have the primary notification responsibility.

Paragraph (a) would provide that, for appeals filed under § 4.904(a) or (b) (*i.e.*, by parties other than Indian lessors), MMS will send a copy of the notice that it issues under § 4.929(d) to the following persons: (1) the office that issued the order; (2) any affected delegated State; (3) any affected Tribe; and (4) the appropriate BIA office, if the order involves leases on individual Indian lands. The BIA office may make available to individual Indian mineral owners whatever notice it deems appropriate by any method it deems appropriate. MMS would not be responsible for notifying individual Indian mineral owners because it does not have the information necessary to contact those persons. However, BIA does have that information. This proposal was based on the assumption that BIA area offices are in the best position to know what type of notice would be useful. For example, such notice could be in the form of notice in a local paper, or posting notice on the Internet that individual Indian mineral owners could access at their local BIA office. We request comments on the most appropriate way to provide useful notice to individual Indian mineral owners about matters that may affect their revenues.

Paragraph (b) would provide that for appeals filed by Indian lessors under § 4.904(c), MMS will send a copy of the notice it issues under § 4.929(d) to the office that decided not to issue the order and to the lessee or its designee.

Section 4.931 If the MMS Director Rescinds or Modifies an Order, How Does it Affect the Statutory Limitations Period?

RSFA § 4(a), adding the new FOGRMA § 115(b)(1), 30 U.S.C. 1724(b)(1), provides that MMS must commence a demand for an obligation within seven years from the date the obligation becomes due. Thus, orders subject to RSFA must be issued within seven years of the date that additional royalties became due. For purposes of this rulemaking, we needed to clarify the effect of the MMS Director's rescission or modification of orders subject to the seven-year limitations period under RSFA.

Accordingly, for purposes of determining whether an order is timely under the limitations period prescribed in 30 U.S.C. 1724(b)–(d), paragraph (a) of the proposed section would state that if the MMS Director modifies an order under § 4.929, the timeliness of the order is not affected and the modified order is timely if the original order was timely. For example, assume that MMS issued an order to pay additional royalty of $10,000 on January 1, 1998, for royalties that were due on January 1, 1991 from lease X.

Also assume that the designee appealed the order, and that the MMS Director modified the order to find that the lessee underpaid royalties on lease X for the same production by $15,000, not the $10,000 under the order as issued, and to require the lessee to pay the higher amount. In that instance,

because the original order was timely, the modification would be timely, even though it increased the amount of royalties due. However, the MMS Director's modification would not address production not included in the original order. Thus, using the above example, the MMS Director could not modify the order to include additional royalties on production from lease Y, because that production was not included in the original order. Similarly, the Director could not modify the order to include production from lease X for a time period different than the time period in the original order.

Paragraph (b) would provide that for purposes of determining whether an order is timely under the limitations period prescribed in 30 U.S.C. 1724(b)–((d), if the MMS Director rescinded all or part of an order under § 4.929, and the IBLA, an Assistant Secretary, the Director of OHA, the Secretary, or a court reinstates that order, in whole or in part, the reinstated order relates back to the date the order was originally issued, and the reinstated order would be timely if the original order was timely. Thus, as long as an appeal (or intervention) of the rescission was pending within the Department or in federal court, an order would stay ''alive'' for purposes of the 7-year limitations period even though the MMS Director rescinded that order.

Section 4.932 When Will MMS Send the Record to IBLA?

Under this section, the MMS DRD would transmit the record to the IBLA within 45 days of the date MMS notifies the appellant under § 4.929(d). If the MMS Director is deemed to have concurred with an order under § 4.929(e), this section would require that the MMS Dispute Resolution Division transmit the record to the IBLA within 105 days after MMS has received the record under § 4.919 or 4.920. The 45-day deadline under this paragraph would merely be guidance for MMS and would create no substantive rights in parties to the appeal or any other persons.

Section 4.933 What Must I Do, or What May I Do, After the MMS Director Concurs With, Rescinds or Modifies an Order or Decision Not To Issue an Order That I Have Appealed?

This section would explain what an appellant could do regarding the appeal of its order after the MMS Director concurs with, modifies or rescinds an order under § 4.929. Depending on the MMS Director's action, and whether the appellant desires to continue the appeal, there are several options for the appellant. First, under paragraph (a), if the MMS Director concurred with the order or decision not to issue an order that you appealed, and you wanted to continue your appeal, you would have to file your Statement of Reasons under § 4.939 with the IBLA within 60 days after you received the MMS Director's concurrence under § 4.929. The 60-day time period is intended to provide sufficient time for you to determine what action you intend to take and to prepare your Statement of Reasons.

Second, under paragraph (b), if the MMS Director rescinded the order that you appealed, and if an Indian lessor or delegated State intervened under § 4.934, because you would be bound by the Department's final decision in the intervention in your appeal, you could file an Answer to the Intervention Brief under § 4.942 within 60 days after you receive the MMS Director's rescission under § 4.929(d). We assume that appellants would not appeal a recission to IBLA. However, we realize that the substantive rights of appellants may be affected if an Indian lessor or delegated State intervenes under § 4.934. Thus, we wanted to ensure that appellants have the opportunity to address any arguments for reinstatement of a rescinded order an Intervenor makes to IBLA in its Intervention Brief. But we also wanted to make clear that if an appellant chooses not to answer an Intervention Brief, it would still be bound by any IBLA decision regarding the rescission.

Third, under paragraph (c), if the MMS Director modified the order that you appealed, and if you still wanted to contest the order as modified, you would have to file your Statement of Reasons under § 4.939, and any Answer to an Intervention Brief under § 4.942, within 60 days after you receive the MMS Director's modification under § 4.929. The 60-day time period is intended to provide sufficient time for you to determine what action you intend to take and to prepare your Statement of Reasons and any Answer to an Intervention Brief.

Finally, under paragraph (d), if the MMS Director was deemed under § 4.929(e) to have concurred with the order or decision not to issue an order that you appealed, you would have to file your Statement of Reasons under § 4.939 within 120 days after the date the MMS DRD receives the record forwarded under §§ 4.919 or 4.920. Thus, if MMS did not notify you of its concurrence, modification, or rescission of the order within the time required under § 4.929, then you would have 60 days from the date that the notification should have been sent to file a Statement of Reasons with the IBLA. This would give an appellant sufficient time to determine whether the appeal was deemed concurred with under § 4.929(e), determine what action it intends to take, and prepare its Statement of Reasons.

Section 4.934 Who May Intervene in an Appeal?

The purpose of this section is to provide a means for Indian lessors and affected delegated States to object to an MMS Director's rescission or modification of an order without having to make the Indian lessor or State file a separate appeal of some kind. We felt it would be too confusing and administratively difficult to track dual appeals regarding the same order for purposes of the 33-month period within which to decide appeals of orders concerning federal oil and gas leases. The RPC Report, paragraph 21.e, recommended that delegated States be allowed to ''continue'' an appeal. However, we believe that Indian lessors and affected delegated States are not ''appellants'' when they disagree with an MMS rescission or modification because there already is an ''appellant.'' Rather, they should be regarded as intervenors because they did not appeal the order but challenge MMS's action with respect to an order. *See e.g.*, 43 CFR 4.471 and 4.1110.

This achieves the same effect as the RPC Report recommendation, but, under the proposed rule, appellants have different substantive rights and procedures than intervenors. For example, under various sections of the proposed rule, if an appellant wants additional time to comply with a filing deadline, hold additional record development or settlement conferences, etc., then, under § 4.958, the appellant must request an extension of the period in which the Department must issue a final decision in its appeal under § 4.956, or which the Department uses as guidance to track its appeal under § 4.948. There is no such requirement for Intervenors because they cannot extend the 33-month period. Thus, the Departmental office considering an extension request from an Intervenor would have discretion whether to grant the request considering, among other factors, whether the Intervenor obtained a written agreement from the appellant to extend the 33-month period. Accordingly, under paragraph (a), Indian lessors could intervene in any appeal involving their leases by filing an Intervention Brief under § 4.939 within 30 days after receiving notification of the MMS Director's concurrence, rescission or modification of an order

under § 4.930 that adversely affects them. Likewise, paragraph (b) would provide that affected delegated States could intervene in an appeal if the MMS Director modified or rescinded an order under § 4.929 that the recipient of the order or Notice of Order appealed, by filing an Intervention Brief under § 4.939 within 30 days after the delegated State received MMS's notification of any rescission or modification under § 4.930, if MMS's rescission or modification of the order adversely affected that State.

We believe that only Indian lessors and delegated States that are adversely affected by the MMS Director's actions regarding an order should be allowed to intervene. Thus, an Indian lessor whose leases are not at issue in the appeal, or a delegated State that does not receive revenues from the leases at issue in the appeal, could not intervene. However, if an unaffected Indian lessor or delegated State wished to express views about the merits of MMS's actions, it could file an amicus brief under § 4.943.

Section 4.935 What is the Record for an Appeal if a State or Indian Lessor Intervenes?

Because a record already exists for an appeal when an Indian lessor or a delegated State intervenes, this section would provide that if an Indian lessor or delegated State intervenes under § 4.934, the record for the appeal that the IBLA must consider is the record established under §§ 4.919 or 4.920 before the MMS Director's rescission or modification under § 4.929, plus any additional correspondence to the MMS Director and the MMS Director's notice of modification or rescission under § 4.929(d).

Section 4.936 If an Indian Lessor or Delegated State Intervenes, How Does it Affect the Time Frame for Deciding an Appeal?

As explained above, we believe that Indian lessors and affected delegated States are not ''appellants'' when they disagree with an MMS rescission or modification because there already is an ''appellant.'' Thus, this section would provide that when an Indian lessor or delegated State intervenes, the appeal commences on the appellant's commencement date under § 4.911, not on the date an intervening party files its Intervention Brief. Thus, intervention would not ''recommence'' an appeal.

Section 4.937 May an Assistant Secretary Decide an Appeal?

Under the current two-step appeals process, an Assistant Secretary may take jurisdiction of an appeal and issue a decision at any time prior to an appeal to the IBLA. *Marathon Oil Co.*, 108 IBLA 177 (1989), *Blue Star, Inc.*, 41 IBLA 333, 335–36 (1979). The RPC recommended that if an Assistant Secretary wanted to decide an appeal, the Assistant Secretary would have to petition the IBLA to relinquish jurisdiction of the appeal. RPC Report, paragraph 30. However, in his letter of September 22, 1997, the Secretary stated that the Department would allow an Assistant Secretary to choose to decide an appeal without leave from the IBLA, at any time prior to the Appellant's filing of its Statement of Reasons or an Intervenor's filing of its Intervention Brief with the IBLA. We believe that if policy-level officials in the Department choose to make a decision in a case, there should be no need for them to be granted permission. This also is similar to the procedures for certain other Departmental appeals. *See* 43 CFR 4.332(b).

Accordingly, paragraph (a) of this section would provide that the Assistant Secretary for Land and Minerals Management (or, the Assistant Secretary for Indian Affairs for appeals involving an Indian lease) could choose to decide an appeal by notifying the appellant, the MMS Dispute Resolution Division, and the IBLA in writing that the Assistant Secretary will decide the appeal, at any time up to 30 days before the date the appellant must file its Statement of Reasons or an Intervenor must file its Intervention Brief under § 4.939. The 30-day notification would give appellants and Intervenors time to prepare their Statement of Reasons or Intervention Brief for filing with the Assistant Secretary, rather than with the IBLA. The proposed rule does not specify how an Assistant Secretary would determine to decide an appeal, but we believe any party, including the appellant, could request that an Assistant Secretary decide the appeal.

We believe that the appellant should argue its case to the Assistant Secretary in much the same way as it would argue the matter to the IBLA. Thus, paragraph (b) of this section would provide that, after the Assistant Secretary notifies you of his or her decision to decide your appeal, you must file all subsequent documents required under this subpart with the Assistant Secretary under § 4.960.

In a public meeting we held on earlier drafts of this proposed rule, industry representatives expressed concern over the extent of *ex parte* communications from the MMS and the Solicitor's office to the Assistant Secretary when an Assistant Secretary decides an appeal. Under the proposed procedure, appellants would be able to submit the same arguments to the Assistant Secretary as they would submit to the IBLA. While the procedures would differ from those before the IBLA because there would be no bar on agency or Solicitor's office personnel working with the Assistant Secretary on a decision, any Assistant Secretary's decision would have the benefit of being subject to immediate judicial review. Moreover, it is critical to the Assistant Secretary's decision making process that he or she have available the expertise of both the agency personnel and his or her attorneys. We specifically request comments about any procedures that the Department should consider regarding how it can maintain an efficient and fair process, while providing adequate staff support to the Assistant Secretary, and preserving the Assistant Secretary's prerogative to consult with whomever he or she chooses within the Department.

Section 4.938 Who Will Notify Other Persons That an Assistant Secretary Will Decide an Appeal or Has Decided an Appeal?

The purpose of this section is to identify who in the Department has responsibility for notifying affected persons other than the appellant that an Assistant Secretary will decide an appeal or has decided an appeal, who would not otherwise be aware of such action. Because MMS would be notified of such action, it would have the primary notification responsibility.

Thus, paragraph (a) would explain that MMS will transmit a copy of the Assistant Secretary's notice required under § 4.937 to:

(1) Affected tribes;
(2) Affected delegated States;
(3) Lessees who join under § 4.908;
(4) Intervenors; and
(5) Affected lessees or their designees if an Indian lessor files an appeal under § 4.904 of any MMS decision not to issue an order.

Paragraph (b) would provide that for appeals involving individual Indian mineral owners' leases, in addition to notifying the persons under paragraph (a), MMS would transmit a copy of the Assistant Secretary's notice required under § 4.937 to the appropriate BIA office. That BIA office could make available to individual Indian mineral owners whatever notice it deems appropriate by any method it deems appropriate. MMS would not be responsible for notifying individual Indian mineral owners because it does not have the information necessary to contact those persons. However, BIA does have that information. Thus, this

proposal was based on the assumption that area BIA offices are in the best position to know what type of notice would be useful. For example, such notice could be in the form of notice in a local paper, or posting notice on the Internet that individual Indian mineral owners could access at their local BIA office. We request comments on the most appropriate way to provide useful notice to individual Indian mineral owners about matters that may affect their revenues.

Section 4.939 How Do I File My Statement of Reasons or Intervention Brief?

This section would explain how an appellant would file its Statement of Reasons, and an Intervenor would file its Intervention Brief, with the IBLA or an Assistant Secretary.

Under paragraph (a), you would have to file your Statement of Reasons or Intervention Brief with the IBLA under § 4.960 within the times required under §§ 4.933 and 4.934.

Under paragraph (b), if an Assistant Secretary will decide your appeal under § 4.937, you would have to file your Statement of Reasons or Intervention Brief with that Assistant Secretary under § 4.960 within 60 days after the MMS DRD has received the record under §§ 4.919 or 4.920.

Under paragraph (c), appellants would have to pay a nonrefundable processing fee of $150 with their Statement of Reasons as required under § 4.965 or seek a fee waiver or reduction under § 4.966. Our analysis leading to the choice of $150 as the processing fee at this stage of the appeal is in the Section-by-Section analysis for § 4.965 of this proposed rule. Indian lessors and delegated States would not have to pay the processing fee.

Under paragraph (d) you also would have to serve your Statement of Reasons or Intervention Brief on all parties to the appeal, and on other persons as required under § 4.962. Section 4.962 requires appellants to serve their Statement of Reasons on the office that issued the order, affected tribes, and affected delegated States. The current rules do not require appellants to serve the Statement of Reasons on these entities. However, we added this requirement to ensure that the office that issued the order, affected tribes, and affected delegated States would be informed about the progress of the appeal and to provide them with an opportunity to give the Solicitor's office information they believe is responsive to the Statement of Reasons or file an amicus brief under § 4.943.

Section 4.940 What if I Do Not Timely File My Statement of Reasons, Intervention Brief or Request for an Extension of Time to File Those Documents?

This section would explain that if you do not file your Statement of Reasons, Intervention Brief, or request for extension of time to file either of those documents within the times prescribed in §§ 4.933, 4.934, or 4.939, or within any extension of time requested and granted under § 4.958, the IBLA or the Assistant Secretary will dismiss your appeal, or will not allow you to intervene. Thus, the filing of the Statement of Reasons would be jurisdictional. We would like comments on whether this is the appropriate sanction for failure to timely file, or whether we should have another sanction for not filing timely. For example, the rule could provide that the IBLA or Assistant Secretary would not consider Statements of Reasons or Intervention Briefs that are filed late. This would tend to have a similar substantive result as dismissal but might be more time consuming.

Section 4.941 Who May File an Answer to a Statement of Reasons or Intervention Brief?

This section would explain who may file an Answer to a Statement of Reasons or Intervention Brief with the IBLA or an Assistant Secretary. Like current practice, the Solicitor's office would file Answers on behalf of MMS and Indian lessors.

Paragraph (a) would provide that if the recipient of an order or Notice of Order files a Statement of Reasons under § 4.939, MMS and Indian lessors whose leases are affected may file Answers under § 4.942.

Paragraph (b) would provide that if an Indian lessor files a Statement of Reasons or an Intervention Brief under § 4.939, MMS and any lessee, designee, or payor for the lease(s) involved in the appeal may file Answers under § 4.942. The proposed rule would allow lessees or payors to answer Indian lessors' Statements of Reasons and Intervention Briefs because, under § 4.933(b), they would be bound by the Department's final decision in the intervention in their appeal. Also, if an Indian lessor appeals MMS's decision not to issue an order regarding its leases, lessees or payors would likewise be bound by any decision in that appeal. Thus, the substantive rights of lessee and payor appellants could be affected if an Indian lessor intervenes under § 4.934 or appeals under § 4.904(c). Accordingly, we wanted to assure that those appellants have the opportunity to address any arguments an Intervenor or Indian lessor appellant makes to the IBLA or Assistant Secretary.

Paragraph (c) would provide that if a delegated State files an Intervention Brief under § 4.939, MMS, Indian lessors whose leases are adversely affected, and any lessee, its designee, or the payor for the lease(s) involved in the appeal may file Answers under § 4.942. The proposed rule would allow lessees, their designees, or the payor to answer delegated States' Intervention Briefs because, under § 4.933(b), they would be bound by the Department's final decision in the intervention in their appeal. Thus, the substantive rights of lessee, designee, and payor appellants could be affected if a delegated State intervenes under § 4.934. Accordingly, we wanted to assure that those appellants have the opportunity to address any arguments an Intervenor makes to the IBLA or Assistant Secretary in its Intervention Brief.

Indian lessors' leases could be adversely affected by the Intervention of a delegated State only if the appeal involves an order that addresses both Federal and Indian leases (a State could not file an Intervention Brief in an appeal involving only Indian leases). While we do not expect that the positions of Indian lessors and delegated States would often conflict, because Indian lessors are the lease owners, we thought they should have the opportunity to address Intervention Briefs filed by delegated States in appeals that involve both Federal and Indian leases.

Section 4.942 How Do I File an Answer to a Statement of Reasons or Intervention Brief?

This section would explain that you would have to file your Answer to a Statement of Reasons within 60 days after the date the Statement of Reasons was served upon you, and an Answer to an Intervention Brief within the time limit proposed in § 4.933(b) (*i.e.*, within 60 days after you receive the MMS Director's rescission). This section also would provide that you must file your Answer with the appropriate office under § 4.960 and serve your Answer on all parties to the appeal.

Section 4.943 Who May File an Amicus Brief?

This section would explain that any person may file an Amicus Brief with the appropriate office under § 4.960 within 60 days after the date the Statement of Reasons or Intervention Brief is filed with the IBLA or Assistant Secretary. You would have to serve your

Amicus Brief on all parties to the appeal.

Section 4.944 May Parties File Additional Responsive Pleadings?

Under current IBLA practice, the IBLA can consider responsive pleadings after an Answer is filed. *See* 43 CFR 4.414. Thus, as proposed, this section would provide that if you filed a Statement of Reasons or an Intervention Brief, and another person files an Answer or an Amicus Brief, you could file a Reply to the Answer or a Response to the Amicus Brief within 30 days after the date the Answer or Amicus Brief was served upon you. In addition, if you filed an Answer and another person filed a Reply or an Amicus Brief, you could file a Surreply to that Reply to address new arguments or authorities raised in the Reply, or a Response to the Amicus Brief, within 20 days after the Reply or Response is served upon you. You would have to serve any responsive pleadings under this section on all parties to the appeal. The IBLA retains the right to limit the length of pleadings or the number of pleadings beyond those specifically provided in this rule.

Section 4.945 May I Ask for a Hearing by an Administrative Law Judge?

This section would provide a way for the IBLA, at the request of any party, to seek additional facts or arguments that the party believes are necessary to help decide the appeal.

Any party could request in writing that the IBLA refer a matter to an Administrative Law Judge of the Hearings Division under 43 CFR 4.415 for an evidentiary hearing if there are disputed issues of material fact which could affect the decision on the appeal. The party's request would have to specify the issues of fact that are in dispute. *See, e.g., W.J. and Betty Lo Wells*, 122 IBLA 250, 252 (1992), in which IBLA required that a party requesting a hearing in a case involving a BLM land exchange explain what issues of material fact require a hearing.

In addition, appellants who request a hearing under this paragraph would have to agree in writing to extend the period under § 4.958 by the additional amount of time necessary for the Hearings Division to complete any action with respect to the referral request, including any of the actions authorized under paragraph (c)(3). Thus, up to no later than 30 days after all responsive pleadings are filed under § 4.944, parties could, at any time during the appeals process, including record development, request that disputed issues of material fact be resolved by an Administrative Law Judge. Parties could not, however, require other parties to produce documents.

Paragraph (c) would provide that if the IBLA grants a party's request, the IBLA could issue an order:

(1) Authorizing the Administrative Law Judge to specify additional issues;

(2) Authorizing the parties to add additional relevant issues, with the approval of the Administrative Law Judge; and

(3) Asking the Administrative Law Judge to issue:

(i) Proposed findings of fact;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that would be final for the Department absent an appeal to IBLA.

Section 4.946 May IBLA Require Additional Evidence or Arguments From Parties?

Paragraph (a) would provide that the IBLA may require additional evidence or written arguments from parties by issuing an order:

(1) Requiring any party or all parties to the appeal to produce additional evidence or written arguments or both. Thus, unlike parties, the IBLA has authority to require parties to produce additional information;

(2) Requiring the parties to appear before the IBLA for oral argument; or

(3) Referring the matter to an Administrative Law Judge of the Hearings Division under 43 CFR 4.415 for an evidentiary hearing if there are disputed issues of material fact which could affect the decision on the appeal.

Under paragraph (b), the IBLA's referral under paragraph (a)(3):

(1) Would have to specify the issues of fact upon which the hearing is to be held;

(2) Could authorize the Administrative Law Judge to specify additional issues;

(3) May authorize the parties to add additional relevant issues, with the approval of the Administrative Law Judge; or

(4) Could request that the Administrative Law Judge issue:

(i) Proposed findings of fact;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that would be final for the Department absent an appeal to IBLA.

Paragraph (c) would provide that failure of any party to comply with an IBLA order issued under this section may result in any contested fact being found against the party who does not comply.

Section 4.947 May IBLA Establish Deadlines for Matters Referred to Administrative Law Judges?

This section would provide that the IBLA may establish appropriate deadlines for any matter referred to an Administrative Law Judge under §§ 4.945 or 4.946.

Section 4.948 When Will the IBLA Decide My Appeal?

This section would provide in paragraph (a) that the IBLA would decide your appeal by the date the appeal ends under § 4.912.

Paragraph (b) would state that the IBLA will serve its decision on all parties to the appeal, and other persons as required under § 4.963.

Paragraph (c) would provide that, if an Assistant Secretary will decide your appeal under § 4.937, the Assistant Secretary would decide your appeal on or before the day your appeal ends under § 4.912. The Assistant Secretary would serve that decision on all parties to the appeal and other persons as required under § 4.963.

Section 4.949 When is an IBLA or an Assistant Secretary's Decision Effective?

This section would explain that an IBLA or an Assistant Secretary's decision is effective on the date it is issued, unless the IBLA or the Assistant Secretary provides otherwise. The decision would be the final action of the Department.

Section 4.950 What if IBLA Requires MMS or a Delegated State to Recalculate Royalties or Other Payments?

The purpose of this section is to provide a mechanism for MMS to correct calculations for orders within the 33-month time period in which to decide appeals concerning Federal oil and gas leases subject to RSFA when IBLA directs MMS to recalculate. Thus, we are proposing this section in order to avoid the need for remands, which could be too time consuming to take place within the RSFA 33-month period. Moreover, we were concerned that if cases were remanded, appellants or intervenors would argue that the order responding to the remand might not be timely under the 7-year RSFA statute of limitations applicable to Federal oil and gas leases under RSFA, § 4(a), adding FOGRMA § 115(b), 30 U.S.C. 1724(b). To deal with these concerns, we decided instead to devise a system to make factual adjustments that would be final for the Department and not subject to administrative appeal when IBLA orders such adjustments.

Under paragraph (a), because Indian leases and Federal leases other than oil

and gas are not subject to RSFA, the time limits and finality requirements in this section would not apply.

Paragraph (b) would provide that an IBLA decision modifying an order and requiring MMS or a delegated State to recalculate royalties or other payments, would be the final decision in the administrative proceeding for purposes of the 33-month period under 30 U.S.C. 1724(h). Thus, the IBLA decision on the merits would not be administratively appealable, even if it ordered MMS to perform additional calculations.

Under paragraph (c), after MMS or the delegated State that performed the audit received an IBLA order to recalculate, it would be required to provide to IBLA, and all parties served with IBLA's decision, any recalculation IBLA requires under paragraph (b) within 60 days of its receipt of IBLA's decision. We chose 60 days because if IBLA issues its decision within the 30-month goal provided under § 4.948, MMS or the delegated State that performed the audit would have 60 days to perform the recalculation, and IBLA would have approximately 30 days to review the recalculation before the running of the 33-month period under RSFA. There would be no further appeal within the Department from MMS's or the delegated State's recalculation under paragraph (c). Accordingly, the decision IBLA issues under paragraph (b), together with MMS's or the delegated State's recalculation under paragraph (c), would constitute the final action of the Department that is judicially reviewable under 5 U.S.C. 704. In other words, appellants and intervenors could not appeal the recalculation administratively, nor object to it before IBLA between the time IBLA receives the recalculation and the running of the 33-month period under RSFA.

Section 4.951 May a Party ask IBLA to Reconsider its Decision?

If you were a party, you could submit a request in writing to IBLA that it reconsider its decision within 30 days of the date you receive the decision. The party requesting reconsideration would have to specifically explain to IBLA in its request what it believes the extraordinary circumstances are that require reconsideration.

Like 43 CFR 4.403, paragraph (b) would provide that filing a request for reconsideration would not suspend the effectiveness of IBLA's decision. The purpose of maintaining the effectiveness of IBLA's decision is to assure that IBLA's decision would be deemed the final decision for the Department under the default rule of decision in § 4.956.

Paragraph (c) would provide that a request for reconsideration is not necessary to exhaust administrative remedies.

Section 4.952 Under What Circumstances May IBLA Reconsider its Decision?

The purpose of this section is to establish IBLA standards for reconsideration of appeals subject to this subpart. The standards IBLA would use to determine whether to reconsider a decision under this proposed section would continue IBLA's practice of only reconsidering its decisions ''in extraordinary circumstances.'' *See* 43 CFR 4.403. In addition, unlike the current provision in 43 CFR 4.403 that provides that there must be a ''sufficient reason'' for reconsideration, the proposed rule would specifically state that the following reasons could be sufficient for reconsideration:

(a) Discovery of evidence not before IBLA at the time the decision was issued which demonstrates error in that decision. Accordingly, a request for reconsideration would have to explain why such evidence was not previously available or provided to IBLA;

(b) IBLA's misinterpretation of material facts;

(c) Clear error of law;

(d) Recent judicial development;

(e) Change in Departmental policy; or

(f) Inconsistent agency decisions.

These reasons codify IBLA practice.

Section 4.953 May Other Parties to the Appeal Respond to a Request for Reconsideration?

The purpose of this section is to provide parties with an opportunity to respond to requests for reconsideration. Thus, you could answer a request for reconsideration within 15 days of your receipt of a copy of the request. We believe that 15 days within which to respond to a request for reconsideration is sufficient because the standards for reconsideration under § 4.952 should narrow the scope of requests, and, likewise, any response. You would have to serve your answer to a request for reconsideration on all parties to the appeal.

Section 4.954 On Whom Will IBLA Serve a Decision on Reconsideration?

This section would provide that IBLA will serve its decision on all parties to the appeal, and other persons as required under § 4.963.

Section 4.955 May the Secretary of the Interior or the Director of OHA Take Jurisdiction of an Appeal or Review a Decision?

This section would state that the Secretary or the Director of OHA may take jurisdiction of an appeal or review a decision issued under this subpart.

Section 4.956 What if the Department Does Not Issue a Decision by the Date My Appeal Ends?

This section of the rule is one the Department hopes it will never use. Our intent was to draft a rule that will allow us to decide appeals within the 33-month period RSFA mandates and avoid the necessity of this section. RSFA states that:

> The Secretary shall issue a final decision in any administrative proceeding, including any administrative proceeding pending on the date of enactment of this section, within 33 months from the date such proceeding was commenced or 33 months from the date of such enactment, whichever is later
>
> * * * * *
>
> RSFA § 4(a), adding new FOGRMA § 115(h)(1), 30 U.S.C. 1724(h)(1).

RSFA also tells us what happens if the Secretary does not issue a decision within 33 months in appeals involving monetary or nonmonetary ''obligations.'' In such instances, under 30 U.S.C. 1724(h)(2):

> (A) the Secretary shall be deemed to have issued and granted a decision in favor of the appellant as to any nonmonetary obligation and any monetary obligation the principal amount of which is less than $10,000; and
>
> (B) the Secretary shall be deemed to have issued a final decision in favor of the Secretary, which decision shall be deemed to affirm those issues for which the agency rendered a decision prior to the end of such period, as to any monetary obligation the principal amount of which is $10,000 or more, and the appellant shall have a right to judicial review of such deemed final decision in accordance with title 5 of the United States Code.

In paragraph (a), the Department makes clear that this section would apply only to appeals of orders or portions of orders involving monetary and nonmonetary obligations under Federal oil and gas leases filed on or after the date this rule becomes effective. (Proposed § 4.972 applies to appeals subject to RSFA but filed before the effective date of this rule.) For Indian leases and Federal mineral leases other than oil and gas, the time limits in 30 U.S.C. 1724(h) and the default rule of decision stated in this section would not apply because those leases are not subject to RSFA. Thus, the default rule of decision in this section also would not apply to appeals of orders or portions of orders regarding Federal oil

and gas leases that do not involve a monetary or nonmonetary obligation. Accordingly, the default rule of decision would not apply to appeals of orders related to reporting of production or providing information under Federal oil and gas leases (e.g., under the authority for investigations under FOGRMA § 107, 30 U.S.C. 1717) because the definition of ''obligation'' under RSFA § 2(1), adding FOGRMA § 3(25), 30 U.S.C. 1702(25), does not include such matters.

In our outreach meetings, representatives of the solid mineral industry requested that we make appeals involving solid mineral leases subject to the 33-month deadline under this section. Specifically, those industry representatives asked the Department to deem solid mineral appeals denied regardless of dollar amount if the Department misses the 33-month time frame. However, the Department decided that the proposed rule would only apply to appeals of orders regarding monetary and nonmonetary obligations as defined under RSFA. Although we plan to use the same time frames to process Indian, solid mineral, and geothermal appeals, we do not plan to impose this section's default rule of decision on those appeals. We believe that the benefits of obtaining IBLA review and decisions outweighs industry's desire for a quick, mandatory decision.

Paragraph (b) would implement the RSFA rule of decision for appeals for which IBLA, an Assistant Secretary, the Secretary, or the Director of OHA does not issue a final decision by the date the appeal ends under § 4.912. In such instances, under 30 U.S.C. 1724(h)(2), the Secretary's default decision on an appeal would be:

(1) In favor of the appellant for any nonmonetary obligation or any monetary obligation with a principal amount of less than $10,000;

(2) In favor of the Secretary for any monetary obligation with a principal amount of $10,000 or more.

Because of the various changes to and dispositions of orders that may occur during the appeals process, such as MMS Director modification or rescission, or IBLA reconsideration, the proposed rule would clarify the application of the RSFA default decision provision in such cases. In essence, the default decision provisions would only apply to those aspects of the appeal still under dispute between the appellant and the Secretary. Thus, paragraph (c) would explain what is deemed decided for orders which have been modified during the appeals process and which an appellant has continued to appeal. Basically, the only portion of an appeal that is subject to the default decision provision is that portion of the original order that is still in dispute between the appellant and MMS, not an intervenor and MMS.

Under paragraph (c)(1), if the MMS Director modified an order and you continued your appeal of the modified order, the decision the Secretary would be deemed to have made under paragraph (b) would apply only to those aspects of the modified order that you continued to contest. Accordingly, those aspects of the Director's modification that you did not contest would stand, and the Secretary would be deemed to have affirmed the modifications you did not contest, regardless of the amount of any monetary obligation, or any nonmonetary obligation, that you did not contest. For example, assume that you appeal an order involving two separate monetary obligations, one worth $15,000, and one worth $20,000. Assume also that MMS agrees with you on the first monetary issue worth $15,000 and modifies the order accordingly to decrease that obligation to $8,000. If you do not dispute that modification, but continue to dispute only the second $20,000 monetary obligation, and the Department does not issue a final decision within 33 months, then, the default decision provision of this section would neither affirm the portion of the initial order that was removed by the MMS Director's modification nor reverse the Director's determination that you owed $8,000 (a monetary obligation less than $10,000). Rather, the order as modified with respect to the $8,000 monetary obligation would stand because there is no longer an administrative proceeding pending with respect to that obligation. In addition, the $20,000 disputed portion of the order would be deemed decided in favor of the Secretary under paragraph (b).

Under paragraph (c)(2), if the MMS Director modified an order and a delegated State intervened in the appeal, and if neither the recipient of the order or Notice of Order nor a joining lessee has continued the appeal, the decision the Secretary would be deemed to have made under paragraph (b) would be to affirm the order as modified by the MMS Director regardless of the amount of any monetary obligation, or any nonmonetary obligation, at issue in the lessee's or designee's appeal. For example, assume that you appeal an order involving two separate monetary obligations, one worth $15,000, and one worth $20,000. Assume also that MMS agrees with the you on the first monetary issue worth $15,000 and modifies the order accordingly to decrease that obligation to $8,000, and that a delegated State intervenes to dispute the modification of the first issue. If you do not dispute that modification but continue to dispute only the second $20,000 monetary obligation, and the Department does not issue a final decision within 33 months, then the order as modified with respect to the $8,000 at issue would stand because there is no longer an administrative proceeding pending with respect to that obligation. Thus, even though the delegated State intervened to contest the modification, the Secretary will be deemed to have affirmed the Director's determination, even though the amount is less than $10,000, because the State is not an appellant. In addition, the disputed portion of the order would be deemed decided in favor of the Secretary under paragraph (b) because the appellant continued to contest that aspect of the order and the amount of the obligation was over $10,000.

Under paragraph (d), if the MMS Director rescinded an order and a delegated State intervened in the appeal, the Secretary would be deemed to have affirmed the MMS Director's rescission in all respects. Although the intervening State disputes the Director's rescission, the original order is no longer in dispute between the Secretary and the appellant—it is in dispute between the Secretary and the delegated State. Therefore, the rescission would be affirmed because the intervening State is not an appellant. We do not believe that Congress intended 30 U.S.C. 1724(h)(2) to operate to reinstate orders the Director had rescinded.

Paragraph (e) would explain the relationship of requests for reconsideration to the default decision provision. If the IBLA issues a decision on or before the date the appeal ends under § 4.912, that decision is the final decision in the administrative proceeding for purposes of 30 U.S.C. 1724(h)(1) and fulfills the requirements of that provision. Thereafter, 30 U.S.C. 1724(h)(1) and (2) have no further application. Section 1724(h)(2) would not apply because the IBLA has already issued a final decision for the Department. Requests for reconsideration do not change the fact that the Department has issued a final decision in the administrative proceeding. IBLA decisions are final for the Department and therefore meet the RSFA 1724(h) standard.

Therefore, if a party requests reconsideration of an IBLA decision, the RSFA provision at 30 U.S.C. 1724(h) does not compel the IBLA to issue a

further decision within the section 1724(h)(1) time frame. Beyond the text of the statute itself, there are several additional reasons why this is so.

First, when the IBLA issues a decision, that decision constitutes final agency action under the Administrative Procedure Act, 5 U.S.C. 704, and the lessee may seek judicial review. If the lessee chooses to seek reconsideration rather than sue for judicial review, it is invoking a purely optional additional procedure within the Department and can have no objection to the IBLA taking the time necessary to rule on the request for reconsideration.

Second, the obvious intent of 30 U.S.C. 1724 (h) is to ensure that the Department issues a judicially reviewable final agency action within the prescribed time frame. When the IBLA issues a decision, it has accomplished that objective and met the statutory purpose.

Third, 30 U.S.C. 1724(h) was not intended to provide lessees a tool to try to thwart IBLA decisions that they don't like that involve principal amounts of less than $10,000 by filing requests for reconsideration. If the IBLA were compelled to issue a second decision within the section 1724(h)(1) time frame, it would leave the IBLA with very little time to act before the section 1724(h)(2) rule of decision automatically reversed the first decision.

Paragraph (f) would provide that if the principal amount of a monetary obligation is not specifically stated in an order and must be computed to comply with the order, the principal amount referred to in paragraph (b) means the principal amount the MMS estimates you would be required to pay as a result of the order. Thus, if MMS issued an order to perform a restructured accounting, MMS could provide an estimate of the principal amount of the monetary obligation for purposes of this section. This estimate normally would be made at the time of the order and included in the order, but it might be done, or revised, later, as more information becomes available during the appeals process, particularly during record development. See proposed 30 CFR 242.105.

Section 4.957 What is the Administrative Record for My Appeal if it is Deemed Decided?

This section would explain that if your appeal is deemed decided under §§ 4.956 or 4.972, regardless of what the deemed decision is under those sections, the record for your appeal is the record established under §§ 4.919 or 4.920, or before the MMS Director in an appeal under former 30 CFR part 290, plus any additional correspondence to the MMS Director, the MMS Director's notice of concurrence, modification, or rescission under § 4.929(d), or MMS Director's decision under 30 CFR part 290, any pleadings to the IBLA, and any IBLA orders and decisions.

For example, assume that the MMS Director modified your order, and you continued your appeal to the IBLA by filing a Statement of Reasons. Assume also that MMS files an Answer. If the IBLA did not issue a decision in your appeal by the end of the RSFA 33-month period, and the MMS Director's modification is deemed decided in the Department's favor under § 4.956, the record would include not only the record developed under §§ 4.919 and 4.920, but also any additional correspondence to the MMS Director, the MMS Director's notice of modification, your Statement of Reasons, and MMS's Answer.

Section 4.958 How Do I Request an Extension of Time?

RSFA, § 4(a), adding new FOGRMA § 115(h)(1), 30 U.S.C. 1724(h)(1), allows extensions of the 33-month time period by any amount ''agreed upon in writing by the Secretary and the appellant.'' To ensure careful tracking of time frames for all appeals, we are proposing the same procedure regardless of whether RSFA applies to the appeal. Regardless of who requests the extension, the Department has sole discretion whether to agree to extensions. However, the time frame cannot be extended without the agreement of the appellant. Thus, if a delegated State Intervenor wanted more time to file its Intervention Brief, the Department could choose not to agree to the extension because the extension could jeopardize meeting the 33-month time frame. However, the State could seek approval of the appellant to extend the 33-month time frame.

This section would explain the process for requesting an extension of time. Parties would be required to follow the procedures in paragraph (a)(1) whenever they needed: (i) additional time after their appeal commenced to meet any filing requirement under this subpart; (ii) additional time for the Department to issue a final decision in their appeal; (iii) to stay their appeal pending settlement efforts; or (iv) additional time for any other reasons. Under paragraph (a)(2), parties would have to submit a written request for an extension of time to the office or official with whom they must file the document before the required filing date.

Paragraph (b) would require appellants to agree in writing in their request to extend the period in which the Department must issue a final decision in their appeal under §§ 4.956 or 4.972, or which the Department uses as guidance to track their appeal under § 4.948, by the amount of time for which they are requesting an extension.

Under paragraph (c), the Department could require any other party seeking an extension of time to submit a written agreement signed by the appellant to extend the period in which the Department must issue a final decision in the appeal under §§ 4.956 or 4.972, or which the Department uses as guidance to track the appeal under § 4.948, by the amount of time for which the other party is requesting an extension.

Section 4.959 May IBLA Consolidate Appeals?

The current IBLA rules do not provide a process for consolidation. Thus, consolidation is at the discretion of IBLA. This section would continue to give IBLA discretion to consolidate appeals when consolidation would make the process more efficient both for parties and the Department.

Paragraph (a) would allow IBLA to consolidate appeals that involve the same order or decision not to issue an order, common issues of disputed material fact, or common issues of law.

In order to prevent concerns about meeting the 33-month time frame and encourage consolidation, proposed paragraph (b) would require appellants that wish to consolidate to extend the 33-month time frame so that all appeals being consolidated are put on the same track as the latest of the appeals being consolidated. However, under paragraph (b)(2)(ii) of this section, the parties and IBLA also could agree to extend the time frame by a different amount.

Paragraph (c) would provide that IBLA will notify all parties to the appeal of any consolidations under this section.

Section 4.960 Where Do I File Documents Required Under This Subpart?

This section departs from the current process whereby all documents at the early stages of the appeals process are filed with the office that issued the order. However, although you would no longer file your documents with the office that issued the order, you could be required to serve that office and other persons under § 4.962.

Accordingly, the substantive sections of the rule would tell you *with whom* you would have to file your document, and this section would provide times

and addresses. Thus, this section would provide that you must file documents required under this subpart in the appropriate office as follows:

(a) With the MMS DRD between 9 a.m. and 5 p.m. local time at: [*address of MMS DRD*], using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (_____) _____–_____.

(b) With IBLA at: Interior Board of Land Appeals 4015 Wilson Boulevard, Arlington, Virginia 22203, using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (703) 235–9014; or

(c) With an Assistant Secretary at: [*address of MMS DRD*], using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (_____) _____–_____.

Currently, the Department does not allow filing by telefax. This rule would allow filing by telefax. However, under paragraph (d), if you filed a document by telefax, you would have to send an additional copy of your document to the same office or official so that it is received within 5 business days of your telefax transmission using the U.S. Postal Service, a private delivery or courier service or hand delivery. The Department added this provision to make filing easier for parties, but wanted to assure that it had a legible hard copy for the file. Because timing is critical, and in some instances jurisdictional, we recommend that parties keep documentation that the proper office received the telefax transmission.

Section 4.961 How Can a State Concerned Receive Notification of Record Development and Settlement Conferences?

For many States concerned, the amount of their revenues from Federal royalties is relatively small, and they therefore do not actively participate in the collection process. Thus, we are not proposing to seek the participation of all States concerned in all record development and settlement conferences that could affect their revenues. However, those States concerned without delegations that would like to participate could inform MMS at any time of their interest, and then MMS would begin notifying them of record development and settlement conferences. Accordingly, if a State concerned wanted to receive notification of record development conferences under § 4.917 and settlement conferences under § 4.924, then the State concerned would have to provide the MMS DRD with the name, title, address, and telephone number of the State official authorized to receive the notifications.

Section 4.962 What Copies of Documents Filed Under This Subpart are Appellants, Lessees, and Intervenors Required to Serve?

This proposal seeks to improve the process of providing appropriate notification about pending appeals to States, Indian lessors, and all parties and others interested in particular appeals. The tables presented in this section and § 4.963 of the proposed rule are an attempt to provide a user-friendly means for each participant in the appeals process to determine when and to whom they must serve copies of documents filed in the appeals process. The requirements for filing the original documents are contained in the sections of this rule discussing each of those specific documents.

This section would apply to appellants, lessees, and intervenors—the requirements for Department of the Interior offices are set out in § 4.963. Who you must serve would be different depending on who the appellant is. The table in paragraph (a) would apply to appellants, lessees, and intervenors participating in appeals filed by recipients of orders or notices of orders involving leases on Federal or Indian tribal lands (*i.e.*, appellants other than Indian lessors).

The table in paragraph (b) would show service requirements for appellants, lessees, and intervenors participating in appeals by recipients of orders or notices of orders involving leases on Federal or Indian tribal lands.

Section 4.963 What Copies of Documents Filed Under This Subpart is the Department Required to Serve?

Who the Department must serve would be different depending on who the appellant is. The table in paragraph (a) would apply to Department of the Interior offices participating in appeals filed by recipients of orders or notices of orders involving leases on Federal or Indian tribal lands (i.e., appellants other than Indian lessors).

The table in paragraph (b) would show service requirements for Department of the Interior offices participating in appeals by recipients of orders or notices of orders involving leases on Federal or Indian tribal lands.

Paragraph (c) would apply to appeals involving individual Indian mineral owners' leases (i.e., leases that are not tribal leases), regardless of who files the appeal.

We do not believe that it is possible or practical to serve copies of all documents filed on individual Indian mineral owners. Instead, the proposal is to serve copies on BIA area offices and for those offices to provide appropriate notification. This could vary depending on the interest of the individual Indian mineral owner and the relative importance of the cases, as well as on other factors relevant to the particular BIA area office and the individual Indian mineral owners.

Thus, such appeals, MMS would transmit a copy of the Notices of Appeal, MMS notices of timely filing, Statements of Reasons, and IBLA decisions required under this subpart to the appropriate BIA office. That BIA office could make available to individual Indian mineral owners whatever notice it deemed appropriate by any method it deemed appropriate.

Section 4.964 What if I Don't Serve Documents as Required?

This section would provide that if you are an appellant, and you fail to serve any person as required under this section, then IBLA could dismiss your appeal if the person you did not serve or the adverse party is prejudiced by your failure to serve.

Section 4.965 How Do I Pay the Processing fee?

This section would provide that you must pay your processing fees to the MMS DRD. You would be required to pay the nonrefundable processing fees required under §§ 4.907(a)(3) and 4.939(a)(2) by Electronic Funds Transfer, unless you requested, and MMS authorized, payment by check or an alternative method before the date the processing fee would be due. The payment would have to include various specified forms of identification in order to properly account for the fee. Indian lessors would not have to pay a processing fee. We request comments on the amount of the processing fee, payment by electronic transfer, and what form of identification should be included with fees.

The Department's authority to recover its costs for appeals involving all leases is the Independent Offices Appropriations Act of 1952, 31 U.S.C. 9701 (originally codified at 31 U.S.C. 483a) (IOAA). In addition, the Department is authorized to recover its costs related to appeals of Federal onshore leases under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701–84. Thus, as part of this proposed rulemaking, we analyzed the proposed appeals rule's processing fees for reasonableness according to the factors in FLPMA § 304(b), 43 U.S.C. 1734(b). Although the IOAA does not contain the same

''reasonableness factors'' as FLPMA § 304(b), the factors MMS considered under FLPMA to determine reasonable fees led it to conclude that the fees for offshore and Indian leases should be the same as for onshore leases.

The October 28, 1996, proposed regulation on appeals also proposed payment of a processing fee. 61 FR 33607 (1996). Several comments to that rule questioned MMS's authority to impose such fees. However, in addition to the authority under the IOAA and FLPMA, the United States Court of Appeals for the District of Columbia Circuit has upheld charging processing fees for administrative appeals. *Ayuda, Inc.* v. *Attorney General,* 848 F.2d 1297 (D.C. Cir. 1988). *See also United Transportation Union-Illinois Legislative Board* v. *Surface Transportation Board,* No. 97–1038, 1997 U.S. App. LEXIS 37560, (D.C. Cir. Nov. 10, 1997) (decision published in table case format without opinion, reaffirming *Ayuda*) (reported in full text format at 1997 U.S. App. LEXIS 37560). The Circuit Court held that processing fees for administrative appeals ''are for a 'service or thing of value' [under the IOAA, 31 U.S.C. 9701(a),] which provides the recipients with a special benefit.'' *Ayuda, Inc.* at 1301. Thus, MMS and OHA have properly determined that under FLPMA and the IOAA they have authority to recover the costs to process appeals because appeals provide ''special benefits or privileges to an identifiable non-Federal recipient above and beyond those which accrue to the public at large.'' 346 Departmental Manual 1.2.A.

The ''reasonableness factors'' set out in FLPMA are: (a) ''actual costs (exclusive of management overhead)'; (b) ''the monetary value of the rights or privileges sought by the applicant''; (c) ''the efficiency to the government processing involved''; (d) ''that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant''; (e) ''the public service provided''; and (f) ''other factors relevant to determining the reasonableness of the costs.''

MMS and the IBLA considered each of the FLPMA factors for appeals processed under this proposed rule. We first estimated the actual cost for processing the appeal, and then considered each of the other FLPMA factors to see if any of them might cause the fee to be set at less than actual cost. If so, we then considered whether any of the remaining factors acted as an enhancing factor that would mitigate against setting the fees at less than actual cost. We then decided the amount of the fee, which cannot be more than the actual processing cost. This method led to fees that are set well below the actual processing costs. Accordingly, for royalty appeals, the fee was set at $150 to be paid with your Notice of Appeal under § 4.907, and at $150 for filing your Statement of Reasons under § 4.939(a)(2). This analysis also applies to the single $150 fee proposed under 30 CFR part 290 for appeals of decisions and orders by the MMS OMM program.

Factor (a)—Actual Costs

Actual costs means the financial measure of resources expended or used by MMS to process a Notice of Appeal, and by the IBLA to process the Statement of Reasons, including, but not limited to the costs to: conduct record development and settlement conferences; issue the MMS Director's concurrence, modification or rescission; consider other pleadings before the IBLA and issue IBLA decisions; or take any other relevant action. Actual costs includes both direct and indirect costs, exclusive of management overhead. Management overhead costs means costs associated with the MMS and OHA directorate. For MMS, this means the entire Washington office staff, except for any Appeals Division staff required to perform work on appeals. For OHA, this means the OHA Director, OHA Deputy Director, and associated staffs. Section 304(b) of FLPMA requires that management overhead be excluded from chargeable costs.

Direct costs include agency expenditures for labor, material, and equipment usage connected with the performance of processing responsibilities. For MMS's costs to process a Notice of Appeal, we calculated actual costs by estimating the average time it would take MMS personnel to perform various phases of the appeals process. That estimate was based on the time it takes to complete current similar processes. We then multiplied the total hours by $50, which is based on an average of MMS's personnel, material and equipment usage costs. MMS's indirect costs include items such as rent and overhead (excluding management overhead). MMS determined its indirect cost rate and applied the rate to direct costs to determine its total actual costs. MMS calculated its indirect cost rate by dividing the indirect costs described above by the total program cost to arrive at an indirect cost percentage of 18.5%. MMS then multiplied the direct costs by the indirect cost percentage and added that figure to its direct costs to determine its total actual costs. This method of calculating costs is a generally accepted practice in both the private and public sectors.

For IBLA's direct costs, we calculated IBLA's total appeals personnel costs, then added costs for supplies and equipment for those appeals. To calculate indirect costs, we determined from information from OHA that 60% of OHA's indirect costs are related to IBLA appeals. We therefore took 60% of OHA's indirect costs and added those to the IBLA's total direct costs to determine total actual costs for all IBLA appeals (not just royalty appeals). We then divided that total actual cost by the average total number of appeals to the IBLA for the last three fiscal years to arrive at an average cost per appeal. The methodology used for determining IBLA's actual costs is different from MMS's methodology because of the different way IBLA keeps and tracks cost information. We believe both methods are reasonable.

Our method of establishing actual costs involved estimating the average cost of processing an individual appeal. We concluded that while it might be possible to track costs and consider the reasonableness factors on a case-by-case basis, doing so would be so inefficient and expensive as to be unreasonable.

As explained above, we propose having two fees for royalty appeals under 43 CFR part 4, subpart J. An appellant would submit one fee with its Notice of Appeal for the costs of processing by MMS. If the appellant decides to file a Statement of Reasons with the IBLA, it would submit a separate fee for the costs of processing by the IBLA. This system would ensure that appellants only pay for the services they receive. We recognized that one larger fee for the entire process would not be fair to appellants who chose not to continue their appeal to the IBLA because they would have ''paid'' for the entire process. For the processing of OMM program appeals under 30 CFR part 290 there would be one fee for the costs of processing by IBLA.

MMS's costs to process a royalty appeal under this proposed 43 CFR part 4, subpart J, would include the cost to consider the Notice of Appeal in various phases at MMS. The first phase would be the MMS DRD performing the following functions:

(1) Receiving and date stamping each document;

(2) Reviewing each appeal for completeness and timeliness;

(3) Docketing the appeal by entering the information into a computer-based tracking system;

(4) Preparing and sending an acknowledgment letter or a denial letter as appropriate;

(5) Preparing an appeal file; and
(6) Copying and forwarding the appeal to the appropriate office.

We estimated based on current processes that the average time to complete this phase would be 3 hours.

The second phase would be the record development process. This would include the following steps:
(1) Preparation for the record development conference by the tribe, delegated State, or MMS office that performed the audit or issued the order under appeal;
(2) Participation in the record development conference by that office as well as an average of three other MMS personnel;
(3) Compilation of the record;
(4) Preparation of the Joint Statement of Facts and Issues, including circulation of a draft statement to all parties, obtaining comments and signatures;
(5) Preparation of the certification of the record, including circulation of a draft certification to all parties, obtaining comments and signatures; and
(6) Submission of the record, statement and certification to the MMS DRD.

We estimated based on current processes that the average time to complete this phase would be 71 hours.

The third phase would consist of the settlement conference. This would include the following steps:
(1) Preparation for the settlement conference by MMS and the tribe, delegated State or MMS office that performed the audit or issued the order under appeal; and
(2) Participation in the actual settlement by an average of four MMS personnel (including a representative from the tribe, delegated State or MMS office that performed the audit or issued the order under appeal).

We estimated based on current processes that the average time to complete this phase (assuming full settlement discussions separate from the record development efforts) would be 64 hours. As discussed below, the settlement conference could be combined with the record development conference to reduce costs and time. However, it is likely that even though the record development and settlement conferences could occur in one meeting the settlement conference would require time in addition to the time to conduct the record development conference. In such instances, we estimate that the time involved for settlement conferences would be 24 hours. Assuming that most appellants would choose to combine the settlement and record development conferences, we determined that 24 hours was a reasonable estimate for the settlement conference.

The final phase of MMS's processing of the appeal would consist of the MMS Director concurring with, modifying or rescinding an order. This includes research for and preparation of the Director's action on the order, as well as transmittal of that action to the appellant and others MMS is required to notify under the proposed rule, and transmittal of the record to the IBLA and Office of the Solicitor if a party continues the appeal before the IBLA. We estimated the average staff-hours the Appeals Division currently spends on each appeal that results in a decision by the MMS Director to be 100 hours. However, much of the work the Appeals Division currently performs would be done during the record development process and would not have to be repeated. For example, the appeals analyst would participate in compiling the record and ensuring it is complete, and would analyze the appeal prior to record development to help ensure all issues were included in the Joint Statement of Facts and issues. Furthermore, under the proposed process, MMS would no longer be writing lengthy decisions, designed for publication. Nevertheless, MMS would spend some time during the MMS Director's determinations to concur with, modify, or rescind orders and documenting that determination (particularly in cases where the order is modified or rescinded). We estimate the time in addition to the record development process necessary to analyze the appeal and draft the MMS Director's concurrence, modification or recission will take 30 hours per appeal.

Thus, the total estimated average hours for MMS to spend on these phases is 3 hours for the docketing of the appeal, 71 hours for the record development process, 24 hours for the settlement conference, and 30 hours for the MMS Director's activity for a total of 128 hours per appeal. This estimate is based on current MMS time requirements for completing similar tasks. Using an estimate of $50 per hour based on an average of MMS's personnel, material and equipment usage costs, we estimate the average direct cost burden for these requests would be $6,400 ($50/hour x 128 hours). MMS's indirect costs for the requests is $1,184 per appeal (18.5% indirect cost rate × $6,400) resulting in total estimated actual costs of $7,584 per average appeal.

After the MMS Director's action, if a party continues the appeal before the IBLA under 43 CFR part 4, subpart J, additional phases would be necessary to process the Statement of Reasons at the IBLA. The costs of this phase at the IBLA would cover the following steps:
(1) Considering all substantive pleadings, requests to supplement the record, and extension requests;
(2) Acting on any requests; and
(3) Researching, writing and issuing a final decision in the appeal.

An additional phase may be necessary if a party requests reconsideration. However, because this occurs infrequently, we have not included any additional costs for the reconsideration request phase in our actual cost estimate.

Rather than estimating IBLA costs by calculating the average number of hours spent on an appeal, we instead added the total IBLA costs and divided by the total number of appeals to the IBLA to arrive at an average cost per appeal. We estimated that the IBLA's average total costs over the last 3 years for all appeals to the IBLA was approximately $3 million. The IBLA decided an average of 620 appeals over that period at an average cost of $4,800 ($3 million divided by 620). Thus, we estimated that the IBLA's total average costs to decide an MMS royalty appeal would be $4800. (This is about the same as the current cost per appeal incurred by the MMS Appeals Division when it renders decisions on appeals.)

Because we will have to modify both the MMS and IBLA docketing and tracking systems we needed to add those costs to our actual costs. We estimate that this will take approximately 3 staff months to complete at a cost of $8,000 per month, for a total cost of $24,000. Moreover, we may incur expenses as startup costs to establish the MMS Dispute Resolution Division. We estimate that moving furniture, phones, data connections and space preparation will cost approximately $24,000 based on a similar reorganization and relocation. Therefore, we added $45 per appeal ($48,000 in costs divided by an average of 213 appeals to the MMS Director per year, spread over 5 years) to our actual cost estimate.

Factor (b)—Monetary Value of the Rights and Privileges Sought

The monetary value of rights and privileges sought means the objective worth of an appeal, in financial terms, to the appellant. The value to an appellant is that of having an error corrected if there is an error in an order. *See Ayuda, Inc.* versus *Attorney General,* 848 F.2d 1297, 1301 (1988). However, the monetary value of having

an error corrected will vary depending on the amount under appeal. Moreover, many appeals will decide a legal question that imparts value to all lessees so the monetary value is not merely equal to the amount under appeal. Therefore, we rejected the idea of trying to calculate monetary value on a case-by-case basis as too speculative, time-consuming, wasteful of resources, and subject to disputes. Instead, we have determined that consideration of this factor should include an examination of equitable considerations related to monetary value, rather than precise figures, which would be very difficult or impossible to calculate.

A major equitable consideration is whether the level of cost reimbursement could burden the applicant to such an extent that the appeal would actually end up being of no monetary value to the appellant whatsoever. An appeal with a small potential value to the appellant, but which triggers high processing costs, would be an example of an instance where the fee might reasonably be set at a figure less than the actual cost of processing due to this factor. Thus, we took into account the costs for an appellant to go through the appeals process relative to the monetary value of the relief sought. After considering this factor, MMS decided that it was reasonable to set fees greatly below actual costs so as not to frustrate Congress' intent under RSFA § 4(a), adding FOGRMA § 115(h), 33 U.S.C. 1724(h), regarding appeals of MMS orders. This is because lessees and their designees would not appeal if our recovery costs are excessive. In fact, during our public meetings on the draft proposed rule, industry representatives expressed that concern. Thus, this factor did cause fees to be set below actual costs.

Factor (c)—Efficiency to the Government Processing Involved

Efficiency to the Government processing means the ability of the United States to process an appeal with a minimum of waste, expense, and effort. Implicit in this factor is the establishment of a cost recovery process that does not cost more to operate than we would collect and does not unduly increase the costs to be recovered. As noted in the above section on actual costs, we have determined that for the appeals process proposed in this rulemaking, it would be inefficient to determine actual cost data on a case-by-case basis. MMS has thus used cost estimates derived from collected data.

The procedures that we would use to process an appeal would be partially based on standardized steps for similar MMS transactions in order to eliminate duplication and extraneous procedures. However, some procedures would require processes in addition to those used under the current appeals process. These additional processes were accounted for under factor (a) above.

Factor (d)—Cost Incurred for the Benefit of the General Public Interest

The cost incurred for the benefit of the general public interest (public benefit) means funds the United States expends, in connection with the processing of an appeal, for studies or data collection determined to have value or utility to the United States or the general public separate and apart from the document processing. It is important to note that this factor addresses funds expended in connection with an appeal. There is another level of public benefit that includes studies which we are required, by statute or regulation, to perform regardless of whether an appeal is received. The costs of such studies are excluded from any cost recovery calculations from the outset. Therefore, no additional reduction from costs recovered is necessary in relation to these studies.

We concluded that the processing of an appeal did not as a rule produce studies or data collection that might benefit the public to any appreciable degree. Therefore, any possible benefits of such studies to the public are balanced by their possible benefits to the appellant. Accordingly, we made no adjustment to the fee recovered based on this factor.

Factor (e)—Public Service Provided

Public service provided means direct benefits with significant public value that are expected as a result of an administrative appeal. This factor is thus concerned with the benefit resulting from the ultimate decision in the appeal, while the previous factor related to the benefits of the document processing itself. Deciding an appeal provides a public service because the primary function of the appeals process is to correct errors in an effort to ensure the ''fair and proper administration of [our] operations . . . .'' *Ayuda*, 848 F.2d at 1301. Indeed, ''the public has a keen interest in the correctness of administrative decisions.'' *Ayuda*, 848 F.2d at 1301. Although the appellant invokes the appeals procedures in order to benefit from them, and therefore receives a ''service or a thing of value,'' *see Ayuda* at *id.*, there also is a substantial benefit to the public. We therefore decided that it was reasonable to set fees greatly below actual costs on the basis of this factor, as well as the monetary value factor.

Factor (f)—Other Factors

The final reasonableness factor is other factors relevant to determining the reasonableness of the costs. Under this factor, we considered fees that other government entities charge for processing administrative appeals (see October 28, 1996, proposed rulemaking, 61 FR at 55609).

After considering all of the reasonableness factors, we concluded that the factors of monetary value and public service make it reasonable to set the fees for royalty (for processing the Notice of Appeal and Statement of Reasons) and OMM program appeals at $150 instead of at the actual costs. None of the other factors mitigated against setting the fees at less than actual costs, and the proposed fee of $150 is within the range of fees other agencies commonly charge. Because these fees would meet the reasonableness factors of FLPMA, they are thus also reasonable under the IOAA.

We invite comments concerning the proposed processing fees. We further specifically request input concerning the value to lessees and designees of using the appeals process.

Section 4.966 How Do I Request a Waiver or Reduction of My Fee?

Under this proposed section, to request a fee waiver or reduction, you would have to submit a written request to the MMS DRD with your Notice of Appeal or Statement of Reasons. In your request, you would have to demonstrate that you are either unable to pay the fee or that payment of the fee would impose an undue hardship upon you.

We invite comments regarding the advisability of including procedures in the proposed rule for granting fee waivers or reductions. We included the fee waiver and reduction provisions because, during our outreach meetings, industry representatives stated that the processing fee might be a hardship on small independent oil and gas producers and feared that the fee would have a ''chilling'' effect on those independents bringing appeals. However, we have already considered hardship and a possible chilling effect in considering the reasonableness factors discussed above, specifically the ''monetary value'' factor. After considering the factors, we decided that it was reasonable to reduce the fee for MMS's processing costs from $7,584 to $150, and for IBLA's processing costs from $4,800 to $150. Thus, we already addressed industry's concerns, and reduced the fee to a nominal fee that

will not cause undue hardship even to small entities.

While waiver procedures for appeals do exist in some other agencies, they may not be applicable in instances such as this where nominal fees are charged. For example, waiver provisions in Department of Transportation Surface of Transportation Board regulations apply to a fee schedule that includes fees ranging up to $23,300 for the filing of a formal complaint 49 CFR 1002.2(c)–(f). *See United Transportation Union-Illinois Legislative Board* versus *Surface Transportation Board*, No. 97–1038, 1997 U.S. App. LEXIS 37560, (D.C. Cir. Nov. 10, 1997) (upheld a Surface Transportation Board fee for handling appeals, in part, because it ''provided a waiver mechanism for fees that would cause undue hardship''). Therefore, we invite comment on whether the waiver and reduction provisions should be removed.

Section 4.967 When Will MMS Grant a Fee Waiver or Reduction?

Under the proposed rule, in extraordinary circumstances, MMS could grant a fee waiver or fee reduction. Extraordinary circumstances would include a demonstrable inability to pay or undue hardship to an entity required to pay the fee.

The MMS DRD would send you a written decision granting or denying your request.

Section 4.968 How Do I Pay My Processing fee if MMS Grants a Reduction or Denies My Request for a Reduction or Waiver?

Under this section, if MMS granted your request for a fee reduction, you would have to pay the reduced processing fee in accordance with this part within 30 days of your receipt of the decision to reduce your fee. If MMS denied your request, that decision would be final for the Department and would not be appealable under this part. Also, if MMS denied your request, you would have to pay the processing fee in accordance with this part within 30 days of your receipt of that denial.

Section 4.969 How Do I Appeal a Decision That My Appeal Was Not Filed on Time?

Under this proposed section, you could appeal MMS's decision on timeliness to the IBLA within 15 days of your receipt of MMS's notification under § 4.914(c)(1) that your appeal was not timely filed. If you choose to appeal that decision to the IBLA, you would be deemed to agree to extend all applicable time periods for deciding your appeal on the merits by the amount of time the IBLA needs to decide your appeal on the issue of timeliness. If the IBLA denied your appeal, the IBLA's decision would be final for the Department, and you would have failed to exhaust required administrative remedies as to the merits of the order or MMS decision not to issue an order.

If you choose not to appeal an adverse timeliness decision to the IBLA, the order, or MMS decision not to issue an order, would be final, and you would have failed to exhaust required administrative remedies as to the merits of the order or MMS decision not to issue an order. Accordingly, neither the IBLA nor a Federal court would have jurisdiction to decide the merits of your appeal. If you appealed an adverse timeliness decision to the IBLA, and the IBLA ruled against you, and if you then sought judicial review of the timeliness issue in Federal court and prevailed in court, your appeal on the merits would commence, and your Preliminary Statement of Issues and processing fee would be due (if you did not already file them), 60 days after the date a final non-appealable judgment was entered.

Section 4.970 What Rules Apply to Appeals Filed Before [Insert Date When This Subpart Becomes Effective]?

Because the RSFA 33-month default decision rule applies to pending appeals, it was necessary to make pending appeals subject to some of the procedures under this subpart. In addition to the current versions of 30 CFR parts 243 and 290, this section and the new 43 CFR 4.901, 4.902, 4.903, 4.911 to 4.913, 4.948, 4.950, 4.957, 4.958, 4.971, and 4.972 would apply to appeals pending on the date this rule becomes effective.

We are placing these transition provisions at the end of the rule so that they can easily be: (1) implemented as a final rule even without the earlier part of this rule (if, for example, we decide not to implement the rest of this rule as proposed or if the implementation of the rest of the rule is delayed beyond May 1999); or (2) removed once they are no longer necessary if this proposed rule becomes final.

This section would make clear that the rules that apply to appeals pending either before the MMS Director or IBLA on the date this rule becomes effective would be the versions of 30 CFR parts 243 and 290 in effect prior to the effective date of this rule, as well as the ''transition'' provisions in this proposed rule. That is because currently pending appeals are subject to a different process than appeals that would be filed under this subpart.

Section 4.971 When Does My Appeal Commence and End if it Was Filed Before [Insert Date This Subpart Becomes Effective]?

RSFA, § 4(a), adding FOGRMA § 115(h)(1), 30 U.S.C. 1724(h)(1) provides, in part, that:

> The Secretary shall issue a final decision in any administrative proceeding, including any administrative proceeding pending on the date of enactment of this section, within 33 months from the date such proceeding was commenced or 33 months from the date of such enactment, whichever is later.

As discussed above, RSFA does not define ''commence'' with respect to appeals. Thus, for purposes of the period in which the Department must issue a final decision in your appeal, paragraph (a) would provide that if your Notice of Appeal and initial Statement of Reasons to MMS was filed on the date RSFA was enacted, your appeal commenced on August 13, 1996.

If your Notice of Appeal or initial Statement of Reasons to MMS was filed after August 13, 1996, paragraph (b) would provide that your appeal commenced on the date MMS received your Notice of Appeal, or, if later, your Statement of Reasons, under 30 CFR 290.3. This proposal is consistent, to the extent possible, with the rules applicable to appeals filed after the effective date of this rule. The current rule provides that:

> [T]he notice of appeal shall incorporate or be accompanied by such written showing and arguments on the facts and laws as the appellant may deem adequate to justify reversal or modification of the order or decision. Within the same 30 day period [for filing the notice of appeal], the appellant will be permitted to file in the office of the official issuing the order or decision additional statements of reasons and written arguments or briefs.

30 CFR 290.3 (1997). Thus, the rules currently in effect require appellants to file their Statement of Reasons with their Notice of Appeal. However, MMS practice, consistent with the current rules at 30 CFR 290.5, has been to allow appellants additional time to file their Statement of Reasons after timely filing the Notice of Appeal, which often contains little or no argument as to why the appellant believes the MMS order or decision should be modified or rescinded. Since enactment of RSFA, in most cases, appellants have agreed to extend the 33-month time period in exchange for MMS's extension of the time within which to file the initial Statement of Reasons. Consistent with the approach to accounting for extensions of time to file the processing fee and Preliminary Statement of Issues

proposed in § 4.907 above, we think the easiest way to account for these extensions is simply to calculate the time frame from the date the initial Statement of Reasons was received, if later than the Notice of Appeal. We also think that this is the most reasonable interpretation of ''commenced'' because an appeal cannot ''commence'' until the appellant tells us why it is appealing. Accordingly, a perfunctory Notice of Appeal merely stating that an appellant is appealing an order does not ''commence'' an appeal.

In some cases, appellants file a Supplemental Statement of Reasons after their initial Statement of Reasons. This supplemental filing would have no effect on the commencement date, but in most cases MMS and the appellants would have agreed to an extension of the 33-month time frame to allow time for such supplemental filings.

Paragraph (c) would state that your appeal ends on the same day of the month of the 33rd calendar month after your appeal commenced under paragraphs (a) or (b), plus the number of days of any applicable time extensions under § 4.958. If the 33rd calendar month after your appeal commenced does not have the same day of the month as the day of the month your appeal commenced, then the initial 33-month period ends on the last day of the 33rd calendar month. *See* the example for calculating the end of your appeal in the Section-by-Section analysis for § 4.912.

Section 4.972 What if the Department Does Not Issue a Decision by the Date My Appeal Ends if I Filed my Appeal Before [Insert Effective Date of This Proposed Subpart]?

This section would be much like § 4.956 but would apply to appeals filed before the effective date of this rule under the current two-level administrative appeals structure.

Paragraph (a) would state that this section applies to appeals of orders, or portions of orders, involving monetary and nonmonetary obligations regarding Federal oil and gas leases pending on the date this rule becomes effective. For orders and portions of orders that do not involve monetary or nonmonetary obligations on Federal oil and gas leases, the time limits in 30 U.S.C. 1724(h)(2) and the default rule of decision stated in this section would not apply. *See* Section-by-Section analysis for § 4.956 for further explanation.

Like § 4.956(b), paragraph (b) would provide that if the IBLA or an Assistant Secretary (or the Secretary or Director of the Office of Hearings and Appeals) does not issue a final decision in an appeal pending on the date this rule became effective by the date the appeal ends under § 4.971(c), then under 30 U.S.C. 1724(h)(2), the Secretary will be deemed to have decided the appeal:

(1) In favor of the appellant for any nonmonetary obligation at issue in the appeal or any monetary obligation at issue in the appeal with a principal amount of less than $10,000;

(2) In favor of the Secretary for any monetary obligation at issue in the appeal with a principal amount of $10,000 or more. *See* Section-by-Section analysis for § 4.956 for further explanation.

Paragraph (c)(1) would state that if the MMS Director has not yet issued a decision under 30 CFR 290.3(c) in your appeal of an order, or portion of an order, under 30 CFR part 290, then the provisions of paragraph (b) apply to the nonmonetary and monetary obligations in the order that you contested in your appeal to the MMS Director. However, under paragraph (2), if the MMS Director has issued a decision under 30 CFR 290.3(c) in your appeal of an order, or portion of an order, under 30 CFR part 290, and if you appealed the Director's decision to IBLA, then the provisions of paragraph (b) apply to the nonmonetary and monetary obligations in the Director's decision that you contested in your appeal to IBLA. For example, assume that you appeal an order involving two separate monetary obligations, one worth $15,000, and one worth $20,000. Assume also that the MMS Director's decision agrees with the you on the first monetary issue worth $15,000 and modifies the order accordingly to decrease that obligation to $8,000. If you do not dispute that modification, but continue to dispute the second $20,000 monetary obligation before IBLA, and the Department does not issue a final decision within 33 months, then the default decision provision of this section would neither affirm the portion of the initial order that was changed by the MMS Director's modification nor reverse the Directors' determination that you owed $8,000 (a monetary obligation worth less than $10,000) that you did not contest. The $8,000 issue would stand because there is no longer an administrative proceeding pending with respect to that obligation. In addition, the disputed portion of the order would be deemed decided in favor of the Secretary under paragraph (b) because it is more than $10,000.

Under paragraph (c)(3), if the MMS Director issued a decision under 30 CFR 290.3(c) in your appeal of an order under 30 CFR part 290, and if you did not appeal the Director's decision to IBLA within the time required under the current version of 30 CFR 290.7 and 43 CFR part 4, then the MMS Director's decision would be the final decision of the Department and 30 U.S.C. 1724(h)(2) has no application.

Paragraph (d) would provide that if any party requests reconsideration of an IBLA decision issued before the date the appeal ends under § 4.971(c), and if IBLA did not issue a decision on reconsideration before the date the appeal ends, then 30 U.S.C. 1724(h)(2) would have no application and the decision the IBLA had issued would be the final action of the Department. *See* Section-by-Section analysis for § 4.956 for further explanation.

Paragraph (e) would provide that if the principal amount is not specifically stated in an order and must be computed to comply with the order, the principal amount referred to in paragraph (b) means the principal amount the MMS estimates you would be required to pay as a result of the order. *See* Section-by-Section Analysis for § 4.956 for further explanation.

We also are proposing §§ 4.971 and 4.972 and the definitions of ''obligation,'' ''monetary obligation,'' and ''nonmonetary obligation'' in proposed § 4.903 as proposed amendments to the existing MMS and IBLA appeals rules in the event that this proposed rule is not promulgated as a final rule. These provisions are needed to implement the RSFA requirements if the present appeals structure is retained. We anticipate that some division and duplication of paragraphs in these sections would be needed to codify the appropriate parts to both 30 CFR part 290 and 43 CFR part 4 in a final rule. However, the substance of such amendments to the current process would not differ from the way these sections would be promulgated if this proposed rule is promulgated as a final rule.

III. Section-by-Section Analysis, 30 CFR Part 208

Section 208.2 Definitions

This section would be amended to define new terms used in the proposed amendment of § 208.16.

Section 208.16 Appeals

This section would be amended to provide a specialized appeals process for appeals filed by refiners or other parties involved in disposition of royalty taken in kind. The purchaser of royalty-in-kind (RIK) production has a contract to purchase personal property from the Federal Government. Such contracts are governed by the Contract

Disputes Act of 1978 (CDA), 41 U.S.C. 601–13. The CDA requires that ''[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer.'' 41 U.S.C. 605(a). It further requires that ''[t]he contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter.'' *Id*.

Under the proposed rule, the contracting officer would be the MMS Director, his or her delegate, or the person designated under a RIK purchase contract. MMS anticipates that the Director will delegate such authority to MMS staff responsible for auditing RIK purchases. Thus, an order issued by an MMS auditor indicating that an RIK purchaser owes additional money to the Government would be a decision of the contracting officer.

The CDA provides for appeals of contracting officers' decisions to the agency's board of contract appeals. 41 U.S.C. 606. Accordingly, there would be no appeal of the contracting officer's decision to the MMS Director. Instead, MMS proposes to provide for appeals of the contracting officer's decision to the Interior Board of Contract Appeals (IBCA) under 43 CFR part 4, subpart C. Note, however, that, although MMS proposes no appeal to the MMS Director, MMS proposes to retain the requirement under the existing provision at 30 CFR 208.12, that appellants must post a bond under 30 CFR part 243 if they decide not to pay pending appeal to the IBCA.

In addition, MMS does not believe that the 33-month limitation for the Department to issue final decisions on appeals under § 4 RSFA, 30 U.S.C. 1724(h), applies to appeals by refiners or other parties involved in disposition of royalty taken in kind. This is because RSFA applies to Federal oil and gas leases and not to the Government's resale under RIK contracts of oil that it receives as royalty under those leases. Thus, appeals to the IBCA under this section would not be subject to any specialized timing requirements such as the default decision rule proposed under 43 CFR 4.956 or 4.972.

The CDA also provides for contractors to bring actions challenging contracting officers' decisions in the United States Court of Federal Claims in lieu of appealing to the agency contract appeals board. 41 U.S.C. 609. Therefore, the proposed amendment to § 208.16 provides for this alternative.

IV. Section-by-Section Analysis, 30 CFR Part 241

This part would be replaced in its entirety by revised provisions making the following general changes.

First, new §§ 241.51 through 241.77 would revise current regulations to clarify the methods to be used to appeal civil penalties authorized by § 109 of FOGRMA, 30 U.S.C. 1719 (Supp. I 1994).

Second, existing § 241.20, which addresses civil penalties authorized by statutes other than FOGRMA, would be deleted. MMS has never used this section. This deletion should not affect MMS's authority to use powers other than civil penalties, such as lease cancellation and debarment, as authorized by other statutes or regulations. MMS welcomes comments regarding whether MMS should keep this section and what form the appeals process should take if it is kept.

Third, this proposal reflects our effort to rewrite this part in ''plain language.'' MMS proposes to use a question and answer format for ease of use.

Fourth, because the amendments to the appeals regulations under this notice are consolidating all royalty appeals before the IBLA, MMS proposes to modify the current rule, which allows certain appeals concerning Notices of Noncompliance to be made to the MMS Director, and allow appeals instead to the IBLA.

Fifth, MMS proposes several changes to make the regulations more consistent with the applicable provisions of FOGRMA.

Finally, MMS proposes to delete the current § 241.53, which addresses assessments for nonperformance. MMS has never used this section and believes that new assessments for chronic erroneous reporting to be proposed under the provisions of the RSFA will be an adequate replacement. MMS welcomes comments suggesting that it be retained and what form the appeals process should take if it is to be retained.

In the new proposed §§ 241.51 through 241.55, MMS would establish the same process for all persons who wish to contest a potential civil penalty that would be assessed under FOGRMA § 109(a) and (b), 30 U.S.C. 1719(a) and (b). Under the current rules, there are separate processes for those persons who comply within the twenty days allowed to correct certain violations under FOGRMA and for those who do not correct within the statutory time frame. The proposed sections would allow all persons served with Notices of Noncompliance to request a hearing on the record before the Hearings Division of the OHA.

The current rule also provides that a person may appeal to the MMS Director if the violation has been corrected within the 20-day cure period. MMS does not believe there is any reason to retain this separate process because we have eliminated appeals to the MMS Director for other appeals involving lease obligations. Thus, consistent with the changes made to 30 CFR parts 243 and 290 and 43 CFR part 4, subpart J, the appeals related to the MMS royalty civil penalty process will also be before the OHA. MMS requests comments on whether MMS should retain the process for appealing royalty civil penalty assessments to the MMS Director.

Section 241.55 would retain the current provision that continues the accrual of penalties during the pendency of appeals. Section 241.63 has a similar provision for penalties authorized by FOGRMA subsections 109(c) and (d), 30 U.S.C. 1719(c) and (d). MMS believes that this provision encourages early compliance with MMS orders when a person in violation believes it is likely to lose on appeal. These provisions would allow a person who receives a Notice of Noncompliance to ask OHA to stay the accrual of penalties.

Section 241.60 would amend the conditions under which MMS may assess penalties without providing recipents with an opportunity to correct them by changing the phraseology from ''for intentional violations'' to be more consistent with FOGRMA. FOGRMA distinguishes between two types of violations: (1) all failures to comply with applicable statutes, regulations, orders, or lease terms, including failures to permit inspection (30 U.S.C. 1719(a) and (b)) and (2) failures to make royalty payments; failures to permit entry, inspection or audit; knowing or wilful failure to inform the Secretary when production commences or resumes (30 U.S.C. 1719(c)); and knowing or wilful preparation, maintenance or submission of false reports; knowing or wilful taking of oil or gas without authority; or purchase, conveyance of oil or gas knowing it was stolen (30 U.S.C. 1719(d)). MMS has previously termed the second group of violations as ''intentional.'' MMS now believes that the use of the term ''intentional violations'' has caused two types of confusion. First, it may have caused the belief that the standard was exactly the same as that for criminal intent. Second, it may have caused confusion by implying that any knowing wrongdoing was covered. MMS believes that using

the same language as the statute will reduce confusion.

MMS therefore is proposing to substitute the specific provisions of FOGRMA for the more generic language in the current rule. This includes increasing the maximum civil penalty up to the $25,000 per day for those acts for which FOGRMA allows such a penalty. MMS does not believe that the regulations should prevent MMS from exercising the full powers granted to it by statute.

Finally, MMS believes that the statutory provision for assessing penalties for ''failure to permit entry, inspection or audit'' applies to failure to provide MMS with documents or information that MMS has requested under the authority of FOGRMA, the regulations, or leases.

V. Section-by-Section Analysis, 30 CFR Part 242

Subpart A—General Provisions

Section 242.1 What Is the Purpose of This Part?

This proposed section would state that the purpose of this part is to explain how MMS or delegated States will issue orders and notices of orders, and serve official correspondence, and how the recipient of an order may appeal that order and exhaust administrative remedies.

Section 242.2 What Leases Are Subject to This Part?

This section would explain that this part applies to all Federal mineral leases onshore and on the OCS, and to all federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands. However, some procedures under this rule would apply only to Federal oil and gas leases because the RSFA provisions regarding notifying lessees when MMS sends orders to their designees applies only to Federal oil and gas leases. The procedures regarding Indian lessor requests for MMS to issue orders under subpart C apply only to Indian leases.

Section 242.3 What Definitions Apply to This Part?

This section would explain the definitions that you will need to know for this part.

Delegated State would mean a State to which MMS has delegated authority to perform royalty management functions pursuant to an agreement or agreements under regulations at 30 CFR part 227. This definition is essentially the same as that under RSFA § 2(1), FOGRMA § 3, 30 U.S.C. 1702(22).

Designee would mean the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf. This definition is essentially the same as the definition under RSFA § 2(1), as added to FOGRMA § 3, 30 U.S.C. 1702(24). Accordingly, the definition cites the rule at 30 CFR 218.52 implementing the requirements of RSFA § 6(g), FOGRMA § 102(a), 30 U.S.C. 1712(a), which allows lessees to designate another person to pay royalties on their behalf. Thus, this definition only would apply to appeals involving royalties and other payments due on production from Federal oil and gas leases after September 1, 1996.

Indian lessor would mean an Indian tribe or individual Indian mineral owner with a beneficial interest in a property that is subject to a lease issued or administered by the Secretary on behalf of the tribe or individual Indian mineral owner.

Lessee would mean any person to whom the United States, or the United States on behalf of an Indian tribe or an individual Indian mineral owner, issues a lease subject to this subpart, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this subpart has been assigned. This definition is essentially the same as that under RSFA § 2(1) and FOGRMA § 3, 30 U.S.C. 1702(7), and would include owners of operating rights. Although RSFA does not apply to Federal oil and gas leases for production prior to September 1, 1996, other Federal solid mineral and geothermal leases, and Indian leases, MMS did not separately define operating rights owners or operators because recipients of orders not subject to RSFA may appeal under this rule regardless of whether they are a ''lessee'' under RSFA.

Obligation would mean:

A lessee's, designee's or payor's duty to:

(1) Deliver royalty-in-kind; or

(2) Make a lease-related payment, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, interest, penalty, civil penalty, or assessment.

This proposed definition is similar to the definition under RSFA § 2(1), FOGRMA, 30 U.S.C. 1702(25), but it does not include MMS's obligations as set out in RSFA's definition of ''obligations,'' because MMS's obligations are not subject to ''orders'' under this part.

Payor would mean any person responsible for reporting and paying royalties for:

(1) Federal oil and gas leases for production before September 1, 1996;

(2) Federal mineral leases other than oil and gas leases; and

(3) Leases on Indian lands subject to this subpart.

This definition is necessary because the term ''designee'' is used for Federal oil and gas leases subject to RSFA, and ''payor'' is used for leases not subject to RSFA.

Reporter would mean a person who submits reports for leases subject to this subpart regardless of whether that person has payment responsibility.

Subpart B—Orders

Section 242.100 What Is the Purpose of This Subpart?

This section would state that the purpose of subpart B is to explain how MMS or delegated States will issue orders and notices to persons concerning the following functions related to leases subject to this subpart: (a) reporting production; (b) reporting, computing, and paying royalties; (c) reporting, computing, and making other payments; and (d) providing documents and other information. This subpart would: (1) respond to the RPC recommendation that lessees receive a ''preliminary determination letter'' before they receive an order and that orders should contain specific information about the basis for the order; and (2) conform to RSFA provisions regarding orders and orders to perform restructured accounting and for service of Notices of Orders on lessees when orders are sent to designees.

Section 242.101 Who May Issue Orders?

This section would specify which officials within and outside the Department of the Interior may issue orders. Within the Department, the Assistant Secretary—Land and Minerals Management, could issue orders in exercise of his or her delegated authority from the Secretary. In addition, the MMS Director, or other officials within the Department of the Interior to whom the MMS Director delegates authority, could issue orders with respect to both Federal and Indian leases. However, only the MMS Associate Director for RMP or higher officials within the Department could issue notices to perform a restructured accounting for leases and time periods subject to RSFA.

Outside the Department, under RSFA § 3, FOGRMA § 205, 30 U.S.C. 1735, and its implementing regulations at 30 CFR part 227, delegated States could issue orders. This section of the rule would specify that for delegated States, the

highest delegated State official having ultimate authority over the collection of royalties, or other State officials to whom that authority has been delegated could issue orders. However, in accordance with RSFA § 4, FOGRMA § 115, 30 U.S.C. 1735(d)(4)(B)(ii), only the highest delegated State official having ultimate authority over the collection of royalties could issue orders to perform restructured accounting. The authority for delegated States to issue orders to perform only applies to leases and time periods subject to RSFA.

MMS specifically requests comments on whether the rule also needs to address the potential for Indian tribes to issue orders. Under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450f (1994), Indian tribes could assume the function of issuing orders for additional royalties and other payments. Because no tribes to date have formally sought this authority, and because MMS wants to avoid any unnecessary complications in the rule, MMS has not addressed this potentiality in the proposed rule. However, such orders would be handled in the same way as orders delegated States issue. If commentators think that the rule should address this potentiality, then MMS would appreciate specific recommendations on how best to address it.

Section 242.102 What May MMS, Tribes, or Delegated States Do Before Issuing an Order?

This section of the rule would implement the RPC recommendation that MMS, State, or tribal auditors issue a ''preliminary findings letter'' to lessees before issuing them an order. RPC Report recommendations, paragraph 4. Because there may be time constraints or other factors making such preliminary notices overly burdensome in some cases, the rule would not make this a mandatory step. Instead, the rule would specify that auditors ''may'' notify lessees, designees, or payors through a ''Preliminary Determination Letter.'' This is the same as the current step auditors usually take to send informal, non-mandatory ''issue letters'' to persons to provide an opportunity to the recipient to discuss the issues and resolve them informally before issuing an order. Thus, the proposed rule would seek to resolve issues informally at the earliest possible stage in order to avoid unnecessary administrative appeals and litigation. Accordingly, this proposed section would make it clear that Preliminary Determination Letters are not appealable.

Section 242.103 What Does a Preliminary Determination Letter Contain?

This section specifies that Preliminary Determination Letters will provide information about the scope of the audit, the factual findings, the legal and policy basis for the preliminary determination, and instructions on how to respond to the letter and seek an informal resolution.

Section 242.104 What Is an Order?

This section would define what an order is for purposes of this part. This section is similar to the definition of order in the proposed new 43 CFR 4.903, but it provides some additional detail not contained in that section and it excludes certain actions (such as denials of lessee requests for MMS to perform some obligation) that are treated as orders under the proposed new definition at 43 CFR 4.903, for the purpose of defining what is appealable.

This section would distinguish between ''orders'' and actions that are not orders. ''Orders'' would contain mandatory language requiring a person to take some action or prohibiting a person from taking some action, whereas actions that are not orders would not contain such language.

Specifically, this section would establish that orders to pay and orders to perform restructured accounting are orders for the purposes of this section. The description of an order to pay would be essentially the same as the definition of that term in RSFA § 2, FOGRMA § 3, 30 U.S.C. 1702(26). Thus, an order to pay would be a demand or order that asserts a specific, definite, and quantified obligation. The types of obligations that could be included in an order include those defined in RSFA § 2, FOGRMA § 3, 30 U.S.C. 1702(25)(B), including duties arising from or relating to a mineral lease administered by the Secretary such as duties to: deliver royalties in kind; pay the principal amount of any royalty, minimum royalty, rental, bonus, net profit share, or proceed of sale; or pay any interest, penalty, or assessment.

The description of an order to perform restructured accounting would largely mirror the description of that term in RSFA § 4, FOGRMA § 115, 30 U.S.C. 1724(d)(4)(B)(i). Thus, orders to perform restructured accounting would have to be based on a finding by MMS or a delegated State that a lessee, designee, or payor made identified underpayments or overpayments as demonstrated by repeated, systemic reporting errors for a significant number of leases, or for a single lease for a significant number of reporting months, such that the errors constitute a pattern of violations. However, because RSFA did not define what ''errors constitute a pattern of violations,'' this proposed rule would state that a person's admission of its failure to comply with lease terms, statutes, or regulations would constitute a pattern of violations likely to result in significant underpayments or overpayments. Such admissions may be sufficient to justify an order to perform because an admitted failure to follow lease terms, regulations, or statutory provisions is *per se* a systemic reporting or payment error that constitutes a pattern of violations that may result in significant overpayments or underpayments. Moreover, nothing in RSFA's description of restructured accounting orders contradicts that interpretation.

This section also would specify what other MMS or delegated State actions constitute ''orders.'' Orders would include denials of requests for exceptions from various valuation and reporting requirements, orders to file reports, and orders to provide documents or other information. This section would make clear that orders to perform a restructured accounting are not ''orders to provide documents or information.'' In addition, under the proposed rule, an order to provide documents or information would not be appealable under 43 CFR part 4, subpart J if the order is issued by Associate Director for Royalty Management, or by a person to whom that Associate Director delegates the authority to issue such orders that are final for the Department. MMS proposes to make such orders final for the Department because (1) courts have consistently upheld MMS's authority to issue orders to produce documents and information, *see Shell Oil Co. (On Reconsideration,* 132 IBLA 354 (overruling *Shell Oil Co.*, 130 IBLA 93), *aff'd, Shell Oil Co.* v. *Babbitt,* 945 F. Supp 792 (D. Del. 1996), *aff'd,* 125 F.3d 172 (3d Cir. 1997); *Santa Fe Energy Products Co.*, 127 IBLA 265 (1993), *aff'd Santa Fe Energy Products Co.* v. *McCutcheon,* No. 94–C–535, slip op., (D. Colo. Mar. 30, 1995), *aff'd,* 90 F.3d 409 (10th Cir. 1996) (1996)), and (2) it would avoid the delay caused by administrative appeals of such orders. Delays associated with these types of orders are particularly detrimental because they interfere with MMS's and delegated States' ability to determine whether additional royalties or other payments may be due. Accordingly, such orders would only be subject to judicial review. Such delays also are contrary to the intent of RSFA, which

attempts to assure that amounts due will be determined quickly.

This section also would state what MMS or delegated State actions would not constitute ''orders.'' Orders would not include non-binding requests for information and guidance. For example, the rule would specify that Preliminary Determination Letters, advice or guidance on how to report and pay, such as valuation determinations, and policy determinations are not ''orders.'' For example, a letter sent to lessees, designees, reporters, or payors with guidance on how to report or pay would not be an order unless it included language mandating that the recipients follow the guidance. Similarly, a policy paper approved by MMS's Royalty Policy Board or other MMS offices would not be appealable. This is because such items do not require anyone to fulfill any obligations associated with Federal or Indian mineral leases. However, if a valuation determination or a letter to payors included mandatory language requiring a person to fulfill an obligation associated with a mineral lease administered by the Secretary, then it would be considered an order. In addition, a person's failure to follow such guidance would not preclude them from later appealing an ''order'' with mandatory language requiring them to follow such guidance.

Subpoenas also would not be ''orders'' under this proposed section. The recipient of a subpoena is obligated to comply with the subpoena. However, if the recipient of a subpoena does not comply, subpoenas are only enforceable by the United States Government in Federal district court under 30 U.S.C. 1717(b), and, thus, are not appealable ''orders.''

Also, orders to pay that MMS issues to refiners or other parties involved in disposition of royalty taken in kind would not be ''orders'' under this section. This is because such orders are under royalty-in-kind contracts between MMS and the purchasers; they are not under leases subject to this part. *See* changes to 30 CFR part 208 proposed elsewhere in this notice.

Section 242.105 What Does an Order Contain?

This proposed new section would implement the RPC's recommendation that orders should contain specific information about the factual, legal, and policy basis for the order. Thus, this section would require orders to include a description of the audit, review or investigation that led to the order, the facts and legal or policy basis for the order, instructions on how to comply, and instructions on how to appeal. Orders also would have to include a list of other persons affected by or involved in the order, including representatives of affected Indian lessors (appropriate BIA Area offices in the case of individual Indian mineral owners), States concerned, relevant MMS offices, delegated States, tribal offices, and any lessees MMS notified of the order under proposed § 242.106(b).

To determine whether the principal amount of any monetary obligation contained in an order to perform a restructured accounting is $10,000 or more (for purposes of determining the consequence of any failure to meet the 33-month time limit for appeals involving Federal oil and gas leases under RSFA § 4, FOGRMA § 115(h)(2), 30 U.S.C. 1724(h)(2)), this section would provide that orders to perform a restructured accounting may contain an estimate of the additional royalties due. This section also would apply to orders involving leases other than Federal oil and gas leases, because such an estimate could be helpful to any appeal. If MMS or a delegated State later adjusted the estimate based on additional information obtained or on a refined estimation technique, then MMS or the delegated State would inform the recipient of the order in writing of such adjustment.

Section 242.106 How Will MMS and Delegated States Serve Orders?

This section would, in part, redesignate and rewrite the section formerly codified at 30 CFR 243.4(a) in ''plain language.'' However, the proposed rewritten section would allow the use of new technologies, such as facsimile and electronic mail, to serve orders, if the new technology provides for a receipt confirming delivery at the applicable address.

This proposed section also would implement the requirement in RSFA § 2, FOGRMA § 3, 30 U.S.C. 1702(23), that MMS or delegated States notify lessees of Federal oil and gas leases whenever MMS or a delegated State issues an order to a lessee's designee. The Notice of Order would include information on the designee who received the order to facilitate contact between the lessee and the designee. Where appropriate and practicable, MMS or a delegated State could send the lessee a copy of the order sent to the designee with the Notice of Order.

However, under paragraph (c), there is an exception to the requirement that MMS or a delegated State serve lessees with a Notice of Order. If a lessee does not designate a designee in writing as required under 30 CFR 218.52, then MMS or a delegated State will serve orders on the person currently making royalty or other payments on the lessee's behalf. Currently, although lessees continue to have persons report and pay on their behalf, few lessees have complied with § 218.52's requirement that they designate a designee in writing as mandated by RSFA § 6, FOGRMA, 30 U.S.C. 1712(a). Thus, because such lessees have not complied with either MMS regulations or RSFA:

(1) MMS or a delegated State would not be required to serve the lessee with the Notice of Order required under paragraph (b) (because RSFA only requires notice to the lessee who has designated the designee in writing to the Secretary); and

(2) The lessee would remain liable for any royalty or other payments due under the order, regardless of the fact that MMS or a delegated State did not serve the lessee with a Notice of Order under paragraph (c)(1).

Subpart C—Requests From Indian Lessors for MMS To Issue an Order

Section 242.200 What Is the Purpose of This Subpart?

This section would state that the purpose of this subpart is to explain how Indian lessors may request that MMS issue an order concerning the reporting and payment of royalty and other payments due under their leases when Indian lessors believe additional royalties or other payments are due based on the lessor's interpretation of the lease, statutes, or regulations.

This subpart only would apply to Indian lessors. MMS is not proposing a similar process for States that receive a portion of the revenues from Federal leases because: (1) States do not hold a property interest in the leases from which they derive a portion of the royalties, and (2) States can obtain a delegation to issue orders themselves under 30 CFR part 227.

Section 242.201 How Can an Indian Lessor Request That MMS Issue an Order?

This section would describe the formal process for lessors to request that MMS issue an order. However, this is not the only process available and, indeed, is not the preferred process. MMS strongly encourages Indian lessors to consult with MMS informally when they believe there are potential problems with royalty payments prior to resorting to use of this subpart. In many cases, MMS could research the issues the Indian lessor raises and take appropriate action, which would avoid

disputes between MMS and the Indian lessor. Thus, Indian lessors only should use this section in those situations where informal efforts do not lead to a result that is satisfactory to the Indian lessor. If informal efforts did not lead to a satisfactory result, they could formally request the MMS issue an order under this section.

Paragraphs (a) and (b) would address requests that MMS issue an order from individual Indian mineral owners or tribes. These paragraphs would state what a request would have to include and who the individual Indian mineral owner or tribe without a cooperative agreement must submit the request to at MMS. Specifically, a request would have to state with specificity why the Indian lessor thinks there is a problem with royalty payments or reports. The Indian lessor also would have to provide any information that he or she has that would support the belief that there is a problem with the royalty payments or reports and that would help MMS to investigate the problem.

Paragraph (c) would address requests that MMS issue an order from tribes with cooperative agreements under § 202 of FOGRMA, 30 U.S.C. 1732 and the regulations at 30 CFR part 228. Because tribes with a cooperative agreement typically would prepare a draft order which they would send to MMS with a request that MMS issue the order, they could not make a request under this section unless MMS does not agree to issue that order in a manner that is satisfactory to the tribe. Any such request would have to be filed with the office that administers the tribe's cooperative agreement, not with the MMS offices listed in paragraph (a). However, such tribes would have to follow the requirements for what a request must include specified under paragraph (b).

Paragraph (d) would explain where tribes and individual Indian mineral owners who do not have cooperative agreements must submit their requests.

Section 242.202 What Will MMS Do After It Receives My Request?

This section would state that MMS will investigate requests filed under the proposed new § 242.201 and will either issue an appropriate order or deny the request and not issue the order.

Section 242.203 How Will MMS Notify Me of Its Decision on My Request That It Issue an Order?

This section would explain how MMS will provide Indian lessors with written notification of its decision to either grant or deny their request that MMS issue an order. If MMS granted your request, MMS would send a copy of the order with the notification. If MMS denied your request, then MMS would state the reasons for denial and advise you of your appeal rights under 43 CFR part 4, subpart J.

Section 242.204 May I Appeal MMS's Decision To Deny My Request to Issue an Order?

This section would state that an Indian lessor may appeal an MMS decision not to issue an order under the proposed new rules at 43 CFR part 4, subpart J. With its appeal, the Indian lessor would have to provide a copy of its request and the notification MMS provided denying the request under proposed § 242.203(b).

Subpart D—Appeals and Service

This subpart would contain essentially the same requirements as those currently found in MMS's regulations at 30 CFR 243.1, 243.3, and 243.4. MMS rewrote this proposed subpart in ''plain language'' and added language necessary to conform to changes made elsewhere in this proposed rule. Such necessary changes were: (1) to eliminate references to 30 CFR part 290 on how to appeal orders, because that part no longer applies to appeals of orders and decisions not to issue orders issued under this part; and (2) to refer to the proposed IBLA rules at 43 CFR part 4, subpart J, that would be applicable to appeals of orders and decisions not to issue orders issued under this part. Also, this section would expand the methods of service in the same manner and for the same reasons as discussed above for the proposed new § 242.106. Finally, the proposed section would expand the persons who are ''addressees of record'' to include not only ''payors,'' but also lessees, designees and reporters, and for participants in the royalty-in-kind (RIK) program, the section would expand the addressee of record from a ''refiner'' to a ''refiner or other party involved in disposition of royalty taken in kind.''

VI. Section-by-Section Analysis for 30 CFR Part 243

Currently, 30 CFR 243.2, regarding suspension of orders or decisions pending appeal, specifies the types of surety instruments MMS accepts for appeals on royalty and other payments due on Federal and Indian mineral leases. However, RSFA § 4(a) amended FOGRMA to add a new § 115(l), 30 U.S.C. 1724(l), ''Stay of Payment Obligation Pending Review.'' Section 115(l) allows any person (as that term is defined by FOGRMA § 102(12)), who MMS or a delegated State orders to pay any obligation (other than an ''assessment'') subject to RSFA, to demonstrate that the person is ''financially solvent.'' If MMS determines that you meet the MMS standard for financial solvency, you would be allowed to stay of order (other than one to pay an assessment) without posting a bond or other surety instrument pending an administrative or judicial proceeding. MMS will use the phrase: ''eligible for self-bonding'' in this preamble to describe MMS's determination that a person is financially solvent and thus entitled to a stay of an order without posting a bond or other surety instrument pending an administrative or judicial proceeding.

If MMS orders you to pay an ''assessment,'' which RSFA defines as:

> [A]ny fee or charge levied or imposed by the Secretary or a delegated State other than—
> (A) The principal amount of any royalty, minimum royalty, rental bonus, net profit share or proceed of sale;
> (B) Any interest; or
> (C) Any civil or criminal penalty,

RSFA § 2(19), you would be entitled to a stay of such an order without posting a surety or demonstrating financial solvency.

This proposed rule provides for ''self-bonding'' by allowing you, a lessee, as that term is defined under FOGRMA, 30 U.S.C. 1701(7), as amended by RSFA, § 2, to demonstrate financial solvency in lieu of the current requirement that you post a bond or other surety instrument for each MMS or delegated State order to pay any obligation that you appeal. Designees who lessees designate to report and pay on their behalf under 30 CFR 218.52 and other persons also could demonstrate financial solvency on behalf of lessees.

The proposed rule also would delete the current part 243 in its entirety and rewrite it using ''plain language.''

RSFA applies to royalties and other payments due on production from Federal oil and gas leases beginning September 1, 1996. Congress made the policy determination that RSFA's ''self-bonding'' provision applies to oil and gas produced from Federal lands after September 1, 1996. However, MMS believes that there is no practical reason, under this proposed part, to treat oil and gas production from earlier periods, and other types of Federal mineral leases, differently than it treats production subject to RSFA. MMS also believes that administration of the sureties will be simplified for both MMS and for lessees receiving MMS decisions or orders to pay any obligation under Federal leases for minerals other than

oil and gas if similar rules apply to all Federal mineral leases. Therefore, MMS proposes to allow self-bonding for all appeals of MMS or delegated State orders to pay any obligation for Federal oil and gas, geothermal, and solid mineral leases, regardless of the date of production. This would:

- Treat all production dates consistently;
- Streamline the administrative appeals process;
- Simplify record keeping; and
- Reduce costs for both Government and industry.

However, the rule retains the requirement that you post a bond or other surety instrument for MMS or delegated State orders to pay any obligations for Indian leases.

MMS specifically requests comments regarding the application of these rules to appeals concerning amounts due on Indian leases. Should MMS raise the amount for which a bond is required for Indian leases to $10,000 and allow the lease bonds to cover amounts less than that? Should MMS allow for self-bonding with respect to appeals of amounts potentially due on Indian leases; or does our trust responsibility to Indian tribes and individual Indian mineral owners preclude the elimination of surety bonds even when the person responsible for paying a demand is financially solvent?

Subpart A—General Provisions

Section 243.1 What Is the Purpose of This Part?

This section would state that the purpose of this part is to explain how a lessee, its designee, or the recipient of an order may suspend compliance with an order that it has appealed under 43 CFR part 4, subpart J or 30 CFR part 208. This part also would explain when a surety must be submitted or when a demonstration of financial solvency could be made.

Section 243.2 What Leases Are Subject to This Part?

This section would explain that this proposed part would apply to all Federal mineral leases onshore and on the OCS, and to all federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands.

Section 243.3 What Definitions Apply to This Part?

This section would explain the definitions that you will need to know for this part. However, other definitions in this subchapter, or 43 CFR part 4, subpart J, which are not specifically defined in this proposed rule and do not conflict with definitions in this proposed rule would apply.

Assessment would mean any fee or charge levied or imposed by the Secretary or a delegated State other than: (1) the principal amount of any royalty, minimum royalty, rental, bonus, net profit share or proceed of sale; (2) any interest; or (3) any civil or criminal penalty.

Designee would mean the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf.

Lessee would mean any person to whom the United States, or the United States on behalf of an Indian tribe or individual Indian mineral owner, issues a lease subject to this part, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this subpart has been assigned.

MMS bond-approving officer would mean the Associate Director for Royalty Management or an official to whom the Associate Director delegates that responsibility.

MMS-specified surety instrument would mean an MMS-specified administrative appeal bond, an MMS-specified irrevocable letter of credit, a Treasury book-entry bond or note, or a financial institution book-entry certificate of deposit.

Notice of order would mean the notice under 30 CFR part 242 that MMS or a delegated State provides to a lessee stating that MMS or the delegated State has issued an order to the lessee's designee.

Order would mean any written order to pay a monetary amount appealable under 43 CFR part 4, subpart J or 30 CFR part 208. Orders may be issued by the MMS Director, officials of the MMS Royalty Management Program (RMP), or a delegated State.

Appeals of orders that do not involve the payment of amounts specified by MMS or delegated State officials would not require the posting of a bond or other surety to stay compliance. For example, appellants would not have to post a bond when appealing MMS or delegated State decisions to deny a lessee's, designee's, or payor's written request that MMS make a payment, refund, offset, or credit of money to the lessee or designee related to the principal amount of any royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or any interest or assessment related to a lease obligation.

Person would mean any individual, firm, corporation, association, partnership, consortium, or joint venture.

Self-bond would mean an MMS-approved demonstration of financial solvency under this part.

Section 243.4 Who Must Post a Bond or Other Surety Instrument or Demonstrate Financial Solvency Under This Part to Suspend Compliance With an Order?

Paragraph (a) of this section would provide that if you appeal an order that requires you to make a payment, you may suspend compliance with the order by either posting a bond or demonstrating financial solvency. Paragraph (b) would provide that you do not need to bond or demonstrate financial solvency if the order is an assessment. Paragraph (c) would provide that another way to meet the requirements of paragraph (a) is if another person fulfills these requirements on your behalf.

Section 243.5 May Another Person Post a Bond or Other Surety Instrument or Demonstrate Financial Solvency on My Behalf?

Under § 243.5, MMS would allow any person to either bond or demonstrate their financial solvency on behalf of a lessee.

Section 243.6 When Must I or Another Person Meet the Bonding or Financial Solvency Requirements Under This Part?

This section would state that, if you must meet the bonding or financial solvency requirements under § 243.4, or if another person is meeting your bonding or financial solvency requirements, then you or the other person must post a bond or other surety instrument or demonstrate financial solvency within 60 days of your receipt of the order or the Notice of Order.

Section 243.7 What Must a Person Do When Posting a Bond or Other Surety Instrument or Demonstrating Financial Solvency on Behalf of an Appellant?

This section would explain the requirements for assuming the responsibility to post a surety or to demonstrate financial solvency on behalf of another person. First, in paragraph (a) you would need to notify MMS in writing that you wish to assume another person's responsibility with respect to an appealed order.

Second, in paragraph (b) you would need to agree that if you post a bond or demonstrate financial solvency on behalf of another person, you could not use your possible non-liability for the underlying monies due, either under the

provisions of RSFA or otherwise, as a defense.

Thus, a designee would not be able to use the fact that it is not liable for royalties or other payments made, under FOGRMA, 30 U.S.C. 1712(a), as amended by RSFA § 6(g), as a defense if MMS calls its bond or requires it to fulfill its responsibility covered by its financial solvency. MMS does not believe this requirement is equivalent to imposing liability on designees. Designees retain the ability to decide whether they are willing to assume this contingent responsibility. If a designee does not wish to act as the surety for the lessees for whom it is paying, it does not need to do so. MMS will attempt to collect first from the liable persons, the lessees, and will only demand payment from designees who accept this responsibility if MMS is unable to collect from the liable person.

Under paragraph (c), you would not be able to end the responsibility you assumed for the appellant under this section unless either the appellant or another person has taken over the responsibility. The purpose of this section is to ensure that if you have assumed the bond responsibilities of another person, you cannot simply walk away from them.

MMS expects that the persons who most commonly would assume responsibility for another person, would be designees who appeal on behalf of their lessees, or affiliates who may have greater assets and be able to lower their affiliate-lessee's bonding costs. However, MMS proposes to allow any person to be able to undertake these responsibilities. MMS welcomes comments on whether the ability to bond or demonstrate financial solvency on behalf of another should be limited.

Section 243.8 When Will MMS Suspend My Obligation to Comply With an Order?

Under paragraph (a)(1) MMS will increase the minimum amount under appeal for which you must post a bond or other surety instrument for Federal mineral leases from $1,000 to $10,000. Appeals with monetary amounts less than $10,000 typically involve appellants who have adequate lease surety coverage to secure the indebtedness during the administrative appeals process. Thus, MMS believes that lease bonds should be sufficient surety for orders of less than $10,000. Moreover, the additional cost to both MMS and appellants to post bonds for amounts less than $10,000 outweighs any benefits to the United States for requiring bonds for lesser amounts.

For appeals of $10,000 or more, under paragraph (a)(2), you would have the option of either posting a bond or other surety instrument under this section or demonstrating financial solvency under subpart C.

Paragraph (b) provides the process for suspending compliance with MMS or delegated State orders to pay any obligation concerning Indian leases. This paragraph continues to require a bond or other surety instrument for appeal amounts of $1,000 or more. This proposal treats lessees and payors with respect to Indian leases differently from lessees and payors with respect to Federal leases in two ways. First, lessees/payors of Indian leases may only assure the financial responsibility for their potential obligations by posting a surety, not by demonstrating financial solvency. Second, lessees/payors of Indian leases would be required to post a surety for any debt of $1,000 or more, while lessees/payors of Federal leases must post a surety for debts of $10,000 or more. MMS has treated Indian and Federal lessees/payors differently because it is concerned that its trust responsibility to Indian lessors may require heightened precaution with respect to potential debts to Indian lessors that remain unpaid. MMS specifically requests comment on whether lessees or payors with contested debts on Indian leases should be treated the same as lessees or payors with contested debts on Federal leases, *i.e.*, whether they should be allowed to self-bond and whether sureties or self-bonding should only be required only for contested debts of $10,000 or more.

Both paragraphs (a) and (b) continue the provision that the MMS, with notification, may choose to not suspend the requirement to comply with an MMS decision or order you appeal. This provision is for circumstances where MMS believes that a stay would not be in the best interests of the United States or Indian lessors. Orders where a bond would serve as adequate surety would not normally be the type of orders where the interests of the United States or Indian lessors would require immediate compliance.

Finally, paragraph (c) continues the proviso that you may pay or comply pending appeal.

Section 243.9 Will MMS Continue To Suspend My Obligation To Comply With an Order if I Appeal to a Federal Court?

This section continues the current requirement that sureties remain in effect if you seek judicial review in Federal court for orders that MMS stayed pending appeal. It also maintains that MMS will notify you in writing of a decision to not suspend your obligation to comply with an order during judicial review.

Section 243.10 When Will MMS Initiate Collection Actions Against a Bond or Other Surety Instrument or the Person Demonstrating Financial Solvency?

This section explains that when your appeal is decided adversely to you, MMS may initiate collection actions 30 days after the decision is issued by either IBLA, the Director of OHA, an Assistant Secretary, the Secretary, or a court of competent jurisdiction. MMS may also initiate collection actions if you or another person do not maintain an adequate surety under § 243.101 or if you or another person are no longer financially solvent under § 243.202.

Section 243.11 May I Appeal the MMS Bond-Approving Officer's Determination of My Surety Amount or Financial Solvency?

MMS proposes to delegate the determination of financial solvency to a bond-approving officer. The designated bond-approving officer for MMS's RMP is the Associate Director for Royalty Management or a delegated official. MMS proposes that the decision by the bond-approving officer be final and not subject to appeal. MMS believes that allowing administrative appeals of MMS's determination of financial solvency would delay the securing of a surety and defeat the purpose of requiring either a surety or a demonstration of financial solvency. MMS requests comments on our election to make this decision final.

Section 243.12 May I Substitute Financial Solvency for a Bond Posted Before the Effective Date of This Rule?

This section would provide for a transitional rule that would allow you to replace a surety with a self-bond if you had posted a bond or other surety prior to the effective date of these regulations.

Subpart B—Bonding Requirements

Section 243.100 What Standards Must My MMS-Specified Surety Instrument Meet?

For purposes of this section, an ''MMS-specified surety instrument'' would have to be in a form MMS specifies. MMS would provide you with standard forms and information.

In addition, MMS would use a bank rating service to determine whether a financial institution has an acceptable rating to provide a surety instrument adequate to indemnify the lessor from loss or damage. Your appeal bonds would have to be from a qualified surety

company which the Department of the Treasury has approved. If you decide to use an irrevocable letter of credit or certificate of deposit, it would have to be from a financial institution acceptable to us with a minimum 1-year period of coverage subject to automatic renewal up to 5 years.

Section 243.101 How Will MMS Determine My Bond or Other Surety Instrument Amount?

The amount of your bond or other surety instrument would be determined by adding the principal amount owed to any accrued interest on that amount and projecting interest on the total for a 1-year period. If your appeal is not decided within 1 year from the date it was filed, then MMS would project additional annual interest and require an amended bond or other surety instrument.

You could submit a single surety that covers multiple appeals if you amend the surety annually to either add new amounts under appeal or remove amounts that have been decided in your favor or that you have paid. However, you would be required to file a separate surety for new amounts under appeal until those new appeals are covered by the single (consolidated) surety during the annual amendment.

Subpart C—Financial Solvency Requirements

Section 243.200 How Do I Demonstrate Financial Solvency?

MMS is proposing to add this new section to provide the procedure for lessees or their designees who appeal MMS or delegated State orders to pay any obligation to demonstrate financial solvency and ''self-bond.'' This would also apply to other persons who wish to demonstrate financial solvency on a lessee's behalf. The proposed regulation allows you to demonstrate financial solvency in two ways. First, you can submit an audited financial statement demonstrating that you have a net worth in excess of $300 million. Second, if you have a net worth less than the $300 million benchmark amount, or you do not have an audited financial statement documenting your net worth, you can ask MMS to consult an MMS determined-business information or credit reporting service or program.

Section 243.201 How Will MMS Determine if I am Financially Solvent?

If your net worth is greater than $300 million, you are presumptively deemed financially solvent and do not need to post a bond or other surety instrument. MMS believes that a company with a net worth in excess of $300 million would clearly be financially solvent. This benchmark value would allow half of the companies that currently post a bond or other surety instrument to ''self-bond.''

The net worth benchmark of $300 million represents the total net worth of all your affiliated entities that you agree would be responsible for paying MMS orders to make a payment. MMS also will deduct the contingent liability of all of your appeals, including your affiliates' appeals, in considering whether your net worth exceeds the benchmark amount. Therefore, if you have a net worth of $325,000,000, and MMS and its delegated States issued one or more orders, which could result in your paying $40,000,000 in additional royalties, including interest, then MMS would not consider you to have a net worth in excess of $300 million. Consequently, you would not be eligible to self-bond under this section. However you would still be eligible to apply for self-bonding by requesting that MMS consult a business information or credit reporting service or program, as described more fully below.

The rule would require you to submit your audited financial statement at the first appeal for which you wish to substitute financial solvency or self-bonding for surety. If MMS determined that you were financially solvent and could self-bond, you would not be required to update the audited financial statement you provided if you file subsequent appeals during the calendar year for which you demonstrated financial solvency unless you file for bankruptcy under the bankruptcy code, Title 11, United States Code. Thereafter, you would submit this statement annually as long as you have pending appeals.

If you had a net worth less than the $300 million benchmark amount, you could ask MMS to consult an MMS-determined business information or credit reporting service or program. In such cases, MMS would consult such services or programs to provide additional information concerning whether you are eligible for self-bonding. Our intent is to look to the information gathered from these commercial services or programs, such as Experian (formerly TRW), to provide information regarding the risk of your default for an obligation equal to the magnitude of the MMS order to make a payment that you appealed, plus accrued interest.

For example, if a commercial service would consider you a low to moderate risk if you were applying for a loan of the same amount as the order, MMS might not require you to post a bond or other surety instrument. However, MMS could determine that you are not financially solvent if, for example, you:

- Have insufficient cash flow to take on new debt, often determined from your financial ratios, and have no alternative source of repayment; or
- Have a poor credit history of late payments, loan defaults, or bankruptcies.

MMS intends to use these and other factors to decide whether an appellant with an audited net worth less than $300 million is eligible to self-bond. If MMS determines that an appellant's risk is low to moderate, we would allow that appellant to self-bond. MMS specifically requests comments concerning the appropriate level of risk that MMS should use in determining whether an appellant is eligible to self-bond.

If you asked MMS to consult a commercial service or program to determine your financial solvency, you would have to submit a non-refundable fee of $50. The fee would have to be paid with the original request and annually thereafter as long as you wish to continue self-bonding. MMS is recovering its costs under the Independent Offices Appropriations Act of 1952, 31 U.S.C. 9701 *et seq.* (IOAA), for Federal solid mineral, geothermal, and offshore leases, and Indian leases, and the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* (FLPMA), for Federal onshore leases. Thus, as part of this interim final rulemaking, MMS analyzed the rule's cost recovery fees for reasonableness according to the factors in FLPMA § 304(b), 43 U.S.C. 1734(b). The ''reasonableness factors'' set out in FLPMA are: a) ''actual costs (exclusive of management overhead),'' b) ''the monetary value of the rights or privileges sought by the applicant,'' c) ''the efficiency to the government processing involved,'' d) ''that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant,'' e) ''the public service provided,'' and f) ''other factors relevant to determining the reasonableness of the costs.''

For the recovery of costs to process a lessee's or its designee's request that MMS consult a commercial service or program to determine their financial solvency under 30 CFR 243.201(c), the method MMS used to evaluate the FLPMA factors is twofold. First, MMS estimated actual costs and MMS evaluated each of the remaining FLPMA reasonableness factors (b) through (f) individually to decide whether the factor might reasonably lead to an

adjustment in actual costs. Second, MMS then weighed that factor against remaining factors to determine whether another factor might reasonably increase, decrease, or eliminate the contemplated reduction. On the basis of this twofold analysis, MMS determined what final fee is reasonable for requests to determine financial solvency. MMS cannot recover an amount greater than its actual costs, so any final adjustment cannot result in a fee greater than actual costs.

For processing a request that a lessee or another person wishes MMS to consult a commercial service or program to determine its financial solvency under 30 CFR 243.201(c), MMS analyzed the FLPMA factors as follows:

Factor (a)—Actual Costs

Actual costs means the financial measure of resources expended or used by the Minerals Management Service in processing a lessee or another person's request that MMS consult a commercial service to determine its financial solvency under 30 CFR 243.201(c), including, but not limited to, the costs of special studies, or any other relevant action. Actual costs includes both direct and indirect costs, exclusive of management overhead. Management overhead costs means costs associated with the MMS directorate, which means the entire Washington Office staff, except where a member of such staff is required to perform work on a specific case. Section 304(b) of FLPMA requires that management overhead be excluded from chargeable costs.

Direct costs include agency expenditures for labor, material, stores, and equipment usage connected with the performance of processing responsibilities. MMS's indirect costs include program support such as systems, appeals, enforcement, and rulemaking. Indirect costs are allocated to specific projects on a pro rata basis. MMS determined the indirect cost rate and applied the rate to its direct costs to determine its total actual costs. This method of calculating costs is a generally accepted practice in both the private and public sectors.

MMS's method of establishing actual costs involved measuring the cost to MMS of processing an individual request for a financial solvency determination. MMS concluded that measuring the cost of an individual request was reasonable because the actual costs will not vary substantially from one individual request to another.

The costs to process a lessee or another person's request that MMS consult a commercial service to determine its financial solvency under 30 CFR 243.201(c) would include MMS's cost to request information from commercial services and to evaluate the lessee or another person's financial solvency, in other words, to process the request. On average, services such as Experian charge MMS $22.50 per request for information. In addition, MMS has determined that the average burden hour estimate to the Federal Government to process each request is ½ hour per request. This estimate is based on current MMS time requirements for completing similar tasks. Using an estimate of $50 per hour based on the salary of the MMS personnel responsible for processing such requests, MMS estimates the average direct cost burden for these requests is $25 ($50/hour ×½ hour). MMS's indirect costs for the requests is $5 per request (18.5% indirect cost rate × $25 rounded) resulting in total estimated actual costs of $52.50 per average request.

Factor (b)—Monetary Value of the Rights and Privileges Sought

The monetary value of rights and privileges sought means the objective worth of self-bonding, in financial terms, to the lessee or its designee. In this instance, the monetary value to each lessee or another person would be the value of not having to post a bond. Thus, the monetary value will vary depending on the amount under appeal, time value of the amount under appeal, etc. Accordingly, MMS rejected the idea of trying to calculate monetary value on a case-by-case basis as too time-consuming, wasteful of resources, and subject to disputes. Instead, MMS took into account equitable considerations involving its savings in not having to process and maintain bonds relative to the monetary value to the lessee or another person for not having to post a bond. Accordingly, this equitable factor would be offset by the savings to MMS as discussed under factor (e) below. Thus, MMS did not upwardly adjust its actual costs for this factor.

Factor (c)—Efficiency to the Government Processing Involved

Efficiency to the government processing means the ability of the United States to process a lessee's or another person's request that MMS consult a commercial service to determine its financial solvency under 30 CFR 243.201(c) with a minimum of waste, expense and effort. Implicit in this factor is the establishment of a cost recovery process that does not cost more to operate than MMS would collect and does not unduly increase the costs to be recovered. As noted in the above section on actual costs, MMS has determined that for the requests in this rulemaking, it would be inefficient to determine actual cost data on a case-by-case basis. Estimates based on MMS experience indicate that the cost of maintaining actual cost data on specific cases is unreasonably high where the amount potentially collectible is relatively small. This is principally because MMS's automated accounting system would have to be extensively reprogrammed to add a relatively few items of information. MMS has thus used cost estimates derived from collected data.

MMS determined that the processing of requests in this proposed rulemaking would be reasonably efficient. The procedures that MMS will use in processing the data would be based on standardized steps for similar MMS transactions in order to eliminate duplication and extraneous procedures. Therefore, MMS believes this would be the most efficient processing method. Accordingly, because this is an efficient processing method, MMS has made no adjustment to actual costs as a result of this factor.

Factor (d)—Cost Incurred for the Benefit of the General Public Interest

The cost incurred for the benefit of the general public interest (public benefit) means funds the United States expends in connection with processing a lessee's or another person's request that MMS consult a commercial service to determine its financial solvency under 30 CFR 243.201(c), for studies and/or data collection determined to have value or utility to the United States or the general public separate and apart from the document processing. It is important to note that this definition addresses funds expended in connection with a request. There is another level of public benefit that includes studies which MMS is required, by statute or regulation, to perform regardless of whether a request is received. The costs of such studies are excluded from any cost recovery calculations from the outset. Therefore, no additional reduction from costs recovered is necessary in relation to these studies.

MMS analysts concluded that the processing of the requests in this rulemaking did not as a rule produce studies or data collection that might benefit the public to any appreciable degree. Therefore, any possible benefits of such studies to the public are balanced by their possible benefits to the applicant. Accordingly, MMS made no adjustment to the fee recovered based on this factor.

Factor (e)—Public Service Provided

Public service provided means tangible improvements or other direct benefits, such as reduced administrative costs, with significant public value that are expected in connection with processing the request to determine financial solvency. This definition distinguishes the factor of ''public service provided'' (a benefit resulting from activities associated with determining financial solvency) from the factor of ''costs incurred for the benefit of the general public interest'' (which relates to benefits of the document processing itself).

MMS has determined that the requests under this rule provide the public service of reducing its costs by decreasing the total number of hours it must devote to monitoring and maintaining bonds. Therefore, MMS has determined that the Government would benefit under this factor to some extent. However, MMS has determined that the administrative savings would be relatively minor and, as discussed above, would be offset by the relative benefit to the lessees from not posting a bond. Accordingly, MMS has not further reduced actual costs as a result of these minor savings.

Factor (f)—Other Factors

The final reasonableness factor is other factors relevant to determining the reasonableness of the costs. MMS examined the requests in this rulemaking to determine whether other factors warranted a reduction in the proposed fee.

MMS has determined that there are no other factors that warrant a reduction to MMS's actual costs.

MMS personnel with expertise and program management responsibilities in the particular area of the requests in this rulemaking reviewed the requests and weighed the proposed processing fee against their knowledge of the value of similar transactions. In the case of the requests in this rulemaking, the MMS analysts concluded that the value of the rights was clearly so far above the expected processing cost that a fee set at actual costs is appropriate. As a result, MMS has determined that a processing cost of $50 would meet the reasonableness factors of FLPMA for onshore leases. Although the IOAA does not contain the same ''reasonableness factors'' as FLPMA section 304(b), the factors MMS considered under the IOAA to determine reasonable fees led it to conclude that the fees for offshore leases are the same as that for onshore leases.

MMS invites specific comments concerning the proposed processing fee.

Section 243.202 When Will MMS Monitor My Financial Solvency?

Under paragraphs (a) and (b) MMS would monitor your financial solvency each time you appeal a new order and at least annually as long as you have active appeals.

In paragraph (c) MMS explains that if the MMS bond-approving officer determines that you are no longer financially solvent, a bond or other surety would be required.

VII. Section-by-Section Analysis for 30 CFR Part 250 and 290, Offshore Minerals Management Appeal Procedures

OMM proposes to amend the regulations related to appeals of OMM decisions or orders to clarify and simplify the appeals process. The proposed OMM appeals process would eliminate the appeal to the MMS Director and provide for a 60-day period to informally resolve the dispute within the Office of the OMM officer that issued the decision or order. If the dispute is not resolved informally, the proposed rule would provide for an appeal to the IBLA. Sections 290.3 and 290.10 of this proposed rule would supersede 43 CFR 4.411(a) and 43 CFR 4.21(a), allowing 60 days to file an appeal with the IBLA and stating that an OMM decision or order will remain in effect during the 60-day period unless otherwise specified in the decision or order.

The proposed MMS rule would require an appellant pay a nonrefundable $150 processing fee with each appeal. See Section-by-Section analysis for 43 CFR 4.965 for our analysis leading to the choice of $150 as the processing fee.

The proposed MMS rule would require the appellant to post a bond when an MMS Reviewing Officer's final decision on a civil penalty is appealed. MMS is committed to safety and environmental protection and only imposes penalties when: (1) a threat of serious, irreparable, or immediate harm or damage to human life, the environment, any mineral deposit, or property resulted from a violation; or (2) the violation was not corrected within the time provided by MMS. The requirement to post a bond is designed to ensure that funds will be available to cover the final civil penalty assessment if the appeal is denied, and to discourage any appeals filed for the sole purpose of delaying payment of that assessment.

These rules will be effective for decisions or orders received by appellants 60 days or more after the final rule is published.

VIII. Procedural Matters

Regulatory Planning and Review E.O. 12866

This document is not a significant rule and is not subject to review by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an annual effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule does not require the payment of additional revenues. This rule sets out how the Department will review MMS's implementation of royalty and OCS operations policy.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The primary function of MMS appealable actions are for the collection of royalties from the minerals industry and the operations of mineral leases on the OCS. Other agency functions do not cover these areas. This rule consolidates the MMS appeals process with the IBLA process. IBLA also provides this function for other agencies such as BLM and Office of Surface Mining. This rule also provides for bonding changes and defines agency orders.

(3) This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. The administrative appeals process from MMS orders regarding royalty or OCS operational matters have no impact or relation to grants, user fee, loan programs, or the rights and obligations of their recipients.

(4) This rule does not raise legal or policy issues. Some of the proposed rules may be controversial (processing fees, self bonding, placing time limits on the appeals process), but they are not novel. Some procedures have been used in the past but not formalized. This proposed rule was developed in cooperation with States, tribes, and industry.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Accordingly, a Small Entity Compliance Guide is not required.

This rule will affect three groups of individuals or companies; (1) Indian lessors, (2) lessees and operators on

offshore leases, and (3) lessees, payors, and designees on Federal and Indian leases (onshore and offshore). Indian lessors are either tribes or individuals. However, Indian tribes are not considered to be small entities for the purposes of RSFA, and individuals do not fit the definition of small entities. As for the remaining groups, the majority of lessees, designees, payors, and operators on Federal and Indian leases would be classified as small businesses according to the definitions in the Small Business Administration Standard Industry Code (SIC). Changes in the proposed rule that could have an economic effect on these groups are the establishment of processing fees for filing a Notice of Appeal and a Statement of Reasons, requirement of using electronic transfers, posting a bond, and serving Statement of Reasons on all affected parties, and an increase in the maximum civil penalty to $25,000.

Any processing fees contained in this proposed rule also provide for a waiver or fee reduction to allow relief to small entities. The processing fees are to be paid by electronic fund transfer but again, small entities may be granted a waiver from this provision.

Bonding or payment is mandatory for appealed amounts above $10,000 on Federal leases and $1,000 for Indian leases. Appealed amounts less than $10,000 for Federal and $1,000 for Indian leases do not require bonding which typically provides relief to small entities. The ability to self bond provides relief of credit charges from surety companies.

The proposed rule requires the appellant to serve copies of the Statement of Reasons to all affected parties in the appeal such as the office that issued the order, affected tribes, and affected delegated states. The cost of serving these papers is not significant, even for a small entity. The number of pages for the Statement of Reasons filed under the proposed rule are less than the number of pages and documentation now being filed under the current rule. Much of the documentation presented under the current rule will have been obtained during the record development and settlement conferences.

The proposed rule changes the maximum civil penalty up to $25,000 per day for those acts for which FOGRMA allows such a penalty. A larger penalty should not have significant economic impacts because MMS assesses penalties only when business operations have reached a very poor level of conduct. A variety of remedies are available to businesses prior to the assessment of a penalty (including alternative dispute resolution) which should be used.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The required record development and settlement conferences could lead to quicker resolution of most appeals causing a reduction in the amount of money required for a legal defense. These conference meetings can be conducted over the phone, video conference, at MMS locations, or at the appellant's office. The appellant is not required to travel to these conferences.

While this rule proposes a processing fee of $150 at certain stages in the appeals process, the rule also provides for waiver or reduction in the fee. MMS receives an average of 400 appeals a year which means a total of $60,000 and IBLA receives an average of 75 MMS appeals which means a total of $11,250, a relatively small amount, would be collected in one year if no waivers or reductions in fees were requested.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This is an administrative review process; there is no impact on these things. The proposed rule allows for faster appeal resolution on onshore and offshore leases, sets a time limit on when an appealed issue must be resolved or decided, gives relief for maintaining bonds, defines what an order is, and clarifies the order process.

Unfunded Mandates Reform Act

This proposed rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State local or tribal governments or the private sector. This proposed rule does not change the relationship between MMS, IBLA, and State, local, or tribal governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (E.O. 12630)

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. The proposed rule would not take away or restrict an entity's right to appeal or bond orders received from MMS or a delegated State. A takings implication assessment is not required.

Federalism (E.O. 12612)

In accordance with Executive Order 12612, the proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The proposed rule does not change the role or responsibilities between Federal, State, and local governmental entities. The rule does not relate to the structure and role of States and will not have direct, substantive, or significant effects on States. A Federalism Assessment is not required.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of §§ 3(a) and 3(b)(2) of the Order. The proposed rule has been reviewed and provides clear language as to what is allowed and what is prohibited. The IBLA and MMS have drafted this proposed rule in plain language and have consulted with The Department of the Interior's Office of the Solicitor, RPC Subcommittee, States, and tribes throughout the drafting process.

Paperwork Reduction Act

There are three information collections associated with this rulemaking. The information collections are at OMB for review and approval. As part of our continuing effort to reduce paperwork and respondent burden, IBLA and MMS invite the public and other Federal agencies to comment on any aspect of the reporting burden. Submit your comments to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for the U. S. Department of the Interior, Washington, DC 20503.

OMB has up to 60 days to approve or disapprove this collection of information but may respond after 30 days. Therefore, public comments should be submitted to OMB within 30 days in order to assure their maximum consideration. However, IBLA and MMS will consider all comments received during the comment period for this notice of proposed rulemaking.

MMS estimates that there will be 400 respondents requesting an appeal and

preparing a Preliminary Statement of Issues (PSI) document and that the average annual burden hour estimate for each respondent will be 90 hours. Respondents will review the issues presented by the MMS order, research the accounting transactions or legal documents related to those issues, and prepare documentation to refute those items where disagreement exists. MMS estimates that the annual burden is 36,000 hours (400 PSI's × 90 hours). Using an estimate of $50 per hour for industry cost, the annual cost burden is $1,800,000 (36,000 burden hours × $50 per hour).

There also will be costs associated with the processing fees and with requests for waiver and reduction. MMS believes that only small businesses would seek a waiver or reduction of the fee. MMS estimates that 49 percent of the appeals it receives are filed by small businesses. Thus, of the 400 appeals filed annually, MMS estimates that 196 appeals will be filed annually by small businesses. However, because the proposed processing fee is nominal, MMS believes that few small businesses will request a waiver or reduction. If a small business did request a fee waiver or reduction, MMS estimates that the burden for each respondent requesting a waiver or reduction of the processing fee would be 5 hours.

Using an estimate of $50 per hour for industry cost, the cost burden would be $250 per request (5 burden hours × $50 per hour). Because MMS thinks that most appellants would pay the nominal fee of $150 rather than incur the costs to request a waiver or reduction, MMS estimates that it could receive up to 20 requests per year for a waiver or reduction of the initial fee due with the Notice of Appeal (10 percent of the 196 appeals per year filed by small businesses). (MMS recognized that some appellants might request a waiver and spend more than the $150 processing because of concerns of a more general nature about the fee.) Thus, the total industry costs to prepare requests for waiver or reduction of the initial fee could be up to $5,000 (20 requests per year × $250 per request). Based on an MMS estimate that about one-half of all appeals would proceed to briefing at the IBLA, MMS estimates that the annual industry costs for seeking a waiver or reduction of the second $150 fee they are required to submit with a Statement of Reasons would be about half of the amount for the first fee, or $2,500. Thus, total annual industry costs for fee waiver or reduction requests could be $7,500 if appellants sought a waiver or reduction of both fees.

Based on the assumption that 10% of small business appellants might seek a fee waiver or reduction, industry would pay the full amount of the initial fee (without a waiver or reduction request) 380 times per year, for a total amount of $57,000. MMS estimates that, the combination of waiving some fees, granting reductions for others, and denying requests for waiver or reduction could halve the amount paid overall by those appellants seeking waiver or reduction. Thus, the initial processing fees paid by those seeking waiver or reduction would be $1,500 (½ × 20 requests per year × $150). Based on these estimates, the total amount of initial processing fees paid would be $58,500. Including the amounts paid for the fee paid with the Statement of Reasons, MMS estimates that the total amount paid for processing fees would be $87,750 (1.5 × $58,500).

MMS estimates that it would take 2 hours per request for MMS to process requests for a fee waiver or reduction. This time is spent reviewing the reasons for the waiver or reduction and preparing a response to the requestor. Thus, the cost per request would be $100. Based on the estimate of 20 requests per year, MMS's total costs to process requests for waiver or reduction of the initial processing fee would be $2,000 per year (20 requests per year × $100 per request). Including costs to process waivers or reductions of the processing fee paid with the Statement of Reasons (based on an assumption that there would be ½ the number of requests for this fee waiver or reduction, i.e., 10 × $100), MMS estimates total costs to process fee waiver or reduction requests to be $3,000 ($1,000 + $2,000).

MMS estimates that it will take 3 hours to review the Notice of Appeal and PSI, record the payment of the processing fee, and generate a letter to document receipt of the appeal. MMS estimates the burden to the Federal government for processing 400 PSI's is 1,200 hours (400 PSI's × 3 hours initial appeals processing). Using an estimate of $50 per hour, MMS estimates that the annual costs for processing this information is $60,000 per year (1,200 hours × $50).

MMS estimates that 12 Indian lessors will submit a request for an order annually. It will take an estimated 15 hours to prepare a request which will result in 180 annual burden hours (12 requests × 15 hours = 180 annual burden hours). Based on $25 per hour, the annualized cost of this collection to Indian lessors is estimated to be $4,500 (180 total burden hours × $25).

MMS expects it will take on average 32 hours to evaluate the merits of each request for an order. Of the expected 12 requests annually, MMS estimates that four will actually result in an order being issued. MMS expects it will take approximately 50 hours to issue each resulting order. Total cost to the Federal Government for this process is $29,200 as described below:

Request Evaluation

12 requests × 32 hours = 384 annual burden hours

384 annual burden hours × $50 hour = $19,200 annual cost

Resulting Orders

4 orders × 50 hours = 200 annual burden hours

200 annual burden hours × $50 hour = $ 10,000 annual cost

The total annual burden is 584 hours, and the total annual cost is $29,200.

Regardless of the type of surety collected (bonds, letters of credit, certificates of deposit), the estimated reporting and record keeping burden is 1 hour. MMS estimates that there will be 136 bonds, 63 Letters of Credit, 100 Self-bonds, and 1 Certificate of Deposit submitted each year. MMS has not had any Treasury Securities submitted as sureties, but would estimate that they would also require one hour for reporting and recording keeping, if any were to be filed. The burden for submitting these sureties is 300 hours; the annual cost burden is $15,000 (300 hours × $50).

The estimated cost to the Federal Government is essentially the same for each type of surety instrument, approximately 1 hour per instrument. MMS estimates there will be 136 bonds, 100 self-bonds, 63 Letters of Credit, 1 Certificate of Deposit and no Treasury Securities. We estimate that the burden for the processing, input, review, approval, and handling of 136 bonds is 136 hours; the annual cost burden is $6,800 (136 burden hours × $50). We estimate that the burden for the processing, input, review, approval, and handling of the 63 LOCs we receive is 63 hours; the annual cost burden is $3,150 (63 burden hours × $50). We estimate that the burden for the processing, input, review, approval, and handling of the 1 certificate of deposit we receive is 1 hour; the annual cost burden is $50 (1 burden hour × $50).

MMS proposes to consult a business information or credit reporting service for all small entities or non-publicly traded companies that cannot comply with the audited, consolidated balance sheet requirement or for a publicly traded company that does not meet our established net worth of $300 million.

We estimate that 100 requests to self-bond will be made each year.

We estimate 25 of those requests will require that we consult with a business information or credit reporting service. It will require approximately 25 hours to review the requests and process the inquiries (1 hour per inquiry) by both MMS and by the business information or credit reporting service. Using an estimate of $50 per inquiry, we estimate the annual cost to the Federal Government will be $1,250 (25 inquires × $50 per request). Using an estimate of $25 per inquiry, we estimate the annual cost to access the business information or credit reporting service to the Federal Government will be $625 (25 inquires × $25 per request). The remaining 75 requests will also require one hour to process by MMS at $50 per hour or $3,750. The total cost to review and process all self-bonding requests is $5,625 ($1,250 + $625 + $3,750).

In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, IBLA and MMS are providing notice and otherwise consulting with members of the public and affected agencies concerning this proposed increase in the collection of information in order to solicit comment to (a) evaluate whether this expanded collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

The Paperwork Reduction Act of 1995 provides that 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.

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required.

Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with this clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A ''section'' appears in bold type and is preceded by the symbol ''§'' and a numbered heading; for example § 4.904.) (5) Is the description of the rule in the ''Supplementary Information'' section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW, Washington, DC 20240. You may also e-mail the comments to this address: Exsec@ios.doi.gov.

List of Subjects

43 CFR Part 4

Administrative practice and procedures, Coal, Continental Shelf, Geothermal energy, Indian lands, Mineral royalties, Natural Gas, Petroleum, Public Lands—mineral resources.

30 CFR Part 208

Continental shelf, Government contracts, Mineral royalties, Petroleum, Public lands—Mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, Small businesses, Surety bonds.

30 CFR Part 241

Coal, Continental shelf, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Penalties, Petroleum, Public lands—Mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 242

Coal, Continental shelf, Geothermal energy, Indian lands, Investigations, Mineral royalties, Natural gas, Oil and gas reserves, Penalties, Petroleum, Public lands—Mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 243

Coal, Continental shelf, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Petroleum, Public lands—Mineral resources, Surety bonds.

30 CFR Part 250

Continental shelf, Environmental impact statements, Environmental protection, Government contracts, Incorporation by reference, Investigations, Mineral royalties, Natural gas, Oil and gas development and production, Oil and gas exploration, Oil and gas reserves, Penalties, Petroleum, Pipelines, Public lands—Mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, Sulphur development and production, Sulphur exploration, Surety bonds.

30 CFR Part 290

Administrative practice and procedure.

Sylvia V. Baca,

Acting Assistant Secretary—Land and Minerals Management.

Robert L. Baum,

Director, Office of Hearings and Appeals.

Hilda A. Manuel,

Deputy Commissioner of Indian Affairs.

For the reasons set out in the preamble, OHA and MMS propose to add 43 CFR part 4, subpart J and 30 CFR part 242 and to amend 30 CFR Parts 208, 241, 243, 250, and 290, as follows:

PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES

1. The authority citation for part 4 continues to read as follows:

Authority: R.S. 2478, as amended, 43 U.S.C. sec. 1201, unless otherwise noted.

1a. In 43 CFR part 4, subpart J is added to read as follows.

Subpart J—Special Rules Applicable to Appeals Concerning Royalties and Related Matters

Sec.

Purpose, Applicability and Definitions

Appeal Rights

How to Appeal or Join an Appeal

Calculating Time Frames for Appeals

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

Subpart J—Special Rules Applicable to Appeals Concerning Royalties and Related Matters

Purpose, Applicability and Definitions

§ 4.901 What is the purpose of this subpart?

This subpart tells you how to appeal Minerals Management Service (MMS) or delegated State orders, and MMS decisions not to issue orders under 30 CFR part 242, concerning reporting to the MMS Royalty Management Program (RMP) and the payment of royalties and other payments due under leases subject to this subpart.

§ 4.902 What leases are subject to this subpart?

This subpart applies to:

(a) All Federal mineral leases onshore and on the Outer Continental Shelf (OCS); and

(b) All federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands, regardless of the statutory authority under which the lease was issued or maintained.

§ 4.903 What definitions apply to this subpart?

Affected means, with respect to delegated States and States concerned, that the appeal concerns an order regarding a Federal onshore or OCS lease, within a State's borders or offshore of the State, from which the State, or a political subdivision of the State, receives a statutorily-prescribed portion of the royalties; and, with respect to Indian lessors, that the appeal concerns an order regarding the Indian lessor's federally-administered mineral lease.

Assessment means any fee or charge levied or imposed by the Secretary or a delegated State other than:

(1) The principal amount of any royalty, minimum royalty, rental, bonus, net profit share or proceed of sale;

(2) Any interest; or

(3) Any civil or criminal penalty.

Delegated State means a State to which MMS has delegated authority to perform royalty management functions pursuant to an agreement or agreements under regulations at 30 CFR part 227.

Designee means the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf.

IBLA means the Interior Board of Land Appeals.

Indian lessor means an Indian tribe or individual Indian mineral owner with a beneficial or restricted interest in a property that is subject to a lease issued or administered by the Secretary on behalf of the tribe or individual Indian mineral owner.

Lease means any agreement authorizing exploration for or extraction of any mineral, regardless of whether the instrument is expressly denominated as a ''lease,'' including any:

(1) Contract;

(2) Net profit share arrangement;

(3) Joint venture; or

(4) Agreement the Secretary approves under the Indian Mineral Development Act, 25 U.S.C. 2101 *et seq.*

Lessee means any person to whom the United States, or the United States on behalf of an Indian tribe or individual Indian mineral owner, issues a lease subject to this subpart, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this subpart has been assigned.

Monetary obligation means any requirement to pay or to compute and pay any obligation in any order. For purposes of the default rule of decision in §§ 4.956 and 4.972, and 30 U.S.C. 1724(h):

(1) If an order asserts a monetary obligation arising from one issue or type of underpayment that covers multiple leases or production months, the total obligation for all leases or production months involved constitutes a single monetary obligation;

(2) If an order asserts monetary obligations arising from different issues or types of underpayments for one or more leases, the obligations arising from each separate issue, subject to paragraph (1) of this definition, constitute separate monetary obligations; and

(3) If an order asserts a monetary obligation with a stated amount of additional royalties due, plus an order to perform a restructured accounting arising from the same issue or cause as the specifically stated underpayment, the stated amount of royalties due plus the estimated amount due under the restructured accounting, subject to paragraphs (1) and (2) of this definition, together constitutes a single monetary obligation.

Nonmonetary obligation means any duty of a lessee or its designee to deliver oil or gas in kind, or any duty of the Secretary to take oil or gas royalty in kind.

Notice of order means the notice under 30 CFR part 242 that MMS or a delegated State provides to a lessee stating that MMS or the delegated State has issued an order to the lessee's designee.

Obligation means:

(1) A lessee's, designee's or payor's duty to:

(i) Deliver oil or gas royalty in kind; or

(ii) Make a lease-related payment, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, interest, penalty, civil penalty, or assessment; and

(2) The Secretary's duty to:

(i) Take oil or gas royalty in kind; or

(ii) Make a lease-related payment, refund, offset, or credit, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or interest.

Order means any document issued by the MMS Director, MMS RMP, or a delegated State that contains mandatory or ordering language that requires the recipient to do any of the following for any lease subject to this subpart: report, compute, or pay royalties or other obligations, report production, or provide other information. An order includes any order issued under 30 CFR part 242 by MMS or a delegated State.

(1) Order includes but is not limited to the following:

(i) An order to pay;

(ii) An MMS or delegated State decision to deny a lessee's, designee's, or payor's written request that MMS make a payment, refund, offset, or credit of money to the lessee or designee related to the principal amount of any royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or any interest or assessment related to a lease obligation;

(iii) A denial of a request for an exception from any valuation and reporting requirement;

(iv) An order to perform restructured accounting;

(v) An order to file a report related to any royalty or other lease requirement under 30 CFR part 210 or 216; and

(vi) An order to provide documents or information. An order to perform a restructured accounting is not an order to provide documents or information.

(2) Order does not include:

(i) A non-binding request, information, or guidance, such as:

(A) A Preliminary Determination Letter issued under 30 CFR 242.102;

(B) Advice or guidance on how to report or pay, including a valuation determination, unless it contains mandatory or ordering language; and

(C) A policy determination;

(ii) A subpoena; or

(iii) An order to pay that MMS issues to a refiner or other party involved in disposition of royalty taken in kind.

Party means MMS, any person who files a Notice of Appeal, and any person who files a Notice of Joinder or Intervention Brief in an appeal under this subpart.

Payor means any person responsible for reporting and paying royalties for:

(1) Federal oil and gas leases for production before September 1, 1996;

(2) Federal mineral leases other than oil and gas leases; and

(3) Leases on Indian lands subject to this subpart.

Reporter means a person who submits reports for leases subject to this subpart regardless of whether that person has payment responsibility.

State concerned means the State that receives a statutorily prescribed portion of the royalties from a Federal onshore or Outer Continental Shelf lease.

Appeal Rights

§ 4.904 Who may file an appeal?

(a) If you receive an order that adversely affects you, you may appeal that order except as provided under § 4.905.

(b) If you are a lessee and you receive a Notice of Order, and if you contest the order, you may either appeal the order or join in your designee's appeal under § 4.908.

(c) If you are an Indian lessor, you may file an appeal of any MMS decision

not to issue an order under 30 CFR part 242 that adversely affects you.

§ 4.905 What may I not appeal under this subpart?

You may not appeal under this subpart:

(a) An action that is not an order, as defined in this subpart;

(b) An order to provide documents or information issued under 30 CFR 242.104(b)(4) by the Associate Director for Royalty Management or a person to whom that Associate Director delegates the authority to issue such orders that are final for the Department; or

(c) A determination of the surety amount or financial solvency under 30 CFR part 243, subparts B or C.

How to Appeal or Join an Appeal

§ 4.906 When must I file an appeal?

You must file your appeal with the MMS Dispute Resolution Division (DRD) under § 4.960 within 60 days after you are served the order, Notice of Order, or MMS decision not to issue an order under 30 CFR part 242. An order, Notice of Order, or decision not to issue an order is considered served as provided under 30 CFR 242.305.

§ 4.907 How must I file an appeal?

(a) For your appeal to be filed, the MMS DRD must receive all of the following by the deadline in § 4.906:

(1) A written Notice of Appeal and a copy of the order, or MMS decision not to issue an order, that you are appealing. You cannot extend the 60-day period for MMS to receive your Notice of Appeal;

(2) A written Preliminary Statement of Issues you will raise on appeal. You must specifically identify the legal and factual disagreements you have with the order, or MMS decision not to issue an order, that you are appealing. See appendix A to this subpart for an example of a Preliminary Statement of Issues;

(3) A nonrefundable processing fee of $150 or a request for reduction or waiver under §§ 4.965 or 4.966. Indian lessors do not have to pay a processing fee.

(b) You must serve your Notice of Appeal, Preliminary Statement of Issues, and any attached documents as required under § 4.962.

(c) You may request an automatic extension of time of up to 60 days to file the Preliminary Statement of Issues or the processing fee required under this paragraph. Your request must be in writing and must be received by the MMS DRD within the time allowed for filing your appeal.

(d) If you are a designee, when you file your appeal under paragraph (a) of this section, you must serve your Notice of Appeal on the lessees who MMS identifies under 30 CFR 242.105(a)(5)(i) in the order you appealed.

§ 4.908 If I am a lessee, can I join a designee's appeal?

If you are a lessee, and your designee files an appeal under § 4.904, you may join in that appeal. To join you must:

(a) File a Notice of Joinder with the MMS DRD as required under § 4.960 within 30 days after you receive your designee's Notice of Appeal; and

(b) Serve your Notice of Joinder on all parties to the appeal and other persons as required under § 4.962.

(c) If you are a lessee and you neither appeal nor join in your designee's appeal under § 4.908, your designee's actions with respect to the appeal and any decisions in the appeal bind you.

§ 4.909 What is the effect of joining an appeal?

If you join in an appeal under § 4.908:

(a) You are deemed to appeal the order jointly with the designee;

(b) The designee must fulfill all requirements imposed on appellants under this subpart;

(c) You may not file submissions or pleadings separately from the designee; and

(d) If the designee notifies you under § 4.910(b) that it declines to further pursue the appeal, then you become an appellant and must then meet all requirements of this subpart as the appellant.

§ 4.910 What must a designee do if it decides to discontine an appeal?

If you are a designee who has appealed under § 4.904 and you decide to stop participating in the appeal, you must notify the following parties in writing at least 30 days before the next submission or pleading is due:

(a) All lessees who have joined in the appeal under § 4.908;

(b) The office or officer with whom any subsequent submissions or pleadings must be filed; and

(c) Other persons as required under § 4.962.

Calculating Time Frames for Appeals

§ 4.911 When does my appeal commence?

(a) For purposes of the period in which the Department must issue a final decision in your appeal under § 4.956, or which the Department uses as guidance to track your appeal under § 4.948, your appeal commences on the date the MMS DRD receives the last of all the items you must file under § 4.907(a).

(b) If you file a request for an extension of time to file your Preliminary Statement of Issues or processing fee under § 4.907(c), your appeal does not commence until the date the MMS DRD receives your Preliminary Statement of Issues and processing fee.

(c) If you requested a fee waiver or reduction under § 4.966, your appeal does not commence until the date the MMS DRD:

(1) Grants your request for a waiver;

(2) Receives the reduced fee, if MMS grants your request for a reduction in the fee; or

(3) Receives the entire fee if MMS denies your request for a reduction in the fee.

§ 4.912 When does my appeal end?

For purposes of the period in which the Department must issue a final decision in your appeal under § 4.956, or which the Department uses as guidance to track your appeal under § 4.948:

(a) Your appeal ends on the same day of the month of the 33rd calendar month after your appeal commenced under § 4.911, plus the number of days of any applicable time extensions, and

(b) If the 33rd calendar month after your appeal commenced does not have the same day of the month as the day of the month your appeal commenced, then the initial 33-month period ends on the last day of the 33rd calendar month.

§ 4.913 What if a due date falls on a day the Department or relevant office is not open for business?

If a due date under this subpart falls on a day the relevant office is not open for business (such as a weekend, Federal holiday, or shutdown), then the due date is the next day the relevant office is open for business.

How MMS Processes Appeals

§ 4.914 What will MMS do after it receives my appeal?

(a) *Documentation of receipt.* When the MMS DRD receives your appeal, it will date stamp each document received. The MMS DRD also will document receipt of your processing fee using any method it deems appropriate.

(b) *Decision on timeliness.* The MMS DRD will decide whether your appeal is filed on time. If the MMS DRD does not receive your Notice of Appeal, Preliminary Statement of Issues, and processing fee, or your request(s) for extension of time to file your Preliminary Statement of Issues and processing fee, or your request for a waiver or fee reduction, by 5:00 p.m. (local time of MMS Dispute Resolution Division) on the 60th day after you

received the order, Notice of Order, or MMS decision not to issue an order, your appeal is not timely filed and will not be considered.

(c) *Notification of decision on timeliness.* The MMS DRD will notify you in writing of its decision on whether your appeal was filed on time.

(1) If MMS notifies you that your appeal was late, you may appeal that decision under § 4.969.

(2) If MMS notifies you that your appeal was filed on time, MMS will give you a docket number to use in future communications regarding your appeal. The notification will include instructions regarding:

(i) A record development conference under § 4.915; and

(ii) A settlement conference under § 4.924.

Record Development Procedures

§ 4.915 How will MMS schedule record development conferences?

(a) If you file an appeal, MMS will schedule you to attend at least one record development conference within 60 days of the commencement of your appeal under § 4.911. You may extend this 60-day period if you agree in writing under § 4.958.

(b) You may ask to hold the record development conferences via telephone, video conference, or in person.

(c) MMS will determine the time and location of record development conferences and whether record development conferences will take place via telephone, video conference, or in person. MMS will not compel you to travel.

§ 4.916 Who must and who may participate in record development conferences?

(a) *Mandatory participation.* The following persons must participate in all record development conferences:

(1) The appellant; and

(2) Relevant MMS offices.

(b) *Optional participation.* The following persons may participate in the record development conferences:

(1) An affected delegated State or affected State concerned;

(2) An affected Indian lessor; and (3) A lessee, designee, payor, or reporter, if not the appellant.

(c) *Consequence of nonparticipation by mandatory participants.* If a person must participate in any record development conference under paragraph (a) of this section, but refuses to do so, then that person my not file any documents or materials for the record.

(d) *Consequence of nonparticipation by optional participants.* If a person may participate in any record development conferences under paragraph (a) of this section, but participates in none of them, then that person may not file any documents or materials for the record.

§ 4.917 How will I receive notification of record development conferences?

(a) After MMS schedules a record development conference under § 4.915, MMS will notify the following persons of the time and location of the conferences:

(1) The appellant;

(2) Lessees that joined under § 4.908;

(3) The office that issued the order;

(4) Affected delegated States;

(5) The persons that affected States concerned identify under § 4.961; and

(6) Affected Indian tribes or appropriate BIA offices.

(b) The BIA office that MMS notifies under paragraph (a)(6) of this section will make available whatever notice to individual Indian mineral owners it deems appropriate by any method it deems appropriate.

§ 4.918 How will the parties to the appeal develop the record during the record development conferences?

(a) During the record development conferences, the parties to the appeal will attempt to agree on the facts and issues on appeal.

(b) At the record development conferences, the parties must identify all documents and evidence that are relevant to disputed legal or factual issues involved in the appeal or that demonstrate material facts, unless the documents or evidence are privileged or their disclosure is prohibited by law.

§ 4.919 What will the parties do if they agree on the record contents?

(a) If the parties to the appeal agree on the contents of the record and the facts and issues on appeal at the record development conferences, unless the parties agree that a party other than MMS will perform this function, MMS will:

(1) Compile for the record all documents and materials listed in paragraph (b) of this section;

(2) Draft a ''Joint Statement of Facts and Issues;'' and

(3) File the following items with the MMS DRD within 30 days after the end of the record development conference:

(i) The record compiled under paragraph (a)(1) of this section;

(ii) The ''Joint Statement of Facts and Issues'' developed under paragraph (a)(2) of this section; and

(iii) A certification that the record is complete, except as provided in § 4.923 of this subpart. The parties may file the certification jointly or individually, but the MMS DRD must receive all parties' certifications before it will deem the record complete. When the record is complete, MMS will notify all parties;

(b) At a minimum, the record compiled under paragraph (a)(1) of this section must include the following, unless they are privileged or their disclosure is prohibited by law:

(1) The order or decision not to issue an order under appeal and associated documents;

(2) All documents and materials that MMS or a delegated State directly or indirectly considered in issuing the order or decision not to issue an order;

(3) All relevant correspondence between applicable MMS or delegated State or tribal offices and the recipient of the order or decision not to issue an order; and

(4) Any evidence in the control of either party that bears upon the disputed facts or issues that are subject to the appeal of the order.

§ 4.920 What will the parties do if they do not agree on the record contents?

If the parties to the appeal cannot agree on the contents of the record and the facts and issues on appeal, each party must:

(a) Jointly or individually submit the material listed under §§ 4.919(a)(3);

(b) File an Additional Statement of Facts and Issues and supporting documentation with the MMS DRD within 30 days after the end of the record development conferences; and

(c) Certify that in the view of the party submitting the certification, the materials filed in paragraphs (a) and (b) of this section comprise the complete record, except as provided in § 4.923 of this subpart. The MMS DRD must receive all parties' certifications before it will deem the record complete. When the record is complete, MMS will notify all parties.

§ 4.921 What must MMS or I do if the record contains proprietary or confidential information?

If a party wishes MMS or IBLA to treat any of the documents or materials compiled under this subpart as proprietary or confidential information, that party must follow the procedures under 43 CFR 4.31.

§ 4.922 What if MMS or I need more time to develop the record?

If you are an appellant and you need more time to complete the record development process, you must obtain an extension under § 4.958.

§ 4.923 May parties supplement the record or Statement of Facts and Issues after the record is deemed complete?

(a) If you are a party, and you want to supplement the record or any

Statement of Facts and Issues submitted under § 4.919 or 4.920, you must:

(1) File any additional material together with a written request for permission to supplement the record or Joint or Additional Statement of Facts and Issues to IBLA (or an Assistant Secretary who is deciding your appeal under § 4.937); and

(2) File these materials and your request between the time MMS deems the record complete under § 4.919 or 4.920 and the time additional responsive pleadings are filed under § 4.944.

(b) Your request must explain why the additional documents, evidence, facts or issues were not available or provided in the record or in the Statement of Facts and Issues and why they are material to a decision on the appeal.

(c) If you are an appellant, you must include with your request your written agreement to extend the period for the Department to issue a final decision in your appeal under 30 U.S.C. 1724(h)(1) by 45 days.

(d) You must serve your request on all parties to the appeal.

(e) IBLA will issue an order either granting or denying your request within 30 days of receiving your request. If IBLA does not issue such an order within 30 days of receiving your request, then your request is deemed granted.

(f) If IBLA grants a request or a request is deemed granted under paragraph (e) of this section, any party to the appeal may respond to the additional material. The party must respond within 15 days of receiving IBLA's order, or, if IBLA does not issue an order, within 45 days of the party's receiving the request.

Settlement Procedures

§ 4.924 How will MMS schedule a settlement conference?

(a) If you file an appeal, MMS will schedule you to attend a settlement conference within 120 days of the commencement of your appeal under § 4.911. You may extend this 120-day period if you agree in writing under § 4.958.

(b) You may ask to have the conference take place via telephone, video conference, or in person.

(c) MMS will determine the time and location of the settlement conference and whether the settlement conference will take place via telephone, video conference, or in person. MMS will not compel you to travel.

(d) The settlement conference may be held as part of the record development conference scheduled under § 4.915 if you and MMS agree to do so.

§ 4.925 Who must and who may participate in the settlement conference?

(a) *Mandatory participation.* The following persons must participate in all settlement conferences:

(1) The appellant; and

(2) Relevant MMS offices.

(b) *Optional participation.* The following persons may participate in the settlement conference:

(1) An affected delegated State or affected State concerned;

(2) An affected Indian lessor; and

(3) A lessee, designee, payor, or reporter, if not the appellant.

§ 4.926 How will I receive notification of settlement conferences?

(a) After MMS schedules a settlement conference under § 4.924, MMS will notify the following persons of the time and location of the conference:

(1) The appellant;

(2) Lessees that joined under § 4.908;

(3) The office that issued the order;

(4) Affected delegated States;

(5) The persons that affected States concerned identify under § 4.961; and

(6) Affected Indian tribes or appropriate BIA offices.

(b) The BIA office that MMS notifies under paragraph (a)(6) of this section will make available whatever notice to individual Indian mineral owners it deems appropriate by any method it deems appropriate.

§ 4.927 May parties resolve an appeal by settlement or using third party neutrals after the settlement conference?

(a) Parties may resolve any appeal by settlement at any time before the Department has issued a final decision.

(b) Any party may participate in settlement negotiations at any stage of the appeal. MMS may use any personnel or officials it deems appropriate for settlement negotiations, including representatives of tribes and delegated States.

(c) In addition to negotiated settlements, at any stage of the appeal, MMS may use third party neutrals under the Administrative Dispute Resolution Act, 5 U.S.C. 571 *et seq.*, if both MMS and the other parties to the appeal agree to do so. If MMS uses third party neutrals, MMS may use the Alternative Dispute Resolution Official from OHA, or a person from OHA's roster of third party neutrals.

§ 4.928 What if I need more time to consider settlement?

If you are an appellant, and you need more time to continue settlement efforts, you must obtain an extension under § 4.958.

MMS Director Actions on Appeals

§ 4.929 May the MMS Director concur with, rescind, or modify an order or decision not to issue an order that I appealed?

(a) Within 60 days after the MMS DRD receives the record under §§ 4.919 or 4.920, the MMS Director may concur with, rescind, or modify the order or decision not to issue an order that you have appealed.

(b) Before the MMS Director rescinds or modifies an order or decision not to issue an order under paragraph (a) of this section, MMS will consult informally with:

(1) The MMS office that issued the order or decision not to issue the order; and

(2) Affected tribes or affected delegated States that participated in any record development or settlement conference.

(c) MMS also may consult informally with:

(1) Other relevant MMS offices;

(2) States concerned; and

(3) Affected Indian lessors.

(d) MMS will notify you in writing that the MMS Director has concurred with, rescinded or modified the order or decision not to issue an order you have appealed. A notice of rescission or modification will state the reasons for the rescission or modification.

(e) If the MMS Director does not act by the deadline in paragraph (a) of this section, the MMS Director is deemed to have concurred with the order or decision not to issue an order.

§ 4.930 What other persons will MMS notify when the MMS Director concurs with, rescinds, or modifies an order or decision not to issue an order?

MMS will send a copy of any notice that it issues under § 4.929(d) as follows:

If the appeal was filed by:	Then MMS will send a copy of the notice under § 4.929(d) to:
(a) The recipient of an order or notice of order under § 4.904(a) or (b).	(1) The office that issued the order; (2) Any affected delegated State; (3) Any affected tribe; and (4) The appropriate BIA office, if the order involves leases on individual Indian lands. The BIA office will provide whatever notice to individual Indian lessors that it deems appropriate by whatever method it deems appropriate.
(b) An Indian lessor under § 4.904(c)	(1) The office that decided not to issue the order, and (2) The lessee or its designee.

§ 4.931 If the MMS Director rescinds or modifies an order, how does it affect the statutory limitations period?

For purposes of determining whether an order is timely under 30 U.S.C. 1724(b)-(d):

(a) If the MMS Director modifies an order under § 4.929, the timeliness of the order is not affected and the modified order is timely if the original order was timely. The MMS Director's modification will not address production not included in the original order.

(b) If the MMS Director rescinds all or part of an order under § 4.929, and if IBLA, an Assistant Secretary, the Director of OHA, the Secretary, or a court reinstates that order, in whole or in part, then the reinstated order relates back to the date the order was originally issued, and the reinstated order is timely if the original order was timely.

§ 4.932 When will MMS send the record to IBLA?

(a) The MMS DRD will send the record to the IBLA within 45 days of the date MMS notifies the appellant under § 4.929(d).

(b) If the MMS Director is deemed to have concurred with an order under § 4.929(e), the MMS DRD will send the record to the IBLA within 105 days after MMS receives the record under §§ 4.919 or 4.920.

(c) The MMS deadline under this section is only guidance for the MMS DRD. It creates no substantive rights in parties to the appeal or any other persons.

Appellant Response to MMS Action

§ 4.933 What must I do, or what may I do, after the MMS Director concurs with, rescinds or modifies an order or decision not to issue an order that I have appealed?

(a) *Concurrence.* If the MMS Director concurs with the order or decision not to issue an order that you have appealed, and you wish to continue your appeal, you must file your Statement of Reasons under § 4.939 within 60 days after you receive the MMS Director's concurrence under § 4.929.

(b) *Recission.* If the MMS Director rescinds the order that you have appealed, and if an Indian lessor or delegated State intervenes under § 4.934, because you will be bound by the Department's final decision in the intervention in your appeal, you may file an Answer to the Intervention Brief under § 4.942 within 60 days after you receive the MMS Director's rescission under § 4.929(d).

(c) *Modification.* If the MMS Director modifies the order that you have appealed, and if you contest the order as modified, you must file your Statement of Reasons under § 4.939, and any Answer to an Intervention Brief under § 4.942, within 60 days after you receive the MMS Director's modification under § 4.929.

(d) *Deemed concurrence.* If the MMS Director is deemed under § 4.929(e) to have concurred with the order or decision not to issue an order that you have appealed, you must file your Statement of Reasons under § 4.939 within 120 days after the date the MMS DRD receives the record forwarded under §§ 4.919 or 4.920.

Intervening in an Appeal

§ 4.934 Who may intervene in an appeal?

(a) *Indian lessors.* If you are an Indian lessor, you may intervene in any appeal involving your lease(s) by filing an Intervention Brief under § 4.939 within 30 days after you receive notification of the MMS Director's concurrence, rescission or modification of an order under § 4.930 that adversely affects you.

(b) *Affected delegated States.* If you are an affected delegated State, and the MMS Director modifies or rescinds an order under § 4.929 that the recipient of an order or Notice of Order has appealed, you may intervene in that appeal by filing an Intervention Brief under § 4.939 within 30 days after you receive MMS's notification of any rescission or modification under § 4.930 if MMS's rescission or modification of the order adversely affects you.

§ 4.935 What is the record for an appeal if a State or Indian lessor intervenes?

If an Indian lessor or delegated State intervenes under § 4.934, the following documents are added to the record established under §§ 4.919 or 4.920:

(a) Any additional correspondence to the MMS Director; and

(b) The MMS Director's notice of modification or rescission under § 4.929(d).

§ 4.936 If an Indian lessor or delegated State intervenes, how does it affect the time frame for deciding an appeal?

If an Indian lessor or delegated State intervenes under § 4.934, the appeal commences on the appellant's commencement date under § 4.911, not on the date an intervening party files its intervention brief. The time frame for deciding the appeal under § 4.956 or tracking the appeal under § 4.948 is calculated from that commencement date.

Assistant Secretary Decisions

§ 4.937 May an Assistant Secretary decide an appeal?

(a) The Assistant Secretary for Land and Minerals Management (or the Assistant Secretary for Indian Affairs for an appeal involving an Indian lease) may decide an appeal if the Assistant Secretary notifies the appellant, the MMS DRD, intervenors, and IBLA in writing any time up to 30 days before the date the appellant must file its Statement of Reasons or an intervenor must file its Intervention Brief under § 4.939.

(b) If an Assistant Secretary will decide under paragraph (a) of this section, you must file all subsequent documents required under this subpart with the Assistant Secretary under § 4.960.

§ 4.938 Who will notify other persons that an Assistant Secretary will decide an appeal or has decided an appeal?

(a) MMS will transmit a copy of the Assistant Secretary's notice required under § 4.937 to:

(1) Affected tribes;

(2) Affected delegated States;

(3) Lessees who join under § 4.908;

(4) Intervenors; and

(5) Affected lessees or their designees if an Indian lessor files an appeal under § 4.904 of any MMS decision not to issue an order.

(b) For any appeal involving a lease on individual Indian lands, in addition

to notifying the persons under paragraph (a) of this section, MMS will transmit a copy of the Assistant Secretary's notice required under § 4.937 to the appropriate BIA office. That BIA office may make available to individual Indian lessors whatever notice it deems appropriate by any method it deems appropriate.

Filing Pleadings With IBLA

§ 4.939 How do I file my Statement of Reasons or Intervention Brief?

(a) If the IBLA is deciding your appeal, you must file your Statement of Reasons or Intervention Brief with IBLA under § 4.960 within the times required under §§ 4.933 and 4.934.

(b) If an Assistant Secretary is deciding your appeal under § 4.937, you must file your Statement of Reasons with that Assistant Secretary under § 4.960 within 60 days after the MMS DRD has received the record under §§ 4.919 or 4.920.

(c) You must pay a nonrefundable processing fee of $150 with your Statement of Reasons as required under § 4.965 or seek a reduction or waiver under § 4.966 within the time required under §§ 4.933 and 4.934. Indian lessors and delegated States do not have to pay a processing fee.

(d) You must serve your Statement of Reasons or Intervention Brief on all parties to the appeal, and on other persons as required under § 4.962.

§ 4.940 What if I do not timely file my Statement of Reasons, Intervention Brief or Request for an Extension of Time to File those documents?

If you do not file your Statement of Reasons, Intervention Brief, or request for extension of time to file either of those documents within the times prescribed in §§ 4.933, 4.934, 4.939, or within any extension of time requested and granted under § 4.958, IBLA or the Assistant Secretary will dismiss your appeal, or will not allow you to intervene.

§ 4.941 Who may file an Answer to a Statement of Reasons or Intervention Brief?

(a) If the recipient of an order or Notice of Order files a Statement of Reasons under § 4.939, MMS and Indian lessors whose leases are affected may file Answers under § 4.942.

(b) If an Indian lessor files a Statement of Reasons or an Intervention Brief under § 4.939, MMS and any lessee, designee or payor for the lease(s) involved in the appeal may file Answers under § 4.942.

(c) If a delegated State files an Intervention Brief under § 4.939, the following may file Answers under § 4.942:

(1) MMS;

(2) Indian lessors whose leases are adversely affected; and

(3) Any lessee, its designee, or the payor for the lease(s) involved in the appeal.

§ 4.942 How do I file an Answer to a Statement of Reasons or Intervention Brief?

(a) If you may file an Answer:

(1) To a Statement of Reasons under § 4.941, you must file your Answer within 60 days after the date the Statement of Reasons is served upon you; or

(2) To an Intervention Brief under § 4.933(b), you must file your Answer within the time required under that section.

(b) You must file your Answer with the appropriate office under § 4.960.

(c) You must serve your Answer on all parties to the appeal.

§ 4.943 Who may file an Amicus Brief?

(a) Any person may file an Amicus Brief with the appropriate office under § 4.960 within 60 days after the date the Statement of Reasons or Intervention Brief is filed with IBLA or Assistant Secretary.

(b) You must serve your Amicus Brief on all parties to the appeal.

§ 4.944 May parties file additional responsive pleadings?

(a) If you filed a Statement of Reasons or an Intervention Brief, and another person files an Answer or an Amicus Brief, then you may file a Reply to the Answer or a Response to the Amicus Brief with IBLA or an Assistant Secretary under § 4.960 within 30 days after the date the Answer or Amicus Brief was served upon you.

(b) If you filed an Answer under § 4.942 and if another person files a Reply or an Amicus Brief, then you may, within 20 days after the Reply or Amicus Brief is served upon you, file under § 4.960:

(1) a Surreply to that Reply to address new arguments or authorities raised in the Reply; or

(2) a Response to the Amicus Brief.

(c) You must serve any responsive pleadings under this section on all parties to the appeal.

Additional Evidence, Arguments, and Hearings

§ 4.945 May I ask for a hearing by an Administrative Law Judge?

(a) If you are a party, you may request a hearing by an Administrative Law Judge of the Hearings Division under 43 CFR 4.415 if there are disputed issues of material fact which could affect the decision on the appeal.

(1) You must file your request in writing within 30 days after all responsive pleadings are filed under § 4.944.

(2) You must specify the issues of fact that are in dispute.

(b) If you are an appellant, you must agree in writing under § 4.958 to extend the period in which the Department must issue a final decision in your appeal under § 4.956, by the additional amount of time necessary for the Hearings Division to complete any action with respect to the referral request, including any of the actions authorized under paragraph (c) of this section.

(c) If IBLA grants a party's request, IBLA may:

(1) Authorize the Administrative Law Judge to specify additional issues;

(2) Authorize the parties to add additional relevant issues, with the approval of the Administrative Law Judge; and

(3) Ask the Administrative Law Judge to issue:

(i) Proposed findings of fact;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that would be final for the Department absent an appeal to IBLA.

§ 4.946 May IBLA require additional evidence or arguments from parties?

(a) IBLA may require additional evidence or written arguments from parties by issuing an order:

(1) Requiring any party or all parties to the appeal to produce additional evidence or written arguments or both;

(2) Requiring the parties to appear before IBLA for oral argument; or

(3) Referring the matter to an Administrative Law Judge of the Hearings Division under 43 CFR 4.415 for an evidentiary hearing if there are disputed issues of material fact that could affect the decision on the appeal.

(b) IBLA's referral under paragraph (a)(3) of this section:

(1) Must specify the issues of fact upon which the hearing is to be held;

(2) May authorize the Administrative Law Judge to specify additional relevant issues;

(3) May authorize the parties to add additional relevant issues, with the approval of the Administrative Law Judge; and

(4) May request that the Administrative Law Judge issue:

(i) Proposed findings of fact;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that would be final for the Department absent an appeal to IBLA.

(c) Failure of any party to comply with an IBLA order issued under this section may result in any contested fact being found against the party who does not comply.

§ 4.947 May IBLA establish deadlines for matters referred to Administrative Law Judges?

IBLA may establish appropriate deadlines for any matter referred to an Administrative Law Judge under §§ 4.945 or 4.946.

Decision on an Appeal

§ 4.948 When will IBLA decide my appeal?

(a) IBLA will decide your appeal on or before the date your appeal ends under 4.912.

(b) The IBLA will serve its decision on all parties to the appeal, and other persons as required under § 4.963.

(c) If an Assistant Secretary is deciding your appeal under § 4.937, the Assistant Secretary will:

(1) Decide your appeal on or before the day your appeal ends under § 4.912; and

(2) Serve the decision on all parties to the appeal and other persons as required under § 4.963.

§ 4.949 When is an IBLA or an Assistant Secretary's decision effective?

An IBLA or an Assistant Secretary's decision is effective on the date it is issued, unless IBLA or the Assistant Secretary provides otherwise. The decision is the final action of the Department.

§ 4.950 What if IBLA requires MMS or a delegated State to recalculate royalties or other payments?

(a) This section applies to appeals of orders involving the reporting and payment of royalties or other payments due under Federal oil and gas leases. For Indian leases and for Federal mineral leases other than oil and gas, the time limits and finality requirements for purposes of 30 U.S.C. 1724(h) stated in this section do not apply.

(b) An IBLA decision modifying an order and requiring MMS or a delegated State to recalculate royalties or other payments is a final decision in the administrative proceeding for purposes of 30 U.S.C. 1724(h).

(c) MMS or the delegated State must provide to IBLA and all parties served with IBLA's decision any recalculation IBLA requires under paragraph (b) of this section within 60 days of receiving IBLA's decision.

(d) There is no further appeal within the Department from MMS's or the State's recalculation under paragraph (c) of this section.

(e) The IBLA decision issued under paragraph (b) of this section together with recalculation under paragraph (c) of this section are the final action of the Department that is judicially reviewable under 5 U.S.C. 704.

Reconsideration of a Decision

§ 4.951 May a party ask IBLA to reconsider its decision?

(a) If you are a party, you may ask the IBLA to reconsider its decision by:

(1) Submitting a written request to IBLA within 30 days of the date you receive the decision;

(2) Explaining the extraordinary circumstances that justify reconsideration; and

(3) Serving your request on all parties to the appeal.

(b) Filing a request for reconsideration will not suspend the effectiveness of IBLA's decision.

(c) A request for reconsideration is not necessary to exhaust administrative remedies.

§ 4.952 Under what circumstances may IBLA reconsider its decision?

IBLA may reconsider its decision in extraordinary circumstances for reasons such as:

(a) Discovery of additional evidence that demonstrates error in the decision;

(b) IBLA's misinterpretation of material facts;

(c) Clear error of law;

(d) Recent judicial developments;

(e) Change in Departmental policy; or

(f) Inconsistent agency decisions.

§ 4.953 May other parties to an appeal respond to a request for reconsideration?

(a) If you are a party, you may answer a request for reconsideration within 15 days of the date you received a copy of the request.

(b) You must serve your answer to a request for reconsideration on all parties to the appeal.

§ 4.954 On whom will IBLA serve a decision On reconsideration?

The IBLA will serve its decision on all parties to the appeal, and other persons as required under § 4.963.

Jurisdiction of the Secretary or Director, Office of Hearings and Appeals

§ 4.955 May the Secretary of the Interior or the Director of OHA take jurisdiction of an appeal or review a decision?

The Secretary or the Director of OHA may take jurisdiction of an appeal or review a decision issued under this subpart. See 43 CFR 4.5.

Consequences if the Department Does Not Issue a Decision On Time

§ 4.956 What if the Department does not issue a decision by the date my appeal ends?

(a) *Applicability of section.* This section applies to any appeal of an order, or portion of an order, involving a monetary or nonmonetary obligation under a Federal oil and gas lease filed on or after [insert the date this proposed subpart becomes effective], where the Department does not issue a final decision by the date the appeal ends under § 4.912. The time limits in 30 U.S.C. 1724(h)(2) and the rule of decision stated in this section do not apply to appeals of orders, or portions of orders, that:

(1) Involve Indian leases or Federal mineral leases other than oil and gas; or

(2) Relate to Federal oil and gas leases but do not involve a monetary or nonmonetary obligation.

(b) *General provision.* If IBLA or an Assistant Secretary (or the Secretary or the Director of OHA) does not issue a final decision in an appeal by the date the appeal ends under § 4.912, then under 30 U.S.C. 1724(h)(2), the Secretary will be deemed to have decided the appeal:

(1) In favor of the appellant for any nonmonetary obligation at issue in the appeal, or any monetary obligation at issue in the appeal with a principal amount of less than $10,000;

(2) In favor of the Secretary for any monetary obligation at issue in the appeal with a principal amount of $10,000 or more.

(c) *Orders modified by the MMS Director.* If the MMS Director has modified an order under § 4.929 that you appealed:

(1) If you continued to appeal the order, or any portion of the order, as modified by the Director, then the rule of decision prescribed in paragraph (b) of this section will apply only to those portions of the modified order that you contested.

(2) If neither you nor a joining lessee continues to contest the order, or any portion of the order, as modified by the Director, and a delegated State has intervened in the appeal to contest a modification that neither you nor a joining lessee contests, then the Secretary will be deemed to have affirmed the MMS Director's modification, regardless of the amount of any monetary or nonmonetary obligation that neither you nor a joining lessee contests.

(d) *Orders rescinded by the MMS Director.* If the MMS Director has rescinded an order under § 4.929 that

you appealed, and if a delegated State intervened in the appeal, then the Secretary will be deemed to have affirmed the MMS Director's recission in all respects.

(e) *Requests for reconsideration.* If the IBLA issues a decision on or before the date the appeal ends under § 4.912, that decision is the final decision in the administrative proceeding and fulfills the requirements of 30 U.S.C. 1724(h)(1). The provisions of 30 U.S.C. 1724(h)(1) and (2) have no further application. If any party requests reconsideration of an IBLA decision, the IBLA is not required to issue a decision on reconsideration before the date the appeal would have ended under § 4.912 had there been no IBLA decision.

(f) *Estimation of principal amount of monetary obligation.* If the principal amount of a monetary obligation is not specifically stated in an order and must be computed to comply with the order, the principal amount referred to in paragraph (b) of this section means the principal amount MMS estimates you would be required to pay as a result of the order.

§ 4.957 What is the administrative record for my appeal if it is deemed decided?

If your appeal is deemed decided under §§ 4.956 or 4.972, the record for your appeal consists of:

(a) The record established under §§ 4.919 or 4.920, or before the MMS Director in an appeal under former 30 CFR part 290;

(b) Any additional correspondence to the MMS Director;

(c) The MMS Director's notice of concurrence, modification or rescission under § 4.933(d);

(d) The MMS Director's decision under former 30 CFR part 290;

(e) Any pleadings to the IBLA; and

(f) Any IBLA orders and decisions.

Extensions of Time

§ 4.958 How do I request an extension of time?

(a) If you are a party to an appeal, and you need additional time after an appeal commences:

(1) You may obtain an extension of time under this section:

(i) To meet any filing requirement under this subpart;

(ii) For the Department to issue a final decision in your appeal;

(iii) To stay the appeal pending settlement efforts; or

(iv) To stay the appeal for any other reasons; and

(2) You must submit a written request for an extension of time to the office or official with whom you must file the document before the required filing date, or with the office or official who is responsible for that stage of the appeals process.

(b) If you are an appellant, in addition to meeting the requirements of paragraph (a) of this section, you must agree in writing in your request to extend the period in which the Department must issue a final decision in your appeal under §§ 4.956 or 4.972, or which the Department uses as guidance to track your appeal under § 4.948, by the amount of time for which you are requesting an extension.

(c) If you are any other party, the office or official with whom you must file the request may require you to submit a written agreement signed by the appellant to extend the period in which the Department must issue a final decision in the appeal under §§ 4.956 or 4.972, or which the Department uses as guidance to track the appeal under § 4.948, by the amount of time for which you are requesting an extension.

(d) The office or official with whom you must file your request has the discretion to decline any request for an extension of time.

(e) You must file requests submitted to the MMS DRD, IBLA or an Assistant Secretary as required under § 4.960.

(f) You must serve your request on all parties to the appeal.

Consolidation

§ 4.959 May IBLA consolidate appeals?

(a) IBLA may consolidate appeals that involve:

(1) The same order or decision not to issue an order;

(2) Common issues of disputed material fact; or

(3) Common issues of law.

(b) If you are an appellant and you request consolidation, you must:

(1) Notify all parties to the appeals for which you have requested consolidation; and

(2) Agree in writing under § 4.958 to extend the period for the Department to issue a final decision in each appeal you wish to consolidate to either:

(i) The date by which the Department must issue a final decision in the most recently filed appeal; or

(ii) Any other date to which you and IBLA agree.

(c) IBLA will notify all parties to the appeal of any consolidations under this section.

Filing, Notification and Service Requirements

§ 4.960 Where do I file documents required under this subpart?

You must file documents required under this subpart in the appropriate office as follows:

(a) With the MMS DRD between 9 a.m. and 5 p.m. local time at: [*address for MMS DRD*] using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (_____) _____–_____.

(b) With IBLA at: Interior Board of Land Appeals 4015 Wilson Boulevard, Arlington, Virginia 22203, using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (703) 235–9014; or

(c) With an Assistant Secretary at: [*address for MMS DRD*] using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (_____) _____–_____.

(d) If you file a document by telefax, you must send an additional copy of your document to the same office or official using the U.S. Postal Service, a private delivery or courier service or hand delivery so that it is received within 5 business days of your telefax transmission.

§ 4.961 How can a State concerned receive notification of record development and settlement conferences?

If a State concerned wants to receive notification of record development conferences under § 4.917 and settlement conferences under § 4.924, the State concerned must give the MMS DRD the name, title, address, and telephone number of the State official authorized to receive the notices.

§ 4.962 What copies of documents filed under this subpart are Appellants, Lessees and Intervenors required to serve?

(a) *Appeals by parties other than Indian lessors.* For any appeal filed by a recipient of an order or Notice of Order involving a lease on Federal or Indian lands, appellants, lessees that have joined, and Intervenors must serve copies of required filings under this subpart as follows:

If you are the:	Then you must serve copies of the:	On the following:
(1) Person filing the Notice of Appeal	(i) Notice of Appeal and Preliminary Statement of Issues.	(A) The office that issued the order;
		(B) Affected tribes;

If you are the:	Then you must serve copies of the:	On the following:
		(C) Affected delegated States; and (D) Lessees under § 4.907(c) if you are the designee.
	(ii) Statement of Reasons	(A) The office that issued the order; (B) Affected tribes; (C) Affected delegated States; (D) Lessees that join under § 4.908; (E) Intervenors; (F) The Office of the Solicitor at the address required under 43 CFR 4.413(c)(1)(i); and (G) MMS DRD.
(2) Lessee joining under § 4.908	(i) Notice of Joinder	(A) The designee who appealed the order; (B) The office that issued the order; (C) Affected tribes; and (D) Affected delegated States.
(3) Intervenor under § 4.934	(i) Intervention Brief	(A) The office that issued the order; (B) Affected tribes; (C) Affected delegated States; (D) Lessees that join under § 4.908; (E) The appellant; (F) The Office of the Solicitor at the address required under 43 CFR 4.413(c)(1)(i); and (G) MMS DRD.

(b) *Appeals by Indian lessors.* For any appeal filed by an Indian lessor, appellants must serve copies of required filings under this subpart as follows:

If you are the:	Then you must serve copies of the:	On the following:
(1) Person filing the Notice of Appeal	(i) Notice of Appeal, and Preliminary Statement of Issues.	(A) The office that refused to issue the order under 30 CFR part 242; and (B) The lessee or payor for the leases involved.
	(ii) Statement of Reasons	(A) The office that refused to issue the order under 30 CFR part 242; (B) The lessee or payor for the leases involved; (C) The Office of the Solicitor at the address required under 43 CFR 4.413(c)(1)(i); and (D) MMS DRD.

§ 4.963 What copies of documents filed under this subpart is the Department required to serve?

(a) *Appeals by parties other than Indian lessors.* For any appeal filed by a recipient of an order or Notice of Order involving a lease on Federal or Indian tribal lands, Department of the Interior offices must serve copies of required filings under this subpart as follows:

If you are the:	Then you must serve copies of the:	On the following:
(1) MMS DRD	(i) Notice that an appeal is timely filed ..	(A) The office that issued the order; (B) Affected tribes; (C) Affected delegated States; and (D) Lessees that join under § 4.908.
(2) IBLA or Assistant Secretary	(i) Decisions and Decisions on Reconsideration.	(A) The office that issued the order; (B) Affected tribes; (C) Affected delegated States; (D) Persons who file amicus briefs under § 4.943; (E) The Office of the Solicitor at the address required under 43 CFR 4.413(c)(1)(i); and (F) MMS DRD.

(b) *Appeals by Indian Lessors.* For any appeal filed by an Indian lessor, Department of the Interior offices must serve copies of required filings under this subpart as follows:

If you are the:	Then you must serve copies of the:	On the following:
(1) MMS DRD	(i) Notice that an appeal is timely filed ..	(A) The office that refused to issue the order under 30 CFR part 242; and

If you are the:	Then you must serve copies of the:	On the following:
(2) IBLA or Assistant Secretary	(1) Decisions and Decisions on Reconsideration.	(B) The lessee or payor for the leases involved. (A) The office that refused to issue the order under 30 CFR part 242; (B) The lessee or payor for the leases involved; (C) Persons who file amicus briefs under § 4.943; (D) The Office of the Solicitor at the address required under 43 CFR 4.413(c)(1)(i); and (E) MMS DRD.

(c) For any appeal involving a lease on individual Indian lands, the following service requirements also apply:

(1) MMS will transmit to the appropriate BIA office a copy of the following documents:

(i) Notices of Appeal;

(ii) Notices of Joinder;

(iii) Notices by designees that they are discontinuing an appeal,

(iv) MMS notices of timely filing,

(v) Statements of Reasons,

(vi) Intervention Briefs, and

(vii) IBLA decisions.

(2) That BIA office may make available to individual Indian lessors whatever notice it deems appropriate by any method it deems appropriate.

§ 4.964 What if I don't serve documents as required?

If you are an appellant, IBLA may dismiss your appeal if:

(a) You do not serve any person as required by § 4.962; and

(b) The person you did not serve or the adverse party is prejudiced by your failure to serve.

Processing Fees

§ 4.965 How do I pay the processing fee?

(a) You must pay the processing fee to the MMS DRD.

(b) You must use Electronic Funds Transfer using the Federal Reserve Communications System (FRCS) link to the Financial Service Fedwire Deposit System unless you request and MMS authorizes payment by check or by an alternative method before the date the processing fee is due.

(c) You must include with the payment:

(1) Your taxpayer identification number;

(2) Your payor identification number, if applicable; and

(3) The number of the order, the bill number, or any other applicable identification of the order that you are appealing.

§ 4.966 How do I request a waiver or reduction of my fee?

To request a waiver or reduction you must:

(a) Send a written request to the MMS DRD when you send your Notice of Appeal or Statement of Reasons; and

(b) Demonstrate in your request that you are unable to pay the fee or that payment of the fee would impose an undue hardship upon you.

§ 4.967 When will MMS grant a fee waiver or reduction?

(a) MMS may grant a fee waiver or fee reduction in extraordinary circumstances.

(b) The MMS DRD will send you a written decision granting or denying your request.

§ 4.968 How do I pay my processing fee if MMS grants a reduction or denies my request for a reduction or waiver?

(a) If MMS grants your request for a fee reduction, you must pay the reduced processing fee within 30 days of the date you recieved the decision to reduce your fee.

(b) If MMS denies your request:

(1) You must pay the processing fee within 30 days of your receipt of the decision; and

(2) That decision is final for the Department.

Appeals not Filed on Time

§ 4.969 How do I appeal a decision that my appeal was not filed on time?

If MMS notifies you under § 4.914(c)(1) that your appeal was not filed on time:

(a) You may appeal that decision to IBLA within 15 days of the date you received MMS's notification.

(1) Your appeal constitutes agreement in writing to extend the period in which the Department must issue a final decision in your appeal under § 4.956, or which the Department uses as guidance to track your appeal under § 4.948. The period is extended by the amount of time it takes IBLA to decide whether your appeal was filed on time.

(2) If IBLA denies your appeal, IBLA's decision is final, and you have failed to exhaust required administrative remedies as to the merits of the order or MMS decision not to issue an order.

(b) If you do not appeal MMS's decision to IBLA under paragraph (a) of this section, you have no further right to appeal within the Department. In that event, the order, or MMS decision not to issue an order, is final, and you have failed to exhaust required administrative remedies as to the merits of the order or MMS decision not to issue an order.

(c) If IBLA or a court of competent jurisdiction later determines that MMS's or the IBLA's decision under this paragraph was incorrect, and that your appeal was filed on time, your appeal commences, and your Preliminary Statement of Issues and processing fee are due (if you have not already filed them), 60 days after the date a final non-appealable judgment is entered.

Provisions for Appeals Filed Before [insert date this proposed subpart becomes effective]

§ 4.970 What rules apply to appeals filed before [insert date this proposed subpart becomes effective]?

The following provisions apply to appeals filed either with the MMS Director or IBLA before [insert date this proposed subpart becomes effective]:

(a) 30 CFR parts 243 and 290 in effect prior to [insert date this rule becomes effective]; and (b) 43 CFR 4.901, 4.902, 4.903, 4.911—4.913, 4.948, 4.950, 4.957, 4.958, 4.971, and 4.972.

§ 4.971 When does my appeal commence and end if it was filed before [insert date this proposed subpart becomes effective]?

For purposes of the period in which the Department must issue a final decision in your appeal under § 4.972:

(a) If you filed your Notice of Appeal and initial Statement of Reasons with MMS before August 13, 1996, your appeal commenced on August 13, 1996.

(b) If you filed your Notice of Appeal or initial Statement of Reasons with MMS after August 13, 1996, your appeal commenced on the date MMS received your Notice of Appeal, or, if later, your initial Statement of Reasons under 30 CFR 290.3.

(c) Your appeal ends on the same day of the month of the 33rd calendar month after your appeal commenced under paragraphs (a) or (b), plus the number of days of any applicable time extensions under § 4.958. If the 33rd calendar

month after your appeal commenced does not have the same day of the month as the day of the month your appeal commenced, then the initial 33 month period ends on the last day of the 33rd calendar month.

§ 4.972 What if the Department does not issue a decision by the date my appeal ends if I filed my appeal before [insert effective date this proposed subpart]?

(a) This section applies to any appeal of an order, or portion of an order, involving a monetary or nonmonetary obligation under a Federal oil and gas lease filed before [insert the date this proposed subpart becomes effective], where the Department does not issue a final decision by the date the appeal ends under § 4.971(c). The time limits in 30 U.S.C. 1724(h)(2) and the rule of decision stated in this section do not apply to appeals of orders, or portions of orders, that:

(1) Involve Indian leases or Federal mineral leases other than oil and gas; or

(2) Relate to Federal oil and gas leases but do not involve a monetary or nonmonetary obligation.

(b) If the IBLA or an Assistant Secretary (or the Secretary or the Director of OHA) does not issue a final decision in an appeal filed before [insert date this proposed subpart becomes effective] by the date the appeal ends under § 4.971(c), then under 30 U.S.C. 1724(h)(2), the Secretary will be deemed to have decided the appeal:

(1) In favor of the appellant for any nonmonetary obligation at issue in the appeal, or any monetary obligation at issue in the appeal with a principal amount of less than $10,000;

(2) In favor of the Secretary for any monetary obligation at issue in the appeal with a principal amount of $10,000 or more.

(c)(1) If your appeal ends before the MMS Director issues a decision in your appeal of an order under 30 CFR 290.3(c), then the provisions of paragraph (b) of this section apply to the monetary and nonmonetary obligations in the order that you contested in your appeal to the Director.

(2) If the MMS Director issues a decision in your appeal of an order under 30 CFR 290.3(c) before your appeal ends, and if you appealed the Director's decision to IBLA, then the provisions of paragraph (b) of this section apply to the monetary and nonmonetary obligations in the Director's decision that you contested in your appeal to IBLA.

(3) If the MMS Director issues a decision in your appeal of an order under 30 CFR 290.3(c), and if you did not appeal the Director's decision to IBLA within the time required under 30 CFR 290.7 and 43 CFR part 4, then the MMS Director's decision is the final decision of the Department and 30 U.S.C. 1724(h)(2) has no application.

(d) If any party requests reconsideration of an IBLA decision issued before the date the appeal ends under § 4.971(c), and if IBLA does not issue a decision on reconsideration before the date the appeal ends, then 30 U.S.C. 1724(h)(2) does not apply and the decision the IBLA has issued is the final action of the Department.

(e) If the principal amount of any monetary obligation is not specifically stated in an order or MMS Director's decision and must be computed to comply with the order or MMS Director's decision, then the principal amount referred to in paragraph (b) of this section means the principal amount MMS estimates you would be required to pay as a result of the order.

Appendix A to Subpart J of Part 4

Xxxxxxx Production Company
Appeal of MMS Order dated
Bill/Invoice No. [if any]
$ amount disputed
Date

Preliminary Statement of Issues

Under the regulations at 43 CFR 4.907(a)(2)(i) (1998), Xxxxxxx hereby submits the following preliminary facts and arguments as reasons for its appeal of the Minerals Management Service (MMS) order dated _____, 1998, (Bill No. _____):

1. The MMS claims are barred by § 4(b) of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, P.L. 104–185 (August 13, 1996), which States that a demand which arises from an obligation ''shall be commenced within seven years from the date on which the obligation becomes due.'' Here, the transactions upon which MMS bases its demand took place on _____, and MMS did not issue its demand for payment to Xxxxxxx Production Company until _____, which was more than seven years after the date(s) of the transactions.

2. Xxxxxxx's ownership of less than 50 percent of the ABC Gas Plant merely creates a rebuttable presumption of control. That presumption should be deemed rebutted by the fact that at the time Xxxxxxx executed its Agreement with the ABC Gas Plant, Xxxxxxx's ownership interest in the ABC Gas Plant was significantly lower than its current ownership (i.e., only ____ percent). Therefore, its Agreement with the ABC Gas Plant should be considered arm's-length. [Insert citation to applicable case law, statutes, and/or regulations.]

3. Xxxxxxx's non-arm's length sales were at fair market prices and were consistent with other, comparable sales in the field or area. For example, data available to Xxxxxxx from [source] indicate that in _____ 19____ comparable sales in the field or area were in the range of $____.____ to $____.____ per mcf, while the non-arm's length sales challenged by the order were at $____.____ per mcf. Therefore, those sales should be treated the same as arm's-length sales for royalty purposes. [Insert citation to applicable case law, statutes, and/or regulations.]

4. The MMS erred in billing the entire amount of the subject assessment to Xxxxxxx. Until _____ ____, 19____, Lease Nos. _____ were owned by XYZ Corporation. When Xxxxxxx acquired Lease Nos. _____ from XYZ Corporation, Xxxxxxx did not assume responsibility for obligations that predated the effective date of that acquisition. [Insert citation to applicable case law, statutes, and/or regulations.]

Please contact the undersigned for all matters relating to this appeal. Respectfully submitted this _____ day of _____, 1999.

By: _____
[name]
Xxxxxxx Production Company
[address]
[phone no.]

TITLE 30—MINERAL RESOURCES

PART 208—SALE OF FEDERAL ROYALTY OIL

2. The authority citation for part 208 is revised to read as follows:

Authority: 5 U.S.C. 301 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1701 *et seq.*; 31 U.S.C. 9701; 41 U.S.C. 601 *et seq.*; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

3. In § 208.2, new definitions are added in alphabetical order to read as follows:

§ 208. Definitions.

* * * * *

Contracting officer means the Director, his or her delegate, or the person designated under a royalty oil purchase contract.

Contracting officer's decision means an MMS order or decision that a contracting officer issues under this part to a purchaser of oil under a royalty oil purchase contract.

* * * * *

Service means served as provided under 30 CFR 242.305.

4. Section 208.16 is revised to read as follows:

§ 208.16 How to appeal a contracting officer's decision that you receive.

If you receive a contracting officer's decision, you may:

(a) Appeal that decision to the Board of Contract Appeals in the Office of Hearings and Appeals, Office of the Secretary, in accordance with the procedures provided in 43 CFR part 4, subpart C; or

(b) File an action in the United States Court of Federal Claims.

PART 241—PENALTIES

5. The authority citation for part 241 continues to read as follows:

Authority: 25 U.S.C 396 *et seq.*; 25 U.S.C. 396a *et seq.*; 25 U.S.C. 2101 *et seq.*; 30 U.S.C. 181 *et seq.*; 30 U.S.C. 351 *et seq.*; 30 U.S.C. 1001 *et seq.*; 30 U.S.C. 1701 *et seq.*; 43 U.S.C. 1301 *et seq.*; 43 U.S.C. 1331 *et seq.*; and 43 U.S.C. 1801 *et seq.*

§ 241.20 [Removed]

6. Section 241.20 is removed and subpart A is reserved.

7. Subpart B is revised to read as follows:

Subpart B—Penalties for Oil and Gas Leases

Sec.

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

Subpart B—Penalties for Oil and Gas Leases

Definitions

§ 241.50 What definitions apply to this subpart?

The terms used in this subpart have the same meaning as in 30 U.S.C. 1702.

Penalties After a Period to Correct

§ 241.51 What may MMS do if I violate a statute, regulation, order, or lease term relating to a Federal or Indian oil and gas lease?

(a) If we believe that you have not followed any requirement of a statute, regulation, order, or terms of a lease for any Federal or Indian oil or gas lease, we will send you a Notice of Noncompliance telling you what the violation is and what you need to do to correct it to avoid civil penalties under 30 U.S.C. 1719(a) and (b).

(b) We will send the Notice to your address of record under 30 CFR 242.304 using the standards of service under 30 CFR 242.305.

§ 241.52 What if I correct the violation?

The matter will be closed if you correct all of the violations identified in the Notice of Noncompliance within 20 days of your receipt of the Notice (or within a longer time period specified in the Notice).

§ 241.53 What if I do not correct the violation?

(a) We may send you a Notice of Civil Penalty if you do not correct all of the violations identified in the Notice of Noncompliance within 20 days of your receipt of the Notice of Noncompliance (or within a longer time period specified in that Notice). The Notice of Civil Penalty will tell you how much penalty you must pay. The amount of penalty may be up to $500 per day, beginning with the date of the Notice of Noncompliance, for each violation set out in the Notice of Noncompliance for as long as you do not correct the violations.

(b) If you do not correct all of the violations identified in the Notice of Noncompliance within 40 days of your receipt of the Notice of Noncompliance (or 20 days following the expiration of a longer time period specified in that Notice), we may increase the amount of the penalty to up to $5,000 per day, beginning with the date of the Notice of Noncompliance, for each violation for as long as you do not correct the violations.

§ 241.54 How may I request a review of a Notice of Noncompliance?

You may request a hearing on the record to review a Notice of Noncompliance by filing a request within 20 days of the date you received the Notice of Noncompliance with the Hearings Division (Departmental), Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. You may do this regardless of whether you correct the violations identified in the Notice of Noncompliance.

§ 241.55 Does my request for a hearing on the record affect the penalties?

(a) If you do not correct the violations identified in the Notice of Noncompliance, the penalties will continue to accrue even if you request a hearing on the record.

(b) You may petition the Departmental Hearings Division to stay the accrual of penalties pending the hearing on the record and a decision by the Administrative Law Judge under § 241.73. You must file your petition within 45 calendar days of receiving the Notice of Noncompliance. The Hearings Division will grant or deny the petition under 43 CFR 4.21(b).

Penalties Without a Period to Correct

§ 241.60 May I be subject to penalties without prior notice and an opportunity to correct?

The Federal Oil and Gas Royalty Management Act sets out several specific violations for which penalties accrue without an opportunity to first correct the violation.

(a) Under 30 U.S.C. 1719(c), you may be subject to penalties of up to $10,000 per day per violation for each day the violation continues if you:

(1) Knowingly or willfully fail to make any royalty payment by the date specified by statute, regulation, order or terms of the lease;

(2) Fail or refuse to permit lawful entry, inspection, or audit; or

(3) Knowingly or willfully fail or refuse to notify the Secretary, within 5 business days after any well begins production on a lease site or allocated to a lease site, or resumes production in the case of a well which has been off production for more than 90 days, of the date on which production has begun or resumed.

(b) Under 30 U.S.C. 1719(d), you may be subject to civil penalties of up to $25,000 per day for each day each violation continues if you:

(1) Knowingly or willfully prepare, maintain, or submit false, inaccurate, or misleading reports, notices, affidavits,

records, data, or other written information;

(2) Knowingly or willfully take or remove, transport, use or divert any oil or gas from any lease site without having valid legal authority to do so; or

(3) Purchase, accept, sell, transport, or convey to another person, any oil or gas knowing or having reason to know that such oil or gas was stolen or unlawfully removed or diverted.

§ 241.61 How will MMS inform me of violations without a period to correct?

We will inform you of violations without a period to correct by issuing a Notice of Noncompliance explaining what the violation is and how to correct it. We also will send you a Notice of Civil Penalty stating the amount of the penalty. The Notice of Noncompliance and Notice of Civil Penalty may be issued simultaneously. We will send the Notice of Noncompliance and the Notice of Civil Penalty to your address of record under 30 CFR 242.304 using the standards of service under 30 CFR 242.305.

§ 241.62 How may I request a review of a Notice of Noncompliance regarding violations without a period to correct?

You may request a hearing on the record of a Notice of Noncompliance regarding violations without a period to correct by filing a request within 20 days of the date you received the Notice of Noncompliance with the Hearings Division (Departmental), Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. You may do this regardless of whether you correct the violations identified in the Notice of Noncompliance.

§ 241.63 Does my request for a hearing on the record affect the penalties?

(a) If you do not correct the violations identified in the Notice of Noncompliance regarding violations without a period to correct, the penalties will continue to accrue even if you request a hearing on the record.

(b) You may ask the Departmental Hearings Division to stay the accrual of penalties pending the hearing on the record and a decision by the Administrative Law Judge under § 241.73. You must file your petition within 45 calendar days of your receipt of the Notice of Noncompliance. The Hearings Division will grant or deny the petition under 43 CFR 4.21(b).

General Provisions

§ 241.70 How does MMS decide what the amount of the penalty should be?

We determine the amount of the penalty by considering the severity of the violations, your history of compliance, and if you are a small business.

§ 241.71 Does the penalty affect whether I owe interest?

(a) The penalties under this section are in addition to interest you may owe on any underlying underpayments or unpaid debt.

(b) If you do not pay the penalty by the date stated in the order assessing the penalty issued under § 241.75, MMS will assess you late payment interest on the penalty amount at the same rate interest is assessed on late royalty payments for the number of days the penalty payment is late.

§ 241.72 How will the Office of Hearings and Appeals conduct the hearing on the record?

If you request a hearing on the record under §§ 241.54 or 241.62, the hearing will be conducted by a Departmental Administrative Law Judge from the Office of Hearings and Appeals. After the hearing, the Administrative Law Judge will issue a decision in accordance with the evidence presented and applicable law.

§ 241.73 How may I appeal the Administrative Law Judge's decision?

If you are adversely affected by the Administrative Law Judge's decision, you may appeal that decision to the Interior Board of Land Appeals in accordance with the procedures set forth in 43 CFR part 4, subpart E.

§ 241.74 May I seek judicial review of the decision of the Interior Board of Land Appeals?

Under 30 U.S.C. 1719(j), you may seek judicial review of the decision of the Interior Board of Land Appeals. Review by the District Court is only on the administrative record and not *de novo.* An appeal to the District Court shall be barred unless filed within 90 days after the final order.

§ 241.75 When must I pay the penalty?

(a) We will send you an order assessing the penalty, in accordance with the Notice of Civil Penalty issued under §§ 241.53 or 241.61, if:

(1) You do not request a hearing on the record under §§ 241.54 or 241.62;

(2) You do not appeal the determination of the Administrative Law Judge to the Interior Board of Land Appeals under § 241.73; or

(3) The Interior Board of Land Appeals issues a final decision for the Department under § 241.73.

(b) You must pay the penalty assessed in that order within 30 days of receiving it, unless you have sought judicial review of the decision of the Interior Board of Land Appeals under § 241.74 and obtained a stay from the district court.

(c) The order assessing the penalty is not appealable.

(d) If you do not pay, that amount is subject to collection under the provisions of § 241.77.

§ 241.76 Can MMS reduce my penalty once it is assessed?

Under 30 U.S.C. 1719(g), the Associate Director for Royalty Management may compromise or reduce civil penalties assessed under this section.

§ 241.77 How may MMS collect the penalty?

(a) MMS may use all available means to collect the penalty including, but not limited to:

(1) Requiring the lease surety, for amounts owed by lessees, to pay the penalty;

(2) Deducting the amount of the penalty from any sums the United States owes to you;

(3) Using judicial process to compel your payment under 30 U.S.C. 1719(k).

(b) If the Department uses judicial process, or if you appeal to a Court under § 241.74 and lose, the Court shall have jurisdiction to award the amount assessed plus interest assessed from the date of the expiration of the 90-day period referred to in § 241.74. The amount of any penalty, as finally determined, may be deducted from any sum owing to you by the United States.

Criminal Penalties

§ 241.80 May the United States criminally prosecute me for violations under mineral leases?

If you commit an act for which a civil penalty is provided at 30 U.S.C. 1719(d) and § 241.60(b), the United States may assess criminal penalties as provided at 30 U.S.C. 1720, in addition to any authority for prosecution under other statutes.

8. The heading of part 242 is revised and subparts A through D are added to part 242 to read as follows.

PART 242—ORDERS

Subpart A—General Provisions

Subpart B—Orders

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

Subpart A—General Provisions

§ 242.1 What is the purpose of this part?

This part explains how the Minerals Management Service (MMS) or delegated States will issue orders and notices of orders, and serve official correspondence, and how the recipient of an order may appeal that order, and exhaust administrative remedies.

§ 242.2 What leases are subject to this part?

This part applies to all Federal mineral leases onshore and on the Outer Continental Shelf (OCS), and to all federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands.

§ 242.3 What definitions apply to this part?

Delegated State means a State to which MMS has delegated authority to perform royalty management functions pursuant to an agreement or agreements under regulations at 30 CFR part 227.

Demand means an order to pay issued under this part.

Designee means the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf.

Indian lessor means an Indian tribe or individual Indian mineral owner with a beneficial interest in a property that is subject to a lease issued or administered by the Secretary on behalf of the tribe or individual Indian mineral owner.

Lessee means any person to whom the United States, or the United States on behalf of an Indian tribe or individual Indian mineral owner, issues a lease subject to this part, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this part have been assigned.

Obligation means a lessee's, designee's or payor's duty to:

(1) Deliver oil or gas royalty in kind; or

(2) Make a lease-related payment, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, interest, penalty, civil penalty, or assessment.

Payor means any person who has been assigned or has assumed the responsibility to report and pay royalties on its own behalf, or on behalf of another person for:

(1) Federal oil and gas leases for production before September 1, 1996;

(2) Federal mineral leases other than oil and gas leases; or

(3) Leases on Indian lands subject to this part.

Reporter means a person who submits reports for leases subject to this part regardless of whether that person has payment responsibility.

Subpart B—Orders

§ 242.100 What is the purpose of this subpart?

This subpart explains how MMS or delegated States issue orders and notices to lessees, designees, payors, reporters, and any other persons concerning the following functions related to leases subject to this part:

(a) Reporting production;

(b) Reporting, computing, and paying royalties;

(c) Reporting, computing, and making other payments; and

(d) Providing documents and other information.

§ 242.101 Who may issue orders?

(a) The Assistant Secretary for Land and Minerals Management, the MMS Director, or other officials to whom the MMS Director delegates authority, may issue orders concerning reporting of production and reporting and paying royalties and other payments due under leases subject to this part.

(b) For States to whom MMS has delegated the authority to issue demands, orders and notices under 30 CFR part 227:

(1) The highest delegated State official having ultimate authority over the collection of royalties, or other State officials to whom that authority has been delegated, may issue demands, orders and notices (other than notices to perform a restructured accounting), concerning reporting and paying royalties and other payments due under any lease for which the State has delegated authority; and

(2) Only the highest delegated State official having ultimate authority over royalty collection may issue orders to perform a restructured accounting.

§ 242.102 What may MMS, tribes, or delegated States do before issuing an order?

Before issuing an order under this subpart, MMS, a tribe, or a delegated State may send you a Preliminary Determination Letter. MMS, the tribe, or the delegated State may send you this letter if it believes that you have not properly:

(a) Provided information related to your lease; or

(b) Reported or paid royalties or other payments due under your lease.

§ 242.103 What does a Preliminary Determination Letter contain?

A Preliminary Determination Letter:

(a) Does not have mandatory or ordering language;

(b) Is not appealable under 43 CFR part 4, subpart J;

(c) Will include:

(1) A description of the scope and conduct of the audit, review, or investigation that led to the letter;

(2) The factual findings and the legal or policy basis for the preliminary determination; and

(3) Instructions on how to respond to the letter to attempt to resolve informally any disagreement you may have with the preliminary determination.

§ 242.104 What is an order?

(a) An order is any document that the MMS Director, MMS RMP, or a delegated State issues that contains mandatory or ordering language that requires the recipient to do any of the following for any lease subject to this subpart: report, compute, or pay royalties or other obligations, or report production, or provide documents or other information.

(b) Orders include but are not limited to the following:

(1) A demand or order to pay which—

(i) Asserts a specific, definite, and quantified amount or obligation claimed to be due; and

(ii) For production from Federal oil and gas leases after September 1, 1996,

specifically identifies the obligation by lease(s), production month(s) and monetary amount of such obligation claimed to be due and ordered to be paid, as well as the reason or reasons such obligation is claimed to be due, but such term does not include any other communication or action by or on behalf of MMS or a delegated State;

(2) Orders to perform restructured accounting that MMS or a delegated State issues to a lessee, designee, or payor when MMS or a delegated State determines that the lessee, designee or payor should recalculate amounts due on an obligation based upon a finding that the lessee, designee or payor has made identified underpayments or overpayments as demonstrated by repeated, systemic reporting errors for a significant number of leases or for a single lease for a significant number of reporting months with the same type of error which constitutes a pattern of violations likely to result in either significant underpayments or overpayments. A person's admission that it has not complied with lease terms, statutes or regulations regarding the reporting and payment of royalties *per se* constitutes a pattern of violations;

(3) Orders to file a report related to any reporting, royalty, or other lease requirement under 30 CFR parts 210, 216, 218, 220, and 250; and

(4) Orders to provide documents or information.

(i) Orders to perform a restructured accounting are not orders to provide documents or information.

(ii) An order to provide documents or information issued under this part by the MMS Associate Director for Royalty Management, or by a person to whom the Associate Director delegates the authority to issue such orders that are final for the Department, is final for the Department and is not appealable under 43 CFR part 4, subpart J.

(c) Orders do not include:

(1) Non-binding requests, information, and guidance, such as:

(i) Preliminary Determination Letters issued under § 242.102;

(ii) Advice or guidance on how to report or pay, including valuation determinations, unless they contain mandatory or ordering language; and

(iii) Policy determinations;

(2) Subpoenas; and

(3) Orders to pay that MMS issues to refiners or other parties involved in disposition of royalty taken in kind.

§ 242.105 What does an order contain?

(a) An order must include:

(1) A description of the audit, review, or investigation that results in the order;

(2) The factual findings and the legal or policy basis for the order;

(3) Instructions on how to comply with the order;

(4) Instructions on how to appeal the order; and

(5) A list specifying:

(i) Lessees who receive notice under § 242.106(b);

(ii) Representatives of any Indian lessors affected by the order; and

(iii) Relevant MMS offices, the Office of the Solicitor, delegated State or tribal offices, and representatives of States concerned.

(b) An order may include references to the Preliminary Determination Letter issued under § 242.102 and any responses to that letter.

(c) An order to perform a restructured accounting under § 242.104(b)(2) may include an estimate of additional royalties due which MMS or a delegated State may adjust based on new information. If MMS or the delegated State adjusts the estimate, it will send written notice to the recipient of the order.

§ 242.106 How will MMS and delegated States serve orders?

(a) MMS and delegated States will serve orders under § 242.303 to the address that you provide under § 242.304.

(b) If MMS or a delegated State serves an order to a designee, as defined in 30 U.S.C. 1701(23), MMS or the delegated State will notify the designee's lessee(s). This notification will be in the form of a Notice of Order that:

(1) Tells the lessee that MMS or the delegated State has issued an order to the lessee's designee;

(2) Includes information about the designee who received the order; and

(3) Is served at the same time and in the same way the order was served.

(c) If a lessee does not designate a designee in writing as required under 30 CFR 218.52, then MMS or a delegated State will serve the order on the person currently making royalty or other payments on the lessee's behalf. In these cases:

(1) MMS or the delegated State is not required to serve the lessee with the Notice of Order required under paragraph (b) of this section; and

(2) The lessee remains liable for any royalty or other payments due under the order, regardless of the fact that MMS or the delegated State did not serve the lessee with a Notice of Order under paragraph (c)(1) of this section.

Subpart C—Requests from Indian Lessors for MMS to Issue an Order

§ 242.200 What is the purpose of this subpart?

This subpart explains how Indian lessors may formally request that MMS issue an order to persons concerning the reporting of production and the reporting and payment of royalties and other payments due under their leases.

§ 242.201 How can an Indian lessor request that MMS issue an order?

(a) If you are an Indian lessor, you may request in writing that MMS issue an order to a lessee, payor or reporter concerning the reporting and payment of royalties and other payments due under any of your leases if you believe that royalties or other lease payments have been underpaid, or that reports are inaccurate.

(b) Your request must:

(1) Specifically state why you believe that royalties or other lease payments have been underpaid, or that reports are inaccurate;

(2) Include evidence, including documents, that you may have that supports your belief that royalties or other lease payments have been underpaid, or that reports are inaccurate;

(3) Include your name, address, the affected lease number(s), and any other information you may have that will help MMS to investigate your request, including the name and address of the lessee, payor, or reporter for the lease(s).

(c) If you are a tribe with a cooperative agreement under § 202 of FOGRMA, send your request to the office designated in your contract.

(d) Other tribes and individual Indian mineral owners must submit their requests to the Office of Indian Royalty Assistance.

(1) You must mail your request to the: Minerals Management Service, Royalty Management Program, Office of Indian Royalty Assistance, MS 3010, PO Box 25165, Denver CO 80225–0165; or

(2) You must deliver your request in person at one of the following offices:

(i) Minerals Management Service, Royalty Management Program, Office of Indian Royalty Assistance, Building 85, Denver Federal Center, Kipling Street and Sixth Avenue, Lakewood, Colorado 80225, (303) 231–3410;

(ii) Minerals Management Service, Royalty Management Program, Oklahoma Indian Royalty Assistance, 4013 NW Expressway, Suite 230, Oklahoma City, OK 73116, (405) 879–6050; or (iii) Department of the Interior, MMS, BIA, and BLM Services, Farmington Indian Minerals Office,

1235 LaPlata Highway, Farmington, NM 87401, (505) 599–8960.

§ 242.202 What will MMS do after it receives my request?

When MMS receives your request, it will:

(a) Investigate your belief that royalties or other lease payments have been underpaid, or that reports are inaccurate; and

(b) Determine whether royalties or other lease payments have been underpaid, or whether reports are inaccurate.

(1) If MMS determines that royalties or other lease payments have been underpaid, or that reports are inaccurate, MMS will issue an appropriate order.

(2) If MMS determines that royalties or other lease payments have not been underpaid, or that reports are not inaccurate as you allege in your request, MMS will deny your request and will not issue an order.

§ 242.203 How will MMS notify me of its decision on my request that it issue an order?

(a) If MMS grants your request, it will notify you in writing of any order that it issues and will give you a copy of the order.

(b) If MMS denies all or part of your request, MMS will explain why in a notice it will issue to you. The notice also will tell you about your appeal rights under 43 CFR part 4, subpart J.

§ 242.204 May I appeal MMS's decision to deny my request to issue an order?

You may appeal MMS's decision to deny your request to issue an order under 43 CFR part 4, subpart J. You must include with your appeal a copy of your request and the notification MMS gave you under § 242.203(b).

Subpart D—Appeals and Service

§ 242.300 What is the purpose of this subpart?

This subpart explains how the recipient of an order may appeal that order, exhaust administrative remedies, and how MMS or delegated States will serve official correspondence.

§ 242.301 How do I appeal an order?

If you receive an order, you may appeal that order under 43 CFR part 4, subpart J.

§ 242.302 How do I exhaust administrative remedies?

If you receive an order, you must appeal that order to the Interior Board of Land Appeals (IBLA) to exhaust administrative remedies (43 CFR part 4, subpart J) unless the Assistant Secretary for Land and Minerals Management or IBLA makes the order immediately effective under 43 CFR part 4, notwithstanding an appeal.

§ 242.303 How will MMS and delegated States serve official correspondence?

(a) MMS and delegated States will serve official correspondence using a method that provides for receipt confirming delivery, such as: certified mail, overnight delivery service, or personal service.

(b) For purposes of this subpart, official correspondence includes all orders that are appealable under 30 CFR part 242.

§ 242.304 Who is the addressee of record?

The addressee of record for each type of official correspondence is shown in the following table:

For correspondence about:	The addressee of record is:	And:
(a) A refiner or other party involved in disposition of Federal royalty taken in kind.	The position title, department name and address, or individual name and address in the executed royalty sale contract; or a different position title, department name and address, or individual name and address that the refiner or other party under the executed royalty sale contract identifies in writing for billing purposes.	The refiner or other party must notify MMS in writing of all addressee changes.
(b) Any person required to report energy and mineral resources removed from Federal and Indian leases to the RMP Production Accounting and Auditing System.	The most recent position title, department name and address, or individual name and address that RMP has in its records for the reporter/payor.	The reporter/ payor must notify RMP, in writing, of any addressee changes.
(c) Onshore Federal leases	The current lessee	The lessee must notify BLM of any addressee changes.
(d) Indian leases	The current lessee	The lessee must notify BIA of any addressee changes.
(e) Offshore leases	The current lessee	The lessee must notify OMM of any addressee changes.
(f) Reviews and audits of lessee, designee, reporter or payor records.	The position title, department name and address, or individual name and address the lessee, designee, reporter or payor identifies in writing at the initiation of the audit; or the most recent addressee that the lessee, designee, reporter or payor specified in writing.	The lessee, designee, reporter or payor must notify MMS of any addressee changes.
(g) Reporting on the ''Report of Sales and Royalty Remittance'' (Form MMS–2014).	The most recent position title, department name and address, or individual name and address that the lessee, designee, reporter or payor identifies in writing.	The lessee, designee, reporter or payor is responsible for notifying RMP in writing of any addressee changes.
(h) Remittances regarding rental and bonuses from nonproducing Federal leases.	The most recent position title, department name and address, or individual name and address maintained in RMP records.	The lessee, designee, reporter or payor is responsible for notifying RMP in writing of any addressee changes.

For correspondence about:	The addressee of record is:	And:
(i) Orders, demands, invoices, or decisions, and other actions identified with lessees, designees, reporters or payors reporting to the RMP Auditing and Financial System not identified in paragraphs (a) through (h) of this section.	The position title, department name and address or individual name and address for the lessee, designee, reporter or payor identified on the most recent Payor Confirmation Report (Report No. ARR 290R) of a Payor Information Form (PIF) (Form MMS–4025 or Form MMS–4030) that RMP returned to the lessee, designee, reporter or payor.	See 30 CFR 210.51.

(j) If official correspondence relates to more than one category identified in paragraphs (a) through (i) of this section, then MMS or the delegated State may serve the correspondence on any one category of affected party.

§ 242.305 When is official correspondence considered served?

(a) Except as provided in paragraph (b) of this section, official correspondence is considered served on the date that it is received at the address of record under § 242.304. A receipt from any person at the address of record is evidence that the correspondence was received. If official correspondence is served by more than one method, the date of service is the earliest date it is received by a method authorized under § 242.303(a).

(b) If MMS or a delegated State cannot deliver the official correspondence after reasonable effort to the addressee of record under § 242.304, official correspondence is deemed to have been constructively served 7 days after the date that MMS or a delegated State mailed the document. This provision covers such situations as nondelivery because:

(1) The addressee has moved without providing a forwarding address in writing to MMS as required under § 242.304;

(2) The forwarding order expired;

(3) Delivery was expressly refused; or

(4) The official correspondence was unclaimed and U.S. Postal Service authorities verify MMS's attempt to deliver.

9. Part 243 is revised to read as follows:

PART 243—SUSPENSIONS PENDING APPEAL AND BONDING—ROYALTY MANAGEMENT PROGRAM

Subpart A—General Provisions

Sec.

Subpart B—Bonding Requirements

Subpart C—Financial Solvency Requirements

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

Subpart A—General Provisions

§ 243.1 What is the purpose of this part?

This part explains how a lessee or recipient of an order may suspend compliance with an order that the lessee, its designee, or the recipient of an order has appealed under 43 CFR part 4, subpart J, or 30 CFR part 208, and when a bond or other surety must be submitted or a party may demonstrate financial solvency.

§ 243.2 What leases are subject to this part?

This part applies to all Federal mineral leases onshore and on the Outer Continental Shelf (OCS), and to all federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands.

§ 243.3 What definitions apply to this part?

Assessment means any fee or charge levied or imposed by the Secretary or a delegated State other than:

(1) The principal amount of any royalty, minimum royalty, rental, bonus, net profit share or proceed of sale;

(2) Any interest; or

(3) Any civil or criminal penalty.

Designee means the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf.

Lessee means any person to whom the United States, or the United States on behalf of an Indian tribe or individual Indian mineral owner, issues a lease subject to this subpart, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this subpart has been assigned.

MMS bond-approving officer means the Associate Director for Royalty Management or an official to whom the Associate Director delegates that responsibility.

MMS-specified surety instrument means an MMS-specified administrative appeal bond, an MMS-specified irrevocable letter of credit, a Treasury book-entry bond or note, or a financial institution book-entry certificate of deposit.

Notice of order means the notice under 30 CFR part 242 that MMS or a delegated State provides to a lessee stating that MMS or the delegated State has issued an order to the lessee's designee.

Order means an order to pay a monetary obligation appealable under 43 CFR part 4, subpart J, or 30 CFR part 208.

Person means any individual, firm, corporation, association, partnership, consortium, or joint venture.

Self-bond means an MMS-approved demonstration of financial solvency under this part.

§ 243.4 Who must post a bond or other surety instrument or demonstrate financial solvency under this part to suspend compliance with an order?

(a) If you appeal under 43 CFR part 4, subpart J or 30 CFR part 208, an order that requires you to make a payment, and you want to suspend compliance with that order, you must post a bond or other surety instrument or demonstrate financial solvency under this part, except as provided in paragraphs (b) and (c) of this section.

(b) You need not meet the requirements of paragraph (a) of this section if the order is an assessment.

(c) You need not meet the requirements of paragraph (a) of this section if another person agrees to fulfill these requirements on your behalf under § 243.5.

§ 243.5 May another person post a bond or other surety instrument or demonstrate financial solvency on my behalf?

Any other person, including a designee, payor, or affiliate, may post a bond or other surety instrument or demonstrate their financial solvency under this part on behalf of an appellant required to post a bond or other surety instrument under § 243.4(a).

§ 243.6 When must I or another person meet the bonding or financial solvency requirements under this part?

If you must meet the bonding or financial solvency requirements under § 243.4, or if another person is meeting your bonding or financial solvency requirements, then you or the other person must post a bond or other surety instrument or demonstrate financial solvency within 60 days of your receipt of the order or the Notice of Order.

§ 243.7 What must a person do when posting a bond or other surety instrument or demonstrating financial solvency on behalf of an appellant?

If you are another person assuming an appellant's responsibility to post a bond or other surety instrument or demonstrating financial solvency under § 243.5, you:

(a) Must notify MMS in writing at the address specified in § 243.200(a) that you are assuming the appellant's responsibility under this part;

(b) May not assert that you are not otherwise liable for royalties or other payments under 30 U.S.C. 1712(a), or any other theory, as a defense if MMS calls your bond or requires you to pay based on your demonstration of financial solvency; and

(c) May end your voluntarily-assumed responsibility for either posting a bond or other surety instrument under this part on behalf of the appellant only after the appellant either pays or posts a bond or other surety instrument or demonstrates financial solvency under this part.

§ 243.8 When will MMS suspend my obligation to comply with an order?

(a) *Federal leases.* For orders appealed under 43 CFR part 4, subpart J, regarding the payment and reporting of royalties and other payments due from Federal mineral leases onshore and on the OCS:

(1) If the amount under appeal is less than $10,000 or does not require payment of a specified amount, MMS will suspend your obligation to comply with the order. MMS will use the lease surety posted with the Bureau of Land Management for onshore leases, and MMS for OCS leases, as collateral for the obligation;

(2) If the amount under appeal is $10,000 or more, MMS will suspend your obligation to comply with that order if you:

(i) Submit an MMS-specified surety instrument under subpart B within a time period MMS prescribes; or

(ii) Demonstrate financial solvency under subpart C of this part.

(3) MMS may inform you that it will not suspend your obligation to comply with the order because suspension would harm the interests of the United States.

(b) *Indian leases.* For orders appealed under 43 CFR part 4, subpart J, regarding the payment and reporting of royalties and other payments due from Indian mineral leases subject to this part:

(1) If the amount under appeal is less than $1,000 or does not require payment, MMS will suspend your obligation to comply with the order. MMS will use the lease surety posted with the Bureau of Indian Affairs as collateral for the obligation;

(2) If the amount under appeal is $1,000 or more, MMS will suspend your obligation to comply with that order if you submit an MMS-specified surety instrument under subpart B within a time period MMS prescribes.

(3) MMS may inform you that it will not suspend your obligation to comply with the order because suspension would harm the interests of the United States or the Indian lessor.

(c) Nothing in this part prohibits you from paying any demanded amount or complying with any other requirement pending appeal. However, voluntarily paying any demanded amount or otherwise complying with any other requirement when suspension of an order is otherwise available under these rules does not create judicially reviewable final agency action under 5 U.S.C. 704.

§ 243.9 Will MMS continue to suspend my obligation to comply with an order if I appeal to a Federal court?

(a) If you seek judicial review of an IBLA decision or other final action of the Department of the Interior regarding an order, MMS will suspend your obligation to comply with that order pending judicial review if you continue to meet the requirements of this part.

(b) Notwithstanding the provisions of paragraph (a) of this section, MMS may decide that it will not suspend your obligation to comply with an order. The Department will notify you in writing of that decision and state the reasons for that decision.

§ 243.10 When will MMS initiate collection actions against a bond or other surety instrument or the person demonstrating financial solvency?

If you maintain a bond or an MMS-specified surety instrument or have demonstrated financial solvency, or if another person maintains a bond or other surety instrument or demonstrates financial solvency on your behalf, for an appeal of an order under this part, MMS may initiate collection actions against the bond or other surety instrument or the person demonstrating financial solvency:

(a) If the IBLA, the Director of the Office of Hearings and Appeals, an Assistant Secretary, or the Secretary decides your appeal adversely to you, and you do not pay the amount due or pursue judicial review within 30 days of the decision;

(b) If a court of competent jurisdiction issues a final non-appealable decision adverse to you, and you do not pay the amount due within 30 days of the decision;

(c) If you do not increase the amount of your bond or other surety instrument as required under § 243.101(b), or otherwise fail to maintain an adequate surety instrument in effect, and you do not pay the amount due under the order within 30 days of notice from MMS under § 243.101(b);

(d) If the MMS bond-approving officer determines that you are no longer financially solvent under § 243.202(c), and you do not pay the order amount or post a bond or other MMS-specified surety instrument under subpart B within 30 days of that determination.

§ 243.11 May I appeal the MMS bond-approving officer's determination of my surety amount or financial solvency?

Any decision on your surety amount under subpart B or your financial solvency under subpart C is final and is not subject to appeal under 43 CFR part 4, subpart J.

§ 243.12 May I substitute financial solvency for a bond posted before the effective date of this rule?

If you appealed an order before the effective date of this rule and you submitted an MMS-specified surety instrument to suspend compliance with that order, you may replace the surety with a demonstration of financial solvency under this part when the surety instrument is due for renewal.

Subpart B—Bonding Requirements

§ 243.100 What standards must my MMS-specified surety instrument meet?

(a) An MMS-specified surety instrument must be in a form specified in MMS instructions. MMS will provide you with written information and standard forms for MMS-specified surety instrument requirements.

(b) MMS will use a bank-rating service to determine whether a financial institution has an acceptable rating to provide a surety instrument adequate to indemnify the lessor from loss or damage.

(1) Administrative appeal bonds must be issued by a qualified surety company which the Department of the Treasury has approved.

(2) Irrevocable letters of credit or certificates of deposit must be from a financial institution acceptable to MMS with a minimum 1-year period of coverage subject to automatic renewal up to 5 years.

§ 243.101 How will MMS determine my bond or other surety instrument amount?

(a) The MMS bond-approving officer may approve your surety if he or she determines that the amount is adequate to guarantee payment. The amount of your surety may vary depending on the form of the surety and how long the surety is effective.

(1) The amount of the MMS-specified surety instrument must include the principal amount owed under the order plus any accrued interest MMS determines is owed plus projected interest for a 1-year period.

(2) Treasury book-entry bonds or notes amounts must be equal to at least 120 percent of the required surety amount.

(b) If your appeal is not decided within 1 year from the date your appeal is filed, you must increase the surety amount to cover additional estimated interest for another 1-year period annually on the date your appeal was filed. MMS will determine the additional estimated interest and notify you of the amount so you can amend your surety instrument.

(c) You may submit a single surety instrument that covers multiple appeals of orders, and you may add new amounts under appeal or remove amounts that have been adjudicated in your favor or that you have paid if you amend the single surety instrument annually on the date you filed your first appeal. However, you must submit a separate surety instrument for new amounts under appeal until those new appeals are covered by the single surety instrument during the annual amendment.

Subpart C—Financial Solvency Requirements

§ 243.200 How do I demonstrate financial solvency?

(a) To demonstrate financial solvency under this part, you must submit an audited consolidated balance sheet, and up to 3 years of tax returns if requested by the MMS bond-approving officer, to the Minerals Management Service, Debt Collection Section using:

(1) The U.S. Postal Service or private delivery at P.O. Box 5760, MS 3031, Denver, CO 80217–5760; or

(2) Courier or overnight delivery at MS 3031, Denver Federal Center, Bldg. 85, Room A–212, Denver, CO 80225–0165.

(b) You must submit an audited consolidated balance sheet annually, and additional annual tax returns if requested, on the date MMS first determined that you demonstrated financial solvency as long as you have active appeals, or whenever MMS requests.

(c) If you demonstrate financial solvency in the current calendar year, you are not required to redemonstrate financial solvency for new appeals of orders during that calendar year unless you file for protection under any provision of the U.S. Bankruptcy Code (Title 11, U.S.C.), or MMS notifies you that you must redemonstrate financial solvency.

§ 243.201 How will MMS determine if I am financially solvent?

(a) The MMS bond-approving officer will determine your financial solvency by examining your total net worth, including, as appropriate, the net worth of your affiliated entities.

(b) If your net worth, minus the amount MMS would require as surety under subpart B for all orders you have appealed is greater than $300 million, you are presumptively deemed financially solvent, and MMS will not require you to post a bond or other surety instrument.

(c) If your net worth, minus the amount MMS would require as surety under subpart B for all orders you have appealed is less than $300 million, you must submit the following to the MMS Debt Collection Section by one of the methods in § 243.200(a):

(1) A written request asking MMS to consult a business-information, or credit-reporting service or program to determine your financial solvency; and

(2) A nonrefundable $50 processing fee.

(i) You must pay the processing fee to by Electronic Funds Transfer using the Federal Reserve Communications System (FRCS) link to the Financial Service Fedwire Deposit System unless you request and MMS authorizes payment by check or an alternative method before the date the processing fee is due. Include with the payment:

(A) Your taxpayer identification number;

(B) Your payor identification number, if applicable; and

(C) The Interior Board of Land Appeals or Interior Board of Contract Appeals Docket Number for the order you appealed, the number of the order, the bill number, or any other applicable identification of the order that you appealed.

(ii) You must submit the fee with your request under paragraph (c)(1) of this section, and then annually on the date MMS first determined that you demonstrated financial solvency, as long as you are not able to demonstrate financial solvency under paragraph (a) of this section and you have active appeals.

(d) If you request that MMS consult a business-information or credit-reporting service or program under paragraph (c) of this section:

(1) MMS will use criteria similar to that which a potential creditor would use to lend an amount equal to the bond or other surety instrument MMS would require under subpart B;

(2) For MMS to consider you financially solvent, the business-information or credit-reporting service or program must demonstrate your degree of risk as low to moderate:

(i) If the MMS bond-approving officer determines that the business-information or credit-reporting service or program information demonstrates your financial solvency to MMS's satisfaction, the MMS bond-approving officer will not require you to post a

bond or other surety instrument under subpart B;

(ii) If the MMS bond-approving officer determines that the business-information or credit-reporting service or program information does not demonstrate your financial solvency to MMS's satisfaction, the MMS bond-approving officer will require you to post a bond or other surety instrument under subpart B or pay the obligation.

§ 243.202 When will MMS monitor my financial solvency?

(a) If you are presumptively financially solvent under § 243.201(b), MMS will determine your net worth as described under §§ 243.201(b) and (c) to evaluate your financial solvency at least annually on the date MMS first determined that you demonstrated financial solvency as long as you have active appeals and each time you appeal a new order.

(b) If you requested that MMS consult a business-information or credit-reporting service or program under § 243.201(c), MMS will consult a service or program annually as long as you have active appeals and each time you appeal a new order.

(c) If the MMS bond-approving officer determines that you are no longer financially solvent, you must post a bond or other MMS-specified surety instrument under subpart B.

PART 250—OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

10. The authority citation for part 250 continues to read as follows:

Authority: 43 U.S.C. 1331, *et seq.*

10a. Section 250.1409 is revised to read as follows:

§ 250.1409 What are my appeal rights?

(a) When you receive the Reviewing Officer's final decision, you have 60 days to either pay the penalty or file an appeal in accordance with 30 CFR part 290.

(b) If you file an appeal, you must submit to the Regional Adjudication Office in the Region where the penalty was assessed, a surety bond in the amount of the penalty. Instructions on submitting the surety bond will be included in the Reviewing Officer's final decision.

(1) In the alternative, you may notify the Regional Adjudication Office in the Region where the penalty was assessed, that you want your lease-specific/areawide bond on file to be used to cover the penalty amount.

(2) The Regional Director may determine that additional security (*i.e.*, security in excess of your lease-specific/areawide bond) is necessary to ensure sufficient coverage during an appeal. If additional security is required, the Regional Director will require that the appellant post the supplemental bond with the regional office in a manner consistent with the regulations established for supplemental bonding in § 256.53(d) through (f). If the Regional Director determines the specific appeal should be covered by a lease-specific abandonment account then the appellant will establish an account consistent with the rules and regulations established in § 256.56.

(c) If you do not either pay the penalty or file a timely appeal, MMS will take one or more of the following actions:

(1) MMS will collect the amount you were assessed, plus interest, late payment charges, and other fees as provided by law, from the date of assessment until the date MMS receives payment;

(2) MMS may initiate additional enforcement, including, if appropriate, cancellation of the lease, right-of-way, license, permit, or approval, or the forfeiture of a bond under this part; or

(3) MMS may bar you from doing further business with the Federal Government according to Executive Orders 12549 and 12689, and § 2455 of the Federal Acquisition Streamlining Act of 1994, 31 U.S.C. 6101. The Department of the Interior's regulations implementing these authorities are found at 43 CFR part 62, subpart D.

11. Part 290 of subchapter C is transferred to subchapter B and is revised to read as follows:

PART 290—OFFSHORE MINERALS MANAGEMENT APPEAL PROCEDURES

Sec.

Authority: 5 U.S.C. 301 *et seq.*; 43 U.S.C. 1331 *et seq.*

§ 290.1 What is the purpose of this part?

The purpose of this part is to explain the procedures for appeals of Minerals Management Service (MMS) Offshore Minerals Management (OMM) decisions and orders issued under subchapter B.

§ 290.2 Who may appeal?

If you are adversely affected by an OMM official's final decision or order issued under 30 CFR subchapter B, you may appeal that decision or order to the Interior Board of Land Appeals (IBLA). Your appeal must conform with the procedures found in this part and 43 CFR part 4. A request for reconsideration of an MMS decision concerning a lease bid, authorized in 30 CFR 256.47(e)(3) and 281.21(a)(1), or a deep water field determination, authorized in 30 CFR 203.79(a) and 30 CFR 260.110(d)(2), is not subject to the procedures found in this part.

§ 290.3 What is the time limit for filing an appeal?

You must file your appeal within 60 days after you receive OMM's final decision or order. The 60-day time period supersedes the time period provided in 43 CFR 4.411(a). A decision or order is received on the date you sign a receipt confirming delivery or, if there is no receipt, the date otherwise documented.

§ 290.4 How do I file an appeal?

For your appeal to be filed, MMS must receive all of the following within 60 days after you receive the decision or order:

(a) A written Notice of Appeal together with a copy of the decision or order you are appealing in the office of the OMM officer that issued the decision or order. You cannot extend the 60-day period for that office to receive your Notice of Appeal; and

(b) A nonrefundable processing fee of $150.00 paid under § 290.5. You cannot extend the 60-day period for payment of the processing fee.

§ 290.5 How do I pay my processing fee?

(a) You must pay the processing fee to the MMS DRD by Electronic Funds Transfer using the Federal Reserve Communications System (FRCS) link to the Financial Service Fedwire Deposit System unless you request and MMS authorizes payment by check or an alternative method before the date the processing fee is due. Include with the payment:

(1) Your taxpayer identification number; and

(2) The number of the decision or order, or any other applicable identification of the decision or order that you are appealing.

(b) MMS may grant a fee waiver or fee reduction in extraordinary circumstances.

(c) To request a waiver or reduction you must:

(1) Send a written request to the MMS DRD when you send your Notice of Appeal.

(2) Demonstrate in your request that you are unable to pay the fee or that payment of the fee would impose an undue hardship upon you.

§ 290.6 How will MMS notify me of its action on my request?

The MMS DRD will send you a written decision granting or denying your request.

(a) If MMS grants your request for a fee reduction, you must pay the reduced processing fee within 30 days of your receipt of the decision to reduce your fee.

(b) If MMS denies your request, that decision is final for the Department. You may not appeal this denial, and you must pay the processing fee within 30 days of your receipt of the decision.

§ 290.7 What is the filing date for my appeal?

For purposes of this part, the date your appeal is filed is the date the MMS DRD receives the last of all the items that you submit under § 290.4.

§ 290.8 Can I obtain an extension for filing documents?

(a) You cannot obtain an extension of time to file the Notice of Appeal. See 43 CFR 4.411(c).

(b) You may ask for additional time to submit your statement of reasons or other supporting documents by following the procedures in 43 CFR 4.22(f).

§ 290.9 Are informal resolutions permitted?

You may seek informal resolution with the issuing officer's next level supervisor during the 60-day period established in § 290.3.

§ 290.10 Do I have to comply with the decision or order while my appeal is pending?

(a) The decision or order is effective during the 60-day period for filing an appeal under § 290.3 unless:

(1) OMM notifies you that the decision or order, or some portion of it, is suspended during this period because there is no likelihood of immediate and irreparable harm to human life, the environment, any mineral deposit, or property; or (2) The appellant posts a surety bond under 30 CFR 250.1409 pending the appeal challenging an order to pay a civil penalty.

(b) This section supersedes 43 CFR 4.21 (a).

(c) After you file your appeal, IBLA may grant a stay of a decision or order under 43 CFR 4.21 (b); however, a decision or order remains in effect until IBLA grants your request for a stay of the decision or order under appeal.

§ 290.11 How do I exhaust my administrative remedies?

(a) If you receive a decision or order issued under this subchapter, to exhaust administrative remedies, you must appeal that decision or order to IBLA under 43 CFR part 4 subpart E;

(b) This section does not apply if the Assistant Secretary for Land and Minerals Management or the IBLA makes a decision or order immediately effective notwithstanding an appeal.

SUBCHAPTER C [Removed]

12. Subchapter C is removed.

[FR Doc. 99–37 Filed 1–11–99; 8:45 am]

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Federal Register

Tuesday
January 12, 1999

Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Part 39

Airworthiness Directives: Boeing Model 727 Series Airplanes Modified in Accordance With Supplemental Type Certificate SA1767SO, SA1768SO, SA7447SW, SA1368SO, SA1797SO, SA1798SO, ST00015AT, SA1444SO, SA1509SO, SA1543SO, SA1896SO, SA1740SO, or SA1667SO; Final Rules

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–09–AD; Amendment 39–10961; AD 98–26–18]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 727 Series Airplanes Modified in Accordance With Supplemental Type Certificate SA1767SO, SA1768SO, or SA7447SW

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; technical public meeting.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration, that requires limiting the payload on the main cargo deck by revising the Limitations Sections of all Airplane Flight Manuals (AFM), AFM Supplements, and Airplane Weight and Balance Supplements for these airplanes. This amendment also provides for the submission of data and analyses that substantiate the strength of the main cargo deck, or modification of the main cargo deck, as optional terminating action for these payload restrictions. This amendment is prompted by the FAA's determination that under certain conditions unreinforced floor structure of the main cargo deck is not strong enough to enable the airplane to safely carry the maximum payload that is currently allowed in this area. The actions specified by this AD are intended to prevent failure of the floor structure, which could lead to loss of the airplane.

DATES: Effective February 16, 1999.

The public meeting will be held January 20, 1999, at 9:00 a.m., in Seattle, Washington. Registration will begin at 8:30 a.m. on the day of the meeting.

ADDRESSES: Information concerning this amendment may be obtained from or examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington, by appointment only between the hours of 8:00 a.m. and 2:00 p.m.

The public meeting will be held at the following location: The Radisson Hotel, 17001 Pacific Highway South, Seattle, Washington 98188; telephone (206) 244–6000.

FOR FURTHER INFORMATION CONTACT: Questions concerning the airworthiness directive should be directed to Paul Sconyers, Associate Manager, Airframe and Propulsion Branch, ACE–117A, FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30349; telephone (770) 703–6076; fax (770) 703–6097.

Requests to present a statement at the public meeting regarding the logistics of the meeting should be directed to Mike Zielinski, Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM–113, 1601 Lind Avenue, SW, Renton, Washington 98055–4056; telephone (425) 227–2279; 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 certain Boeing Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration in accordance with Supplemental Type Certificates (STC's) held by FedEx was published in the **Federal Register** on July 15, 1997 (62 FR 37798). At the same time, the FAA issued three other similar notices of proposed rulemaking (NPRM's) to address airplanes similarly converted in accordance with STC's held by Aeronautical Engineers, Inc., Pemco, and ATAZ (now held by Kitty Hawk Air Cargo). That action proposed to require limiting the payload on the main cargo deck by revising the Limitations Sections of all Airplane Flight Manuals (AFM), AFM Supplements, and Airplane Weight and Balance Supplements for these airplanes. That action also proposed to provide for the submission of data and analyses that substantiate the strength of the main cargo deck, or modification of the main cargo deck, as optional terminating action for these payload restrictions.

On February 4, 1998, in order to obtain additional public participation in these NPRM's, the FAA reopened the comment period for a period of 90 days and scheduled two sets of public meetings, which were held in Seattle, Washington, on February 18 and 19, 1998, and April 1 and 2, 1998. In addition to the comments submitted during the original comment period, the comments that were provided at the public meetings and submitted to the Rules Dockets during the reopened comment period also are discussed below.

Comments

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

The FAA has received comments in response to the four NPRM's discussed previously (i.e., Docket No.'s 97–NM–09–AD, 97–NM–79–AD, 97–NM–80–AD, and 97–NM–81–AD). Some of these comments addressed only one NPRM, while others addressed all four. For example, although the comments submitted by FedEx address only the NPRM applicable to its STC's (i.e., Docket No. 97–NM–09–AD), other commenters referenced FedEx's comments and requested that those comments be considered in the context of the other three NPRM's, as well. Because in most cases the issues raised by the commenters are generally relevant to all four NPRM's, each final rule includes a discussion of all comments received.

Existence of Unsafe Condition

Several commenters disagree with the FAA's finding of an unsafe condition and refer to the following statement in the NPRM's, ''[a] design which does not meet [certification] standards is presumed to be unsafe.'' The commenters contend that, while this statement is ''convenient,'' the FAA is still obliged to issue the AD in accordance with 14 CFR part 39. In accordance with part 39, prior to the issuance of an AD, the FAA must establish that an unsafe condition exists in a product and that this condition is likely to exist in other products of the same type design.

From this comment, the FAA infers that the commenters believe the proposed AD is merely a consequence of non-compliance with Civil Air Regulations (CAR) part 4b, which are the design standards to which the Model 727 was certificated, and that the unsafe condition has not been substantiated. The FAA does not concur. The context of the quoted statement in the NPRM's was an explanation of the FAA's method used in the design review that led to issuance of the NPRM's. Initially, the FAA had identified the potential non-compliance based on observation and review of original certification data. Since, in accordance with the Federal Aviation Act, CAR part 4b standards establish the minimum level of safety, the FAA considered that further evaluation was necessary and appropriate to determine whether this potential non-compliance created an unsafe condition warranting

an AD. As explained in the NPRM's, the FAA determined not only that the design was non-compliant, but that the degree of non-compliance was highly significant, and resulted in substantial negative structural margins of safety. The FAA's analysis addressed the ''up'' load case, which was considered to be the most likely critical load case, in the sense that it was likely to be the load case that would present the most serious negative margins of safety. The analysis verified these negative margins and confirmed the FAA's concerns that serious negative margins may exist for other load cases, as well. The effect of these substantial negative margins is that the likelihood of catastrophic failure of the floor structure is unacceptably high. The FAA's finding of unsafe condition arises from this determination rather than from a finding of non-compliance with CAR part 4b.

Risk From Actual Operations

Several commenters state that the FAA's finding of an unsafe condition in the NPRM's is incorrect because, based on the way the airplanes are actually loaded and operated, the likelihood of encountering conditions specified in CAR part 4b that would exceed the strength of the floor structure is extremely improbable.

The FAA does not concur. The FAA's evaluation was based on the potential for a catastrophic event occurring as a result of an airplane encountering severe gust conditions while transporting containers loaded with maximum allowable payloads. (Unless otherwise stated, throughout the preamble of this AD the FAA uses the term ''container'' to refer to all unit load devices, including pallets.) The fact that operators may transport containers with maximum payloads only for a small percentage of their operations does not diminish the seriousness of the unsafe condition when they do transport such containers. (It should be noted that one commenter stated that its operations with even one container at maximum allowable payload are only a small percentage of its total operations, but also stated that it engages in such operations daily.)

In addition, the FAA disagrees with the commenters' conclusions regarding the probability of catastrophic events. The events that may cause a catastrophic failure occur randomly and, thus, cannot be reliably predicted and avoided for any particular operation. Although the probability of large gusts or excessive maneuvers (as specified in CAR part 4b) is low (approximately once in the lifetime of an airplane for a large gust), because of the large negative margins of safety associated with these unreinforced floor structure designs (discussed in the NPRM's), less severe events (i.e., lower gusts or milder maneuvers) also could result in catastrophic failure. Therefore, because the likelihood of encountering less severe events is significantly greater than the likelihood of encountering the events contemplated by CAR part 4b standards, and because the consequences of such encounters may be catastrophic, the FAA considers that the risk is unacceptable.

During the public meetings, several commenters suggested using analytical methods developed to show compliance with 14 CFR 25.1309 in assessing risks from gust loads. Their position was that if such analysis were performed, it would demonstrate that the unsafe condition addressed by the proposed AD is ''extremely improbable;'' therefore, an AD is unnecessary to address it.

The FAA does not concur. The purpose of section 25.1309 is to require that type certificate applicants demonstrate the robustness of the airplane systems and equipment. Therefore, it is not applicable to the assessment of the seriousness of an unsafe condition associated with identified structural deficiencies. Nevertheless, assuming that it is appropriate, section 25.1309(a) states that the airplane systems, equipment, and installations ''must be designed to ensure that they perform their intended functions under any foreseeable operating condition.'' This means that the airplane must function properly if it is being operated within its approved operating and environmental conditions. As discussed in the NPRM's, the FAA's analysis demonstrates that the affected airplanes, when operated with allowable payload weights and distributions (which is foreseeable), could experience catastrophic failure if they encounter gust conditions that are also foreseeable. Therefore, applying the analytical methods of section 25.1309(a), these STC designs would be found not to comply.

In addition, section 25.1309(b) requires that any system failure condition that would result in a catastrophic event be shown to be extremely improbable, even if the system failure occurred concurrently with environmental conditions that would reduce the capability of the airplane or the ability of the crew to cope with the system failure. Probabilistic analyses are used to demonstrate compliance with section 25.1309(b) by estimating the probability of random system and equipment failures occurring on the airplane. The consequences of failures that are more probable must be shown to be relatively minor; failures with more serious consequences must be shown to have lower probabilities. However, in providing guidance for compliance with this requirement, Advisory Circular (AC) No. 25.1309–1A advises: ''In any system or subsystem, the failure of any single element, component or connection during any one flight * * * should be assumed, regardless of probability. Such single failures should not prevent continued safe flight and landing * * *.''

Applying this analytical method to the circumstances of this AD, if the failure of the floor beam is assumed, the consequences are likely to be catastrophic, preventing continued safe flight and landing. Therefore, under the analytical approaches of either section 25.1309(a) or (b), the operations with understrength floors without limitations is unacceptable.

During the reopened comment period, FedEx submitted a risk assessment from which it concluded that, even assuming the NPRM identified a potential unsafe condition, the probability of occurrence was sufficiently small (i.e., once every 300 years) so that AD action should be postponed until additional testing and analysis has been completed. Other commenters referenced this analysis and supported FedEx's conclusion.

The FAA has evaluated the risk assessment submitted to Rules Docket No. 97–NM–09–AD, and does not concur with the commenters' conclusion. Regarding the general relevance of the kind of risk assessment submitted by the commenter, it should be noted that the probability of the limit gust event has already been considered when establishing the gust intensities specified in CAR section 4b.211(b). CAR part 4b requires that all airplanes be capable of structurally withstanding a gust of the intensities specified therein, as such a gust is expected to occur at some time in the airplane's operating life.

Regarding the specific data presented in the FedEx risk assessment, the FAA does not concur with the assumption that extreme gusts will be encountered by a cargo carrying Boeing Model 727 airplane only once in 5 million flight hours. As its basis for this assumption, the commenter states that ''FAA data indicate that, in approximately 50 million flight-hours of experience among U.S. domestic 727s, there have been five pilot reports of extreme gusts that exceeded federal thresholds for danger.'' The commenter states that this equates to a rate of occurrence of

approximately once every 10 million flights. The commenter also states that due to potential errors, it would be conservative to double this rate to 10 total events, and use an estimate of 1 occurrence per 5 million hours.

The FAA does not concur with the commenter's statement that FAA data show that only five cases of extreme gust have been encountered by the U.S. 727 fleet. Turbulence events must be reported only if they result in detected airplane damage or passenger injuries. During certain gust events, the gust loads encountered in the cockpit are substantially less severe than those encountered in the aft portion of the airplane. Therefore, some large gust encounters may not ''feel'' very severe to the flight crew. As a result, the FAA recognizes that not all severe turbulence events are reported. Further, in the NPRM's, the FAA provided five cases of turbulence as examples, to illustrate that turbulence is a real occurrence, and not merely theoretical. These five examples were obtained from data showing 87 reported severe turbulence events, which resulted in passenger injuries, on the Boeing 727 from 1966 to March 1997. The FAA selected the five reports because the airplane operators had reported the magnitude of the turbulence event after obtaining this information from the flight data recorder. Operators are not required to obtain data regarding the magnitude of the turbulence event, and therefore it is rarely reported.

During the public meeting held on Thursday, February 19, 1998, the FAA explained that these turbulence cases were just examples and had been selected because the reports included information regarding event magnitude. The FAA further explained at that meeting that it was inappropriate to use these data in a probabilistic analysis. The commenter's risk assessment provides no information to change the FAA's views.

A section of the commenter's report states, ''Detailed equations that combine empirical evidence and physical theory estimate how frequently gusts of different magnitudes arise at different altitudes.'' The commenter states that its calculations indicate that gusts with intensities that equal or exceed 50 feet per second are encountered once per 50 million flight hours at 35,000 feet. The report does not provide the equations themselves, does not describe the methodology used to determine the 1 in 50 million flight hours probability value, and does not specifically identify the referenced source data. Therefore, the FAA cannot assess the validity of the commenter's conclusions.

The commenter also refers to graphs contained in a 1988 American Institute of Aeronautics and Astronautics (AIAA) publication by Frederic M. Hoblit that the commenter states indicate even lower encounter rates for gusts during climb and descent. The FAA has examined this publication, and does not concur with the commenter's statements regarding these data. First, the commenter appears to be incorrectly referencing the graphs, which represent continuous turbulence, and not discrete gusts, as provided in CAR 4b. The two types of atmospheric disturbances are different, and to reference these graphs is inappropriate. Secondly, the commenter's risk assessment only addresses gusts ''that exceed the Federal threshold'' (which the FAA infers to mean limit load gusts) in combination with cargo loads with two adjacent containers having a total weight that equals or exceeds 9,600 lbs. This approach is unconservative. As discussed in the NPRM, the cargo floor has a high negative margin of safety, and the risk of structural collapse exists at gust intensities well below the limit gust load when carrying currently allowed payloads above 9,600 lbs. The greater the weight being carried in the container, the lower the gust needed to cause catastrophic failure of the floor. The lower the gust intensity, the more common the gust occurrence becomes.

Based on the foregoing, the FAA has determined that the risk assessment submitted by FedEx does not provide a basis for delaying the final rule.

One group of commenters, identifying themselves as airmen for one of the affected operators, supports issuance of the final rule, as proposed. The commenters state that they do not have procedures to avoid clear air turbulence, and based on their knowledge, if any of them had encountered a similar wind condition to that experienced by a Boeing 747 in January 1998, their airplane would ''come apart, in-flight.''

The FAA concurs that there is no reliable means to forecast or to avoid clear air turbulence. The flight conditions encountered by the referenced 747 could be very hazardous to one of the affected airplanes if encountered while critically loaded with heavy containers.

Change in Applicable Standards

Several commenters state that the NPRM's reflect a radical change in the assumptions that certificate holders are permitted to use to substantiate the main deck floor structure. The FAA does not concur. As discussed below, the FAA's analysis is consistent with the applicable CAR part 4b standards, which became effective in 1953.

''Infinitesimal Probability''

One commenter states that the proposed AD would impose unnecessary costs which would then be passed to its customers, for what the FAA's Director of Aircraft Certification Service has stated is an ''infinitesimal probability of a safety related happening.'' The referenced comment is contained in an article in the April 15, 1997, issue of ''Commercial Aviation Report.''

From this comment, the FAA infers that the commenter believes the reference to ''infinitesimal probability'' belies the need for an AD. The commenter has taken the remark out of context. The actual quote is, ''What is the probability of it [catastrophe] happening in the next month? Infinitesimal.'' This remark was made in response to a question regarding why the FAA was issuing an NPRM rather than an emergency AD. The Director of the Aircraft Certification Service was explaining that, although the FAA had determined that the unsafe condition must be addressed by issuance of an AD, the urgency of the issue was not so great as to preclude the normal legally required process of providing public notice and opportunity to comment.

Accident Data

One commenter states that the fact that no crashes have occurred with the affected airplanes has nothing whatsoever to do with these airplanes being of a safe design. They merely have had the good fortune to have not yet encountered a critical condition. The FAA concurs.

''Erroneous Certification''

One commenter states that it counted on the competence of the FAA when obtaining the affected airplanes, as the cargo modifications were FAA-approved. The commenter further states that the FAA's error in issuing these approvals is going to severely hurt small operators of these airplanes, who are neither culpable nor negligent. While the FAA understands that the impact of this AD may be significant for some operators, the FAA cannot ignore the fact that an unsafe condition exists that requires action to ensure the continued operational safety of the fleet. If the FAA had been aware of these deficiencies at the time of the original STC issuance, the FAA would not have issued the STC's.

One commenter points out that the FAA design review team observed that the original passenger floor beams had

not been structurally reinforced, and that this fact is immediately apparent from the technical drawings associated with the STC. The commenter questions why the FAA has not expressed any concern or noticed these facts earlier.

The applicant for any design approval is responsible for compliance with all applicable FAA regulations. The FAA has the discretion to review or otherwise evaluate the applicant's compliance to the degree the FAA considers appropriate in the interest of safety. The normal certification process allows for the review and approval of data by FAA designees. Consequently, the FAA office responsible for the certification of an airplane or modification to an airplane or an aeronautical appliance may not review all details regarding compliance with the appropriate regulations. Also, the fact that the cargo floor structure was unmodified does not necessarily lead to the conclusion that the floors are structurally deficient. As explained in the NPRM, the understrength floors on certain 747 airplanes converted to freighters caused the FAA to question the adequacy of all STC-converted passenger-to-freighter cargo floor structures. This AD arises from this evaluation.

An FAA/Industry Team

Several commenters request that the FAA establish an industry team comprised of the FAA, STC holders, and operators before issuing an AD to establish the requirements and a corrective action plan to resolve the problems with the STC's in a logical manner. One commenter states that ''too much time has been spent going in different directions to resolve common problems for all STC's,'' and that ''the FAA has not been sufficiently clear in their requirements for the re-design.''

The FAA does not concur that issuance of the AD should be delayed. An unsafe condition has been identified, and the FAA must take action to ensure an acceptable level of safety of the affected fleet of airplanes. The STC holders and operators are certainly free to form an industry team to find common solutions, and the FAA is willing to participate in such efforts. The FAA also does not concur that the requirements for re-design are unclear; as the FAA has stated repeatedly, the standards for evaluating proposed corrective actions are the original certification basis for the airplane, CAR part 4b. Any non-compliance with CAR part 4b would have to be shown to provide an acceptable level of long-term safety.

FAA/Industry Communication

One commenter states that there has been ''virtually no opportunity for technical exchange'' and, therefore, the FAA should delay issuance of the final rule until such an exchange has taken place. The FAA does not concur. Since as early as November 1996, the STC holders have been made aware of the FAA's concerns regarding the cargo floor structure. More specifically, meetings were held with each of the affected STC holders in January 1997 to discuss further details regarding FAA concerns.

On February 14, 1997, the FAA again discussed its concerns with the affected industry and again requested that industry provide the FAA with valid data to address those FAA concerns. Subsequently, over the course of the next four months as the FAA prepared the NPRM's, only one STC holder provided any data relative to the merits of the proposed AD's, and that data did not alleviate the FAA's concerns. In response to the NPRM's first comment period, three of the affected STC holders did not submit technical data and, for reasons discussed below, the data submitted by the fourth STC holder (FedEx) did not alleviate the FAA's concerns. During the reopened comment period, the FAA engaged in further extensive discussion with the affected industry and those discussions continue in the context of on-going efforts to identify necessary actions to address the unsafe condition. Based on this history, the FAA considers that sufficient opportunity for technical exchange has been provided and that further delay is unwarranted and unnecessarily jeopardizes public safety.

Delay Issuance

Two commenters state that additional time is necessary so that the airplanes would be removed from service only once to incorporate all needed corrective actions (i.e., not only for the floors, but also for other problems identified in the NPRM) due to the high cost of incorporating partial solutions to the overall problem. One commenter requests that all problems associated with the STC's be identified, solutions provided, and methods for accomplishment of the solutions be agreed upon prior to the issuance of any AD. The FAA does not concur. In light of the seriousness of the unsafe condition, the FAA has determined that it would first address the strength of the cargo floor structure. All of the remaining issues will be addressed in future rulemaking efforts. Even though this AD addresses only the cargo floor structure, it should not inhibit industry from taking corrective action with regard to the remaining issues. In fact, in order to minimize the inefficiencies identified by the commenter, the FAA is committed to working with industry to identify as expeditiously as possible necessary corrective actions for all of the problems discussed in the NPRM.

The Cargo Airline Association (CAA) requests that the FAA not adopt an AD imposing interim limits. Since the CAA believes that the risk of a catastrophic failure is ''virtually nonexistent,'' and since several potential STC holders with varying solutions to issues raised are in the process of working with FAA, scarce resources should be devoted to ensuring expeditious approval of these proposals.

Another commenter requests that the FAA delay issuance of the final rules until industry solutions are approved [estimating an additional 60 to 90 days for Israel Aircraft Industries (IAI) to complete its analysis, as it has only recently had access to Boeing drawings]. The commenter also states that the FAA rulemaking process has caused industry to make significant progress and aggressively pursue solutions that will likely meet with relatively prompt FAA approvals. The commenter also states that although these approvals will result in a 25 percent reduction in allowable payload, it is willing to operate with that limitation. This commenter, and several other commenters reference the FedEx risk assessment, which purports to demonstrate a low probability of catastrophic failure, as a basis for delaying the final rules.

Another commenter requests 4 to 6 months for completion of certain industry tests and risk analysis, as the 3-month timetable for the reopened comment period was not adequate, due to the highly complex and time-consuming nature of testing and evaluation procedures.

For the reasons discussed above under the heading ''Risk From Actual Operations,'' the FAA does not agree that the risk assessment submitted by FedEx warrants delaying this rulemaking. Furthermore, the FAA does not agree that correction of the unsafe condition can be assured within 60 to 90 days, or 4 to 6 months without this final rule. The STC holders and many operators have been aware of this issue since the fall of 1996. The FAA anticipates that, with the adoption of this AD, industry will continue recent significant progress in addressing these issues, which will result in timely implementation of appropriate corrective action.

Extension of Interim Operational Period

Several commenters state that the proposed 120-day interim allowances must have been determined to be safe by the FAA, with positive margins of safety. Therefore, the commenters request that the interim time limits be extended. Some of the commenters request that the extension coincide with regularly scheduled heavy maintenance. The CAA requests that the interim limits should be allowed to continue for however long it takes to modify the airplanes to bring them up to the original design limits. This commenter states that under normal operations, there is no risk of floor beam failure, and also states that the FedEx risk assessment shows that the likelihood of encountering conditions set forth in the NPRM are virtually nonexistent.

As discussed above under the heading ''Risk from Actual Operations,'' the FAA does not concur that the information provided in the FedEx risk assessment provides a basis for an extension of the interim period. However, for other reasons, the FAA concurs that the interim operational period can be extended.

In the NPRM, the FAA stated, ''because the determination of the effects of operational limitations on payload is based on approximations, the resulting payload limits may be unconservative.'' The 120-day interim limit was based on this potential unconservatism. Since issuance of the NPRM, the FAA has received data (Reports DFE–72701 and DFE–72702, submitted during the initial comment period as Appendices 5 and 6 to FedEx's comments to the NPRM) that partially confirm these approximations. In addition, although some progress has been made by industry in developing corrective actions, neither industry's proposal (as discussed in the NPRM) nor the FAA's expectations have been fulfilled. Based on current information regarding the status of various efforts to develop corrective actions, the FAA estimates that the entire affected fleet can incorporate corrective actions during scheduled heavy maintenance within 28 months after the effective date of this AD. In light of this new information, the FAA has reassessed the proposed interim period of 120 days and concluded that the period should be extended to 28 months. Therefore, the FAA has revised the final rule accordingly.

The FAA's decision to extend the interim limitations does not imply that the cargo floor structure has been determined by the FAA to be safe for an indefinite period, or in compliance with CAR part 4b requirements. As stated in the NPRM, the FAA's analysis considered only the most likely critical load case, and the proposed interim limitations were based on that analysis. The confirming data referenced above still does not address other potential critical load cases or all locations within the airplane. Nevertheless, in light of the balance of the safety and economic factors discussed above, the FAA considers that the level of safety provided by the interim limitations is adequate for the time period of 28 months. However, it is less than the level of safety provided by demonstrated compliance with CAR part 4b standards, and the FAA considers that compliance with those standards is a necessary objective to ensure the long term safety of the affected fleet. The balancing that the FAA has considered in establishing this interim compliance period is typical of the balancing that occurs in all AD's establishing interim requirements and is fully consistent with the FAA's obligation to consider economic impacts, such as those imposed by Executive Order 12866.

Increased Interim Payload Limits

Several commenters also request that, due to ''highly conservative'' methodologies used by FAA, the proposed interim weight limit should be expanded to allow an average maximum container weight of 6,000 lbs. The FAA does not concur that its methodologies are highly conservative. As discussed in the NPRM and in more detail below, the FAA's analytical methods are typical of industry practice, and the commenters have not demonstrated how these methods are highly conservative. The FAA has not been provided with any acceptable data to support the allowance for 6,000-lb. containers, except as discussed below under the heading ''Position-by-Position Limitations.'' A commenter requests that the FAA maximize the interim limits. The FAA concurs that the interim limits should be maximized to the extent that they are consistent with the necessity of addressing the unsafe condition. The FAA considers that the interim limits established in the final rule meet this objective; however, as discussed below, the FAA will continue to work to approve higher limitations, once their safety is substantiated.

Federal Express submitted report 98–026 ''Substantiation of Side Vertical Cargo Restraint Installation Using Static Test Results,'' Revision A, during the reopened comment period. FedEx states that this report ''proves conclusively that the side restraint installation is adequate to restrain the applied container loads due to vertical gust.'' The FAA concurs, and has changed the final rule (Rules Docket No. 97–NM–09–AD) applicable to the FedEx STC's to allow the higher interim limits with the FedEx side restraints installed.

Position-by-Position Limitations

The CAA requests that the FAA consider ''position-by-position'' limitations, which would establish individual weight limits for each container position on the airplane, based on the strength of the floor structure at that location. The CAA states that this would allow a higher total payload, while addressing the unsafe condition. The FAA concurs with the concept of position-by-position limitations, and will consider any such proposal when presented with supporting data.

For example, one commenter, Amerijet, has submitted a position-by-position proposal, which includes analysis providing for increased weights for certain container positions relative to those determined by the FAA for the interim period. This proposal also contained lower limits for other container positions and presupposes the installation of sidelocks. The commenter stated at the April 2 public meeting that it intends to install vertical side restraints [sidelocks], but has not submitted any data to the FAA on a sidelock installation. The FAA has determined that this proposal would provide an acceptable level of safety for the 28-month interim period, when the affected airplanes are equipped with approved sidelocks. The commenter's proposal would not be acceptable to the FAA for indefinite operations, however, as the analysis did not consider other issues such as CAR part 4b emergency landing loads. The FAA will continue to work with the commenter, or any other interested parties, to refine these proposals so that they may be approved under paragraph (e) or (f) of the final rule.

FedEx also submitted a position-by-position proposal, which also contained both higher and lower limits as compared to the FAA's proposed interim limits. FedEx's proposal also is promising, however, its analysis is based on assumptions which the FAA has determined to be inaccurate, given the limitations of the weight and balance manual. For example, FedEx's assumption for the percentage of the load distributed to the sidelocks (40 percent) was derived from its ''Inverted Container Test.'' As discussed below under the heading ''FedEx's Tests,'' the

FAA considers this assumption to be unconservative. The FAA also will continue to work with FedEx to refine its proposal, so that it may be approved under paragraph (e) or (f) of the final rule.

The CAA also submitted a finite element analysis (FEA) and, based on this analysis, requested that the final rule allow interim container payload limitations (regardless of whether sidelocks are installed) of approximately 3,500 lbs. in the most forward and aft positions, and 8,000 lbs. over the wing and wheel well. All other positions would be limited to 4,800 lbs. per container position with no sidelocks installed, and 5,000 lbs. with sidelocks installed. The CAA also requested that, after unspecified frame modifications are incorporated and sidelocks installed, interim limitations of 6,000 lbs. per container be allowed. Three other commenters submitted similar proposals.

As stated previously, the FAA is willing to work with commenters to establish interim limits other than those established in the final rule. However, the data submitted with the comment do not establish that the model used in CAA's FEA accurately represents the airplane. The CAA states that the model was made using the Boeing Structural Repair Manual (SRM) and various unspecified measurements of the airplane, but without access to the type design data that define the airplane configuration. It is, therefore, based on numerous assumptions regarding the configuration, which have not been validated. Furthermore, the model purports only to represent a 120-inch long section of the fuselage. The model does not account for the numerous fuselage cutouts for cargo and passenger doors, which affect the way the floor structure reacts to loads. Also, the model does not address the different structural design of the wing box or wheel well areas.

Even if it were assumed that the model is accurate for some airplanes, it is based on the cargo container locations used by FedEx, which are different from those of the other affected airplanes. The positions of the containers and locks determine the loads introduced into the floor beams. Therefore, using the FedEx container layout produces a result which, even if valid, would be only applicable to the FedEx airplanes. Based on the foregoing, the FAA does not consider that the model provides a sufficient basis for revising the interim limits.

Several commenters state that the FAA's findings of negative margins of safety are too conservative over the wing box and wheel well, as these areas are capable of supporting higher container payloads due to their stronger design. The FAA concurs partially. The FAA has determined that an unsafe condition exists by analyzing the basic floor structure rather than the much more complex wheel well or wing box structure. These areas are capable of supporting greater loads, but the commenters have submitted insufficient data to determine what loads may be safe in these areas.

However, the FAA has issued STC's which substantiate the wing box and wheel well areas for payload capabilities equivalent to the carriage of 6,000- to 10,000-lb. containers, depending on the individual airplane's structural capability, which has increased as the 727's type design has evolved. The FAA notes that, although no structural reinforcement was added to the wing box and wheel well for these STC's, limitations were sometimes imposed in consideration of the individual airplane's structural capability.

The FAA has considered the greater strength of the wing box and wheel well and has determined that an acceptable level of safety will be achieved by allowing a total payload of 12,000 lbs. for any two adjacent containers in this area, without other limitations, for the 28-month interim period. To eliminate potential ambiguity as to the containers to which this limitation applies, the final rule specifies that this alternative limitation applies to containers located completely or partially between body stations (BS) 740 to 950. However, the FAA does not consider that it is acceptable to allow combined payloads above 12,000 lbs. for this interim period, or to allow 12,000-lb. combined payloads indefinitely, because the FAA does not have the detailed information or resources necessary to determine the appropriate payload and operational limitations for all configurations of the affected airplanes. Operators who desire further increased loading in this area are invited to submit their requests and supporting data to the FAA in accordance with paragraph (e) or (f) of this AD.

Paragraph (a) of the NPRM did include a limited position-by-position proposal, in that it specified a reduced payload limitation in the area of the cargo door (BS 440 to BS 660). As with the wing box and wheel well area, to eliminate potential ambiguity as to the containers to which this limitation applies, the final rule specifies that this limitation applies to containers located completely or partially between BS 440 and BS 660.

Extension of Initial Compliance Time

One commenter states that the NPRM's will ''wreak havoc'' on the express industry and shipping public. The commenter states that it has no way of knowing when the effective date of the AD will be. The 48-hour implementation of the load limits will inevitably result in serious disruption to cargo already booked or in transit when the final AD's are issued. Several other commenters requested 120 days after AD issuance for interim limits to become effective, as this time was necessary to alter manuals, provide personnel training, and generally prepare for a significantly different loading procedure. The FAA concurs partially. The FAA has changed the final rule to extend the compliance time from 48 hours to 90 days. The AD becomes effective 35 days after the date of publication in the **Federal Register**. As requested by the commenters, this allows a total of 125 days for operators to make necessary changes to the FAA-approved Airplane Flight Manual and cargo loading procedures.

All Container Types

Several commenters state that the proposed AD should address the use of all possible containers, pallets, and the intermixing of pallets and containers. Other commenters followed with similar statements about pallets, bulk loading, oversized cargo, and combi configurations (i.e., configurations with provisions for passenger seating and cargo on the main deck). One of the commenters requests that the wording of the proposed AD be changed to contain generalized wording that would address all container sizes, using a ratio of the length and width of other containers to the 88- by 125-inch container specified in the proposed AD as a means to determine the container payload limit. The commenter further states that this could help the implementation of the rule. The commenters request these changes to avoid the disruption that might result from having to obtain individual approvals for each of the types of containers.

The FAA concurs partially. In light of the administrative burden of approving individual container types, the FAA has reassessed this proposed requirement. The FAA recognizes that, except for half-size containers (discussed below), the FAA analysis used to establish the payload limits for containers measuring 88 by 125 inches also is applicable to any container within the same floor area. The reasons are that the analysis considered the effect of the container

weight on the floor structure supporting the container, and that the differences in the stresses in the floor structure associated with the different container types are not sufficient to warrant different limits. Therefore, the FAA has revised the final rule to specify the same limitations for container size codes ''A,'' ''B,'' and ''C,'' as defined in National Aerospace Standard (NAS) 3610, which is the specification referenced in FAA's Technical Standard Order (TSO) C90c for cargo unit load devices (containers).

For half-size containers (i.e., size code ''D'' or ''E'' of NAS 3610, or the FedEx ''Demi'' container), the final rule specifies payload limits that are one-half those for other containers. Since these half-size containers are designed to be placed side-by-side across the fuselage, this separate limit is necessary to ensure proper load distribution within the area. It should be noted that paragraph (f) of the final rule allows operators to establish different container payload limits from those specified in the rule by substantiating that those limits provide an acceptable level of safety.

For oversize cargo, operators may apply for approval of alternative methods of compliance in accordance with paragraph (e) or (f) of the AD by proposing appropriate limitations for such cargo.

Service History

One commenter claims that, for the converted 727 freighters, ''successful flight history is direct evidence which supports [the commenter's] analysis showing the airplanes to be safe.'' The commenter references CAR sections 4b.202, 4b.270, and 4b.300 to show that service history is a reliable indicator ''to support or define a substantiation methodology.''

The FAA does not concur. The requirements of CAR part 4b that the commenter references are related to the determination of the fatigue strength of structure, where it is acceptable to utilize the service history of airplanes of similar structural design. However, the unsafe condition addressed in this AD is not related to fatigue, but is the result of the existing floor structure being significantly understrength. The only conclusion that can be drawn analytically from the accumulated flight history of the converted 727 freighters is that these airplanes have yet to encounter a sufficiently severe gust condition when critically loaded with an allowable payload configuration to cause failure of the floor structure.

Deflection of Floor Beams

One commenter states that the FAA did not provide a reasoned explanation of the NPRM claim that ''even if the floor beams of the main cargo deck only become deformed, the results could be catastrophic.'' The commenter compares this statement to McDonnell Douglas Report MDC–J5568, applicable to Model DC–10 series airplanes, which was approved by the FAA and showed significant and permanent deformation of the wing.

From this comment, the FAA infers that the commenter believes that, if the wing can bend safely and even deform permanently when it has cables/fuel lines, etc., passing through the structure, then the floor beams also must be capable of safely deforming or bending.

The FAA does not concur. The NPRM states why deformation of the floor beams could be catastrophic. For the ''up'' load case analyzed by the FAA, which consisted of ''up'' loads applied to the containers due to a down gust on the airplane, the floor beams common to the forward and aft locks of a container bend upward due to the applied upward load. The adjacent floor beams underneath the containers that are not attached to the container do not bend. If this deflection relative to the adjacent floor beams is excessive, this could result in the bending and stretching of all control cables and fuel lines passing through the floor beams. Such bending and stretching could result in uncommanded flight control inputs at a critical time when the airplane is subject to severe gust conditions. In addition, the fuel lines located in the floor beams are not designed to flex in the same manner as fuel lines located in the wing structure of an airplane and, therefore, may crack, bend, or rupture.

The occurrence of either an uncommanded flight control input during critical flight conditions or the rupture of a fuel line can be catastrophic. The McDonnell Douglas report referenced by the commenter is not applicable to the floor beam deflections of a 727 converted freighter since the fuel lines and control cables located in the wing of Model DC–10 series airplanes are specifically designed to accommodate large wing deflections and are in compliance with the applicable regulations.

Safety Factor

One commenter states that the use of a safety factor as small as 1.5 presupposes very accurate analysis, knowledge of loads and material properties, and sound engineering practices. Structure with negative margins of safety of −0.63 clearly indicates that some or all of these suppositions have not been achieved. In addition, some operating conditions, such as gusts, are beyond human control. The safety factor of 1.5, as required by CAR part 4b, is necessary to maintain the safety of the airplanes. The FAA concurs with the commenter, but notes that the finding of unsafe condition in this AD is based on the FAA's determination that the risk of catastrophic failure of the understrength floor structure is unacceptably high, rather than on a simple finding of non-compliance with CAR part 4b.

Fore and Aft Center of Gravity Shifts

Several commenters objected to the FAA's analytical use of the trapezoidal method for evaluating shifts in the center of gravity (cg) within a container. One commenter, FedEx, states that the FAA's use of the trapezoidal shift results in impracticable—if not impossible—circumstances that exceed the requirements of CAR section 4b.210.

In order to gain a better understanding of this and other FedEx comments, the FAA met with FedEx on September 19, 1997, having first provided FedEx with a series of questions to be discussed at the meeting. (The minutes of this meeting are included in Rules Docket No. 97–NM–09–AD.) At this meeting, FedEx reported that it had only recently obtained a scale that would allow it, for the first time, to determine the actual locations of the cg's inside its containers. FedEx stated that it had weighed and determined the cg location on a sampling of 1,500 containers, but did not provide any data to the FAA at the meeting. In any case, the FAA does not consider it appropriate to evaluate only an operator's average container payload when establishing the safety of the affected airplanes. The unsafe condition determined by the FAA's analysis is based on the payload weight and distribution with which these airplanes are currently allowed to operate.

In addition, in a letter dated November 4, 1997, to the FAA (a copy of which has been placed in Rules Docket No. 97–NM–09–AD), FedEx states that ''A review of container weights, quadrant weights, and cg's for the 'SAA' (88- by 125-inch) container finds no containers in the 4,000 to 8,000 lb. range with a cg offset greater than 8.67%.'' However, FedEx did not provide data (e.g., the numbers and types of containers reviewed; the percentage of cg shift for different container weights) to substantiate the value of 8.67 percent. Therefore, the FAA is unable to determine the significance of this comment.

FedEx states that it chose to use a ''stair step'' or ''box'' method to evaluate the effects of cg shifts within a

container. FedEx also states that the FAA rejected this method for use on the 727 converted freighters without a reasoned explanation.

The FAA does not concur with the comments regarding the FAA's methodology. As stated in the NPRM, the large negative margins of safety calculated using the FAA's analysis included consideration of the effect of a horizontal cg shift of 10 percent within the container (e.g., 8.8 inches from the geometric center of the base of the container for the forward and aft direction). Shifts in cg are particularly important in considering the ''up'' load case because the container loads are applied primarily to the floor beams at the forward and aft edges of the container where the container locks are located. The effect of the cg shift is to increase the loading on the beam in the direction of the cg shift. For example, if the cg is shifted aft, the applied loads will be increased on the floor beam located at the aft edge of the container.

In analyzing the effects of forward or aft cg shifts, the FAA employed a ''trapezoidal method.'' The trapezoidal method is well accepted and used by both Type Certificate (TC) and STC holders. The trapezoidal method is analogous to shifting sand in a box. With no cg shift, the weight of the cargo is uniformly distributed across the base of the container. As the cg is shifted, the load or ''sand'' is taken from one side and applied to the other side. This results in a sloping load distribution, with a load ''peak'' on one end of the container, and a load ''valley'' on the other end. Another acceptable method for considering forward or aft cg shifts is the ''box'' or ''stair step'' method. In this method, rather than sloping, the load ''steps'' up from a low level on one end, to a high level on the other.

The FAA does not concur that the trapezoidal shift used in the FAA's analysis exceeds the requirements of CAR section 4b.210. For ''up'' loads on the container, and a forward or aft cg shift (which the FAA has identified as the most likely critical case), if the airplane is not equipped with side vertical restraints (sidelocks), the results of the loads analysis are the same regardless of whether the stair step or trapezoidal method is used. Since all loads are carried by the floor beams that support the forward and aft container locks, the loads on the beams will be identical for any method that shifts the cg a particular percentage within the container. It is the percentage of cg shift that is important, not how that cg shift was achieved. This represents the majority of the airplanes affected by these four AD's. For those airplanes equipped with sidelocks, there is a maximum difference of 14 percent in the two methods for ''up'' loads, at the ''peak'' of the trapezoid. In consideration of the varying locations of sidelocks and the manner in which loads are actually distributed among all locks, this difference does not significantly affect the FAA's analysis or alter the finding of the unsafe condition.

The FAA considered 10 percent as the appropriate amount to shift the cg within the container, as it is realistic and typical of cg shift limitations contained in operator weight and balance manuals. Consideration of a 10 percent cg shift also represents an industry standard as evidenced by NAS 3610 (contained in the Rules Dockets). The vast majority of containers used by operators comply with this standard. FedEx has not provided any data that indicate that a 10 percent cg shift is unreasonable, or that show that the FAA's use of a trapezoidal shift is unrealistic. The data that FedEx provided (average container densities ranging from 7 to 18 lb./cubic foot) concern only the average weight of a container used in its operations and assumes the weight to be equally distributed throughout the container.

FedEx also states that the trapezoidal method results in load distributions that greatly exceed the 90 lb./inch ''running load'' (freight payload per inch of airplane floor length) limitation specified in the FedEx weight and balance manual. FedEx states that the trapezoidal shift method will result in possible freight densities of 40 lb./cubic foot in approximately ¼ of the container volume. FedEx states that this equates to an average value of over 200 lb./inch running load in this area of the container. FedEx reports that its daily average operational load density is approximately 7 to 7.5 lb./cubic foot, and on rare occasions may have reached the 18 lb./cubic foot range; therefore, the FAA's analysis bears no relationship to operational reality. (An average density of 18 lb./cubic foot over the entire volume for the full-size FedEx container equates approximately to a 7,920-lb. container, or about 90 lb./inch running load.)

The FAA acknowledges that, in its analysis described in the NPRM, it was not constrained by the 90 lb./running inch limitation specified in the FedEx weight and balance manual. However, the FAA does not concur that this results in inaccurate weight limits. The FAA notes that, for a FedEx container at the maximum permitted payload of 8,000 lbs., the running load limit is exceeded even with no shift in the container cg (88-inch container width times 90 lbs. per inch equals 7,920 lbs.). For any forward/aft cg shift within the container, using either the trapezoidal or ''box'' method, the degree to which the limit is exceeded increases in direct relation to the magnitude of the cg shift.

In addition, the FAA reviewed FedEx's loading procedures during a visit to its flight line at Sea-Tac International Airport, Seattle, Washington, on February 5, 1997. During this review, the FAA became aware that FedEx neither determines the actual cg location of the cargo within each container nor has the necessary equipment at all of its loading facilities to determine that it is operating within the cg and running load limitations of its weight and balance manual.

Based on other comments received in response to the NPRM, it appears that FedEx's practice is not unusual even though it is inconsistent with its weight and balance manuals. In light of the fact that, to the FAA's knowledge, no operators are measuring the cg's for all containers, and that a recent sampling accomplished by FedEx shows cg shifts as high as 8.67 percent, the FAA concludes that use of 10 percent cg shift in its analysis is not only an appropriate reflection of industry cargo loading practice, but may actually be unconservative.

Finally, the FAA does not concur that it has rejected the use of the ''box'' method proposed by FedEx. FedEx did not consider a cg shift effect in the original substantiation documentation for its original STC design, but later proposed to employ a ''box'' method used by McDonnell Douglas for the certification of a DC–10 freighter (submitted by FedEx as a comment during the first comment period in Appendix 2, Report 97–028, Revision I/R, dated April 1, 1997). After review of this method, the FAA accepted it in a meeting with FedEx on April 29, 1997. The basis for this acceptance is that it provides an acceptable level of conservatism in the absence of more rational data to predict the cg within a container. As discussed above, the use of the ''box'' method does not significantly affect the FAA's analysis or alter its finding of an unsafe condition.

FAA's Methodology

Boeing states that the FAA's analysis is similar to that used by Boeing for initial certification of Model 727 series airplanes. However, Boeing also states that while the analysis is conventional, some of the assumptions made are not typical of industry practice for the floor beam analysis and are conservative relative to the original certification practice of Boeing, with respect to

trapezoidal loading and credit for pressurization. Boeing states that, when it evaluates cg offsets in containers, it uses the stepped rectangular or ''box'' method to determine cg shifts.

The FAA concurs partially. As explained previously, the trapezoidal loading assumption is nominally more conservative than the stepped rectangular or ''box method.'' For the ''up'' load case, this nominal difference only affects those airplanes with sidelocks. In any case, this difference does not significantly affect the FAA's analysis or alter its finding of an unsafe condition.

The FAA does not concur that its analysis is inappropriately conservative because it considered zero fuselage pressurization. Fuselage pressurization tends to provide an increase in floor beam load carrying capability because the pressurized fuselage, to which the ends of the floor beams are attached, pulls outward on the ends of the floor beams, which makes the floor beams act stiffer. Severe gust conditions, such as microbursts, may be encountered at low altitudes when the fuselage is not pressurized; therefore, it is realistic to consider those conditions. Even with credit for fuselage pressurization, the FAA's conclusion would be unchanged because the pressurization effects do not significantly affect the substantial negative margins of safety found as a result of the analysis. Furthermore, CAR section 4b.216(c)(1) requires that ''The airplane structure shall have sufficient strength to withstand the flight loads combined with pressure differential loads from zero up to the maximum relief valve setting.''

Another commenter, FedEx, states that the FAA's analytical techniques are too conservative and, therefore, result in artificially low payload numbers (container weights) for the 727 converted freighters. The FAA does not concur. The FAA reviewed the substantiating data submitted for the original certification of FedEx's 727 freighter conversion STC and found that this data package lacked any stress analysis substantiating the floor structure. Lacking this data, the FAA reviewed the analytical methods used by others in industry. The FAA determined that other industry analytical methods for cargo systems used conservative overlapping assumptions to ensure that the design resulted in a safe product that complied with CAR part 4b. The FAA's decision to use these methods to perform an analysis of the floor structure of the affected 727 converted freighters is consistent with industry standard practices.

One commenter expresses concern over the methods utilized in the structural substantiation of floor beam loads in the documentation contained in these Rule Dockets, although the commenter did not identify a basis for the concern. The commenter states that over the course of the last two decades it has developed stringent methods for accurately predicting cargo induced loads in airplane structure. The commenter requests that the FAA consider these methods in performing its evaluations. The commenter submitted data regarding its analytical methodology used in development of numerous STC approvals of cargo handling systems.

FAA has reviewed the commenter's methods and considers that this methodology utilized conservative, overlapping assumptions to ''bracket'' unknown variables and utilized a trapezoidal distribution of cargo in defining its cg offsets. The FAA agrees that these are appropriate methods for determining loads for cargo floor structure and are consistent with those employed by the FAA. These methods result in conclusions that are consistent with the FAA's findings that the floor structure addressed by these AD's presents an unsafe condition. Further, the FAA notes that these conclusions are consistent with those derived from other methods commonly used in industry.

Boeing addresses the statement in the FAA's analysis of the floor beam allowables (contained in the Rules Dockets) that the analysis is ''partial'' and ''unconservative.'' Boeing states that, for the ''down'' load case (i.e., ''down'' loads applied to the container), the FAA's analysis is sufficiently conservative for the following reasons: (1) the critical section selected for analysis reflects the worst case hole-out situation; (2) all significant [down] load cases were dealt with; (3) the critical section analyzed would have no degradation of [safety] margins because of secondary bending effects; and (4) the critical section analyzed has no shear on it by first principles and, therefore, any shear interaction effects should be small.

The FAA concurs with the commenter's statement; however, the FAA notes that this statement was carefully limited to apply to ''the down load case being considered'' and does not address all load cases, the actual strength of the floor, or the floor beam as a whole.

The FAA does not concur that the commenter's statement is valid for all load cases and all floor beam structure. The FAA's statement that the analysis is ''partial'' and ''unconservative'' relates to the fact that there are many floor beams, several with differing applied loads, load carrying capabilities, and critical cross-sections. As a result, the FAA's analysis could not be considered complete (therefore partial), nor could the FAA state that it had accounted for all effects, which may result in yet higher stress levels and larger negative margins of safety (therefore unconservative).

One commenter states that the standard being pursued by the FAA for the converted 727 freighter includes all known theoretical possibilities, plus an additional safety factor of indeterminate size. The commenter refers to a statement in the NPRM that ''* * *airplanes may encounter severe turbulence that exerts wind gust forces beyond the critical case forces of CAR part 4b * * *.'' as implying that the FAA is imposing standards beyond that of CAR part 4b.

The FAA does not concur. The FAA's analysis of the converted 727 freighter floor beams was accomplished using the standards identified in CAR part 4b. No new standard is being applied to these airplanes. The commenter has taken the NPRM statement out of context. The FAA's reference to gusts that exceed CAR part 4b critical load cases is in a portion of the NPRM that addresses the basis for the retention of the 1.5 factor of safety, which is required by CAR section 4b.200(a). This factor is used to protect the airplane from failure when experiencing limit load, the highest expected actual in-flight loading, and other unknown situations.

As stated in the NPRM, interested parties had requested that the FAA eliminate the safety factor during preparation of the NPRM, which would allow higher payloads. The statement that the commenter characterizes as implying ''new standards,'' and a safety factor of ''indeterminate size,'' was simply a discussion of the existing level of safety established by the CAR part 4b standards (this airplane was originally certificated to those standards over 30 years ago).

One commenter quotes from CAR section 4b.210 that the analysis must be conducted using ''any practicable distribution of disposable loads.'' The commenter states that the loading scenarios the FAA uses are much higher than the maximum [loading] experienced in actual service. Several other commenters characterize the FAA's assumptions and analysis as ''ultra conservative.''

The commenters appear to have misinterpreted the referenced CAR section 4b.210. The word ''practicable,''

which means possible to put into practice, appears to be read as ''practical.'' Subpart C of CAR part 4b requires that analysis be conducted for conditions (e.g., critical altitude, critical load, or maximum/minimum weight) that are possible; Subpart C is not restricted to normal, average, or practical conditions. Designing airplanes to withstand only average loads would result in a greater potential for catastrophic failures whenever those loads are exceeded.

Boeing Data

FedEx states that none of Boeing's analysis for the affected 727 airplanes provides any baseline for comparison of the unit load device (ULD) cg shifts, container load distribution, or other key methodologies. The FAA does not concur. As a check to verify that its analysis was generally correct, the FAA examined some of the type certification data that Boeing had submitted prior to certification of 727 passenger and freighter airplanes. The Boeing data verified the FAA's analysis in the following two significant respects:

1. Boeing's stress analysis that established allowable floor beam strength for the passenger version was entirely consistent with the FAA's stress analysis; and

2. Boeing's loads analysis for the freighter version, while using a different methodology from that used by the FAA, would result in substantial negative margins of safety for passenger floor structure when carrying 8,000-lb. containers.

In accordance with CAR part 4b, Boeing's analysis of the 727 freighter considered all aspects of cargo loading, including cg offsets, load distribution, and multiple other facets. It should be noted that Boeing found it necessary to substantially strengthen the floor structure for its freighter version in order to carry the same payloads currently allowed by the subject STC's and remain in full compliance with CAR part 4b.

FedEx's Analysis

In support of its position that there is no unsafe condition, FedEx states that it has used a rational, conservative analytical approach for determining that the cargo floor structure is safe, which has not been accepted by the FAA. Specifically, FedEx references individual floor beam analysis and tests conducted with combinations of loads, offsets, container positioning, airplane weight, and flight maneuvers that create conditions exceeding any that statistically will occur.

The FAA does not concur. Except for the lateral floor beams over the 80-inch long wheel well area, which is discussed below under the heading ''Data Showing Floors to be Safe,'' FedEx has not yet submitted a complete analysis of the floor structure, or of a single floor beam. The tests that have been run to date are of limited relevance as discussed under the heading ''FedEx's Tests.'' Further, as discussed previously, the FAA also does not concur that the unsafe condition is so improbable that it should not be addressed.

FedEx states that the statement in the NPRM that the FAA used commonly accepted analytical methods in its structural analysis is misleading because it fails to address other ''commonly accepted analytical methods.'' In particular, FedEx references the FAA's use of a pinned end column fixity coefficient (''c'') of 1.0, and in contrast points out that a ''c'' of 2.58 is used in an example problem contained in ''Analysis and Design of Flight Vehicle Structures'' by E.F. Bruhn. FedEx considers this example problem to be analogous to a floor beam lower cap analysis. FedEx states that other alternative analytical methods (such as Bruhn) result in a significant increase in allowable loads for the floor beams (therefore potentially higher allowable container weights), but these methods have been rejected by the FAA as inapplicable to the converted 727 freighters, even though they have been accepted previously by the FAA on other certification efforts.

The FAA does not concur. The selection of this coefficient can have a significant effect on the determination of the allowable payloads. A low column fixity coefficient of 1.0 means that the ends of the beam are ''pinned'' (i.e., free to rotate or move like a hinge). A column fixity coefficient of 4.0 means that the ends of the beam are fully ''fixed'' (i.e., unable to rotate or move for any applied load). The FAA's analysis uses a ''pin end coefficient'' because it represents the airplane structure. As stated previously, the FAA's analysis considered the ''up'' load case to be the most likely critical case. For this load case, the lower horizontal member or ''chord'' of the ''I'' shaped floor beam will be in compression and, therefore, will behave in the same manner as a column under compression. It will be free to rotate or move like a hinge, not fixed as a higher fixity coefficient would suggest.

FedEx's proposed ''c'' coefficient of 2.58 does not appear in any of its analysis in support of its comments to the NPRM. At the September 19 meeting, FedEx stated that it did not use the 2.58 value in any of its analyses submitted in its comments. FedEx also stated at the meeting that the 2.58 value was merely an illustration of a fixity coefficient that could be found in the Bruhn handbook for a similar problem. Nevertheless, FedEx maintained at that meeting that it estimates the true value of ''c'' is in excess of 1.2, and may be as high as 2.58, although FedEx did not provide any data to the FAA to show that a ''c'' of 2.58 would be representative of the structure.

In addition, in FedEx's analysis submitted to the NPRM, FedEx used a ''c'' value of 1.2. (Document 97–021, initial release, dated February 28, 1997, submitted to the NPRM (Rules Docket No. 97–NM–09–AD) as Appendix 1 during the first comment period). However, in a later version of the same document, FedEx also used a ''c'' coefficient of 1.01 (Document 97–021, dated March 24, 1997, but designated as the initial release of the document, as well), submitted to the FAA for review on April 7, 1997. The FAA has determined that there is essentially no difference between 1.00 and 1.01 for a column end fixity coefficient. Therefore, the FAA concludes that the more recent data submitted by FedEx is consistent with the value of 1.0 for the column fixity coefficient used in the FAA's analysis.

FedEx states that it has submitted reports to the Seattle Aircraft Certification Office (ACO) that employ assumptions that were used by Douglas Aircraft Company and were accepted by the Los Angeles ACO for the original certification of the Model DC–10 airplane. FedEx also states that the Los Angeles ACO's earlier approval of the assumptions used in the Model DC–10 analysis affirms that it is using an appropriate method to substantiate the integrity of its converted 727 freighters. FedEx states that the FAA has not explained how the methodology can be accepted by the Los Angeles ACO and not accepted by the Seattle ACO.

The FAA acknowledges that use of the particular assumption(s) referenced in the DC–10 analysis, if applicable to FedEx's 727 analysis, may allow higher container weights than those specified in the proposed AD.

The FAA does not concur with the commenter's statements. For many certification projects, it has been acceptable to use a particular assumption which may not be conservative, provided that there are other quantifiable assumptions used which account for the lack of conservatism and result in the overall design being conservative and in

compliance with CAR part 4b. Therefore, an unconservative assumption used as part of a particular approved methodology is not equally acceptable for another methodology without ensuring that the lack of conservatism is accounted for elsewhere in the methodology and that the overall design is conservative.

At the July 24, 1997, meeting with FedEx, an FAA representative from the Los Angeles ACO stated that it was the responsibility of FedEx to demonstrate that the analytical assumptions and methodologies used on the DC–10 were conservative for the Boeing 727. To date, FedEx has not made that demonstration. During the September 19 meeting with FedEx, the FAA asked FedEx if it had used the entire analytical methodology that was used for the DC–10. FedEx replied that it had not. Therefore, the FAA does not agree that the two ACO's have been inconsistent.

FedEx states that neither it nor the FAA has a complete, accurate model which objectively demonstrates the actual performance of the vast array of the TSO and STC ULD's in any one of the hundreds of individual airplane cargo positions and latch configurations of in-service airplanes. The FAA concurs that there is no accurate model which demonstrates the actual loads input into the structure of the 727 converted freighters for the myriad of possible configurations. However, an analysis using conservative overlapping (or enveloping) assumptions can be performed to show the design is safe for the proposed usage and is in compliance with CAR section 4b.200(c). This approach has been successfully used by aerospace companies for many years and is acceptable to the FAA.

FedEx's Tests

FedEx states that three tests (descriptions follow) indicate that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits of the weight and balance manual.

1. *Inverted Container Test.* FedEx states that it has conducted an inverted container test that demonstrates that its existing sidelocks are effective in carrying 35 to 40 percent of the container load. The test report is contained in Appendix 9 (Report 97–048, Revision I/R, dated May 5, 1997) of FedEx's comments to the NPRM (Rules Docket No. 97–NM–09–AD) during the initial comment period. FedEx also states that these results show that the FAA's estimation that the sidelocks carry 20 percent of the container load is far too conservative.

The FAA infers that FedEx considers that the FAA's estimation that 20 percent of the total container load is carried by all sidelocks (10 percent per side) is conservatively low since this results in 80 percent of the total load being carried by the locks attached to the main deck floor beams. Because FedEx's inverted container test showed that 35 to 40 percent of the container load was carried by the sidelocks (approximately 20 percent per side), 60 to 65 percent of the total load would be carried by the locks attached to the main deck floor beams.

FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits. The FAA does not concur that FedEx's testing has shown that sidelocks are 35 to 40 percent effective because the testing does not address all container types, cg shifts, and all container positions on the airplane. The FAA estimated that the sidelocks are 20 percent effective based on current industry methods, as used in TC and STC programs. To date, industry, with the exception of this test by FedEx, has little or no data showing the exact distributions of actual sidelock load percentages. Therefore, enveloping assumptions and/or conservative analytical methodologies have been consistently used by various manufacturers to show compliance with CAR sections 4b.200(c), 4b.210, and 4b.359, to which these STC's also were certified. This approach has previously obviated the need to determine the exact load distributions to each lock for the various container types used by operators.

Several commenters point out that there is a vast array of different types of containers and other ULD's used by the affected operators. This includes a wide range of construction, shapes, and materials. Some ULD's look like boxes; others look like flat pallets or ''cookie sheets.'' These differences significantly affect the distribution of loads to all locks when subjected to ''up'' loads on the container. Although FedEx's airplanes that have been modified in accordance with the affected STC's predominantly haul the full-size or ''SAA'' container, and the half-size or ''Demi'' container, FedEx reported at the September 19 meeting with the FAA that its modified 727's haul other kinds of containers, such as flat pallets, when necessary.

For these reasons, the FAA's analysis used to determine the maximum safe payload limits for operations must conservatively account for any of the currently permitted container types.

CAR section 4b.359 requires that ''each cargo and baggage compartment be designed for the placarded maximum weight of contents and the critical load at the appropriate maximum load factors corresponding to all specified flight * * * conditions * * *.'' CAR section 4b.210 requires that ''flight load requirements shall be complied with * * * at all weights from the design minimum weight to the maximum weight appropriate to each particular flight condition, with any practicable distribution of disposable load (mass load) within the prescribed operating limitations stated in the Airplane Flight Manual.'' CAR section 4b.200(c) requires that ''all loads [force loads] shall be distributed in a manner closely approximating, or conservatively representing actual conditions.''

Therefore, in order to show compliance with the applicable regulations, either the distribution of the container loads to latches used to analyze the floor beam structure must be accurately determined for all container types used, or conservative assumptions must be used considering all practicable distribution of cargo loads. Finally, the floor structure must be strong enough to carry the maximum weight at the critical cargo load distribution at the appropriate maximum applied loads.

As stated previously, the FAA's analysis in the NPRM's identifies one of several possible critical load cases—that of a large gust pushing the airplane down, which causes ''up'' loads on two adjacent containers. On all of the affected STC's, adjacent containers share the same set of container locks at the forward and aft edges, and these locks are attached to the floor structure. This condition results in the loads for both containers being concentrated on isolated floor beam(s) at the location of the locks.

A ''typical'' full-size (88- by 125-inch) container is an enclosed box with two sides curved to match the rounded contour of the airplane fuselage, a fully or partially removable front side (i.e., a door), and a fixed or rigid back wall. Because of the design of a typical container, the back wall tends to carry the majority of the load (the curved sides and removable front are not as effective in supporting an ''up'' load as the rigid back wall). A different type of ULD, a flat pallet, with netting to restrain the cargo, distributes the loads to the container locks very differently than the 88 by 125-inch container. The net tends to distribute the load more uniformly around the pallet edges.

The rational basis for the FAA's analysis is illustrated by the following two examples of container/ULD

arrangements that result in load distributions to the floor beams which approach or exceed the 80 percent estimate used by the FAA (i.e., the converse of the estimate that 20 percent of the load is carried by the sidelocks). These two examples assume maximum allowable ULD payloads of 8,000 lbs. using configurations that are permitted for all of these STC's.

Example 1: Back-to-Back Containers. Based on the data from FedEx's inverted container test with an ''SAA'' container facing (door side) forward, 43 percent of the total load was carried by the locks on the back side of the container. If two containers of equal weight are placed back to back, the equivalent of 86 percent of the total load of one container would be placed on the floor beam(s) at the interface (43 percent plus 43 percent).

Example 2: Container and Flat Pallet. Using the test data for the inverted container test, 43 percent of the load would be carried by the back wall. A flat pallet (''cookie sheet'') placed just aft of this container in a cargo position, which has four sidelocks on each side, will place approximately 28 percent of the total load on the front side of the ''cookie sheet'' [as discussed previously, the net on the flat pallet tends to distribute the load equally to all sides of the sheet, and since there are five locks each on the floor beam(s) supporting the front and back side of the sheet, and four on each side, 5/18 (or 28 percent of the total load) will be on the front side]. This results in a total of 71 percent (43 percent plus 28 percent) of the maximum ULD payload, being placed on the floor beam(s) between these two ULD's.

These two examples of the many possible loading configurations illustrate the reasonableness of the FAA's estimation that 80 percent of the maximum allowable container payload could be concentrated on the floor beam(s) at the interface between two adjacent containers.

In addition, the FAA has other concerns with FedEx's inverted container test. First, the effects of a critical cg shift within the container were not tested. As tested by FedEx, the back wall of the container carried 43 percent of the load with a zero percent cg shift (i.e., the cg of the container was at its geometric center). As discussed previously, this is impractical to achieve in actual operations. If the cg had been shifted towards the back wall of the container, the load at the back wall of the container would have been higher than the 43 percent noted previously.

It should be noted that the FedEx test plan submitted to the FAA in May 1997 (Appendix 4 of FedEx's comment to Rules Docket No. 97–NM–09–AD submitted during the initial comment period; Document 97–034, dated May 6, 1997) listed aft cg shift load cases on page 9 of that plan. However, these critical load cases were not tested because the actual test (described in Appendix 9) had taken place in accordance with an earlier test plan, Document 97–023 (which is referenced in Appendix 9). This was confirmed by FedEx at the September 19 meeting.

A second concern with the FedEx inverted container test is that the container was tested in a fixture in which the lock locations were representative of only one cargo position on the airplane. There are typically a maximum of 8 to 12 containers that may be carried on the main deck, depending on the configuration of the airplane. Sidelocks are evenly spaced along the fuselage, and different cargo container positions result in either four or five sidelocks along the container side edges. For these reasons, a variety of locations should be tested to determine the critical load case for the floor beams.

A third concern is that FedEx tested cargo position 5 on the 727–200 with the door of the container on the aft side of the cargo position. This orientation is opposite of how FedEx reports that the ''SAA'' containers are usually placed in its airplanes. This orientation of the container in the test fixture resulted in a sidelock being within 4 inches of the back wall of the container. The distance from the front wall of the container to the nearest sidelock was 23.5 inches. Due to this large distance, or ''overhang,'' and the flexibility of the ''SAA'' container, the nearest sidelock to the front wall on each side of the container together carried 32 percent of the total test load. If the container had been placed in the fixture with the door on the front side of the cargo position, such that the back wall of the container had a 23.5-inch ''overhang,'' or was in one of the several other cargo positions possible which have greater than a 4-inch ''overhang'' to the backwall of the container, the loads on the container back wall (which are carried by the floor beams) would have been significantly higher.

Finally, it is important to note that FedEx has provided no analysis of the floor beam structure showing that the large negative margins of safety are resolved based on its assertion that 35 to 40 percent of the container load is distributed to the sidelocks. The load distribution is only part of the answer; the load distribution must be used in a stress analysis to develop data identifying stresses in the structural members.

The FAA concurs that, in principal, testing of containers using a fixture such as that used by FedEx, if it represents the most adverse case of ''overhang'' for the back wall for all applicable cargo positions, and if it shifts the container cg to the most adverse position, will produce conservative results for the latches common to the floor beams, for the container type tested. The results will be conservative because of the flexibility of the floor beams, relative to the stiff behavior of the test fixture. The degree of conservatism is unknown to the FAA and has not been demonstrated by FedEx.

FedEx, in its test, did not consider all practicable load distributions nor establish the critical case considering an adverse aft cg shift and sidelock location. FedEx tested only those containers or ULD's that it predominantly uses, but not all the types that it actually uses in service; therefore, it is impossible to draw broad conclusions about the behavior of many different container types, applicable to all cargo positions, or the degree of conservatism introduced by floor beam flexibility from its limited testing.

Therefore, the FAA concludes that the 35 to 40 percent distribution of the ''up'' load to the sidelocks used by FedEx is artificially high. The FAA does not concur that the data ''Container Test,'' documented in Appendix 9, demonstrate that the commenter's existing sidelocks, in general, are effective in reacting 35 to 40 percent of the container load, or that the tests ''indicate that the floor structure of the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits.'' The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect.

2. *Single ''I'' Beam Test.* FedEx states that it performed a floor beam test on a conservative representation of an unmodified passenger floor beam. This test is documented in Appendix 8 of FedEx's submittal to Rules Docket No. 97–NM–09–AD (FedEx Engineering Report 97–049, Revision I/R, dated August 15, 1997), and the additional data is contained in Appendices 10 (FedEx Floor Beam Test, Wyle Lab) and 11 (FedEx Floor Beam Test Videotapes).

FedEx also states that this test showed a lower floor beam chord compression allowable in excess of 60 ksi (60,000 lbs. per square inch) just prior to failure of the floor beam. FedEx states that this value controverts the FAA's calculation of 40.6 ksi in the FAA's analysis. In addition, FedEx states that the floor beam was tested in a fixture designed to replicate the airplane floor support structure, and that the test results are conservative due to the interaction of other floor beams, seat tracks, and floor panels in the airplane—the benefits of

which were not addressed during this test. FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits.

The FAA does not concur that FedEx's measurement of 60 ksi compressive stress is relevant to the actual strength of the floor beam. In the FedEx test, the 60 ksi measurement was taken just before the floor beam fractured in tension (i.e., stretching of the floor beam to the point of failure). The FAA considers that the critical failure mode (i.e., the failure mode that would cause collapse of the floor structure in actual operation) is buckling of the floor beam. Buckling occurs when the floor beam warps or twists under applied loads. As discussed below, the test data indicate that the actual compressive stress at which the floor beam buckled was approximately 18 ksi.

Although the floor beam buckled during the test, the floor beam did not collapse, in part because the test fixture substantially and artificially limited the amount of warping of the beam. The test fixture used a rigid ''I'' beam to support the ends of the floor beam. This kept the ends of the floor beam from moving inward during the test. In contrast, on an actual airplane, the ends of the floor beam can move inward because they are attached to the fuselage frames, which are much more flexible than the rigid ''I'' beam used in the test fixture. The result of this artificial restraint was that the floor beam buckled and began to deflect. Instead of collapsing, as would be expected on an airplane, the floor beam behaved more like a cable, suspended from two rigid ends, with very little bending strength, but significant axial strength. This behavior was ultimately demonstrated by the catastrophic failure of the beam in tension, similar to a cable failure. If the beam had been supported as it is in the airplane, it is likely that the floor beam would have collapsed at the onset of buckling.

For example, if a horizontal beam is supported at each end, and vertical loads are placed on the beam, as the beam deflects the ends will pull inward. Restraining the beam ends will limit the bending deflection and stiffen the beam, preventing collapse of the beam as it buckles. This artificial restraint does not affect the buckling capability of the beam, but it causes the beam to appear to have higher load carrying capability than it actually has. FedEx acknowledged the effect of this axial restraint in a November 4, 1997, letter to the FAA. FedEx stated that ''It is conceivable that the bending deformation of the beam * * * would be influenced by restraining the ends of the floor beam from translating * * *.''

As stated previously, the critical compression buckling stress of the floor beam tested was approximately 18 ksi. (This occurred at the load step entitled ''0.6g.'') At this point the beam buckled as a column in the forward/aft direction. Beyond this load factor, at the spanwise location left buttock line (LBL) 11, the beam began bending in the forward and aft direction, as evidenced by the detailed test data for load case number 5, 2.8 g (2.8 times the force exerted by gravity at sea level) ''up'' load in Appendix 8. Forward and aft bending of the beam clearly indicates that the beam has buckled, and can be seen by observing the FedEx videotapes contained in Appendix 11. This buckling failure occurred prior to 40.6 ksi as predicted by the FAA, and before the 49.1 ksi value predicted analytically by FedEx in Appendix 1.

The occurrence of buckling at 18 ksi rather than approximately 40 ksi can be explained by the ineffectiveness of the stability straps in the test fixture. Over most of the airplane, the floor beams extend from one side of the airplane to the other. A stability strap is a long, thin strip of metal, running perpendicular to the floor beam, and attached to the lower surface of several beams, at intervals ranging from 17 to 24.75 inches along the lower surface of the floor beam. The purpose of the stability straps is to support or stabilize the lower chord to strengthen the floor beam. This is accomplished by reducing the ''effective length'' of the lower chord of the beam from one long column (the entire length) by splitting it into a series of shorter, stiffer columns that are equal in length to the distance between the stability straps. The stability straps in the test model were ineffective because the portion of the test fixture to which the straps were attached was not stiff enough to allow the straps to fully stabilize the floor beam. (This is exactly the opposite problem from that described above with respect to the excessive rigidity of the test fixture where the floor beam ends were attached.)

By graphing the results obtained from the test, the FAA determined that the stability straps were not fully effective at the location where the beam buckled. This graphing demonstrated that the ''effective length'' of the floor beam lower chord at the point of buckling was 40.4 inches [between LBL 32.6 and right buttock line (RBL) 7.8], rather than the ''effective length'' of 24.75 inches used in the analyses conducted by FedEx and the FAA. Since the ''effective length'' was longer for the tested beam due to the ineffectiveness of the stability straps, the resulting column was weaker and buckled at a lower stress than would occur on the affected airplanes.

The FAA subsequently used the same analytical techniques used in its previous analysis to confirm that the buckling strength of the beam is approximately 20 ksi based on the effective column length of 40.4 inches demonstrated by the FedEx tests. This correlates well with the stress at buckling of 18 ksi measured in the tests and confirms the validity of the FAA's analysis.

During the September 19, 1997, meeting, and at the February 18, 1998, public meeting, FedEx concurred with the FAA that the stability straps buckled during the test, and were largely ineffective, as the straps could not provide stability to the lower chord.

At the public meeting on February 18, 1998, two FedEx consultants made presentations regarding this test. Both consultants agreed that, although the test was properly performed in accordance with the test protocol, the test fixture was not representative of the airplane. As a result, one of the consultants (Dr. Foster of Auburn University) stated that it would be inappropriate to draw conclusions from this test for the airplane floor beam.

Based on the discussion above, the FAA concludes that FedEx's ''Single I Beam Test'' does not demonstrate a lower chord stress capability greater than that calculated by the FAA, or that the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits. The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect.

3. *''On-Aircraft'' Test.* FedEx states that an ''on-aircraft'' test was conducted (Appendix 12, Report 97–052, Revision I/R, dated August 27, 1997), and that this test demonstrated that the container/airplane combination withstood an applied ''up'' load of approximately 20,000 lbs. FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits. FedEx also states in Section 6 of Report 97–051, also in Appendix 12, that a margin of safety of 2.1 was demonstrated with a 10,700-lb. container.

The FAA does not concur that this test demonstrates that the airplane is safe and in compliance with CAR part 4b. The test also does not demonstrate that the FAA's finding of unsafe

condition is incorrect. The ''on-aircraft'' test consisted of FedEx's ''SAA'' or full-size container, situated on the main cargo deck of a 727, restrained vertically by the forward and aft pallet locks (attached to the floor beams), and side vertical restraints (sidelocks). The container was modified to place four ''I'' shaped beams running lengthwise through the container. Four hydraulic jacks were positioned underneath the ''I'' beams on either side of the container and attached to jacking platforms on the main deck floor. The jacks were used to apply ''up'' loads to the container, as is shown in Figure 2.1 of FedEx's Report 97–051 (Appendix 12 of FedEx's submittal to Rules Docket No. 97–NM–09–AD). To transmit the loads applied to the ''I'' beams to the container, a rigid structure made of seventy-two 4- by 4-inch thick wood beam spacers, and thirty-eight ¾-inch thick plywood sheet formers curved at the edges to match the contour of the container, were fastened with screws to the 0.063-inch thick aluminum skin of the container. This structure, weighing approximately 1,400 lbs., provided a rigid platform for the ''I'' beams to lift the container (details of the plywood structure and its estimated weight are provided in Figure 2.3 of Report 97–051, Appendix 12).

The FAA has determined that the ''I'' beams and rigid structure used to introduce ''up'' load into the container artificially limited the distortion of the container under load and forced most of the applied load to the sidelocks and away from the floor beams. This is unconservative for the floor beams because it results in the test not representing how an actual loaded container or other ULD would affect the loads on the floor beams.

During the September 19 meeting, FedEx agreed that in the ''up'' load case, if the container is loaded and not restrained by the rigid structure, it attempts to deform to a catenary (arched) shape at the front of the container where the door is located. This effect is demonstrated by FedEx's inverted container test described in Appendix 9. FedEx also stated, however, that this would have no effect on the test results, although it was considering the use of airbags or hydraulic bags instead of the rigid structure to allow the ''SAA'' container to behave as it did in the test documented in Appendix 9. FedEx also stated in the meeting that it believed that testing to 2.5 g's, or 20,000 lbs. of ''up'' load, helps to account for the load being ''beamed'' or forced to the sidelocks.

The test results indicated that over 80 percent of the load was directed to the sidewalls of the container and, therefore, to the sidelocks rather than the floor beams. The FAA finds that this effect results from the rigid structure used to introduce the load into the container, and that this renders the test unrepresentative of the actual loading of the floor beam and significantly unconservative.

Even though the FAA determined that the results of the inverted container test (Appendix 9 of FedEx's comment) were unconservative, it showed that the percentage of the load carried by the back wall of the container was approximately three times greater than that determined by the ''on-aircraft'' test. The loads carried by the rigid back wall are largely carried by floor beam(s) locks, not the sidelocks. These results also contradict FedEx's conclusion that the ''on-aircraft'' test demonstrates that the floor structure is safe. The ''on-aircraft'' test provides confidence in the strength of FedEx's sidelocks. However, because of the artificial shifting of the loads from the floor beams to the sidelocks, the test fails to demonstrate that the floor structure is safe. Further, the ''on-aircraft'' testing to 2.5 g's did not result in the application of significant loading to the floor beams. Therefore, the results of the testing to 2.5 g's is of little significance when addressing the unsafe condition of the floor beams.

In Appendix 1 of FedEx's April 30, 1998, submission to Rules Docket No. 97–NM–09–AD during the reopened comment period, FedEx appears to now recognize the effect of the rigid plywood formers in forcing the load to the sidelocks and away from the floor beams. In this Appendix, on page 2 of the FedEx Engineering Report 98–026, Revision A, FedEx states ''Measured loads for the container perimeter latch locations indicate that 40 percent of the applied load was reacted on each side by the side latches (see Reference 3). This is due to the fact that the rigid formers did not allow the top of the container to deform as it would during actual conditions and thereby forced more load outboard than what would be typically encountered during flight.''

In summary, based on the previous discussion, the FAA does not concur that this test demonstrates that the airplane is safe and in compliance with CAR part 4b. The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect. One commenter states that he participated in FedEx's ''on-aircraft'' test. He states that the data from the latch load cells were inconclusive for the tests, and although he considered the test to be a reasonable representation of airplane conditions, he suggests that FedEx improve the latch load cell installation and data acquisition system and investigate whether the plywood formers used to apply the test load to the container roof could influence the latch load distribution. As discussed previously, the FAA does not concur that the ''on-aircraft'' test was representative of the airplane, but concurs that the plywood formers influenced the load distribution.

First Container Facing Aft

Two commenters state that positioning the first container aft of the 9g cargo barrier with the door facing forward is not optimum from a crashworthiness perspective and request that the AD specify that this container be facing aft instead. The FAA concurs. Paragraphs (a) and (b) of the final rule have been revised to allow the first container aft of the bulkhead to face aft, with all other containers facing forward.

Increased Running Load

One commenter states that the following statement in the NPRM is factually inaccurate: ''This running load of 90 pounds per inch is a safety concern, as it is approximately 2.6 times higher than the maximum running load of 34.5 pounds per inch allowed on these same floor beams when the airplane was in a passenger configuration.'' The commenter states that in a negative gust (''up'' load) situation the passenger floor beams must act to restrain upper deck loads and lower deck cargo loads simultaneously and, as a result, must react 81.0 lbs. per inch, not just the 34.5 figure as the NPRM indicates. The commenter maintains that if reduced loads are necessary to maintain the safety of cargo airplanes, then passenger airplanes should be similarly restricted.

The FAA does not concur that the passenger and cargo airplanes present similar safety concerns. The NPRM statement quoted by the commenter appeared in the section of the NPRM that described the FAA's reasons for undertaking the detailed design review which led to the conclusion that there is an unsafe condition. The statement in the NPRM is factually accurate for the running loads and the ''down'' load case and contributed to the FAA's concern with the strength of an unreinforced cargo floor.

The FAA subsequently determined that the ''up'' load case is the most likely critical case. The FAA agrees that, for the ''up'' load case, the running load figures identified in the comment are accurate. However, the passenger compartment is designed to uniformly

distribute passenger loads such that every floor beam is active in carrying these loads. In contrast, the freighter floor loads are applied differently. Instead of the main deck loads being applied uniformly, each 88-inch deep container spans several floor beams. As discussed previously, the result of this is that only floor beams located at the edges of containers are active in carrying the ''up'' loads. Hence, as the FAA determined in its detailed design review, the effect on the airplane is that the 90 lbs. per inch cargo container loading is much more critical than the uniformly applied upper and lower deck loads of the passenger configuration and is, in fact, a safety concern.

One commenter states that the interim weight reduction is too restrictive considering that the passenger 727 can carry in excess of 6,800 lbs. in the same zone. The 3,000-lb. limitation imposed in the NPRM is unjustified. The FAA does not concur. As discussed previously, the loading on the floor is significantly different depending on whether it is loaded by the carriage of passengers or containers. The 3,000-lb. limitation specified for the carriage of cargo in the NPRM is justified by the FAA's analysis provided in the Rules Dockets.

Netted Lower Lobe Cargo

One commenter states that if the lower lobe cargo is assumed to be netted (restrained), it would not have any relevance in a down gust situation. The FAA infers that the commenter believes that, as the cargo would be restrained to the belly of the airplane, it would not load the underside of the floor beams in a negative ''g'' environment due to a down gust.

Another commenter states that the NPRM should be changed to allow lower lobe weights to be subtracted from the main deck limits if the load is properly tied down. The FAA concurs partially. If the lower lobe cargo is properly tied down, it will be restrained by the structure differently than represented in the FAA analysis. While the FAA is not currently aware of configurations that restrain lower lobe cargo, paragraphs (e) and (f) of this AD allow for approval of this type of configuration as an alternative method of compliance with the final rule.

Airplane Weight Increases

One commenter states that the FAA should reconsider the present policy of withholding approval of maximum take-off weight (MTOW) and maximum landing weight (MLW) increases for 727 freighter modified airplanes. The rationale for this is that the resulting higher weights would allow greater fuel loads for remote region operators, and also would increase the safety margin of the airplane's modified fuselage structure, which is the FAA's prime concern addressed by the NPRM's. The FAA infers that the commenter believes that the proposed AD should be changed to reflect this.

The FAA concurs partially. The FAA concurs that maintaining a minimum in-flight weight reduces the loads resulting from vertical gusts, unless this additional weight is carried in body fuel tanks that are suspended from floor beams. Additional loads to the floor beams exacerbate the unsafe condition. This issue is addressed appropriately in the context of type certification and is not addressed in this AD. Therefore, the FAA has determined that no change to the final rule is necessary.

Operators' Ability To Determine Container CG's

One commenter states that there is no means to measure or comply with the requirement that the container cg's be within +/− 10 percent of the geometric center of the container. Two commenters state that the wording in the proposed AD should be changed to allow those operators having a loading procedure that maintains the container cg within +/− 10 percent to be considered compliant with this requirement. The FAA does not concur that the cg of the container cannot be determined, or that the requirement to maintain the cg within 10 percent of the horizontal cg cannot be complied with. For example, FedEx has recently acquired equipment for this purpose. Because the cg location within the container has a major effect on the loads imposed on the floor beams, the FAA considers that this limitation is necessary to address the unsafe condition. It should be noted that the vast majority of cargo containers are certificated to TSO C90c, which specifies a maximum cg shift of 10 percent. Therefore, operators should always have been ensuring that the cg shift did not exceed this limitation in the TSO.

One commenter submitted data to the Rules Dockets that the commenter states will allow an operator with a properly designed or modified scale to accurately determine, display, and record the container cg. The FAA did not evaluate the technical accuracy of the submission, as no change to the proposed AD was requested by the commenter.

Airplanes With Apparent Increased Floor Capability

One commenter states that one of its 727–200 airplanes has a greater running load allowable than its other two airplanes (37.5 lbs. per running inch versus 34 lbs. per running inch) and asks why this airplane is limited by the same restriction.

The FAA infers that the commenter believes that its airplane should have higher allowable container loads, based on this apparent increased capability, and that the AD should be changed to reflect this. The FAA does not concur. From its analysis, the design review team determined that the 727 main cargo decks are capable of supporting a maximum payload of approximately 3,000 lbs. per container. Paragraphs (e) and (f) of the AD allow for an applicant to propose new payloads along with substantiating data and analysis. No change to the final rule is necessary.

Inconsistent Limitations

One commenter states that the FAA's determination that these airplanes are capable of supporting only 3,000 lbs. per container is entirely inconsistent with the FAA's interim proposal, which would allow an 8,000-lb. pallet in any position where the entire load would be carried by one set of container locks. The commenter does not see any rational or consistent approach in the NPRM's. The FAA does not concur. The analysis that resulted in the 3,000-lb. per container limit was based on the current operational limits of the airplane. As discussed in the NPRM, the FAA determined that, if more restrictive operational limits are imposed, a higher payload could be allowed on an interim basis. The FAA has estimated that the airplane gust loads will be reduced with limitations on in-flight weight and maximum operating airspeed to the extent that the 3,000-lb. limit per container can be raised to 4,000 lbs. for the interim period.

For the ''up'' load case, two 4,000-lb. containers placed back-to-back, without side vertical restraints, impose approximately the same amount of load on the floor structure as a single 8,000-lb. container with the adjacent cargo positions carrying no payload. Because of this, for the interim period, the operator would have the flexibility to carry an 8,000-lb. container, provided the containers on either side are empty.

If side vertical restraints acceptable to the FAA are installed, then the interim payload is not to exceed a total weight of 9,600 lbs. for any two adjacent containers. In this case, as stated in paragraph (b) of the AD, the 8,000-lb.

limit per container would still apply. Many of the different containers and flat pallets or ''cookie sheets'' used by operators require side vertical restraints, as specified in TSO C90c.

Irrelevancy of Model 747 Problems

One commenter states that the FAA only proposed payload reduction because of the incidents occurring on 747's, but the FAA has no reason to believe the problems found on the 747's will occur on the 727's. The FAA does not concur. The FAA did, in fact, look into the 727 conversions because those conversions had been performed by some of the same companies and with similar procedures and design methods as some 747's which had been found to be unsafe. The unsafe condition that is the subject of this AD, however, is specific to the 727 and has been documented in the Rules Dockets.

Applicability of 14 CFR 25.1529

One commenter states that the NPRM statement indicating that STC holders are required to issue Instructions for Continued Airworthiness in accordance with 14 CFR 25.1529 does not apply to its STC's because the applicable airworthiness standards for the 727 are CAR part 4b, rather than 14 CFR part 25. The FAA does not concur. Since January 28, 1981, 14 CFR 21.50(b) has required that the holder of an STC for which application was made after that date shall furnish the Instructions for Continued Airworthiness prepared in accordance with 14 CFR 25.1529. This requirement is effective regardless of the specific certification basis of the airplane.

Fatigue Cracks as Evidence of Unsafe Condition

FedEx states that, if the FAA's report of huge negative margins of safety at ultimate load are true, then the ''typical daily operating conditions would still impose substantial loads on the structure,'' and result in wear and cracking of the floor structure. FedEx's review of the FAA service difficulty report data generated only two reports of cracks on the converted 727 freighters, and no other damage was found that could be attributed to the 727 cargo conversion modification.

The FAA does not concur that a low number of in-service difficulty reports indicates that the FAA's finding of unsafe condition is unfounded. FedEx has reported that its average cargo load density is approximately 7.5 lbs. per cubic foot, which equates to an average cargo payload of approximately 3,300 lbs. per container. This results in stress levels that on average would be similar to those of a passenger 727. Therefore, it is not expected that fatigue cracks would develop in only 11,008 total flight cycles, which is the highest number of cycles accumulated (as of August 27, 1998) by any FedEx 727 airplane since conversion to a freighter configuration. As discussed previously, the unsafe condition addressed in these AD's is not a result of fatigue, but is the result of the existing floor structure not being able to support the allowable payloads and distributions for the critical gust conditions.

Data Showing Floors To Be Safe

FedEx states that the NPRM is inaccurate in stating that the FAA design review team was unable to find any data which showed that the floors were safe for the heavier (than passenger loading) freight payloads. FedEx states that the FAA has received and accepted data verifying the safety of the floor structure. FedEx also states that the FAA has failed to provide ''reasoned explanation'' for not approving various documents.

The FAA does not concur. In performing its own analysis, the FAA was careful to use only methodologies that were commonly employed in industry. One of the ways that the reasonableness of the FAA analysis contained in the Rules Dockets was checked was to compare the results with results of the STC holders' analyses, where possible. In this case, several analysis documents (Dee Howard Reports R90–2, R90–4, and R90–6) were used by FedEx to analyze the main deck floor beams in support of its STC for half-size containers (SA7447SW). However, these documents do not ''verify that the unreinforced floor structure of the main cargo deck can safely support the heavier freighter payloads.'' Also, they do not address all of the critical load cases or configurations, nor do they address the effect of cg shifts.

Recognizing these limitations, the FAA used FedEx's methodology to verify that the FAA analysis yielded similar results for a similar load case. In doing this, the FAA used the load case which placed ''down'' loads on the containers, as provided in FedEx's analysis, as its analysis did not contain an ''up'' load case (as required by CAR part 4b standards). Using the applied loads from FedEx's ''down'' load case, the FAA calculated the margins of safety for the floor beams using the FAA's documented methodology. The results for the mid-span of the floor beam matched very closely to those documented in FedEx's STC analysis for the half-size containers, which verifies that the FAA's and FedEx's analytical methodologies were quite similar for the same load case.

However, because FedEx's (Dee Howard) documents do not address all the critical load cases, locations on the floor beam, or configurations, nor do they address the effects of cg shifts, they do not ''verify the safety of the floor structure.''

In addition, of the ten documents related to the floor beam analysis testing that FedEx submitted in its comments, three documents (Appendices 1, 2, and 3) describe analytical methodologies and do not (and are not intended to) ''show the floor structure can safely support the heavier payloads.'' Regarding the decompression methodology document submitted in Appendix 3, FedEx acknowledged at the September 19, 1997, meeting that it had not yet revised the document following comments received from the FAA at a meeting held between FedEx and the FAA on July 24, 1997.

Three other documents (Appendices 4, 8, and 9) are test plans or results that have been discussed previously and also do not ''show the floor structure can safely support the heavier payloads.''

The two external loads documents (Appendices 5 and 6) have been approved by the FAA prior to FedEx's comment submittal (FAA letter 97–120S–534, dated August 21, 1997) and are considered appropriate as a starting point for an analysis of the floor structure. However, these documents by themselves do not ''verify the safety of the floor structure.''

Appendix 12 includes a document containing an incomplete analysis of one floor beam, a test report which was discussed previously, and two videotapes of that test, none of which ''verify the safety of the floor structure.'' Finally, FedEx's Document ER 97–035 I/R, dated July 20, 1997 (Appendix 7), which was approved by FedEx on August 13, 1997, had not been submitted to the FAA prior to its inclusion in FedEx's comment submittal. In reviewing this document, the FAA has determined that because the area addressed is shorter than an 88-inch container, this document alone does not substantiate higher container loads. The floor under the rest of the container also would need to be substantiated to warrant a change to the AD limits.

The FAA does not concur that it has received and accepted data verifying the safety of the floor structure, or that the FAA design review team was in possession of any data which showed that the floors were safe for the heavier (than passenger loading) freight

payloads. Finally, the FAA does not concur that it has failed to provide FedEx with a ''reasoned explanation'' for not approving various documents. FedEx is aware of the current status of all the above mentioned documents.

FedEx also states that a Boeing letter (Appendix 41) indicated that the floor beams were safe for a passenger to freighter airplane conversion at (container) weights of 8,000 lbs. The FAA does not concur. The referenced letter was part of an initial budget quote for a zero fuel weight increase that estimated potential weight increases that might be applicable to airplanes converted from passenger to freighter configurations. Simplifying assumptions were used by Boeing in order to allow FedEx to quickly establish, as a rough approximation, the financial feasibility of converting an airplane. Any necessary changes to the floor beams in estimating the weight of the airplane following conversion were not addressed.

FedEx's Finite Element Model

FedEx states that the FAA misused FedEx's finite element model (contained in Engineering Report 8504), which identifies negative margins of safety in the fuselage monocoque, to substantiate its finding of unsafe condition. FedEx also states that the NPRM was inaccurate in stating that the report was used for certification. The FAA does not concur. The FAA did not use FedEx's Engineering Report 8504 to validate its analysis. Rather, as discussed previously, the FAA used the floor beam analysis documents submitted as part of the substantiation for FedEx's STC for half-size containers (SA7447SW) to validate its analysis. The NPRM did state that the original STC certification data contained documented negative margins of safety. The FAA does not concur that this statement is incorrect. At the meeting held September 19, 1997, FedEx stated that the document was used to support original STC issuance, and that no other document was submitted.

Critical Loading on Floor Beams

FedEx states that, contrary to a statement in the NPRM, the FAA has not established that floor beams at the forward and aft edges of the container are more critically loaded. In its August 28, 1997, submittal to Rules Docket No. 97–NM–09–AD, FedEx cited its ''on-aircraft'' test as proof that the sidelocks are more critically loaded. FedEx appears to have mistakenly inferred that this statement addresses the effectiveness of FedEx's sidelocks. This inference is incorrect. In context, this statement simply points out that, for the ''up'' load case, ''the floor beams at the forward or aft edges of the containers would be more critically loaded'' than the floor beams under the center of the container. The reason for this is that a full-size container is restrained against vertical movement by the container locks attached to the floor beams at container edges and there are no container locks in the center of the container.

Communications With FAA

FedEx's comments included a number of disagreements with documentation of various communications prepared by the FAA and placed in Rules Docket No. 97–NM–09–AD. Because these comments do not relate to the merits of this AD, they are not addressed in this final rule. However, the FAA has provided a response to these comments in that Rules Docket.

Interim Limitations Already Observed

One commenter states that the interim operating limitations are not necessary because the commenter does not know of a 727 freighter STC that allows operation higher than 350 knots indicated airspeed (KIAS) and, for practical reasons, 727–200 airplanes almost never operate at weights below 100,000 lbs. The FAA does not concur. While many of the affected airplanes are subject to a maximum operational speed limitation of approximately 350 KIAS, other affected airplanes are not subject to such limitations and do operate at higher speeds. In addition, while operation at weights below 100,000 lbs. is not likely for most 727–200 converted freighters, such operation is permitted and may occur. Such operation is even more likely for the lighter weight 727–100, which also is subject to this AD.

Alternatives to Limitations in the AD

Several commenters asked about alternatives to the proposed rule and suggested increased inspections, such as those in other AD's. The FAA does not concur. The unsafe condition identified in the AD is not based on loads imposed on the floor structure on an average flight (i.e., fatigue-type loading). The unsafe condition is caused by loads experienced on the airplane due to a large gust while carrying certain cargo payloads and distributions. In this case, a floor beam failure or excessive deflection would likely result in the loss of the airplane. Because such a failure would not necessarily be preceded by cracking, inspections of the airplane would not prevent the failure. The only means for preventing a catastrophic event is to limit the flight operation of the airplane and/or the container payloads.

One commenter proposes a statistical approach to study the unsafe condition by requiring certain inspections over the next year while imposing certain operational limitations. The FAA does not concur. Because the unsafe condition is a collapse of the floor caused by large gusts, increased inspections in the areas of concern will not serve to lessen the likelihood of loss of the airplane.

One commenter proposes that the FAA revise the proposed AD to further limit the maximum operational speed to 280 KIAS as an alternative to payload limitations. The FAA does not concur with the commenter's proposal to reduce the maximum operational speed to 280 KIAS. Reducing the maximum operational speed levels below 350 KIAS does reduce the gust loads on the airplane. However, speed restrictions below 350 KIAS that permit safe operation of the airplane do not affect the maneuver loads, which at these speeds become more critical than the gust loads.

''Mode B''

One commenter requests that, for the interim limitations, the FAA also allows operation at ''Mode B'' [350 knots equivalent airspeed (KEAS)] for the maximum operating airspeed (Vmo). The commenter states that operations at ''Mode B'' would be more convenient than the 350 KIAS limitation specified in the proposed AD. The FAA concurs. The FAA has revised the interim limitations of the final rule accordingly.

Release of Proprietary Data

Several commenters state that the FAA must divulge all data used to make its finding of an unsafe condition; the commenters cite various legal cases.

The FAA infers that commenters are insisting that the FAA release relevant proprietary data that was considered by the FAA during this rulemaking. The FAA does not concur for two reasons. First, the Trade Secret Act (18 U.S.C. 1905) prohibits the disclosure of such data, and this prohibition is not overridden by the requirements of the Administrative Procedure Act (APA). The cases cited by the commenters, while generally stating that agencies must release all information on which they rely during rulemaking, do not address the prohibition against the release of trade secret data.

Because AD's address unsafe conditions associated with aeronautical products, the FAA routinely evaluates proprietary design data in determining whether AD's are necessary. In

determining whether such material should be placed in the Rules Docket, the FAA applies the standards developed under the Freedom of Information Act (FOIA; 5 U.S.C. 552) in the application of Exemption 4 [§ 552(B)(4)], which protects ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' If data are determined to meet those standards, they are not placed in the Rules Docket, but are retained in separate files that are not released to the public. Apart from violation of the Trade Secret Act, if the FAA were to release such data, it would be much more difficult for the FAA to obtain the data on which its findings of unsafe conditions are necessarily based.

Second, the APA generally has been interpreted as requiring that agencies provide the public with a meaningful opportunity to comment on proposed rules. In this rulemaking, the FAA has fully complied with this requirement, even without releasing trade secret data. In developing the NPRM, the FAA used proprietary Boeing loads data in its analysis, from which the FAA identified the existence of the unsafe condition. Although Boeing has not consented to releasing these data, FedEx has submitted comparable loads data (discussed previously under the heading, ''Extension of Interim Operational Period'') which, when used in the FAA analysis (which has been placed in the Rules Dockets), also demonstrate the existence of the unsafe condition. FedEx did consent to the release of these data. In fact, at the first public meeting on February 18, 1998, the FAA used these data in its presentation explaining its analysis. The analysis and the presentation are fully documented in the Rules Dockets, and have been available for review by commenters. The FAA also has referenced other proprietary data, which have been submitted by applicants seeking approval for modifications to correct the unsafe condition, as confirming the FAA's analysis. Although these data are relevant to the rulemaking, they do not provide the basis for the FAA's action, and their release would not significantly increase the meaningfulness of the public's opportunity to comment on the FAA's proposal.

One commenter requests copies of three recently updated Boeing computer programs which it believes were utilized by the FAA in determining the container payload limits specified in the NPRM. The commenter states that those programs are entitled: (1) ''Vertical Gust Load Factors 'Gs;'' (2) ''727 Movement (sic) of Inertia Model;'' and (3) ''Operating Empty Weight Plus Payload Distribution.'' The FAA is not aware of the referenced programs, does not have them, and did not use them in its analysis.

Economic Analysis

Several commenters state that the FAA underestimated the cost to modify the airplane floor structure into compliance to CAR part 4b, citing a Pemco estimate of $400,000, as opposed to the $100,000 estimate contained in the NPRM. Several commenters also state that the FAA had underestimated (1) the loss in revenue due to the reduced allowable payloads, and (2) the amount of time necessary to get all airplanes modified due to the short 120-day interim period, a lack of FAA-approved fixes, and the limited availability of facilities to install the modifications within the 120-day period proposed by the NPRM.

The FAA concurs. The FAA used data supplied by industry to conduct its cost and regulatory flexibility analysis used in the NPRM and has considered the data supplied by commenters during the comment period to conduct the cost and regulatory flexibility analysis used for the final rule.

Cost-Benefit Analysis

One commenter states that the FAA must undertake a thorough cost-benefit analysis and economic impact assessment in conjunction with its consideration of the remedial actions at issue in this rulemaking. The commenter states that the FAA has thus far failed to conduct an adequate cost-benefit analysis. The commenter states that a cost-benefit analysis and economic impact assessment are required by the provisions of the Regulatory Flexibility Act.

The FAA does not concur. As discussed below under the heading ''Regulatory Evaluation Summary,'' the FAA has performed an extensive analysis of the costs and benefits of this AD and has fulfilled the requirements of the Regulatory Flexibility Act.

Combi Airplanes

One commenter states that the NPRM has not considered those operators that operate airplanes in a combi mode (a combi airplane has provisions for passengers and cargo on the main deck in separate compartments). The commenter also states that it assumes that the load restrictions would not apply to the floor structure which is used to carry passengers and that the original manufacturer's limitations are applicable. The FAA concurs. Although the commenter is correct with respect to floor structure carrying passengers, combi airplanes transporting containers on the main deck must be in compliance with the limitations specified in this AD.

Applicability of Proposal

FedEx points out that the wording of the applicability in the AD could easily be misconstrued as also applying to airplanes manufactured as freighters by the original equipment manufacturer. The FAA concurs and has revised the applicability of the final rule to read ''Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration in accordance with Supplemental Type Certificate SA1767SO, SA1768SO, or SA7447SW; certificated in any category.''

Other Cargo Lock Devices

One commenter requests that the proposed AD be revised to add a paragraph discussing a ''special load-alleviating cargo container lock'' for which the commenter has applied for an STC at the FAA, Los Angeles ACO. The commenter reports that this lock will allow for the carriage of 16,000 lbs. rather than 8,000 lbs. in two adjacent containers, as specified in the proposed AD, but to be conservative, the commenter requests that the rule allow 12,000 lbs. for two adjacent containers for the interim period. During the reopened comment period, this commenter submitted additional information in support of its original comment.

The FAA does not concur. The information submitted is not sufficient to substantiate the safety of the airplane with the locks installed. This lock is the subject of an STC application and is not currently FAA-approved. Paragraphs (e) and (f) of the AD provide for approval of alternative methods of compliance to address potentially alleviating devices for the unsafe condition. The commenter may obtain such an approval upon submission of data substantiating that the referenced device provides an acceptable level of safety. Therefore, no change to the final rule is necessary.

''Fine Tune'' the AD

The CAA and others request that the AD should be ''fine tuned'' after issuance, as new data become available. The FAA does not concur that ''fine tuning'' of the AD is necessary. Paragraphs (e) and (f) of the AD allow for approval of alternative methods of addressing the unsafe condition when substantiated properly. As with any AD, if new information indicates that

changes to the AD itself are needed, the FAA has the authority to revise or supersede this AD.

Request for Clarification

One commenter requests clarification of the procedures that will be used to obtain future FAA approvals with respect to this rulemaking and to inform the public of those approvals.

As stated in the final rule, all submissions should be made to the Atlanta ACO. The Transport Airplane Directorate has established a team consisting of members from several ACO's to review all requests in accordance with paragraphs (e) and (f) of this AD. In all other respects, the process for approvals under this AD will be similar to that followed for all AD's. For example, in order to protect applicants' proprietary data, the FAA will notify only the applicant for an approval of the FAA's decision; while the FAA will disclose whether approvals have been granted, requests for approved data would be handled under normal FOIA procedures.

Other Safety Improvements

One commenter states that, because this AD will necessitate large expenditures and does not address an unsafe condition, requiring compliance with it will prevent the affected airlines from adopting other less costly and more effective safety enhancements, such as updating flight deck equipment. The FAA does not concur. As discussed previously, this AD addresses a serious unsafe condition. Although correcting this condition may be expensive, the FAA has determined that it must be corrected to ensure an acceptable level of safety.

Petitions for Reconsideration

In addition to their comments, several commenters also filed ''Petitions for Reconsideration'' in accordance with 14 CFR 11.93. Because these petitions were filed prematurely, the FAA considered them as comments to the Rules Docket. However, because the substance of the petitions is repetitious of the more extensive comments submitted by FedEx and others discussed above, the petitions are not discussed separately in this final rule.

Explanation of Change of Aircraft Certification Office Contact

The FAA has changed the point of contact for obtaining further information, for obtaining FAA approval of certain actions, and for submitting substantiating data and analyses in accordance with the provisions of this AD, due to relocation of certain STC holders.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Participation at the Public Meeting on the Final Rule

Requests from persons who wish to present oral statements at the public meeting should be received by the FAA no later than 5 days prior to the meeting. Such requests should be submitted to Mike Zielinski as listed in the section titled **FOR FURTHER INFORMATION CONTACT** above, and should include a written summary of oral remarks to be presented, and an estimate of time needed for the presentation. Requests received after the date specified above will be scheduled if there is time available during the meeting; however, the names of those individuals may not appear on the written agenda. The FAA will prepare an agenda of speakers that will be available at the meeting. To accommodate as many speakers as possible, the amount of time allocated to each speaker may be less than the amount of time requested. Those persons desiring to have available audiovisual equipment should notify the FAA when requesting to be placed on the agenda.

Purpose of Public Meeting

Because of the high degree of public interest in this AD, the FAA has scheduled a public meeting to discuss its content and issues relating to compliance. The FAA's objective is to ensure that all affected operators and design approval holders have a full understanding of the issues addressed in the AD and of the actions necessary to comply with it. The FAA anticipates that, following this meeting, there will continue to be extensive discussions between the affected parties and the FAA for the purpose of identifying and implementing the most timely and cost-effective means to eliminate the unsafe condition addressed in this AD.

Public Meeting Procedures

Persons who plan to attend the public meeting should be aware of the following procedures that have been established for this meeting:

1. There will be no admission fee or other charge to attend or to participate in the public meeting. The meeting will be open to all persons who have requested in advance to present statements, or who register on the day of the meeting (between 8:30 a.m. and 9:00 a.m.) subject to availability of space in the meeting room.

2. Representatives from the FAA will conduct the public meeting. A technical panel of FAA experts will be established to discuss information presented by participants.

3. The FAA will try to accommodate all speakers; therefore, it may be necessary to limit the time available for an individual or group. If necessary, the public meeting may be extended to evenings or additional days. If practicable, the meeting may be accelerated to enable adjournment in less than the time scheduled.

4. Sign and oral interpretation can be made available at the public meeting, as well assistive listening device, if requested 5 calendar days before the meeting.

5. The public meeting will be recorded by a court reporter. Any person who is interested in purchasing a copy of the transcript should contact the court reporter directly. This information will be available at the meeting.

6. The FAA requests that persons participating in the public meeting provide 10 copies of all materials to be presented for distribution to the panel members; other copies may be provided to the audience at the discretion of the participant.

Regulatory Evaluation Summary

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

The FAA conducted a Cost Analysis and Final Regulatory Flexibility Analysis to determine the regulatory impacts of this and three other AD's to operators of all 244 U.S.-registered Boeing Model 727 passenger airplanes that have been converted to cargo-carrying configurations under 10 STC's held by four companies. This analysis is included in the Rules Docket for each AD. The FAA has determined that approximately 38 727–100's and 79 727–200's were converted under FedEx

STC's. All of these airplanes are operated by FedEx. (There were 15 727's for which the FAA could not identify the STC holder. It is possible that these airplanes were also converted under a FedEx STC. Their costs are not included here.)

Assuming that FedEx will comply with the restricted interim operating conditions specified in the AD, the FAA estimates that FedEx will not lose revenues during the 28-month interim period after the effective date of the AD. Both 727–100 and 727–200 series airplanes modified under the FedEx STC have side restraints approved by the FAA. These airplanes will be limited to a total of 9,600 lbs. for each pair of adjacent containers with an 8,000-lb. single container limit. Based on typical payloads, FedEx will not lose revenues during the interim operating period.

The Cost Analysis and Final Regulatory Flexibility Analysis completed by the FAA and included in the Rules Dockets, estimates that affected airplanes can be modified at a cost of $385,000 per airplane to carry the maximum payloads currently allowed, or a total of $45 million for the 117 FedEx 727's. The FAA expects that FedEx will modify its airplanes during the 28-month interim period, scheduling the modifications to coincide with periodic maintenance. A modification will require that the airplane be removed from service for a period of 17 days; the FAA conservatively estimates that scheduling a modification during periodic maintenance will reduce the net time out of service by two days. The FAA estimates the lost revenue during this 15-day period will be $14,829 per day, per 727–100, and $23,405 per day, per 727–200. The total down-time lost revenue for FedEx will be $36.2 million. This estimate conservatively assumes that cargo is not shifted from airplanes being modified to other airplanes. Such cargo shifting is typical industry practice and would reduce the costs attributable to lost revenues. Incremental fuel costs to carry the additional weight of the floor modification will be $462,000 over the 28-month period, as airplanes are modified. When all affected FedEx 727's are modified, additional fuel costs will be about $32,000 per month.

The total cost, therefore, to modify the fleet of affected 727's that were originally modified to the FedEx STC, including lost revenues while the airplanes are out of service, modification costs, and increased fuel costs is $81.7 million, or $74.5 million discounted at seven percent over 28 months.

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), was enacted by Congress to ensure that small entities are not unnecessarily or disproportionately burdened by government regulations. The RFA requires a Regulatory Flexibility Analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The purpose of this analysis is to ensure that the agency has considered all reasonable regulatory alternatives that will minimize the rule's economic burdens for affected small entities, while achieving its safety objectives. Under section 63(b) of the RFA, the analysis must address:

1. Reasons why the agency is promulgating the rule;
2. The objectives and legal basis for the rule;
3. The kind and number of small entities to which the rule will apply;
4. The projected reporting, recordkeeping, and other compliance requirements of the rule; and
5. All federal rules that may duplicate, overlap, or conflict with the rule. These elements of the RFA are addressed below:

A. Reasons Why the Agency Is Promulgating the Rule

The FAA has determined that the unreinforced floor structure of the main cargo deck of converted 727's is not strong enough to enable the airplane to safely carry the maximum payload that is currently allowed in this area. The actions specified in this AD are intended to prevent failure of the floor structure, which could lead to loss of the airplane.

B. Statement of Objective and Legal Basis

Under the United States Code (U.S.C.), the FAA Administrator is required to consider the following matter, among others, as being in the public interest: assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. (See 49 U.S.C. 44101(d).) Accordingly, this AD amends Title 14 of the CFR's to require operators of Boeing 727 airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration to comply with certain payload limitations, substantiate data showing other acceptable limits, or show an alternative method of compliance (AMOC).

C. Regulatory Flexibility Determination

Under the RFA, the FAA must determine whether or not a rule significantly affects a substantial number of small entities. This determination is typically based on small entity size and cost thresholds that vary depending on the affected industry. The entities affected by the rule are those operating the 117 U.S.-registered converted Boeing 727 airplanes that have been converted under FedEx STC's. There is only one operator of such airplanes, namely FedEx, and it is not a small entity, therefore, a substantial number of small entities will not be significantly affected by this rule. Nevertheless, the FAA has prepared an analysis of cost impacts and has examined possible regulatory alternatives.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

With two minor exceptions, the rule will not mandate additional reporting or recordkeeping. First, there will be a negligible one-time cost to operators to revise their AFM's and Supplements. Second, operators will be required to keep records of the modifications to their airplanes. This requirement is common to all maintenance, preventive maintenance, and alterations under § 91.417, Maintenance records, and does not impose costs attributable to this rule.

E. Overlapping, Duplicative, or Conflicting Federal Rules

The rule will not overlap, duplicate, or conflict with existing Federal rules.

F. Analysis of Alternatives

This AD will not impose a financial requirement on small entities because only one entity, FedEx, will be affected and it is large. However, because this AD is one of four that the FAA will impose on operators of converted 727's and because many of the entities affected by the other AD's are small, the FAA examined potential alternatives to the AD's requirements to minimize the rule's economic burden for small entities while achieving its safety objectives. The alternatives are:

- Exclude small entities;
- Extend the compliance deadline for small entities; and
- Establish higher payload limits for small entities.

The FAA has determined that the option to exclude small entities from the requirements of the rule is not justified. The unsafe condition that exists on an affected 727 operated by a small entity is as potentially catastrophic as that on an affected 727 operated by a large

entity. In fact, the average payloads carried by small entities may exceed the average payloads carried by large operators, resulting in a higher probability of a catastrophic event.

The FAA also considered options to extend the compliance period for small operators. The proposed rule established a final compliance date of 120 days after the effective date of the rule. During this 120-day period, operators could comply with interim operating conditions that would enable them to carry higher payloads than those permitted after that interim period. When the proposed rule was published, the FAA had information that indicated that a portion of the engineering data from an FAA-approved STC for a floor modification that could be used as an AMOC would be available within a few months of the proposed rule's publication. In addition, the FAA estimated that operators would be able to modify their airplanes within the 120-day interim period.

Hamilton Aviation has received letters of approval for work towards obtaining an STC for strengthening the floor beams aft of Station 700 and expects to be able to submit additional data in the Fall of 1998 that will provide the basis for an STC for the entire floor. Pemco World Air Services expects to be able to use Hamilton's engineering tools to modify the floors of the 727's it has converted. The FAA is confident, therefore, that there will be AMOC's for FedEx when this final rule is published.

Several commenters to the Rule Dockets for the proposed AD's rejected the FAA's claim that their airplanes could be modified within the 120-day interim period. Their arguments were based on the unavailability of an approved STC that could be used as an AMOC (or, at that time, even letters of approval toward an STC). Operators also stated that modification of all 244 U.S.-registered airplanes would be impossible within a 120-day time frame.

The FAA agrees 120 days is unrealistic and would have severe economic consequences because FedEx would be required to reduce their payloads substantially at the end of the interim period. In the final rule, therefore, the FAA extends the interim period to 28 months. This will permit FedEx to modify its airplanes during regularly scheduled maintenance, minimizing down time and associated lost revenues. This change will be especially beneficial to small entities affected by the other AD's that may find it difficult to find alternative means of carrying cargo.

Finally, the FAA rejects the compliance alternative that would reduce payloads from those currently required but would establish higher payload limits than those for larger entities. This alternative is unacceptable because the unsafe condition is dependent on the size of the payload, not the size of the entity. The FAA cannot permit a small entity to operate under an unsafe condition.

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed ''significant intergovernmental mandate.'' A ''significant intergovernmental mandate'' under the Act is any provision in a Federal agency regulation that would impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of $100 million (adjusted annually for inflation) in any one year. Section 203 of the Act, 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

This AD does not contain any Federal intergovernmental or private sector mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

98–26–18 Boeing: Amendment 39–10961. Docket 97–NM–09–AD.

Applicability: Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration in accordance with Supplemental Type Certificate (STC) SA1767SO, SA1768SO, or SA7447SW; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

Note 2: The payload limitations specified in this AD are in addition to payload limitations that are otherwise applicable and do not allow for increases in payloads beyond those specified in such limitations.

To prevent structural failure of the floor beams of the main cargo deck, which could lead to loss of the airplane, accomplish the following:

(a) Except as provided in paragraph (b) of this AD, within 90 days after the effective date of this AD, accomplish the requirements of paragraph (a)(1) or (a)(2) of this AD, as applicable.

(1) For airplanes that transport containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Codes ''A,'' ''B,'' ''C,'' ''D,'' ''E,'' or the FedEx STC SA7447SW containers: Revise the Limitations Section of all FAA-approved Airplane Flight Manuals (AFM) and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements to include the following information. This may be accomplished by inserting a copy of this AD in all AFM's, AFM Supplements, and Weight and Balance Supplements.

''LIMITATIONS

All containers with one door must be oriented with the door side of the container facing forward, except the door of the first container aft of the cargo barrier may face aft.

The location of the horizontal center of gravity for the total payload within each

container or pallet shall not vary more than 10 percent (8.8 inches) from the geometric center of the base of the container or pallet for the forward and aft direction, and 10 percent of the width from the geometric center of the base of the container or pallet for the left or right direction.''

''PAYLOAD LIMITATIONS

For containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Code ''A'' (88 by 125 inches), ''B'' (88 by 108 inches), or ''C'' (88 by 118 inches):

Do not exceed a total weight of 3,000 pounds per container or pallet on the main cargo deck, except in the area adjacent to the side cargo door. In the side cargo door area, for all containers or pallets completely or partially located between Body Station 440 and Body Station 660, those containers or pallets are restricted to a maximum payload of 2,700 pounds per container or pallet. The 3,000 and 2,700 pound payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.

For containers or pallets that have been manufactured in accordance with NAS 3610 Size Code ''D'' (88 by 54 inches) or ''E'' (88 by 53 inches), or FedEx STC SA7447SW containers (88 by 63 inches):

Do not exceed a total weight of 1,500 pounds per container or pallet on the main cargo deck, except in the area adjacent to the side cargo door. In the side cargo door area, for all containers or pallets completely or partially located between Body Station 440 and Body Station 660, those containers or pallets are restricted to a maximum payload of 1,350 pounds per container or pallet. The 1,500 and 1,350 pound payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.''

(2) For airplanes on which any other containers or pallets are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate.

Note 3: The weight restrictions to be approved under paragraph (a)(2) will be consistent with the limitations specified in paragraph (a)(1) of this AD.

(b) As an optional alternative to compliance with paragraph (a) of this AD, within 90 days after the effective date of this AD, accomplish the requirements of paragraph (b)(1) or (b)(2) of this AD, as applicable. This alternative may be used only during the period ending 28 months after the effective date of this AD.

(1) For airplanes on which containers complying with NAS 3610 Size Codes ''A,'' ''B,'' ''C,'' ''D,'' or ''E,'' or STC SA7447SW, are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements to include the following limitations. This may be accomplished by inserting a copy of this AD in all AFM's, AFM Supplements, and Weight and Balance Supplements.

''LIMITATIONS

Maximum Operating Airspeed of Vmo equals 350 knots indicated airspeed (KIAS), or Mode ''B'' [350 knots equivalent airspeed (KEAS)].

Minimum operating weight: 100,000 pounds.

All containers with one door must be oriented with the door side of the container facing forward, except the door of the first container aft of the cargo barrier may face aft.

The location of the horizontal center of gravity for the total payload within each container shall not vary more than 10 percent (8.8 inches) from the geometric center of the base of the container for the forward and aft direction and 10 percent of the width from the geometric center of the base of the container for the left or right direction.''

''PAYLOAD LIMITATIONS

For airplanes that transport containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Code ''A'' (88 by 125 inches), ''B'' (88 by 108 inches), or ''C'' (88 by 118 inches):

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 9,600 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

For those containers or pallets which are completely or partially located within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 12,000 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

These container payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck; and

For containers or pallets that have been manufactured in accordance with NAS 3610 Size Code ''D'' (88 by 54 inches) or ''E'' (88 by 53 inches), or FedEx STC SA7447SW containers (88 by 63 inches):

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 4,800 pounds for any two adjacent (in the forward and aft direction) containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

For those containers or pallets which are completely or partially contained within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 6,000 pounds for any two adjacent (in the forward and aft direction) containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

These payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.''

(2) For airplanes on which pallets or containers other than those specified in paragraph (b)(1) of this AD, are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113.

Note 4: The weight restrictions to be approved under paragraph (b)(2) will be consistent with the limitations specified in paragraph (b)(1) of this AD.

(c) For airplanes complying with paragraph (b) of this AD, within 28 months after the effective date of this AD, accomplish the requirements of paragraph (a) of this AD.

(d) For airplanes that operate under the 350 KIAS limitations specified in paragraph (b) of this AD: A maximum operating airspeed limitation placard must be installed adjacent to the airspeed indicator and in full view of both pilots. This placard must state: ''Limit Vmo to 350 KIAS.''

(e) As an alternative to compliance with paragraphs (a), (b), (c), and (d) of this AD: An applicant may propose to modify the floor structure or propose differing payloads and other limits by submitting substantiating data and analyses to the Manager, Atlanta Aircraft Certification Office (ACO), FAA, Small Airplane Directorate, One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia 30349. The Manager of the Atlanta ACO will coordinate the review of the submittal with the Manager of the Standardization Branch, ANM–113, in accordance with the procedures of paragraph (f) of this AD. If the FAA determines that the proposal is in compliance with the requirements of Civil Air Regulations (CAR) part 4b and is applicable to the specific airplane being analyzed and approves the proposed limits, prior to flight under these new limits, the operator must revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113. Accomplishment of these revisions in accordance with the requirements of this paragraph constitutes terminating action for the requirements of this AD.

(f) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta ACO, who will coordinate the approval with the Manager of the Standardization Branch, ANM–113.

Note 5: Information concerning the existence of approved alternative methods of

compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

(g) 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.

(h) This amendment becomes effective on February 16, 1999.

Issued in Renton, Washington, on December 16, 1998.

Ronald T. Wojnar,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99–444 Filed 1–11–99; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–79–AD; Amendment 39–10962; AD 98–26–19]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 727 Series Airplanes Modified in Accordance With Supplemental Type Certificate SA1368SO, SA1797SO, or SA1798SO

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; technical public meeting.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration, that requires limiting the payload on the main cargo deck by revising the Limitations Sections of all Airplane Flight Manuals (AFM), AFM Supplements, and Airplane Weight and Balance Supplements for these airplanes. This amendment also provides for the submission of data and analyses that substantiate the strength of the main cargo deck, or modification of the main cargo deck, as optional terminating action for these payload restrictions. This amendment is prompted by the FAA's determination that under certain conditions unreinforced floor structure of the main cargo deck is not strong enough to enable the airplane to safely carry the maximum payload that is currently allowed in this area. The actions specified by this AD are intended to prevent failure of the floor structure, which could lead to loss of the airplane.

DATES: Effective February 16, 1999.

The public meeting will be held January 20, 1999, at 9:00 a.m., in Seattle, Washington. Registration will begin at 8:30 a.m. on the day of the meeting.

ADDRESSES: Information concerning this amendment may be obtained from or examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington, by appointment only between the hours of 8:00 a.m. and 2:00 p.m.

The public meeting will be held at the following location: The Radisson Hotel, 17001 Pacific Highway South, Seattle, Washington 98188; telephone (206) 244–6000.

FOR FURTHER INFORMATION CONTACT: Questions concerning the airworthiness directive should be directed to Paul Sconyers, Associate Manager, Airframe and Propulsion Branch, ACE–117A, FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30349; telephone (770) 703–6076; fax (770) 703–6097.

Requests to present a statement at the public meeting regarding the logistics of the meeting should be directed to Mike Zielinski, Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM–113, 1601 Lind Avenue, SW, Renton, Washington 98055–4056; telephone (425) 227–2279; 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 certain Boeing Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration was published in the **Federal Register** on July 15, 1997 (62 FR 37808). At the same time, the FAA issued three other similar notices of proposed rulemaking (NPRM's) to address airplanes similarly converted in accordance with STC's held by FedEx, Pemco, and ATAZ (now held by Kitty Hawk Air Cargo). That action proposed to require limiting the payload on the main cargo deck by revising the Limitations Sections of all Airplane Flight Manuals (AFM), AFM Supplements, and Airplane Weight and Balance Supplements for these airplanes. That action also proposed to provide for the submission of data and analyses that substantiate the strength of the main cargo deck, or modification of the main cargo deck, as optional terminating action for these payload restrictions.

On February 4, 1998, in order to obtain additional public participation in these NPRM's, the FAA reopened the comment period for a period of 90 days and scheduled two sets of public meetings, which were held in Seattle, Washington, on February 18 and 19, 1998, and April 1 and 2, 1998. In addition to the comments submitted during the original comment period, the comments that were provided at the public meetings and submitted to the Rules Dockets during the reopened comment period also are discussed below.

Comments

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

The FAA has received comments in response to the four NPRM's discussed previously (i.e., Docket No.'s 97–NM–09–AD, 97–NM–79–AD, 97–NM–80–AD, and 97–NM–81–AD). Some of these comments addressed only one NPRM, while others addressed all four. For example, although the comments submitted by FedEx address only the NPRM applicable to its STC's (i.e., Docket No. 97–NM–09–AD), other commenters referenced FedEx's comments and requested that those comments be considered in the context of the other three NPRM's, as well. Because in most cases the issues raised by the commenters are generally relevant to all four NPRM's, each final rule includes a discussion of all comments received.

Existence of Unsafe Condition

Several commenters disagree with the FAA's finding of an unsafe condition and refer to the following statement in the NPRM's, ''[a] design which does not meet [certification] standards is presumed to be unsafe.'' The commenters contend that, while this statement is ''convenient,'' the FAA is still obliged to issue the AD in accordance with 14 CFR part 39. In accordance with part 39, prior to the issuance of an AD, the FAA must establish that an unsafe condition exists in a product and that this condition is likely to exist in other products of the same type design.

From this comment, the FAA infers that the commenters believe the proposed AD is merely a consequence of non-compliance with Civil Air Regulations (CAR) part 4b, which are the design standards to which the Model 727 was certificated, and that the

unsafe condition has not been substantiated. The FAA does not concur. The context of the quoted statement in the NPRM's was an explanation of the FAA's method used in the design review that led to issuance of the NPRM's. Initially, the FAA had identified the potential non-compliance based on observation and review of original certification data. Since, in accordance with the Federal Aviation Act, CAR part 4b standards establish the minimum level of safety, the FAA considered that further evaluation was necessary and appropriate to determine whether this potential non-compliance created an unsafe condition warranting an AD. As explained in the NPRM's, the FAA determined not only that the design was non-compliant, but that the degree of non-compliance was highly significant, and resulted in substantial negative structural margins of safety. The FAA's analysis addressed the ''up'' load case, which was considered to be the most likely critical load case, in the sense that it was likely to be the load case that would present the most serious negative margins of safety. The analysis verified these negative margins and confirmed the FAA's concerns that serious negative margins may exist for other load cases, as well. The effect of these substantial negative margins is that the likelihood of catastrophic failure of the floor structure is unacceptably high. The FAA's finding of unsafe condition arises from this determination rather than from a finding of non-compliance with CAR part 4b.

Risk From Actual Operations

Several commenters state that the FAA's finding of an unsafe condition in the NPRM's is incorrect because, based on the way the airplanes are actually loaded and operated, the likelihood of encountering conditions specified in CAR part 4b that would exceed the strength of the floor structure is extremely improbable.

The FAA does not concur. The FAA's evaluation was based on the potential for a catastrophic event occurring as a result of an airplane encountering severe gust conditions while transporting containers loaded with maximum allowable payloads. (Unless otherwise stated, throughout the preamble of this AD the FAA uses the term ''container'' to refer to all unit load devices, including pallets.) The fact that operators may transport containers with maximum payloads only for a small percentage of their operations does not diminish the seriousness of the unsafe condition when they do transport such containers. (It should be noted that one commenter stated that its operations with even one container at maximum allowable payload are only a small percentage of its total operations, but also stated that it engages in such operations daily.)

In addition, the FAA disagrees with the commenters' conclusions regarding the probability of catastrophic events. The events that may cause a catastrophic failure occur randomly and, thus, cannot be reliably predicted and avoided for any particular operation. Although the probability of large gusts or excessive maneuvers (as specified in CAR part 4b) is low (approximately once in the lifetime of an airplane for a large gust), because of the large negative margins of safety associated with these unreinforced floor structure designs (discussed in the NPRM's), less severe events (i.e., lower gusts or milder maneuvers) also could result in catastrophic failure. Therefore, because the likelihood of encountering less severe events is significantly greater than the likelihood of encountering the events contemplated by CAR part 4b standards, and because the consequences of such encounters may be catastrophic, the FAA considers that the risk is unacceptable.

During the public meetings, several commenters suggested using analytical methods developed to show compliance with 14 CFR 25.1309 in assessing risks from gust loads. Their position was that if such analysis were performed, it would demonstrate that the unsafe condition addressed by the proposed AD is ''extremely improbable;'' therefore, an AD is unnecessary to address it.

The FAA does not concur. The purpose of section 25.1309 is to require that type certificate applicants demonstrate the robustness of the airplane systems and equipment. Therefore, it is not applicable to the assessment of the seriousness of an unsafe condition associated with identified structural deficiencies. Nevertheless, assuming that it is appropriate, section 25.1309(a) states that the airplane systems, equipment, and installations ''must be designed to ensure that they perform their intended functions under any foreseeable operating condition.'' This means that the airplane must function properly if it is being operated within its approved operating and environmental conditions. As discussed in the NPRM's, the FAA's analysis demonstrates that the affected airplanes, when operated with allowable payload weights and distributions (which is foreseeable), could experience catastrophic failure if they encounter gust conditions that are also foreseeable. Therefore, applying the analytical methods of section 25.1309(a), these STC designs would be found not to comply.

In addition, section 25.1309(b) requires that any system failure condition that would result in a catastrophic event be shown to be extremely improbable, even if the system failure occurred concurrently with environmental conditions that would reduce the capability of the airplane or the ability of the crew to cope with the system failure. Probabilistic analyses are used to demonstrate compliance with section 25.1309(b) by estimating the probability of random system and equipment failures occurring on the airplane. The consequences of failures that are more probable must be shown to be relatively minor; failures with more serious consequences must be shown to have lower probabilities. However, in providing guidance for compliance with this requirement, Advisory Circular (AC) No. 25.1309–1A advises: ''In any system or subsystem, the failure of any single element, component or connection during any one flight * * * should be assumed, regardless of probability. Such single failures should not prevent continued safe flight and landing. * * *''

Applying this analytical method to the circumstances of this AD, if the failure of the floor beam is assumed, the consequences are likely to be catastrophic, preventing continued safe flight and landing. Therefore, under the analytical approaches of either section 25.1309(a) or (b), the operations with understrength floors without limitations is unacceptable.

During the reopened comment period, FedEx submitted a risk assessment from which it concluded that, even assuming the NPRM identified a potential unsafe condition, the probability of occurrence was sufficiently small (i.e., once every 300 years) so that AD action should be postponed until additional testing and analysis has been completed. Other commenters referenced this analysis and supported FedEx's conclusion.

The FAA has evaluated the risk assessment submitted to Rules Docket No. 97–NM–09–AD, and does not concur with the commenters' conclusion. Regarding the general relevance of the kind of risk assessment submitted by the commenter, it should be noted that the probability of the limit gust event has already been considered when establishing the gust intensities specified in CAR section 4b.211(b). CAR part 4b requires that all airplanes be capable of structurally withstanding a gust of the intensities specified therein, as such a gust is expected to occur at

some time in the airplane's operating life.

Regarding the specific data presented in the FedEx risk assessment, the FAA does not concur with the assumption that extreme gusts will be encountered by a cargo carrying Boeing Model 727 airplane only once in 5 million flight hours. As its basis for this assumption, the commenter states that ''FAA data indicate that, in approximately 50 million flight-hours of experience among US domestic 727s, there have been five pilot reports of extreme gusts that exceeded federal thresholds for danger.'' The commenter states that this equates to a rate of occurrence of approximately once every 10 million flights. The commenter also states that due to potential errors, it would be conservative to double this rate to 10 total events, and use an estimate of 1 occurrence per 5 million hours.

The FAA does not concur with the commenter's statement that FAA data show that only five cases of extreme gust have been encountered by the U.S. 727 fleet. Turbulence events must be reported only if they result in detected airplane damage or passenger injuries. During certain gust events, the gust loads encountered in the cockpit are substantially less severe than those encountered in the aft portion of the airplane. Therefore, some large gust encounters may not ''feel'' very severe to the flight crew. As a result, the FAA recognizes that not all severe turbulence events are reported. Further, in the NPRM's, the FAA provided five cases of turbulence as examples, to illustrate that turbulence is a real occurrence, and not merely theoretical. These five examples were obtained from data showing 87 reported severe turbulence events, which resulted in passenger injuries, on the Boeing 727 from 1966 to March 1997. The FAA selected the five reports because the airplane operators had reported the magnitude of the turbulence event after obtaining this information from the flight data recorder. Operators are not required to obtain data regarding the magnitude of the turbulence event, and therefore it is rarely reported.

During the public meeting held on Thursday, February 19, 1998, the FAA explained that these turbulence cases were just examples and had been selected because the reports included information regarding event magnitude. The FAA further explained at that meeting that it was inappropriate to use these data in a probabilistic analysis. The commenter's risk assessment provides no information to change the FAA's views.

A section of the commenter's report states, ''Detailed equations that combine empirical evidence and physical theory estimate how frequently gusts of different magnitudes arise at different altitudes.'' The commenter states that its calculations indicate that gusts with intensities that equal or exceed 50 feet per second are encountered once per 50 million flight hours at 35,000 feet. The report does not provide the equations themselves, does not describe the methodology used to determine the 1 in 50 million flight hours probability value, and does not specifically identify the referenced source data. Therefore, the FAA cannot assess the validity of the commenter's conclusions.

The commenter also refers to graphs contained in a 1988 American Institute of Aeronautics and Astronautics (AIAA) publication by Frederic M. Hoblit that the commenter states indicate even lower encounter rates for gusts during climb and descent. The FAA has examined this publication, and does not concur with the commenter's statements regarding these data. First, the commenter appears to be incorrectly referencing the graphs, which represent continuous turbulence, and not discrete gusts, as provided in CAR 4b. The two types of atmospheric disturbances are different, and to reference these graphs is inappropriate. Secondly, the commenter's risk assessment only addresses gusts ''that exceed the Federal threshold'' (which the FAA infers to mean limit load gusts) in combination with cargo loads with two adjacent containers having a total weight that equals or exceeds 9,600 lbs. This approach is unconservative. As discussed in the NPRM, the cargo floor has a high negative margin of safety, and the risk of structural collapse exists at gust intensities well below the limit gust load when carrying currently allowed payloads above 9,600 lbs. The greater the weight being carried in the container, the lower the gust needed to cause catastrophic failure of the floor. The lower the gust intensity, the more common the gust occurrence becomes.

Based on the foregoing, the FAA has determined that the risk assessment submitted by FedEx does not provide a basis for delaying the final rule.

One group of commenters, identifying themselves as airmen for one of the affected operators, supports issuance of the final rule, as proposed. The commenters state that they do not have procedures to avoid clear air turbulence, and based on their knowledge, if any of them had encountered a similar wind condition to that experienced by a Boeing 747 in January 1998, their airplane would ''come apart, in-flight.''

The FAA concurs that there is no reliable means to forecast or to avoid clear air turbulence. The flight conditions encountered by the referenced 747 could be very hazardous to one of the affected airplanes if encountered while critically loaded with heavy containers.

Change in Applicable Standards

Several commenters state that the NPRM's reflect a radical change in the assumptions that certificate holders are permitted to use to substantiate the main deck floor structure. The FAA does not concur. As discussed below, the FAA's analysis is consistent with the applicable CAR part 4b standards, which became effective in 1953.

''Infinitesimal Probability''

One commenter states that the proposed AD would impose unnecessary costs which would then be passed to its customers, for what the FAA's Director of Aircraft Certification Service has stated is an ''infinitesimal probability of a safety related happening.'' The referenced comment is contained in an article in the April 15, 1997, issue of ''Commercial Aviation Report.''

From this comment, the FAA infers that the commenter believes the reference to ''infinitesimal probability'' belies the need for an AD. The commenter has taken the remark out of context. The actual quote is, ''What is the probability of it [catastrophe] happening in the next month? Infinitesimal.'' This remark was made in response to a question regarding why the FAA was issuing an NPRM rather than an emergency AD. The Director of the Aircraft Certification Service was explaining that, although the FAA had determined that the unsafe condition must be addressed by issuance of an AD, the urgency of the issue was not so great as to preclude the normal legally required process of providing public notice and opportunity to comment.

Accident Data

One commenter states that the fact that no crashes have occurred with the affected airplanes has nothing whatsoever to do with these airplanes being of a safe design. They merely have had the good fortune to have not yet encountered a critical condition. The FAA concurs.

''Erroneous Certification''

One commenter states that it counted on the competence of the FAA when obtaining the affected airplanes, as the cargo modifications were FAA-approved. The commenter further states

that the FAA's error in issuing these approvals is going to severely hurt small operators of these airplanes, who are neither culpable nor negligent. While the FAA understands that the impact of this AD may be significant for some operators, the FAA cannot ignore the fact that an unsafe condition exists that requires action to ensure the continued operational safety of the fleet. If the FAA had been aware of these deficiencies at the time of the original STC issuance, the FAA would not have issued the STC's.

One commenter points out that the FAA design review team observed that the original passenger floor beams had not been structurally reinforced, and that this fact is immediately apparent from the technical drawings associated with the STC. The commenter questions why the FAA has not expressed any concern or noticed these facts earlier.

The applicant for any design approval is responsible for compliance with all applicable FAA regulations. The FAA has the discretion to review or otherwise evaluate the applicant's compliance to the degree the FAA considers appropriate in the interest of safety. The normal certification process allows for the review and approval of data by FAA designees. Consequently, the FAA office responsible for the certification of an airplane or modification to an airplane or an aeronautical appliance may not review all details regarding compliance with the appropriate regulations. Also, the fact that the cargo floor structure was unmodified does not necessarily lead to the conclusion that the floors are structurally deficient. As explained in the NPRM, the understrength floors on certain 747 airplanes converted to freighters caused the FAA to question the adequacy of all STC-converted passenger-to-freighter cargo floor structures. This AD arises from this evaluation.

An FAA/Industry Team

Several commenters request that the FAA establish an industry team comprised of the FAA, STC holders, and operators before issuing an AD to establish the requirements and a corrective action plan to resolve the problems with the STC's in a logical manner. One commenter states that ''too much time has been spent going in different directions to resolve common problems for all STC's,'' and that ''the FAA has not been sufficiently clear in their requirements for the re-design.''

The FAA does not concur that issuance of the AD should be delayed. An unsafe condition has been identified, and the FAA must take action to ensure an acceptable level of safety of the affected fleet of airplanes. The STC holders and operators are certainly free to form an industry team to find common solutions, and the FAA is willing to participate in such efforts. The FAA also does not concur that the requirements for re-design are unclear; as the FAA has stated repeatedly, the standards for evaluating proposed corrective actions are the original certification basis for the airplane, CAR part 4b. Any non-compliance with CAR part 4b would have to be shown to provide an acceptable level of long-term safety.

FAA/Industry Communication

One commenter states that there has been ''virtually no opportunity for technical exchange'' and, therefore, the FAA should delay issuance of the final rule until such an exchange has taken place. The FAA does not concur. Since as early as November 1996, the STC holders have been made aware of the FAA's concerns regarding the cargo floor structure. More specifically, meetings were held with each of the affected STC holders in January 1997 to discuss further details regarding FAA concerns.

On February 14, 1997, the FAA again discussed its concerns with the affected industry and again requested that industry provide the FAA with valid data to address those FAA concerns. Subsequently, over the course of the next four months as the FAA prepared the NPRM's, only one STC holder provided any data relative to the merits of the proposed AD's, and that data did not alleviate the FAA's concerns. In response to the NPRM's first comment period, three of the affected STC holders did not submit technical data and, for reasons discussed below, the data submitted by the fourth STC holder (FedEx) did not alleviate the FAA's concerns. During the reopened comment period, the FAA engaged in further extensive discussion with the affected industry and those discussions continue in the context of on-going efforts to identify necessary actions to address the unsafe condition. Based on this history, the FAA considers that sufficient opportunity for technical exchange has been provided and that further delay is unwarranted and unnecessarily jeopardizes public safety.

Delay Issuance

Two commenters state that additional time is necessary so that the airplanes would be removed from service only once to incorporate all needed corrective actions (i.e., not only for the floors, but also for other problems identified in the NPRM) due to the high cost of incorporating partial solutions to the overall problem. One commenter requests that all problems associated with the STC's be identified, solutions provided, and methods for accomplishment of the solutions be agreed upon prior to the issuance of any AD. The FAA does not concur. In light of the seriousness of the unsafe condition, the FAA has determined that it would first address the strength of the cargo floor structure. All of the remaining issues will be addressed in future rulemaking efforts. Even though this AD addresses only the cargo floor structure, it should not inhibit industry from taking corrective action with regard to the remaining issues. In fact, in order to minimize the inefficiencies identified by the commenter, the FAA is committed to working with industry to identify as expeditiously as possible necessary corrective actions for all of the problems discussed in the NPRM.

The Cargo Airline Association (CAA) requests that the FAA not adopt an AD imposing interim limits. Since the CAA believes that the risk of a catastrophic failure is ''virtually nonexistent,'' and since several potential STC holders with varying solutions to issues raised are in the process of working with FAA, scarce resources should be devoted to ensuring expeditious approval of these proposals.

Another commenter requests that the FAA delay issuance of the final rules until industry solutions are approved [estimating an additional 60 to 90 days for Israel Aircraft Industries (IAI) to complete its analysis, as it has only recently had access to Boeing drawings]. The commenter also states that the FAA rulemaking process has caused industry to make significant progress and aggressively pursue solutions that will likely meet with relatively prompt FAA approvals. The commenter also states that although these approvals will result in a 25 percent reduction in allowable payload, it is willing to operate with that limitation. This commenter, and several other commenters reference the FedEx risk assessment, which purports to demonstrate a low probability of catastrophic failure, as a basis for delaying the final rules.

Another commenter requests 4 to 6 months for completion of certain industry tests and risk analysis, as the 3-month timetable for the reopened comment period was not adequate, due to the highly complex and time-consuming nature of testing and evaluation procedures.

For the reasons discussed above under the heading ''Risk From Actual Operations,'' the FAA does not agree that the risk assessment submitted by

FedEx warrants delaying this rulemaking. Furthermore, the FAA does not agree that correction of the unsafe condition can be assured within 60 to 90 days, or 4 to 6 months without this final rule. The STC holders and many operators have been aware of this issue since the fall of 1996. The FAA anticipates that, with the adoption of this AD, industry will continue recent significant progress in addressing these issues, which will result in timely implementation of appropriate corrective action.

Extension of Interim Operational Period

Several commenters state that the proposed 120-day interim allowances must have been determined to be safe by the FAA, with positive margins of safety. Therefore, the commenters request that the interim time limits be extended. Some of the commenters request that the extension coincide with regularly scheduled heavy maintenance. The CAA requests that the interim limits should be allowed to continue for however long it takes to modify the airplanes to bring them up to the original design limits. This commenter states that under normal operations, there is no risk of floor beam failure, and also states that the FedEx risk assessment shows that the likelihood of encountering conditions set forth in the NPRM are virtually nonexistent.

As discussed above under the heading ''Risk from Actual Operations,'' the FAA does not concur that the information provided in the FedEx risk assessment provides a basis for an extension of the interim period. However, for other reasons, the FAA concurs that the interim operational period can be extended.

In the NPRM, the FAA stated, ''because the determination of the effects of operational limitations on payload is based on approximations, the resulting payload limits may be unconservative.'' The 120-day interim limit was based on this potential unconservatism. Since issuance of the NPRM, the FAA has received data (Reports DFE–72701 and DFE–72702, submitted during the initial comment period as Appendices 5 and 6 to FedEx's comments to the NPRM) that partially confirm these approximations. In addition, although some progress has been made by industry in developing corrective actions, neither industry's proposal (as discussed in the NPRM) nor the FAA's expectations have been fulfilled. Based on current information regarding the status of various efforts to develop corrective actions, the FAA estimates that the entire affected fleet can incorporate corrective actions during scheduled heavy maintenance within 28 months after the effective date of this AD. In light of this new information, the FAA has reassessed the proposed interim period of 120 days and concluded that the period should be extended to 28 months. Therefore, the FAA has revised the final rule accordingly.

The FAA's decision to extend the interim limitations does not imply that the cargo floor structure has been determined by the FAA to be safe for an indefinite period, or in compliance with CAR part 4b requirements. As stated in the NPRM, the FAA's analysis considered only the most likely critical load case, and the proposed interim limitations were based on that analysis. The confirming data referenced above still does not address other potential critical load cases or all locations within the airplane. Nevertheless, in light of the balance of the safety and economic factors discussed above, the FAA considers that the level of safety provided by the interim limitations is adequate for the time period of 28 months. However, it is less than the level of safety provided by demonstrated compliance with CAR part 4b standards, and the FAA considers that compliance with those standards is a necessary objective to ensure the long term safety of the affected fleet. The balancing that the FAA has considered in establishing this interim compliance period is typical of the balancing that occurs in all AD's establishing interim requirements and is fully consistent with the FAA's obligation to consider economic impacts, such as those imposed by Executive Order 12866.

Increased Interim Payload Limits

Several commenters also request that, due to ''highly conservative'' methodologies used by FAA, the proposed interim weight limit should be expanded to allow an average maximum container weight of 6,000 lbs. The FAA does not concur that its methodologies are highly conservative. As discussed in the NPRM and in more detail below, the FAA's analytical methods are typical of industry practice, and the commenters have not demonstrated how these methods are highly conservative. The FAA has not been provided with any acceptable data to support the allowance for 6,000-lb. containers, except as discussed below under the heading ''Position-by-Position Limitations.'' A commenter requests that the FAA maximize the interim limits. The FAA concurs that the interim limits should be maximized to the extent that they are consistent with the necessity of addressing the unsafe condition. The FAA considers that the interim limits established in the final rule meet this objective; however, as discussed below, the FAA will continue to work to approve higher limitations, once their safety is substantiated.

Federal Express submitted report 98–026 ''Substantiation of Side Vertical Cargo Restraint Installation Using Static Test Results,'' Revision A, during the reopened comment period. FedEx states that this report ''proves conclusively that the side restraint installation is adequate to restrain the applied container loads due to vertical gust.'' The FAA concurs, and has changed the final rule (Rules Docket No. 97–NM–09–AD) applicable to the FedEx STC's to allow the higher interim limits with the FedEx side restraints installed.

Position-by-Position Limitations

The CAA requests that the FAA consider ''position-by-position'' limitations, which would establish individual weight limits for each container position on the airplane, based on the strength of the floor structure at that location. The CAA states that this would allow a higher total payload, while addressing the unsafe condition. The FAA concurs with the concept of position-by-position limitations, and will consider any such proposal when presented with supporting data.

For example, one commenter, Amerijet, has submitted a position-by-position proposal, which includes analysis providing for increased weights for certain container positions relative to those determined by the FAA for the interim period. This proposal also contained lower limits for other container positions and presupposes the installation of sidelocks. The commenter stated at the April 2 public meeting that it intends to install vertical side restraints [sidelocks], but has not submitted any data to the FAA on a sidelock installation. The FAA has determined that this proposal would provide an acceptable level of safety for the 28-month interim period, when the affected airplanes are equipped with approved sidelocks. The commenter's proposal would not be acceptable to the FAA for indefinite operations, however, as the analysis did not consider other issues such as CAR part 4b emergency landing loads. The FAA will continue to work with the commenter, or any other interested parties, to refine these proposals so that they may be approved under paragraph (f) or (g) of the final rule.

FedEx also submitted a position-by-position proposal, which also contained both higher and lower limits as compared to the FAA's proposed interim limits. FedEx's proposal also is promising, however, its analysis is based on assumptions which the FAA has determined to be inaccurate, given the limitations of the weight and balance manual. For example, FedEx's assumption for the percentage of the load distributed to the sidelocks (40 percent) was derived from its ''Inverted Container Test.'' As discussed below under the heading ''FedEx's Tests,'' the FAA considers this assumption to be unconservative. The FAA also will continue to work with FedEx to refine its proposal, so that it may be approved under paragraph (f) or (g) of the final rule.

The CAA also submitted a finite element analysis (FEA) and, based on this analysis, requested that the final rule allow interim container payload limitations (regardless of whether sidelocks are installed) of approximately 3,500 lbs. in the most forward and aft positions, and 8,000 lbs. over the wing and wheel well. All other positions would be limited to 4,800 lbs. per container position with no sidelocks installed, and 5,000 lbs. with sidelocks installed. The CAA also requested that, after unspecified frame modifications are incorporated and sidelocks installed, interim limitations of 6,000 lbs. per container be allowed. Three other commenters submitted similar proposals.

As stated previously, the FAA is willing to work with commenters to establish interim limits other than those established in the final rule. However, the data submitted with the comment do not establish that the model used in CAA's FEA accurately represents the airplane. The CAA states that the model was made using the Boeing Structural Repair Manual (SRM) and various unspecified measurements of the airplane, but without access to the type design data that define the airplane configuration. It is, therefore, based on numerous assumptions regarding the configuration, which have not been validated. Furthermore, the model purports only to represent a 120-inch long section of the fuselage. The model does not account for the numerous fuselage cutouts for cargo and passenger doors, which affect the way the floor structure reacts to loads. Also, the model does not address the different structural design of the wing box or wheel well areas.

Even if it were assumed that the model is accurate for some airplanes, it is based on the cargo container locations used by FedEx, which are different from those of the other affected airplanes. The positions of the containers and locks determine the loads introduced into the floor beams. Therefore, using the FedEx container layout produces a result which, even if valid, would be only applicable to the FedEx airplanes. Based on the foregoing, the FAA does not consider that the model provides a sufficient basis for revising the interim limits.

Several commenters state that the FAA's findings of negative margins of safety are too conservative over the wing box and wheel well, as these areas are capable of supporting higher container payloads due to their stronger design. The FAA concurs partially. The FAA has determined that an unsafe condition exists by analyzing the basic floor structure rather than the much more complex wheel well or wing box structure. These areas are capable of supporting greater loads, but the commenters have submitted insufficient data to determine what loads may be safe in these areas.

However, the FAA has issued STC's which substantiate the wing box and wheel well areas for payload capabilities equivalent to the carriage of 6,000- to 10,000-lb. containers, depending on the individual airplane's structural capability, which has increased as the 727's type design has evolved. The FAA notes that, although no structural reinforcement was added to the wing box and wheel well for these STC's, limitations were sometimes imposed in consideration of the individual airplane's structural capability.

The FAA has considered the greater strength of the wing box and wheel well and has determined that an acceptable level of safety will be achieved by allowing a total payload of 12,000 lbs. for any two adjacent containers in this area, without other limitations, for the 28-month interim period. To eliminate potential ambiguity as to the containers to which this limitation applies, the final rule specifies that this alternative limitation applies to containers located completely or partially between body stations (BS) 740 to 950. However, the FAA does not consider that it is acceptable to allow combined payloads above 12,000 lbs. for this interim period, or to allow 12,000-lb. combined payloads indefinitely, because the FAA does not have the detailed information or resources necessary to determine the appropriate payload and operational limitations for all configurations of the affected airplanes. Operators who desire further increased loading in this area are invited to submit their requests and supporting data to the FAA in accordance with paragraph (f) or (g) of this AD.

Paragraph (a) of the NPRM did include a limited position-by-position proposal, in that it specified a reduced payload limitation in the area of the cargo door (BS 440 to BS 660). As with the wing box and wheel well area, to eliminate potential ambiguity as to the containers to which this limitation applies, the final rule specifies that this limitation applies to containers located completely or partially between BS 440 and BS 660.

Extension of Initial Compliance Time

One commenter states that the NPRM's will ''wreak havoc'' on the express industry and shipping public. The commenter states that it has no way of knowing when the effective date of the AD will be. The 48-hour implementation of the load limits will inevitably result in serious disruption to cargo already booked or in transit when the final AD's are issued. Several other commenters requested 120 days after AD issuance for interim limits to become effective, as this time was necessary to alter manuals, provide personnel training, and generally prepare for a significantly different loading procedure. The FAA concurs partially. The FAA has changed the final rule to extend the compliance time from 48 hours to 90 days. The AD becomes effective 35 days after the date of publication in the **Federal Register**. As requested by the commenters, this allows a total of 125 days for operators to make necessary changes to the FAA-approved Airplane Flight Manual and cargo loading procedures.

All Container Types

Several commenters state that the proposed AD should address the use of all possible containers, pallets, and the intermixing of pallets and containers. Other commenters followed with similar statements about pallets, bulk loading, oversized cargo, and combi configurations (i.e., configurations with provisions for passenger seating and cargo on the main deck). One of the commenters requests that the wording of the proposed AD be changed to contain generalized wording that would address all container sizes, using a ratio of the length and width of other containers to the 88- by 125-inch container specified in the proposed AD as a means to determine the container payload limit. The commenter further states that this could help the implementation of the rule. The commenters request these changes to avoid the disruption that might result

from having to obtain individual approvals for each of the types of containers.

The FAA concurs partially. In light of the administrative burden of approving individual container types, the FAA has reassessed this proposed requirement. The FAA recognizes that, except for half-size containers (discussed below), the FAA analysis used to establish the payload limits for containers measuring 88 by 125 inches also is applicable to any container within the same floor area. The reasons are that the analysis considered the effect of the container weight on the floor structure supporting the container, and that the differences in the stresses in the floor structure associated with the different container types are not sufficient to warrant different limits. Therefore, the FAA has revised the final rule to specify the same limitations for container size codes ''A,'' ''B,'' and ''C,'' as defined in National Aerospace Standard (NAS) 3610, which is the specification referenced in FAA's Technical Standard Order (TSO) C90c for cargo unit load devices (containers).

For half-size containers (i.e., size code ''D'' or ''E'' of NAS 3610, or the FedEx ''Demi'' container), the final rule specifies payload limits that are one-half those for other containers. Since these half-size containers are designed to be placed side-by-side across the fuselage, this separate limit is necessary to ensure proper load distribution within the area. It should be noted that paragraph (g) of the final rule allows operators to establish different container payload limits from those specified in the rule by substantiating that those limits provide an acceptable level of safety.

For oversize cargo, operators may apply for approval of alternative methods of compliance in accordance with paragraph (f) or (g) of the AD by proposing appropriate limitations for such cargo.

Service History

One commenter claims that, for the converted 727 freighters, ''successful flight history is direct evidence which supports [the commenter's] analysis showing the airplanes to be safe.'' The commenter references CAR sections 4b.202, 4b.270, and 4b.300 to show that service history is a reliable indicator ''to support or define a substantiation methodology.''

The FAA does not concur. The requirements of CAR part 4b that the commenter references are related to the determination of the fatigue strength of structure, where it is acceptable to utilize the service history of airplanes of similar structural design. However, the unsafe condition addressed in this AD is not related to fatigue, but is the result of the existing floor structure being significantly understrength. The only conclusion that can be drawn analytically from the accumulated flight history of the converted 727 freighters is that these airplanes have yet to encounter a sufficiently severe gust condition when critically loaded with an allowable payload configuration to cause failure of the floor structure.

Deflection of Floor Beams

One commenter states that the FAA did not provide a reasoned explanation of the NPRM claim that ''even if the floor beams of the main cargo deck only become deformed, the results could be catastrophic.'' The commenter compares this statement to McDonnell Douglas Report MDC–J5568, applicable to Model DC–10 series airplanes, which was approved by the FAA and showed significant and permanent deformation of the wing.

From this comment, the FAA infers that the commenter believes that, if the wing can bend safely and even deform permanently when it has cables/fuel lines, etc., passing through the structure, then the floor beams also must be capable of safely deforming or bending.

The FAA does not concur. The NPRM states why deformation of the floor beams could be catastrophic. For the ''up'' load case analyzed by the FAA, which consisted of ''up'' loads applied to the containers due to a down gust on the airplane, the floor beams common to the forward and aft locks of a container bend upward due to the applied upward load. The adjacent floor beams underneath the containers that are not attached to the container do not bend. If this deflection relative to the adjacent floor beams is excessive, this could result in the bending and stretching of all control cables and fuel lines passing through the floor beams. Such bending and stretching could result in uncommanded flight control inputs at a critical time when the airplane is subject to severe gust conditions. In addition, the fuel lines located in the floor beams are not designed to flex in the same manner as fuel lines located in the wing structure of an airplane and, therefore, may crack, bend, or rupture.

The occurrence of either an uncommanded flight control input during critical flight conditions or the rupture of a fuel line can be catastrophic. The McDonnell Douglas report referenced by the commenter is not applicable to the floor beam deflections of a 727 converted freighter since the fuel lines and control cables located in the wing of Model DC–10 series airplanes are specifically designed to accommodate large wing deflections and are in compliance with the applicable regulations.

Safety Factor

One commenter states that the use of a safety factor as small as 1.5 presupposes very accurate analysis, knowledge of loads and material properties, and sound engineering practices. Structure with negative margins of safety of -0.63 clearly indicates that some or all of these suppositions have not been achieved. In addition, some operating conditions, such as gusts, are beyond human control. The safety factor of 1.5, as required by CAR part 4b, is necessary to maintain the safety of the airplanes. The FAA concurs with the commenter, but notes that the finding of unsafe condition in this AD is based on the FAA's determination that the risk of catastrophic failure of the understrength floor structure is unacceptably high, rather than on a simple finding of non-compliance with CAR part 4b.

Fore and Aft Center Of Gravity Shifts

Several commenters objected to the FAA's analytical use of the trapezoidal method for evaluating shifts in the center of gravity (cg) within a container. One commenter, FedEx, states that the FAA's use of the trapezoidal shift results in impracticable—if not impossible—circumstances that exceed the requirements of CAR section 4b.210.

In order to gain a better understanding of this and other FedEx comments, the FAA met with FedEx on September 19, 1997, having first provided FedEx with a series of questions to be discussed at the meeting. (The minutes of this meeting are included in Rules Docket No. 97–NM–09–AD.) At this meeting, FedEx reported that it had only recently obtained a scale that would allow it, for the first time, to determine the actual locations of the cg's inside its containers. FedEx stated that it had weighed and determined the cg location on a sampling of 1,500 containers, but did not provide any data to the FAA at the meeting. In any case, the FAA does not consider it appropriate to evaluate only an operator's average container payload when establishing the safety of the affected airplanes. The unsafe condition determined by the FAA's analysis is based on the payload weight and distribution with which these airplanes are currently allowed to operate.

In addition, in a letter dated November 4, 1997, to the FAA (a copy of which has been placed in Rules Docket No. 97–NM–09–AD), FedEx states that ''A review of container

weights, quadrant weights, and cg's for the 'SAA' (88- by 125-inch) container finds no containers in the 4,000 to 8,000 lb. range with a cg offset greater than 8.67%.'' However, FedEx did not provide data (e.g., the numbers and types of containers reviewed; the percentage of cg shift for different container weights) to substantiate the value of 8.67 percent. Therefore, the FAA is unable to determine the significance of this comment.

FedEx states that it chose to use a ''stair step'' or ''box'' method to evaluate the effects of cg shifts within a container. FedEx also states that the FAA rejected this method for use on the 727 converted freighters without a reasoned explanation.

The FAA does not concur with the comments regarding the FAA's methodology. As stated in the NPRM, the large negative margins of safety calculated using the FAA's analysis included consideration of the effect of a horizontal cg shift of 10 percent within the container (e.g., 8.8 inches from the geometric center of the base of the container for the forward and aft direction). Shifts in cg are particularly important in considering the ''up'' load case because the container loads are applied primarily to the floor beams at the forward and aft edges of the container where the container locks are located. The effect of the cg shift is to increase the loading on the beam in the direction of the cg shift. For example, if the cg is shifted aft, the applied loads will be increased on the floor beam located at the aft edge of the container.

In analyzing the effects of forward or aft cg shifts, the FAA employed a ''trapezoidal method.'' The trapezoidal method is well accepted and used by both Type Certificate (TC) and STC holders. The trapezoidal method is analogous to shifting sand in a box. With no cg shift, the weight of the cargo is uniformly distributed across the base of the container. As the cg is shifted, the load or ''sand'' is taken from one side and applied to the other side. This results in a sloping load distribution, with a load ''peak'' on one end of the container, and a load ''valley'' on the other end. Another acceptable method for considering forward or aft cg shifts is the ''box'' or ''stair step'' method. In this method, rather than sloping, the load ''steps'' up from a low level on one end, to a high level on the other.

The FAA does not concur that the trapezoidal shift used in the FAA's analysis exceeds the requirements of CAR section 4b.210. For ''up'' loads on the container, and a forward or aft cg shift (which the FAA has identified as the most likely critical case), if the airplane is not equipped with side vertical restraints (sidelocks), the results of the loads analysis are the same regardless of whether the stair step or trapezoidal method is used. Since all loads are carried by the floor beams that support the forward and aft container locks, the loads on the beams will be identical for any method that shifts the cg a particular percentage within the container. It is the percentage of cg shift that is important, not how that cg shift was achieved. This represents the majority of the airplanes affected by these four AD's. For those airplanes equipped with sidelocks, there is a maximum difference of 14 percent in the two methods for ''up'' loads, at the ''peak'' of the trapezoid. In consideration of the varying locations of sidelocks and the manner in which loads are actually distributed among all locks, this difference does not significantly affect the FAA's analysis or alter the finding of the unsafe condition.

The FAA considered 10 percent as the appropriate amount to shift the cg within the container, as it is realistic and typical of cg shift limitations contained in operator weight and balance manuals. Consideration of a 10 percent cg shift also represents an industry standard as evidenced by NAS 3610 (contained in the Rules Dockets). The vast majority of containers used by operators comply with this standard. FedEx has not provided any data that indicate that a 10 percent cg shift is unreasonable, or that show that the FAA's use of a trapezoidal shift is unrealistic. The data that FedEx provided (average container densities ranging from 7 to 18 lb./cubic foot) concern only the average weight of a container used in its operations and assumes the weight to be equally distributed throughout the container.

FedEx also states that the trapezoidal method results in load distributions that greatly exceed the 90 lb./inch ''running load'' (freight payload per inch of airplane floor length) limitation specified in the FedEx weight and balance manual. FedEx states that the trapezoidal shift method will result in possible freight densities of 40 lb./cubic foot in approximately 1/4 of the container volume. FedEx states that this equates to an average value of over 200 lb./inch running load in this area of the container. FedEx reports that its daily average operational load density is approximately 7 to 7.5 lb./cubic foot, and on rare occasions may have reached the 18 lb./cubic foot range; therefore, the FAA's analysis bears no relationship to operational reality. (An average density of 18 lb./cubic foot over the entire volume for the full-size FedEx container equates approximately to a 7,920-lb. container, or about 90 lb./inch running load.)

The FAA acknowledges that, in its analysis described in the NPRM, it was not constrained by the 90 lb./running inch limitation specified in the FedEx weight and balance manual. However, the FAA does not concur that this results in inaccurate weight limits. The FAA notes that, for a FedEx container at the maximum permitted payload of 8,000 lbs., the running load limit is exceeded even with no shift in the container cg (88-inch container width times 90 lbs. per inch equals 7,920 lbs.). For any forward/aft cg shift within the container, using either the trapezoidal or ''box'' method, the degree to which the limit is exceeded increases in direct relation to the magnitude of the cg shift.

In addition, the FAA reviewed FedEx's loading procedures during a visit to its flight line at Sea-Tac International Airport, Seattle, Washington, on February 5, 1997. During this review, the FAA became aware that FedEx neither determines the actual cg location of the cargo within each container nor has the necessary equipment at all of its loading facilities to determine that it is operating within the cg and running load limitations of its weight and balance manual.

Based on other comments received in response to the NPRM, it appears that FedEx's practice is not unusual even though it is inconsistent with its weight and balance manuals. In light of the fact that, to the FAA's knowledge, no operators are measuring the cg's for all containers, and that a recent sampling accomplished by FedEx shows cg shifts as high as 8.67 percent, the FAA concludes that use of 10 percent cg shift in its analysis is not only an appropriate reflection of industry cargo loading practice, but may actually be unconservative.

Finally, the FAA does not concur that it has rejected the use of the ''box'' method proposed by FedEx. FedEx did not consider a cg shift effect in the original substantiation documentation for its original STC design, but later proposed to employ a ''box'' method used by McDonnell Douglas for the certification of a DC–10 freighter (submitted by FedEx as a comment during the first comment period in Appendix 2, Report 97–028, Revision I/R, dated April 1, 1997). After review of this method, the FAA accepted it in a meeting with FedEx on April 29, 1997. The basis for this acceptance is that it provides an acceptable level of conservatism in the absence of more rational data to predict the cg within a container. As discussed above, the use

of the ''box'' method does not significantly affect the FAA's analysis or alter its finding of an unsafe condition.

FAA's Methodology

Boeing states that the FAA's analysis is similar to that used by Boeing for initial certification of Model 727 series airplanes. However, Boeing also states that while the analysis is conventional, some of the assumptions made are not typical of industry practice for the floor beam analysis and are conservative relative to the original certification practice of Boeing, with respect to trapezoidal loading and credit for pressurization. Boeing states that, when it evaluates cg offsets in containers, it uses the stepped rectangular or ''box'' method to determine cg shifts.

The FAA concurs partially. As explained previously, the trapezoidal loading assumption is nominally more conservative than the stepped rectangular or ''box method.'' For the ''up'' load case, this nominal difference only affects those airplanes with sidelocks. In any case, this difference does not significantly affect the FAA's analysis or alter its finding of an unsafe condition.

The FAA does not concur that its analysis is inappropriately conservative because it considered zero fuselage pressurization. Fuselage pressurization tends to provide an increase in floor beam load carrying capability because the pressurized fuselage, to which the ends of the floor beams are attached, pulls outward on the ends of the floor beams, which makes the floor beams act stiffer. Severe gust conditions, such as microbursts, may be encountered at low altitudes when the fuselage is not pressurized; therefore, it is realistic to consider those conditions. Even with credit for fuselage pressurization, the FAA's conclusion would be unchanged because the pressurization effects do not significantly affect the substantial negative margins of safety found as a result of the analysis. Furthermore, CAR section 4b.216(c)(1) requires that ''The airplane structure shall have sufficient strength to withstand the flight loads combined with pressure differential loads from zero up to the maximum relief valve setting.''

Another commenter, FedEx, states that the FAA's analytical techniques are too conservative and, therefore, result in artificially low payload numbers (container weights) for the 727 converted freighters. The FAA does not concur. The FAA reviewed the substantiating data submitted for the original certification of FedEx's 727 freighter conversion STC and found that this data package lacked any stress analysis substantiating the floor structure. Lacking this data, the FAA reviewed the analytical methods used by others in industry. The FAA determined that other industry analytical methods for cargo systems used conservative overlapping assumptions to ensure that the design resulted in a safe product that complied with CAR part 4b. The FAA's decision to use these methods to perform an analysis of the floor structure of the affected 727 converted freighters is consistent with industry standard practices.

One commenter expresses concern over the methods utilized in the structural substantiation of floor beam loads in the documentation contained in these Rules Dockets, although the commenter did not identify a basis for the concern. The commenter states that over the course of the last two decades it has developed stringent methods for accurately predicting cargo induced loads in airplane structure. The commenter requests that the FAA consider these methods in performing its evaluations. The commenter submitted data regarding its analytical methodology used in development of numerous STC approvals of cargo handling systems.

The FAA has reviewed the commenter's methods and considers that this methodology utilized conservative, overlapping assumptions to ''bracket'' unknown variables and utilized a trapezoidal distribution of cargo in defining its cg offsets. The FAA agrees that these are appropriate methods for determining loads for cargo floor structure and are consistent with those employed by the FAA. These methods result in conclusions that are consistent with the FAA's findings that the floor structure addressed by these AD's presents an unsafe condition. Further, the FAA notes that these conclusions are consistent with those derived from other methods commonly used in industry.

Boeing addresses the statement in the FAA's analysis of the floor beam allowables (contained in the Rules Dockets) that the analysis is ''partial'' and ''unconservative.'' Boeing states that, for the ''down'' load case (i.e., ''down'' loads applied to the container), the FAA's analysis is sufficiently conservative for the following reasons: (1) the critical section selected for analysis reflects the worst case hole-out situation; (2) all significant [down] load cases were dealt with; (3) the critical section analyzed would have no degradation of [safety] margins because of secondary bending effects; and (4) the critical section analyzed has no shear on it by first principles and, therefore, any shear interaction effects should be small.

The FAA concurs with the commenter's statement; however, the FAA notes that this statement was carefully limited to apply to ''the down load case being considered'' and does not address all load cases, the actual strength of the floor, or the floor beam as a whole.

The FAA does not concur that the commenter's statement is valid for all load cases and all floor beam structure. The FAA's statement that the analysis is ''partial'' and ''unconservative'' relates to the fact that there are many floor beams, several with differing applied loads, load carrying capabilities, and critical cross-sections. As a result, the FAA's analysis could not be considered complete (therefore partial), nor could the FAA state that it had accounted for all effects, which may result in yet higher stress levels and larger negative margins of safety (therefore unconservative).

One commenter states that the standard being pursued by the FAA for the converted 727 freighter includes all known theoretical possibilities, plus an additional safety factor of indeterminate size. The commenter refers to a statement in the NPRM that ''* * * airplanes may encounter severe turbulence that exerts wind gust forces beyond the critical case forces of CAR part 4b * * *.'' as implying that the FAA is imposing standards beyond that of CAR part 4b.

The FAA does not concur. The FAA's analysis of the converted 727 freighter floor beams was accomplished using the standards identified in CAR part 4b. No new standard is being applied to these airplanes. The commenter has taken the NPRM statement out of context. The FAA's reference to gusts that exceed CAR part 4b critical load cases is in a portion of the NPRM that addresses the basis for the retention of the 1.5 factor of safety, which is required by CAR section 4b.200(a). This factor is used to protect the airplane from failure when experiencing limit load, the highest expected actual in-flight loading, and other unknown situations.

As stated in the NPRM, interested parties had requested that the FAA eliminate the safety factor during preparation of the NPRM, which would allow higher payloads. The statement that the commenter characterizes as implying ''new standards,'' and a safety factor of ''indeterminate size,'' was simply a discussion of the existing level of safety established by the CAR part 4b standards (this airplane was originally

certificated to those standards over 30 years ago).

One commenter quotes from CAR section 4b.210 that the analysis must be conducted using ''any practicable distribution of disposable loads.'' The commenter states that the loading scenarios the FAA uses are much higher than the maximum [loading] experienced in actual service. Several other commenters characterize the FAA's assumptions and analysis as ''ultra conservative.''

The commenters appear to have misinterpreted the referenced CAR section 4b.210. The word ''practicable,'' which means possible to put into practice, appears to be read as ''practical.'' Subpart C of CAR part 4b requires that analysis be conducted for conditions (e.g., critical altitude, critical load, or maximum/minimum weight) that are possible; Subpart C is not restricted to normal, average, or practical conditions. Designing airplanes to withstand only average loads would result in a greater potential for catastrophic failures whenever those loads are exceeded.

Boeing Data

FedEx states that none of Boeing's analysis for the affected 727 airplanes provides any baseline for comparison of the unit load device (ULD) cg shifts, container load distribution, or other key methodologies. The FAA does not concur. As a check to verify that its analysis was generally correct, the FAA examined some of the type certification data that Boeing had submitted prior to certification of 727 passenger and freighter airplanes. The Boeing data verified the FAA's analysis in the following two significant respects:

1. Boeing's stress analysis that established allowable floor beam strength for the passenger version was entirely consistent with the FAA's stress analysis; and

2. Boeing's loads analysis for the freighter version, while using a different methodology from that used by the FAA, would result in substantial negative margins of safety for passenger floor structure when carrying 8,000-lb. containers.

In accordance with CAR part 4b, Boeing's analysis of the 727 freighter considered all aspects of cargo loading, including cg offsets, load distribution, and multiple other facets. It should be noted that Boeing found it necessary to substantially strengthen the floor structure for its freighter version in order to carry the same payloads currently allowed by the subject STC's and remain in full compliance with CAR part 4b.

FedEx's Analysis

In support of its position that there is no unsafe condition, FedEx states that it has used a rational, conservative analytical approach for determining that the cargo floor structure is safe, which has not been accepted by the FAA. Specifically, FedEx references individual floor beam analysis and tests conducted with combinations of loads, offsets, container positioning, airplane weight, and flight maneuvers that create conditions exceeding any that statistically will occur.

The FAA does not concur. Except for the lateral floor beams over the 80-inch long wheel well area, which is discussed below under the heading ''Data Showing Floors to be Safe,'' FedEx has not yet submitted a complete analysis of the floor structure, or of a single floor beam. The tests that have been run to date are of limited relevance as discussed under the heading ''FedEx's Tests.'' Further, as discussed previously, the FAA also does not concur that the unsafe condition is so improbable that it should not be addressed.

FedEx states that the statement in the NPRM that the FAA used commonly accepted analytical methods in its structural analysis is misleading because it fails to address other ''commonly accepted analytical methods.'' In particular, FedEx references the FAA's use of a pinned end column fixity coefficient (''c'') of 1.0, and in contrast points out that a ''c'' of 2.58 is used in an example problem contained in ''Analysis and Design of Flight Vehicle Structures'' by E.F. Bruhn. FedEx considers this example problem to be analogous to a floor beam lower cap analysis. FedEx states that other alternative analytical methods (such as Bruhn) result in a significant increase in allowable loads for the floor beams (therefore potentially higher allowable container weights), but these methods have been rejected by the FAA as inapplicable to the converted 727 freighters, even though they have been accepted previously by the FAA on other certification efforts.

The FAA does not concur. The selection of this coefficient can have a significant effect on the determination of the allowable payloads. A low column fixity coefficient of 1.0 means that the ends of the beam are ''pinned'' (i.e., free to rotate or move like a hinge). A column fixity coefficient of 4.0 means that the ends of the beam are fully ''fixed'' (i.e., unable to rotate or move for any applied load). The FAA's analysis uses a ''pin end coefficient'' because it represents the airplane structure. As stated previously, the FAA's analysis considered the ''up'' load case to be the most likely critical case. For this load case, the lower horizontal member or ''chord'' of the ''I'' shaped floor beam will be in compression and, therefore, will behave in the same manner as a column under compression. It will be free to rotate or move like a hinge, not fixed as a higher fixity coefficient would suggest.

FedEx's proposed ''c'' coefficient of 2.58 does not appear in any of its analysis in support of its comments to the NPRM. At the September 19 meeting, FedEx stated that it did not use the 2.58 value in any of its analyses submitted in its comments. FedEx also stated at the meeting that the 2.58 value was merely an illustration of a fixity coefficient that could be found in the Bruhn handbook for a similar problem. Nevertheless, FedEx maintained at that meeting that it estimates the true value of ''c'' is in excess of 1.2, and may be as high as 2.58, although FedEx did not provide any data to the FAA to show that a ''c'' of 2.58 would be representative of the structure.

In addition, in FedEx's analysis submitted to the NPRM, FedEx used a ''c'' value of 1.2. (Document 97–021, initial release, dated February 28, 1997, submitted to the NPRM (Rules Docket No. 97–NM–09–AD) as Appendix 1 during the first comment period). However, in a later version of the same document, FedEx also used a ''c'' coefficient of 1.01 (Document 97–021, dated March 24, 1997, but designated as the initial release of the document, as well), submitted to the FAA for review on April 7, 1997. The FAA has determined that there is essentially no difference between 1.00 and 1.01 for a column end fixity coefficient. Therefore, the FAA concludes that the more recent data submitted by FedEx is consistent with the value of 1.0 for the column fixity coefficient used in the FAA's analysis.

FedEx states that it has submitted reports to the Seattle Aircraft Certification Office (ACO) that employ assumptions that were used by Douglas Aircraft Company and were accepted by the Los Angeles ACO for the original certification of the Model DC–10 airplane. FedEx also states that the Los Angeles ACO's earlier approval of the assumptions used in the Model DC–10 analysis affirms that it is using an appropriate method to substantiate the integrity of its converted 727 freighters. FedEx states that the FAA has not explained how the methodology can be accepted by the Los Angeles ACO and not accepted by the Seattle ACO.

The FAA acknowledges that use of the particular assumption(s) referenced in the DC–10 analysis, if applicable to FedEx's 727 analysis, may allow higher container weights than those specified in the proposed AD.

The FAA does not concur with the commenter's statements. For many certification projects, it has been acceptable to use a particular assumption which may not be conservative, provided that there are other quantifiable assumptions used which account for the lack of conservatism and result in the overall design being conservative and in compliance with CAR part 4b. Therefore, an unconservative assumption used as part of a particular approved methodology is not equally acceptable for another methodology without ensuring that the lack of conservatism is accounted for elsewhere in the methodology and that the overall design is conservative.

At the July 24, 1997, meeting with FedEx, an FAA representative from the Los Angeles ACO stated that it was the responsibility of FedEx to demonstrate that the analytical assumptions and methodologies used on the DC–10 were conservative for the Boeing 727. To date, FedEx has not made that demonstration. During the September 19 meeting with FedEx, the FAA asked FedEx if it had used the entire analytical methodology that was used for the DC–10. FedEx replied that it had not. Therefore, the FAA does not agree that the two ACO's have been inconsistent.

FedEx states that neither it nor the FAA has a complete, accurate model which objectively demonstrates the actual performance of the vast array of the TSO and STC ULD's in any one of the hundreds of individual airplane cargo positions and latch configurations of in-service airplanes. The FAA concurs that there is no accurate model which demonstrates the actual loads input into the structure of the 727 converted freighters for the myriad of possible configurations. However, an analysis using conservative overlapping (or enveloping) assumptions can be performed to show the design is safe for the proposed usage and is in compliance with CAR section 4b.200(c). This approach has been successfully used by aerospace companies for many years and is acceptable to the FAA.

FedEx's Tests

FedEx states that three tests (descriptions follow) indicate that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits of the weight and balance manual.

1. *Inverted Container Test.* FedEx states that it has conducted an inverted container test that demonstrates that its existing sidelocks are effective in carrying 35 to 40 percent of the container load. The test report is contained in Appendix 9 (Report 97–048, Revision I/R, dated May 5, 1997) of FedEx's comments to the NPRM (Rules Docket No. 97–NM–09–AD) during the initial comment period. FedEx also states that these results show that the FAA's estimation that the sidelocks carry 20 percent of the container load is far too conservative.

The FAA infers that FedEx considers that the FAA's estimation that 20 percent of the total container load is carried by all sidelocks (10 percent per side) is conservatively low since this results in 80 percent of the total load being carried by the locks attached to the main deck floor beams. Because FedEx's inverted container test showed that 35 to 40 percent of the container load was carried by the sidelocks (approximately 20 percent per side), 60 to 65 percent of the total load would be carried by the locks attached to the main deck floor beams.

FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits. The FAA does not concur that FedEx's testing has shown that sidelocks are 35 to 40 percent effective because the testing does not address all container types, cg shifts, and all container positions on the airplane. The FAA estimated that the sidelocks are 20 percent effective based on current industry methods, as used in TC and STC programs. To date, industry, with the exception of this test by FedEx, has little or no data showing the exact distributions of actual sidelock load percentages. Therefore, enveloping assumptions and/or conservative analytical methodologies have been consistently used by various manufacturers to show compliance with CAR sections 4b.200(c), 4b.210, and 4b.359, to which these STC's also were certified. This approach has previously obviated the need to determine the exact load distributions to each lock for the various container types used by operators.

Several commenters point out that there is a vast array of different types of containers and other ULD's used by the affected operators. This includes a wide range of construction, shapes, and materials. Some ULD's look like boxes; others look like flat pallets or ''cookie sheets.'' These differences significantly affect the distribution of loads to all locks when subjected to ''up'' loads on the container. Although FedEx's airplanes that have been modified in accordance with the affected STC's predominantly haul the full-size or ''SAA'' container, and the half-size or ''Demi'' container, FedEx reported at the September 19 meeting with the FAA that its modified 727's haul other kinds of containers, such as flat pallets, when necessary.

For these reasons, the FAA's analysis used to determine the maximum safe payload limits for operations must conservatively account for any of the currently permitted container types.

CAR section 4b.359 requires that ''each cargo and baggage compartment be designed for the placarded maximum weight of contents and the critical load at the appropriate maximum load factors corresponding to all specified flight * * * conditions * * *'' CAR section 4b.210 requires that ''flight load requirements shall be complied with * * * at all weights from the design minimum weight to the maximum weight appropriate to each particular flight condition, with any practicable distribution of disposable load (mass load) within the prescribed operating limitations stated in the Airplane Flight Manual.'' CAR section 4b.200(c) requires that ''all loads [force loads] shall be distributed in a manner closely approximating, or conservatively representing actual conditions.''

Therefore, in order to show compliance with the applicable regulations, either the distribution of the container loads to latches used to analyze the floor beam structure must be accurately determined for all container types used, or conservative assumptions must be used considering all practicable distribution of cargo loads. Finally, the floor structure must be strong enough to carry the maximum weight at the critical cargo load distribution at the appropriate maximum applied loads.

As stated previously, the FAA's analysis in the NPRM's identifies one of several possible critical load cases—that of a large gust pushing the airplane down, which causes ''up'' loads on two adjacent containers. On all of the affected STC's, adjacent containers share the same set of container locks at the forward and aft edges, and these locks are attached to the floor structure. This condition results in the loads for both containers being concentrated on isolated floor beam(s) at the location of the locks.

A ''typical'' full-size (88- by 125-inch) container is an enclosed box with two sides curved to match the rounded contour of the airplane fuselage, a fully or partially removable front side (i.e., a door), and a fixed or rigid back wall.

Because of the design of a typical container, the back wall tends to carry the majority of the load (the curved sides and removable front are not as effective in supporting an ''up'' load as the rigid back wall). A different type of ULD, a flat pallet, with netting to restrain the cargo, distributes the loads to the container locks very differently than the 88- by 125-inch container. The net tends to distribute the load more uniformly around the pallet edges.

The rational basis for the FAA's analysis is illustrated by the following two examples of container/ULD arrangements that result in load distributions to the floor beams which approach or exceed the 80 percent estimate used by the FAA (i.e., the converse of the estimate that 20 percent of the load is carried by the sidelocks). These two examples assume maximum allowable ULD payloads of 8,000 lbs. using configurations that are permitted for all of these STC's.

Example 1: Back-to-Back Containers. Based on the data from FedEx's inverted container test with an ''SAA'' container facing (door side) forward, 43 percent of the total load was carried by the locks on the back side of the container. If two containers of equal weight are placed back to back, the equivalent of 86 percent of the total load of one container would be placed on the floor beam(s) at the interface (43 percent plus 43 percent).

Example 2: Container and Flat Pallet. Using the test data for the inverted container test, 43 percent of the load would be carried by the back wall. A flat pallet (''cookie sheet'') placed just aft of this container in a cargo position, which has four sidelocks on each side, will place approximately 28 percent of the total load on the front side of the ''cookie sheet'' [as discussed previously, the net on the flat pallet tends to distribute the load equally to all sides of the sheet, and since there are five locks each on the floor beam(s) supporting the front and back side of the sheet, and four on each side, 5/18 (or 28 percent of the total load) will be on the front side]. This results in a total of 71 percent (43 percent plus 28 percent) of the maximum ULD payload, being placed on the floor beam(s) between these two ULD's.

These two examples of the many possible loading configurations illustrate the reasonableness of the FAA's estimation that 80 percent of the maximum allowable container payload could be concentrated on the floor beam(s) at the interface between two adjacent containers.

In addition, the FAA has other concerns with FedEx's inverted container test. First, the effects of a critical cg shift within the container were not tested. As tested by FedEx, the back wall of the container carried 43 percent of the load with a zero percent cg shift (i.e., the cg of the container was at its geometric center). As discussed previously, this is impractical to achieve in actual operations. If the cg had been shifted towards the back wall of the container, the load at the back wall of the container would have been higher than the 43 percent noted previously.

It should be noted that the FedEx test plan submitted to the FAA in May 1997 (Appendix 4 of FedEx's comment to Rules Docket No. 97–NM–09–AD submitted during the initial comment period; Document 97–034, dated May 6, 1997) listed aft cg shift load cases on page 9 of that plan. However, these critical load cases were not tested because the actual test (described in Appendix 9) had taken place in accordance with an earlier test plan, Document 97–023 (which is referenced in Appendix 9). This was confirmed by FedEx at the September 19 meeting.

A second concern with the FedEx inverted container test is that the container was tested in a fixture in which the lock locations were representative of only one cargo position on the airplane. There are typically a maximum of 8 to 12 containers that may be carried on the main deck, depending on the configuration of the airplane. Sidelocks are evenly spaced along the fuselage, and different cargo container positions result in either four or five sidelocks along the container side edges. For these reasons, a variety of locations should be tested to determine the critical load case for the floor beams.

A third concern is that FedEx tested cargo position 5 on the 727–200 with the door of the container on the aft side of the cargo position. This orientation is opposite of how FedEx reports that the ''SAA'' containers are usually placed in its airplanes. This orientation of the container in the test fixture resulted in a sidelock being within 4 inches of the back wall of the container. The distance from the front wall of the container to the nearest sidelock was 23.5 inches. Due to this large distance, or ''overhang,'' and the flexibility of the ''SAA'' container, the nearest sidelock to the front wall on each side of the container together carried 32 percent of the total test load. If the container had been placed in the fixture with the door on the front side of the cargo position, such that the back wall of the container had a 23.5-inch ''overhang,'' or was in one of the several other cargo positions possible which have greater than a 4-inch ''overhang'' to the backwall of the container, the loads on the container back wall (which are carried by the floor beams) would have been significantly higher.

Finally, it is important to note that FedEx has provided no analysis of the floor beam structure showing that the large negative margins of safety are resolved based on its assertion that 35 to 40 percent of the container load is distributed to the sidelocks. The load distribution is only part of the answer; the load distribution must be used in a stress analysis to develop data identifying stresses in the structural members.

The FAA concurs that, in principal, testing of containers using a fixture such as that used by FedEx, if it represents the most adverse case of ''overhang'' for the back wall for all applicable cargo positions, and if it shifts the container cg to the most adverse position, will produce conservative results for the latches common to the floor beams, for the container type tested. The results will be conservative because of the flexibility of the floor beams, relative to the stiff behavior of the test fixture. The degree of conservatism is unknown to the FAA and has not been demonstrated by FedEx.

FedEx, in its test, did not consider all practicable load distributions nor establish the critical case considering an adverse aft cg shift and sidelock location. FedEx tested only those containers or ULD's that it predominantly uses, but not all the types that it actually uses in service; therefore, it is impossible to draw broad conclusions about the behavior of many different container types, applicable to all cargo positions, or the degree of conservatism introduced by floor beam flexibility from its limited testing.

Therefore, the FAA concludes that the 35 to 40 percent distribution of the ''up'' load to the sidelocks used by FedEx is artificially high. The FAA does not concur that the data ''Container Test,'' documented in Appendix 9, demonstrate that the commenter's existing sidelocks, in general, are effective in reacting 35 to 40 percent of the container load, or that the tests ''indicate that the floor structure of the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits.'' The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect.

2. *Single ''I'' Beam Test.* FedEx states that it performed a floor beam test on a conservative representation of an unmodified passenger floor beam. This test is documented in Appendix 8 of FedEx's submittal to Rules Docket No. 97–NM–09–AD (FedEx Engineering Report 97–049, Revision I/R, dated August 15, 1997), and the additional data is contained in Appendices 10

(FedEx Floor Beam Test, Wyle Lab) and 11 (FedEx Floor Beam Test Videotapes).

FedEx also states that this test showed a lower floor beam chord compression allowable in excess of 60 ksi (60,000 lbs. per square inch) just prior to failure of the floor beam. FedEx states that this value controverts the FAA's calculation of 40.6 ksi in the FAA's analysis. In addition, FedEx states that the floor beam was tested in a fixture designed to replicate the airplane floor support structure, and that the test results are conservative due to the interaction of other floor beams, seat tracks, and floor panels in the airplane; the benefits of which were not addressed during this test. FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits.

The FAA does not concur that FedEx's measurement of 60 ksi compressive stress is relevant to the actual strength of the floor beam. In the FedEx test, the 60 ksi measurement was taken just before the floor beam fractured in tension (i.e., stretching of the floor beam to the point of failure). The FAA considers that the critical failure mode (i.e., the failure mode that would cause collapse of the floor structure in actual operation) is buckling of the floor beam. Buckling occurs when the floor beam warps or twists under applied loads. As discussed below, the test data indicate that the actual compressive stress at which the floor beam buckled was approximately 18 ksi.

Although the floor beam buckled during the test, the floor beam did not collapse, in part because the test fixture substantially and artificially limited the amount of warping of the beam. The test fixture used a rigid ''I'' beam to support the ends of the floor beam. This kept the ends of the floor beam from moving inward during the test. In contrast, on an actual airplane, the ends of the floor beam can move inward because they are attached to the fuselage frames, which are much more flexible than the rigid ''I'' beam used in the test fixture. The result of this artificial restraint was that the floor beam buckled and began to deflect. Instead of collapsing, as would be expected on an airplane, the floor beam behaved more like a cable, suspended from two rigid ends, with very little bending strength, but significant axial strength. This behavior was ultimately demonstrated by the catastrophic failure of the beam in tension, similar to a cable failure. If the beam had been supported as it is in the airplane, it is likely that the floor beam would have collapsed at the onset of buckling.

For example, if a horizontal beam is supported at each end, and vertical loads are placed on the beam, as the beam deflects the ends will pull inward. Restraining the beam ends will limit the bending deflection and stiffen the beam, preventing collapse of the beam as it buckles. This artificial restraint does not affect the buckling capability of the beam, but it causes the beam to appear to have higher load carrying capability than it actually has. FedEx acknowledged the effect of this axial restraint in a November 4, 1997, letter to the FAA. FedEx stated that ''It is conceivable that the bending deformation of the beam * * * would be influenced by restraining the ends of the floor beam from translating * * *.''

As stated previously, the critical compression buckling stress of the floor beam tested was approximately 18 ksi. (This occurred at the load step entitled ''0.6g.'') At this point the beam buckled as a column in the forward/aft direction. Beyond this load factor, at the spanwise location left buttock line (LBL) 11, the beam began bending in the forward and aft direction, as evidenced by the detailed test data for load case number 5, 2.8 g (2.8 times the force exerted by gravity at sea level) ''up'' load in Appendix 8. Forward and aft bending of the beam clearly indicates that the beam has buckled, and can be seen by observing the FedEx videotapes contained in Appendix 11. This buckling failure occurred prior to 40.6 ksi as predicted by the FAA, and before the 49.1 ksi value predicted analytically by FedEx in Appendix 1.

The occurrence of buckling at 18 ksi rather than approximately 40 ksi can be explained by the ineffectiveness of the stability straps in the test fixture. Over most of the airplane, the floor beams extend from one side of the airplane to the other. A stability strap is a long, thin strip of metal, running perpendicular to the floor beam, and attached to the lower surface of several beams, at intervals ranging from 17 to 24.75 inches along the lower surface of the floor beam. The purpose of the stability straps is to support or stabilize the lower chord to strengthen the floor beam. This is accomplished by reducing the ''effective length'' of the lower chord of the beam from one long column (the entire length) by splitting it into a series of shorter, stiffer columns that are equal in length to the distance between the stability straps. The stability straps in the test model were ineffective because the portion of the test fixture to which the straps were attached was not stiff enough to allow the straps to fully stabilize the floor beam. (This is exactly the opposite problem from that described above with respect to the excessive rigidity of the test fixture where the floor beam ends were attached.)

By graphing the results obtained from the test, the FAA determined that the stability straps were not fully effective at the location where the beam buckled. This graphing demonstrated that the ''effective length'' of the floor beam lower chord at the point of buckling was 40.4 inches [between LBL 32.6 and right buttock line (RBL) 7.8], rather than the ''effective length'' of 24.75 inches used in the analyses conducted by FedEx and the FAA. Since the ''effective length'' was longer for the tested beam due to the ineffectiveness of the stability straps, the resulting column was weaker and buckled at a lower stress than would occur on the affected airplanes.

The FAA subsequently used the same analytical techniques used in its previous analysis to confirm that the buckling strength of the beam is approximately 20 ksi based on the effective column length of 40.4 inches demonstrated by the FedEx tests. This correlates well with the stress at buckling of 18 ksi measured in the tests and confirms the validity of the FAA's analysis.

During the September 19, 1997, meeting, and at the February 18, 1998, public meeting, FedEx concurred with the FAA that the stability straps buckled during the test, and were largely ineffective, as the straps could not provide stability to the lower chord.

At the public meeting on February 18, 1998, two FedEx consultants made presentations regarding this test. Both consultants agreed that, although the test was properly performed in accordance with the test protocol, the test fixture was not representative of the airplane. As a result, one of the consultants (Dr. Foster of Auburn University) stated that it would be inappropriate to draw conclusions from this test for the airplane floor beam.

Based on the discussion above, the FAA concludes that FedEx's ''Single I Beam Test'' does not demonstrate a lower chord stress capability greater than that calculated by the FAA, or that the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits. The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect.

3. *''On-Aircraft'' Test.* FedEx states that an ''on-aircraft'' test was conducted (Appendix 12, Report 97–052, Revision I/R, dated August 27, 1997), and that this test demonstrated that the

container/airplane combination withstood an applied ''up'' load of approximately 20,000 lbs. FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits. FedEx also states in Section 6 of Report 97–051, also in Appendix 12, that a margin of safety of 2.1 was demonstrated with a 10,700-lb. container.

The FAA does not concur that this test demonstrates that the airplane is safe and in compliance with CAR part 4b. The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect. The ''on-aircraft'' test consisted of FedEx's ''SAA'' or full-size container, situated on the main cargo deck of a 727, restrained vertically by the forward and aft pallet locks (attached to the floor beams), and side vertical restraints (sidelocks). The container was modified to place four ''I'' shaped beams running lengthwise through the container. Four hydraulic jacks were positioned underneath the ''I'' beams on either side of the container and attached to jacking platforms on the main deck floor. The jacks were used to apply ''up'' loads to the container, as is shown in Figure 2.1 of FedEx's Report 97–051 (Appendix 12 of FedEx's submittal to Rules Docket No. 97–NM–09–AD). To transmit the loads applied to the ''I'' beams to the container, a rigid structure made of seventy-two 4- by 4-inch thick wood beam spacers, and thirty-eight ¾-inch thick plywood sheet formers curved at the edges to match the contour of the container, were fastened with screws to the 0.063-inch thick aluminum skin of the container. This structure, weighing approximately 1,400 lbs., provided a rigid platform for the ''I'' beams to lift the container (details of the plywood structure and its estimated weight are provided in Figure 2.3 of Report 97–051, Appendix 12).

The FAA has determined that the ''I'' beams and rigid structure used to introduce ''up'' load into the container artificially limited the distortion of the container under load and forced most of the applied load to the sidelocks and away from the floor beams. This is unconservative for the floor beams because it results in the test not representing how an actual loaded container or other ULD would affect the loads on the floor beams.

During the September 19 meeting, FedEx agreed that in the ''up'' load case, if the container is loaded and not restrained by the rigid structure, it attempts to deform to a catenary (arched) shape at the front of the container where the door is located. This effect is demonstrated by FedEx's inverted container test described in Appendix 9. FedEx also stated, however, that this would have no effect on the test results, although it was considering the use of airbags or hydraulic bags instead of the rigid structure to allow the ''SAA'' container to behave as it did in the test documented in Appendix 9. FedEx also stated in the meeting that it believed that testing to 2.5 g's, or 20,000 lbs. of ''up'' load, helps to account for the load being ''beamed'' or forced to the sidelocks.

The test results indicated that over 80 percent of the load was directed to the sidewalls of the container and, therefore, to the sidelocks rather than the floor beams. The FAA finds that this effect results from the rigid structure used to introduce the load into the container, and that this renders the test unrepresentative of the actual loading of the floor beam and significantly unconservative.

Even though the FAA determined that the results of the inverted container test (Appendix 9 of FedEx's comment) were unconservative, it showed that the percentage of the load carried by the back wall of the container was approximately three times greater than that determined by the ''on-aircraft'' test. The loads carried by the rigid back wall are largely carried by floor beam(s) locks, not the sidelocks. These results also contradict FedEx's conclusion that the ''on-aircraft'' test demonstrates that the floor structure is safe. The ''on-aircraft'' test provides confidence in the strength of FedEx's sidelocks. However, because of the artificial shifting of the loads from the floor beams to the sidelocks, the test fails to demonstrate that the floor structure is safe. Further, the ''on-aircraft'' testing to 2.5 g's did not result in the application of significant loading to the floor beams. Therefore, the results of the testing to 2.5 g's is of little significance when addressing the unsafe condition of the floor beams.

In Appendix 1 of FedEx's April 30, 1998, submission to Rules Docket No. 97–NM–09–AD during the reopened comment period, FedEx appears to now recognize the effect of the rigid plywood formers in forcing the load to the sidelocks and away from the floor beams. In this Appendix, on page 2 of the FedEx Engineering Report 98–026, Revision A, FedEx states ''Measured loads for the container perimeter latch locations indicate that 40 percent of the applied load was reacted on each side by the side latches (see Reference 3). This is due to the fact that the rigid formers did not allow the top of the container to deform as it would during actual conditions and thereby forced more load outboard than what would be typically encountered during flight.''

In summary, based on the previous discussion, the FAA does not concur that this test demonstrates that the airplane is safe and in compliance with CAR part 4b. The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect. One commenter states that he participated in FedEx's ''on-aircraft'' test. He states that the data from the latch load cells were inconclusive for the tests, and although he considered the test to be a reasonable representation of airplane conditions, he suggests that FedEx improve the latch load cell installation and data acquisition system and investigate whether the plywood formers used to apply the test load to the container roof could influence the latch load distribution. As discussed previously, the FAA does not concur that the ''on-aircraft'' test was representative of the airplane, but concurs that the plywood formers influenced the load distribution.

First Container Facing Aft

Two commenters state that positioning the first container aft of the 9g cargo barrier with the door facing forward is not optimum from a crashworthiness perspective and request that the AD specify that this container be facing aft instead. The FAA concurs. Paragraphs (a) and (b) of the final rule have been revised to allow the first container aft of the bulkhead to face aft, with all other containers facing forward.

Increased Running Load

One commenter states that the following statement in the NPRM is factually inaccurate: ''This running load of 90 pounds per inch is a safety concern, as it is approximately 2.6 times higher than the maximum running load of 34.5 pounds per inch allowed on these same floor beams when the airplane was in a passenger configuration.'' The commenter states that in a negative gust (''up'' load) situation the passenger floor beams must act to restrain upper deck loads and lower deck cargo loads simultaneously and, as a result, must react 81.0-lbs. per inch, not just the 34.5 figure as the NPRM indicates. The commenter maintains that if reduced loads are necessary to maintain the safety of cargo airplanes, then passenger airplanes should be similarly restricted.

The FAA does not concur that the passenger and cargo airplanes present similar safety concerns. The NPRM statement quoted by the commenter

appeared in the section of the NPRM that described the FAA's reasons for undertaking the detailed design review which led to the conclusion that there is an unsafe condition. The statement in the NPRM is factually accurate for the running loads and the ''down'' load case and contributed to the FAA's concern with the strength of an unreinforced cargo floor.

The FAA subsequently determined that the ''up'' load case is the most likely critical case. The FAA agrees that, for the ''up'' load case, the running load figures identified in the comment are accurate. However, the passenger compartment is designed to uniformly distribute passenger loads such that every floor beam is active in carrying these loads. In contrast, the freighter floor loads are applied differently. Instead of the main deck loads being applied uniformly, each 88-inch deep container spans several floor beams. As discussed previously, the result of this is that only floor beams located at the edges of containers are active in carrying the ''up'' loads. Hence, as the FAA determined in its detailed design review, the effect on the airplane is that the 90 lbs. per inch cargo container loading is much more critical than the uniformly applied upper and lower deck loads of the passenger configuration and is, in fact, a safety concern.

One commenter states that the interim weight reduction is too restrictive considering that the passenger 727 can carry in excess of 6,800 lbs. in the same zone.

The 3,000-lb. limitation imposed in the NPRM is unjustified. The FAA does not concur. As discussed previously, the loading on the floor is significantly different depending on whether it is loaded by the carriage of passengers or containers. The 3,000-lb. limitation specified for the carriage of cargo in the NPRM is justified by the FAA's analysis provided in the Rules Dockets.

Netted Lower Lobe Cargo

One commenter states that if the lower lobe cargo is assumed to be netted (restrained), it would not have any relevance in a down gust situation. The FAA infers that the commenter believes that, as the cargo would be restrained to the belly of the airplane, it would not load the underside of the floor beams in a negative ''g'' environment due to a down gust.

Another commenter states that the NPRM should be changed to allow lower lobe weights to be subtracted from the main deck limits if the load is properly tied down. The FAA concurs partially. If the lower lobe cargo is properly tied down, it will be restrained by the structure differently than represented in the FAA analysis. While the FAA is not currently aware of configurations that restrain lower lobe cargo, paragraphs (f) and (g) of this AD allow for approval of this type of configuration as an alternative method of compliance with the final rule.

Airplane Weight Increases

One commenter states that the FAA should reconsider the present policy of withholding approval of maximum take-off weight (MTOW) and maximum landing weight (MLW) increases for 727 freighter modified airplanes. The rationale for this is that the resulting higher weights would allow greater fuel loads for remote region operators, and also would increase the safety margin of the airplane's modified fuselage structure, which is the FAA's prime concern addressed by the NPRM's. The FAA infers that the commenter believes that the proposed AD should be changed to reflect this.

The FAA concurs partially. The FAA concurs that maintaining a minimum in-flight weight reduces the loads resulting from vertical gusts, unless this additional weight is carried in body fuel tanks that are suspended from floor beams. Additional loads to the floor beams exacerbate the unsafe condition. This issue is addressed appropriately in the context of type certification and is not addressed in this AD. Therefore, the FAA has determined that no change to the final rule is necessary.

Operators' Ability to Determine Container CG's

One commenter states that there is no means to measure or comply with the requirement that the container cg's be within +/-10 percent of the geometric center of the container. Two commenters state that the wording in the proposed AD should be changed to allow those operators having a loading procedure that maintains the container cg within +/-10 percent to be considered compliant with this requirement. The FAA does not concur that the cg of the container cannot be determined, or that the requirement to maintain the cg within 10 percent of the horizontal cg cannot be complied with. For example, FedEx has recently acquired equipment for this purpose. Because the cg location within the container has a major effect on the loads imposed on the floor beams, the FAA considers that this limitation is necessary to address the unsafe condition. It should be noted that the vast majority of cargo containers are certificated to TSO C90c, which specifies a maximum cg shift of 10 percent. Therefore, operators should always have been ensuring that the cg shift did not exceed this limitation in the TSO.

One commenter submitted data to the Rules Dockets that the commenter states will allow an operator with a properly designed or modified scale to accurately determine, display, and record the container cg. The FAA did not evaluate the technical accuracy of the submission, as no change to the proposed AD was requested by the commenter.

Airplanes With Apparent Increased Floor Capability

One commenter states that one of its 727–200 airplanes has a greater running load allowable than its other two airplanes (37.5 lbs. per running inch versus 34 lbs. per running inch) and asks why this airplane is limited by the same restriction.

The FAA infers that the commenter believes that its airplane should have higher allowable container loads, based on this apparent increased capability, and that the AD should be changed to reflect this. The FAA does not concur. From its analysis, the design review team determined that the 727 main cargo decks are capable of supporting a maximum payload of approximately 3,000 lbs. per container. Paragraphs (f) and (g) of the AD allow for an applicant to propose new payloads along with substantiating data and analysis. No change to the final rule is necessary.

Inconsistent Limitations

One commenter states that the FAA's determination that these airplanes are capable of supporting only 3,000 lbs. per container is entirely inconsistent with the FAA's interim proposal, which would allow an 8,000-lb. pallet in any position where the entire load would be carried by one set of container locks. The commenter does not see any rational or consistent approach in the NPRM's. The FAA does not concur. The analysis that resulted in the 3,000 lb. per container limit was based on the current operational limits of the airplane. As discussed in the NPRM, the FAA determined that, if more restrictive operational limits are imposed, a higher payload could be allowed on an interim basis. The FAA has estimated that the airplane gust loads will be reduced with limitations on in-flight weight and maximum operating airspeed to the extent that the 3,000-lb. limit per container can be raised to 4,000 lbs. for the interim period.

For the ''up'' load case, two 4,000-lb. containers placed back-to-back, without side vertical restraints, impose

approximately the same amount of load on the floor structure as a single 8,000-lb. container with the adjacent cargo positions carrying no payload. Because of this, for the interim period, the operator would have the flexibility to carry an 8,000-lb. container, provided the containers on either side are empty.

If side vertical restraints acceptable to the FAA are installed, then the interim payload is not to exceed a total weight of 9,600 lbs. for any two adjacent containers. In this case, as stated in paragraph (b) of the AD, the 8,000-lb. limit per container would still apply. Many of the different containers and flat pallets or ''cookie sheets'' used by operators require side vertical restraints, as specified in TSO C90c.

Irrelevancy of Model 747 Problems

One commenter states that the FAA only proposed payload reduction because of the incidents occurring on 747's, but the FAA has no reason to believe the problems found on the 747's will occur on the 727's. The FAA does not concur. The FAA did, in fact, look into the 727 conversions because those conversions had been performed by some of the same companies and with similar procedures and design methods as some 747's which had been found to be unsafe. The unsafe condition that is the subject of this AD, however, is specific to the 727 and has been documented in the Rules Dockets.

Applicability of 14 CFR 25.1529

One commenter states that the NPRM statement indicating that STC holders are required to issue Instructions for Continued Airworthiness in accordance with 14 CFR 25.1529 does not apply to its STC's because the applicable airworthiness standards for the 727 are CAR part 4b, rather than 14 CFR part 25. The FAA does not concur. Since January 28, 1981, 14 CFR 21.50(b) has required that the holder of an STC for which application was made after that date shall furnish the Instructions for Continued Airworthiness prepared in accordance with 14 CFR 25.1529. This requirement is effective regardless of the specific certification basis of the airplane.

Fatigue Cracks as Evidence of Unsafe Condition

FedEx states that, if the FAA's report of huge negative margins of safety at ultimate load are true, then the ''typical daily operating conditions would still impose substantial loads on the structure,'' and result in wear and cracking of the floor structure. FedEx's review of the FAA service difficulty report data generated only two reports of cracks on the converted 727 freighters, and no other damage was found that could be attributed to the 727 cargo conversion modification.

The FAA does not concur that a low number of in-service difficulty reports indicates that the FAA's finding of unsafe condition is unfounded. FedEx has reported that its average cargo load density is approximately 7.5 lbs. per cubic foot, which equates to an average cargo payload of approximately 3,300 lbs. per container. This results in stress levels that on average would be similar to those of a passenger 727. Therefore, it is not expected that fatigue cracks would develop in only 11,008 total flight cycles, which is the highest number of cycles accumulated (as of August 27, 1998) by any FedEx 727 airplane since conversion to a freighter configuration. As discussed previously, the unsafe condition addressed in these AD's is not a result of fatigue, but is the result of the existing floor structure not being able to support the allowable payloads and distributions for the critical gust conditions.

Data Showing Floors to be Safe

FedEx states that the NPRM is inaccurate in stating that the FAA design review team was unable to find any data which showed that the floors were safe for the heavier (than passenger loading) freight payloads. FedEx states that the FAA has received and accepted data verifying the safety of the floor structure. FedEx also states that the FAA has failed to provide ''reasoned explanation'' for not approving various documents.

The FAA does not concur. In performing its own analysis, the FAA was careful to use only methodologies that were commonly employed in industry. One of the ways that the reasonableness of the FAA analysis contained in the Rules Dockets was checked was to compare the results with results of the STC holders' analyses, where possible. In this case, several analysis documents (Dee Howard Reports R90–2, R90–4, and R90–6) were used by FedEx to analyze the main deck floor beams in support of its STC for half-size containers (SA7447SW). However, these documents do not ''verify that the unreinforced floor structure of the main cargo deck can safely support the heavier freighter payloads.'' Also, they do not address all of the critical load cases or configurations, nor do they address the effect of cg shifts.

Recognizing these limitations, the FAA used FedEx's methodology to verify that the FAA analysis yielded similar results for a similar load case. In doing this, the FAA used the load case which placed ''down'' loads on the containers, as provided in FedEx's analysis, as its analysis did not contain an ''up'' load case (as required by CAR part 4b standards). Using the applied loads from FedEx's ''down'' load case, the FAA calculated the margins of safety for the floor beams using the FAA's documented methodology. The results for the mid-span of the floor beam matched very closely to those documented in FedEx's STC analysis for the half-size containers, which verifies that the FAA's and FedEx's analytical methodologies were quite similar for the same load case.

However, because FedEx's (Dee Howard) documents do not address all the critical load cases, locations on the floor beam, or configurations, nor do they address the effects of cg shifts, they do not ''verify the safety of the floor structure.''

In addition, of the ten documents related to the floor beam analysis testing that FedEx submitted in its comments, three documents (Appendices 1, 2, and 3) describe analytical methodologies and do not (and are not intended to) ''show the floor structure can safely support the heavier payloads.'' Regarding the decompression methodology document submitted in Appendix 3, FedEx acknowledged at the September 19, 1997, meeting that it had not yet revised the document following comments received from the FAA at a meeting held between FedEx and the FAA on July 24, 1997.

Three other documents (Appendices 4, 8, and 9) are test plans or results that have been discussed previously and also do not ''show the floor structure can safely support the heavier payloads.''

The two external loads documents (Appendices 5 and 6) have been approved by the FAA prior to FedEx's comment submittal (FAA letter 97–120S–534, dated August 21, 1997) and are considered appropriate as a starting point for an analysis of the floor structure. However, these documents by themselves do not ''verify the safety of the floor structure.''

Appendix 12 includes a document containing an incomplete analysis of one floor beam, a test report which was discussed previously, and two videotapes of that test, none of which ''verify the safety of the floor structure.'' Finally, FedEx's Document ER 97–035 I/R, dated July 20, 1997 (Appendix 7), which was approved by FedEx on August 13, 1997, had not been submitted to the FAA prior to its inclusion in FedEx's comment submittal. In reviewing this document, the FAA has determined that because

the area addressed is shorter than an 88-inch container, this document alone does not substantiate higher container loads. The floor under the rest of the container also would need to be substantiated to warrant a change to the AD limits.

The FAA does not concur that it has received and accepted data verifying the safety of the floor structure, or that the FAA design review team was in possession of any data which showed that the floors were safe for the heavier (than passenger loading) freight payloads. Finally, the FAA does not concur that it has failed to provide FedEx with a ''reasoned explanation'' for not approving various documents. FedEx is aware of the current status of all the above mentioned documents.

FedEx also states that a Boeing letter (Appendix 41) indicated that the floor beams were safe for a passenger to freighter airplane conversion at (container) weights of 8,000 lbs. The FAA does not concur. The referenced letter was part of an initial budget quote for a zero fuel weight increase that estimated potential weight increases that might be applicable to airplanes converted from passenger to freighter configurations. Simplifying assumptions were used by Boeing in order to allow FedEx to quickly establish, as a rough approximation, the financial feasibility of converting an airplane. Any necessary changes to the floor beams in estimating the weight of the airplane following conversion were not addressed.

FedEx's Finite Element Model

FedEx states that the FAA misused FedEx's finite element model (contained in Engineering Report 8504), which identifies negative margins of safety in the fuselage monocoque, to substantiate its finding of unsafe condition. FedEx also states that the NPRM was inaccurate in stating that the report was used for certification. The FAA does not concur. The FAA did not use FedEx's Engineering Report 8504 to validate its analysis. Rather, as discussed previously, the FAA used the floor beam analysis documents submitted as part of the substantiation for FedEx's STC for half-size containers (SA7447SW) to validate its analysis. The NPRM did state that the original STC certification data contained documented negative margins of safety. The FAA does not concur that this statement is incorrect. At the meeting held September 19, 1997, FedEx stated that the document was used to support original STC issuance, and that no other document was submitted.

Critical Loading on Floor Beams

FedEx states that, contrary to a statement in the NPRM, the FAA has not established that floor beams at the forward and aft edges of the container are more critically loaded. In its August 28, 1997, submittal to Rules Docket No. 97–NM–09–AD, FedEx cited its ''on-aircraft'' test as proof that the sidelocks are more critically loaded. FedEx appears to have mistakenly inferred that this statement addresses the effectiveness of FedEx's sidelocks. This inference is incorrect. In context, this statement simply points out that, for the ''up'' load case, ''the floor beams at the forward or aft edges of the containers would be more critically loaded'' than the floor beams under the center of the container. The reason for this is that a full-size container is restrained against vertical movement by the container locks attached to the floor beams at container edges and there are no container locks in the center of the container.

Communications with FAA

FedEx's comments included a number of disagreements with documentation of various communications prepared by the FAA and placed in Rules Docket No. 97–NM–09–AD. Because these comments do not relate to the merits of this AD, they are not addressed in this final rule. However, the FAA has provided a response to these comments in that Rules Docket.

Interim Limitations Already Observed

One commenter states that the interim operating limitations are not necessary because the commenter does not know of a 727 freighter STC that allows operation higher than 350 knots indicated airspeed (KIAS) and, for practical reasons, 727–200 airplanes almost never operate at weights below 100,000 lbs. The FAA does not concur.

While many of the affected airplanes are subject to a maximum operational speed limitation of approximately 350 KIAS, other affected airplanes are not subject to such limitations and do operate at higher speeds. In addition, while operation at weights below 100,000 lbs. is not likely for most 727–200 converted freighters, such operation is permitted and may occur. Such operation is even more likely for the lighter weight 727–100, which also is subject to this AD.

Alternatives to Limitations in the AD

Several commenters asked about alternatives to the proposed rule and suggested increased inspections, such as those in other AD's. The FAA does not concur. The unsafe condition identified in the AD is not based on loads imposed on the floor structure on an average flight (i.e., fatigue-type loading). The unsafe condition is caused by loads experienced on the airplane due to a large gust while carrying certain cargo payloads and distributions. In this case, a floor beam failure or excessive deflection would likely result in the loss of the airplane. Because such a failure would not necessarily be preceded by cracking, inspections of the airplane would not prevent the failure. The only means for preventing a catastrophic event is to limit the flight operation of the airplane and/or the container payloads.

One commenter proposes a statistical approach to study the unsafe condition by requiring certain inspections over the next year while imposing certain operational limitations. The FAA does not concur. Because the unsafe condition is a collapse of the floor caused by large gusts, increased inspections in the areas of concern will not serve to lessen the likelihood of loss of the airplane.

One commenter proposes that the FAA revise the proposed AD to further limit the maximum operational speed to 280 KIAS as an alternative to payload limitations. The FAA does not concur with the commenter's proposal to reduce the maximum operational speed to 280 KIAS. Reducing the maximum operational speed levels below 350 KIAS does reduce the gust loads on the airplane. However, speed restrictions below 350 KIAS that permit safe operation of the airplane do not affect the maneuver loads, which at these speeds become more critical than the gust loads.

''Mode B''

One commenter requests that, for the interim limitations, the FAA also allows operation at ''Mode B'' [350 knots equivalent airspeed (KEAS)] for the maximum operating airspeed (Vmo). The commenter states that operations at ''Mode B'' would be more convenient than the 350 KIAS limitation specified in the proposed AD. The FAA concurs. The FAA has revised the interim limitations of the final rule accordingly.

Release of Proprietary Data

Several commenters state that the FAA must divulge all data used to make its finding of an unsafe condition; the commenters cited various legal cases.

The FAA infers that commenters are insisting that the FAA release relevant proprietary data that was considered by the FAA during this rulemaking. The FAA does not concur for two reasons. First, the Trade Secret Act (18 U.S.C.

1905) prohibits the disclosure of such data, and this prohibition is not overridden by the requirements of the Administrative Procedure Act (APA). The cases cited by the commenters, while generally stating that agencies must release all information on which they rely during rulemaking, do not address the prohibition against the release of trade secret data.

Because AD's address unsafe conditions associated with aeronautical products, the FAA routinely evaluates proprietary design data in determining whether AD's are necessary. In determining whether such material should be placed in the Rules Docket, the FAA applies the standards developed under the Freedom of Information Act (FOIA; 5 U.S.C. 552) in the application of Exemption 4 [Section 552(B)(4)], which protects ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' If data are determined to meet those standards, they are not placed in the Rules Docket, but are retained in separate files that are not released to the public. Apart from violation of the Trade Secret Act, if the FAA were to release such data, it would be much more difficult for the FAA to obtain the data on which its findings of unsafe conditions are necessarily based.

Second, the APA generally has been interpreted as requiring that agencies provide the public with a meaningful opportunity to comment on proposed rules. In this rulemaking, the FAA has fully complied with this requirement, even without releasing trade secret data. In developing the NPRM, the FAA used proprietary Boeing loads data in its analysis, from which the FAA identified the existence of the unsafe condition. Although Boeing has not consented to releasing these data, FedEx has submitted comparable loads data (discussed previously under the heading, ''Extension of Interim Operational Period'') which, when used in the FAA analysis (which has been placed in the Rules Dockets), also demonstrate the existence of the unsafe condition. FedEx did consent to the release of these data. In fact, at the first public meeting on February 18, 1998, the FAA used these data in its presentation explaining its analysis. The analysis and the presentation are fully documented in the Rules Dockets, and have been available for review by commenters. The FAA also has referenced other proprietary data, which have been submitted by applicants seeking approval for modifications to correct the unsafe condition, as confirming the FAA's analysis. Although these data are relevant to the rulemaking, they do not provide the basis for the FAA's action, and their release would not significantly increase the meaningfulness of the public's opportunity to comment on the FAA's proposal.

One commenter requests copies of three recently updated Boeing computer programs which it believes were utilized by the FAA in determining the container payload limits specified in the NPRM. The commenter states that those programs are entitled: (1) ''Vertical Gust Load Factors 'Gs;'' (2) ''727 Movement (sic) of Inertia Model;'' and (3) ''Operating Empty Weight Plus Payload Distribution.'' The FAA is not aware of the referenced programs, does not have them, and did not use them in its analysis.

Economic Analysis

Several commenters state that the FAA underestimated the cost to modify the airplane floor structure into compliance to CAR part 4b, citing a Pemco estimate of $400,000, as opposed to the $100,000 estimate contained in the NPRM. Several commenters also state that the FAA had underestimated (1) the loss in revenue due to the reduced allowable payloads, and (2) the amount of time necessary to get all airplanes modified due to the short 120-day interim period, a lack of FAA-approved fixes, and the limited availability of facilities to install the modifications within the 120-day period proposed by the NPRM.

The FAA concurs. The FAA used data supplied by industry to conduct its cost and regulatory flexibility analysis used in the NPRM and has considered the data supplied by commenters during the comment period to conduct the cost and regulatory flexibility analysis used for the final rule.

Cost-Benefit Analysis

One commenter states that the FAA must undertake a thorough cost-benefit analysis and economic impact assessment in conjunction with its consideration of the remedial actions at issue in this rulemaking. The commenter states that the FAA has thus far failed to conduct an adequate cost-benefit analysis. The commenter states that a cost-benefit analysis and economic impact assessment are required by the provisions of the Regulatory Flexibility Act.

The FAA does not concur. As discussed below under the heading ''Regulatory Evaluation Summary,'' the FAA has performed an extensive analysis of the costs and benefits of this AD and has fulfilled the requirements of the Regulatory Flexibility Act.

Combi Airplanes

One commenter states that the NPRM has not considered those operators that operate airplanes in a combi mode (a combi airplane has provisions for passengers and cargo on the main deck in separate compartments). The commenter also states that it assumes that the load restrictions would not apply to the floor structure which is used to carry passengers and that the original manufacturer's limitations are applicable. The FAA concurs. Although the commenter is correct with respect to floor structure carrying passengers, combi airplanes transporting containers on the main deck must be in compliance with the limitations specified in this AD.

Applicability of Proposal

FedEx points out that the wording of the applicability in the AD could easily be misconstrued as also applying to airplanes manufactured as freighters by the original equipment manufacturer. The FAA concurs and has revised the applicability of the final rule to read ''Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration in accordance with Supplemental Type Certificate SA1368SO, SA1797SO, or SA1798SO; certificated in any category.''

Other Cargo Lock Devices

One commenter requests that the proposed AD be revised to add a paragraph discussing a ''special load-alleviating cargo container lock'' for which the commenter has applied for an STC at the FAA, Los Angeles ACO. The commenter reports that this lock will allow for the carriage of 16,000 lbs. rather than 8,000 lbs. in two adjacent containers, as specified in the proposed AD, but to be conservative, the commenter requests that the rule allow 12,000 lbs. for two adjacent containers for the interim period. During the reopened comment period, this commenter submitted additional information in support of its original comment.

The FAA does not concur. The information submitted is not sufficient to substantiate the safety of the airplane with the locks installed. This lock is the subject of an STC application and is not currently FAA-approved. Paragraphs (f) and (g) of the AD provide for approval of alternative methods of compliance to address potentially alleviating devices for the unsafe condition. The commenter may obtain such an approval upon submission of data substantiating that the referenced device

provides an acceptable level of safety. Therefore, no change to the final rule is necessary.

"Fine Tune" the AD

The CAA and others request that the AD should be ''fine tuned'' after issuance, as new data become available. The FAA does not concur that ''fine tuning'' of the AD is necessary. Paragraphs (f) and (g) of the AD allow for approval of alternative methods of addressing the unsafe condition when substantiated properly. As with any AD, if new information indicates that changes to the AD itself are needed, the FAA has the authority to revise or supersede this AD.

Request For Clarification

One commenter requests clarification of the procedures that will be used to obtain future FAA approvals with respect to this rulemaking and to inform the public of those approvals.

As stated in the final rule, all submissions should be made to the Atlanta ACO. The Transport Airplane Directorate has established a team consisting of members from several ACO's to review all requests in accordance with paragraphs (e) and (f) of this AD. In all other respects, the process for approvals under this AD will be similar to that followed for all AD's. For example, in order to protect applicants' proprietary data, the FAA will notify only the applicant for an approval of the FAA's decision; while the FAA will disclose whether approvals have been granted, requests for approved data would be handled under normal FOIA procedures.

Other Safety Improvements

One commenter states that, because this AD will necessitate large expenditures and does not address an unsafe condition, requiring compliance with it will prevent the affected airlines from adopting other less costly and more effective safety enhancements, such as updating flight deck equipment. The FAA does not concur. As discussed previously, this AD addresses a serious unsafe condition. Although correcting this condition may be expensive, the FAA has determined that it must be corrected to ensure an acceptable level of safety.

Petitions for Reconsideration

In addition to their comments, several commenters also filed ''Petitions for Reconsideration'' in accordance with 14 CFR 11.93. Because these petitions were filed prematurely, the FAA considered them as comments to the Rules Docket. However, because the substance of the petitions is repetitious of the more extensive comments submitted by FedEx and others discussed above, the petitions are not discussed separately in this final rule.

Explanation of Change of Aircraft Certification Office Contact

The FAA has changed the point of contact for obtaining further information, for obtaining FAA approval of certain actions, and for submitting substantiating data and analyses in accordance with the provisions of this AD, due to relocation of certain STC holders.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Participation at the Public Meeting on the Final Rule

Requests from persons who wish to present oral statements at the public meeting should be received by the FAA no later than 5 days prior to the meeting. Such requests should be submitted to Mike Zielinski as listed in the section titled **FOR FURTHER INFORMATION CONTACT** above, and should include a written summary of oral remarks to be presented, and an estimate of time needed for the presentation. Requests received after the date specified above will be scheduled if there is time available during the meeting; however, the names of those individuals may not appear on the written agenda. The FAA will prepare an agenda of speakers that will be available at the meeting. To accommodate as many speakers as possible, the amount of time allocated to each speaker may be less than the amount of time requested. Those persons desiring to have available audiovisual equipment should notify the FAA when requesting to be placed on the agenda.

Purpose of Public Meeting

Because of the high degree of public interest in this AD, the FAA has scheduled a public meeting to discuss its content and issues relating to compliance. The FAA's objective is to ensure that all affected operators and design approval holders have a full understanding of the issues addressed in the AD and of the actions necessary to comply with it. The FAA anticipates that, following this meeting, there will continue to be extensive discussions between the affected parties and the FAA for the purpose of identifying and implementing the most timely and cost-effective means to eliminate the unsafe condition addressed in this AD.

Public Meeting Procedures

Persons who plan to attend the public meeting should be aware of the following procedures that have been established for this meeting:

1. There will be no admission fee or other charge to attend or to participate in the public meeting. The meeting will be open to all persons who have requested in advance to present statements, or who register on the day of the meeting (between 8:30 a.m. and 9:00 a.m.) subject to availability of space in the meeting room.

2. Representatives from the FAA will conduct the public meeting. A technical panel of FAA experts will be established to discuss information presented by participants.

3. The FAA will try to accommodate all speakers; therefore, it may be necessary to limit the time available for an individual or group. If necessary, the public meeting may be extended to evenings or additional days. If practicable, the meeting may be accelerated to enable adjournment in less than the time scheduled.

4. Sign and oral interpretation can be made available at the public meeting, as well assistive listening device, if requested 5 calendar days before the meeting.

5. The public meeting will be recorded by a court reporter. Any person who is interested in purchasing a copy of the transcript should contact the court reporter directly. This information will be available at the meeting.

6. The FAA requests that persons participating in the public meeting provide 10 copies of all materials to be presented for distribution to the panel members; other copies may be provided to the audience at the discretion of the participant.

Regulatory Evaluation Summary

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

implications to warrant the preparation of a Federalism Assessment.

The FAA conducted a Cost Analysis and Final Regulatory Flexibility Analysis to determine the regulatory impacts of this and three other AD's to operators of all 244 U.S.-registered Boeing Model 727 passenger airplanes that have been converted to cargo-carrying configurations under 10 STC's held by four companies. This analysis is included in the Rules Docket for each AD. The FAA has determined that approximately 20 727–100's and 37 727–200's operated by 13 carriers were converted under AEI STC's. (There were 15 727's for which the FAA could not identify the STC holder. It is possible that these airplanes were also converted under an AEI STC. Their costs are not included here.)

Assuming that the operators of affected airplanes converted under AEI STC's will comply with the restricted interim operating conditions set forth in the AD, the FAA estimates that operators will not lose revenues during the 28-month interim period after the effective date of the AD. During the interim period, these airplanes will be limited to a total of 8,000 lbs. per pair of adjacent containers (a total of 36,000 to 48,000 lbs., depending on the number of pallets) because none of the AEI-converted 727's have installed approved side restraints. Assuming typical payloads ranging from 34,835 lbs. for a 727–100 with nine pallets to 47,820 lbs. for a 727–200 with 12 pallets, none of the operators of AEI-converted airplanes will lose revenues during this interim period.

The Cost Analysis and Final Regulatory Flexibility Analysis, completed by the FAA and included in the Rules Dockets, estimates that affected airplanes can be modified at a cost of $385,000 per airplane to carry the maximum payloads currently allowed, or a total of $21.9 million for the 57 AEI 727's. The FAA expects that operators will modify their airplanes during the 28-month interim period, scheduling the modifications to coincide with periodic maintenance. A modification will require that the airplane be removed from service for a period of 17 days; the FAA conservatively estimates that scheduling a modification during periodic maintenance will reduce the net time out of service by two days. The FAA estimates the lost revenue during this 15-day period will be $14,829 per day, per 727–100, and $23,405 per day, per 727–200. The total down-time lost revenue for the 13 operators will be $17.4 million. This estimate conservatively assumes that cargo is not shifted from airplanes being modified to other airplanes. Such cargo shifting is typical industry practice and would reduce the costs attributable to lost revenues. Incremental fuel costs to carry the additional weight of the floor modification will be $224,000 over the 28-month period, as airplanes are modified. When all affected AEI 727's are modified, additional fuel costs will be about $15,000 per month.

The total cost, therefore, to modify the fleet of affected 727's that were originally modified to the AEI STC, including lost revenues while the airplanes are out of service and modification costs, is $39.6 million, or $36.1 million discounted at seven percent over 28 months.

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), was enacted by Congress to ensure that small entities are not unnecessarily or disproportionately burdened by government regulations. The RFA requires a Regulatory Flexibility Analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The purpose of this analysis is to ensure that the agency has considered all reasonable regulatory alternatives that will minimize the rule's economic burdens for affected small entities, while achieving its safety objectives. Under section 63(b) of the RFA, the analysis must address:

1. Reasons why the agency is promulgating the rule;

2. The objectives and legal basis for the rule;

3. The kind and number of small entities to which the rule will apply;

4. The projected reporting, recordkeeping, and other compliance requirements of the rule; and

5. All federal rules that may duplicate, overlap, or conflict with the rule. These elements of the RFA are addressed below:

A. Reasons Why the Agency Is Promulgating the Rule

The FAA has determined that the unreinforced floor structure of the main cargo deck of converted 727's is not strong enough to enable the airplane to safely carry the maximum payload that is currently allowed in this area. The actions specified in this AD are intended to prevent failure of the floor structure, which could lead to loss of the airplane.

B. Statement of Objective and Legal Basis

Under the United States Code (U.S.C.), the FAA Administrator is required to consider the following matter, among others, as being in the public interest: assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. (See 49 U.S.C. 44101(d).) Accordingly, this AD amends Title 14 of the CFR's to require operators of Boeing 727 airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration to comply with certain payload limitations, substantiate data showing other acceptable limits, or show an alternative method of compliance (AMOC).

C. Regulatory Flexibility Determination

Under the RFA, the FAA must determine whether or not a rule significantly affects a substantial number of small entities. This determination is typically based on small entity size and cost thresholds that vary depending on the affected industry. The entities affected by this rule are those 13 carriers operating the 57 U.S.-registered converted Boeing 727 airplanes that have been converted under AEI's STC's. Many of these carriers may be small. Therefore, the FAA has prepared an analysis of cost impacts and has examined possible regulatory alternatives.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

With two minor exceptions, the rule will not mandate additional reporting or recordkeeping. First, there will be a negligible one-time cost to operators to revise their AFM's and Supplements. Second, operators will be required to keep records of the modifications to their airplanes. This requirement is common to all maintenance, preventive maintenance, and alterations under § 91.417, Maintenance records, and does not impose costs attributable to this rule.

E. Overlapping, Duplicative, or Conflicting Federal Rules

The rule will not overlap, duplicate, or conflict with existing Federal rules.

F. Analysis of Alternatives

This AD will impose a financial requirement on small entities that operate 727's that were converted under AEI STC's. The FAA examined potential alternatives to the AD's requirements to minimize the rule's economic burden for small entities while achieving its safety objectives. The alternatives are:

- Exclude small entities;

• Extend the compliance deadline for small entities; and

• Establish higher payload limits for small entities.

The FAA has determined that the option to exclude small entities from the requirements of the rule is not justified. The unsafe condition that exists on an affected 727 operated by a small entity is as potentially catastrophic as that on an affected 727 operated by a large entity. In fact, the average payloads carried by small entities may exceed the average payloads carried by large operators, resulting in a higher probability of a catastrophic event.

The FAA also considered options to extend the compliance period for small operators. The proposed rule established a final compliance date of 120 days after the effective date of the rule. During this 120-day period, operators could comply with interim operating conditions that would enable them to carry higher payloads than those permitted after that interim period. When the proposed rule was published, the FAA had information that indicated that a portion of the engineering data from an FAA-approved STC for a floor modification that could be used as an AMOC would be available within a few months of the proposed rule's publication. In addition, the FAA estimated that operators would be able to modify their airplanes within the 120-day interim period.

Hamilton Aviation has received letters of approval for work towards obtaining an STC for strengthening the floor beams aft of Station 700 and expects to be able to submit additional data in the Fall of 1998 that will provide the basis for an STC for the entire floor. Pemco World Air Services expects to be able to use Hamilton's engineering tools to modify the floors of the 727's it has converted. The FAA is confident, therefore, that there will be AMOC's for operators of affected airplanes when this final rule is published.

Several commenters to the Rules Dockets for the proposed AD's rejected the FAA's claim that their airplanes could be modified within the 120-day interim period. Their arguments were based on the unavailability of an approved STC that could be used as an AMOC (or, at that time, even letters of approval toward an STC). Operators also stated that modification of all 244 U.S.-registered airplanes would be impossible within a 120-day time frame.

The FAA agrees 120 days is unrealistic and would have severe economic consequences because operators would be required to reduce their payloads substantially at the end of the interim period. In the final rule, therefore, the FAA extends the interim period to 28 months. This will permit operators time to modify their airplanes during regularly scheduled maintenance, minimizing down time and associated lost revenues. This change will be especially beneficial to small entities that may find it difficult to find alternative means of carrying cargo.

Finally, the FAA rejects the compliance alternative that would reduce payloads from those currently required but would establish higher payload limits than those for larger entities. This alternative is unacceptable because the unsafe condition is dependent on the size of the payload, not the size of the entity. The FAA cannot permit a small entity to operate under an unsafe condition.

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed ''significant intergovernmental mandate.'' A ''significant intergovernmental mandate'' under the Act is any provision in a Federal agency regulation that would impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of $100 million (adjusted annually for inflation) in any one year. Section 203 of the Act, 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

This AD does not contain any Federal intergovernmental or private sector mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

98–26–19 Boeing: Amendment 39–10962. Docket 97–NM–79–AD.

Applicability: Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration in accordance with Supplemental Type Certificate SA1368SO, SA1797SO, or SA1798SO; 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 (g) 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.

Note 2: The payload limitations specified in this AD are in addition to payload limitations that are otherwise applicable and do not allow for increases in payloads beyond those specified in such limitations.

To prevent structural failure of the floor beams of the main cargo deck, which could lead to loss of the airplane, accomplish the following:

(a) Except as provided in paragraphs (b) and (c) of this AD, within 90 days after the effective date of this AD, accomplish the requirements of paragraph (a)(1) or (a)(2) of this AD, as applicable.

(1) For airplanes that transport containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Codes ''A,'' ''B,'' ''C,'' ''D,'' or ''E,'' containers: Revise the Limitations Section of all FAA-approved Airplane Flight Manuals (AFM) and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements to include the following information. This may be accomplished by inserting a copy of this AD

in all AFM's, AFM Supplements, and Weight and Balance Supplements.

''LIMITATIONS

All containers with one door must be oriented with the door side of the container facing forward, except the door of the first container aft of the cargo barrier may face aft.

The location of the horizontal center of gravity for the total payload within each container or pallet shall not vary more than 10 percent (8.8 inches) from the geometric center of the base of the container or pallet for the forward and aft direction, and 10 percent of the width from the geometric center of the base of the container or pallet for the left or right direction.''

''PAYLOAD LIMITATIONS

For containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Code ''A'' (88 by 125 inches), ''B'' (88 by 108 inches), or ''C'' (88 by 118 inches):

Do not exceed a total weight of 3,000 pounds per container or pallet on the main cargo deck, except in the area adjacent to the side cargo door. In the side cargo door area, for all containers or pallets completely or partially located between Body Station 440 and Body Station 660, those containers or pallets are restricted to a maximum payload of 2,700 pounds per container or pallet. The 3,000 and 2,700 pound payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.

For containers or pallets that have been manufactured in accordance with NAS 3610 Size Code ''D'' (88 by 54 inches) or ''E'' (88 by 53 inches) containers:

Do not exceed a total weight of 1,500 pounds per container or pallet on the main cargo deck, except in the area adjacent to the side cargo door. In the side cargo door area, for all containers or pallets completely or partially located between Body Station 440 and Body Station 660, those containers or pallets are restricted to a maximum payload of 1,350 pounds per container or pallet. The 1,500 and 1,350 pound payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.''

(2) For airplanes on which any other containers or pallets are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate.

Note 3: The weight restrictions to be approved under paragraph (a)(2) will be consistent with the limitations specified in paragraph (a)(1) of this AD.

(b) For airplanes that ARE equipped with side vertical cargo container restraints that have been approved by the Manager, Standardization Branch, ANM–113: As an optional alternative to compliance with paragraph (a) of this AD, within 90 days after the effective date of this AD, accomplish the requirements of paragraph (b)(1) or (b)(2) of this AD, as applicable. This alternative may be used only during the period ending 28 months after the effective date of this AD.

Note 4: To be eligible for compliance with this paragraph, the side vertical cargo container restraints must be approved by the Manager, Standardization Branch, ANM–113, regardless of whether they have been previously FAA approved.

(1) For airplanes on which containers complying with NAS 3610 Size Code ''A,'' ''B,'' ''C,'' ''D,'' or ''E,'' are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements to include the following limitations. This may be accomplished by inserting a copy of this AD in all AFM's, AFM Supplements, and Weight and Balance Supplements.

''LIMITATIONS

Maximum Operating Airspeed of Vmo equals 350 knots indicated airspeed (KIAS), or Mode ''B'' [350 knots equivalent airspeed (KEAS)].

Minimum operating weight: 100,000 pounds.

All containers with one door must be oriented with the door side of the container facing forward, except the door of the first container aft of the cargo barrier may face aft.

The location of the horizontal center of gravity for the total payload within each container shall not vary more than 10 percent (8.8 inches) from the geometric center of the base of the container for the forward and aft direction and 10 percent of the width from the geometric center of the base of the container for the left or right direction.''

''PAYLOAD LIMITATIONS

For airplanes that transport containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Code ''A'' (88 by 125 inches), ''B'' (88 by 108 inches), or ''C'' (88 by 118 inches):

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 9,600 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

For those containers or pallets which are completely or partially located within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 12,000 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

These container payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck; and

For containers or pallets that have been manufactured in accordance with NAS 3610 Size Code ''D'' (88 by 54 inches) or ''E'' (88 by 53 inches) containers:

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 4,800 pounds for any two adjacent (in the forward and aft direction) containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

For those containers or pallets which are completely or partially contained within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 6,000 pounds for any two adjacent (in the forward and aft direction) containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

These payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.''

(2) For airplanes on which pallets or containers other than those specified in paragraph (b)(1) of this AD, are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113.

Note 5: The weight restrictions to be approved under paragraph (b)(2) will be consistent with the limitations specified in paragraph (b)(1) of this AD.

(c) For airplanes that are NOT equipped with side vertical cargo container restraints that have been approved by the Manager, Standardization Branch, ANM–113: As an optional alternative to compliance with paragraph (a) of this AD, within 90 days after the effective date of this AD, accomplish the requirements of paragraph (c)(1) or (c)(2) of this AD, as applicable. This alternative may be used only during the period ending 28 months after the effective date of this AD.

(1) For airplanes on which containers complying with NAS 3610 Size Codes ''A,'' ''B,'' ''C,'' ''D,'' or ''E,'' are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements to include the following limitations. This may be accomplished by inserting a copy of this AD in all AFM's, AFM Supplements, and Weight and Balance Supplements.

''LIMITATIONS

Maximum Operating Airspeed of Vmo equals 350 knots indicated airspeed (KIAS), or Mode ''B'' [350 knots equivalent airspeed (KEAS)].

Minimum operating weight: 100,000 pounds.

All containers with one door must be oriented with the door side of the container facing forward, except the door of the first container aft of the cargo barrier may face aft.

The location of the horizontal center of gravity for the total payload within each container shall not vary more than 10 percent (8.8 inches) from the geometric center of the

base of the container for the forward and aft direction and 10 percent of the width from the geometric center of the base of the container for the left or right direction.''

''PAYLOAD LIMITATIONS

For airplanes that transport containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Code ''A'' (88 by 125 inches), ''B'' (88 by 108 inches), or ''C'' (88 by 118 inches):

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 8,000 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

For those cargo pallets which are completely or partially contained within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 12,000 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

These payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.

For containers or pallets that have been manufactured in accordance with NAS 3610 Size Code ''D'' (88 by 54 inches) or ''E'' (88 by 53 inches) containers:

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 4,000 pounds for any two adjacent (in the forward and aft direction) containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

For those cargo pallets which are completely or partially contained within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 6,000 pounds for any two adjacent containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

These payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.''

(2) For airplanes on which pallets or containers other than those specified in paragraph (c)(1) of this AD, are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113.

Note 6: The weight restrictions to be approved under paragraph (c)(2) will be consistent with the limitations specified in paragraph (c)(1) of this AD.

(d) For airplanes complying with paragraph (b) or (c) of this AD, within 28 months after the effective date of this AD, accomplish the requirements of paragraph (a) of this AD.

(e) For airplanes that operate under the 350 KIAS limitations specified in paragraph (b) or (c) of this AD: A maximum operating airspeed limitation placard must be installed adjacent to the airspeed indicator and in full view of both pilots. This placard must state: ''Limit Vmo to 350 KIAS.''

(f) As an alternative to compliance with paragraphs (a), (b), (c), (d), and (e) of this AD: An applicant may propose to modify the floor structure or propose differing payloads and other limits by submitting substantiating data and analyses to the Manager, Atlanta Aircraft Certification Office (ACO), FAA, Small Airplane Directorate, One Crown Center, 1895 Phoenix Boulevard, Suite 450, Atlanta, Georgia 30349. The Manager of the Atlanta ACO will coordinate the review of the submittal with the Manager of the Standardization Branch, ANM–113, in accordance with the procedures of paragraph (g) of this AD. If the FAA determines that the proposal is in compliance with the requirements of Civil Air Regulations (CAR) part 4b and is applicable to the specific airplane being analyzed and approves the proposed limits, prior to flight under these new limits, the operator must revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113. Accomplishment of these revisions in accordance with the requirements of this paragraph constitutes terminating action for the requirements of this AD.

(g) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta ACO, who will coordinate the approval with the Manager of the Standardization Branch, ANM–113.

Note 7: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

(h) 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.

(i) This amendment becomes effective on February 16, 1999.

Issued in Renton, Washington, on December 16, 1998.

Ronald T. Wojnar,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99–445 Filed 1–11–99; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–80–AD; Amendment 39–10963; AD 98–26–20]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 727 Series Airplanes Modified in Accordance With Supplemental Type Certificate ST00015AT

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; technical public meeting.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration, that requires limiting the payload on the main cargo deck by revising the Limitations Sections of all Airplane Flight Manuals (AFM), AFM Supplements, and Airplane Weight and Balance Supplements for these airplanes. This amendment also provides for the submission of data and analyses that substantiate the strength of the main cargo deck, or modification of the main cargo deck, as optional terminating action for these payload restrictions. This amendment is prompted by the FAA's determination that under certain conditions unreinforced floor structure of the main cargo deck is not strong enough to enable the airplane to safely carry the maximum payload that is currently allowed in this area. The actions specified by this AD are intended to prevent failure of the floor structure, which could lead to loss of the airplane.

DATES: Effective February 16, 1999.

The public meeting will be held January 20, 1999, at 9:00 a.m., in Seattle, Washington. Registration will begin at 8:30 a.m. on the day of the meeting.

ADDRESSES: Information concerning this amendment may be obtained from or examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington, by appointment only between the hours of 8:00 a.m. and 2:00 p.m.

The public meeting will be held at the following location: The Radisson Hotel, 17001 Pacific Highway South, Seattle, Washington 98188; telephone (206) 244–6000.

FOR FURTHER INFORMATION CONTACT: Questions concerning the airworthiness

directive should be directed to Michael O'Neil, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712; telephone (562) 627–5320; fax (562) 627–5210.

Requests to present a statement at the public meeting regarding the logistics of the meeting should be directed to Mike Zielinski, Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM–113, 1601 Lind Avenue, SW, Renton, Washington 98055–4056; telephone (425) 227–2279; 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 certain Boeing Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration was published in the **Federal Register** on July 15, 1997 (62 FR 37788). At the same time, the FAA issued three other similar notices of proposed rulemaking (NPRM's) to address airplanes similarly converted in accordance with STC's held by FedEx, Aeronautical Engineers, Inc., and Pemco. That action proposed to require limiting the payload on the main cargo deck by revising the Limitations Sections of all Airplane Flight Manuals (AFM), AFM Supplements, and Airplane Weight and Balance Supplements for these airplanes. That action also proposed to provide for the submission of data and analyses that substantiate the strength of the main cargo deck, or modification of the main cargo deck, as optional terminating action for these payload restrictions.

On February 4, 1998, in order to obtain additional public participation in these NPRM's, the FAA reopened the comment period for a period of 90 days and scheduled two sets of public meetings, which were held in Seattle, Washington, on February 18 and 19, 1998, and April 1 and 2, 1998. In addition to the comments submitted during the original comment period, the comments that were provided at the public meetings and submitted to the Rules Dockets during the reopened comment period also are discussed below.

Comments

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

The FAA has received comments in response to the four NPRM's discussed previously (i.e., Docket No.'s 97–NM–09–AD, 97–NM–79–AD, 97–NM–80–AD, and 97–NM–81–AD). Some of these comments addressed only one NPRM, while others addressed all four. For example, although the comments submitted by FedEx address only the NPRM applicable to its STC's (i.e., Docket No. 97–NM–09–AD), other commenters referenced FedEx's comments and requested that those comments be considered in the context of the other three NPRM's, as well. Because in most cases the issues raised by the commenters are generally relevant to all four NPRM's, each final rule includes a discussion of all comments received.

Existence of Unsafe Condition

Several commenters disagree with the FAA's finding of an unsafe condition and refer to the following statement in the NPRM's, ''[a] design which does not meet [certification] standards is presumed to be unsafe.'' The commenters contend that, while this statement is ''convenient,'' the FAA is still obliged to issue the AD in accordance with 14 CFR part 39. In accordance with part 39, prior to the issuance of an AD, the FAA must establish that an unsafe condition exists in a product and that this condition is likely to exist in other products of the same type design.

From this comment, the FAA infers that the commenters believe the proposed AD is merely a consequence of non-compliance with Civil Air Regulations (CAR) part 4b, which are the design standards to which the Model 727 was certificated, and that the unsafe condition has not been substantiated. The FAA does not concur. The context of the quoted statement in the NPRM's was an explanation of the FAA's method used in the design review that led to issuance of the NPRM's. Initially, the FAA had identified the potential non-compliance based on observation and review of original certification data. Since, in accordance with the Federal Aviation Act, CAR part 4b standards establish the minimum level of safety, the FAA considered that further evaluation was necessary and appropriate to determine whether this potential non-compliance created an unsafe condition warranting an AD. As explained in the NPRM's, the FAA determined not only that the design was non-compliant, but that the degree of non-compliance was highly significant, and resulted in substantial negative structural margins of safety. The FAA's analysis addressed the ''up'' load case, which was considered to be the most likely critical load case, in the sense that it was likely to be the load case that would present the most serious negative margins of safety. The analysis verified these negative margins and confirmed the FAA's concerns that serious negative margins may exist for other load cases, as well. The effect of these substantial negative margins is that the likelihood of catastrophic failure of the floor structure is unacceptably high. The FAA's finding of unsafe condition arises from this determination rather than from a finding of non-compliance with CAR part 4b.

Risk From Actual Operations

Several commenters state that the FAA's finding of an unsafe condition in the NPRM's is incorrect because, based on the way the airplanes are actually loaded and operated, the likelihood of encountering conditions specified in CAR part 4b that would exceed the strength of the floor structure is extremely improbable.

The FAA does not concur. The FAA's evaluation was based on the potential for a catastrophic event occurring as a result of an airplane encountering severe gust conditions while transporting containers loaded with maximum allowable payloads. (Unless otherwise stated, throughout the preamble of this AD the FAA uses the term ''container'' to refer to all unit load devices, including pallets.) The fact that operators may transport containers with maximum payloads only for a small percentage of their operations does not diminish the seriousness of the unsafe condition when they do transport such containers. (It should be noted that one commenter stated that its operations with even one container at maximum allowable payload are only a small percentage of its total operations, but also stated that it engages in such operations daily.)

In addition, the FAA disagrees with the commenters' conclusions regarding the probability of catastrophic events. The events that may cause a catastrophic failure occur randomly and, thus, cannot be reliably predicted and avoided for any particular operation. Although the probability of large gusts or excessive maneuvers (as specified in CAR part 4b) is low (approximately once in the lifetime of an airplane for a large gust), because of the large negative margins of safety associated with these unreinforced floor structure designs (discussed in the NPRM's), less severe events (i.e., lower gusts or milder maneuvers) also could result in catastrophic failure. Therefore, because the likelihood of encountering

less severe events is significantly greater than the likelihood of encountering the events contemplated by CAR part 4b standards, and because the consequences of such encounters may be catastrophic, the FAA considers that the risk is unacceptable.

During the public meetings, several commenters suggested using analytical methods developed to show compliance with 14 CFR 25.1309 in assessing risks from gust loads. Their position was that if such analysis were performed, it would demonstrate that the unsafe condition addressed by the proposed AD is ''extremely improbable;'' therefore, an AD is unnecessary to address it.

The FAA does not concur. The purpose of section 25.1309 is to require that type certificate applicants demonstrate the robustness of the airplane systems and equipment. Therefore, it is not applicable to the assessment of the seriousness of an unsafe condition associated with identified structural deficiencies. Nevertheless, assuming that it is appropriate, section 25.1309(a) states that the airplane systems, equipment, and installations ''must be designed to ensure that they perform their intended functions under any foreseeable operating condition.'' This means that the airplane must function properly if it is being operated within its approved operating and environmental conditions. As discussed in the NPRM's, the FAA's analysis demonstrates that the affected airplanes, when operated with allowable payload weights and distributions (which is foreseeable), could experience catastrophic failure if they encounter gust conditions that are also foreseeable. Therefore, applying the analytical methods of section 25.1309(a), these STC designs would be found not to comply.

In addition, section 25.1309(b) requires that any system failure condition that would result in a catastrophic event be shown to be extremely improbable, even if the system failure occurred concurrently with environmental conditions that would reduce the capability of the airplane or the ability of the crew to cope with the system failure. Probabilistic analyses are used to demonstrate compliance with section 25.1309(b) by estimating the probability of random system and equipment failures occurring on the airplane. The consequences of failures that are more probable must be shown to be relatively minor; failures with more serious consequences must be shown to have lower probabilities. However, in providing guidance for compliance with this requirement, Advisory Circular (AC) No. 25.1309–1A advises: ''In any system or subsystem, the failure of any single element, component or connection during any one flight * * * should be assumed, regardless of probability. Such single failures should not prevent continued safe flight and landing * * *.''

Applying this analytical method to the circumstances of this AD, if the failure of the floor beam is assumed, the consequences are likely to be catastrophic, preventing continued safe flight and landing. Therefore, under the analytical approaches of either section 25.1309(a) or (b), the operations with understrength floors without limitations is unacceptable.

During the reopened comment period, FedEx submitted a risk assessment from which it concluded that, even assuming the NPRM identified a potential unsafe condition, the probability of occurrence was sufficiently small (i.e., once every 300 years) so that AD action should be postponed until additional testing and analysis has been completed. Other commenters referenced this analysis and supported FedEx's conclusion.

The FAA has evaluated the risk assessment submitted to Rules Docket No. 97–NM–09–AD, and does not concur with the commenters' conclusion. Regarding the general relevance of the kind of risk assessment submitted by the commenter, it should be noted that the probability of the limit gust event has already been considered when establishing the gust intensities specified in CAR section 4b.211(b). CAR part 4b requires that all airplanes be capable of structurally withstanding a gust of the intensities specified therein, as such a gust is expected to occur at some time in the airplane's operating life.

Regarding the specific data presented in the FedEx risk assessment, the FAA does not concur with the assumption that extreme gusts will be encountered by a cargo carrying Boeing Model 727 airplane only once in 5 million flight hours. As its basis for this assumption, the commenter states that ''FAA data indicate that, in approximately 50 million flight-hours of experience among US domestic 727s, there have been five pilot reports of extreme gusts that exceeded federal thresholds for danger.'' The commenter states that this equates to a rate of occurrence of approximately once every 10 million flights. The commenter also states that due to potential errors, it would be conservative to double this rate to 10 total events, and use an estimate of 1 occurrence per 5 million hours.

The FAA does not concur with the commenter's statement that FAA data show that only five cases of extreme gust have been encountered by the U.S. 727 fleet. Turbulence events must be reported only if they result in detected airplane damage or passenger injuries. During certain gust events, the gust loads encountered in the cockpit are substantially less severe than those encountered in the aft portion of the airplane. Therefore, some large gust encounters may not ''feel'' very severe to the flight crew. As a result, the FAA recognizes that not all severe turbulence events are reported. Further, in the NPRM's, the FAA provided five cases of turbulence as examples, to illustrate that turbulence is a real occurrence, and not merely theoretical. These five examples were obtained from data showing 87 reported severe turbulence events, which resulted in passenger injuries, on the Boeing 727 from 1966 to March 1997. The FAA selected the five reports because the airplane operators had reported the magnitude of the turbulence event after obtaining this information from the flight data recorder. Operators are not required to obtain data regarding the magnitude of the turbulence event, and therefore it is rarely reported.

During the public meeting held on Thursday, February 19, 1998, the FAA explained that these turbulence cases were just examples and had been selected because the reports included information regarding event magnitude. The FAA further explained at that meeting that it was inappropriate to use these data in a probabilistic analysis. The commenter's risk assessment provides no information to change the FAA's views.

A section of the commenter's report states, ''Detailed equations that combine empirical evidence and physical theory estimate how frequently gusts of different magnitudes arise at different altitudes.'' The commenter states that its calculations indicate that gusts with intensities that equal or exceed 50 feet per second are encountered once per 50 million flight hours at 35,000 feet. The report does not provide the equations themselves, does not describe the methodology used to determine the 1 in 50 million flight hours probability value, and does not specifically identify the referenced source data. Therefore, the FAA cannot assess the validity of the commenter's conclusions.

The commenter also refers to graphs contained in a 1988 American Institute of Aeronautics and Astronautics (AIAA) publication by Frederic M. Hoblit that the commenter states indicate even lower encounter rates for gusts during

climb and descent. The FAA has examined this publication, and does not concur with the commenter's statements regarding these data. First, the commenter appears to be incorrectly referencing the graphs, which represent continuous turbulence, and not discrete gusts, as provided in CAR 4b. The two types of atmospheric disturbances are different, and to reference these graphs is inappropriate. Secondly, the commenter's risk assessment only addresses gusts ''that exceed the Federal threshold'' (which the FAA infers to mean limit load gusts) in combination with cargo loads with two adjacent containers having a total weight that equals or exceeds 9,600 lbs. This approach is unconservative. As discussed in the NPRM, the cargo floor has a high negative margin of safety, and the risk of structural collapse exists at gust intensities well below the limit gust load when carrying currently allowed payloads above 9,600 lbs. The greater the weight being carried in the container, the lower the gust needed to cause catastrophic failure of the floor. The lower the gust intensity, the more common the gust occurrence becomes.

Based on the foregoing, the FAA has determined that the risk assessment submitted by FedEx does not provide a basis for delaying the final rule.

One group of commenters, identifying themselves as airmen for one of the affected operators, supports issuance of the final rule, as proposed. The commenters state that they do not have procedures to avoid clear air turbulence, and based on their knowledge, if any of them had encountered a similar wind condition to that experienced by a Boeing 747 in January 1998, their airplane would ''come apart, in-flight.''

The FAA concurs that there is no reliable means to forecast or to avoid clear air turbulence. The flight conditions encountered by the referenced 747 could be very hazardous to one of the affected airplanes if encountered while critically loaded with heavy containers.

Change in Applicable Standards

Several commenters state that the NPRM's reflect a radical change in the assumptions that certificate holders are permitted to use to substantiate the main deck floor structure. The FAA does not concur. As discussed below, the FAA's analysis is consistent with the applicable CAR part 4b standards, which became effective in 1953.

''Infinitesimal Probability''

One commenter states that the proposed AD would impose unnecessary costs which would then be passed to its customers, for what the FAA's Director of Aircraft Certification Service has stated is an ''infinitesimal probability of a safety related happening.'' The referenced comment is contained in an article in the April 15, 1997, issue of ''Commercial Aviation Report.''

From this comment, the FAA infers that the commenter believes the reference to ''infinitesimal probability'' belies the need for an AD. The commenter has taken the remark out of context. The actual quote is, ''What is the probability of it [catastrophe] happening in the next month? Infinitesimal.'' This remark was made in response to a question regarding why the FAA was issuing an NPRM rather than an emergency AD. The Director of the Aircraft Certification Service was explaining that, although the FAA had determined that the unsafe condition must be addressed by issuance of an AD, the urgency of the issue was not so great as to preclude the normal legally required process of providing public notice and opportunity to comment.

Accident Data

One commenter states that the fact that no crashes have occurred with the affected airplanes has nothing whatsoever to do with these airplanes being of a safe design. They merely have had the good fortune to have not yet encountered a critical condition. The FAA concurs.

''Erroneous Certification''

One commenter states that it counted on the competence of the FAA when obtaining the affected airplanes, as the cargo modifications were FAA-approved. The commenter further states that the FAA's error in issuing these approvals is going to severely hurt small operators of these airplanes, who are neither culpable nor negligent. While the FAA understands that the impact of this AD may be significant for some operators, the FAA cannot ignore the fact that an unsafe condition exists that requires action to ensure the continued operational safety of the fleet. If the FAA had been aware of these deficiencies at the time of the original STC issuance, the FAA would not have issued the STC's.

One commenter points out that the FAA design review team observed that the original passenger floor beams had not been structurally reinforced, and that this fact is immediately apparent from the technical drawings associated with the STC. The commenter questions why the FAA has not expressed any concern or noticed these facts earlier.

The applicant for any design approval is responsible for compliance with all applicable FAA regulations. The FAA has the discretion to review or otherwise evaluate the applicant's compliance to the degree the FAA considers appropriate in the interest of safety. The normal certification process allows for the review and approval of data by FAA designees. Consequently, the FAA office responsible for the certification of an airplane or modification to an airplane or an aeronautical appliance may not review all details regarding compliance with the appropriate regulations. Also, the fact that the cargo floor structure was unmodified does not necessarily lead to the conclusion that the floors are structurally deficient. As explained in the NPRM, the understrength floors on certain 747 airplanes converted to freighters caused the FAA to question the adequacy of all STC-converted passenger-to-freighter cargo floor structures. This AD arises from this evaluation.

An FAA/Industry Team

Several commenters request that the FAA establish an industry team comprised of the FAA, STC holders, and operators before issuing an AD to establish the requirements and a corrective action plan to resolve the problems with the STC's in a logical manner. One commenter states that ''too much time has been spent going in different directions to resolve common problems for all STC's,'' and that ''the FAA has not been sufficiently clear in their requirements for the re-design.''

The FAA does not concur that issuance of the AD should be delayed. An unsafe condition has been identified, and the FAA must take action to ensure an acceptable level of safety of the affected fleet of airplanes. The STC holders and operators are certainly free to form an industry team to find common solutions, and the FAA is willing to participate in such efforts. The FAA also does not concur that the requirements for re-design are unclear; as the FAA has stated repeatedly, the standards for evaluating proposed corrective actions are the original certification basis for the airplane, CAR part 4b. Any non-compliance with CAR part 4b would have to be shown to provide an acceptable level of long-term safety.

FAA/Industry Communication

One commenter states that there has been ''virtually no opportunity for technical exchange'' and, therefore, the FAA should delay issuance of the final rule until such an exchange has taken

place. The FAA does not concur. Since as early as November 1996, the STC holders have been made aware of the FAA's concerns regarding the cargo floor structure. More specifically, meetings were held with each of the affected STC holders in January 1997 to discuss further details regarding FAA concerns.

On February 14, 1997, the FAA again discussed its concerns with the affected industry and again requested that industry provide the FAA with valid data to address those FAA concerns. Subsequently, over the course of the next four months as the FAA prepared the NPRM's, only one STC holder provided any data relative to the merits of the proposed AD's, and that data did not alleviate the FAA's concerns. In response to the NPRM's first comment period, three of the affected STC holders did not submit technical data and, for reasons discussed below, the data submitted by the fourth STC holder (FedEx) did not alleviate the FAA's concerns. During the reopened comment period, the FAA engaged in further extensive discussion with the affected industry and those discussions continue in the context of on-going efforts to identify necessary actions to address the unsafe condition. Based on this history, the FAA considers that sufficient opportunity for technical exchange has been provided and that further delay is unwarranted and unnecessarily jeopardizes public safety.

Delay Issuance

Two commenters state that additional time is necessary so that the airplanes would be removed from service only once to incorporate all needed corrective actions (i.e., not only for the floors, but also for other problems identified in the NPRM) due to the high cost of incorporating partial solutions to the overall problem. One commenter requests that all problems associated with the STC's be identified, solutions provided, and methods for accomplishment of the solutions be agreed upon prior to the issuance of any AD. The FAA does not concur. In light of the seriousness of the unsafe condition, the FAA has determined that it would first address the strength of the cargo floor structure. All of the remaining issues will be addressed in future rulemaking efforts. Even though this AD addresses only the cargo floor structure, it should not inhibit industry from taking corrective action with regard to the remaining issues. In fact, in order to minimize the inefficiencies identified by the commenter, the FAA is committed to working with industry to identify as expeditiously as possible necessary corrective actions for all of the problems discussed in the NPRM.

The Cargo Airline Association (CAA) requests that the FAA not adopt an AD imposing interim limits. Since the CAA believes that the risk of a catastrophic failure is ''virtually nonexistent,'' and since several potential STC holders with varying solutions to issues raised are in the process of working with FAA, scarce resources should be devoted to ensuring expeditious approval of these proposals.

Another commenter requests that the FAA delay issuance of the final rules until industry solutions are approved [estimating an additional 60 to 90 days for Israel Aircraft Industries (IAI) to complete its analysis, as it has only recently had access to Boeing drawings]. The commenter also states that the FAA rulemaking process has caused industry to make significant progress and aggressively pursue solutions that will likely meet with relatively prompt FAA approvals. The commenter also states that although these approvals will result in a 25 percent reduction in allowable payload, it is willing to operate with that limitation. This commenter, and several other commenters reference the FedEx risk assessment, which purports to demonstrate a low probability of catastrophic failure, as a basis for delaying the final rules.

Another commenter requests 4 to 6 months for completion of certain industry tests and risk analysis, as the 3-month timetable for the reopened comment period was not adequate, due to the highly complex and time-consuming nature of testing and evaluation procedures.

For the reasons discussed above under the heading ''Risk From Actual Operations,'' the FAA does not agree that the risk assessment submitted by FedEx warrants delaying this rulemaking. Furthermore, the FAA does not agree that correction of the unsafe condition can be assured within 60 to 90 days, or 4 to 6 months without this final rule. The STC holders and many operators have been aware of this issue since the fall of 1996. The FAA anticipates that, with the adoption of this AD, industry will continue recent significant progress in addressing these issues, which will result in timely implementation of appropriate corrective action.

Extension of Interim Operational Period

Several commenters state that the proposed 120-day interim allowances must have been determined to be safe by the FAA, with positive margins of safety. Therefore, the commenters request that the interim time limits be extended. Some of the commenters request that the extension coincide with regularly scheduled heavy maintenance. The CAA requests that the interim limits should be allowed to continue for however long it takes to modify the airplanes to bring them up to the original design limits. This commenter states that under normal operations, there is no risk of floor beam failure, and also states that the FedEx risk assessment shows that the likelihood of encountering conditions set forth in the NPRM are virtually nonexistent.

As discussed above under the heading ''Risk from Actual Operations,'' the FAA does not concur that the information provided in the FedEx risk assessment provides a basis for an extension of the interim period. However, for other reasons, the FAA concurs that the interim operational period can be extended.

In the NPRM, the FAA stated, ''because the determination of the effects of operational limitations on payload is based on approximations, the resulting payload limits may be unconservative.'' The 120-day interim limit was based on this potential unconservatism. Since issuance of the NPRM, the FAA has received data (Reports DFE–72701 and DFE–72702, submitted during the initial comment period as Appendices 5 and 6 to FedEx's comments to the NPRM) that partially confirm these approximations. In addition, although some progress has been made by industry in developing corrective actions, neither industry's proposal (as discussed in the NPRM) nor the FAA's expectations have been fulfilled. Based on current information regarding the status of various efforts to develop corrective actions, the FAA estimates that the entire affected fleet can incorporate corrective actions during scheduled heavy maintenance within 28 months after the effective date of this AD. In light of this new information, the FAA has reassessed the proposed interim period of 120 days and concluded that the period should be extended to 28 months. Therefore, the FAA has revised the final rule accordingly.

The FAA's decision to extend the interim limitations does not imply that the cargo floor structure has been determined by the FAA to be safe for an indefinite period, or in compliance with CAR part 4b requirements. As stated in the NPRM, the FAA's analysis considered only the most likely critical load case, and the proposed interim limitations were based on that analysis. The confirming data referenced above still does not address other potential critical load cases or all locations within

the airplane. Nevertheless, in light of the balance of the safety and economic factors discussed above, the FAA considers that the level of safety provided by the interim limitations is adequate for the time period of 28 months. However, it is less than the level of safety provided by demonstrated compliance with CAR part 4b standards, and the FAA considers that compliance with those standards is a necessary objective to ensure the long term safety of the affected fleet. The balancing that the FAA has considered in establishing this interim compliance period is typical of the balancing that occurs in all AD's establishing interim requirements and is fully consistent with the FAA's obligation to consider economic impacts, such as those imposed by Executive Order 12866.

Increased Interim Payload Limits

Several commenters also request that, due to ''highly conservative'' methodologies used by FAA, the proposed interim weight limit should be expanded to allow an average maximum container weight of 6,000 lbs. The FAA does not concur that its methodologies are highly conservative. As discussed in the NPRM and in more detail below, the FAA's analytical methods are typical of industry practice, and the commenters have not demonstrated how these methods are highly conservative. The FAA has not been provided with any acceptable data to support the allowance for 6,000-lb. containers, except as discussed below under the heading ''Position-by-Position Limitations.'' A commenter requests that the FAA maximize the interim limits. The FAA concurs that the interim limits should be maximized to the extent that they are consistent with the necessity of addressing the unsafe condition. The FAA considers that the interim limits established in the final rule meet this objective; however, as discussed below, the FAA will continue to work to approve higher limitations, once their safety is substantiated.

Federal Express submitted report 98–026 ''Substantiation of Side Vertical Cargo Restraint Installation Using Static Test Results,'' Revision A, during the reopened comment period. FedEx states that this report ''proves conclusively that the side restraint installation is adequate to restrain the applied container loads due to vertical gust.'' The FAA concurs, and has changed the final rule (Rules Docket No. 97–NM–09–AD) applicable to the FedEx STC's to allow the higher interim limits with the FedEx side restraints installed.

Position-by-Position Limitations

The CAA requests that the FAA consider ''position-by-position'' limitations, which would establish individual weight limits for each container position on the airplane, based on the strength of the floor structure at that location. The CAA states that this would allow a higher total payload, while addressing the unsafe condition. The FAA concurs with the concept of position-by-position limitations, and will consider any such proposal when presented with supporting data.

For example, one commenter, Amerijet, has submitted a position-by-position proposal, which includes analysis providing for increased weights for certain container positions relative to those determined by the FAA for the interim period. This proposal also contained lower limits for other container positions and presupposes the installation of sidelocks. The commenter stated at the April 2 public meeting that it intends to install vertical side restraints [sidelocks], but has not submitted any data to the FAA on a sidelock installation. The FAA has determined that this proposal would provide an acceptable level of safety for the 28-month interim period, when the affected airplanes are equipped with approved sidelocks. The commenter's proposal would not be acceptable to the FAA for indefinite operations, however, as the analysis did not consider other issues such as CAR part 4b emergency landing loads. The FAA will continue to work with the commenter, or any other interested parties, to refine these proposals so that they may be approved under paragraph (f) or (g) of the final rule.

FedEx also submitted a position-by-position proposal, which also contained both higher and lower limits as compared to the FAA's proposed interim limits. FedEx's proposal also is promising, however, its analysis is based on assumptions which the FAA has determined to be inaccurate, given the limitations of the weight and balance manual. For example, FedEx's assumption for the percentage of the load distributed to the sidelocks (40 percent) was derived from its ''Inverted Container Test.'' As discussed below under the heading ''FedEx's Tests,'' the FAA considers this assumption to be unconservative. The FAA also will continue to work with FedEx to refine its proposal, so that it may be approved under paragraph (f) or (g) of the final rule.

The CAA also submitted a finite element analysis (FEA) and, based on this analysis, requested that the final rule allow interim container payload limitations (regardless of whether sidelocks are installed) of approximately 3,500 lbs. in the most forward and aft positions, and 8,000 lbs. over the wing and wheel well. All other positions would be limited to 4,800 lbs. per container position with no sidelocks installed, and 5,000 lbs. with sidelocks installed. The CAA also requested that, after unspecified frame modifications are incorporated and sidelocks installed, interim limitations of 6,000 lbs. per container be allowed. Three other commenters submitted similar proposals.

As stated previously, the FAA is willing to work with commenters to establish interim limits other than those established in the final rule. However, the data submitted with the comment do not establish that the model used in CAA's FEA accurately represents the airplane. The CAA states that the model was made using the Boeing Structural Repair Manual (SRM) and various unspecified measurements of the airplane, but without access to the type design data that define the airplane configuration. It is, therefore, based on numerous assumptions regarding the configuration, which have not been validated. Furthermore, the model purports only to represent a 120-inch long section of the fuselage. The model does not account for the numerous fuselage cutouts for cargo and passenger doors, which affect the way the floor structure reacts to loads. Also, the model does not address the different structural design of the wing box or wheel well areas.

Even if it were assumed that the model is accurate for some airplanes, it is based on the cargo container locations used by FedEx, which are different from those of the other affected airplanes. The positions of the containers and locks determine the loads introduced into the floor beams. Therefore, using the FedEx container layout produces a result which, even if valid, would be only applicable to the FedEx airplanes. Based on the foregoing, the FAA does not consider that the model provides a sufficient basis for revising the interim limits.

Several commenters state that the FAA's findings of negative margins of safety are too conservative over the wing box and wheel well, as these areas are capable of supporting higher container payloads due to their stronger design. The FAA concurs partially. The FAA has determined that an unsafe condition exists by analyzing the basic floor structure rather than the much more complex wheel well or wing box

structure. These areas are capable of supporting greater loads, but the commenters have submitted insufficient data to determine what loads may be safe in these areas.

However, the FAA has issued STC's which substantiate the wing box and wheel well areas for payload capabilities equivalent to the carriage of 6,000- to 10,000-lb. containers, depending on the individual airplane's structural capability, which has increased as the 727's type design has evolved. The FAA notes that, although no structural reinforcement was added to the wing box and wheel well for these STC's, limitations were sometimes imposed in consideration of the individual airplane's structural capability.

The FAA has considered the greater strength of the wing box and wheel well and has determined that an acceptable level of safety will be achieved by allowing a total payload of 12,000 lbs. for any two adjacent containers in this area, without other limitations, for the 28-month interim period. To eliminate potential ambiguity as to the containers to which this limitation applies, the final rule specifies that this alternative limitation applies to containers located completely or partially between body stations (BS) 740 to 950. However, the FAA does not consider that it is acceptable to allow combined payloads above 12,000 lbs. for this interim period, or to allow 12,000-lb. combined payloads indefinitely, because the FAA does not have the detailed information or resources necessary to determine the appropriate payload and operational limitations for all configurations of the affected airplanes. Operators who desire further increased loading in this area are invited to submit their requests and supporting data to the FAA in accordance with paragraph (f) or (g) of this AD.

Paragraph (a) of the NPRM did include a limited position-by-position proposal, in that it specified a reduced payload limitation in the area of the cargo door (BS 440 to BS 660). As with the wing box and wheel well area, to eliminate potential ambiguity as to the containers to which this limitation applies, the final rule specifies that this limitation applies to containers located completely or partially between BS 440 and BS 660.

Extension of Initial Compliance Time

One commenter states that the NPRM's will ''wreak havoc'' on the express industry and shipping public. The commenter states that it has no way of knowing when the effective date of the AD will be. The 48-hour implementation of the load limits will inevitably result in serious disruption to cargo already booked or in transit when the final AD's are issued. Several other commenters requested 120 days after AD issuance for interim limits to become effective, as this time was necessary to alter manuals, provide personnel training, and generally prepare for a significantly different loading procedure. The FAA concurs partially. The FAA has changed the final rule to extend the compliance time from 48 hours to 90 days. The AD becomes effective 35 days after the date of publication in the **Federal Register**. As requested by the commenters, this allows a total of 125 days for operators to make necessary changes to the FAA-approved Airplane Flight Manual and cargo loading procedures.

All Container Types

Several commenters state that the proposed AD should address the use of all possible containers, pallets, and the intermixing of pallets and containers. Other commenters followed with similar statements about pallets, bulk loading, oversized cargo, and combi configurations (i.e., configurations with provisions for passenger seating and cargo on the main deck). One of the commenters requests that the wording of the proposed AD be changed to contain generalized wording that would address all container sizes, using a ratio of the length and width of other containers to the 88- by 125-inch container specified in the proposed AD as a means to determine the container payload limit. The commenter further states that this could help the implementation of the rule. The commenters request these changes to avoid the disruption that might result from having to obtain individual approvals for each of the types of containers.

The FAA concurs partially. In light of the administrative burden of approving individual container types, the FAA has reassessed this proposed requirement. The FAA recognizes that, except for half-size containers (discussed below), the FAA analysis used to establish the payload limits for containers measuring 88 by 125 inches also is applicable to any container within the same floor area. The reasons are that the analysis considered the effect of the container weight on the floor structure supporting the container, and that the differences in the stresses in the floor structure associated with the different container types are not sufficient to warrant different limits. Therefore, the FAA has revised the final rule to specify the same limitations for container size codes ''A,'' ''B,'' and ''C,'' as defined in National Aerospace Standard (NAS) 3610, which is the specification referenced in FAA's Technical Standard Order (TSO) C90c for cargo unit load devices (containers).

For half-size containers (i.e., size code ''D'' or ''E'' of NAS 3610, or the FedEx ''Demi'' container), the final rule specifies payload limits that are one-half those for other containers. Since these half-size containers are designed to be placed side-by-side across the fuselage, this separate limit is necessary to ensure proper load distribution within the area. It should be noted that paragraph (g) of the final rule allows operators to establish different container payload limits from those specified in the rule by substantiating that those limits provide an acceptable level of safety.

For oversize cargo, operators may apply for approval of alternative methods of compliance in accordance with paragraph (f) or (g) of the AD by proposing appropriate limitations for such cargo.

Service History

One commenter claims that, for the converted 727 freighters, ''successful flight history is direct evidence which supports [the commenter's] analysis showing the airplanes to be safe.'' The commenter references CAR sections 4b.202, 4b.270, and 4b.300 to show that service history is a reliable indicator ''to support or define a substantiation methodology.''

The FAA does not concur. The requirements of CAR part 4b that the commenter references are related to the determination of the fatigue strength of structure, where it is acceptable to utilize the service history of airplanes of similar structural design. However, the unsafe condition addressed in this AD is not related to fatigue, but is the result of the existing floor structure being significantly understrength. The only conclusion that can be drawn analytically from the accumulated flight history of the converted 727 freighters is that these airplanes have yet to encounter a sufficiently severe gust condition when critically loaded with an allowable payload configuration to cause failure of the floor structure.

Deflection of Floor Beams

One commenter states that the FAA did not provide a reasoned explanation of the NPRM claim that ''even if the floor beams of the main cargo deck only become deformed, the results could be catastrophic.'' The commenter compares this statement to McDonnell Douglas Report MDC–J5568, applicable to Model DC–10 series airplanes, which was approved by the FAA and showed

significant and permanent deformation of the wing.

From this comment, the FAA infers that the commenter believes that, if the wing can bend safely and even deform permanently when it has cables/fuel lines, etc., passing through the structure, then the floor beams also must be capable of safely deforming or bending.

The FAA does not concur. The NPRM states why deformation of the floor beams could be catastrophic. For the ''up'' load case analyzed by the FAA, which consisted of ''up'' loads applied to the containers due to a down gust on the airplane, the floor beams common to the forward and aft locks of a container bend upward due to the applied upward load. The adjacent floor beams underneath the containers that are not attached to the container do not bend. If this deflection relative to the adjacent floor beams is excessive, this could result in the bending and stretching of all control cables and fuel lines passing through the floor beams. Such bending and stretching could result in uncommanded flight control inputs at a critical time when the airplane is subject to severe gust conditions. In addition, the fuel lines located in the floor beams are not designed to flex in the same manner as fuel lines located in the wing structure of an airplane and, therefore, may crack, bend, or rupture.

The occurrence of either an uncommanded flight control input during critical flight conditions or the rupture of a fuel line can be catastrophic. The McDonnell Douglas report referenced by the commenter is not applicable to the floor beam deflections of a 727 converted freighter since the fuel lines and control cables located in the wing of Model DC–10 series airplanes are specifically designed to accommodate large wing deflections and are in compliance with the applicable regulations.

Safety Factor

One commenter states that the use of a safety factor as small as 1.5 presupposes very accurate analysis, knowledge of loads and material properties, and sound engineering practices. Structure with negative margins of safety of -0.63 clearly indicates that some or all of these suppositions have not been achieved. In addition, some operating conditions, such as gusts, are beyond human control. The safety factor of 1.5, as required by CAR part 4b, is necessary to maintain the safety of the airplanes. The FAA concurs with the commenter, but notes that the finding of unsafe condition in this AD is based on the FAA's determination that the risk of catastrophic failure of the understrength floor structure is unacceptably high, rather than on a simple finding of non-compliance with CAR part 4b.

Fore and Aft Center Of Gravity Shifts

Several commenters objected to the FAA's analytical use of the trapezoidal method for evaluating shifts in the center of gravity (cg) within a container. One commenter, FedEx, states that the FAA's use of the trapezoidal shift results in impracticable—if not impossible—circumstances that exceed the requirements of CAR section 4b.210.

In order to gain a better understanding of this and other FedEx comments, the FAA met with FedEx on September 19, 1997, having first provided FedEx with a series of questions to be discussed at the meeting. (The minutes of this meeting are included in Rules Docket No. 97–NM–09–AD.) At this meeting, FedEx reported that it had only recently obtained a scale that would allow it, for the first time, to determine the actual locations of the cg's inside its containers. FedEx stated that it had weighed and determined the cg location on a sampling of 1,500 containers, but did not provide any data to the FAA at the meeting. In any case, the FAA does not consider it appropriate to evaluate only an operator's average container payload when establishing the safety of the affected airplanes. The unsafe condition determined by the FAA's analysis is based on the payload weight and distribution with which these airplanes are currently allowed to operate.

In addition, in a letter dated November 4, 1997, to the FAA (a copy of which has been placed in Rules Docket No. 97–NM–09–AD), FedEx states that ''A review of container weights, quadrant weights, and cg's for the 'SAA' (88- by 125-inch) container finds no containers in the 4,000 to 8,000 lb. range with a cg offset greater than 8.67%.'' However, FedEx did not provide data (e.g., the numbers and types of containers reviewed; the percentage of cg shift for different container weights) to substantiate the value of 8.67 percent. Therefore, the FAA is unable to determine the significance of this comment.

FedEx states that it chose to use a ''stair step'' or ''box'' method to evaluate the effects of cg shifts within a container. FedEx also states that the FAA rejected this method for use on the 727 converted freighters without a reasoned explanation.

The FAA does not concur with the comments regarding the FAA's methodology. As stated in the NPRM, the large negative margins of safety calculated using the FAA's analysis included consideration of the effect of a horizontal cg shift of 10 percent within the container (e.g., 8.8 inches from the geometric center of the base of the container for the forward and aft direction). Shifts in cg are particularly important in considering the ''up'' load case because the container loads are applied primarily to the floor beams at the forward and aft edges of the container where the container locks are located. The effect of the cg shift is to increase the loading on the beam in the direction of the cg shift. For example, if the cg is shifted aft, the applied loads will be increased on the floor beam located at the aft edge of the container.

In analyzing the effects of forward or aft cg shifts, the FAA employed a ''trapezoidal method.'' The trapezoidal method is well accepted and used by both Type Certificate (TC) and STC holders. The trapezoidal method is analogous to shifting sand in a box. With no cg shift, the weight of the cargo is uniformly distributed across the base of the container. As the cg is shifted, the load or ''sand'' is taken from one side and applied to the other side. This results in a sloping load distribution, with a load ''peak'' on one end of the container, and a load ''valley'' on the other end. Another acceptable method for considering forward or aft cg shifts is the ''box'' or ''stair step'' method. In this method, rather than sloping, the load ''steps'' up from a low level on one end, to a high level on the other.

The FAA does not concur that the trapezoidal shift used in the FAA's analysis exceeds the requirements of CAR section 4b.210. For ''up'' loads on the container, and a forward or aft cg shift (which the FAA has identified as the most likely critical case), if the airplane is not equipped with side vertical restraints (sidelocks), the results of the loads analysis are the same regardless of whether the stair step or trapezoidal method is used. Since all loads are carried by the floor beams that support the forward and aft container locks, the loads on the beams will be identical for any method that shifts the cg a particular percentage within the container. It is the percentage of cg shift that is important, not how that cg shift was achieved. This represents the majority of the airplanes affected by these four AD's. For those airplanes equipped with sidelocks, there is a maximum difference of 14 percent in the two methods for ''up'' loads, at the ''peak'' of the trapezoid. In consideration of the varying locations of sidelocks and the manner in which loads are actually distributed among all locks, this difference does not

significantly affect the FAA's analysis or alter the finding of the unsafe condition.

The FAA considered 10 percent as the appropriate amount to shift the cg within the container, as it is realistic and typical of cg shift limitations contained in operator weight and balance manuals. Consideration of a 10 percent cg shift also represents an industry standard as evidenced by NAS 3610 (contained in the Rules Dockets). The vast majority of containers used by operators comply with this standard. FedEx has not provided any data that indicate that a 10 percent cg shift is unreasonable, or that show that the FAA's use of a trapezoidal shift is unrealistic. The data that FedEx provided (average container densities ranging from 7 to 18 lb./cubic foot) concern only the average weight of a container used in its operations and assumes the weight to be equally distributed throughout the container.

FedEx also states that the trapezoidal method results in load distributions that greatly exceed the 90 lb./inch ''running load'' (freight payload per inch of airplane floor length) limitation specified in the FedEx weight and balance manual. FedEx states that the trapezoidal shift method will result in possible freight densities of 40 lb./cubic foot in approximately 1/4 of the container volume. FedEx states that this equates to an average value of over 200 lb./inch running load in this area of the container. FedEx reports that its daily average operational load density is approximately 7 to 7.5 lb./cubic foot, and on rare occasions may have reached the 18 lb./cubic foot range; therefore, the FAA's analysis bears no relationship to operational reality. (An average density of 18 lb./cubic foot over the entire volume for the full-size FedEx container equates approximately to a 7,920-lb. container, or about 90 lb./inch running load.)

The FAA acknowledges that, in its analysis described in the NPRM, it was not constrained by the 90 lb./running inch limitation specified in the FedEx weight and balance manual. However, the FAA does not concur that this results in inaccurate weight limits. The FAA notes that, for a FedEx container at the maximum permitted payload of 8,000 lbs., the running load limit is exceeded even with no shift in the container cg (88-inch container width times 90 lbs. per inch equals 7,920 lbs.). For any forward/aft cg shift within the container, using either the trapezoidal or ''box'' method, the degree to which the limit is exceeded increases in direct relation to the magnitude of the cg shift.

In addition, the FAA reviewed FedEx's loading procedures during a visit to its flight line at Sea-Tac International Airport, Seattle, Washington, on February 5, 1997. During this review, the FAA became aware that FedEx neither determines the actual cg location of the cargo within each container nor has the necessary equipment at all of its loading facilities to determine that it is operating within the cg and running load limitations of its weight and balance manual.

Based on other comments received in response to the NPRM, it appears that FedEx's practice is not unusual even though it is inconsistent with its weight and balance manuals. In light of the fact that, to the FAA's knowledge, no operators are measuring the cg's for all containers, and that a recent sampling accomplished by FedEx shows cg shifts as high as 8.67 percent, the FAA concludes that use of 10 percent cg shift in its analysis is not only an appropriate reflection of industry cargo loading practice, but may actually be unconservative.

Finally, the FAA does not concur that it has rejected the use of the ''box'' method proposed by FedEx. FedEx did not consider a cg shift effect in the original substantiation documentation for its original STC design, but later proposed to employ a ''box'' method used by McDonnell Douglas for the certification of a DC–10 freighter (submitted by FedEx as a comment during the first comment period in Appendix 2, Report 97–028, Revision I/R, dated April 1, 1997). After review of this method, the FAA accepted it in a meeting with FedEx on April 29, 1997. The basis for this acceptance is that it provides an acceptable level of conservatism in the absence of more rational data to predict the cg within a container. As discussed above, the use of the ''box'' method does not significantly affect the FAA's analysis or alter its finding of an unsafe condition.

FAA's Methodology

Boeing states that the FAA's analysis is similar to that used by Boeing for initial certification of Model 727 series airplanes. However, Boeing also states that while the analysis is conventional, some of the assumptions made are not typical of industry practice for the floor beam analysis and are conservative relative to the original certification practice of Boeing, with respect to trapezoidal loading and credit for pressurization. Boeing states that, when it evaluates cg offsets in containers, it uses the stepped rectangular or ''box'' method to determine cg shifts.

The FAA concurs partially. As explained previously, the trapezoidal loading assumption is nominally more conservative than the stepped rectangular or ''box method.'' For the ''up'' load case, this nominal difference only affects those airplanes with sidelocks. In any case, this difference does not significantly affect the FAA's analysis or alter its finding of an unsafe condition.

The FAA does not concur that its analysis is inappropriately conservative because it considered zero fuselage pressurization. Fuselage pressurization tends to provide an increase in floor beam load carrying capability because the pressurized fuselage, to which the ends of the floor beams are attached, pulls outward on the ends of the floor beams, which makes the floor beams act stiffer. Severe gust conditions, such as microbursts, may be encountered at low altitudes when the fuselage is not pressurized; therefore, it is realistic to consider those conditions. Even with credit for fuselage pressurization, the FAA's conclusion would be unchanged because the pressurization effects do not significantly affect the substantial negative margins of safety found as a result of the analysis. Furthermore, CAR section 4b.216(c)(1) requires that ''The airplane structure shall have sufficient strength to withstand the flight loads combined with pressure differential loads from zero up to the maximum relief valve setting.''

Another commenter, FedEx, states that the FAA's analytical techniques are too conservative and, therefore, result in artificially low payload numbers (container weights) for the 727 converted freighters. The FAA does not concur. The FAA reviewed the substantiating data submitted for the original certification of FedEx's 727 freighter conversion STC and found that this data package lacked any stress analysis substantiating the floor structure. Lacking this data, the FAA reviewed the analytical methods used by others in industry. The FAA determined that other industry analytical methods for cargo systems used conservative overlapping assumptions to ensure that the design resulted in a safe product that complied with CAR part 4b. The FAA's decision to use these methods to perform an analysis of the floor structure of the affected 727 converted freighters is consistent with industry standard practices.

One commenter expresses concern over the methods utilized in the structural substantiation of floor beam loads in the documentation contained in these Rule Dockets, although the commenter did not identify a basis for the concern. The commenter states that over the course of the last two decades

it has developed stringent methods for accurately predicting cargo induced loads in airplane structure. The commenter requests that the FAA consider these methods in performing its evaluations. The commenter submitted data regarding its analytical methodology used in development of numerous STC approvals of cargo handling systems.

The FAA has reviewed the commenter's methods and considers that this methodology utilized conservative, overlapping assumptions to ''bracket'' unknown variables and utilized a trapezoidal distribution of cargo in defining its cg offsets. The FAA agrees that these are appropriate methods for determining loads for cargo floor structure and are consistent with those employed by the FAA. These methods result in conclusions that are consistent with the FAA's findings that the floor structure addressed by these AD's presents an unsafe condition. Further, the FAA notes that these conclusions are consistent with those derived from other methods commonly used in industry.

Boeing addresses the statement in the FAA's analysis of the floor beam allowables (contained in the Rules Dockets) that the analysis is ''partial'' and ''unconservative.'' Boeing states that, for the ''down'' load case (i.e., ''down'' loads applied to the container), the FAA's analysis is sufficiently conservative for the following reasons: (1) the critical section selected for analysis reflects the worst case hole-out situation; (2) all significant [down] load cases were dealt with; (3) the critical section analyzed would have no degradation of [safety] margins because of secondary bending effects; and (4) the critical section analyzed has no shear on it by first principles and, therefore, any shear interaction effects should be small.

The FAA concurs with the commenter's statement; however, the FAA notes that this statement was carefully limited to apply to ''the down load case being considered'' and does not address all load cases, the actual strength of the floor, or the floor beam as a whole.

The FAA does not concur that the commenter's statement is valid for all load cases and all floor beam structure. The FAA's statement that the analysis is ''partial'' and ''unconservative'' relates to the fact that there are many floor beams, several with differing applied loads, load carrying capabilities, and critical cross-sections. As a result, the FAA's analysis could not be considered complete (therefore partial), nor could the FAA state that it had accounted for all effects, which may result in yet higher stress levels and larger negative margins of safety (therefore unconservative).

One commenter states that the standard being pursued by the FAA for the converted 727 freighter includes all known theoretical possibilities, plus an additional safety factor of indeterminate size. The commenter refers to a statement in the NPRM that ''airplanes may encounter severe turbulence that exerts wind gust forces beyond the critical case forces of CAR part 4b * * *'' as implying that the FAA is imposing standards beyond that of CAR part 4b.

The FAA does not concur. The FAA's analysis of the converted 727 freighter floor beams was accomplished using the standards identified in CAR part 4b. No new standard is being applied to these airplanes. The commenter has taken the NPRM statement out of context. The FAA's reference to gusts that exceed CAR part 4b critical load cases is in a portion of the NPRM that addresses the basis for the retention of the 1.5 factor of safety, which is required by CAR section 4b.200(a). This factor is used to protect the airplane from failure when experiencing limit load, the highest expected actual in-flight loading, and other unknown situations.

As stated in the NPRM, interested parties had requested that the FAA eliminate the safety factor during preparation of the NPRM, which would allow higher payloads. The statement that the commenter characterizes as implying ''new standards,'' and a safety factor of ''indeterminate size,'' was simply a discussion of the existing level of safety established by the CAR part 4b standards (this airplane was originally certificated to those standards over 30 years ago).

One commenter quotes from CAR section 4b.210 that the analysis must be conducted using ''any practicable distribution of disposable loads.'' The commenter states that the loading scenarios the FAA uses are much higher than the maximum [loading] experienced in actual service. Several other commenters characterize the FAA's assumptions and analysis as ''ultra conservative.''

The commenters appear to have misinterpreted the referenced CAR section 4b.210. The word ''practicable,'' which means possible to put into practice, appears to be read as ''practical.'' Subpart C of CAR part 4b requires that analysis be conducted for conditions (e.g., critical altitude, critical load, or maximum/minimum weight) that are possible; Subpart C is not restricted to normal, average, or practical conditions. Designing airplanes to withstand only average loads would result in a greater potential for catastrophic failures whenever those loads are exceeded.

Boeing Data

FedEx states that none of Boeing's analysis for the affected 727 airplanes provides any baseline for comparison of the unit load device (ULD) cg shifts, container load distribution, or other key methodologies. The FAA does not concur. As a check to verify that its analysis was generally correct, the FAA examined some of the type certification data that Boeing had submitted prior to certification of 727 passenger and freighter airplanes. The Boeing data verified the FAA's analysis in the following two significant respects:

1. Boeing's stress analysis that established allowable floor beam strength for the passenger version was entirely consistent with the FAA's stress analysis; and

2. Boeing's loads analysis for the freighter version, while using a different methodology from that used by the FAA, would result in substantial negative margins of safety for passenger floor structure when carrying 8,000-lb. containers.

In accordance with CAR part 4b, Boeing's analysis of the 727 freighter considered all aspects of cargo loading, including cg offsets, load distribution, and multiple other facets. It should be noted that Boeing found it necessary to substantially strengthen the floor structure for its freighter version in order to carry the same payloads currently allowed by the subject STC's and remain in full compliance with CAR part 4b.

FedEx's Analysis

In support of its position that there is no unsafe condition, FedEx states that it has used a rational, conservative analytical approach for determining that the cargo floor structure is safe, which has not been accepted by the FAA. Specifically, FedEx references individual floor beam analysis and tests conducted with combinations of loads, offsets, container positioning, airplane weight, and flight maneuvers that create conditions exceeding any that statistically will occur.

The FAA does not concur. Except for the lateral floor beams over the 80-inch long wheel well area, which is discussed below under the heading ''Data Showing Floors to be Safe,'' FedEx has not yet submitted a complete analysis of the floor structure, or of a single floor beam. The tests that have been run to date are of limited relevance

as discussed under the heading ''FedEx's Tests.'' Further, as discussed previously, the FAA also does not concur that the unsafe condition is so improbable that it should not be addressed.

FedEx states that the statement in the NPRM that the FAA used commonly accepted analytical methods in its structural analysis is misleading because it fails to address other ''commonly accepted analytical methods.'' In particular, FedEx references the FAA's use of a pinned end column fixity coefficient (''c'') of 1.0, and in contrast points out that a ''c'' of 2.58 is used in an example problem contained in ''Analysis and Design of Flight Vehicle Structures'' by E.F. Bruhn. FedEx considers this example problem to be analogous to a floor beam lower cap analysis. FedEx states that other alternative analytical methods (such as Bruhn) result in a significant increase in allowable loads for the floor beams (therefore potentially higher allowable container weights), but these methods have been rejected by the FAA as inapplicable to the converted 727 freighters, even though they have been accepted previously by the FAA on other certification efforts.

The FAA does not concur. The selection of this coefficient can have a significant effect on the determination of the allowable payloads. A low column fixity coefficient of 1.0 means that the ends of the beam are ''pinned'' (i.e., free to rotate or move like a hinge). A column fixity coefficient of 4.0 means that the ends of the beam are fully ''fixed'' (i.e., unable to rotate or move for any applied load). The FAA's analysis uses a ''pin end coefficient'' because it represents the airplane structure. As stated previously, the FAA's analysis considered the ''up'' load case to be the most likely critical case. For this load case, the lower horizontal member or ''chord'' of the ''I'' shaped floor beam will be in compression and, therefore, will behave in the same manner as a column under compression. It will be free to rotate or move like a hinge, not fixed as a higher fixity coefficient would suggest.

FedEx's proposed ''c'' coefficient of 2.58 does not appear in any of its analysis in support of its comments to the NPRM. At the September 19 meeting, FedEx stated that it did not use the 2.58 value in any of its analyses submitted in its comments. FedEx also stated at the meeting that the 2.58 value was merely an illustration of a fixity coefficient that could be found in the Bruhn handbook for a similar problem. Nevertheless, FedEx maintained at that meeting that it estimates the true value of ''c'' is in excess of 1.2, and may be as high as 2.58, although FedEx did not provide any data to the FAA to show that a ''c'' of 2.58 would be representative of the structure.

In addition, in FedEx's analysis submitted to the NPRM, FedEx used a ''c'' value of 1.2. (Document 97–021, initial release, dated February 28, 1997, submitted to the NPRM (Rules Docket No. 97–NM–09–AD) as Appendix 1 during the first comment period). However, in a later version of the same document, FedEx also used a ''c'' coefficient of 1.01 (Document 97–021, dated March 24, 1997, but designated as the initial release of the document, as well), submitted to the FAA for review on April 7, 1997. The FAA has determined that there is essentially no difference between 1.00 and 1.01 for a column end fixity coefficient. Therefore, the FAA concludes that the more recent data submitted by FedEx is consistent with the value of 1.0 for the column fixity coefficient used in the FAA's analysis.

FedEx states that it has submitted reports to the Seattle Aircraft Certification Office (ACO) that employ assumptions that were used by Douglas Aircraft Company and were accepted by the Los Angeles ACO for the original certification of the Model DC–10 airplane. FedEx also states that the Los Angeles ACO's earlier approval of the assumptions used in the Model DC–10 analysis affirms that it is using an appropriate method to substantiate the integrity of its converted 727 freighters. FedEx states that the FAA has not explained how the methodology can be accepted by the Los Angeles ACO and not accepted by the Seattle ACO.

The FAA acknowledges that use of the particular assumption(s) referenced in the DC–10 analysis, if applicable to FedEx's 727 analysis, may allow higher container weights than those specified in the proposed AD.

The FAA does not concur with the commenter's statements. For many certification projects, it has been acceptable to use a particular assumption which may not be conservative, provided that there are other quantifiable assumptions used which account for the lack of conservatism and result in the overall design being conservative and in compliance with CAR part 4b. Therefore, an unconservative assumption used as part of a particular approved methodology is not equally acceptable for another methodology without ensuring that the lack of conservatism is accounted for elsewhere in the methodology and that the overall design is conservative.

At the July 24, 1997, meeting with FedEx, an FAA representative from the Los Angeles ACO stated that it was the responsibility of FedEx to demonstrate that the analytical assumptions and methodologies used on the DC–10 were conservative for the Boeing 727. To date, FedEx has not made that demonstration. During the September 19 meeting with FedEx, the FAA asked FedEx if it had used the entire analytical methodology that was used for the DC–10. FedEx replied that it had not. Therefore, the FAA does not agree that the two ACO's have been inconsistent.

FedEx states that neither it nor the FAA has a complete, accurate model which objectively demonstrates the actual performance of the vast array of the TSO and STC ULD's in any one of the hundreds of individual airplane cargo positions and latch configurations of in-service airplanes. The FAA concurs that there is no accurate model which demonstrates the actual loads input into the structure of the 727 converted freighters for the myriad of possible configurations. However, an analysis using conservative overlapping (or enveloping) assumptions can be performed to show the design is safe for the proposed usage and is in compliance with CAR section 4b.200(c). This approach has been successfully used by aerospace companies for many years and is acceptable to the FAA.

FedEx's Tests

FedEx states that three tests (descriptions follow) indicate that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits of the weight and balance manual.

1. *Inverted Container Test.* FedEx states that it has conducted an inverted container test that demonstrates that its existing sidelocks are effective in carrying 35 to 40 percent of the container load. The test report is contained in Appendix 9 (Report 97–048, Revision I/R, dated May 5, 1997) of FedEx's comments to the NPRM (Rules Docket No. 97–NM–09–AD) during the initial comment period. FedEx also states that these results show that the FAA's estimation that the sidelocks carry 20 percent of the container load is far too conservative.

The FAA infers that FedEx considers that the FAA's estimation that 20 percent of the total container load is carried by all sidelocks (10 percent per side) is conservatively low since this results in 80 percent of the total load being carried by the locks attached to the main deck floor beams. Because FedEx's inverted container test showed that 35 to 40 percent of the container

load was carried by the sidelocks (approximately 20 percent per side), 60 to 65 percent of the total load would be carried by the locks attached to the main deck floor beams.

FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits. The FAA does not concur that FedEx's testing has shown that sidelocks are 35 to 40 percent effective because the testing does not address all container types, cg shifts, and all container positions on the airplane. The FAA estimated that the sidelocks are 20 percent effective based on current industry methods, as used in TC and STC programs. To date, industry, with the exception of this test by FedEx, has little or no data showing the exact distributions of actual sidelock load percentages. Therefore, enveloping assumptions and/or conservative analytical methodologies have been consistently used by various manufacturers to show compliance with CAR sections 4b.200(c), 4b.210, and 4b.359, to which these STC's also were certified. This approach has previously obviated the need to determine the exact load distributions to each lock for the various container types used by operators.

Several commenters point out that there is a vast array of different types of containers and other ULD's used by the affected operators. This includes a wide range of construction, shapes, and materials. Some ULD's look like boxes; others look like flat pallets or ''cookie sheets.'' These differences significantly affect the distribution of loads to all locks when subjected to ''up'' loads on the container. Although FedEx's airplanes that have been modified in accordance with the affected STC's predominantly haul the full-size or ''SAA'' container, and the half-size or ''Demi'' container, FedEx reported at the September 19 meeting with the FAA that its modified 727's haul other kinds of containers, such as flat pallets, when necessary.

For these reasons, the FAA's analysis used to determine the maximum safe payload limits for operations must conservatively account for any of the currently permitted container types.

CAR section 4b.359 requires that ''each cargo and baggage compartment be designed for the placarded maximum weight of contents and the critical load at the appropriate maximum load factors corresponding to all specified flight * * * conditions * * *.'' CAR section 4b.210 requires that ''flight load requirements shall be complied with * * * at all weights from the design minimum weight to the maximum weight appropriate to each particular flight condition, with any practicable distribution of disposable load (mass load) within the prescribed operating limitations stated in the Airplane Flight Manual.'' CAR section 4b.200(c) requires that ''all loads [force loads] shall be distributed in a manner closely approximating, or conservatively representing actual conditions.''

Therefore, in order to show compliance with the applicable regulations, either the distribution of the container loads to latches used to analyze the floor beam structure must be accurately determined for all container types used, or conservative assumptions must be used considering all practicable distribution of cargo loads. Finally, the floor structure must be strong enough to carry the maximum weight at the critical cargo load distribution at the appropriate maximum applied loads.

As stated previously, the FAA's analysis in the NPRM's identifies one of several possible critical load cases—that of a large gust pushing the airplane down, which causes ''up'' loads on two adjacent containers. On all of the affected STC's, adjacent containers share the same set of container locks at the forward and aft edges, and these locks are attached to the floor structure. This condition results in the loads for both containers being concentrated on isolated floor beam(s) at the location of the locks.

A ''typical'' full-size (88-by 125-inch) container is an enclosed box with two sides curved to match the rounded contour of the airplane fuselage, a fully or partially removable front side (i.e., a door), and a fixed or rigid back wall. Because of the design of a typical container, the back wall tends to carry the majority of the load (the curved sides and removable front are not as effective in supporting an ''up'' load as the rigid back wall). A different type of ULD, a flat pallet, with netting to restrain the cargo, distributes the loads to the container locks very differently than the 88- by 125-inch container. The net tends to distribute the load more uniformly around the pallet edges.

The rational basis for the FAA's analysis is illustrated by the following two examples of container/ULD arrangements that result in load distributions to the floor beams which approach or exceed the 80 percent estimate used by the FAA (i.e., the converse of the estimate that 20 percent of the load is carried by the sidelocks). These two examples assume maximum allowable ULD payloads of 8,000 lbs. using configurations that are permitted for all of these STC's.

Example 1: Back-to-Back Containers. Based on the data from FedEx's inverted container test with an ''SAA'' container facing (door side) forward, 43 percent of the total load was carried by the locks on the back side of the container. If two containers of equal weight are placed back to back, the equivalent of 86 percent of the total load of one container would be placed on the floor beam(s) at the interface (43 percent plus 43 percent).

Example 2: Container and Flat Pallet. Using the test data for the inverted container test, 43 percent of the load would be carried by the back wall. A flat pallet (''cookie sheet'') placed just aft of this container in a cargo position, which has four sidelocks on each side, will place approximately 28 percent of the total load on the front side of the ''cookie sheet'' [as discussed previously, the net on the flat pallet tends to distribute the load equally to all sides of the sheet, and since there are five locks each on the floor beam(s) supporting the front and back side of the sheet, and four on each side, 5/18 (or 28 percent of the total load) will be on the front side]. This results in a total of 71 percent (43 percent plus 28 percent) of the maximum ULD payload, being placed on the floor beam(s) between these two ULD's.

These two examples of the many possible loading configurations illustrate the reasonableness of the FAA's estimation that 80 percent of the maximum allowable container payload could be concentrated on the floor beam(s) at the interface between two adjacent containers.

In addition, the FAA has other concerns with FedEx's inverted container test. First, the effects of a critical cg shift within the container were not tested. As tested by FedEx, the back wall of the container carried 43 percent of the load with a zero percent cg shift (i.e., the cg of the container was at its geometric center). As discussed previously, this is impractical to achieve in actual operations. If the cg had been shifted towards the back wall of the container, the load at the back wall of the container would have been higher than the 43 percent noted previously.

It should be noted that the FedEx test plan submitted to the FAA in May 1997 (Appendix 4 of FedEx's comment to Rules Docket No. 97–NM–09–AD submitted during the initial comment period; Document 97–034, dated May 6, 1997) listed aft cg shift load cases on page 9 of that plan. However, these critical load cases were not tested because the actual test (described in Appendix 9) had taken place in accordance with an earlier test plan, Document 97–023 (which is referenced in Appendix 9). This was confirmed by FedEx at the September 19 meeting.

A second concern with the FedEx inverted container test is that the container was tested in a fixture in

which the lock locations were representative of only one cargo position on the airplane. There are typically a maximum of 8 to 12 containers that may be carried on the main deck, depending on the configuration of the airplane. Sidelocks are evenly spaced along the fuselage, and different cargo container positions result in either four or five sidelocks along the container side edges. For these reasons, a variety of locations should be tested to determine the critical load case for the floor beams.

A third concern is that FedEx tested cargo position 5 on the 727–200 with the door of the container on the aft side of the cargo position. This orientation is opposite of how FedEx reports that the ''SAA'' containers are usually placed in its airplanes. This orientation of the container in the test fixture resulted in a sidelock being within 4 inches of the back wall of the container. The distance from the front wall of the container to the nearest sidelock was 23.5 inches. Due to this large distance, or ''overhang,'' and the flexibility of the ''SAA'' container, the nearest sidelock to the front wall on each side of the container together carried 32 percent of the total test load. If the container had been placed in the fixture with the door on the front side of the cargo position, such that the back wall of the container had a 23.5-inch ''overhang,'' or was in one of the several other cargo positions possible which have greater than a 4-inch ''overhang'' to the backwall of the container, the loads on the container back wall (which are carried by the floor beams) would have been significantly higher.

Finally, it is important to note that FedEx has provided no analysis of the floor beam structure showing that the large negative margins of safety are resolved based on its assertion that 35 to 40 percent of the container load is distributed to the sidelocks. The load distribution is only part of the answer; the load distribution must be used in a stress analysis to develop data identifying stresses in the structural members.

The FAA concurs that, in principal, testing of containers using a fixture such as that used by FedEx, if it represents the most adverse case of ''overhang'' for the back wall for all applicable cargo positions, and if it shifts the container cg to the most adverse position, will produce conservative results for the latches common to the floor beams, for the container type tested. The results will be conservative because of the flexibility of the floor beams, relative to the stiff behavior of the test fixture. The degree of conservatism is unknown to the FAA and has not been demonstrated by FedEx.

FedEx, in its test, did not consider all practicable load distributions nor establish the critical case considering an adverse aft cg shift and sidelock location. FedEx tested only those containers or ULD's that it predominantly uses, but not all the types that it actually uses in service; therefore, it is impossible to draw broad conclusions about the behavior of many different container types, applicable to all cargo positions, or the degree of conservatism introduced by floor beam flexibility from its limited testing.

Therefore, the FAA concludes that the 35 to 40 percent distribution of the ''up'' load to the sidelocks used by FedEx is artificially high. The FAA does not concur that the data ''Container Test,'' documented in Appendix 9, demonstrate that the commenter's existing sidelocks, in general, are effective in reacting 35 to 40 percent of the container load, or that the tests ''indicate that the floor structure of the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits.'' The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect.

2. *Single ''I'' Beam Test.* FedEx states that it performed a floor beam test on a conservative representation of an unmodified passenger floor beam. This test is documented in Appendix 8 of FedEx's submittal to Rules Docket No. 97–NM–09–AD (FedEx Engineering Report 97–049, Revision I/R, dated August 15, 1997), and the additional data is contained in Appendices 10 (FedEx Floor Beam Test, Wyle Lab) and 11 (FedEx Floor Beam Test Videotapes).

FedEx also states that this test showed a lower floor beam chord compression allowable in excess of 60 ksi (60,000 lbs. per square inch) just prior to failure of the floor beam. FedEx states that this value controverts the FAA's calculation of 40.6 ksi in the FAA's analysis. In addition, FedEx states that the floor beam was tested in a fixture designed to replicate the airplane floor support structure, and that the test results are conservative due to the interaction of other floor beams, seat tracks, and floor panels in the airplane; the benefits of which were not addressed during this test. FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits.

The FAA does not concur that FedEx's measurement of 60 ksi compressive stress is relevant to the actual strength of the floor beam. In the FedEx test, the 60 ksi measurement was taken just before the floor beam fractured in tension (i.e., stretching of the floor beam to the point of failure). The FAA considers that the critical failure mode (i.e., the failure mode that would cause collapse of the floor structure in actual operation) is buckling of the floor beam. Buckling occurs when the floor beam warps or twists under applied loads. As discussed below, the test data indicate that the actual compressive stress at which the floor beam buckled was approximately 18 ksi.

Although the floor beam buckled during the test, the floor beam did not collapse, in part because the test fixture substantially and artificially limited the amount of warping of the beam. The test fixture used a rigid ''I'' beam to support the ends of the floor beam. This kept the ends of the floor beam from moving inward during the test. In contrast, on an actual airplane, the ends of the floor beam can move inward because they are attached to the fuselage frames, which are much more flexible than the rigid ''I'' beam used in the test fixture. The result of this artificial restraint was that the floor beam buckled and began to deflect. Instead of collapsing, as would be expected on an airplane, the floor beam behaved more like a cable, suspended from two rigid ends, with very little bending strength, but significant axial strength. This behavior was ultimately demonstrated by the catastrophic failure of the beam in tension, similar to a cable failure. If the beam had been supported as it is in the airplane, it is likely that the floor beam would have collapsed at the onset of buckling.

For example, if a horizontal beam is supported at each end, and vertical loads are placed on the beam, as the beam deflects the ends will pull inward. Restraining the beam ends will limit the bending deflection and stiffen the beam, preventing collapse of the beam as it buckles. This artificial restraint does not affect the buckling capability of the beam, but it causes the beam to appear to have higher load carrying capability than it actually has. FedEx acknowledged the effect of this axial restraint in a November 4, 1997, letter to the FAA. FedEx stated that ''It is conceivable that the bending deformation of the beam * * * would be influenced by restraining the ends of the floor beam from translating * * *.''

As stated previously, the critical compression buckling stress of the floor beam tested was approximately 18 ksi. (This occurred at the load step entitled ''0.6g.'') At this point the beam buckled as a column in the forward/aft direction.

Beyond this load factor, at the spanwise location left buttock line (LBL) 11, the beam began bending in the forward and aft direction, as evidenced by the detailed test data for load case number 5, 2.8 g (2.8 times the force exerted by gravity at sea level) ''up'' load in Appendix 8. Forward and aft bending of the beam clearly indicates that the beam has buckled, and can be seen by observing the FedEx videotapes contained in Appendix 11. This buckling failure occurred prior to 40.6 ksi as predicted by the FAA, and before the 49.1 ksi value predicted analytically by FedEx in Appendix 1.

The occurrence of buckling at 18 ksi rather than approximately 40 ksi can be explained by the ineffectiveness of the stability straps in the test fixture. Over most of the airplane, the floor beams extend from one side of the airplane to the other. A stability strap is a long, thin strip of metal, running perpendicular to the floor beam, and attached to the lower surface of several beams, at intervals ranging from 17 to 24.75 inches along the lower surface of the floor beam. The purpose of the stability straps is to support or stabilize the lower chord to strengthen the floor beam. This is accomplished by reducing the ''effective length'' of the lower chord of the beam from one long column (the entire length) by splitting it into a series of shorter, stiffer columns that are equal in length to the distance between the stability straps. The stability straps in the test model were ineffective because the portion of the test fixture to which the straps were attached was not stiff enough to allow the straps to fully stabilize the floor beam. (This is exactly the opposite problem from that described above with respect to the excessive rigidity of the test fixture where the floor beam ends were attached.)

By graphing the results obtained from the test, the FAA determined that the stability straps were not fully effective at the location where the beam buckled. This graphing demonstrated that the ''effective length'' of the floor beam lower chord at the point of buckling was 40.4 inches [between LBL 32.6 and right buttock line (RBL) 7.8], rather than the ''effective length'' of 24.75 inches used in the analyses conducted by FedEx and the FAA. Since the ''effective length'' was longer for the tested beam due to the ineffectiveness of the stability straps, the resulting column was weaker and buckled at a lower stress than would occur on the affected airplanes.

The FAA subsequently used the same analytical techniques used in its previous analysis to confirm that the buckling strength of the beam is approximately 20 ksi based on the effective column length of 40.4 inches demonstrated by the FedEx tests. This correlates well with the stress at buckling of 18 ksi measured in the tests and confirms the validity of the FAA's analysis.

During the September 19, 1997, meeting, and at the February 18, 1998, public meeting, FedEx concurred with the FAA that the stability straps buckled during the test, and were largely ineffective, as the straps could not provide stability to the lower chord.

At the public meeting on February 18, 1998, two FedEx consultants made presentations regarding this test. Both consultants agreed that, although the test was properly performed in accordance with the test protocol, the test fixture was not representative of the airplane. As a result, one of the consultants (Dr. Foster of Auburn University) stated that it would be inappropriate to draw conclusions from this test for the airplane floor beam.

Based on the discussion above, the FAA concludes that FedEx's ''Single I Beam Test'' does not demonstrate a lower chord stress capability greater than that calculated by the FAA, or that the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits. The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect.

3. *''On-Aircraft'' Test.* FedEx states that an ''on-aircraft'' test was conducted (Appendix 12, Report 97–052, Revision I/R, dated August 27, 1997), and that this test demonstrated that the container/airplane combination withstood an applied ''up'' load of approximately 20,000 lbs. FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits. FedEx also states in Section 6 of Report 97–051, also in Appendix 12, that a margin of safety of 2.1 was demonstrated with a 10,700-lb. container.

The FAA does not concur that this test demonstrates that the airplane is safe and in compliance with CAR part 4b. The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect. The ''on-aircraft'' test consisted of FedEx's ''SAA'' or full-size container, situated on the main cargo deck of a 727, restrained vertically by the forward and aft pallet locks (attached to the floor beams), and side vertical restraints (sidelocks). The container was modified to place four ''I'' shaped beams running lengthwise through the container. Four hydraulic jacks were positioned underneath the ''I'' beams on either side of the container and attached to jacking platforms on the main deck floor. The jacks were used to apply ''up'' loads to the container, as is shown in Figure 2.1 of FedEx's Report 97–051 (Appendix 12 of FedEx's submittal to Rules Docket No. 97–NM–09–AD). To transmit the loads applied to the ''I'' beams to the container, a rigid structure made of seventy-two 4- by 4-inch thick wood beam spacers, and thirty-eight ¾-inch thick plywood sheet formers curved at the edges to match the contour of the container, were fastened with screws to the 0.063-inch thick aluminum skin of the container. This structure, weighing approximately 1,400 lbs., provided a rigid platform for the ''I'' beams to lift the container (details of the plywood structure and its estimated weight are provided in Figure 2.3 of Report 97–051, Appendix 12).

The FAA has determined that the ''I'' beams and rigid structure used to introduce ''up'' load into the container artificially limited the distortion of the container under load and forced most of the applied load to the sidelocks and away from the floor beams. This is unconservative for the floor beams because it results in the test not representing how an actual loaded container or other ULD would affect the loads on the floor beams.

During the September 19 meeting, FedEx agreed that in the ''up'' load case, if the container is loaded and not restrained by the rigid structure, it attempts to deform to a catenary (arched) shape at the front of the container where the door is located. This effect is demonstrated by FedEx's inverted container test described in Appendix 9. FedEx also stated, however, that this would have no effect on the test results, although it was considering the use of airbags or hydraulic bags instead of the rigid structure to allow the ''SAA'' container to behave as it did in the test documented in Appendix 9. FedEx also stated in the meeting that it believed that testing to 2.5 g's, or 20,000 lbs. of ''up'' load, helps to account for the load being ''beamed'' or forced to the sidelocks.

The test results indicated that over 80 percent of the load was directed to the sidewalls of the container and, therefore, to the sidelocks rather than the floor beams. The FAA finds that this effect results from the rigid structure used to introduce the load into the container, and that this renders the test unrepresentative of the actual loading of the floor beam and significantly unconservative.

Even though the FAA determined that the results of the inverted container test (Appendix 9 of FedEx's comment) were unconservative, it showed that the percentage of the load carried by the back wall of the container was approximately three times greater than that determined by the ''on-aircraft'' test. The loads carried by the rigid back wall are largely carried by floor beam(s) locks, not the sidelocks. These results also contradict FedEx's conclusion that the ''on-aircraft'' test demonstrates that the floor structure is safe. The ''on-aircraft'' test provides confidence in the strength of FedEx's sidelocks. However, because of the artificial shifting of the loads from the floor beams to the sidelocks, the test fails to demonstrate that the floor structure is safe. Further, the ''on-aircraft'' testing to 2.5 g's did not result in the application of significant loading to the floor beams. Therefore, the results of the testing to 2.5 g's is of little significance when addressing the unsafe condition of the floor beams.

In Appendix 1 of FedEx's April 30, 1998, submission to Rules Docket No. 97–NM–09–AD during the reopened comment period, FedEx appears to now recognize the effect of the rigid plywood formers in forcing the load to the sidelocks and away from the floor beams. In this Appendix, on page 2 of the FedEx Engineering Report 98–026, Revision A, FedEx states ''Measured loads for the container perimeter latch locations indicate that 40% of the applied load was reacted on each side by the side latches (see Reference 3). This is due to the fact that the rigid formers did not allow the top of the container to deform as it would during actual conditions and thereby forced more load outboard than what would be typically encountered during flight.''

In summary, based on the previous discussion, the FAA does not concur that this test demonstrates that the airplane is safe and in compliance with CAR part 4b. The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect. One commenter states that he participated in FedEx's ''on-aircraft'' test. He states that the data from the latch load cells were inconclusive for the tests, and although he considered the test to be a reasonable representation of airplane conditions, he suggests that FedEx improve the latch load cell installation and data acquisition system and investigate whether the plywood formers used to apply the test load to the container roof could influence the latch load distribution. As discussed previously, the FAA does not concur that the ''on-aircraft'' test was representative of the airplane, but concurs that the plywood formers influenced the load distribution.

First Container Facing Aft

Two commenters state that positioning the first container aft of the 9g cargo barrier with the door facing forward is not optimum from a crashworthiness perspective and request that the AD specify that this container be facing aft instead. The FAA concurs. Paragraphs (a) and (b) of the final rule have been revised to allow the first container aft of the bulkhead to face aft, with all other containers facing forward.

Increased Running Load

One commenter states that the following statement in the NPRM is factually inaccurate: ''This running load of 90 pounds per inch is a safety concern, as it is approximately 2.6 times higher than the maximum running load of 34.5 pounds per inch allowed on these same floor beams when the airplane was in a passenger configuration.'' The commenter states that in a negative gust (''up'' load) situation the passenger floor beams must act to restrain upper deck loads and lower deck cargo loads simultaneously and, as a result, must react 81.0-lbs. per inch, not just the 34.5 figure as the NPRM indicates. The commenter maintains that if reduced loads are necessary to maintain the safety of cargo airplanes, then passenger airplanes should be similarly restricted.

The FAA does not concur that the passenger and cargo airplanes present similar safety concerns. The NPRM statement quoted by the commenter appeared in the section of the NPRM that described the FAA's reasons for undertaking the detailed design review which led to the conclusion that there is an unsafe condition. The statement in the NPRM is factually accurate for the running loads and the ''down'' load case and contributed to the FAA's concern with the strength of an unreinforced cargo floor.

The FAA subsequently determined that the ''up'' load case is the most likely critical case. The FAA agrees that, for the ''up'' load case, the running load figures identified in the comment are accurate. However, the passenger compartment is designed to uniformly distribute passenger loads such that every floor beam is active in carrying these loads. In contrast, the freighter floor loads are applied differently. Instead of the main deck loads being applied uniformly, each 88-inch deep container spans several floor beams. As discussed previously, the result of this is that only floor beams located at the edges of containers are active in carrying the ''up'' loads. Hence, as the FAA determined in its detailed design review, the effect on the airplane is that the 90 lbs. per inch cargo container loading is much more critical than the uniformly applied upper and lower deck loads of the passenger configuration and is, in fact, a safety concern.

One commenter states that the interim weight reduction is too restrictive considering that the passenger 727 can carry in excess of 6,800 lbs. in the same zone. The 3,000-lb. limitation imposed in the NPRM is unjustified. The FAA does not concur. As discussed previously, the loading on the floor is significantly different depending on whether it is loaded by the carriage of passengers or containers. The 3,000-lb. limitation specified for the carriage of cargo in the NPRM is justified by the FAA's analysis provided in the Rules Dockets.

Netted Lower Lobe Cargo

One commenter states that if the lower lobe cargo is assumed to be netted (restrained), it would not have any relevance in a down gust situation. The FAA infers that the commenter believes that, as the cargo would be restrained to the belly of the airplane, it would not load the underside of the floor beams in a negative ''g'' environment due to a down gust.

Another commenter states that the NPRM should be changed to allow lower lobe weights to be subtracted from the main deck limits if the load is properly tied down. The FAA concurs partially. If the lower lobe cargo is properly tied down, it will be restrained by the structure differently than represented in the FAA analysis. While the FAA is not currently aware of configurations that restrain lower lobe cargo, paragraphs (f) and (g) of this AD allow for approval of this type of configuration as an alternative method of compliance with the final rule.

Airplane Weight Increases

One commenter states that the FAA should reconsider the present policy of withholding approval of maximum take-off weight (MTOW) and maximum landing weight (MLW) increases for 727 freighter modified airplanes. The rationale for this is that the resulting higher weights would allow greater fuel loads for remote region operators, and also would increase the safety margin of the airplane's modified fuselage structure, which is the FAA's prime concern addressed by the NPRM's. The FAA infers that the commenter believes

that the proposed AD should be changed to reflect this.

The FAA concurs partially. The FAA concurs that maintaining a minimum in-flight weight reduces the loads resulting from vertical gusts, unless this additional weight is carried in body fuel tanks that are suspended from floor beams. Additional loads to the floor beams exacerbate the unsafe condition. This issue is addressed appropriately in the context of type certification and is not addressed in this AD. Therefore, the FAA has determined that no change to the final rule is necessary.

Operators' Ability To Determine Container CG's

One commenter states that there is no means to measure or comply with the requirement that the container cg's be within +/− 10 percent of the geometric center of the container. Two commenters state that the wording in the proposed AD should be changed to allow those operators having a loading procedure that maintains the container cg within +/− 10 percent to be considered compliant with this requirement. The FAA does not concur that the cg of the container cannot be determined, or that the requirement to maintain the cg within 10 percent of the horizontal cg cannot be complied with. For example, FedEx has recently acquired equipment for this purpose. Because the cg location within the container has a major effect on the loads imposed on the floor beams, the FAA considers that this limitation is necessary to address the unsafe condition. It should be noted that the vast majority of cargo containers are certificated to TSO C90c, which specifies a maximum cg shift of 10 percent. Therefore, operators should always have been ensuring that the cg shift did not exceed this limitation in the TSO.

One commenter submitted data to the Rules Dockets that the commenter states will allow an operator with a properly designed or modified scale to accurately determine, display, and record the container cg. The FAA did not evaluate the technical accuracy of the submission, as no change to the proposed AD was requested by the commenter.

Airplanes With Apparent Increased Floor Capability

One commenter states that one of its 727–200 airplanes has a greater running load allowable than its other two airplanes (37.5 lbs. per running inch versus 34 lbs. per running inch) and asks why this airplane is limited by the same restriction.

The FAA infers that the commenter believes that its airplane should have higher allowable container loads, based on this apparent increased capability, and that the AD should be changed to reflect this. The FAA does not concur. From its analysis, the design review team determined that the 727 main cargo decks are capable of supporting a maximum payload of approximately 3,000 lbs. per container. Paragraphs (f) and (g) of the AD allow for an applicant to propose new payloads along with substantiating data and analysis. No change to the final rule is necessary.

Inconsistent Limitations

One commenter states that the FAA's determination that these airplanes are capable of supporting only 3,000 lbs. per container is entirely inconsistent with the FAA's interim proposal, which would allow an 8,000-lb. pallet in any position where the entire load would be carried by one set of container locks. The commenter does not see any rational or consistent approach in the NPRM's. The FAA does not concur. The analysis that resulted in the 3,000 lb. per container limit was based on the current operational limits of the airplane. As discussed in the NPRM, the FAA determined that, if more restrictive operational limits are imposed, a higher payload could be allowed on an interim basis. The FAA has estimated that the airplane gust loads will be reduced with limitations on in-flight weight and maximum operating airspeed to the extent that the 3,000-lb. limit per container can be raised to 4,000 lbs. for the interim period.

For the ''up'' load case, two 4,000-lb. containers placed back-to-back, without side vertical restraints, impose approximately the same amount of load on the floor structure as a single 8,000-lb. container with the adjacent cargo positions carrying no payload. Because of this, for the interim period, the operator would have the flexibility to carry an 8,000-lb. container, provided the containers on either side are empty.

If side vertical restraints acceptable to the FAA are installed, then the interim payload is not to exceed a total weight of 9,600 lbs. for any two adjacent containers. In this case, as stated in paragraph (b) of the AD, the 8,000–lb. limit per container would still apply. Many of the different containers and flat pallets or ''cookie sheets'' used by operators require side vertical restraints, as specified in TSO C90c.

Irrelevancy of Model 747 Problems

One commenter states that the FAA only proposed payload reduction because of the incidents occurring on 747's, but the FAA has no reason to believe the problems found on the 747's will occur on the 727's. The FAA does not concur. The FAA did, in fact, look into the 727 conversions because those conversions had been performed by some of the same companies and with similar procedures and design methods as some 747's which had been found to be unsafe. The unsafe condition that is the subject of this AD, however, is specific to the 727 and has been documented in the Rules Dockets.

Applicability of 14 CFR 25.1529

One commenter states that the NPRM statement indicating that STC holders are required to issue Instructions for Continued Airworthiness in accordance with 14 CFR 25.1529 does not apply to its STC's because the applicable airworthiness standards for the 727 are CAR part 4b, rather than 14 CFR part 25. The FAA does not concur. Since January 28, 1981, 14 CFR 21.50(b) has required that the holder of an STC for which application was made after that date shall furnish the Instructions for Continued Airworthiness prepared in accordance with 14 CFR 25.1529. This requirement is effective regardless of the specific certification basis of the airplane.

Fatigue Cracks as Evidence of Unsafe Condition

FedEx states that, if the FAA's report of huge negative margins of safety at ultimate load are true, then the ''typical daily operating conditions would still impose substantial loads on the structure,'' and result in wear and cracking of the floor structure. FedEx's review of the FAA service difficulty report data generated only two reports of cracks on the converted 727 freighters, and no other damage was found that could be attributed to the 727 cargo conversion modification.

The FAA does not concur that a low number of in-service difficulty reports indicates that the FAA's finding of unsafe condition is unfounded. FedEx has reported that its average cargo load density is approximately 7.5 lbs. per cubic foot, which equates to an average cargo payload of approximately 3,300 lbs. per container. This results in stress levels that on average would be similar to those of a passenger 727. Therefore, it is not expected that fatigue cracks would develop in only 11,008 total flight cycles, which is the highest number of cycles accumulated (as of August 27, 1998) by any FedEx 727 airplane since conversion to a freighter configuration. As discussed previously, the unsafe condition addressed in these AD's is not a result of fatigue, but is the

result of the existing floor structure not being able to support the allowable payloads and distributions for the critical gust conditions.

Data Showing Floors To Be Safe

FedEx states that the NPRM is inaccurate in stating that the FAA design review team was unable to find any data which showed that the floors were safe for the heavier (than passenger loading) freight payloads. FedEx states that the FAA has received and accepted data verifying the safety of the floor structure. FedEx also states that the FAA has failed to provide ''reasoned explanation'' for not approving various documents.

The FAA does not concur. In performing its own analysis, the FAA was careful to use only methodologies that were commonly employed in industry. One of the ways that the reasonableness of the FAA analysis contained in the Rules Dockets was checked was to compare the results with results of the STC holders' analyses, where possible. In this case, several analysis documents (Dee Howard Reports R90–2, R90–4, and R90–6) were used by FedEx to analyze the main deck floor beams in support of its STC for half-size containers (SA7447SW). However, these documents do not ''verify that the unreinforced floor structure of the main cargo deck can safely support the heavier freighter payloads.'' Also, they do not address all of the critical load cases or configurations, nor do they address the effect of cg shifts.

Recognizing these limitations, the FAA used FedEx's methodology to verify that the FAA analysis yielded similar results for a similar load case. In doing this, the FAA used the load case which placed ''down'' loads on the containers, as provided in FedEx's analysis, as its analysis did not contain an ''up'' load case (as required by CAR part 4b standards). Using the applied loads from FedEx's ''down'' load case, the FAA calculated the margins of safety for the floor beams using the FAA's documented methodology. The results for the mid-span of the floor beam matched very closely to those documented in FedEx's STC analysis for the half-size containers, which verifies that the FAA's and FedEx's analytical methodologies were quite similar for the same load case.

However, because FedEx's (Dee Howard) documents do not address all the critical load cases, locations on the floor beam, or configurations, nor do they address the effects of cg shifts, they do not ''verify the safety of the floor structure.''

In addition, of the ten documents related to the floor beam analysis testing that FedEx submitted in its comments, three documents (Appendices 1, 2, and 3) describe analytical methodologies and do not (and are not intended to) ''show the floor structure can safely support the heavier payloads.'' Regarding the decompression methodology document submitted in Appendix 3, FedEx acknowledged at the September 19, 1997, meeting that it had not yet revised the document following comments received from the FAA at a meeting held between FedEx and the FAA on July 24, 1997.

Three other documents (Appendices 4, 8, and 9) are test plans or results that have been discussed previously and also do not ''show the floor structure can safely support the heavier payloads.''

The two external loads documents (Appendices 5 and 6) have been approved by the FAA prior to FedEx's comment submittal (FAA letter 97–120S–534, dated August 21, 1997) and are considered appropriate as a starting point for an analysis of the floor structure. However, these documents by themselves do not ''verify the safety of the floor structure.''

Appendix 12 includes a document containing an incomplete analysis of one floor beam, a test report which was discussed previously, and two videotapes of that test, none of which ''verify the safety of the floor structure.'' Finally, FedEx's Document ER 97–035 I/R, dated July 20, 1997 (Appendix 7), which was approved by FedEx on August 13, 1997, had not been submitted to the FAA prior to its inclusion in FedEx's comment submittal. In reviewing this document, the FAA has determined that because the area addressed is shorter than an 88-inch container, this document alone does not substantiate higher container loads. The floor under the rest of the container also would need to be substantiated to warrant a change to the AD limits.

The FAA does not concur that it has received and accepted data verifying the safety of the floor structure, or that the FAA design review team was in possession of any data which showed that the floors were safe for the heavier (than passenger loading) freight payloads. Finally, the FAA does not concur that it has failed to provide FedEx with a ''reasoned explanation'' for not approving various documents. FedEx is aware of the current status of all the above mentioned documents.

FedEx also states that a Boeing letter (Appendix 41) indicated that the floor beams were safe for a passenger to freighter airplane conversion at (container) weights of 8,000 lbs. The FAA does not concur. The referenced letter was part of an initial budget quote for a zero fuel weight increase that estimated potential weight increases that might be applicable to airplanes converted from passenger to freighter configurations. Simplifying assumptions were used by Boeing in order to allow FedEx to quickly establish, as a rough approximation, the financial feasibility of converting an airplane. Any necessary changes to the floor beams in estimating the weight of the airplane following conversion were not addressed.

FedEx's Finite Element Model

FedEx states that the FAA misused FedEx's finite element model (contained in Engineering Report 8504), which identifies negative margins of safety in the fuselage monocoque, to substantiate its finding of unsafe condition. FedEx also states that the NPRM was inaccurate in stating that the report was used for certification. The FAA does not concur. The FAA did not use FedEx's Engineering Report 8504 to validate its analysis. Rather, as discussed previously, the FAA used the floor beam analysis documents submitted as part of the substantiation for FedEx's STC for half-size containers (SA7447SW) to validate its analysis. The NPRM did state that the original STC certification data contained documented negative margins of safety. The FAA does not concur that this statement is incorrect. At the meeting held September 19, 1997, FedEx stated that the document was used to support original STC issuance, and that no other document was submitted.

Critical Loading on Floor Beams

FedEx states that, contrary to a statement in the NPRM, the FAA has not established that floor beams at the forward and aft edges of the container are more critically loaded. In its August 28, 1997, submittal to Rules Docket No. 97–NM–09–AD, FedEx cited its ''on-aircraft'' test as proof that the sidelocks are more critically loaded. FedEx appears to have mistakenly inferred that this statement addresses the effectiveness of FedEx's sidelocks. This inference is incorrect. In context, this statement simply points out that, for the ''up'' load case, ''the floor beams at the forward or aft edges of the containers would be more critically loaded'' than the floor beams under the center of the container. The reason for this is that a full-size container is restrained against vertical movement by the container locks attached to the floor beams at container edges and there are no

container locks in the center of the container.

Communications With FAA

FedEx's comments included a number of disagreements with documentation of various communications prepared by the FAA and placed in Rules Docket No. 97–NM–09–AD. Because these comments do not relate to the merits of this AD, they are not addressed in this final rule. However, the FAA has provided a response to these comments in that Rules Docket.

Interim Limitations Already Observed

One commenter states that the interim operating limitations are not necessary because the commenter does not know of a 727 freighter STC that allows operation higher than 350 knots indicated airspeed (KIAS) and, for practical reasons, 727–200 airplanes almost never operate at weights below 100,000 lbs. The FAA does not concur. While many of the affected airplanes are subject to a maximum operational speed limitation of approximately 350 KIAS, other affected airplanes are not subject to such limitations and do operate at higher speeds. In addition, while operation at weights below 100,000 lbs. is not likely for most 727–200 converted freighters, such operation is permitted and may occur. Such operation is even more likely for the lighter weight 727–100, which also is subject to this AD.

Alternatives to Limitations in the AD

Several commenters asked about alternatives to the proposed rule and suggested increased inspections, such as those in other AD's. The FAA does not concur. The unsafe condition identified in the AD is not based on loads imposed on the floor structure on an average flight (i.e., fatigue-type loading). The unsafe condition is caused by loads experienced on the airplane due to a large gust while carrying certain cargo payloads and distributions. In this case, a floor beam failure or excessive deflection would likely result in the loss of the airplane. Because such a failure would not necessarily be preceded by cracking, inspections of the airplane would not prevent the failure. The only means for preventing a catastrophic event is to limit the flight operation of the airplane and/or the container payloads.

One commenter proposes a statistical approach to study the unsafe condition by requiring certain inspections over the next year while imposing certain operational limitations. The FAA does not concur. Because the unsafe condition is a collapse of the floor caused by large gusts, increased inspections in the areas of concern will not serve to lessen the likelihood of loss of the airplane.

One commenter proposes that the FAA revise the proposed AD to further limit the maximum operational speed to 280 KIAS as an alternative to payload limitations. The FAA does not concur with the commenter's proposal to reduce the maximum operational speed to 280 KIAS. Reducing the maximum operational speed levels below 350 KIAS does reduce the gust loads on the airplane. However, speed restrictions below 350 KIAS that permit safe operation of the airplane do not affect the maneuver loads, which at these speeds become more critical than the gust loads.

''Mode B''

One commenter requests that, for the interim limitations, the FAA also allows operation at ''Mode B'' [350 knots equivalent airspeed (KEAS)] for the maximum operating airspeed (Vmo). The commenter states that operations at ''Mode B'' would be more convenient than the 350 KIAS limitation specified in the proposed AD. The FAA concurs. The FAA has revised the interim limitations of the final rule accordingly.

Release of Proprietary Data

Several commenters state that the FAA must divulge all data used to make its finding of an unsafe condition; the commenters cited various legal cases.

The FAA infers that commenters are insisting that the FAA release relevant proprietary data that was considered by the FAA during this rulemaking. The FAA does not concur for two reasons. First, the Trade Secret Act (18 U.S.C. 1905) prohibits the disclosure of such data, and this prohibition is not overridden by the requirements of the Administrative Procedure Act (APA). The cases cited by the commenters, while generally stating that agencies must release all information on which they rely during rulemaking, do not address the prohibition against the release of trade secret data.

Because AD's address unsafe conditions associated with aeronautical products, the FAA routinely evaluates proprietary design data in determining whether AD's are necessary. In determining whether such material should be placed in the Rules Docket, the FAA applies the standards developed under the Freedom of Information Act (FOIA; 5 U.S.C. 552) in the application of Exemption 4 [§ 552(B)(4)], which protects ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' If data are determined to meet those standards, they are not placed in the Rules Docket, but are retained in separate files that are not released to the public. Apart from violation of the Trade Secret Act, if the FAA were to release such data, it would be much more difficult for the FAA to obtain the data on which its findings of unsafe conditions are necessarily based.

Second, the APA generally has been interpreted as requiring that agencies provide the public with a meaningful opportunity to comment on proposed rules. In this rulemaking, the FAA has fully complied with this requirement, even without releasing trade secret data. In developing the NPRM, the FAA used proprietary Boeing loads data in its analysis, from which the FAA identified the existence of the unsafe condition. Although Boeing has not consented to releasing these data, FedEx has submitted comparable loads data (discussed previously under the heading, ''Extension of Interim Operational Period'') which, when used in the FAA analysis (which has been placed in the Rules Dockets), also demonstrate the existence of the unsafe condition. FedEx did consent to the release of these data. In fact, at the first public meeting on February 18, 1998, the FAA used these data in its presentation explaining its analysis. The analysis and the presentation are fully documented in the Rules Dockets, and have been available for review by commenters. The FAA also has referenced other proprietary data, which have been submitted by applicants seeking approval for modifications to correct the unsafe condition, as confirming the FAA's analysis. Although these data are relevant to the rulemaking, they do not provide the basis for the FAA's action, and their release would not significantly increase the meaningfulness of the public's opportunity to comment on the FAA's proposal.

One commenter requests copies of three recently updated Boeing computer programs which it believes were utilized by the FAA in determining the container payload limits specified in the NPRM. The commenter states that those programs are entitled: (1) ''Vertical Gust Load Factors 'Gs;'' (2) ''727 Movement (sic) of Inertia Model;'' and (3) ''Operating Empty Weight Plus Payload Distribution.'' The FAA is not aware of the referenced programs, does not have them, and did not use them in its analysis.

Economic Analysis

Several commenters state that the FAA underestimated the cost to modify the airplane floor structure into

compliance to CAR part 4b, citing a Pemco estimate of $400,000, as opposed to the $100,000 estimate contained in the NPRM. Several commenters also state that the FAA had underestimated (1) the loss in revenue due to the reduced allowable payloads, and (2) the amount of time necessary to get all airplanes modified due to the short 120-day interim period, a lack of FAA-approved fixes, and the limited availability of facilities to install the modifications within the 120-day period proposed by the NPRM.

The FAA concurs. The FAA used data supplied by industry to conduct its cost and regulatory flexibility analysis used in the NPRM and has considered the data supplied by commenters during the comment period to conduct the cost and regulatory flexibility analysis used for the final rule.

Cost-Benefit Analysis

One commenter states that the FAA must undertake a thorough cost-benefit analysis and economic impact assessment in conjunction with its consideration of the remedial actions at issue in this rulemaking. The commenter states that the FAA has thus far failed to conduct an adequate cost-benefit analysis. The commenter states that a cost-benefit analysis and economic impact assessment are required by the provisions of the Regulatory Flexibility Act.

The FAA does not concur. As discussed below under the heading ''Regulatory Evaluation Summary,'' the FAA has performed an extensive analysis of the costs and benefits of this AD and has fulfilled the requirements of the Regulatory Flexibility Act.

Combi Airplanes

One commenter states that the NPRM has not considered those operators that operate airplanes in a combi mode (a combi airplane has provisions for passengers and cargo on the main deck in separate compartments). The commenter also states that it assumes that the load restrictions would not apply to the floor structure which is used to carry passengers and that the original manufacturer's limitations are applicable. The FAA concurs. Although the commenter is correct with respect to floor structure carrying passengers, combi airplanes transporting containers on the main deck must be in compliance with the limitations specified in this AD.

Applicability of Proposal

FedEx points out that the wording of the applicability in the AD could easily be misconstrued as also applying to airplanes manufactured as freighters by the original equipment manufacturer. The FAA concurs and has revised the applicability of the final rule to read ''Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration in accordance with Supplemental Type Certificate ST00015AT; certificated in any category.''

Other Cargo Lock Devices

One commenter requests that the proposed AD be revised to add a paragraph discussing a ''special load-alleviating cargo container lock'' for which the commenter has applied for an STC at the FAA, Los Angeles ACO. The commenter reports that this lock will allow for the carriage of 16,000 lbs. rather than 8,000 lbs. in two adjacent containers, as specified in the proposed AD, but to be conservative, the commenter requests that the rule allow 12,000 lbs. for two adjacent containers for the interim period. During the reopened comment period, this commenter submitted additional information in support of its original comment.

The FAA does not concur. The information submitted is not sufficient to substantiate the safety of the airplane with the locks installed. This lock is the subject of an STC application and is not currently FAA-approved. Paragraphs (f) and (g) of the AD provide for approval of alternative methods of compliance to address potentially alleviating devices for the unsafe condition. The commenter may obtain such an approval upon submission of data substantiating that the referenced device provides an acceptable level of safety. Therefore, no change to the final rule is necessary.

''Fine Tune'' the AD

The CAA and others request that the AD should be ''fine tuned'' after issuance, as new data become available. The FAA does not concur that ''fine tuning'' of the AD is necessary. Paragraphs (f) and (g) of the AD allow for approval of alternative methods of addressing the unsafe condition when substantiated properly. As with any AD, if new information indicates that changes to the AD itself are needed, the FAA has the authority to revise or supersede this AD.

Request for Clarification

One commenter requests clarification of the procedures that will be used to obtain future FAA approvals with respect to this rulemaking and to inform the public of those approvals.

As stated in the final rule, all submissions should be made to the Atlanta ACO. The Transport Airplane Directorate has established a team consisting of members from several ACO's to review all requests in accordance with paragraphs (e) and (f) of this AD. In all other respects, the process for approvals under this AD will be similar to that followed for all AD's. For example, in order to protect applicants' proprietary data, the FAA will notify only the applicant for an approval of the FAA's decision; while the FAA will disclose whether approvals have been granted, requests for approved data would be handled under normal FOIA procedures.

Other Safety Improvements

One commenter states that, because this AD will necessitate large expenditures and does not address an unsafe condition, requiring compliance with it will prevent the affected airlines from adopting other less costly and more effective safety enhancements, such as updating flight deck equipment. The FAA does not concur. As discussed previously, this AD addresses a serious unsafe condition. Although correcting this condition may be expensive, the FAA has determined that it must be corrected to ensure an acceptable level of safety.

Petitions for Reconsideration

In addition to their comments, several commenters also filed ''Petitions for Reconsideration'' in accordance with 14 CFR 11.93. Because these petitions were filed prematurely, the FAA considered them as comments to the Rules Docket. However, because the substance of the petitions is repetitious of the more extensive comments submitted by FedEx and others discussed above, the petitions are not discussed separately in this final rule.

Explanation of Change of Aircraft Certification Office Contact

The FAA has changed the point of contact for obtaining further information, for obtaining FAA approval of certain actions, and for submitting substantiating data and analyses in accordance with the provisions of this AD, due to relocation of certain STC holders.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will

neither increase the economic burden on any operator nor increase the scope of the AD.

Participation at the Public Meeting on the Final Rule

Requests from persons who wish to present oral statements at the public meeting should be received by the FAA no later than 5 days prior to the meeting. Such requests should be submitted to Mike Zielinski as listed in the section titled **FOR FURTHER INFORMATION CONTACT** above, and should include a written summary of oral remarks to be presented, and an estimate of time needed for the presentation. Requests received after the date specified above will be scheduled if there is time available during the meeting; however, the names of those individuals may not appear on the written agenda. The FAA will prepare an agenda of speakers that will be available at the meeting. To accommodate as many speakers as possible, the amount of time allocated to each speaker may be less than the amount of time requested. Those persons desiring to have available audiovisual equipment should notify the FAA when requesting to be placed on the agenda.

Purpose of Public Meeting

Because of the high degree of public interest in this AD, the FAA has scheduled a public meeting to discuss its content and issues relating to compliance. The FAA's objective is to ensure that all affected operators and design approval holders have a full understanding of the issues addressed in the AD and of the actions necessary to comply with it. The FAA anticipates that, following this meeting, there will continue to be extensive discussions between the affected parties and the FAA for the purpose of identifying and implementing the most timely and cost-effective means to eliminate the unsafe condition addressed in this AD.

Public Meeting Procedures

Persons who plan to attend the public meeting should be aware of the following procedures that have been established for this meeting:

1. There will be no admission fee or other charge to attend or to participate in the public meeting. The meeting will be open to all persons who have requested in advance to present statements, or who register on the day of the meeting (between 8:30 a.m. and 9:00 a.m.) subject to availability of space in the meeting room.

2. Representatives from the FAA will conduct the public meeting. A technical panel of FAA experts will be established to discuss information presented by participants.

3. The FAA will try to accommodate all speakers; therefore, it may be necessary to limit the time available for an individual or group. If necessary, the public meeting may be extended to evenings or additional days. If practicable, the meeting may be accelerated to enable adjournment in less than the time scheduled.

4. Sign and oral interpretation can be made available at the public meeting, as well assistive listening device, if requested 5 calendar days before the meeting.

5. The public meeting will be recorded by a court reporter. Any person who is interested in purchasing a copy of the transcript should contact the court reporter directly. This information will be available at the meeting.

6. The FAA requests that persons participating in the public meeting provide 10 copies of all materials to be presented for distribution to the panel members; other copies may be provided to the audience at the discretion of the participant.

Regulatory Evaluation Summary

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

The FAA conducted a Cost Analysis and Final Regulatory Flexibility Analysis to determine the regulatory impacts of this and three other AD's to operators of all 244 U.S.-registered Boeing Model 727 passenger airplanes that have been converted to cargo-carrying configurations under 10 STC's held by four companies. This analysis is included in the Rules Docket for each AD. The FAA has determined that approximately four 727–200's operated by one carrier were converted under Pemco STC's. This carrier also operates nine converted 727's affected by other STC's. [There were 15 727's for which the FAA could not identify the STC holder. It is possible that these airplanes were also converted under a Kitty Hawk STC (STC previously held by ATAZ, Inc.) Their costs are not included here.]

Assuming that the operator of affected airplanes converted under Kitty Hawk STC's will comply with the restricted interim operating conditions set forth in the AD, the FAA estimates that this operator will not lose revenues during the 28-month interim period after the effective date of the AD. During the interim period, these airplanes will be limited to a total of 8,000 lbs. per pair of adjacent containers (a total of 36,000 to 48,000 lbs., depending on the number of pallets) because none of the Kitty Hawk-converted 727's have approved side restraints. Assuming typical payloads ranging from 34,835 lbs. for a 727–100 with nine pallets to 47,820 lbs. for a 727–200 with 12 pallets, none of the operators of Kitty Hawk-converted airplanes will lose revenues during this interim period.

The Cost Analysis and Final Regulatory Flexibility Analysis, completed by the FAA and included in the Rules Dockets, estimates that affected airplanes can be modified at a cost of $385,000 per airplane to carry the maximum payloads currently allowed, or a total of $1.5 million for the four Kitty Hawk 727's. The FAA expects that the operator will modify its airplanes during the 28-month interim period, scheduling the modifications to coincide with periodic maintenance. A modification will require that the airplane be removed from service for a period of 17 days; the FAA conservatively estimates that scheduling a modification during periodic maintenance will reduce the net time out of service by two days. The FAA estimates the lost revenue during this 15-day period will be $14,829 per day, per 727–100, and $23,405 per day, per 727–200. The total down-time lost revenue for the operator will be $1.4 million. This estimate conservatively assumes that cargo is not shifted from airplanes being modified to other airplanes. Such cargo shifting is typical industry practice and would reduce the costs attributable to lost revenues. Incremental fuel costs to carry the additional weight of the floor modification will be $17,000 over the 28-month period, as airplanes are modified. When all affected Kitty Hawk 727's are modified, additional fuel costs will be about $1,100 per month.

The total cost, therefore, to modify the fleet of affected 727's that were originally modified to the Kitty Hawk STC's, including lost revenues while the airplanes are out of service and modification costs, is $3.0 million, or $2.7 million discounted at seven percent.

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), was enacted by Congress to ensure that small

entities are not unnecessarily or disproportionately burdened by government regulations. The RFA requires a Regulatory Flexibility Analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The purpose of this analysis is to ensure that the agency has considered all reasonable regulatory alternatives that will minimize the rule's economic burdens for affected small entities, while achieving its safety objectives. Under section 63(b) of the RFA, the analysis must address:

1. Reasons Why the Agency Is Promulgating the Rule
2. The objectives and legal basis for the rule;
3. The kind and number of small entities to which the rule will apply;
4. The projected reporting, recordkeeping, and other compliance requirements of the rule; and
5. All federal rules that may duplicate, overlap, or conflict with the rule. These elements of the RFA are addressed below.

A. Reasons Why the Agency Is Promulgating the Rule

The FAA has determined that the unreinforced floor structure of the main cargo deck of converted 727's is not strong enough to enable the airplane to safely carry the maximum payload that is currently allowed in this area. The actions specified in this AD are intended to prevent failure of the floor structure, which could lead to loss of the airplane.

B. Statement of Objective and Legal Basis

Under the United States Code (U.S.C.), the FAA Administrator is required to consider the following matter, among others, as being in the public interest: assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. [See 49 U.S.C. 44101(d).] Accordingly, this AD amends Title 14 of the CFR's to require operators of Boeing 727 airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration to comply with certain payload limitations, substantiate data showing other acceptable limits, or show an alternative method of compliance (AMOC).

C. Regulatory Flexibility Determination

Under the RFA, the FAA must determine whether or not a rule significantly affects a substantial number of small entities. This determination is typically based on small entity size and cost thresholds that vary depending on the affected industry. The entity affected by this rule operates four U.S.-registered converted Boeing 727 airplanes that have been converted under Kitty Hawk STC's as well as nine other affected airplanes converted under other STC's. The FAA has prepared an analysis of cost impacts and has examined possible regulatory alternatives.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

With two minor exceptions, the rule will not mandate additional reporting or recordkeeping. First, there will be a negligible one-time cost to operators to revise their AFM's and Supplements. Second, operators will be required to keep records of the modifications to their airplanes. This requirement is common to all maintenance, preventive maintenance, and alterations under § 91.417, Maintenance records.

E. Overlapping, Duplicative, or Conflicting Federal Rules

The rule will not overlap, duplicate, or conflict with existing Federal rules.

F. Analysis of Alternatives

This AD will impose a financial requirement on small entities that operate 727's that were converted under Kitty Hawk STC's. The FAA examined potential alternatives to the AD's requirements to minimize the rule's economic burden for small entities while achieving its safety objectives. The alternatives are:

- Exclude small entities;
- Extend the compliance deadline for small entities; and
- Establish higher payload limits for small entities.

The FAA has determined that the option to exclude small entities from the requirements of the rule is not justified. The unsafe condition that exists on an affected 727 operated by a small entity is as potentially catastrophic as that on an affected 727 operated by a large entity. In fact, the average payloads carried by small entities may exceed the average payloads carried by large operators, resulting in a higher probability of a catastrophic event.

The FAA also considered options to extend the compliance period for small operators. The proposed rule established a final compliance date of 120 days after the effective date of the rule. During this 120-day period, operators could comply with interim operating conditions that would enable them to carry higher payloads than those permitted after that interim period. When the proposed rule was published, the FAA had information that indicated that a portion of engineering data from an FAA-approved STC for a floor modification that could be used as an AMOC would be available within a few months of the proposed rule's publication. In addition, the FAA estimated that operators would be able to modify their airplanes within the 120-day interim period.

Hamilton Aviation has received letters of approval for work towards obtaining an STC for strengthening the floor beams aft of Station 700 and expects to be able to submit additional data in the Fall of 1998 that will provide the basis for an STC for the entire floor. Pemco World Air Services expects to be able to use Hamilton's engineering data to modify the floors of the 727's it has converted. The FAA is confident, therefore, that there will be AMOC's for operators of all affected airplanes when this final rule is published.

Several commenters to the Rules Dockets for the proposed AD's rejected the FAA's claim that their airplanes could be modified within the 120-day interim period. Their arguments were based on the unavailability of an approved STC that could be used as an AMOC (or, at that time, even letters of approval toward an STC). Operators also stated that modification of all 244 U.S.-registered airplanes would be impossible within a 120-day time frame.

The FAA agrees 120 days is unrealistic and would have severe economic consequences as operators would be required to reduce their payloads substantially at the end of the interim period. In the final rule, therefore, the FAA extends the interim period to 28 months. This will permit operators to modify their airplanes during regularly scheduled maintenance, minimizing down time and associated lost revenues. This change will be especially beneficial to small entities that may find it difficult to find alternative means of carrying cargo.

Finally, the FAA rejects the compliance alternative that would reduce payloads from those currently required but would establish higher payload limits than those for larger entities. This alternative is unacceptable because the unsafe condition is dependent on the size of the payload, not the size of the entity. The FAA cannot permit a small entity to operate under an unsafe condition.

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any

Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed ''significant intergovernmental mandate.'' A ''significant intergovernmental mandate'' under the Act is any provision in a Federal agency regulation that would impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of $100 million (adjusted annually for inflation) in any one year. Section 203 of the Act, 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

This AD does not contain any Federal intergovernmental or private sector mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

98–26–20 Boeing: Amendment 39–10963. Docket 97–NM–80–AD.

Applicability: Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration in accordance with Supplemental Type Certificate ST00015AT; 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 (g) 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.

Note 2: The payload limitations specified in this AD are in addition to payload limitations that are otherwise applicable and do not allow for increases in payloads beyond those specified in such limitations.

To prevent structural failure of the floor beams of the main cargo deck, which could lead to loss of the airplane, accomplish the following:

(a) Except as provided in paragraphs (b) and (c) of this AD, within 90 days after the effective date of this AD, accomplish the requirements of paragraph (a)(1) or (a)(2) of this AD, as applicable.

(1) For airplanes that transport containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Codes ''A,'' ''B,'' ''C,'' ''D,'' or ''E,'' containers: Revise the Limitations Section of all FAA-approved Airplane Flight Manuals (AFM) and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements to include the following information. This may be accomplished by inserting a copy of this AD in all AFM's, AFM Supplements, and Weight and Balance Supplements.

''LIMITATIONS

All containers with one door must be oriented with the door side of the container facing forward, except the door of the first container aft of the cargo barrier may face aft.

The location of the horizontal center of gravity for the total payload within each container or pallet shall not vary more than 10 percent (8.8 inches) from the geometric center of the base of the container or pallet for the forward and aft direction, and 10 percent of the width from the geometric center of the base of the container or pallet for the left or right direction.''

''PAYLOAD LIMITATIONS

For containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Code ''A'' (88 by 125 inches), ''B'' (88 by 108 inches), or ''C'' (88 by 118 inches):

Do not exceed a total weight of 3,000 pounds per container or pallet on the main cargo deck, except in the area adjacent to the side cargo door. In the side cargo door area, for all containers or pallets completely or partially located between Body Station 440 and Body Station 660, those containers or pallets are restricted to a maximum payload of 2,700 pounds per container or pallet. The 3,000 and 2,700 pound payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.

For containers or pallets that have been manufactured in accordance with NAS 3610 Size Code ''D'' (88 by 54 inches) or ''E'' (88 by 53 inches) containers:

Do not exceed a total weight of 1,500 pounds per container or pallet on the main cargo deck, except in the area adjacent to the side cargo door. In the side cargo door area, for all containers or pallets completely or partially located between Body Station 440 and Body Station 660, those containers or pallets are restricted to a maximum payload of 1,350 pounds per container or pallet. The 1,500 and 1,350 pound payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.''

(2) For airplanes on which any other containers or pallets are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate.

Note 3: The weight restrictions to be approved under paragraph (a)(2) will be consistent with the limitations specified in paragraph (a)(1) of this AD.

(b) For airplanes that ARE equipped with side vertical cargo container restraints that have been approved by the Manager, Standardization Branch, ANM–113: As an optional alternative to compliance with paragraph (a) of this AD, within 90 days after the effective date of this AD, accomplish the requirements of paragraph (b)(1) or (b)(2) of this AD, as applicable. This alternative may be used only during the period ending 28 months after the effective date of this AD.

Note 4: To be eligible for compliance with this paragraph, the side vertical cargo container restraints must be approved by the Manager, Standardization Branch, ANM–113, regardless of whether they have been previously FAA approved.

(1) For airplanes on which containers complying with NAS 3610 Size Codes ''A,'' ''B,'' ''C,'' ''D,'' or ''E,'' are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements to include the following limitations. This may be accomplished by inserting a copy of this AD in all AFM's, AFM Supplements, and Weight and Balance Supplements.

''LIMITATIONS

Maximum Operating Airspeed of Vmo equals 350 knots indicated airspeed (KIAS), or Mode ''B'' [350 knots equivalent airspeed (KEAS)].

Minimum operating weight: 100,000 pounds.

All containers with one door must be oriented with the door side of the container facing forward, except the door of the first container aft of the cargo barrier may face aft.

The location of the horizontal center of gravity for the total payload within each container shall not vary more than 10 percent (8.8 inches) from the geometric center of the base of the container for the forward and aft direction and 10 percent of the width from the geometric center of the base of the container for the left or right direction.''

''PAYLOAD LIMITATIONS

For airplanes that transport containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Code ''A'' (88 by 125 inches), ''B'' (88 by 108 inches), or ''C'' (88 by 118 inches):

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 9,600 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

For those containers or pallets which are completely or partially located within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 12,000 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

These container payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck; and

For containers or pallets that have been manufactured in accordance with NAS 3610 Size Code ''D'' (88 by 54 inches) or ''E'' (88 by 53 inches) containers:

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 4,800 pounds for any two adjacent (in the forward and aft direction) containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

For those containers or pallets which are completely or partially contained within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 6,000 pounds for any two adjacent (in the forward and aft direction) containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

These payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.''

(2) For airplanes on which pallets or containers other than those specified in paragraph (b)(1) of this AD, are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113.

Note 5: The weight restrictions to be approved under paragraph (b)(2) will be consistent with the limitations specified in paragraph (b)(1) of this AD.

(c) For airplanes that are NOT equipped with side vertical cargo container restraints that have been approved by the Manager, Standardization Branch, ANM–113: As an optional alternative to compliance with paragraph (a) of this AD, within 90 days after the effective date of this AD, accomplish the requirements of paragraph (c)(1) or (c)(2) of this AD, as applicable. This alternative may be used only during the period ending 28 months after the effective date of this AD.

(1) For airplanes on which containers complying with NAS 3610 Size Codes ''A,'' ''B,'' ''C,'' ''D,'' or ''E,'' are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements to include the following limitations. This may be accomplished by inserting a copy of this AD in all AFM's, AFM Supplements, and Weight and Balance Supplements.

''LIMITATIONS

Maximum Operating Airspeed of Vmo equals 350 knots indicated airspeed (KIAS), or Mode ''B'' [350 knots equivalent airspeed (KEAS)].

Minimum operating weight: 100,000 pounds.

All containers with one door must be oriented with the door side of the container facing forward, except the door of the first container aft of the cargo barrier may face aft.

The location of the horizontal center of gravity for the total payload within each container shall not vary more than 10 percent (8.8 inches) from the geometric center of the base of the container for the forward and aft direction and 10 percent of the width from the geometric center of the base of the container for the left or right direction.''

''PAYLOAD LIMITATIONS

For airplanes that transport containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Code ''A'' (88 by 125 inches), ''B'' (88 by 108 inches), or ''C'' (88 by 118 inches):

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 8,000 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

For those cargo pallets which are completely or partially contained within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 12,000 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

These payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.

For containers or pallets that have been manufactured in accordance with NAS 3610 Size Code ''D'' (88 by 54 inches) or ''E'' (88 by 53 inches) containers:

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 4,000 pounds for any two adjacent (in the forward and aft direction) containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

For those cargo pallets which are completely or partially contained within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 6,000 pounds for any two adjacent containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

These payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.''

(2) For airplanes on which pallets or containers other than those specified in paragraph (c)(1) of this AD, are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113.

Note 6: The weight restrictions to be approved under paragraph (c)(2) will be consistent with the limitations specified in paragraph (c)(1) of this AD.

(d) For airplanes complying with paragraph (b) or (c) of this AD, within 28 months after the effective date of this AD, accomplish the requirements of paragraph (a) of this AD.

(e) For airplanes that operate under the 350 KIAS limitations specified in paragraph (b) or (c) of this AD: A maximum operating airspeed limitation placard must be installed adjacent to the airspeed indicator and in full view of both pilots. This placard must state: ''Limit Vmo to 350 KIAS.''

(f) As an alternative to compliance with paragraphs (a), (b), (c), (d), and (e) of this AD: An applicant may propose to modify the floor structure or propose differing payloads and other limits by submitting substantiating data and analyses to the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate, 3960 Paramount Boulevard, Lakewood, California 90712. The Manager of the Los Angeles ACO will coordinate the review of the submittal with the Manager of the Standardization Branch, ANM–113, in accordance with the procedures of paragraph (g) of this AD. If the FAA determines that the proposal is in compliance with the requirements of Civil Air Regulations (CAR) part 4b and is applicable to the specific airplane being analyzed and approves the proposed limits,

prior to flight under these new limits, the operator must revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113. Accomplishment of these revisions in accordance with the requirements of this paragraph constitutes terminating action for the requirements of this AD.

(g) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO, who will coordinate the approval with the Manager of the Standardization Branch, ANM–113.

Note 7: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

(h) 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.

(i) This amendment becomes effective on February 16, 1999.

Issued in Renton, Washington, on December 16, 1998.

Ronald T. Wojnar,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99–446 Filed 1–11–99; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–81–AD; Amendment 39–10964; AD 98–26–21]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 727 Series Airplanes Modified in Accordance With Supplemental Type Certificate SA1444SO, SA1509SO, SA1543SO, SA1896SO, SA1740SO, or SA1667SO

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; technical public meeting.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration, that requires limiting the payload on the main cargo deck by revising the Limitations Sections of all Airplane Flight Manuals (AFM), AFM Supplements, and Airplane Weight and Balance Supplements for these airplanes. This amendment also provides for the submission of data and analyses that substantiate the strength of the main cargo deck, or modification of the main cargo deck, as optional terminating action for these payload restrictions. This amendment is prompted by the FAA's determination that under certain conditions unreinforced floor structure of the main cargo deck is not strong enough to enable the airplane to safely carry the maximum payload that is currently allowed in this area. The actions specified by this AD are intended to prevent failure of the floor structure, which could lead to loss of the airplane.

DATES: Effective February 16, 1999.

The public meeting will be held January 20, 1999, at 9:00 a.m., in Seattle, Washington. Registration will begin at 8:30 a.m. on the day of the meeting.

ADDRESSES: Information concerning this amendment may be obtained from or examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington, by appointment only between the hours of 8:00 a.m. and 2:00 p.m.

The public meeting will be held at the following location: The Radisson Hotel, 17001 Pacific Highway South, Seattle, Washington 98188; telephone (206) 244–6000.

FOR FURTHER INFORMATION CONTACT: Questions concerning the airworthiness directive should be directed to Melissa Sandow, Aerospace Engineer, ANM–100D, FAA, Transport Airplane Directorate, Denver Aircraft Certification Office (ACO), 26805 E. 68th Avenue, Room 214, Denver, Colorado 80249; telephone (303) 342–1084; fax (303) 342–1084.

Requests to present a statement at the public meeting regarding the logistics of the meeting should be directed to Mike Zielinski, Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM–113, 1601 Lind Avenue, SW, Renton, Washington 98055–4056; telephone (425) 227–2279; 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 certain Boeing Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration was published in the **Federal Register** on July 15, 1997 (62 FR 37778). At the same time, the FAA issued three other similar notices of proposed rulemaking (NPRM's) to address airplanes similarly converted in accordance with STC's held by FedEx, Aeronautical Engineers, Inc., and ATAZ (now held by Kitty Hawk Air Cargo). That action proposed to require limiting the payload on the main cargo deck by revising the Limitations Sections of all Airplane Flight Manuals (AFM), AFM Supplements, and Airplane Weight and Balance Supplements for these airplanes. That action also proposed to provide for the submission of data and analyses that substantiate the strength of the main cargo deck, or modification of the main cargo deck, as optional terminating action for these payload restrictions.

On February 4, 1998, in order to obtain additional public participation in these NPRM's, the FAA reopened the comment period for a period of 90 days and scheduled two sets of public meetings, which were held in Seattle, Washington, on February 18 and 19, 1998, and April 1 and 2, 1998. In addition to the comments submitted during the original comment period, the comments that were provided at the public meetings and submitted to the Rules Dockets during the reopened comment period also are discussed below.

Comments

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

The FAA has received comments in response to the four NPRM's discussed previously (i.e., Docket No.'s 97–NM–09–AD, 97–NM–79–AD, 97–NM–80–AD, and 97–NM–81–AD). Some of these comments addressed only one NPRM, while others addressed all four. For example, although the comments submitted by FedEx address only the NPRM applicable to its STC's (i.e., Docket No. 97–NM–09–AD), other commenters referenced FedEx's comments and requested that those comments be considered in the context of the other three NPRM's, as well. Because in most cases the issues raised by the commenters are generally relevant to all four NPRM's, each final rule includes a discussion of all comments received.

Existence of Unsafe Condition

Several commenters disagree with the FAA's finding of an unsafe condition and refer to the following statement in the NPRM's, ''[a] design which does not meet [certification] standards is presumed to be unsafe.'' The commenters contend that, while this statement is ''convenient,'' the FAA is still obliged to issue the AD in accordance with 14 CFR part 39. In accordance with part 39, prior to the issuance of an AD, the FAA must establish that an unsafe condition exists in a product and that this condition is likely to exist in other products of the same type design.

From this comment, the FAA infers that the commenters believe the proposed AD is merely a consequence of non-compliance with Civil Air Regulations (CAR) part 4b, which are the design standards to which the Model 727 was certificated, and that the unsafe condition has not been substantiated. The FAA does not concur. The context of the quoted statement in the NPRM's was an explanation of the FAA's method used in the design review that led to issuance of the NPRM's. Initially, the FAA had identified the potential non-compliance based on observation and review of original certification data. Since, in accordance with the Federal Aviation Act, CAR part 4b standards establish the minimum level of safety, the FAA considered that further evaluation was necessary and appropriate to determine whether this potential non-compliance created an unsafe condition warranting an AD. As explained in the NPRM's, the FAA determined not only that the design was non-compliant, but that the degree of non-compliance was highly significant, and resulted in substantial negative structural margins of safety. The FAA's analysis addressed the ''up'' load case, which was considered to be the most likely critical load case, in the sense that it was likely to be the load case that would present the most serious negative margins of safety. The analysis verified these negative margins and confirmed the FAA's concerns that serious negative margins may exist for other load cases, as well. The effect of these substantial negative margins is that the likelihood of catastrophic failure of the floor structure is unacceptably high. The FAA's finding of unsafe condition arises from this determination rather than from a finding of non-compliance with CAR part 4b.

Risk From Actual Operations

Several commenters state that the FAA's finding of an unsafe condition in the NPRM's is incorrect because, based on the way the airplanes are actually loaded and operated, the likelihood of encountering conditions specified in CAR part 4b that would exceed the strength of the floor structure is extremely improbable.

The FAA does not concur. The FAA's evaluation was based on the potential for a catastrophic event occurring as a result of an airplane encountering severe gust conditions while transporting containers loaded with maximum allowable payloads. (Unless otherwise stated, throughout the preamble of this AD the FAA uses the term ''container'' to refer to all unit load devices, including pallets.) The fact that operators may transport containers with maximum payloads only for a small percentage of their operations does not diminish the seriousness of the unsafe condition when they do transport such containers. (It should be noted that one commenter stated that its operations with even one container at maximum allowable payload are only a small percentage of its total operations, but also stated that it engages in such operations daily.)

In addition, the FAA disagrees with the commenters' conclusions regarding the probability of catastrophic events. The events that may cause a catastrophic failure occur randomly and, thus, cannot be reliably predicted and avoided for any particular operation. Although the probability of large gusts or excessive maneuvers (as specified in CAR part 4b) is low (approximately once in the lifetime of an airplane for a large gust), because of the large negative margins of safety associated with these unreinforced floor structure designs (discussed in the NPRM's), less severe events (i.e., lower gusts or milder maneuvers) also could result in catastrophic failure. Therefore, because the likelihood of encountering less severe events is significantly greater than the likelihood of encountering the events contemplated by CAR part 4b standards, and because the consequences of such encounters may be catastrophic, the FAA considers that the risk is unacceptable.

During the public meetings, several commenters suggested using analytical methods developed to show compliance with 14 CFR 25.1309 in assessing risks from gust loads. Their position was that if such analysis were performed, it would demonstrate that the unsafe condition addressed by the proposed AD is ''extremely improbable;'' therefore, an AD is unnecessary to address it.

The FAA does not concur. The purpose of section 25.1309 is to require that type certificate applicants demonstrate the robustness of the airplane systems and equipment. Therefore, it is not applicable to the assessment of the seriousness of an unsafe condition associated with identified structural deficiencies. Nevertheless, assuming that it is appropriate, section 25.1309(a) states that the airplane systems, equipment, and installations ''must be designed to ensure that they perform their intended functions under any foreseeable operating condition.'' This means that the airplane must function properly if it is being operated within its approved operating and environmental conditions. As discussed in the NPRM's, the FAA's analysis demonstrates that the affected airplanes, when operated with allowable payload weights and distributions (which is foreseeable), could experience catastrophic failure if they encounter gust conditions that are also foreseeable. Therefore, applying the analytical methods of section 25.1309(a), these STC designs would be found not to comply.

In addition, section 25.1309(b) requires that any system failure condition that would result in a catastrophic event be shown to be extremely improbable, even if the system failure occurred concurrently with environmental conditions that would reduce the capability of the airplane or the ability of the crew to cope with the system failure. Probabilistic analyses are used to demonstrate compliance with section 25.1309(b) by estimating the probability of random system and equipment failures occurring on the airplane. The consequences of failures that are more probable must be shown to be relatively minor; failures with more serious consequences must be shown to have lower probabilities. However, in providing guidance for compliance with this requirement, Advisory Circular (AC) No. 25.1309–1A advises: ''In any system or subsystem, the failure of any single element, component or connection during any one flight * * * should be assumed, regardless of probability. Such single failures should not prevent continued safe flight and landing * * *.''

Applying this analytical method to the circumstances of this AD, if the failure of the floor beam is assumed, the consequences are likely to be catastrophic, preventing continued safe flight and landing. Therefore, under the analytical approaches of either section 25.1309(a) or (b), the operations with understrength floors without limitations is unacceptable.

During the reopened comment period, FedEx submitted a risk assessment from which it concluded that, even assuming the NPRM identified a potential unsafe condition, the probability of occurrence was sufficiently small (i.e., once every 300 years) so that AD action should be postponed until additional testing and analysis has been completed. Other commenters referenced this analysis and supported FedEx's conclusion.

The FAA has evaluated the risk assessment submitted to Rules Docket No. 97–NM–09–AD, and does not concur with the commenters' conclusion. Regarding the general relevance of the kind of risk assessment submitted by the commenter, it should be noted that the probability of the limit gust event has already been considered when establishing the gust intensities specified in CAR section 4b.211(b). CAR part 4b requires that all airplanes be capable of structurally withstanding a gust of the intensities specified therein, as such a gust is expected to occur at some time in the airplane's operating life.

Regarding the specific data presented in the FedEx risk assessment, the FAA does not concur with the assumption that extreme gusts will be encountered by a cargo carrying Boeing Model 727 airplane only once in 5 million flight hours. As its basis for this assumption, the commenter states that ''FAA data indicate that, in approximately 50 million flight-hours of experience among US domestic 727s, there have been five pilot reports of extreme gusts that exceeded federal thresholds for danger.'' The commenter states that this equates to a rate of occurrence of approximately once every 10 million flights. The commenter also states that due to potential errors, it would be conservative to double this rate to 10 total events, and use an estimate of 1 occurrence per 5 million hours.

The FAA does not concur with the commenter's statement that FAA data show that only five cases of extreme gust have been encountered by the U.S. 727 fleet. Turbulence events must be reported only if they result in detected airplane damage or passenger injuries. During certain gust events, the gust loads encountered in the cockpit are substantially less severe than those encountered in the aft portion of the airplane. Therefore, some large gust encounters may not ''feel'' very severe to the flight crew. As a result, the FAA recognizes that not all severe turbulence events are reported. Further, in the NPRM's, the FAA provided five cases of turbulence as examples, to illustrate that turbulence is a real occurrence, and not merely theoretical. These five examples were obtained from data showing 87 reported severe turbulence events, which resulted in passenger injuries, on the Boeing 727 from 1966 to March 1997. The FAA selected the five reports because the airplane operators had reported the magnitude of the turbulence event after obtaining this information from the flight data recorder. Operators are not required to obtain data regarding the magnitude of the turbulence event, and therefore it is rarely reported.

During the public meeting held on Thursday, February 19, 1998, the FAA explained that these turbulence cases were just examples and had been selected because the reports included information regarding event magnitude. The FAA further explained at that meeting that it was inappropriate to use these data in a probabilistic analysis. The commenter's risk assessment provides no information to change the FAA's views.

A section of the commenter's report states, ''Detailed equations that combine empirical evidence and physical theory estimate how frequently gusts of different magnitudes arise at different altitudes.'' The commenter states that its calculations indicate that gusts with intensities that equal or exceed 50 feet per second are encountered once per 50 million flight hours at 35,000 feet. The report does not provide the equations themselves, does not describe the methodology used to determine the 1 in 50 million flight hours probability value, and does not specifically identify the referenced source data. Therefore, the FAA cannot assess the validity of the commenter's conclusions.

The commenter also refers to graphs contained in a 1988 American Institute of Aeronautics and Astronautics (AIAA) publication by Frederic M. Hoblit that the commenter states indicate even lower encounter rates for gusts during climb and descent. The FAA has examined this publication, and does not concur with the commenter's statements regarding these data. First, the commenter appears to be incorrectly referencing the graphs, which represent continuous turbulence, and not discrete gusts, as provided in CAR 4b. The two types of atmospheric disturbances are different, and to reference these graphs is inappropriate. Secondly, the commenter's risk assessment only addresses gusts ''that exceed the Federal threshold'' (which the FAA infers to mean limit load gusts) in combination with cargo loads with two adjacent containers having a total weight that equals or exceeds 9,600 lbs. This approach is unconservative. As discussed in the NPRM, the cargo floor has a high negative margin of safety, and the risk of structural collapse exists at gust intensities well below the limit gust load when carrying currently allowed payloads above 9,600 lbs. The greater the weight being carried in the container, the lower the gust needed to cause catastrophic failure of the floor. The lower the gust intensity, the more common the gust occurrence becomes.

Based on the foregoing, the FAA has determined that the risk assessment submitted by FedEx does not provide a basis for delaying the final rule.

One group of commenters, identifying themselves as airmen for one of the affected operators, supports issuance of the final rule, as proposed. The commenters state that they do not have procedures to avoid clear air turbulence, and based on their knowledge, if any of them had encountered a similar wind condition to that experienced by a Boeing 747 in January 1998, their airplane would ''come apart, in-flight.''

The FAA concurs that there is no reliable means to forecast or to avoid clear air turbulence. The flight conditions encountered by the referenced 747 could be very hazardous to one of the affected airplanes if encountered while critically loaded with heavy containers.

Change in Applicable Standards

Several commenters state that the NPRM's reflect a radical change in the assumptions that certificate holders are permitted to use to substantiate the main deck floor structure. The FAA does not concur. As discussed below, the FAA's analysis is consistent with the applicable CAR part 4b standards, which became effective in 1953.

''Infinitesimal Probability''

One commenter states that the proposed AD would impose unnecessary costs which would then be passed to its customers, for what the FAA's Director of Aircraft Certification Service has stated is an ''infinitesimal probability of a safety related happening.'' The referenced comment is contained in an article in the April 15, 1997, issue of ''Commercial Aviation Report.''

From this comment, the FAA infers that the commenter believes the reference to ''infinitesimal probability'' belies the need for an AD. The commenter has taken the remark out of context. The actual quote is, ''What is the probability of it [catastrophe] happening in the next month? Infinitesimal.'' This remark was made in response to a question regarding why the FAA was issuing an NPRM rather than an emergency AD. The Director of

the Aircraft Certification Service was explaining that, although the FAA had determined that the unsafe condition must be addressed by issuance of an AD, the urgency of the issue was not so great as to preclude the normal legally required process of providing public notice and opportunity to comment.

Accident Data

One commenter states that the fact that no crashes have occurred with the affected airplanes has nothing whatsoever to do with these airplanes being of a safe design. They merely have had the good fortune to have not yet encountered a critical condition. The FAA concurs.

''Erroneous Certification''

One commenter states that it counted on the competence of the FAA when obtaining the affected airplanes, as the cargo modifications were FAA-approved. The commenter further states that the FAA's error in issuing these approvals is going to severely hurt small operators of these airplanes, who are neither culpable nor negligent. While the FAA understands that the impact of this AD may be significant for some operators, the FAA cannot ignore the fact that an unsafe condition exists that requires action to ensure the continued operational safety of the fleet. If the FAA had been aware of these deficiencies at the time of the original STC issuance, the FAA would not have issued the STC's.

One commenter points out that the FAA design review team observed that the original passenger floor beams had not been structurally reinforced, and that this fact is immediately apparent from the technical drawings associated with the STC. The commenter questions why the FAA has not expressed any concern or noticed these facts earlier.

The applicant for any design approval is responsible for compliance with all applicable FAA regulations. The FAA has the discretion to review or otherwise evaluate the applicant's compliance to the degree the FAA considers appropriate in the interest of safety. The normal certification process allows for the review and approval of data by FAA designees. Consequently, the FAA office responsible for the certification of an airplane or modification to an airplane or an aeronautical appliance may not review all details regarding compliance with the appropriate regulations. Also, the fact that the cargo floor structure was unmodified does not necessarily lead to the conclusion that the floors are structurally deficient. As explained in the NPRM, the understrength floors on certain 747 airplanes converted to freighters caused the FAA to question the adequacy of all STC-converted passenger-to-freighter cargo floor structures. This AD arises from this evaluation.

An FAA/Industry Team

Several commenters request that the FAA establish an industry team comprised of the FAA, STC holders, and operators before issuing an AD to establish the requirements and a corrective action plan to resolve the problems with the STC's in a logical manner. One commenter states that ''too much time has been spent going in different directions to resolve common problems for all STC's,'' and that ''the FAA has not been sufficiently clear in their requirements for the re-design.''

The FAA does not concur that issuance of the AD should be delayed. An unsafe condition has been identified, and the FAA must take action to ensure an acceptable level of safety of the affected fleet of airplanes. The STC holders and operators are certainly free to form an industry team to find common solutions, and the FAA is willing to participate in such efforts. The FAA also does not concur that the requirements for re-design are unclear; as the FAA has stated repeatedly, the standards for evaluating proposed corrective actions are the original certification basis for the airplane, CAR part 4b. Any non-compliance with CAR part 4b would have to be shown to provide an acceptable level of long-term safety.

FAA/Industry Communication

One commenter states that there has been ''virtually no opportunity for technical exchange'' and, therefore, the FAA should delay issuance of the final rule until such an exchange has taken place. The FAA does not concur. Since as early as November 1996, the STC holders have been made aware of the FAA's concerns regarding the cargo floor structure. More specifically, meetings were held with each of the affected STC holders in January 1997 to discuss further details regarding FAA concerns.

On February 14, 1997, the FAA again discussed its concerns with the affected industry and again requested that industry provide the FAA with valid data to address those FAA concerns. Subsequently, over the course of the next four months as the FAA prepared the NPRM's, only one STC holder provided any data relative to the merits of the proposed AD's, and that data did not alleviate the FAA's concerns. In response to the NPRM's first comment period, three of the affected STC holders did not submit technical data and, for reasons discussed below, the data submitted by the fourth STC holder (FedEx) did not alleviate the FAA's concerns. During the reopened comment period, the FAA engaged in further extensive discussion with the affected industry and those discussions continue in the context of on-going efforts to identify necessary actions to address the unsafe condition. Based on this history, the FAA considers that sufficient opportunity for technical exchange has been provided and that further delay is unwarranted and unnecessarily jeopardizes public safety.

Delay Issuance

Two commenters state that additional time is necessary so that the airplanes would be removed from service only once to incorporate all needed corrective actions (i.e., not only for the floors, but also for other problems identified in the NPRM) due to the high cost of incorporating partial solutions to the overall problem. One commenter requests that all problems associated with the STC's be identified, solutions provided, and methods for accomplishment of the solutions be agreed upon prior to the issuance of any AD. The FAA does not concur. In light of the seriousness of the unsafe condition, the FAA has determined that it would first address the strength of the cargo floor structure. All of the remaining issues will be addressed in future rulemaking efforts. Even though this AD addresses only the cargo floor structure, it should not inhibit industry from taking corrective action with regard to the remaining issues. In fact, in order to minimize the inefficiencies identified by the commenter, the FAA is committed to working with industry to identify as expeditiously as possible necessary corrective actions for all of the problems discussed in the NPRM.

The Cargo Airline Association (CAA) requests that the FAA not adopt an AD imposing interim limits. Since the CAA believes that the risk of a catastrophic failure is ''virtually nonexistent,'' and since several potential STC holders with varying solutions to issues raised are in the process of working with FAA, scarce resources should be devoted to ensuring expeditious approval of these proposals.

Another commenter requests that the FAA delay issuance of the final rules until industry solutions are approved [estimating an additional 60 to 90 days for Israel Aircraft Industries (IAI) to complete its analysis, as it has only recently had access to Boeing drawings]. The commenter also states that the FAA rulemaking process has caused industry

to make significant progress and aggressively pursue solutions that will likely meet with relatively prompt FAA approvals. The commenter also states that although these approvals will result in a 25 percent reduction in allowable payload, it is willing to operate with that limitation. This commenter, and several other commenters reference the FedEx risk assessment, which purports to demonstrate a low probability of catastrophic failure, as a basis for delaying the final rules.

Another commenter requests 4 to 6 months for completion of certain industry tests and risk analysis, as the 3-month timetable for the reopened comment period was not adequate, due to the highly complex and time-consuming nature of testing and evaluation procedures.

For the reasons discussed above under the heading ''Risk From Actual Operations,'' the FAA does not agree that the risk assessment submitted by FedEx warrants delaying this rulemaking. Furthermore, the FAA does not agree that correction of the unsafe condition can be assured within 60 to 90 days, or 4 to 6 months without this final rule. The STC holders and many operators have been aware of this issue since the fall of 1996. The FAA anticipates that, with the adoption of this AD, industry will continue recent significant progress in addressing these issues, which will result in timely implementation of appropriate corrective action.

Extension of Interim Operational Period

Several commenters state that the proposed 120-day interim allowances must have been determined to be safe by the FAA, with positive margins of safety. Therefore, the commenters request that the interim time limits be extended. Some of the commenters request that the extension coincide with regularly scheduled heavy maintenance. The CAA requests that the interim limits should be allowed to continue for however long it takes to modify the airplanes to bring them up to the original design limits. This commenter states that under normal operations, there is no risk of floor beam failure, and also states that the FedEx risk assessment shows that the likelihood of encountering conditions set forth in the NPRM are virtually nonexistent.

As discussed above under the heading ''Risk from Actual Operations,'' the FAA does not concur that the information provided in the FedEx risk assessment provides a basis for an extension of the interim period. However, for other reasons, the FAA concurs that the interim operational period can be extended.

In the NPRM, the FAA stated, ''because the determination of the effects of operational limitations on payload is based on approximations, the resulting payload limits may be unconservative.'' The 120-day interim limit was based on this potential unconservatism. Since issuance of the NPRM, the FAA has received data (Reports DFE–72701 and DFE–72702, submitted during the initial comment period as Appendices 5 and 6 to FedEx's comments to the NPRM) that partially confirm these approximations. In addition, although some progress has been made by industry in developing corrective actions, neither industry's proposal (as discussed in the NPRM) nor the FAA's expectations have been fulfilled. Based on current information regarding the status of various efforts to develop corrective actions, the FAA estimates that the entire affected fleet can incorporate corrective actions during scheduled heavy maintenance within 28 months after the effective date of this AD. In light of this new information, the FAA has reassessed the proposed interim period of 120 days and concluded that the period should be extended to 28 months. Therefore, the FAA has revised the final rule accordingly.

The FAA's decision to extend the interim limitations does not imply that the cargo floor structure has been determined by the FAA to be safe for an indefinite period, or in compliance with CAR part 4b requirements. As stated in the NPRM, the FAA's analysis considered only the most likely critical load case, and the proposed interim limitations were based on that analysis. The confirming data referenced above still does not address other potential critical load cases or all locations within the airplane. Nevertheless, in light of the balance of the safety and economic factors discussed above, the FAA considers that the level of safety provided by the interim limitations is adequate for the time period of 28 months. However, it is less than the level of safety provided by demonstrated compliance with CAR part 4b standards, and the FAA considers that compliance with those standards is a necessary objective to ensure the long term safety of the affected fleet. The balancing that the FAA has considered in establishing this interim compliance period is typical of the balancing that occurs in all AD's establishing interim requirements and is fully consistent with the FAA's obligation to consider economic impacts, such as those imposed by Executive Order 12866.

Increased Interim Payload Limits

Several commenters also request that, due to ''highly conservative'' methodologies used by FAA, the proposed interim weight limit should be expanded to allow an average maximum container weight of 6,000 lbs. The FAA does not concur that its methodologies are highly conservative. As discussed in the NPRM and in more detail below, the FAA's analytical methods are typical of industry practice, and the commenters have not demonstrated how these methods are highly conservative. The FAA has not been provided with any acceptable data to support the allowance for 6,000-lb. containers, except as discussed below under the heading ''Position-by-Position Limitations.''

A commenter requests that the FAA maximize the interim limits. The FAA concurs that the interim limits should be maximized to the extent that they are consistent with the necessity of addressing the unsafe condition. The FAA considers that the interim limits established in the final rule meet this objective; however, as discussed below, the FAA will continue to work to approve higher limitations, once their safety is substantiated.

Federal Express submitted report 98–026 ''Substantiation of Side Vertical Cargo Restraint Installation Using Static Test Results,'' Revision A, during the reopened comment period. FedEx states that this report ''proves conclusively that the side restraint installation is adequate to restrain the applied container loads due to vertical gust.'' The FAA concurs, and has changed the final rule (Rules Docket No. 97–NM–09–AD) applicable to the FedEx STC's to allow the higher interim limits with the FedEx side restraints installed.

Position-by-Position Limitations

The CAA requests that the FAA consider ''position-by-position'' limitations, which would establish individual weight limits for each container position on the airplane, based on the strength of the floor structure at that location. The CAA states that this would allow a higher total payload, while addressing the unsafe condition. The FAA concurs with the concept of position-by-position limitations, and will consider any such proposal when presented with supporting data.

For example, one commenter, Amerijet, has submitted a position-by-position proposal, which includes analysis providing for increased weights

for certain container positions relative to those determined by the FAA for the interim period. This proposal also contained lower limits for other container positions and presupposes the installation of sidelocks. The commenter stated at the April 2 public meeting that it intends to install vertical side restraints [sidelocks], but has not submitted any data to the FAA on a sidelock installation. The FAA has determined that this proposal would provide an acceptable level of safety for the 28-month interim period, when the affected airplanes are equipped with approved sidelocks. The commenter's proposal would not be acceptable to the FAA for indefinite operations, however, as the analysis did not consider other issues such as CAR part 4b emergency landing loads. The FAA will continue to work with the commenter, or any other interested parties, to refine these proposals so that they may be approved under paragraph (f) or (g) of the final rule.

FedEx also submitted a position-by-position proposal, which also contained both higher and lower limits as compared to the FAA's proposed interim limits. FedEx's proposal also is promising, however, its analysis is based on assumptions which the FAA has determined to be inaccurate, given the limitations of the weight and balance manual. For example, FedEx's assumption for the percentage of the load distributed to the sidelocks (40 percent) was derived from its ''Inverted Container Test.'' As discussed below under the heading ''FedEx's Tests,'' the FAA considers this assumption to be unconservative. The FAA also will continue to work with FedEx to refine its proposal, so that it may be approved under paragraph (f) or (g) of the final rule.

The CAA also submitted a finite element analysis (FEA) and, based on this analysis, requested that the final rule allow interim container payload limitations (regardless of whether sidelocks are installed) of approximately 3,500 lbs. in the most forward and aft positions, and 8,000 lbs. over the wing and wheel well. All other positions would be limited to 4,800 lbs. per container position with no sidelocks installed, and 5,000 lbs. with sidelocks installed. The CAA also requested that, after unspecified frame modifications are incorporated and sidelocks installed, interim limitations of 6,000 lbs. per container be allowed. Three other commenters submitted similar proposals.

As stated previously, the FAA is willing to work with commenters to establish interim limits other than those established in the final rule. However, the data submitted with the comment do not establish that the model used in CAA's FEA accurately represents the airplane. The CAA states that the model was made using the Boeing Structural Repair Manual (SRM) and various unspecified measurements of the airplane, but without access to the type design data that define the airplane configuration. It is, therefore, based on numerous assumptions regarding the configuration, which have not been validated. Furthermore, the model purports only to represent a 120-inch long section of the fuselage. The model does not account for the numerous fuselage cutouts for cargo and passenger doors, which affect the way the floor structure reacts to loads. Also, the model does not address the different structural design of the wing box or wheel well areas.

Even if it were assumed that the model is accurate for some airplanes, it is based on the cargo container locations used by FedEx, which are different from those of the other affected airplanes. The positions of the containers and locks determine the loads introduced into the floor beams. Therefore, using the FedEx container layout produces a result which, even if valid, would be only applicable to the FedEx airplanes. Based on the foregoing, the FAA does not consider that the model provides a sufficient basis for revising the interim limits.

Several commenters state that the FAA's findings of negative margins of safety are too conservative over the wing box and wheel well, as these areas are capable of supporting higher container payloads due to their stronger design. The FAA concurs partially. The FAA has determined that an unsafe condition exists by analyzing the basic floor structure rather than the much more complex wheel well or wing box structure. These areas are capable of supporting greater loads, but the commenters have submitted insufficient data to determine what loads may be safe in these areas.

However, the FAA has issued STC's which substantiate the wing box and wheel well areas for payload capabilities equivalent to the carriage of 6,000- to 10,000-lb. containers, depending on the individual airplane's structural capability, which has increased as the 727's type design has evolved. The FAA notes that, although no structural reinforcement was added to the wing box and wheel well for these STC's, limitations were sometimes imposed in consideration of the individual airplane's structural capability.

The FAA has considered the greater strength of the wing box and wheel well and has determined that an acceptable level of safety will be achieved by allowing a total payload of 12,000 lbs. for any two adjacent containers in this area, without other limitations, for the 28-month interim period. To eliminate potential ambiguity as to the containers to which this limitation applies, the final rule specifies that this alternative limitation applies to containers located completely or partially between body stations (BS) 740 to 950. However, the FAA does not consider that it is acceptable to allow combined payloads above 12,000 lbs. for this interim period, or to allow 12,000-lb. combined payloads indefinitely, because the FAA does not have the detailed information or resources necessary to determine the appropriate payload and operational limitations for all configurations of the affected airplanes. Operators who desire further increased loading in this area are invited to submit their requests and supporting data to the FAA in accordance with paragraph (f) or (g) of this AD.

Paragraph (a) of the NPRM did include a limited position-by-position proposal, in that it specified a reduced payload limitation in the area of the cargo door (BS 440 to BS 660). As with the wing box and wheel well area, to eliminate potential ambiguity as to the containers to which this limitation applies, the final rule specifies that this limitation applies to containers located completely or partially between BS 440 and BS 660.

Extension of Initial Compliance Time

One commenter states that the NPRM's will ''wreak havoc'' on the express industry and shipping public. The commenter states that it has no way of knowing when the effective date of the AD will be. The 48-hour implementation of the load limits will inevitably result in serious disruption to cargo already booked or in transit when the final AD's are issued. Several other commenters requested 120 days after AD issuance for interim limits to become effective, as this time was necessary to alter manuals, provide personnel training, and generally prepare for a significantly different loading procedure. The FAA concurs partially. The FAA has changed the final rule to extend the compliance time from 48 hours to 90 days. The AD becomes effective 35 days after the date of publication in the **Federal Register**. As requested by the commenters, this allows a total of 125 days for operators to make necessary changes to the FAA-

approved Airplane Flight Manual and cargo loading procedures.

All Container Types

Several commenters state that the proposed AD should address the use of all possible containers, pallets, and the intermixing of pallets and containers. Other commenters followed with similar statements about pallets, bulk loading, oversized cargo, and combi configurations (i.e., configurations with provisions for passenger seating and cargo on the main deck). One of the commenters requests that the wording of the proposed AD be changed to contain generalized wording that would address all container sizes, using a ratio of the length and width of other containers to the 88- by 125-inch container specified in the proposed AD as a means to determine the container payload limit. The commenter further states that this could help the implementation of the rule. The commenters request these changes to avoid the disruption that might result from having to obtain individual approvals for each of the types of containers.

The FAA concurs partially. In light of the administrative burden of approving individual container types, the FAA has reassessed this proposed requirement. The FAA recognizes that, except for half-size containers (discussed below), the FAA analysis used to establish the payload limits for containers measuring 88 by 125 inches also is applicable to any container within the same floor area. The reasons are that the analysis considered the effect of the container weight on the floor structure supporting the container, and that the differences in the stresses in the floor structure associated with the different container types are not sufficient to warrant different limits. Therefore, the FAA has revised the final rule to specify the same limitations for container size codes ''A,'' ''B,'' and ''C,'' as defined in National Aerospace Standard (NAS) 3610, which is the specification referenced in FAA's Technical Standard Order (TSO) C90c for cargo unit load devices (containers).

For half-size containers (i.e., size code ''D'' or ''E'' of NAS 3610, or the FedEx ''Demi'' container), the final rule specifies payload limits that are one-half those for other containers. Since these half-size containers are designed to be placed side-by-side across the fuselage, this separate limit is necessary to ensure proper load distribution within the area. It should be noted that paragraph (g) of the final rule allows operators to establish different container payload limits from those specified in the rule by substantiating that those limits provide an acceptable level of safety.

For oversize cargo, operators may apply for approval of alternative methods of compliance in accordance with paragraph (f) or (g) of the AD by proposing appropriate limitations for such cargo.

Service History

One commenter claims that, for the converted 727 freighters, ''successful flight history is direct evidence which supports [the commenter's] analysis showing the airplanes to be safe.'' The commenter references CAR sections 4b.202, 4b.270, and 4b.300 to show that service history is a reliable indicator ''to support or define a substantiation methodology.''

The FAA does not concur. The requirements of CAR part 4b that the commenter references are related to the determination of the fatigue strength of structure, where it is acceptable to utilize the service history of airplanes of similar structural design. However, the unsafe condition addressed in this AD is not related to fatigue, but is the result of the existing floor structure being significantly understrength. The only conclusion that can be drawn analytically from the accumulated flight history of the converted 727 freighters is that these airplanes have yet to encounter a sufficiently severe gust condition when critically loaded with an allowable payload configuration to cause failure of the floor structure.

Deflection of Floor Beams

One commenter states that the FAA did not provide a reasoned explanation of the NPRM claim that ''even if the floor beams of the main cargo deck only become deformed, the results could be catastrophic.'' The commenter compares this statement to McDonnell Douglas Report MDC–J5568, applicable to Model DC–10 series airplanes, which was approved by the FAA and showed significant and permanent deformation of the wing.

From this comment, the FAA infers that the commenter believes that, if the wing can bend safely and even deform permanently when it has cables/fuel lines, etc., passing through the structure, then the floor beams also must be capable of safely deforming or bending.

The FAA does not concur. The NPRM states why deformation of the floor beams could be catastrophic. For the ''up'' load case analyzed by the FAA, which consisted of ''up'' loads applied to the containers due to a down gust on the airplane, the floor beams common to the forward and aft locks of a container bend upward due to the applied upward load. The adjacent floor beams underneath the containers that are not attached to the container do not bend. If this deflection relative to the adjacent floor beams is excessive, this could result in the bending and stretching of all control cables and fuel lines passing through the floor beams. Such bending and stretching could result in uncommanded flight control inputs at a critical time when the airplane is subject to severe gust conditions. In addition, the fuel lines located in the floor beams are not designed to flex in the same manner as fuel lines located in the wing structure of an airplane and, therefore, may crack, bend, or rupture.

The occurrence of either an uncommanded flight control input during critical flight conditions or the rupture of a fuel line can be catastrophic. The McDonnell Douglas report referenced by the commenter is not applicable to the floor beam deflections of a 727 converted freighter since the fuel lines and control cables located in the wing of Model DC–10 series airplanes are specifically designed to accommodate large wing deflections and are in compliance with the applicable regulations.

Safety Factor

One commenter states that the use of a safety factor as small as 1.5 presupposes very accurate analysis, knowledge of loads and material properties, and sound engineering practices. Structure with negative margins of safety of -0.63 clearly indicates that some or all of these suppositions have not been achieved. In addition, some operating conditions, such as gusts, are beyond human control. The safety factor of 1.5, as required by CAR part 4b, is necessary to maintain the safety of the airplanes. The FAA concurs with the commenter, but notes that the finding of unsafe condition in this AD is based on the FAA's determination that the risk of catastrophic failure of the understrength floor structure is unacceptably high, rather than on a simple finding of non-compliance with CAR part 4b.

Fore and Aft Center of Gravity Shifts

Several commenters objected to the FAA's analytical use of the trapezoidal method for evaluating shifts in the center of gravity (cg) within a container. One commenter, FedEx, states that the FAA's use of the trapezoidal shift results in impracticable—if not impossible—circumstances that exceed the requirements of CAR section 4b.210.

In order to gain a better understanding of this and other FedEx comments, the FAA met with FedEx on September 19,

1997, having first provided FedEx with a series of questions to be discussed at the meeting. (The minutes of this meeting are included in Rules Docket No. 97–NM–09–AD.) At this meeting, FedEx reported that it had only recently obtained a scale that would allow it, for the first time, to determine the actual locations of the cg's inside its containers. FedEx stated that it had weighed and determined the cg location on a sampling of 1,500 containers, but did not provide any data to the FAA at the meeting. In any case, the FAA does not consider it appropriate to evaluate only an operator's average container payload when establishing the safety of the affected airplanes. The unsafe condition determined by the FAA's analysis is based on the payload weight and distribution with which these airplanes are currently allowed to operate.

In addition, in a letter dated November 4, 1997, to the FAA (a copy of which has been placed in Rules Docket No. 97–NM–09–AD), FedEx states that ''A review of container weights, quadrant weights, and cg's for the 'SAA' (88- by 125-inch) container finds no containers in the 4,000 to 8,000 lb. range with a cg offset greater than 8.67%.'' However, FedEx did not provide data (e.g., the numbers and types of containers reviewed; the percentage of cg shift for different container weights) to substantiate the value of 8.67 percent. Therefore, the FAA is unable to determine the significance of this comment.

FedEx states that it chose to use a ''stair step'' or ''box'' method to evaluate the effects of cg shifts within a container. FedEx also states that the FAA rejected this method for use on the 727 converted freighters without a reasoned explanation.

The FAA does not concur with the comments regarding the FAA's methodology. As stated in the NPRM, the large negative margins of safety calculated using the FAA's analysis included consideration of the effect of a horizontal cg shift of 10 percent within the container (e.g., 8.8 inches from the geometric center of the base of the container for the forward and aft direction). Shifts in cg are particularly important in considering the ''up'' load case because the container loads are applied primarily to the floor beams at the forward and aft edges of the container where the container locks are located. The effect of the cg shift is to increase the loading on the beam in the direction of the cg shift. For example, if the cg is shifted aft, the applied loads will be increased on the floor beam located at the aft edge of the container.

In analyzing the effects of forward or aft cg shifts, the FAA employed a ''trapezoidal method.'' The trapezoidal method is well accepted and used by both Type Certificate (TC) and STC holders. The trapezoidal method is analogous to shifting sand in a box. With no cg shift, the weight of the cargo is uniformly distributed across the base of the container. As the cg is shifted, the load or ''sand'' is taken from one side and applied to the other side. This results in a sloping load distribution, with a load ''peak'' on one end of the container, and a load ''valley'' on the other end. Another acceptable method for considering forward or aft cg shifts is the ''box'' or ''stair step'' method. In this method, rather than sloping, the load ''steps'' up from a low level on one end, to a high level on the other.

The FAA does not concur that the trapezoidal shift used in the FAA's analysis exceeds the requirements of CAR section 4b.210. For ''up'' loads on the container, and a forward or aft cg shift (which the FAA has identified as the most likely critical case), if the airplane is not equipped with side vertical restraints (sidelocks), the results of the loads analysis are the same regardless of whether the stair step or trapezoidal method is used. Since all loads are carried by the floor beams that support the forward and aft container locks, the loads on the beams will be identical for any method that shifts the cg a particular percentage within the container. It is the percentage of cg shift that is important, not how that cg shift was achieved. This represents the majority of the airplanes affected by these four AD's. For those airplanes equipped with sidelocks, there is a maximum difference of 14 percent in the two methods for ''up'' loads, at the ''peak'' of the trapezoid. In consideration of the varying locations of sidelocks and the manner in which loads are actually distributed among all locks, this difference does not significantly affect the FAA's analysis or alter the finding of the unsafe condition.

The FAA considered 10 percent as the appropriate amount to shift the cg within the container, as it is realistic and typical of cg shift limitations contained in operator weight and balance manuals. Consideration of a 10 percent cg shift also represents an industry standard as evidenced by NAS 3610 (contained in the Rules Dockets). The vast majority of containers used by operators comply with this standard. FedEx has not provided any data that indicate that a 10 percent cg shift is unreasonable, or that show that the FAA's use of a trapezoidal shift is unrealistic. The data that FedEx provided (average container densities ranging from 7 to 18 lb./cubic foot) concern only the average weight of a container used in its operations and assumes the weight to be equally distributed throughout the container.

FedEx also states that the trapezoidal method results in load distributions that greatly exceed the 90 lb./inch ''running load'' (freight payload per inch of airplane floor length) limitation specified in the FedEx weight and balance manual. FedEx states that the trapezoidal shift method will result in possible freight densities of 40 lb./cubic foot in approximately 1/4 of the container volume. FedEx states that this equates to an average value of over 200 lb./inch running load in this area of the container. FedEx reports that its daily average operational load density is approximately 7 to 7.5 lb./cubic foot, and on rare occasions may have reached the 18 lb./cubic foot range; therefore, the FAA's analysis bears no relationship to operational reality. (An average density of 18 lb./cubic foot over the entire volume for the full-size FedEx container equates approximately to a 7,920-lb. container, or about 90 lb./inch running load.)

The FAA acknowledges that, in its analysis described in the NPRM, it was not constrained by the 90 lb./running inch limitation specified in the FedEx weight and balance manual. However, the FAA does not concur that this results in inaccurate weight limits. The FAA notes that, for a FedEx container at the maximum permitted payload of 8,000 lbs., the running load limit is exceeded even with no shift in the container cg (88-inch container width times 90 lbs. per inch equals 7,920 lbs.). For any forward/aft cg shift within the container, using either the trapezoidal or ''box'' method, the degree to which the limit is exceeded increases in direct relation to the magnitude of the cg shift.

In addition, the FAA reviewed FedEx's loading procedures during a visit to its flight line at Sea-Tac International Airport, Seattle, Washington, on February 5, 1997. During this review, the FAA became aware that FedEx neither determines the actual cg location of the cargo within each container nor has the necessary equipment at all of its loading facilities to determine that it is operating within the cg and running load limitations of its weight and balance manual.

Based on other comments received in response to the NPRM, it appears that FedEx's practice is not unusual even though it is inconsistent with its weight and balance manuals. In light of the fact that, to the FAA's knowledge, no operators are measuring the cg's for all

containers, and that a recent sampling accomplished by FedEx shows cg shifts as high as 8.67 percent, the FAA concludes that use of 10 percent cg shift in its analysis is not only an appropriate reflection of industry cargo loading practice, but may actually be unconservative.

Finally, the FAA does not concur that it has rejected the use of the ''box'' method proposed by FedEx. FedEx did not consider a cg shift effect in the original substantiation documentation for its original STC design, but later proposed to employ a ''box'' method used by McDonnell Douglas for the certification of a DC–10 freighter (submitted by FedEx as a comment during the first comment period in Appendix 2, Report 97–028, Revision I/R, dated April 1, 1997). After review of this method, the FAA accepted it in a meeting with FedEx on April 29, 1997. The basis for this acceptance is that it provides an acceptable level of conservatism in the absence of more rational data to predict the cg within a container. As discussed above, the use of the ''box'' method does not significantly affect the FAA's analysis or alter its finding of an unsafe condition.

FAA's Methodology

Boeing states that the FAA's analysis is similar to that used by Boeing for initial certification of Model 727 series airplanes. However, Boeing also states that while the analysis is conventional, some of the assumptions made are not typical of industry practice for the floor beam analysis and are conservative relative to the original certification practice of Boeing, with respect to trapezoidal loading and credit for pressurization. Boeing states that, when it evaluates cg offsets in containers, it uses the stepped rectangular or ''box'' method to determine cg shifts.

The FAA concurs partially. As explained previously, the trapezoidal loading assumption is nominally more conservative than the stepped rectangular or ''box method.'' For the ''up'' load case, this nominal difference only affects those airplanes with sidelocks. In any case, this difference does not significantly affect the FAA's analysis or alter its finding of an unsafe condition.

The FAA does not concur that its analysis is inappropriately conservative because it considered zero fuselage pressurization. Fuselage pressurization tends to provide an increase in floor beam load carrying capability because the pressurized fuselage, to which the ends of the floor beams are attached, pulls outward on the ends of the floor beams, which makes the floor beams act stiffer. Severe gust conditions, such as microbursts, may be encountered at low altitudes when the fuselage is not pressurized; therefore, it is realistic to consider those conditions. Even with credit for fuselage pressurization, the FAA's conclusion would be unchanged because the pressurization effects do not significantly affect the substantial negative margins of safety found as a result of the analysis. Furthermore, CAR section 4b.216(c)(1) requires that ''The airplane structure shall have sufficient strength to withstand the flight loads combined with pressure differential loads from zero up to the maximum relief valve setting.''

Another commenter, FedEx, states that the FAA's analytical techniques are too conservative and, therefore, result in artificially low payload numbers (container weights) for the 727 converted freighters. The FAA does not concur. The FAA reviewed the substantiating data submitted for the original certification of FedEx's 727 freighter conversion STC and found that this data package lacked any stress analysis substantiating the floor structure. Lacking this data, the FAA reviewed the analytical methods used by others in industry. The FAA determined that other industry analytical methods for cargo systems used conservative overlapping assumptions to ensure that the design resulted in a safe product that complied with CAR part 4b. The FAA's decision to use these methods to perform an analysis of the floor structure of the affected 727 converted freighters is consistent with industry standard practices.

One commenter expresses concern over the methods utilized in the structural substantiation of floor beam loads in the documentation contained in these Rule Dockets, although the commenter did not identify a basis for the concern. The commenter states that over the course of the last two decades it has developed stringent methods for accurately predicting cargo induced loads in airplane structure. The commenter requests that the FAA consider these methods in performing its evaluations. The commenter submitted data regarding its analytical methodology used in development of numerous STC approvals of cargo handling systems.

The FAA has reviewed the commenter's methods and considers that this methodology utilized conservative, overlapping assumptions to ''bracket'' unknown variables and utilized a trapezoidal distribution of cargo in defining its cg offsets. The FAA agrees that these are appropriate methods for determining loads for cargo floor structure and are consistent with those employed by the FAA. These methods result in conclusions that are consistent with the FAA's findings that the floor structure addressed by these AD's presents an unsafe condition. Further, the FAA notes that these conclusions are consistent with those derived from other methods commonly used in industry.

Boeing addresses the statement in the FAA's analysis of the floor beam allowables (contained in the Rules Dockets) that the analysis is ''partial'' and ''unconservative.'' Boeing states that, for the ''down'' load case (i.e., ''down'' loads applied to the container), the FAA's analysis is sufficiently conservative for the following reasons: (1) The critical section selected for analysis reflects the worst case hole-out situation; (2) all significant [down] load cases were dealt with; (3) the critical section analyzed would have no degradation of [safety] margins because of secondary bending effects; and (4) the critical section analyzed has no shear on it by first principles and, therefore, any shear interaction effects should be small.

The FAA concurs with the commenter's statement; however, the FAA notes that this statement was carefully limited to apply to ''the down load case being considered'' and does not address all load cases, the actual strength of the floor, or the floor beam as a whole.

The FAA does not concur that the commenter's statement is valid for all load cases and all floor beam structure. The FAA's statement that the analysis is ''partial'' and ''unconservative'' relates to the fact that there are many floor beams, several with differing applied loads, load carrying capabilities, and critical cross-sections. As a result, the FAA's analysis could not be considered complete (therefore partial), nor could the FAA state that it had accounted for all effects, which may result in yet higher stress levels and larger negative margins of safety (therefore unconservative).

One commenter states that the standard being pursued by the FAA for the converted 727 freighter includes all known theoretical possibilities, plus an additional safety factor of indeterminate size. The commenter refers to a statement in the NPRM that ''* * * airplanes may encounter severe turbulence that exerts wind gust forces beyond the critical case forces of CAR part 4b * * *'' as implying that the FAA is imposing standards beyond that of CAR part 4b.

The FAA does not concur. The FAA's analysis of the converted 727 freighter floor beams was accomplished using the standards identified in CAR part 4b. No new standard is being applied to these airplanes. The commenter has taken the NPRM statement out of context. The FAA's reference to gusts that exceed CAR part 4b critical load cases is in a portion of the NPRM that addresses the basis for the retention of the 1.5 factor of safety, which is required by CAR section 4b.200(a). This factor is used to protect the airplane from failure when experiencing limit load, the highest expected actual in-flight loading, and other unknown situations.

As stated in the NPRM, interested parties had requested that the FAA eliminate the safety factor during preparation of the NPRM, which would allow higher payloads. The statement that the commenter characterizes as implying ''new standards,'' and a safety factor of ''indeterminate size,'' was simply a discussion of the existing level of safety established by the CAR part 4b standards (this airplane was originally certificated to those standards over 30 years ago).

One commenter quotes from CAR section 4b.210 that the analysis must be conducted using ''any practicable distribution of disposable loads.'' The commenter states that the loading scenarios the FAA uses are much higher than the maximum [loading] experienced in actual service. Several other commenters characterize the FAA's assumptions and analysis as ''ultra conservative.''

The commenters appear to have misinterpreted the referenced CAR section 4b.210. The word ''practicable,'' which means possible to put into practice, appears to be read as ''practical.'' Subpart C of CAR part 4b requires that analysis be conducted for conditions (e.g., critical altitude, critical load, or maximum/minimum weight) that are possible; Subpart C is not restricted to normal, average, or practical conditions. Designing airplanes to withstand only average loads would result in a greater potential for catastrophic failures whenever those loads are exceeded.

Boeing Data

FedEx states that none of Boeing's analysis for the affected 727 airplanes provides any baseline for comparison of the unit load device (ULD) cg shifts, container load distribution, or other key methodologies. The FAA does not concur. As a check to verify that its analysis was generally correct, the FAA examined some of the type certification data that Boeing had submitted prior to certification of 727 passenger and freighter airplanes. The Boeing data verified the FAA's analysis in the following two significant respects:

1. Boeing's stress analysis that established allowable floor beam strength for the passenger version was entirely consistent with the FAA's stress analysis; and

2. Boeing's loads analysis for the freighter version, while using a different methodology from that used by the FAA, would result in substantial negative margins of safety for passenger floor structure when carrying 8,000-lb. containers.

In accordance with CAR part 4b, Boeing's analysis of the 727 freighter considered all aspects of cargo loading, including cg offsets, load distribution, and multiple other facets. It should be noted that Boeing found it necessary to substantially strengthen the floor structure for its freighter version in order to carry the same payloads currently allowed by the subject STC's and remain in full compliance with CAR part 4b.

FedEx's Analysis

In support of its position that there is no unsafe condition, FedEx states that it has used a rational, conservative analytical approach for determining that the cargo floor structure is safe, which has not been accepted by the FAA. Specifically, FedEx references individual floor beam analysis and tests conducted with combinations of loads, offsets, container positioning, airplane weight, and flight maneuvers that create conditions exceeding any that statistically will occur.

The FAA does not concur. Except for the lateral floor beams over the 80-inch long wheel well area, which is discussed below under the heading ''Data Showing Floors to be Safe,'' FedEx has not yet submitted a complete analysis of the floor structure, or of a single floor beam. The tests that have been run to date are of limited relevance as discussed under the heading ''FedEx's Tests.'' Further, as discussed previously, the FAA also does not concur that the unsafe condition is so improbable that it should not be addressed.

FedEx states that the statement in the NPRM that the FAA used commonly accepted analytical methods in its structural analysis is misleading because it fails to address other ''commonly accepted analytical methods.'' In particular, FedEx references the FAA's use of a pinned end column fixity coefficient (''c'') of 1.0, and in contrast points out that a ''c'' of 2.58 is used in an example problem contained in ''Analysis and Design of Flight Vehicle Structures'' by E.F. Bruhn. FedEx considers this example problem to be analogous to a floor beam lower cap analysis. FedEx states that other alternative analytical methods (such as Bruhn) result in a significant increase in allowable loads for the floor beams (therefore potentially higher allowable container weights), but these methods have been rejected by the FAA as inapplicable to the converted 727 freighters, even though they have been accepted previously by the FAA on other certification efforts.

The FAA does not concur. The selection of this coefficient can have a significant effect on the determination of the allowable payloads. A low column fixity coefficient of 1.0 means that the ends of the beam are ''pinned'' (i.e., free to rotate or move like a hinge). A column fixity coefficient of 4.0 means that the ends of the beam are fully ''fixed'' (i.e., unable to rotate or move for any applied load). The FAA's analysis uses a ''pin end coefficient'' because it represents the airplane structure. As stated previously, the FAA's analysis considered the ''up'' load case to be the most likely critical case. For this load case, the lower horizontal member or ''chord'' of the ''I'' shaped floor beam will be in compression and, therefore, will behave in the same manner as a column under compression. It will be free to rotate or move like a hinge, not fixed as a higher fixity coefficient would suggest.

FedEx's proposed ''c'' coefficient of 2.58 does not appear in any of its analysis in support of its comments to the NPRM. At the September 19 meeting, FedEx stated that it did not use the 2.58 value in any of its analyses submitted in its comments. FedEx also stated at the meeting that the 2.58 value was merely an illustration of a fixity coefficient that could be found in the Bruhn handbook for a similar problem. Nevertheless, FedEx maintained at that meeting that it estimates the true value of ''c'' is in excess of 1.2, and may be as high as 2.58, although FedEx did not provide any data to the FAA to show that a ''c'' of 2.58 would be representative of the structure.

In addition, in FedEx's analysis submitted to the NPRM, FedEx used a ''c'' value of 1.2. (Document 97–021, initial release, dated February 28, 1997, submitted to the NPRM (Rules Docket No. 97–NM–09–AD) as Appendix 1 during the first comment period). However, in a later version of the same document, FedEx also used a ''c'' coefficient of 1.01 (Document 97–021, dated March 24, 1997, but designated as the initial release of the document, as

well), submitted to the FAA for review on April 7, 1997. The FAA has determined that there is essentially no difference between 1.00 and 1.01 for a column end fixity coefficient. Therefore, the FAA concludes that the more recent data submitted by FedEx is consistent with the value of 1.0 for the column fixity coefficient used in the FAA's analysis.

FedEx states that it has submitted reports to the Seattle Aircraft Certification Office (ACO) that employ assumptions that were used by Douglas Aircraft Company and were accepted by the Los Angeles ACO for the original certification of the Model DC–10 airplane. FedEx also states that the Los Angeles ACO's earlier approval of the assumptions used in the Model DC–10 analysis affirms that it is using an appropriate method to substantiate the integrity of its converted 727 freighters. FedEx states that the FAA has not explained how the methodology can be accepted by the Los Angeles ACO and not accepted by the Seattle ACO.

The FAA acknowledges that use of the particular assumption(s) referenced in the DC–10 analysis, if applicable to FedEx's 727 analysis, may allow higher container weights than those specified in the proposed AD.

The FAA does not concur with the commenter's statements. For many certification projects, it has been acceptable to use a particular assumption which may not be conservative, provided that there are other quantifiable assumptions used which account for the lack of conservatism and result in the overall design being conservative and in compliance with CAR part 4b. Therefore, an unconservative assumption used as part of a particular approved methodology is not equally acceptable for another methodology without ensuring that the lack of conservatism is accounted for elsewhere in the methodology and that the overall design is conservative.

At the July 24, 1997, meeting with FedEx, an FAA representative from the Los Angeles ACO stated that it was the responsibility of FedEx to demonstrate that the analytical assumptions and methodologies used on the DC–10 were conservative for the Boeing 727. To date, FedEx has not made that demonstration. During the September 19 meeting with FedEx, the FAA asked FedEx if it had used the entire analytical methodology that was used for the DC–10. FedEx replied that it had not. Therefore, the FAA does not agree that the two ACO's have been inconsistent.

FedEx states that neither it nor the FAA has a complete, accurate model which objectively demonstrates the actual performance of the vast array of the TSO and STC ULD's in any one of the hundreds of individual airplane cargo positions and latch configurations of in-service airplanes. The FAA concurs that there is no accurate model which demonstrates the actual loads input into the structure of the 727 converted freighters for the myriad of possible configurations. However, an analysis using conservative overlapping (or enveloping) assumptions can be performed to show the design is safe for the proposed usage and is in compliance with CAR section 4b.200(c). This approach has been successfully used by aerospace companies for many years and is acceptable to the FAA.

FedEx's Tests

FedEx states that three tests (descriptions follow) indicate that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits of the weight and balance manual.

1. *Inverted Container Test.* FedEx states that it has conducted an inverted container test that demonstrates that its existing sidelocks are effective in carrying 35 to 40 percent of the container load. The test report is contained in Appendix 9 (Report 97–048, Revision I/R, dated May 5, 1997) of FedEx's comments to the NPRM (Rules Docket No. 97–NM–09–AD) during the initial comment period. FedEx also states that these results show that the FAA's estimation that the sidelocks carry 20 percent of the container load is far too conservative.

The FAA infers that FedEx considers that the FAA's estimation that 20 percent of the total container load is carried by all sidelocks (10 percent per side) is conservatively low since this results in 80 percent of the total load being carried by the locks attached to the main deck floor beams. Because FedEx's inverted container test showed that 35 to 40 percent of the container load was carried by the sidelocks (approximately 20 percent per side), 60 to 65 percent of the total load would be carried by the locks attached to the main deck floor beams.

FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits. The FAA does not concur that FedEx's testing has shown that sidelocks are 35 to 40 percent effective because the testing does not address all container types, cg shifts, and all container positions on the airplane. The FAA estimated that the sidelocks are 20 percent effective based on current industry methods, as used in TC and STC programs. To date, industry, with the exception of this test by FedEx, has little or no data showing the exact distributions of actual sidelock load percentages. Therefore, enveloping assumptions and/or conservative analytical methodologies have been consistently used by various manufacturers to show compliance with CAR sections 4b.200(c), 4b.210, and 4b.359, to which these STC's also were certified. This approach has previously obviated the need to determine the exact load distributions to each lock for the various container types used by operators.

Several commenters point out that there is a vast array of different types of containers and other ULD's used by the affected operators. This includes a wide range of construction, shapes, and materials. Some ULD's look like boxes; others look like flat pallets or ''cookie sheets.'' These differences significantly affect the distribution of loads to all locks when subjected to ''up'' loads on the container. Although FedEx's airplanes that have been modified in accordance with the affected STC's predominantly haul the full-size or ''SAA'' container, and the half-size or ''Demi'' container, FedEx reported at the September 19 meeting with the FAA that its modified 727's haul other kinds of containers, such as flat pallets, when necessary.

For these reasons, the FAA's analysis used to determine the maximum safe payload limits for operations must conservatively account for any of the currently permitted container types.

CAR section 4b.359 requires that ''each cargo and baggage compartment be designed for the placarded maximum weight of contents and the critical load at the appropriate maximum load factors corresponding to all specified flight * * * conditions * * *.'' CAR section 4b.210 requires that ''flight load requirements shall be complied with * * * at all weights from the design minimum weight to the maximum weight appropriate to each particular flight condition, with any practicable distribution of disposable load (mass load) within the prescribed operating limitations stated in the Airplane Flight Manual.'' CAR section 4b.200(c) requires that ''all loads [force loads] shall be distributed in a manner closely approximating, or conservatively representing actual conditions.''

Therefore, in order to show compliance with the applicable regulations, either the distribution of the container loads to latches used to analyze the floor beam structure must be accurately determined for all container

types used, or conservative assumptions must be used considering all practicable distribution of cargo loads. Finally, the floor structure must be strong enough to carry the maximum weight at the critical cargo load distribution at the appropriate maximum applied loads.

As stated previously, the FAA's analysis in the NPRM's identifies one of several possible critical load cases—that of a large gust pushing the airplane down, which causes ''up'' loads on two adjacent containers. On all of the affected STC's, adjacent containers share the same set of container locks at the forward and aft edges, and these locks are attached to the floor structure. This condition results in the loads for both containers being concentrated on isolated floor beam(s) at the location of the locks.

A ''typical'' full-size (88- by 125-inch) container is an enclosed box with two sides curved to match the rounded contour of the airplane fuselage, a fully or partially removable front side (i.e., a door), and a fixed or rigid back wall. Because of the design of a typical container, the back wall tends to carry the majority of the load (the curved sides and removable front are not as effective in supporting an ''up'' load as the rigid back wall). A different type of ULD, a flat pallet, with netting to restrain the cargo, distributes the loads to the container locks very differently than the 88- by 125-inch container. The net tends to distribute the load more uniformly around the pallet edges.

The rational basis for the FAA's analysis is illustrated by the following two examples of container/ULD arrangements that result in load distributions to the floor beams which approach or exceed the 80 percent estimate used by the FAA (i.e., the converse of the estimate that 20 percent of the load is carried by the sidelocks). These two examples assume maximum allowable ULD payloads of 8,000 lbs. using configurations that are permitted for all of these STC's.

Example 1: Back-to-Back Containers. Based on the data from FedEx's inverted container test with an ''SAA'' container facing (door side) forward, 43 percent of the total load was carried by the locks on the back side of the container. If two containers of equal weight are placed back to back, the equivalent of 86 percent of the total load of one container would be placed on the floor beam(s) at the interface (43 percent plus 43 percent).

Example 2: Container and Flat Pallet. Using the test data for the inverted container test, 43 percent of the load would be carried by the back wall. A flat pallet (''cookie sheet'') placed just aft of this container in a cargo position, which has four sidelocks on each side, will place approximately 28 percent of the total load on the front side of the ''cookie sheet'' [as discussed previously, the net on the flat pallet tends to distribute the load equally to all sides of the sheet, and since there are five locks each on the floor beam(s) supporting the front and back side of the sheet, and four on each side, 5/18 (or 28 percent of the total load) will be on the front side]. This results in a total of 71 percent (43 percent plus 28 percent) of the maximum ULD payload, being placed on the floor beam(s) between these two ULD's.

These two examples of the many possible loading configurations illustrate the reasonableness of the FAA's estimation that 80 percent of the maximum allowable container payload could be concentrated on the floor beam(s) at the interface between two adjacent containers.

In addition, the FAA has other concerns with FedEx's inverted container test. First, the effects of a critical cg shift within the container were not tested. As tested by FedEx, the back wall of the container carried 43 percent of the load with a zero percent cg shift (i.e., the cg of the container was at its geometric center). As discussed previously, this is impractical to achieve in actual operations. If the cg had been shifted towards the back wall of the container, the load at the back wall of the container would have been higher than the 43 percent noted previously.

It should be noted that the FedEx test plan submitted to the FAA in May 1997 (Appendix 4 of FedEx's comment to Rules Docket No. 97–NM–09–AD submitted during the initial comment period; Document 97–034, dated May 6, 1997) listed aft cg shift load cases on page 9 of that plan. However, these critical load cases were not tested because the actual test (described in Appendix 9) had taken place in accordance with an earlier test plan, Document 97–023 (which is referenced in Appendix 9). This was confirmed by FedEx at the September 19 meeting.

A second concern with the FedEx inverted container test is that the container was tested in a fixture in which the lock locations were representative of only one cargo position on the airplane. There are typically a maximum of 8 to 12 containers that may be carried on the main deck, depending on the configuration of the airplane. Sidelocks are evenly spaced along the fuselage, and different cargo container positions result in either four or five sidelocks along the container side edges. For these reasons, a variety of locations should be tested to determine the critical load case for the floor beams.

A third concern is that FedEx tested cargo position 5 on the 727–200 with the door of the container on the aft side of the cargo position. This orientation is opposite of how FedEx reports that the ''SAA'' containers are usually placed in its airplanes. This orientation of the container in the test fixture resulted in a sidelock being within 4 inches of the back wall of the container. The distance from the front wall of the container to the nearest sidelock was 23.5 inches. Due to this large distance, or ''overhang,'' and the flexibility of the ''SAA'' container, the nearest sidelock to the front wall on each side of the container together carried 32 percent of the total test load. If the container had been placed in the fixture with the door on the front side of the cargo position, such that the back wall of the container had a 23.5-inch ''overhang,'' or was in one of the several other cargo positions possible which have greater than a 4-inch ''overhang'' to the backwall of the container, the loads on the container back wall (which are carried by the floor beams) would have been significantly higher.

Finally, it is important to note that FedEx has provided no analysis of the floor beam structure showing that the large negative margins of safety are resolved based on its assertion that 35 to 40 percent of the container load is distributed to the sidelocks. The load distribution is only part of the answer; the load distribution must be used in a stress analysis to develop data identifying stresses in the structural members.

The FAA concurs that, in principal, testing of containers using a fixture such as that used by FedEx, if it represents the most adverse case of ''overhang'' for the back wall for all applicable cargo positions, and if it shifts the container cg to the most adverse position, will produce conservative results for the latches common to the floor beams, for the container type tested. The results will be conservative because of the flexibility of the floor beams, relative to the stiff behavior of the test fixture. The degree of conservatism is unknown to the FAA and has not been demonstrated by FedEx.

FedEx, in its test, did not consider all practicable load distributions nor establish the critical case considering an adverse aft cg shift and sidelock location. FedEx tested only those containers or ULD's that it predominantly uses, but not all the types that it actually uses in service; therefore, it is impossible to draw broad conclusions about the behavior of many different container types, applicable to all cargo positions, or the degree of conservatism introduced by floor beam flexibility from its limited testing.

Therefore, the FAA concludes that the 35 to 40 percent distribution of the ''up'' load to the sidelocks used by FedEx is artificially high. The FAA does not concur that the data ''Container Test,'' documented in Appendix 9, demonstrate that the commenter's existing sidelocks, in general, are effective in reacting 35 to 40 percent of the container load, or that the tests ''indicate that the floor structure of the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits.'' The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect.

2. *Single ''I'' Beam Test.* FedEx states that it performed a floor beam test on a conservative representation of an unmodified passenger floor beam. This test is documented in Appendix 8 of FedEx's submittal to Rules Docket No. 97–NM–09–AD (FedEx Engineering Report 97–049, Revision I/R, dated August 15, 1997), and the additional data is contained in Appendices 10 (FedEx Floor Beam Test, Wyle Lab) and 11 (FedEx Floor Beam Test Videotapes).

FedEx also states that this test showed a lower floor beam chord compression allowable in excess of 60 ksi (60,000 lbs. per square inch) just prior to failure of the floor beam. FedEx states that this value controverts the FAA's calculation of 40.6 ksi in the FAA's analysis. In addition, FedEx states that the floor beam was tested in a fixture designed to replicate the airplane floor support structure, and that the test results are conservative due to the interaction of other floor beams, seat tracks, and floor panels in the airplane; the benefits of which were not addressed during this test. FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with CAR part 4b when supporting existing weight limits.

The FAA does not concur that FedEx's measurement of 60 ksi compressive stress is relevant to the actual strength of the floor beam. In the FedEx test, the 60 ksi measurement was taken just before the floor beam fractured in tension (i.e., stretching of the floor beam to the point of failure). The FAA considers that the critical failure mode (i.e., the failure mode that would cause collapse of the floor structure in actual operation) is buckling of the floor beam. Buckling occurs when the floor beam warps or twists under applied loads. As discussed below, the test data indicate that the actual compressive stress at which the floor beam buckled was approximately 18 ksi.

Although the floor beam buckled during the test, the floor beam did not collapse, in part because the test fixture substantially and artificially limited the amount of warping of the beam. The test fixture used a rigid ''I'' beam to support the ends of the floor beam. This kept the ends of the floor beam from moving inward during the test. In contrast, on an actual airplane, the ends of the floor beam can move inward because they are attached to the fuselage frames, which are much more flexible than the rigid ''I'' beam used in the test fixture. The result of this artificial restraint was that the floor beam buckled and began to deflect. Instead of collapsing, as would be expected on an airplane, the floor beam behaved more like a cable, suspended from two rigid ends, with very little bending strength, but significant axial strength. This behavior was ultimately demonstrated by the catastrophic failure of the beam in tension, similar to a cable failure. If the beam had been supported as it is in the airplane, it is likely that the floor beam would have collapsed at the onset of buckling.

For example, if a horizontal beam is supported at each end, and vertical loads are placed on the beam, as the beam deflects the ends will pull inward. Restraining the beam ends will limit the bending deflection and stiffen the beam, preventing collapse of the beam as it buckles. This artificial restraint does not affect the buckling capability of the beam, but it causes the beam to appear to have higher load carrying capability than it actually has. FedEx acknowledged the effect of this axial restraint in a November 4, 1997, letter to the FAA. FedEx stated that ''It is conceivable that the bending deformation of the beam * * * would be influenced by restraining the ends of the floor beam from translating * * *.''

As stated previously, the critical compression buckling stress of the floor beam tested was approximately 18 ksi. (This occurred at the load step entitled ''0.6g.'') At this point the beam buckled as a column in the forward/aft direction. Beyond this load factor, at the spanwise location left buttock line (LBL) 11, the beam began bending in the forward and aft direction, as evidenced by the detailed test data for load case number 5, 2.8 g (2.8 times the force exerted by gravity at sea level) ''up'' load in Appendix 8. Forward and aft bending of the beam clearly indicates that the beam has buckled, and can be seen by observing the FedEx videotapes contained in Appendix 11. This buckling failure occurred prior to 40.6 ksi as predicted by the FAA, and before the 49.1 ksi value predicted analytically by FedEx in Appendix 1.

The occurrence of buckling at 18 ksi rather than approximately 40 ksi can be explained by the ineffectiveness of the stability straps in the test fixture. Over most of the airplane, the floor beams extend from one side of the airplane to the other. A stability strap is a long, thin strip of metal, running perpendicular to the floor beam, and attached to the lower surface of several beams, at intervals ranging from 17 to 24.75 inches along the lower surface of the floor beam. The purpose of the stability straps is to support or stabilize the lower chord to strengthen the floor beam. This is accomplished by reducing the ''effective length'' of the lower chord of the beam from one long column (the entire length) by splitting it into a series of shorter, stiffer columns that are equal in length to the distance between the stability straps. The stability straps in the test model were ineffective because the portion of the test fixture to which the straps were attached was not stiff enough to allow the straps to fully stabilize the floor beam. (This is exactly the opposite problem from that described above with respect to the excessive rigidity of the test fixture where the floor beam ends were attached.)

By graphing the results obtained from the test, the FAA determined that the stability straps were not fully effective at the location where the beam buckled. This graphing demonstrated that the ''effective length'' of the floor beam lower chord at the point of buckling was 40.4 inches [between LBL 32.6 and right buttock line (RBL) 7.8], rather than the ''effective length'' of 24.75 inches used in the analyses conducted by FedEx and the FAA. Since the ''effective length'' was longer for the tested beam due to the ineffectiveness of the stability straps, the resulting column was weaker and buckled at a lower stress than would occur on the affected airplanes.

The FAA subsequently used the same analytical techniques used in its previous analysis to confirm that the buckling strength of the beam is approximately 20 ksi based on the effective column length of 40.4 inches demonstrated by the FedEx tests. This correlates well with the stress at buckling of 18 ksi measured in the tests and confirms the validity of the FAA's analysis.

During the September 19, 1997, meeting, and at the February 18, 1998, public meeting, FedEx concurred with the FAA that the stability straps buckled during the test, and were largely ineffective, as the straps could not provide stability to the lower chord.

At the public meeting on February 18, 1998, two FedEx consultants made presentations regarding this test. Both consultants agreed that, although the test was properly performed in accordance with the test protocol, the test fixture was not representative of the airplane. As a result, one of the consultants (Dr. Foster of Auburn University) stated that it would be inappropriate to draw conclusions from this test for the airplane floor beam.

Based on the discussion above, the FAA concludes that FedEx's ''Single I Beam Test'' does not demonstrate a lower chord stress capability greater than that calculated by the FAA, or that the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits. The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect.

3. *''On-Aircraft'' Test.* FedEx states that an ''on-aircraft'' test was conducted (Appendix 12, Report 97–052, Revision I/R, dated August 27, 1997), and that this test demonstrated that the container/airplane combination withstood an applied ''up'' load of approximately 20,000 lbs. FedEx states that this test indicates that the floor structure of the existing main cargo deck is in compliance with the requirements of CAR part 4b when supporting existing weight limits. FedEx also states in Section 6 of Report 97–051, also in Appendix 12, that a margin of safety of 2.1 was demonstrated with a 10,700-lb. container.

The FAA does not concur that this test demonstrates that the airplane is safe and in compliance with CAR part 4b. The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect. The ''on-aircraft'' test consisted of FedEx's ''SAA'' or full-size container, situated on the main cargo deck of a 727, restrained vertically by the forward and aft pallet locks (attached to the floor beams), and side vertical restraints (sidelocks). The container was modified to place four ''I'' shaped beams running lengthwise through the container. Four hydraulic jacks were positioned underneath the ''I'' beams on either side of the container and attached to jacking platforms on the main deck floor. The jacks were used to apply ''up'' loads to the container, as is shown in Figure 2.1 of FedEx's Report 97–051 (Appendix 12 of FedEx's submittal to Rules Docket No. 97–NM–09–AD). To transmit the loads applied to the ''I'' beams to the container, a rigid structure made of seventy-two 4- by 4-inch thick wood beam spacers, and thirty-eight 3/4-inch thick plywood sheet formers curved at the edges to match the contour of the container, were fastened with screws to the 0.063-inch thick aluminum skin of the container. This structure, weighing approximately 1,400 lbs., provided a rigid platform for the ''I'' beams to lift the container (details of the plywood structure and its estimated weight are provided in Figure 2.3 of Report 97–051, Appendix 12).

The FAA has determined that the ''I'' beams and rigid structure used to introduce ''up'' load into the container artificially limited the distortion of the container under load and forced most of the applied load to the sidelocks and away from the floor beams. This is unconservative for the floor beams because it results in the test not representing how an actual loaded container or other ULD would affect the loads on the floor beams.

During the September 19 meeting, FedEx agreed that in the ''up'' load case, if the container is loaded and not restrained by the rigid structure, it attempts to deform to a catenary (arched) shape at the front of the container where the door is located. This effect is demonstrated by FedEx's inverted container test described in Appendix 9. FedEx also stated, however, that this would have no effect on the test results, although it was considering the use of airbags or hydraulic bags instead of the rigid structure to allow the ''SAA'' container to behave as it did in the test documented in Appendix 9. FedEx also stated in the meeting that it believed that testing to 2.5 g's, or 20,000 lbs. of ''up'' load, helps to account for the load being ''beamed'' or forced to the sidelocks.

The test results indicated that over 80 percent of the load was directed to the sidewalls of the container and, therefore, to the sidelocks rather than the floor beams. The FAA finds that this effect results from the rigid structure used to introduce the load into the container, and that this renders the test unrepresentative of the actual loading of the floor beam and significantly unconservative.

Even though the FAA determined that the results of the inverted container test (Appendix 9 of FedEx's comment) were unconservative, it showed that the percentage of the load carried by the back wall of the container was approximately three times greater than that determined by the ''on-aircraft'' test. The loads carried by the rigid back wall are largely carried by floor beam(s) locks, not the sidelocks. These results also contradict FedEx's conclusion that the ''on-aircraft'' test demonstrates that the floor structure is safe. The ''on-aircraft'' test provides confidence in the strength of FedEx's sidelocks. However, because of the artificial shifting of the loads from the floor beams to the sidelocks, the test fails to demonstrate that the floor structure is safe. Further, the ''on-aircraft'' testing to 2.5 g's did not result in the application of significant loading to the floor beams. Therefore, the results of the testing to 2.5 g's is of little significance when addressing the unsafe condition of the floor beams.

In Appendix 1 of FedEx's April 30, 1998, submission to Rules Docket No. 97–NM–09–AD during the reopened comment period, FedEx appears to now recognize the effect of the rigid plywood formers in forcing the load to the sidelocks and away from the floor beams. In this Appendix, on page 2 of the FedEx Engineering Report 98–026, Revision A, FedEx states ''Measured loads for the container perimeter latch locations indicate that 40% of the applied load was reacted on each side by the side latches (see Reference 3). This is due to the fact that the rigid formers did not allow the top of the container to deform as it would during actual conditions and thereby forced more load outboard than what would be typically encountered during flight.''

In summary, based on the previous discussion, the FAA does not concur that this test demonstrates that the airplane is safe and in compliance with CAR part 4b. The test also does not demonstrate that the FAA's finding of unsafe condition is incorrect. One commenter states that he participated in FedEx's ''on-aircraft'' test. He states that the data from the latch load cells were inconclusive for the tests, and although he considered the test to be a reasonable representation of airplane conditions, he suggests that FedEx improve the latch load cell installation and data acquisition system and investigate whether the plywood formers used to apply the test load to the container roof could influence the latch load distribution. As discussed previously, the FAA does not concur that the ''on-aircraft'' test was representative of the airplane, but concurs that the plywood formers influenced the load distribution.

First Container Facing Aft

Two commenters state that positioning the first container aft of the 9g cargo barrier with the door facing forward is not optimum from a crashworthiness perspective and request that the AD specify that this container be facing aft instead. The FAA concurs. Paragraphs (a) and (b) of the final rule have been revised to allow the first

container aft of the bulkhead to face aft, with all other containers facing forward.

Increased Running Load

One commenter states that the following statement in the NPRM is factually inaccurate: ''This running load of 90 pounds per inch is a safety concern, as it is approximately 2.6 times higher than the maximum running load of 34.5 pounds per inch allowed on these same floor beams when the airplane was in a passenger configuration.'' The commenter states that in a negative gust (''up'' load) situation the passenger floor beams must act to restrain upper deck loads and lower deck cargo loads simultaneously and, as a result, must react 81.0-lbs. per inch, not just the 34.5 figure as the NPRM indicates. The commenter maintains that if reduced loads are necessary to maintain the safety of cargo airplanes, then passenger airplanes should be similarly restricted.

The FAA does not concur that the passenger and cargo airplanes present similar safety concerns. The NPRM statement quoted by the commenter appeared in the section of the NPRM that described the FAA's reasons for undertaking the detailed design review which led to the conclusion that there is an unsafe condition. The statement in the NPRM is factually accurate for the running loads and the ''down'' load case and contributed to the FAA's concern with the strength of an unreinforced cargo floor.

The FAA subsequently determined that the ''up'' load case is the most likely critical case. The FAA agrees that, for the ''up'' load case, the running load figures identified in the comment are accurate. However, the passenger compartment is designed to uniformly distribute passenger loads such that every floor beam is active in carrying these loads. In contrast, the freighter floor loads are applied differently. Instead of the main deck loads being applied uniformly, each 88-inch deep container spans several floor beams. As discussed previously, the result of this is that only floor beams located at the edges of containers are active in carrying the ''up'' loads. Hence, as the FAA determined in its detailed design review, the effect on the airplane is that the 90 lbs. per inch cargo container loading is much more critical than the uniformly applied upper and lower deck loads of the passenger configuration and is, in fact, a safety concern.

One commenter states that the interim weight reduction is too restrictive considering that the passenger 727 can carry in excess of 6,800 lbs. in the same zone. The 3,000-lb. limitation imposed in the NPRM is unjustified. The FAA does not concur. As discussed previously, the loading on the floor is significantly different depending on whether it is loaded by the carriage of passengers or containers. The 3,000-lb. limitation specified for the carriage of cargo in the NPRM is justified by the FAA's analysis provided in the Rules Dockets.

Netted Lower Lobe Cargo

One commenter states that if the lower lobe cargo is assumed to be netted (restrained), it would not have any relevance in a down gust situation. The FAA infers that the commenter believes that, as the cargo would be restrained to the belly of the airplane, it would not load the underside of the floor beams in a negative ''g'' environment due to a down gust.

Another commenter states that the NPRM should be changed to allow lower lobe weights to be subtracted from the main deck limits if the load is properly tied down. The FAA concurs partially. If the lower lobe cargo is properly tied down, it will be restrained by the structure differently than represented in the FAA analysis. While the FAA is not currently aware of configurations that restrain lower lobe cargo, paragraphs (f) and (g) of this AD allow for approval of this type of configuration as an alternative method of compliance with the final rule.

Airplane Weight Increases

One commenter states that the FAA should reconsider the present policy of withholding approval of maximum take-off weight (MTOW) and maximum landing weight (MLW) increases for 727 freighter modified airplanes. The rationale for this is that the resulting higher weights would allow greater fuel loads for remote region operators, and also would increase the safety margin of the airplane's modified fuselage structure, which is the FAA's prime concern addressed by the NPRM's. The FAA infers that the commenter believes that the proposed AD should be changed to reflect this.

The FAA concurs partially. The FAA concurs that maintaining a minimum in-flight weight reduces the loads resulting from vertical gusts, unless this additional weight is carried in body fuel tanks that are suspended from floor beams. Additional loads to the floor beams exacerbate the unsafe condition. This issue is addressed appropriately in the context of type certification and is not addressed in this AD. Therefore, the FAA has determined that no change to the final rule is necessary.

Operators' Ability To Determine Container CG's

One commenter states that there is no means to measure or comply with the requirement that the container cg's be within +/−10 percent of the geometric center of the container. Two commenters state that the wording in the proposed AD should be changed to allow those operators having a loading procedure that maintains the container cg within +/−10 percent to be considered compliant with this requirement. The FAA does not concur that the cg of the container cannot be determined, or that the requirement to maintain the cg within 10 percent of the horizontal cg cannot be complied with. For example, FedEx has recently acquired equipment for this purpose. Because the cg location within the container has a major effect on the loads imposed on the floor beams, the FAA considers that this limitation is necessary to address the unsafe condition. It should be noted that the vast majority of cargo containers are certificated to TSO C90c, which specifies a maximum cg shift of 10 percent. Therefore, operators should always have been ensuring that the cg shift did not exceed this limitation in the TSO.

One commenter submitted data to the Rules Dockets that the commenter states will allow an operator with a properly designed or modified scale to accurately determine, display, and record the container cg. The FAA did not evaluate the technical accuracy of the submission, as no change to the proposed AD was requested by the commenter.

Airplanes With Apparent Increased Floor Capability

One commenter states that one of its 727–200 airplanes has a greater running load allowable than its other two airplanes (37.5 lbs. per running inch versus 34 lbs. per running inch) and asks why this airplane is limited by the same restriction.

The FAA infers that the commenter believes that its airplane should have higher allowable container loads, based on this apparent increased capability, and that the AD should be changed to reflect this. The FAA does not concur. From its analysis, the design review team determined that the 727 main cargo decks are capable of supporting a maximum payload of approximately 3,000 lbs. per container. Paragraphs (f) and (g) of the AD allow for an applicant to propose new payloads along with substantiating data and analysis. No change to the final rule is necessary.

Inconsistent Limitations

One commenter states that the FAA's determination that these airplanes are capable of supporting only 3,000 lbs. per container is entirely inconsistent with the FAA's interim proposal, which would allow an 8,000-lb. pallet in any position where the entire load would be carried by one set of container locks. The commenter does not see any rational or consistent approach in the NPRM's. The FAA does not concur. The analysis that resulted in the 3,000 lb. per container limit was based on the current operational limits of the airplane. As discussed in the NPRM, the FAA determined that, if more restrictive operational limits are imposed, a higher payload could be allowed on an interim basis. The FAA has estimated that the airplane gust loads will be reduced with limitations on in-flight weight and maximum operating airspeed to the extent that the 3,000 lbs. limit per container can be raised to 4,000 lbs. for the interim period.

For the ''up'' load case, two 4,000-lb. containers placed back-to-back, without side vertical restraints, impose approximately the same amount of load on the floor structure as a single 8,000-lb. container with the adjacent cargo positions carrying no payload. Because of this, for the interim period, the operator would have the flexibility to carry an 8,000-lb. container, provided the containers on either side are empty.

If side vertical restraints acceptable to the FAA are installed, then the interim payload is not to exceed a total weight of 9,600 lbs. for any two adjacent containers. In this case, as stated in paragraph (b) of the AD, the 8,000-lb. limit per container would still apply. Many of the different containers and flat pallets or ''cookie sheets'' used by operators require side vertical restraints, as specified in TSO C90c.

Irrelevancy of Model 747 Problems

One commenter states that the FAA only proposed payload reduction because of the incidents occurring on 747's, but the FAA has no reason to believe the problems found on the 747's will occur on the 727's. The FAA does not concur. The FAA did, in fact, look into the 727 conversions because those conversions had been performed by some of the same companies and with similar procedures and design methods as some 747's which had been found to be unsafe. The unsafe condition that is the subject of this AD, however, is specific to the 727 and has been documented in the Rules Dockets.

Applicability of 14 CFR 25.1529

One commenter states that the NPRM statement indicating that STC holders are required to issue Instructions for Continued Airworthiness in accordance with 14 CFR 25.1529 does not apply to its STC's because the applicable airworthiness standards for the 727 are CAR part 4b, rather than 14 CFR part 25. The FAA does not concur. Since January 28, 1981, 14 CFR 21.50(b) has required that the holder of an STC for which application was made after that date shall furnish the Instructions for Continued Airworthiness prepared in accordance with 14 CFR 25.1529. This requirement is effective regardless of the specific certification basis of the airplane.

Fatigue Cracks as Evidence of Unsafe Condition

FedEx states that, if the FAA's report of huge negative margins of safety at ultimate load are true, then the ''typical daily operating conditions would still impose substantial loads on the structure,'' and result in wear and cracking of the floor structure. FedEx's review of the FAA service difficulty report data generated only two reports of cracks on the converted 727 freighters, and no other damage was found that could be attributed to the 727 cargo conversion modification.

The FAA does not concur that a low number of in-service difficulty reports indicates that the FAA's finding of unsafe condition is unfounded. FedEx has reported that its average cargo load density is approximately 7.5 lbs. per cubic foot, which equates to an average cargo payload of approximately 3,300 lbs. per container. This results in stress levels that on average would be similar to those of a passenger 727. Therefore, it is not expected that fatigue cracks would develop in only 11,008 total flight cycles, which is the highest number of cycles accumulated (as of August 27, 1998) by any FedEx 727 airplane since conversion to a freighter configuration. As discussed previously, the unsafe condition addressed in these AD's is not a result of fatigue, but is the result of the existing floor structure not being able to support the allowable payloads and distributions for the critical gust conditions.

Data Showing Floors To Be Safe

FedEx states that the NPRM is inaccurate in stating that the FAA design review team was unable to find any data which showed that the floors were safe for the heavier (than passenger loading) freight payloads. FedEx states that the FAA has received and accepted data verifying the safety of the floor structure. FedEx also states that the FAA has failed to provide ''reasoned explanation'' for not approving various documents.

The FAA does not concur. In performing its own analysis, the FAA was careful to use only methodologies that were commonly employed in industry. One of the ways that the reasonableness of the FAA analysis contained in the Rules Dockets was checked was to compare the results with results of the STC holders' analyses, where possible. In this case, several analysis documents (Dee Howard Reports R90–2, R90–4, and R90–6) were used by FedEx to analyze the main deck floor beams in support of its STC for half-size containers (SA7447SW). However, these documents do not ''verify that the unreinforced floor structure of the main cargo deck can safely support the heavier freighter payloads.'' Also, they do not address all of the critical load cases or configurations, nor do they address the effect of cg shifts.

Recognizing these limitations, the FAA used FedEx's methodology to verify that the FAA analysis yielded similar results for a similar load case. In doing this, the FAA used the load case which placed ''down'' loads on the containers, as provided in FedEx's analysis, as its analysis did not contain an ''up'' load case (as required by CAR part 4b standards). Using the applied loads from FedEx's ''down'' load case, the FAA calculated the margins of safety for the floor beams using the FAA's documented methodology. The results for the mid-span of the floor beam matched very closely to those documented in FedEx's STC analysis for the half-size containers, which verifies that the FAA's and FedEx's analytical methodologies were quite similar for the same load case.

However, because FedEx's (Dee Howard) documents do not address all the critical load cases, locations on the floor beam, or configurations, nor do they address the effects of cg shifts, they do not ''verify the safety of the floor structure.''

In addition, of the ten documents related to the floor beam analysis testing that FedEx submitted in its comments, three documents (Appendices 1, 2, and 3) describe analytical methodologies and do not (and are not intended to) ''show the floor structure can safely support the heavier payloads.'' Regarding the decompression methodology document submitted in Appendix 3, FedEx acknowledged at the September 19, 1997, meeting that it had not yet revised the document following

comments received from the FAA at a meeting held between FedEx and the FAA on July 24, 1997.

Three other documents (Appendices 4, 8, and 9) are test plans or results that have been discussed previously and also do not ''show the floor structure can safely support the heavier payloads.''

The two external loads documents (Appendices 5 and 6) have been approved by the FAA prior to FedEx's comment submittal (FAA letter 97–120S–534, dated August 21, 1997) and are considered appropriate as a starting point for an analysis of the floor structure. However, these documents by themselves do not ''verify the safety of the floor structure.''

Appendix 12 includes a document containing an incomplete analysis of one floor beam, a test report which was discussed previously, and two videotapes of that test, none of which ''verify the safety of the floor structure.'' Finally, FedEx's Document ER 97–035 I/R, dated July 20, 1997 (Appendix 7), which was approved by FedEx on August 13, 1997, had not been submitted to the FAA prior to its inclusion in FedEx's comment submittal. In reviewing this document, the FAA has determined that because the area addressed is shorter than an 88-inch container, this document alone does not substantiate higher container loads. The floor under the rest of the container also would need to be substantiated to warrant a change to the AD limits.

The FAA does not concur that it has received and accepted data verifying the safety of the floor structure, or that the FAA design review team was in possession of any data which showed that the floors were safe for the heavier (than passenger loading) freight payloads. Finally, the FAA does not concur that it has failed to provide FedEx with a ''reasoned explanation'' for not approving various documents. FedEx is aware of the current status of all the above mentioned documents.

FedEx also states that a Boeing letter (Appendix 41) indicated that the floor beams were safe for a passenger to freighter airplane conversion at (container) weights of 8,000 lbs. The FAA does not concur. The referenced letter was part of an initial budget quote for a zero fuel weight increase that estimated potential weight increases that might be applicable to airplanes converted from passenger to freighter configurations. Simplifying assumptions were used by Boeing in order to allow FedEx to quickly establish, as a rough approximation, the financial feasibility of converting an airplane. Any necessary changes to the floor beams in estimating the weight of the airplane following conversion were not addressed.

FedEx's Finite Element Model

FedEx states that the FAA misused FedEx's finite element model (contained in Engineering Report 8504), which identifies negative margins of safety in the fuselage monocoque, to substantiate its finding of unsafe condition. FedEx also states that the NPRM was inaccurate in stating that the report was used for certification. The FAA does not concur. The FAA did not use FedEx's Engineering Report 8504 to validate its analysis. Rather, as discussed previously, the FAA used the floor beam analysis documents submitted as part of the substantiation for FedEx's STC for half-size containers (SA7447SW) to validate its analysis. The NPRM did state that the original STC certification data contained documented negative margins of safety. The FAA does not concur that this statement is incorrect. At the meeting held September 19, 1997, FedEx stated that the document was used to support original STC issuance, and that no other document was submitted.

Critical Loading on Floor Beams

FedEx states that, contrary to a statement in the NPRM, the FAA has not established that floor beams at the forward and aft edges of the container are more critically loaded. In its August 28, 1997, submittal to Rules Docket No. 97–NM–09–AD, FedEx cited its ''on-aircraft'' test as proof that the sidelocks are more critically loaded. FedEx appears to have mistakenly inferred that this statement addresses the effectiveness of FedEx's sidelocks. This inference is incorrect. In context, this statement simply points out that, for the ''up'' load case, ''the floor beams at the forward or aft edges of the containers would be more critically loaded'' than the floor beams under the center of the container. The reason for this is that a full-size container is restrained against vertical movement by the container locks attached to the floor beams at container edges and there are no container locks in the center of the container.

Communications With FAA

FedEx's comments included a number of disagreements with documentation of various communications prepared by the FAA and placed in Rules Docket No. 97–NM–09–AD. Because these comments do not relate to the merits of this AD, they are not addressed in this final rule. However, the FAA has provided a response to these comments in that Rules Docket.

Interim Limitations Already Observed

One commenter states that the interim operating limitations are not necessary because the commenter does not know of a 727 freighter STC that allows operation higher than 350 knots indicated airspeed (KIAS) and, for practical reasons, 727–200 airplanes almost never operate at weights below 100,000 lbs. The FAA does not concur. While many of the affected airplanes are subject to a maximum operational speed limitation of approximately 350 KIAS, other affected airplanes are not subject to such limitations and do operate at higher speeds. In addition, while operation at weights below 100,000 lbs. is not likely for most 727–200 converted freighters, such operation is permitted and may occur. Such operation is even more likely for the lighter weight 727–100, which also is subject to this AD.

Alternatives to Limitations in the AD

Several commenters asked about alternatives to the proposed rule and suggested increased inspections, such as those in other AD's. The FAA does not concur. The unsafe condition identified in the AD is not based on loads imposed on the floor structure on an average flight (i.e., fatigue-type loading). The unsafe condition is caused by loads experienced on the airplane due to a large gust while carrying certain cargo payloads and distributions. In this case, a floor beam failure or excessive deflection would likely result in the loss of the airplane. Because such a failure would not necessarily be preceded by cracking, inspections of the airplane would not prevent the failure. The only means for preventing a catastrophic event is to limit the flight operation of the airplane and/or the container payloads.

One commenter proposes a statistical approach to study the unsafe condition by requiring certain inspections over the next year while imposing certain operational limitations. The FAA does not concur. Because the unsafe condition is a collapse of the floor caused by large gusts, increased inspections in the areas of concern will not serve to lessen the likelihood of loss of the airplane.

One commenter proposes that the FAA revise the proposed AD to further limit the maximum operational speed to 280 KIAS as an alternative to payload limitations. The FAA does not concur with the commenter's proposal to reduce the maximum operational speed to 280 KIAS. Reducing the maximum operational speed levels below 350

KIAS does reduce the gust loads on the airplane. However, speed restrictions below 350 KIAS that permit safe operation of the airplane do not affect the maneuver loads, which at these speeds become more critical than the gust loads.

''Mode B''

One commenter requests that, for the interim limitations, the FAA also allows operation at ''Mode B'' [350 knots equivalent airspeed (KEAS)] for the maximum operating airspeed (Vmo). The commenter states that operations at ''Mode B'' would be more convenient than the 350 KIAS limitation specified in the proposed AD. The FAA concurs. The FAA has revised the interim limitations of the final rule accordingly.

Release of Proprietary Data

Several commenters state that the FAA must divulge all data used to make its finding of an unsafe condition and cited various legal cases.

The FAA infers that commenters are insisting that the FAA release relevant proprietary data that was considered by the FAA during this rulemaking. The FAA does not concur for two reasons. First, the Trade Secret Act (18 U.S.C. 1905) prohibits the disclosure of such data, and this prohibition is not overridden by the requirements of the Administrative Procedure Act (APA). The cases cited by the commenters, while generally stating that agencies must release all information on which they rely during rulemaking, do not address the prohibition against the release of trade secret data.

Because AD's address unsafe conditions associated with aeronautical products, the FAA routinely evaluates proprietary design data in determining whether AD's are necessary. In determining whether such material should be placed in the Rules Docket, the FAA applies the standards developed under the Freedom of Information Act (FOIA; 5 U.S.C. 552) in the application of Exemption 4 [§ 552(B)(4)], which protects ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' If data are determined to meet those standards, they are not placed in the Rules Docket, but are retained in separate files that are not released to the public. Apart from violation of the Trade Secret Act, if the FAA were to release such data, it would be much more difficult for the FAA to obtain the data on which its findings of unsafe conditions are necessarily based.

Second, the APA generally has been interpreted as requiring that agencies provide the public with a meaningful opportunity to comment on proposed rules. In this rulemaking, the FAA has fully complied with this requirement, even without releasing trade secret data. In developing the NPRM, the FAA used proprietary Boeing loads data in its analysis, from which the FAA identified the existence of the unsafe condition. Although Boeing has not consented to releasing these data, FedEx has submitted comparable loads data (discussed previously under the heading, ''Extension of Interim Operational Period'') which, when used in the FAA analysis (which has been placed in the Rules Dockets), also demonstrate the existence of the unsafe condition. FedEx did consent to the release of these data. In fact, at the first public meeting on February 18, 1998, the FAA used these data in its presentation explaining its analysis. The analysis and the presentation are fully documented in the Rules Dockets, and have been available for review by commenters. The FAA also has referenced other proprietary data, which have been submitted by applicants seeking approval for modifications to correct the unsafe condition, as confirming the FAA's analysis. Although these data are relevant to the rulemaking, they do not provide the basis for the FAA's action, and their release would not significantly increase the meaningfulness of the public's opportunity to comment on the FAA's proposal.

One commenter requests copies of three recently updated Boeing computer programs which it believes were utilized by the FAA in determining the container payload limits specified in the NPRM. The commenter states that those programs are entitled: (1) ''Vertical Gust Load Factors 'Gs;'' (2) ''727 Movement (sic) of Inertia Model;'' and (3) ''Operating Empty Weight Plus Payload Distribution.'' The FAA is not aware of the referenced programs, does not have them, and did not use them in its analysis.

Economic Analysis

Several commenters state that the FAA underestimated the cost to modify the airplane floor structure into compliance to CAR part 4b, citing a Pemco estimate of $400,000, as opposed to the $100,000 estimate contained in the NPRM. Several commenters also state that the FAA had underestimated (1) the loss in revenue due to the reduced allowable payloads, and (2) the amount of time necessary to get all airplanes modified due to the short 120-day interim period, a lack of FAA-approved fixes, and the limited availability of facilities to install the modifications within the 120-day period proposed by the NPRM.

The FAA concurs. The FAA used data supplied by industry to conduct its cost and regulatory flexibility analysis used in the NPRM and has considered the data supplied by commenters during the comment period to conduct the cost and regulatory flexibility analysis used for the final rule.

Cost-Benefit Analysis

One commenter states that the FAA must undertake a thorough cost-benefit analysis and economic impact assessment in conjunction with its consideration of the remedial actions at issue in this rulemaking. The commenter states that the FAA has thus far failed to conduct an adequate cost-benefit analysis. The commenter states that a cost-benefit analysis and economic impact assessment are required by the provisions of the Regulatory Flexibility Act.

The FAA does not concur. As discussed below under the heading ''Regulatory Evaluation Summary,'' the FAA has performed an extensive analysis of the costs and benefits of this AD and has fulfilled the requirements of the Regulatory Flexibility Act.

Combi Airplanes

One commenter states that the NPRM has not considered those operators that operate airplanes in a combi mode (a combi airplane has provisions for passengers and cargo on the main deck in separate compartments). The commenter also states that it assumes that the load restrictions would not apply to the floor structure which is used to carry passengers and that the original manufacturer's limitations are applicable. The FAA concurs. Although the commenter is correct with respect to floor structure carrying passengers, combi airplanes transporting containers on the main deck must be in compliance with the limitations specified in this AD.

Applicability of Proposal

FedEx points out that the wording of the applicability in the AD could easily be misconstrued as also applying to airplanes manufactured as freighters by the original equipment manufacturer. The FAA concurs and has revised the applicability of the final rule to read ''Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration in accordance with Supplemental Type Certificate SA1444SO, SA1509SO, SA1543SO, SA1896SO, SA1740SO, or SA1667SO; certificated in any category.''

Other Cargo Lock Devices

One commenter requests that the proposed AD be revised to add a paragraph discussing a ''special load-alleviating cargo container lock'' for which the commenter has applied for an STC at the FAA, Los Angeles ACO. The commenter reports that this lock will allow for the carriage of 16,000 lbs. rather than 8,000 lbs. in two adjacent containers, as specified in the proposed AD, but to be conservative, the commenter requests that the rule allow 12,000 lbs. for two adjacent containers for the interim period. During the reopened comment period, this commenter submitted additional information in support of its original comment.

The FAA does not concur. The information submitted is not sufficient to substantiate the safety of the airplane with the locks installed. This lock is the subject of an STC application and is not currently FAA-approved. Paragraphs (f) and (g) of the AD provide for approval of alternative methods of compliance to address potentially alleviating devices for the unsafe condition. The commenter may obtain such an approval upon submission of data substantiating that the referenced device provides an acceptable level of safety. Therefore, no change to the final rule is necessary.

''Fine Tune'' the AD

The CAA and others request that the AD should be ''fine tuned'' after issuance, as new data become available. The FAA does not concur that ''fine tuning'' of the AD is necessary. Paragraphs (f) and (g) of the AD allow for approval of alternative methods of addressing the unsafe condition when substantiated properly. As with any AD, if new information indicates that changes to the AD itself are needed, the FAA has the authority to revise or supersede this AD.

Request for Clarification

One commenter requests clarification of the procedures that will be used to obtain future FAA approvals with respect to this rulemaking and to inform the public of those approvals.

As stated in the final rule, all submissions should be made to the Atlanta ACO. The Transport Airplane Directorate has established a team consisting of members from several ACO's to review all requests in accordance with paragraphs (f) and (g) of this AD. In all other respects, the process for approvals under this AD will be similar to that followed for all AD's. For example, in order to protect applicants' proprietary data, the FAA will notify only the applicant for an approval of the FAA's decision; while the FAA will disclose whether approvals have been granted, requests for approved data would be handled under normal FOIA procedures.

Other Safety Improvements

One commenter states that, because this AD will necessitate large expenditures and does not address an unsafe condition, requiring compliance with it will prevent the affected airlines from adopting other less costly and more effective safety enhancements, such as updating flight deck equipment. The FAA does not concur. As discussed previously, this AD addresses a serious unsafe condition. Although correcting this condition may be expensive, the FAA has determined that it must be corrected to ensure an acceptable level of safety.

Petitions for Reconsideration

In addition to their comments, several commenters also filed ''Petitions for Reconsideration'' in accordance with 14 CFR 11.93. Because these petitions were filed prematurely, the FAA considered them as comments to the Rules Docket. However, because the substance of the petitions is repetitious of the more extensive comments submitted by FedEx and others discussed above, the petitions are not discussed separately in this final rule.

Explanation of Change of Aircraft Certification Office Contact

The FAA has changed the point of contact for obtaining further information, for obtaining FAA approval of certain actions, and for submitting substantiating data and analyses in accordance with the provisions of this AD, due to relocation of certain STC holders.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Participation at the Public Meeting on the Final Rule

Requests from persons who wish to present oral statements at the public meeting should be received by the FAA no later than 5 days prior to the meeting. Such requests should be submitted to Mike Zielinski as listed in the section titled **FOR FURTHER INFORMATION CONTACT** above, and should include a written summary of oral remarks to be presented, and an estimate of time needed for the presentation. Requests received after the date specified above will be scheduled if there is time available during the meeting; however, the names of those individuals may not appear on the written agenda. The FAA will prepare an agenda of speakers that will be available at the meeting. To accommodate as many speakers as possible, the amount of time allocated to each speaker may be less than the amount of time requested. Those persons desiring to have available audiovisual equipment should notify the FAA when requesting to be placed on the agenda.

Purpose of Public Meeting

Because of the high degree of public interest in this AD, the FAA has scheduled a public meeting to discuss its content and issues relating to compliance. The FAA's objective is to ensure that all affected operators and design approval holders have a full understanding of the issues addressed in the AD and of the actions necessary to comply with it. The FAA anticipates that, following this meeting, there will continue to be extensive discussions between the affected parties and the FAA for the purpose of identifying and implementing the most timely and cost-effective means to eliminate the unsafe condition addressed in this AD.

Public Meeting Procedures

Persons who plan to attend the public meeting should be aware of the following procedures that have been established for this meeting:

1. There will be no admission fee or other charge to attend or to participate in the public meeting. The meeting will be open to all persons who have requested in advance to present statements, or who register on the day of the meeting (between 8:30 a.m. and 9:00 a.m.) subject to availability of space in the meeting room.

2. Representatives from the FAA will conduct the public meeting. A technical panel of FAA experts will be established to discuss information presented by participants.

3. The FAA will try to accommodate all speakers; therefore, it may be necessary to limit the time available for an individual or group. If necessary, the public meeting may be extended to evenings or additional days. If practicable, the meeting may be

accelerated to enable adjournment in less than the time scheduled.

4. Sign and oral interpretation can be made available at the public meeting, as well assistive listening device, if requested 5 calendar days before the meeting.

5. The public meeting will be recorded by a court reporter. Any person who is interested in purchasing a copy of the transcript should contact the court reporter directly. This information will be available at the meeting.

6. The FAA requests that persons participating in the public meeting provide 10 copies of all materials to be presented for distribution to the panel members; other copies may be provided to the audience at the discretion of the participant.

Regulatory Evaluation Summary

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

The FAA conducted a Cost Analysis and Final Regulatory Flexibility Analysis to determine the regulatory impacts of this and three other AD's to operators of all 244 U.S.-registered Boeing Model 727 passenger airplanes that have been converted to cargo-carrying configurations under 10 STC's held by four companies. This analysis is included in the Rules Docket for each AD. The FAA has determined that approximately 6 727–100's and 45 727–200's operated by 10 carriers were converted under Pemco STC's. (There were 15 727's for which the FAA could not identify the STC holder. It is possible that these airplanes were also converted under a Pemco STC. Their costs are not included here.)

Assuming that the operators of affected airplanes converted under Pemco STC's will comply with the restricted interim operating conditions set forth in the AD, the FAA estimates that operators will not lose revenues during the 28-month interim period after the effective date of the AD. During the interim period, these airplanes will be limited to a total of 8,000 lbs. per pair of adjacent containers (a total of 36,000 to 48,000 lbs., depending on the number of pallets) because none of the Pemco-converted 727's have approved side restraints. Assuming typical payloads ranging from 34,835 lbs. for a 727–100 with nine pallets to 47,820 lbs. for a 727–200 with 12 pallets, none of the operators of Pemco-converted airplanes will lose revenues during this interim period.

The Cost Analysis and Final Regulatory Flexibility Analysis, completed by the FAA and included in the Rules Dockets, estimates that affected airplanes can be modified at a cost of $385,000 per airplane to carry the maximum payloads currently allowed, or a total of $19.6 million for the 51 Pemco 727's. The FAA expects that operators will modify their airplanes during the 28-month interim period, scheduling the modifications to coincide with periodic maintenance. A modification will require that the airplane be removed from service for a period of 17 days; the FAA conservatively estimates that scheduling a modification during periodic maintenance will reduce the net time out of service by two days. The FAA estimates the lost revenue during this 15-day period will be $14,829 per 727–100 and $23,405 per 727–200. The total down-time lost revenue for the 10 operators will be $17.1 million. This estimate conservatively assumes that cargo is not shifted from airplanes being modified to other airplanes. Such cargo shifting is typical industry practice and would reduce the costs attributable to lost revenues. Incremental fuel costs to carry the additional weight of the floor modification will be $211,000 over the 28-month period, as airplanes are modified. When all Pemco 727's are modified, additional fuel costs will be about $15,000 per month.

The total cost, therefore, to modify the fleet of affected 727's that were originally modified to the Pemco STC's, including lost revenues while the airplanes are out of service plus the modification cost, is $37.0 million, or $33.8 million discounted at seven percent.

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), was enacted by Congress to ensure that small entities are not unnecessarily or disproportionately burdened by government regulations. The RFA requires a Regulatory Flexibility Analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The purpose of this analysis is to ensure that the agency has considered all reasonable regulatory alternatives that will minimize the rule's economic burdens for affected small entities, while achieving its safety objectives. Under section 63(b) of the RFA, the analysis must address:

1. Reasons why the agency is promulgating the rule;

2. The objectives and legal basis for the rule;

3. The kind and number of small entities to which the rule will apply;

4. The projected reporting, recordkeeping, and other compliance requirements of the rule; and

5. All federal rules that may duplicate, overlap, or conflict with the rule. These elements of the RFA are addressed below:

A. Reasons Why the Agency is Promulgating the Rule

The FAA has determined that unreinforced floor structure of the main cargo deck of converted 727's is not strong enough to enable the airplane to safely carry the maximum payload that is currently allowed in this area. The actions specified in this AD are intended to prevent failure of the floor structure, which could lead to loss of the airplane.

B. Statement of Objective and Legal Basis

Under the United States Code (U.S.C.), the FAA Administrator is required to consider the following matter, among others, as being in the public interest: assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. [See 49 U.S.C. § 44101(d).] Accordingly, this AD amends Title 14 of the CFR's to require operators of Boeing 727 airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration to comply with certain payload limitations, substantiate data showing other acceptable limits, or show an alternative method of compliance (AMOC).

C. Regulatory Flexibility Determination

Under the RFA, the FAA must determine whether or not a rule significantly affects a substantial number of small entities. This determination is typically based on small entity size and cost thresholds that vary depending on the affected industry. The entities affected by this rule are those 10 carriers operating the 51 U.S.-registered converted Boeing 727 airplanes that have been converted under Pemco's STC's. Many of these carriers may be small. Therefore, the FAA has prepared an analysis of cost impacts and has examined possible regulatory alternatives.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

With two minor exceptions, the rule will not mandate additional reporting or recordkeeping. First, there will be a negligible one-time cost to operators to revise their AFM's and Supplements. Second, operators will be required to keep records of the modifications to their airplanes. This requirement is common to all maintenance, preventive maintenance, and alterations under § 91.417, Maintenance records.

E. Overlapping, Duplicative, or Conflicting Federal Rules

The rule will not overlap, duplicate, or conflict with existing Federal rules.

F. Analysis of Alternatives

This AD will impose a financial requirement on small entities that operate 727's that were converted under Pemco STC's. The FAA examined potential alternatives to the AD's requirements to minimize the rule's economic burden for small entities while achieving its safety objectives. The alternatives are:

- Exclude small entities;
- Extend the compliance deadline for small entities; and
- Establish higher payload limits for small entities.

The FAA has determined that the option to exclude small entities from the requirements of the rule is not justified. The unsafe condition that exists on an affected 727 operated by a small entity is as potentially catastrophic as that on an affected 727 operated by a large entity. In fact, the average payloads carried by small entities may exceed the average payloads carried by large operators, resulting in a higher probability of a catastrophic event.

The FAA also considered options to extend the compliance period for small operators. The proposed rule established a final compliance date of 120 days after the effective date of the rule. During this 120-day period, operators could comply with interim operating conditions that would enable them to carry higher payloads than those permitted after that interim period. When the proposed rule was published, the FAA had information that indicated that a portion of the engineering data from an FAA-approved STC for a floor modification that could be used as an AMOC would be available within a few months of the proposed rule's publication. In addition, the FAA estimated that operators would be able to modify their airplanes within the 120-day interim period.

Hamilton Aviation has received letters of approval for work towards obtaining an STC for strengthening the floor beams aft of Station 700 and expects to be able to submit additional data in the Fall of 1998 that will provide the basis for an STC for the entire floor. Pemco World Air Services expects to be able to use Hamilton's engineering tools to modify the floors of the 727's it has converted. The FAA is confident, therefore, that there will be AMOC's for operators of all affected airplanes when this final rule is published.

Several commenters to the Rules Dockets for the proposed AD's rejected the FAA's claim that their airplanes could be modified within the 120-day interim period. Their arguments were based on the unavailability of an approved STC that could be used as an AMOC (or, at that time, even letters of approval toward an STC). Operators also stated that modification of all 244 U.S.-registered airplanes would be impossible within a 120-day time frame.

The FAA agrees 120 days is unrealistic and would have severe economic consequences because operators would be required to reduce their payloads substantially at the end of the interim period. In the final rule, therefore, the FAA extends the interim period to 28 months. This will permit operators time to modify their airplanes during regularly scheduled maintenance, minimizing down time and associated lost revenues. This change will be especially beneficial to small entities that may find it difficult to find alternative means of carrying cargo.

Finally, the FAA rejects the compliance alternative that would reduce payloads from those currently required but would establish higher payload limits than those for larger entities. This alternative is unacceptable because the unsafe condition is dependent on the size of the payload, not the size of the entity. The FAA cannot permit a small entity to operate under an unsafe condition.

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed ''significant intergovernmental mandate.'' A ''significant intergovernmental mandate'' under the Act is any provision in a Federal agency regulation that would impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of $100 million (adjusted annually for inflation) in any one year. Section 203 of the Act, 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

This AD does not contain any Federal intergovernmental or private sector mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

98–26–21 Boeing: Amendment 39–10964. Docket 97–NM–81–AD.

Applicability: Model 727 series airplanes that have been converted from a passenger to a cargo-carrying (''freighter'') configuration in accordance with Supplemental Type Certificate SA1444SO, SA1509SO, SA1543SO, SA1896SO, SA1740SO, or SA1667SO; 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 (g) 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.

Note 2: The payload limitations specified in this AD are in addition to payload limitations that are otherwise applicable and do not allow for increases in payloads beyond those specified in such limitations.

To prevent structural failure of the floor beams of the main cargo deck, which could lead to loss of the airplane, accomplish the following:

(a) Except as provided in paragraphs (b) and (c) of this AD, within 90 days after the effective date of this AD, accomplish the requirements of paragraph (a)(1) or (a)(2) of this AD, as applicable.

(1) For airplanes that transport containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Codes ''A,'' ''B,'' ''C,'' ''D,'' or ''E,'' containers: Revise the Limitations Section of all FAA-approved Airplane Flight Manuals (AFM) and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements to include the following information. This may be accomplished by inserting a copy of this AD in all AFM's, AFM Supplements, and Weight and Balance Supplements.

''LIMITATIONS

All containers with one door must be oriented with the door side of the container facing forward, except the door of the first container aft of the cargo barrier may face aft.

The location of the horizontal center of gravity for the total payload within each container or pallet shall not vary more than 10 percent (8.8 inches) from the geometric center of the base of the container or pallet for the forward and aft direction, and 10 percent of the width from the geometric center of the base of the container or pallet for the left or right direction.''

''PAYLOAD LIMITATIONS

For containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Code ''A'' (88 by 125 inches), ''B'' (88 by 108 inches), or ''C'' (88 by 118 inches):

Do not exceed a total weight of 3,000 pounds per container or pallet on the main cargo deck, except in the area adjacent to the side cargo door. In the side cargo door area, for all containers or pallets completely or partially located between Body Station 440 and Body Station 660, those containers or pallets are restricted to a maximum payload of 2,700 pounds per container or pallet. The 3,000 and 2,700 pound payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.

For containers or pallets that have been manufactured in accordance with NAS 3610 Size Code ''D'' (88 by 54 inches) or ''E'' (88 by 53 inches) containers:

Do not exceed a total weight of 1,500 pounds per container or pallet on the main cargo deck, except in the area adjacent to the side cargo door. In the side cargo door area, for all containers or pallets completely or partially located between Body Station 440 and Body Station 660, those containers or pallets are restricted to a maximum payload of 1,350 pounds per container or pallet. The 1,500 and 1,350 pound payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.''

(2) For airplanes on which any other containers or pallets are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate.

Note 3: The weight restrictions to be approved under paragraph (a)(2) will be consistent with the limitations specified in paragraph (a)(1) of this AD.

(b) For airplanes that ARE equipped with side vertical cargo container restraints that have been approved by the Manager, Standardization Branch, ANM–113: As an optional alternative to compliance with paragraph (a) of this AD, within 90 days after the effective date of this AD, accomplish the requirements of paragraph (b)(1) or (b)(2) of this AD, as applicable. This alternative may be used only during the period ending 28 months after the effective date of this AD.

Note 4: To be eligible for compliance with this paragraph, the side vertical cargo container restraints must be approved by the Manager, Standardization Branch, ANM–113, regardless of whether they have been previously FAA approved.

(1) For airplanes on which containers complying with NAS 3610 Size Codes ''A,'' ''B,'' ''C,'' ''D,'' or ''E,'' are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements to include the following limitations. This may be accomplished by inserting a copy of this AD in all AFM's, AFM Supplements, and Weight and Balance Supplements.

''LIMITATIONS

Maximum Operating Airspeed of Vmo equals 350 knots indicated airspeed (KIAS), or Mode ''B'' [350 knots equivalent airspeed (KEAS)].

Minimum operating weight: 100,000 pounds.

All containers with one door must be oriented with the door side of the container facing forward, except the door of the first container aft of the cargo barrier may face aft.

The location of the horizontal center of gravity for the total payload within each container shall not vary more than 10 percent (8.8 inches) from the geometric center of the base of the container for the forward and aft direction and 10 percent of the width from the geometric center of the base of the container for the left or right direction.''

''PAYLOAD LIMITATIONS

For airplanes that transport containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Code ''A'' (88 by 125 inches), ''B'' (88 by 108 inches), or ''C'' (88 by 118 inches):

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 9,600 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

For those containers or pallets which are completely or partially located within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 12,000 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

These container payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck; and

For containers or pallets that have been manufactured in accordance with NAS 3610

Size Code ''D'' (88 by 54 inches) or ''E'' (88 by 53 inches) containers:

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 4,800 pounds for any two adjacent (in the forward and aft direction) containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

For those containers or pallets which are completely or partially contained within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 6,000 pounds for any two adjacent (in the forward and aft direction) containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

These payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.''

(2) For airplanes on which pallets or containers other than those specified in paragraph (b)(1) of this AD, are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113.

Note 5: The weight restrictions to be approved under paragraph (b)(2) will be consistent with the limitations specified in paragraph (b)(1) of this AD.

(c) For airplanes that are NOT equipped with side vertical cargo container restraints that have been approved by the Manager, Standardization Branch, ANM–113: As an optional alternative to compliance with paragraph (a) of this AD, within 90 days after the effective date of this AD, accomplish the requirements of paragraph (c)(1) or (c)(2) of this AD, as applicable. This alternative may be used only during the period ending 28 months after the effective date of this AD.

(1) For airplanes on which containers complying with NAS 3610 Size Codes ''A,'' ''B,'' ''C,'' ''D,'' or ''E,'' are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements to include the following limitations. This may be accomplished by inserting a copy of this AD in all AFM's, AFM Supplements, and Weight and Balance Supplements.

''LIMITATIONS

Maximum Operating Airspeed of Vmo equals 350 knots indicated airspeed (KIAS), or Mode ''B'' [350 knots equivalent airspeed (KEAS)].

Minimum operating weight: 100,000 pounds.

All containers with one door must be oriented with the door side of the container facing forward, except the door of the first container aft of the cargo barrier may face aft.

The location of the horizontal center of gravity for the total payload within each container shall not vary more than 10 percent (8.8 inches) from the geometric center of the base of the container for the forward and aft direction and 10 percent of the width from the geometric center of the base of the container for the left or right direction.''

''PAYLOAD LIMITATIONS

For airplanes that transport containers or pallets that have been manufactured in accordance with National Aerospace Standard (NAS) 3610 Size Code ''A'' (88 by 125 inches), ''B'' (88 by 108 inches), or ''C'' (88 by 118 inches):

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 8,000 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

For those cargo pallets which are completely or partially contained within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 12,000 pounds for any two adjacent containers or pallets and a total weight of 8,000 pounds for any single container or pallet.

These payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.

For containers or pallets that have been manufactured in accordance with NAS 3610 Size Code ''D'' (88 by 54 inches) or ''E'' (88 by 53 inches) containers:

Except as provided below for Body Station 740 to Body Station 950, do not exceed a total weight of 4,000 pounds for any two adjacent (in the forward and aft direction) containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

For those cargo pallets which are completely or partially contained within Body Station 740 to Body Station 950 (the region of the wing box and main landing gear wheel well): Do not exceed a total weight of 6,000 pounds for any two adjacent containers or pallets and a total weight of 4,000 pounds for any single container or pallet.

These payload limits include the payload in the lower lobe cargo compartments and any other load applied to the bottom of the floor beams of the main cargo deck for the same body station location as the container or pallet on the main cargo deck.''

(2) For airplanes on which pallets or containers other than those specified in paragraph (c)(1) of this AD, are transported: Revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113.

Note 6: The weight restrictions to be approved under paragraph (c)(2) will be consistent with the limitations specified in paragraph (c)(1) of this AD.

(d) For airplanes complying with paragraph (b) or (c) of this AD, within 28 months after the effective date of this AD, accomplish the requirements of paragraph (a) of this AD.

(e) For airplanes that operate under the 350 KIAS limitations specified in paragraph (b) or (c) of this AD: A maximum operating airspeed limitation placard must be installed adjacent to the airspeed indicator and in full view of both pilots. This placard must state: ''Limit Vmo to 350 KIAS.''

(f) As an alternative to compliance with paragraphs (a), (b), (c), (d), and (e) of this AD: An applicant may propose to modify the floor structure or propose differing payloads and other limits by submitting substantiating data and analyses to the Manager, Denver Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate, 26805 E. 68th Avenue, Room 214, Denver, Colorado 80249. The Manager of the Denver ACO will coordinate the review of the submittal with the Manager of the Standardization Branch, ANM–113, in accordance with the procedures of paragraph (g) of this AD. If the FAA determines that the proposal is in compliance with the requirements of Civil Air Regulations (CAR) part 4b and is applicable to the specific airplane being analyzed and approves the proposed limits, prior to flight under these new limits, the operator must revise the Limitations Section of all FAA-approved AFM's and AFM Supplements, and the Limitations Section of all FAA-approved Airplane Weight and Balance Supplements, in accordance with a method approved by the Manager, Standardization Branch, ANM–113. Accomplishment of these revisions in accordance with the requirements of this paragraph constitutes terminating action for the requirements of this AD.

(g) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Denver ACO, who will coordinate the approval with the Manager of the Standardization Branch, ANM–113.

Note 7: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

(h) 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.

(i) This amendment becomes effective on February 16, 1999.

Issued in Renton, Washington, on December 16, 1998.

Ronald T. Wojnar,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99–447 Filed 1–11–99; 8:45 am]

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Federal Register

Tuesday
January 12, 1999

Part V

Department of Transportation

Federal Aviation Administration

14 CFR Part 93

High Density Airports; Allocation of Slots; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 93

[Docket No. FAA–1999–4971; Notice No. 99–20]

RIN 2120–AG50

High Density Airports; Allocation of Slots

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to amend the regulations governing takeoff and landing slots and slot allocation procedures at certain High Density Traffic Airports. As a result of the ''Open Transborder'' Agreement between the Government of the United States and Government of Canada, this proposed rule is necessary to codify the provisions of the bilateral agreement and ensure consistency between FAA regulations governing slots and the bilateral agreement.

DATES: Comments must be received on or before February 11, 1999.

ADDRESSES: Comments on this proposed rulemaking should be mailed or delivered, in duplicate, to: U.S. Department of Transportation Dockets, Docket No. FAA–1999–4971, 400 Seventh Street, SW, Room Plaza 401, Washington, DC 20590. Comments may also be sent electronically to the following Internet address: 9–NPRM–CMTS@faa.dot.gov. Comments may be filed and/or examined in Room Plaza 401 between 10 a.m. and 5 p.m. weekdays except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lorelei D. Peter, Airspace and Air Traffic Law Branch, Regulations Division, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3073.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that may result from adopting the proposals in this notice are also invited. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions. Communications should identify the regulatory docket number and be submitted in triplicate to the above specified address. All communications and a report summarizing any substantive public contact with FAA personnel on this rulemaking will be filed in the docket. The docket is available for public inspection both before and after the closing date for receiving comments.

Before taking any final action on this proposal, the Administrator will consider all comments made on or before the closing date for comments and the proposal may be changed in light of the comments received.

The FAA will acknowledge receipt of a comment if the commenter includes a self-addressed, stamped postcard with the comment. The postcard should be marked ''Comments to Docket No. FAA–1999–4971.'' When the comment is received by the FAA, the postcard will be dated, time stamped, and returned to the commenter.

Availablity of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Rulemaking, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9677. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future FAA NPRMs should request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes application procedures.

An electronic copy of this document may be downloaded using a modem and suitable communications software from the FAA regulations section of the Fedworld electronic bulletin board service (telephone 703–321–3339) or the **Federal Register's** electronic bulletin board service (telephone 202–512–1661). Internet users may read the FAA's web page at http://www.faa.gov or the **Federal Register's** web page at http://www.access.gpo.gov/su__docs for access to recently published rulemaking documents.

Background

The FAA has broad authority under Title 49 of the United States Code (U.S.C.), Subtitle VII, to regulate and control the use of navigable airspace of the United States. Under 49 U.S.C. 40103, the agency is authorized to develop plans for and to formulate policy with respect to the use of navigable airspace and to assign by rule, regulation, or order the use of navigable airspace under such terms, conditions, and limitations as may be deemed necessary in order to ensure the safety of aircraft and the efficient utilization of the navigable airspace. Also, under section 40103, the agency is further authorized and directed to prescribe air traffic rules and regulations governing the efficient utilization of the navigable airspace.

The High Density Traffic Airports Rule, or ''High Density Rule,'' 14 CFR part 93, subpart K, was promulgated in 1968 to reduce delays at five congested airports: JFK International Airport, LaGuardia Airport, O'Hare International Airport, Ronald Reagan National Airport, and Newark International Airport (33 FR 17896; December 3, 1968). The regulation limits the number of instrument flight rule (IFR) operations at each airport, by hour or half hour, during certain hours of the day. It provides for the allocation to carriers of operational authority, in the form of a ''slot'' for each IFR landing or takeoff during a specific 30- or 60-minute period. The restrictions were lifted at Newark in the early 1970's.

On December 16, 1985, the Department of Transportation (Department) promulgated the ''buy/sell'' rule, a comprehensive set of regulations that provide for the allocation and transfer of air carrier and commuter slots (50 FR 52180; December 20, 1985). The two primary features of this rule were, first, that initial allocation would be accomplished by ''grandfathering'' existing slots to the carriers that currently held them, and second, that a relatively unrestricted aftermarket in slots would be permitted. As a result, effective April 1, 1986 slots used for domestic operations could be brought and sold by any party.

The FAA allocates slots designated for international use by U.S. and foreign-flag carriers under procedures different from those that apply to the allocation of slots designated as domestic. Under 14 CFR section 93.217, international slots are allocated at Kennedy and O'Hare twice a year for the summer and winter scheduling seasons.

In promulgating the ''buy/sell'' rule, the Department determined that, as a matter of international aviation policy, the allocation of new slots to international carriers as Kennedy and O'Hare Airports would be made by the FAA based on requests from foreign and U.S. operators conducting international operations (50 FR 52187; December 20, 1985).

O'Hare is unique in that domestic slots are withdrawn to accommodate requests for international operations during each summer and winter season. 14 CFR section 93.217(a)(6) specifically

provides that the FAA must allocate a slot for an international operation at O'Hare upon request. If there is not an available slot within 60 minutes of requested time, a slot would be withdrawn from a domestic carrier to fill that request. At LaGuardia, section 93.217(a)(7) provides that additional slots will be allocated for international operation if required by bilateral agreement. At Kennedy, section 93.217(a)(8) provides that domestic slots will be withdrawn for international operations only if required by international obligations.

At the time of the ''buy/sell'' rule, the Department concluded that since certain slots used for international operations are specially treated within Subpart S, it is important that the Department be aware of which slots are being used for those operations. Therefore, U.S. carriers were required to submit to the FAA in writing, the slots that were used for international operations as of December 16, 1985. These slots were then designated by the FAA as international slots.

International slots may not be bought, sold, leased, or otherwise transferred, except such slots may be traded to another slot holder on a one-for-one-basis at the same airport. Furthermore, if a carrier does not use an international slot for more than a two-week period, the slot must be returned to the FAA. International slots may only be used for international service.

However, FAA regulations permit the use of domestic slots for either international or domestic service. Regardless of the type of service, i.e., domestic or international, the minimum slot usage requirement and withdrawal procedures apply to a slot designated as domestic. FAA regulations governing slots provide for lotteries of domestic slots in certain circumstances. These regulations also permit only U.S. carriers to participate in lotteries for domestic slots. International slots are not allocated by the lottery mechanism.

U.S.-Canada Bilateral Agreement

On February 24, 1995, the Government of the United States and the Government of Canada entered into a bilateral agreement (Agreement) phasing in an ''Open Transborder'' regime between the two countries. Annex II of the Agreement specifically addresses slots and access to O'Hare, LaGuardia and Ronald Reagan National Airports. After a three year phase-in period, the Agreement provides that, effective February 24, 1998: (1) the Canadian carriers will be able to obtain slots at the High Density Traffic Airports under the same prevailing allocation system as U.S. carriers; (2) the base levels of slots established for Canada will consist of 42 slots at LaGuardia, and 36 slots for the Summer season at O'Hare and 32 slots for the Winter season at O'Hare; (3) Canadian carriers' slot base at LaGuardia and O'Hare (which currently is comprised of international slots), effectively will ''convert'' to domestic slots; (4) all slots acquired by the Canadian carriers, including the determined slot base, as described in (2) above, at LaGuardia and O'Hare, will be subject to the minimum slot usage requirement set forth in section 93.227 and may be withdrawn for failure to meet that requirement; (5) the provision of the bilateral agreement do not permit the determined slot base as LaGuardia and O'Hare to be withdrawn for the purpose of providing a U.S. or foreign air carrier with slots for international operations or to provide slots for new entrant operators; (6) any slots acquired after the transition date that do not form part of the determined slot base may be withdrawn at any time to fulfill operational needs; (7) neither the Government of Canada nor any Canadian carrier may modify the determined slot base at LaGuardia or O'Hare and then have claim to any time slot to restore the base; and (8) slots that are acquired above the determined slot base level and then subsequently disposed of shall not modify the base.

The Agreement also contains several provisions specific to Ronald Reagan National Airport, concerning non-stop service between Canada and the U.S. These provisions will not be addressed since they are unaffected by the contents of this proposal.

The present regulatory framework governing slots and slot allocation procedures does not provide for all the terms of the Agreement as set forth above. In order to ensure that FAA slot regulations are consistent with the terms of the Agreement, the FAA proposes to modify the regulations. This proposal consists of two primary actions: the conversion of certain international slots to domestic, and the establishment of a regulatory base level of slots for the Canadian carriers. In addition, the FAA proposes to amend the regulatory submission deadline for international requests to coincide with the deadline established for the seasonal International Air Transport Association (IATA) Schedule Coordination Conference.

Conversion of International Slot to Domestic Slots

The Open Transborder bilateral agreement has liberalized U.S.-Canadian transborder air transportation. Following the three year phase-in period, U.S. and Canadian carriers have full freedom of entry. The Agreement provides that Canadian carriers will be able to obtain slots in the HDR Airports under the ''same prevailing allocation system'' as U.S. carriers. This effectively requires that the Canadian carriers be treated similarly to domestic carriers. Consequently, effective February 24, 1998, Canadian air carriers and their slots are subject to the allocation provisions and associated options applicable to domestic slots.

U.S. carriers may obtain domestic slots three ways: (1) through the market, by the buying, selling, trading, or leasing of slots; (2) by participation in a slot lottery (in accordance with 14 CFR section 93.225, the FAA may hold a lottery upon determination that there are a sufficient number of slots available); and (3) allocation of slots in low-demand periods. (14 CFR section 92.226 permits, on a first-come, first-served basis, for the allocation of slots available for less than 5 days per week; for less than a full season; or between 6:00 a.m.–6:59 a.m. or 10:00 p.m.–midnight.)

At present, the Canadian carriers hold 36 international slots at O'Hare and 42 international slots at LaGuardia. Since the Agreement permits the Canadian carriers to buy, sell, lease, or trade these slots, the FAA proposes to reclassify the 36 international slots at O'Hare and the 42 international slots at LaGuardia as domestic slots. As a result of this reclassification, all the regulatory requirements of domestic slots, such as the minimum slot usage requirement, would attach to the subject slots. We note that the Agreement already subjects these slots to the minimum slot usage requirement. This reclassification would be consistent with the purpose and intent of the Agreement.

The FAA proposes that U.S. carriers be extended similar treatment. The basis for a number of provisions being codified in the ''buy/sell'' rule was the standing policy that it is desirable to treat U.S. carriers and foreign-flag carriers similarly when conducting identical service. In 1985, at the time that the ''buy/sell'' rule was promulgated, several commenters argued for the exclusion of any international operations from the ''buy/sell'' provisions (50 FR 52187). The Department, favoring equal treatment of U.S. international operators and foreign operators in most respects, concluded that the ''buy/sell'' provisions should apply only to domestic slots and that all international slots will be treated the same, irrespective of whether the holder is a U.S. carrier or foreign-flag carrier.

Thus, in 1985, U.S. carriers were required to identify which slots were used for international service as of December 16, 1985.

The slots identified by U.S. carriers as international in 1985 were predominantly used to service the U.S./Canada market. Certain provisions applicable to international slots were specifically adopted to address concerns by the Canadian carriers about competing with U.S. carriers who had much larger slot basis at the HDR airports than the Canadian operators. For example, an international slot could be traded to another carrier for the purpose of conducting the operation in a different hour or half-hour. Deliberate measures were taken in promulgating the ''buy/sell'' rule to minimize distinctions between U.S. and foreign-flag carriers when engaged in international operations. Under a similar analysis, FAA now believes that the treatment of U.S. carrier international slots at O'Hare and LaGuardia warrants reexamination in light of the Agreement and the consideration afforded Canadian carriers under the terms of the Agreement.

By classifying international slots held by the Canadian carriers as domestic slots, the Canadian carriers may realize an unfair advantage over U.S. carriers. Canadian carriers may buy, sell, or lease the slots they use for U.S./Canada transborder service, while U.S. carriers that operate international slots cannot buy, sell, or lease the slots for the same transborder service. While the Agreement was clear that Canadian carriers would be subject to the prevailing mechanisms for slot allocation that apply to U.S. carriers, it was silent as to its impact on U.S. carriers. U.S. carriers, subject to the existing international allocation procedures, would continue to treat flights to or from Canada as international flights for slots allocated under section 93.217(1)(a). On the other hand, U.S. carriers may request additional international slots under section 93.217(a)(1) for U.S./Canada service while Canadian carriers could not, since Canadian carriers are now subject to allocation procedures for domestic slots. Canadian carriers may perceive this as an unfair benefit to their U.S. competitors.

The equitable intent of the Agreement was to treat carriers of both countries in the same manner for purposes of slot allocation. Therefore, the FAA proposes similar treatment for certain, identified, international slots held by U.S. carriers at O'Hare and LaGuardia Airports. Specifically, the FAA proposes to reclassify as domestic a total of 35 international slots at O'Hare and 17 international slots at LaGuardia that are held by U.S. carriers. As stated above, the principal reason for designating these slots as international slots in December 1985 was to provide U.S. carriers the same opportunities and protections as foreign-flag carriers, particularly with respect to U.S.-Canada transborder service.

FAA records for O'Hare indicate that in December 1985, American Airlines held 18 international slots, Northwest held two international slots, and United held 15 international slots. Of these 35 slots, 32 were used for U.S./Canada service. Agency records for LaGuardia also indicate that in 1985 American Airlines held 15 international slots and Delta held two slots. The FAA finds significant that the four U.S. carriers directly affected by the proposed redesignation of slots from international to domestic status have continuously used these slots since the adoption of the Department's slot allocation rules in December 1985, and in some cases, conducted this same international service prior to the adoption of the High Density Rule in 1969.

This proposed amendment would redesignate slots identified and held by U.S. carriers as international under 14 CFR section 93.215(d), provided that an equivalent number of slots were held by the carriers as of February 24, 1998, the date of phase-in under the Agreement. This proposal would not affect any other international slots subsequently allocated under section 93.217 after December 1985, i.e., that were not part of a carrier's historic base at the time that the ''buy/sell'' rule was adopted. This proposed ''conversion'' to domestic status would provide affected slot holders with increased scheduling flexibility; as domestic slots, they can be used for U.S./Canada transborder service, any other domestic service, or for international service.

Since the FAA proposes to reclassify certain international slots held by U.S. carriers as domestic, the FAA accordingly finds it necessary to propose an adjustment of the international slot allocation of air carriers holding or operating 100 or more slots at O'Hare. Specifically, 14 CFR Section 93.217(a)(10) provides that the international allocation for air carriers holding and operating 100 or more permanent slots will not exceed the number of international slots allocated to that carrier as of February 23, 1990, unless the allocation could be made without increasing withdrawals. The purpose of this amendment was to limit the ability of the largest U.S. air carriers to force the withdrawal of domestic slots from other U.S. carriers in order to expand international operations. The largest carriers may still increase their international operations at O'Hare above their international allocation of February 23, 1990; however, they must do so by using slots from within their own domestic slot base or from slots otherwise available without withdrawal of a slot. The reclassification of certain international slots to domestic must take into account large carriers that are subject to the above cap on international allocation. Today the only carriers limited by section 93.217(a)(10) are American and United and their affiliated commuter operations under common ownership. Consequently, in reclassifying the 18 international slots held by American and 15 international slots held by United in December 1985, it would be necessary to adjust the February 23, 1990, international allocation for, American and United by the corresponding number. Therefore, the FAA proposes to reduce the February 23, 1990, international base allocation for American and United respectively by 18 and 15 slots.

Establishment of Regulatory Base of Slots for the Canadian Carriers

The terms of the Agreement also provide for an established based level of slots for the Canadian carriers at LaGuardia and O'Hare. At LaGuardia, the base level of slots for the Canadian carriers is 42. At the time the Agreement was signed, the Canadian carriers held 28 slots. In June 1995, the FAA was directed by the Department to allocate 14 new slots to the Canadian carriers. The FAA proposes to increase the quota under 14 CFR Section 93.123 for air carrier operations at LaGuardia to include the 14 new slots, as authorized by the Agreement and in operation since June 1995.

At O'Hare, the Agreement provides Canadian carriers with a base level of 36 slots for the Summer season and 32 slots for the Winter season. At the time of the Agreement, the Canadian slot base was comprised of 12 slots held by the Canadian carriers since 1985, and 14 slots held by the Canadian carriers in time periods for which domestic slots usually have been withdrawn. These 14 slots are allocated seasonally under section 93.217 and do not constitute permanent slots. In June 1995, ten slots were allocated to the Canadian carriers. Thus, the above sets forth the present Canadian air carrier slot base, as articulated in the Agreement. The Canadian carriers are now permitted to buy, sell, lease or otherwise trade their

slots. The 14 slots held by Canadian carriers allocated under section 93.217(a)(6), which have resulted from withdrawals of domestic slots, cannot be bought, sold, leased, or otherwise traded. The FAA does not have a regulatory process to withdraw slots from domestic carriers and to permanently allocate the slots to the Canadian carriers. The FAA believes that creating 14 new slots at O'Hare would achieve two desired results. First, it would address the requirements of the Agreement. Second, it would not result in the permanent withdrawal of domestic slots to the benefit of foreign-flag carriers. At the time that the Agreement was negotiated, a permanent withdrawal of domestic slots was not contemplated. Therefore, the FAA proposes to increase the quota under 14 CFR Section 93.123 for air carrier slots at O'Hare to allow the Canadian carriers to continue to operate as envisioned by the negotiated Agreement without withdrawing domestic slots from U.S. carriers. The 14 new slots, plus the 10 slots allocated in June 1995 in addition to the 12 slots previously held by Canadian carriers, would constitute the agreed upon slot base at O'Hare.

A section by section analysis describing the proposed amendments is as follows:

Section 93.123 High Density Traffic Airports

The FAA proposes to amend section 93.123 by adding a footnote that specifically allocates to the Canadian carriers 14 slots at LaGuardia and 24 slots at O'Hare, in accordance with the Agreement between the U.S. and Canada of February 24, 1995. The FAA proposes this amendment in the manner of a footnote rather than as an amendment to the hourly totals at LaGuardia and O'Hare for two reasons. First, these slots did not exist for allocation prior to the negotiations for the bilateral agreement between the U.S. and Canada, i.e., these slots did not represent any unused capacity at either airport. Second, the special allocation of these slots was a component of the complete negotiated Agreement and constitutes the established base for Canadian carriers. Therefore, not only were these slots not available for any of FAA's specified allocation procedures as set forth in sections 93.217, 93.219 or 93.225 of Subpart S, but the FAA did not have discretion to allocate these slots to any other requesting carrier.

Section 93.217 Allocation of Slots for International Operations and Applicable Limitations

The FAA proposes amending section 93.217(a) to exclude from this section, the allocation of international slots at HDR airports for transborder service operations solely between that airport and Canada. This proposal would not affect the allocation of international slots to foreign-flag carriers for continuation flights originating/terminating outside the U.S.

Additionally, section 93.217(a) (5), (6) and (8) require that requests for international slot allocations must be submitted to the FAA Slot Administration office by May 15 of each year for operations to commence during the following Winter season and by October 15 for operations to commence during the following Summer season. With the exception of the U.S. slot controlled airports, all other capacity scheduled international airports generally follow the IATA guidelines in allocating international slots. The IATA guidelines for submission of each carrier's seasonal request for slots are published by IATA and generally fall within seven days of the FAA deadline articulated in section 93.217 above. For carriers requesting international slots, the use of two separate deadlines, one for U.S. airports and another for all other airports, causes confusion and has resulted in carriers unintentionally submitting late requests for O'Hare and Kennedy. Therefore, the FAA proposes to amend the deadline for seasonal requests to coincide with the date of submission for IATA. While the IATA deadlines remain in October for the Summer season and May for the Winter season, the particular date changes every year. The FAA proposes to announce the submission deadline for international requests at Kennedy and O'Hare in the **Federal Register** no later than 90 days in advance of the scheduled IATA deadline. The FAA believes that coordinating submission deadlines would reduce the administrative burden for affected U.S. carriers and foreign-flag carriers, as well as for the FAA.

Lastly, paragraph (a)(10) of this section would amend the international allocation of the largest carriers at O'Hare by reducing their international slot base to reflect the proposed reclassification of certain international slots to domestic slots.

Section 93.218 Reclassification of Certain International Slots to Domestic Slots and Special Provisions for Slots Held by Canadian Carriers.

The FAA proposes a new section 93.218 that provides for the reclassification as domestic slots the number of slots identified by U.S carriers for international operations in December 1985. This number is not to exceed the number of equivalent slots held as of February 24, 1998. In addition, this section would change the reclassification of the slots comprising the Canadian slots base from international status to domestic status. The properties and characteristics associated with domestic slots, such as the minumum slot usage requirement, would attach to all the slots in the slot base upon the reclassification as domestic.

This section also proposes to codify the established base of slots to Canadian carriers as set forth in the Agreement. The established base of slots would consist of 42 slots at LaGuardia, 36 slots at O'Hare for the Summer season, and 32 slots at O'Hare for the Winter season.

In addition, in accordance with the Agreement, the FAA proposes that any disposal of slots comprising the defined established base, that would result in a decrease of that base would be considered a permanent modification to the slot base.

Section 93.223 Slot Withdrawal

The FAA proposes to amend this section by adding a new paragraph that would prevent, as specified by the terms of the Agreement, slots that comprise the established Canadian slot base, as defined in the new section 93.218, from being withdrawn to fulfill requests for international operations or for new entrants.

Section 93.225 Lottery of Available Slots

Lastly, the FAA proposes to amend this section to include participation by Canadian carriers in the allocation of slots by lottery. Historically, the participation in slot lotteries was reserved for domestic carriers. However, since Canadian carriers are now subject to the same prevailing allocation methods that apply to U.S. carriers, an extension of this provision would be necessary to provide the same allocation procedures for carriers of both countries.

Related Petitions

On May 27, 1998, the FAA granted a limited exemption to Northwest Airlines, Inc., permitting the air carrier to use two international slots at O'Hare

for domestic service. The FAA found that the public interest supported this limited exemption and recognized Northwest Airlines' considerable long-term use of the two slots and the fact that its ''use'' of the slots, at a minimum, has been equivalent to the usage required for domestic service.

Additionally, by petition dated April 29, 1998, American Airlines petitioned to redesignate 15 international slots at LaGuardia as domestic slots.

The Proposal

In order to ensure that FAA regulations governing slots and slot allocation procedures are consistent with the terms of the Agreement, the FAA proposes to amend the following provisions of Subparts K and S:

The FAA proposes to: (1) codify, in a footnote to the hourly slot totals in subpart K, the 14 slots at LaGuardia and 24 slots at O'Hare that were allocated to the Canadian carriers in June 1995; (2) exclude from the allocation of international slots at HDR airports transborder service operations solely between that airport and Canada; (3) set forth the provisions that apply to slots used for transborder service between the U.S. and Canada and codify the established base level of slots allocated to Canadian carriers; (4) reclassify certain international slots as domestic slots; (5) reduce the international allocation for air carriers that hold and operate more than 100 permanent slots at O'Hare by the number of international slots reclassified as domestic slots; (6) permit Canadian carriers to participate in any lotteries of domestic slots; and (7) amend the regulatory deadline for submitting requests for international allocation to coincide with the published IATA deadline.

The Summer 1999 scheduling season begins on April 4, 1999. The FAA understands from industry practices that air carriers need approximately 60 days advance notice to set schedules for aircraft crews and to publish scheduled airline information. In order for all air carriers that may be affected by the changes proposed in this NPRM to be able to determine their slot base with respect to international and domestic slots prior to this season, the FAA finds that a 30-day comment period is justified. A 30-day comment period for this NPRM will provide commenters with adequate time to file comments and will enable the FAA to promulgate the final rule so that it can be in effect for slot allocation for the 1999 Summer scheduling season.

Environmental Review

The FAA has concluded that this proposed rule does not trigger the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., or other environmental laws. As explained below, the action is a non-discretionary one mandated by the bilateral agreement entered into by the United States and Canada on February 24, 1995.

In accordance with the bilateral agreement, part one of this proposed regulation reclassifies slots held by Canadian carrier at LaGuardia and O'Hare airports. The Canadian carriers' slots would be converted from international to a modified form of domestic slots. Under the arrangement mandated by the Agreement and codified in this proposed regulation, the slots held by the Canadian carriers would resemble domestic slots in that (1) they can be bought, sold, or traded on the open market, and (2) they are subject to the bi-monthly ''use-or-lose'' requirement. Unlike other domestic slots, however, the slots held by the Canadian carriers would not be subject to seasonal withdrawal for international use pursuant to 14 CFR section 93.217 or for new entrants. To provent disparate treatment between U.S. carriers and Canadian carriers, the proposed regulations would also reclassify certain, identified international slots held by U.S. carriers as domestic slots.

Part two of this proposed regulation would establish base levels of permanent slots for the Canadian carriers at LaGuardia and O'Hare. The bilateral agreement directs that the Canadian carriers receive 42 permanent slots at LaGuardia. Currently, the Canadian carriers are using 42 slots at LaGuardia so no additional allocation of slots is necessary. This Agreement also directs that the Canadian carriers receive 36 Summer slots and 32 Winter slots at O'Hare. Currently, the Canadian carriers hold 22 permanent slots at O'Hare. The Canadian carriers also are allocated 14 seasonal slots for the summer and 10 seasonal slots for the winter under 14 CFR section 93.217 in time periods for which domestic slots are withdrawn. To complete the base level of slots at O'Hare, the proposed regulation provides that an additional 14 slots in the summer and 10 slots in the winter be allocated permanently to the Canadian carriers. Because the Canadian carriers are receiving these allocations as permanent, the proposed regulation also provides that they would no longer be eligible to receive international slots under 14 CFR section 93.217.

No NEPA or other environmental analysis is required because the proposed action is ministerial in nature. The FAA has no choice about how to accomplish the international mandate, which reclassifies international slots held by Canadian carriers as domestic slots and to provide additional slots at O'Hare. While the FAA retains complete authority to withdraw slots for operational needs in accordance with 14 CFR section 93.223, the existing allocation mechanisms do not provide a means for the FAA to allocate the slots to the Canadian carriers. 14 CFR section 93.225 provides that if slots are available, the slots will be distributed by random lottery with new entrant and limited incumbent carriers receiving priority. In addition, fulfilling the Agreement obligation by allocating slots under 14 CFR section 93.217 is not feasible since these slots are allocated seasonally. Furthermore, even if allocating slots under 14 CFR section 93.217 were feasible, slot withdrawals by the FAA are legislatively capped at the level of slots withdrawn as of October 31, 1993. 49 U.S.C. 41714(b)(2). Thus, lacking a mechanism for withdrawing the slots from the existing slot holders and re-directing them to the Canadian carriers, the FAA has no choice but to comply with the bilateral agreement by creating 14 additional slots at O'Hare. NEPA requires agencies to take environmental concerns into consideration when making decisions where a range of alternatives is available. However, under these circumstances, where no choice is involved, an action is ministerial and no NEPA analysis is required.

The FAA's position that this action is ministerial finds support in the NEPA-implementing regulations promulgated by the Department of State, 22 CFR part 161. Among the actions which the State Department exempts from NEPA analysis are:

> Mandatory actions required under any treaty or international agreement to which the United States Government is a party, or required by the decisions of international organizations or authorities in which the United States is a member or participant, except when the United States has substantial discretion over implementation of such requirements.

By comparison, the allocation of slots to the Canadian carriers is an example of an action that would likely be exempt under the State Department regulations. The FAA is required by the Agreement to allot permanent slots to the Canadian carriers, and the agency has no discretion but to create additional slots.

Given the international agreement, the FAA adopts the position espoused by the State Department regulations and concludes that the allocation of slots to Canadian carriers, as required by the bilateral agreement, does not trigger NEPA compliance.

Regulatory Evaluation Summary

Both the executive and legislative branches of government recognize that economic considerations are an important factor in establishing regulations. Executive Order 12866, signed by President Clinton on September 30, 1993, requires Federal agencies to assess both the costs and benefits of proposed regulations. Recognizing that some costs and benefits are difficult to quantify, agencies are to propose or adopt regulations only upon a reasoned determination that the benefits of each regulation justify its costs. In addition, the Regulatory Flexibility Act of 1980 requires Federal agencies to determine whether or not proposed regulations are expected to have a significant economic impact on a substantial number of small entities, and, if so, to examine the feasibility of regulatory alternatives to minimize the economic burden on small entities. Finally, the Office of Management and Budget directs agencies to assess the effects of proposed regulations on international trade.

This section summarizes the FAA's economic and trade analyses, findings, and determinations in response to these requirements. The complete economic and trade analyses are contained in the docket.

The FAA allocates international and domestic slots without charge to carriers at HDR airports. Allocated slots do not represent a property right, but represent an operating privilege subject to absolute FAA control. As such, the FAA does not place any economic value on the slots it allocates at HDR airports. However, slots do have economic value to air carriers, because they provide access to the HDR airport, and with access to the airport comes the opportunity to earn revenue.

A market has been created for those domestic slots that air carriers control at the HDR airports. Since domestic slots can be bought, sold, traded, or leased, these slots have a monetized value. International slots also provide an opportunity to earn revenue. However, because they cannot be bought, sold, leased, bartered, or used as collateral, no market exists for them at HDR airports.

Although the total number of slots (international plus domestic) would not increase for any of the U.S. carriers, the number of domestic slots for affected carriers would increase. The proposed rule would generate benefits for those air carriers holding historic slots identified for international use under 14 CFR 93.215(d) because those international slots would be converted to domestic slots. Operators benefit because of the enhanced flexibility they receive to manage their scheduling at HDR airports. The slots that have been converted from international to domestic can be scheduled in Canada-USA transborder service, they can be scheduled in other domestic service, or they can be scheduled for any international service. Operators also receive an expanded economic value because the market has placed a value on domestic slots if the operator decides to buy, sell, lease, barter, or collateralize slots. Therefore, the FAA believes that the proposed rule would benefit operators not only because domestic slots present a greater measure of potential earning power than do international slots, but also because domestic slots offer operators a better opportunity to manage their assets.

There is no compliance cost associated with the proposed rule. The proposed rule would not impose any additional equipment, training, administrative, or other cost to the aviation industry. However, the FAA solicits comments regarding the extent and plausibility of the adverse impacts on operators that feel they would be impacted from implementation of the proposed rule. All commenters are asked to provide detailed cost information on the nature of their impact and over what time period.

The NPRM would not place any additional requirements on the aviation industry. Therefore, there is no compliance costs associated with the proposed rule. Qualitative benefits from the proposed rule would come from converting certain identified international slots to domestic slots, thereby affording operators greater flexibility, because the converted slots can be used for transborder service, any other domestic service, or for other international service. Domestic slots have greater economic value than international slots, because domestic slots can be bought, sold, leased, bartered, or used as collateral. Due to the advantages domestic slots offer over international slots, operators have an enhanced opportunity to manage their assets in such a way as to maximize their income. Therefore, the FAA has determined that the proposed rule is cost beneficial.

Initial Regulatory Flexibility Assessment

The Regulatory Flexibility Act of 1980 (RFA), as amended, was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by Government regulations. The Act requires that whenever an agency publishes a general notice of proposed rulemaking, an initial regulatory flexibility analysis identifying the economic impact on small entities, and considering alternatives that may lessen those impacts must be conducted if the proposed rule would have a significant economic impact on a substantial number of small entities.

This proposed rule will impact entities regulated by part 93. The FAA has determined that the proposed amendments to part 93, Subparts K and S, if promulgated, would affect only two Canadian carriers and four major U.S. carriers and, the proposed amendments would not have a significant impact on these major air carrier costs. Therefore, the FAA certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. However, the FAA solicits comments from operators that feel they would be negatively impacted from implementation of the proposed rule.

International Trade Impact Statement

This proposal could positively affect the sale of Canadian aviation services in the United States, but it could also positively affect the sale of United States aviation services in Canada. However, this proposed rule is not expected to impose a competitive advantage or disadvantage to either U.S. air carriers doing business in Canada or Canadian air carriers doing business in the United States. This assessment is based on the fact that this proposed rule would not impose additional costs on either U.S. or Canadian air carriers.

Unfunded Mandates Reform Act Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process

to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed ''significant intergovernmental mandate.'' A ''significant intergovernmental mandate'' under the Act is any provision in a Federal agency regulation that would impose an enforceable duty upon State, local, and tribal governments, in the aggregate of $100 million (adjusted annually for inflation) in any one year. Section 203 of the Act 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for meaningful and timely opportunity to provide input in the development of regulatory proposals.

This rule does not contain any Federal intergovernmental or private sector mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has submitted an explanation of the proposed burden associated with this NPRM to the Office of Management and Budget (OMB) for its review. Under the provisions of this NPRM, Canadian carriers or commuter operators would need to report to the FAA certain aspects of their operations at high density requirement (HDR) airports. Specifically, FAA regulation requires notification of (1) requests for confirmation of transferred slots; (2) requests to be included in a lottery for available slots; (3) usage for slots on a bi-monthly basis; and (4) requests for short-term use of off peak hour slots. Prior to this NPRM, Canadian carriers and commuter operators were not required to submit this information for international slots, nor were they able to participate in the allocation procedures that apply to U.S. carriers. The total reporting burden associated with this NPRM is 54 hours. The affected public would be Canadian carriers or commuter operators. The requirement would be mandatory. Once this NPRM becomes a final rule, the burden associated with it would be added to the current information collection package, High Density Traffic Airports; Slot Allocation and Transfer Methods, OMB approval number 2120–0524.

Federalism Implications

The regulations proposed 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 proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 14 CFR Part 93

Air traffic control, Airports, Alaska, Navigation (air), Reporting and recordkeeping.

The Proposed Amendment

For the reasons set forth above, the Federal Aviation Administration proposes to amend 14 CFR part 93 as follows:

PART 93—SPECIAL AIR TRAFFIC RULES AND AIRPORT TRAFFIC PATTERNS

1. The authority citation for part 93 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40109, 40113, 44502, 44514, 44701, 44719, 46301.

2. § 93.123 is amended by adding a new footnote 5 in the headings in columns 2 and 4 and revising the heading in column 5 of the chart in paragraph (a) to read as follows:

§ 93.123 High density traffic airports.

(a) * * *

IFR OPERATIONS PER HOUR—AIRPORT

Class of user	LaGuardia [4 5]	Newark	O'Hare [2 3 5]	Ronald Reagan National [1]
*	*	*	*	*	*	*

[1] Washington National Airport operations are subject to modifications per Section 93.124.

[2] The hour period in effect at O'Hare begins at 6:45 a.m. and continues in 30-minute increments until 9:15 p.m.

[3] Operations at O'Hare International Airport shall not—

(a) Except as provided in paragraph (c) of the note, exceed 62 for air carriers and 13 for commuters and 5 for ''other'' during any 30-minute period beginning at 6:45 a.m. and continuing every 30 minutes thereafter.

(b) Except as provided in paragraph (c) of the note, exceed more than 120 for air carriers, 25 for commuters and 10 for ''other'' in any two consecutive 30-minute periods.

(c) For the hours beginning as 6:45 a.m., 7:45 a.m., 11:45 a.m., 7:45 p.m. and 8:45 p.m., the hourly limitations shall be 105 for air carriers, 40 for commuters and 10 for ''other,'' and the 30-minute limitations shall be 55 for air carriers, 20 for commuters and 5 for ''other.'' For the hour beginning at 3:45 p.m., the hourly limitations shall be 115 for air carriers, 30 for commuters and 10 for ''others'', and the 30-minute limitations shall be 60 for air carriers, 15 for commuters and 5 for ''other.''

[4] Operations at LaGuardia Airport shall not—

(a) Exceed 26 for air carriers, 7 for commuters and 3 for ''other'' during any 30-minute period.

(b) Exceed 48 for air carriers, 14 for commuters, and 6 for ''other'' in any two consecutive 30-minute period.

[5] Pursuant to bilateral agreement, 14 slots at LaGuardia and 24 slots at O'Hare are allocated to the Canadian carriers. These slots are excluded from the hourly and daily quotas set forth in this section.

3. Section 93.217 is amended by revising paragraphs (a) introductory text, (a)(5), (a)(6), (a)(8) and (a)(10)(i) to read as follows:

§ 93.217 Allocation of slots for international operations and applicable limitations.

(a) Any air carrier or commuter operator having the authority to conduct international operations shall be provided slots for those operations, excluding transborder service solely between HDR airports and Canada, subject to the following conditions and the other provisions of this section:

* * * * *

(5) Except as provided in paragraph (a)(10) of this section, at Kennedy and O'Hare Airports, a slot shall be allocated, upon request, for seasonal international operations, including charter operations, if the Chief Counsel of the FAA determines that the slot had been permanently allocated to and used by the requesting carrier in the same hour and for the same time period during the corresponding season of the preceding year. Requests for such slots must be submitted to the office specified in § 93.221(a)(1), *in accordance with the terms published in the* **Federal Register** *for each season.* For operations during the 1986 summer season, request under

this paragraph must have been submitted to the FAA on or before February 1, 1986. Each carrier requesting a slot under this paragraph must submit its entire international schedule at the relevant airport for the particular season, noting which requests are in addition to or changes from the previous year.

(6) Except as provided in paragraph (a)(10) of this section, additional slots shall be allocated at O'Hare Airport for international scheduled air carrier and commuter operations (beyond those slots allocated under § 93.215 and § 93.217(a)(5)) if a request is submitted to the office specified in § 93.221(a)(1) *and filed in accordance with the terms published in the* **Federal Register** for each season. These slots will be allocated at the time requested unless a slot is available within one hour of the requested time, in which case the unallocated slots will be used to satisfy the request.

* * * * *

(8) To the extent vacant slots are available, additional slots during the high density hours shall be allocated at Kennedy Airport for new international scheduled air carrier and commuter operations (beyond those operations for which slots have been allocated under §§ 93.215 and 93.217(a)(5)), if a request is submitted to the office specified in § 93.221(a)(1) *and in accordance with the terms published in the* **Federal Register** for each season. In addition, slots may be withdrawn from domestic operations for operations at Kennedy Airport under this paragraph if required by international obligations.

* * * * *

(10) * * *

(i) Allocation of the slot does not result in a total allocation to that carrier under this section that exceeds the number of slots allocated to and scheduled by that carrier under this section on February 23, 1990, *and as reduced by the number of slots reclassified under § 93.218,* and does not exceed by more than 2 the number of slots allocated to and scheduled by that carrier during any half hour of that day, or

* * * * *

3. A new § 93.218 is added to read as follows:

§ 93.218 Slots for transborder service to and from Canada.

(a) Except as otherwise provided in this subpart, effective February 24, 1998, international slots identified by U.S. carriers for international operations in December 1985 and the equivalent number of international slots held as of February 24, 1998, will be domestic slots. The Chief Counsel of the FAA shall be the final decisionmaker for these determinations.

(b) Canadian carriers shall have a guaranteed base level of slots of 42 slots at LaGuardia, 36 slots at O'Hare for the Summer season, and 32 slots at O'Hare in the Winter season.

(c) Any modification to the slot base by the Government of Canada or the Canadian carriers that results in a decrease of the guaranteed base in paragraph (b) of this section shall permanently modify the base number of slots.

4. § 93.223 is amended by adding a new paragraph (c)(4) to read as follows:

§ 93.223 Slot withdrawal.

* * * * *

(c) * * *

(4) No slot comprising the guaranteed base of slots, as defined in § 93.318(b), shall be withdrawn for use for international operations or for new entrants.

* * * * *

5. § 93.225 is amended by revising paragraph (e) to read as follows:

§ 93.225 Lottery of available slots.

* * * * *

(e) Participation in a lottery is open to each U.S. air carrier or commuter operator operating at the airport and providing scheduled passenger service at the airport, *as well as where provided for by bilateral agreement.* Any U.S. carrier that is not operating scheduled service at the airport and has not failed to operate slots obtained in the previous lottery, or slots traded for those obtained by lottery, but wishes to initiate scheduled passenger service at the airport, shall be included in the lottery if that operator notifies, in writing, the Slot Administration Office, AGC–230, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. The notification must be received 15 days prior to the lottery date and state whether there is any common ownership or control of, by, or with any other air carrier or commuter operator as defined in § 93.213(c). New entrant and limited incumbent carriers will be permitted to complete their selections before participation by other incumbent carriers is initiated.

* * * * *

Issued in Washington, DC, on January 6, 1998.

James W. Whitlow,

Deputy Chief Counsel.

[FR Doc. 99–621 Filed 1–7–99; 12:13 pm]

BILLING CODE 4910–13–M

Federal Register

Tuesday
January 12, 1999

Part VI

Federal Emergency Management Agency

Final Agency Policy for Government-to-Government Relations with American Indian and Alaska Native Tribal Governments; Notice

FEDERAL EMERGENCY MANAGEMENT AGENCY

Final Agency Policy for Government-to-Government Relations with American Indian and Alaska Native Tribal Governments

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice; final policy statement.

SUMMARY: This final policy statement has been developed to guide FEMA's interactions with American Indian and Alaska Native Tribal governments in response to a policy memorandum issued by the President on April 29, 1994. President Clinton's memorandum directed agency and department heads to ensure that the Federal Government operates within a government-to-government relationship with Federally recognized Tribal governments. This policy reflects the extensive and insightful comments received over the last twelve months. The comments received and the Agency's response to those comments are contained within an accompanying notice detailing statements of consideration.

EFFECTIVE DATE: September 25, 1998.

FOR FURTHER INFORMATION CONTACT: Kyle W. Blackman, Federal Emergency Management Agency, 500 C Street SW. Washington, DC 20472, (tel.) (202) 646–2776 or (email) *kyle.blackman@fema.gov*.

SUPPLEMENTARY INFORMATION: On June 24, 1997, as Director of the Federal Emergency Management Agency (FEMA), I presented a draft Agency policy on American Indian and Alaska Natives to Tribal leaders on the Standing Rock Sioux Reservation. At that time, I encouraged the beginning of a dialogue between FEMA and this nation's first inhabitants on issues associated with emergencies and disasters.

Following that historic meeting, I wrote to the leaders of all of the Federally recognized Tribes, State Governors, State Emergency Management Directors, and national constituency and officials organizations requesting their review and comment on the draft policy. On November 17, 1997, we published the policy in the **Federal Register** for public comment (62 FR 61329). On February 17, 1998, we published another **Federal Register** notice extending the comment period until March 15, 1998 (63 FR 7793). Subsequently, we published an announcement of the Agency's consultation sessions on the draft policy in the **Federal Register** on March 6, 1998 (63 FR 11260).

With the publication today of the final Agency policy, we commit FEMA to the deliberate and thoughtful implementation of this policy. We intend to select not more than five Tribal governments to begin to refine the policy. With the practical experience of working with Tribal governments on emergency management programs, we believe that we can identify and resolve significant programmatic issues, as well as identify any resource and staffing requirements to support this policy. Within one year of the publication of this policy, we shall develop a five-year implementation plan.

The final Federal Emergency Management Agency Policy for government-to-government Relations with American Indian and Alaska Native Tribal Governments follows:

In the face of disasters, the citizens of the United States have historically come together to assist those who have suffered losses. It is in this spirit that the Federal Emergency Management Agency commits itself to building a strong and lasting partnership with American Indians and Alaska Natives to prepare them for the hazards they face, to reduce their disaster vulnerabilities, to respond quickly and compassionately when disasters strike, and to assist them to recover in their aftermath.

Introduction

The Federal Emergency Management Agency recognizes and acknowledges that American Indian and Alaska Native Tribal governments hold a unique status in the United States of America with the rights and benefits of sovereign nations. The Federal Emergency Management Agency has developed this policy to affirm the Agency's understanding, support, and pursuit of a government-to-government relationship with American Indian and Alaska Native Tribal governments.

This policy outlines the guiding principles under which all employees of the Federal Emergency Management Agency are to operate with regard to Federally recognized American Indian and Alaska Native Tribal governments. This policy does not apply to interactions with any other Tribal governments or any other Alaska Native Tribal governments.

The Federal Emergency Management Agency acknowledges the trust relationship between the U.S. government and American Indian and Alaska Native Tribal governments as established by specific statutes, treaties, court decisions, executive orders, regulations, and policies. The Federal Emergency Management Agency further acknowledges the precedents of the Constitution, the President of the United States, and the U.S. Congress as the foundation of this policy's content.

This policy is intended to be flexible and dynamic to provide for the evolution of the partnerships between and among the Federal Emergency Management Agency, Tribal governments, State and local governments, and other Federal agencies. Working within existing statutes and authorities, the Federal Emergency Management Agency will endeavor to be consistent in its dealings with Tribal governments throughout the country.

This policy is consistent with existing law and does not alter or supersede the authorities of the Federal Emergency Management Agency or those of any other Federal departments and agencies. Further, this policy does not diminish or modify existing Tribal government authority in any way, nor does it suggest recognition of Tribal authority that does not currently exist beyond the inherent attributes of sovereign Tribal authority to protect Tribal interests and welfare. The Federal Emergency Management Agency has authority to work with Tribal governments concerning emergency management programs under existing law.

Definitions and Terms

Federal Emergency Management Agency

An independent agency of the U.S. Government established by Reorganization Plan No. 3 of 1978, whose employees are subject to the policies and guiding principles contained herein. Also referred to in this document as ''the Agency.''

Indian Tribe

Means an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

Tribal Government

The recognized governing body of an Indian Tribe, band, nation, pueblo, village, or community, including any Alaska Native Village defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688).

Policy Principles

The following policy principles define the commitment of the Federal Emergency Management Agency and its employees to build a strong and lasting partnership with American Indian and

Alaska Native Tribal governments. These principles will serve to guide and direct the Agency's interactions with American Indian and Alaskan Native Tribal governments.

These principles mirror and reinforce the philosophy embodied in President Clinton's April 29, 1994, Memorandum for the Heads of Executive Departments and Agencies entitled ''Government-to-Government Relations with Native American Tribal Governments''.

The Federal Emergency Management Agency recognizes and commits to a government-to-government relationship with American Indian and Alaska Native Tribal governments.

The Federal Emergency Management Agency recognizes that the Tribal right of self-government flows from the inherent sovereignty of Tribes as nations and that Federally recognized Tribes have a unique and direct relationship with the Federal government.

The Federal Emergency Management Agency will consult, to the extent practicable and to the extent permitted by law, with American Indian and Alaska Native Tribal governments before taking actions that affect Federally recognized Tribal governments to ensure that Tribal rights and concerns are addressed.

The Federal Emergency Management Agency recognizes that, as a sovereign government, each Tribal government has the right to set its own priorities and goals for the welfare of its membership, which include the considerations Tribal governments make to fulfill their responsibilities to their non-Tribal residents, relatives, employees, and neighbors. The Federal Emergency Management Agency will involve Tribal governments in consultations to the extent practicable to seek their input on policies, programs, and issues so that they may evaluate the potential impacts for themselves.

The Federal Emergency Management Agency acknowledges the trust relationship between the Federal Government and American Indian and Alaska Native Tribal governments as established by specific treaties, court decisions, statutes, executive orders, regulations, and policies.

In recognition of this trust responsibility, the Federal Emergency Management Agency will evaluate to the extent possible the impact of policies, programs, and activities on Tribal trust resources and assure that it considers the rights and concerns of Tribal governments in its decision-making.

The Federal Emergency Management Agency will identify and take appropriate steps to the extent practicable to eliminate or diminish procedural impediments to working directly and effectively with Tribal govemments.

The Federal Emergency Management Agency recognizes that there may be legal, procedural, organizational, or other impediments that affect its working relationships with Tribes. To the extent practicable and permitted by law, the Federal Emergency Management Agency will apply the requirements of Executive Order 12875, ''Enhancing the Intergovernmental Partnership,'' and Executive Order 12866, ''Regulatory Planning and Review,'' to design solutions and tailor Agency programs to address specific or unique needs of Tribal governments.

The Federal Emergency Management Agency will work in partnership with other Federal departments and agencies to the extent practicable to enlist their support of cooperative efforts to further the goals of this policy.

The Federal Emergency Management Agency recognizes the importance of interagency communication, coordination, and cooperation to pursue and implement its Tribal policy and to fulfill the Agency's commitment to work with Tribal governments in a government-to-government relationship.

The Federal Emergency Management Agency will encourage cooperation and partnership between and among Federal, Tribal, State, and local governments to resolve issues of mutual concern related to emergency management.

Effective emergency management requires the cooperation, partnership, and mutual consideration of neighboring governments, whether those governments are neighboring Tribal, State, or local governments. Accordingly, the Federal Emergency Management Agency will encourage pursuing partnerships in the interest of emergency management. The Agency's support is not intended to lend Federal support to any one party to the jeopardy of the interests of another. In the field of emergency management, problems are often shared and the principle of partnership between equals and neighbors often serves the best interests of both.

The Federal Emergency Management Agency acknowledges as precedents the policy commitments and decisions of the executive, legislative, and judicial branches of the United States Government.

The Federal Emergency Management Agency's policy for government-to-government relations with American Indian and Alaska Native Tribal governments reinforces and incorporates the commitments contained in various Presidential policies emphasizing that such a government-to-government relationship be pursued. The Agency's policy also recognizes the 1988 U.S. House of Representatives Concurrent Resolution #331, which declares the policy ''To acknowledge the contribution of the Iroquois Confederacy of Nations . . . and to reaffirm the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution.'' Further, this policy acknowledges the importance and precedence of treaties, court decisions, statutes, executive orders, and regulations regarding Tribal policy without extensive citations.

The Federal Emergency Management Agency will use its best efforts to institutionalize this policy within the fundamental tenets of the Agency's mission.

The Federal Emergency Management Agency will fully and effectively incorporate to the extent practicable all of the principles of this policy into the daily activities and operations of Agency employees. This policy is designed to reflect an ongoing and long-term planning and management effort.

As Director of the Federal Emergency Management Agency, I designate the Preparedness, Training and Exercises Directorate to serve as our liaison with American Indian and Alaska Native Tribal governments on policy issues. Further, each of the Agency's ten regional offices has designated an individual as the focal point for the coordination and implementation of this policy.

This policy is subject to periodic review based upon lessons learned in the course of its implementation. Therefore, as Director of the Federal Emergency Management Agency, I am hereby directing all Agency components and staff to implement this policy by incorporating all of the principles above in their activities, policies, and programs.

Dated: September 25, 1998.

James L. Witt,

Director.

[FR Doc. 99–642 Filed 1–11–99; 8:45 am]

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Federal Register

Tuesday
January 12, 1999

Part VII

Federal Emergency Management Agency

Statement of Considerations of Comments Received on Draft Agency Tribal Policy; Notice

FEDERAL EMERGENCY MANAGEMENT AGENCY

Statement of Considerations of Comments Received on Draft Agency Tribal Policy

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice; statement of considerations of comments received.

SUMMARY: As a demonstration of the consultation process undertaken by FEMA in the course of developing its final Policy on Government-to-Government Relations with American Indian and Alaska Native Tribal Governments, this Statement of Considerations allows interested parties to understand the scope and nature of comments received on the draft policy, as well as the Agency's disposition of these comments.

FOR FURTHER INFORMATION CONTACT: Kyle W. Blackman, Federal Emergency Management Agency, 500 C Street SW., Washington, D.C. 20472, (202) 646–2776 (e-mail) *kyle.blackman@fema.gov*.

SUPPLEMENTARY INFORMATION: FEMA pursued comments on its draft policy on American Indian and Alaska Natives through three avenues: direct correspondence, **Federal Register** publications (62 FR 61329, November 17, 1997, and 63 FR 7793, February 17, 1998), and consultation sessions. We received written comments and recommendations from 66 respondents. In addition, more than 100 individuals participated in the nine consultation sessions organized by FEMA. We incorporated the transcripts of the consultation sessions into the official record of the Agency's interactions on this policy and factored comments and recommendations received through these sessions into the final policy and into this statement of considerations. (A full record of the Agency's policy development process is available for review at FEMA's offices in Washington, D.C.).

Comments received from respondents on the draft policy fall into three categories—policy recommendations (including editorial and content issues); implementation issues; and general statements of support or concern regarding the policy. We address comments received through this process in this statement of considerations. We identify respondents and their recommendations and provide the Agency's response to the comments. We will address relevant issues associated with the implementation of this policy that were identified through this process in programmatic guidance and will provide copies of the issues to all interested parties. We also made substantial editorial changes recommended for clarity in the course of this policy review.

Section I of this statement of considerations provides general statements regarding the policy and the actions of FEMA in undertaking this effort. Some statements have been abbreviated without impact on their intent or nature. Within Section II of this document, recurrent issues are summarized and a summarized Agency response appears. In the third and final part, we address detailed comments in a section-by-section analysis of the policy. The sections analyzed correspond to the Sections outlined in the draft policy published twice previously in the **Federal Register**. As the direct result of recommended revisions, the final policy sections do not correspond directly with those identified in this statement of considerations.

I. General Statements About the Policy

(Colorado River Indian Tribes) ''We appreciate the attention that FEMA is giving to the situation. We applaud and reiterate the concerns expressed in your draft policy document.''

(Mni Sose Intertribal Water Rights Coalition, Inc.) ''Mni Sose Intertribal Water Rights Coalition expresses appreciation and commends the Federal Emergency Management Agency for its enlightened view of its relationship with Indian Tribes.''

(National Congress of American Indians) ''NCAI appreciates FEMA's effort and commends the agency for issuing its draft policy to tribal governments for comment. Though the policy is long overdue, we believe that the agency and tribal governments will benefit from a consistent and dedicated collaborative effort, which can result from a formal policy. FEMA has stated that its goal is to create a relationship, which is flexible and dynamic enough to provide for the evolution of partnerships between FEMA and tribal governments. NCA1 applauds such a goal.''

(Mandan, Hidatsa, and Arikara Nation—Three Affiliated Tribes) ''I would like to take this opportunity to thank you on behalf of the Three Affiliated Tribes for providing financial assistance so diligently and expeditiously to our members affected by the winter storms and spring flood of 1997. It was a pleasure to work with a Federal agency that is so efficient and concerned for the well being of people. We look forward to working with you again on any other emergency situations.''

(The Confederated Salish and Kootenai Tribes of the Flathead Nation) ''The Salish and Kootenai Tribes are encouraged with the drafting of the Indian Policy by FEMA.''

(Crow Tribal Council) ''We do appreciate FEMA's efforts to develop a partnership which is intended to be flexible and dynamic.''

(Douglas Indian Association Tribal Government) ''As a Federally Recognized tribe, we appreciate the partnership described in the above document. We also uphold the policy principles.''

(Narragansett Indian Tribe) ''The only comment that I have for the draft FEMA Native American and Alaska Natives Policy is will this policy solidify what the Narragansett Tribe has in place already with FEMA. Other than that, the policy is very straight forward.''

(Prairie Island Indian Community) ''We have long been interested in the development of such a policy that would enable your agency to work with our tribe on a government-to-government basis * * * We look forward to the implementation of the policy.''

(Division of Special Revenue, Department of Revenue Services, State of Connecticut) ''In summary, as long as the FEMA policy is limited to emergency management related issues [that do not conflict with agreements the State has with Tribes] inclusion of interaction with Tribal governments in times of disaster makes sense in coordinating and implementing disaster or emergency preparedness, response and recovery policies.''

(Disaster and Emergency Services Division, Department of Military Affairs, State of Montana) ''MTDES is glad that FEMA is finally addressing this issue formally and we hope to work in partnership with FEMA in furthering the goals of this policy.''

(Bureau of Disaster Services, Military Division, State of Idaho) ''I am extremely interested in what effect this new policy will have on the State of Idaho and its people.''

(Military Division, State of Idaho) ''Both Governor Batt and I will be extremely interested in what effect this new FEMA policy will have on the State of Idaho and its tribes.''

(International City/County Management Association) ''Overall the principles under which all FEMA employees are to operate when working with American Indian and Alaska Native tribal governments are strong and comprehensive.''

(Northern Idaho Agency, Bureau of Indian Affairs, U.S. Department of the

Interior) ''FEMA is to be congratulated for this undertaking as it attempts to fulfill the trust responsibility of the United States and its Agencies to deal with and treat with [sic] the several American Indian Tribal Governments.''

(Eastern Area Office, Bureau of Indian Affairs, U.S. Department of the Interior) ''I would like to commend [FEMA] for their hard work and effort in drafting an Indian Policy Statement which reflects the commitment of the Clinton Administration and FEMA to work with Federally recognized Indian tribes on a government-to-government basis. Congratulations on a job well done.''

(Billings Area Office, Bureau of Indian Affairs, U.S. Department of the Interior) ''We are encouraged to see FEMA acknowledging its fiduciary relationship and recognizing its trust responsibility to the native people. Hopefully, the draft policy will only be the beginning of a long overdue need to address the quandary Indian people are put in when an emergency arises on the reservations.''

(Southern California Agency, Bureau of Indian Affairs, U.S. Department of the Interior) ''We encourage FEMA to continue the commitment of a government to government relationship with Federally recognized Tribal governments.''

(The Mohegan Tribe) ''I have reviewed your [draft policy] and found it to be well thought out and sensitive to the fact the Indian Tribes are governments and should be dealt with as such. The Mohegan Tribe would look forward to working with FEMA pursuant to the terms of the draft policy statement.''

(Gila River Indian Community) ''A strong cooperative relationship with FEMA would allow the Community to have access to technical expertise and assistance, training and other opportunities as we improve our own emergency management organization.''

(Kotlik Traditional Council) ''We believe that this policy would serve to enhance the capability of all governments to prepare for and respond to the realistic hazards we face, and to better protect our community when disaster strikes.''

(Muskogee Area Office, Bureau of Indian Affairs, U.S. Department of the Interior) ''The draft offers the flexibility of meeting the needs of an existing government-to-government relationship between [FEMA] and the tribes.''

(Horton Agency, Bureau of Indian Affairs, U.S. Department of the Interior) ''The information contained in the draft is a good step forward in working with tribes.''

(Office of the Governor, State of New Mexico) ''The attempt by FEMA to recognize the need for improvement in the Federal interagency Tribal partnership through improved planning, communication, coordination and cooperation with respect to emergency management is to be commended.''

(State of Ohio Emergency Management Agency) ''We support your efforts to provide disaster assistance, mitigation activities, preparedness, response and recovery to these Tribal governments.''

(Commonwealth of Pennsylvania Emergency Management Agency) ''It is important that [FEMA] maintains a partnership with many Tribal governments and ensures a working relationship with them that is consistent among all Tribal governments.''

(Commonwealth of Massachusetts Emergency Management Agency) ''I have reviewed the draft American Indian and Alaska Native Policy and Massachusetts concurs with the intent and content of the policy.''

(Office of the Governor, State of Hawaii) ''I commend the efforts to reflect our President's and [FEMA's] commitment to a government to government relationship with Federally recognized tribal governments. Your new proposed policy sets the framework for a spirit of partnership. The end result should be an enhanced capability to prepare for and respond to disasters. In the long run, our communities will be better protected.''

(Office of the Governor, State of Wisconsin) ''On behalf of the Governor, I concur with the draft policy's overall intent. Governor Thompson is pleased that FEMA has included language which recognizes and encourages the importance of partnership between tribal, state, and local governments to resolve issues of mutual concern relating to emergency management.''

(Office of Indian Affairs, Office of the Governor, State of Louisiana) ''The state is pleased with this draft and believes it effectively addresses mutual emergency management concerns among tribes, local governments, the state, and the Federal Government.''

(Department of Community Affairs, State of Florida) ''In the new world of states entering into collaborative ''partnerships'' with FEMA, it is only natural to establish the same working partnerships with Native Americans. This should have a beneficial impact on future disaster recovery operations involving Native Americans, including the Seminole and Miccosukee Tribes of Florida.''

(Office of the Governor, State of Wyoming) ''The spirit of the guidelines and the policy are very consistent with Wyoming's commitment to partnerships and focusing emergency response at the local level.''

(Office of the State Fire Marshal, Department of Public Safety and Corrections, State of Louisiana) ''I concur with Mr. Witt's belief that problems in emergencies and disasters are often shared and the spirit of partnership between equals and neighbors during these times often serves the interest of both.''

(Emergency Management Section, Division of State Police, State of New Jersey) ''This office shares your belief that partnerships between individuals and organizations in preparing for and responding to emergency situations can be beneficial to the interests of the partners. [W]e support the spirit of cooperation and commitment FEMA is bringing to its relationship with Native Americans. We feel this cooperation is essential between all levels of government as we work to develop and maintain the best possible capability to respond in time of emergency.''

(Office of the Governor, State of Alaska) ''The state of Alaska has no objection to adoption of the proposed policy.''

(Office of Emergency Management, Department of Local Affairs, State of Colorado) ''Colorado is supportive of the policy as stated in the draft, and of the nine underlying policy principles.''

(State of Georgia Emergency Management Agency) ''While Georgia does not have any American Indian tribes covered under this policy we believe the policy is equitable and especially appreciate your efforts to include members of tribes, state and local governments in planning efforts and to enlist them as partners in the decision making process.''

(State of California Governor's Office of Emergency Services) ''FEMA has clarified for all native peoples—as well as to the states—that the federal government will make the proper coordination with native peoples a high priority. We support and encourage FEMA's effort to clarify the relationship between Native Americans and the United States government during disasters.''

(U.S. Virgin Islands Territorial Emergency Management Agency) ''I have reviewed the draft document, and have found it to be a satisfactory partnership agreement.''

(Caddo Indian Tribe of Oklahoma) ''I want to congratulate you on your initiative to include American Indians and Alaska Natives in the commenting period on your draft. I also want to

thank you for working with the tribes on a government-to-government basis.''

(Mohegan Tribe) ''We think that the language in the policy respects the government-to-government relationship. And it certainly reflects that each tribe should decide what's best for them. It appears by your language that you understand what [sovereignty] is and what our rights are, and that we should expect that FEMA demonstrate that in how they make policy.''

(The Hopi Tribe) ''I could not agree with you more that a policy such as this will reinforce the importance of partnership between and among all levels of government.''

(Quinault Indian Nation) ''As a self-governance tribe, Quinault in particular appreciates your commitment to dealing with tribes on a government-to-government basis. In return for your commitment, the Quinault Indian Nation pledges to make every effort to establish and promote a cooperative and effective working relationship with FEMA.''

(Pueblo of Zuni) ''We look forward to the incorporation of our recommendations into the policy and to a stronger working relationship with FEMA.''

(Fond Du Lac Reservation) ''Although no one expects an emergency of the kind requiring us to work with FEMA staff, it is essential that should such an emergency arise, the groundwork for swift and immediate action has been established. The draft policy that we have reviewed would establish this groundwork. We have reviewed the comments of the Prairie Island Indian Community, and the National Congress of American Indians * * * and find they have fully covered our concerns.''

II. Issues of Common Interest

Comment: Many respondents expressed concern about the recurring, ambiguous phrases ''where appropriate'' and ''when appropriate'' and recommended alternative language be inserted to reinforce and clarify the intent.

Response: We agree that these statements give the mistaken impression that personal judgments will dictate whether policy principles are honored. In the final policy statement we revised these statements to reflect that these principles will be followed ''to the greatest extent practicable and to the extent permitted by law.'' This language is consistent with that contained within President Clinton's April 29, 1994, Policy Memorandum, ''Government-to-Government Relations With Native American Tribal Governments,'' as well as the congressional policies reflected in Public Law 93–638, Indian self-determination and Education Assistance Act.

Comment: Several respondents recommended for consistency that wherever ''American Indian and Alaska Native governments'' appears in the policy that the statement be revised to ''American Indian and Alaska Native tribal governments.''

Response: We agree. The final policy reflects these recommendations.

Comment: Several respondents recommended that the definitions of Indian Tribe and Tribal government within the policy be as consistent as possible with definitions contained in existing statutes.

Response: We agree. The final policy reflects these recommendations.

Comment: Several respondents wanted to know whether this policy would allow tribal governments to request disaster declarations directly from FEMA, rather than working through the State.

Response: We understand the interest in the implications for this policy on the administration of the Federal disaster assistance programs. However, the policy is consistent with the existing authorities of the Agency. As we noted in the introductory section of the policy, we do not intend the policy to alter or supersede existing laws. Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. 5121 et reg., requests for presidential disaster declarations must come from the Governor of the State. Once a declaration has been made, however, Tribal governments have the flexibility to decide between several options for working with FEMA on the administration of disaster assistance programs.

Comment: Some respondents were concerned about how FEMA would make determinations of who is an American Indian for purposes of providing Individual Assistance during a Presidentially declared major disaster or emergency.

Response: Individuals who are legally within this country, regardless of their age, sex, religion, or race, are eligible to receive Individual Assistance from FEMA if they reside within a jurisdiction where the President has declared a major disaster or emergency and is eligible to receive this program's assistance. This includes American Indians. The Agency's Tribal policy will not have an impact on current procedures for determining eligibility under this program.

Comment: Some respondents asked whether pre-disaster preparedness funding currently provided to States and local governments would be reduced as the result of this policy.

Response: Our policy for American Indians and Alaska Natives affirms the government-to-government policy commitments of the Clinton Administration and other legal precedents. The policy focuses on building partnerships with Tribal governments for the development and maintenance of emergency management programs to address the hazards these governments face. The policy outlines the communications philosophy of the Agency with regard to these sovereign nations, yet acknowledges that these interactions will occur within the existing authorities and resources of the Agency. Therefore, we intend through this policy to strengthen the communication and partnership between and among Federal, State, Tribal, and local governments. We intend to build these relationships in cooperation with State and local governments—and not at their expense. Although additional resources may need to be pursued in the future to implement this policy, we do not intend to reduce funding provided to the States and local governments in order to accomplish this.

Comment: On the issue of FEMA's commitment to a government-to-government relationship, several respondents expressed their concern that Tribal government requests for technical assistance not be subordinated to the will of the State.

Response: As outlined in the policy, we believe that partnership between and among all levels of government is in the interest of disaster mitigation, preparedness, response and recovery. For this reason, we encourage Tribal governments to develop strong working relationships with local and State government entities. We believe that the Agency's State and local partners possess resources and expertise that could be of great value to tribal governments as they undertake emergency management programs.

Comment: Several respondents were interested in broadening the application of this policy to include State-recognized tribes.

Response: We disagree. Our policy is consistent with the Administration's policy and remains only applicable to Federally recognized Tribes.

Comment: Several respondents encouraged that FEMA Tribal liaison position be staffed by an American Indian or Alaska Native.

Response: We are sensitive to this concern and interested in employing staff who are representative of the interests we need to serve. At this time,

however, the Agency Tribal Liaison positions in Headquarters and the Regional Offices are an additional duty for existing employees.

Comment: Several respondents were concerned about the short notice of the consultation sessions on the draft Agency policy and the publication of the **Federal Register** *Notice after two such sessions had occurred.*

Response: FEMA apologizes for the timing of the **Federal Register** notice publication. The Agency wrote to all of the Federally recognized Tribes in advance of the sessions to invite them to attend.

Comments: Several respondents suggested that FEMA present its final policy at the National Congress of American Indians conference this year.

Response: When the policy is final we hope to present and discuss the policy with Tribal government leaders in various forums.

III. Section-By-Section Comments and Recommendations

A. Overall policy

Comment: ''[The President's] memorandum should be highlighted as a central supporting document for this policy.'' (National Congress of American Indians)

Response: We agree and we reorganized the final policy to mirror the form and content of the President's Memorandum for the Heads of Executive Departments and Agencies on ''Government-to-Government Relations With Native American Tribal Governments.''

Comment: ''I would like to take this opportunity to express several concerns regarding the policy as drafted because the policy only addresses federally recognized tribes. If the FEMA policy is adopted, the needs of many state recognized Indian tribes and Indian citizens located in urban and rural communities through the United States will not be addressed.'' (N.C. Commission of Indian Affairs, Department of Administration, State of North Carolina)

Response: We understand the respondent's concerns, but remain firm in our position that the policy must apply only to Federally recognized American Indian and Alaska Native Tribal governments.

Comment: ''The Mni Sose Intertribal Water Rights Coalition recommends that the Federal Emergency Management Agency address the following items as part of its policy to deal with Indian Tribes and Alaska Native Tribes: A. Annual consultation with the Tribes to remain current on tribal preparedness status and tribal needs in emergency response; B. To maintain a more efficient government-to-government relationship that eliminates or reduces administrative barriers during times of emergencies. In past experiences, Tribes have been required to involve the Bureau of Indian Affairs to receive emergency aid and relief; C. To implement plans between the Federal Emergency Management Agency and tribal governments on matters of training and educational preparedness; D. To assist in securing funding on each reservation or on a regional basis for Tribal emergency and disaster preparedness staff; E. Recognition of disaster declarations as made by Tribes and Alaska Native Tribes through tribal government.'' (Mni Sose Intertribal Water Rights Coalition).

Response: We are sensitive to the concerns the coalition expressed and will assess these issues as the policy evolves.

Comment: ''Indian Nations deserve from FEMA, (in accordance with its trust relationship), treatment at least equal to the support FEMA gives to State and local/county governments for emergency management infrastructure, including: funding for emergency management coordinators, program support services, planning, training personnel, communications, equipment and other standard emergency management program needs. The secondary treatment given to Indian Nations, with set aside grants, is far inferior to the standard emergency management support traditionally and currently being offered to State and county governments. Only true government-to-government relationships, similar to State and local relationships, will meet the emergency management needs of the Indian Nations. Then and only then will the FEMA American Indian and Alaska Native Policy be a standard with real meaning, and FEMA will meet its trust relationship goals.'' (The Confederated Salish and Kootenai Tribes of the Flathead Nation)

Response: As with the other respondent's concerns, we understand the issues raised but must adhere to existing legislation, regulations and legal opinions.

Comment: ''[FEMA] must include policies which will provide more meaningful involvement in protecting cultural and archeology sites. Many tribes have historical ties with archeological sites that require consultation prior to any disturbance. The policy must include policies and procedures which promote priority protection for specific sites in situ, and arrangements to assure adequate protection of known sites, from future disturbances.'' (The Confederated Salish and Kootenai Tribes of the Flathead Nation)

Response: We are very sensitive to the concerns expressed by the Tribes and will assess these issues as the policy evolves.

Comment: ''We believe it is necessary to follow up on the Policy with: funding for emergency management infrastructure; training and education among non-Indian/non-Alaskan bureaucracies concerning Indian Law and political rights; and goals and objectives designed to implement the Policy.'' (Disaster and Emergency Services Division, Department of Military Affairs, State of Montana)

Response: We are sensitive to the concerns expressed by the Montana representative and will assess these issues as the policy evolves.

Comment: ''This policy, while meeting all the federal criteria for working with the Tribes and recognizing their government status, has the potential for excluding the state and local jurisdiction emergency managers from the American Indian emergency management programs. This is contrary to the way we respond to disasters. Our current approach is based on neighbors helping neighbors, communities helping each other.'' (Emergency Management Division and Office of Indian Affairs, on behalf of the Office of the Governor, State of Washington)

Response: We believe that cooperation and partnership between and among Federal, State, Tribal, and local governments is essential in emergency management and will emphasize and encourage that relationship. We echo this philosophy in the final policy.

Comment: ''We recommend that the policy be revised to require FEMA to consult with all state and federally recognized tribes during natural disaster relief efforts. Furthermore, we recommend that the FEMA policy be modified to require state governments to enter into formal working agreements with Indian tribes to assure that disaster relief efforts reach Indian communities.'' (N.C. Commission of Indian Affairs, Department of Administration, State of North Carolina)

Response: We will extend consultation only to Federally recognized Tribes. We will also evaluate the need for formal working agreements between States and Indian Tribes on emergency management issues as the policy evolves.

Comment: ''Mutual aid assistance agreements between local Federal

agencies (BIA, FEMA, and Tribes) need to be in place. These agreements should also include the state and county emergency management agencies.'' (Wind River Agency, Bureau of Indian Affairs, U.S. Department of the Interior)

Response: We agree that mutual aid is important in response to disasters but view this comment as an implementation issue.

Comment: ''After Tribal representatives attended a meeting hosted by FEMA, our optimism was diminished. It became clear that the proposed policy would not establish a true government to-government relationship. In answer to questions and concerns raised by participants, FEMA representatives admitted that, in fact, implementation of the policy would result in no real change. It would do very little to improve Indian Nation access to emergency assistance or to improve working relationships between Indian Tribes and FEMA.'' (Gila River Indian Community)

Response: This final policy does represent a commitment by the Agency to a government-to-government relationship with American Indian and Alaska Native Tribal governments, to the extent legally feasible.

Comment: ''[The policy] talks about the interaction between governments and tribal governments, or whatever, but there's no real details on what is actually going to happen, it's just a—it's kind of vague.'' (Mashantucket Pequot Tribal Nation)

Response: We understand the respondent's comment and we commit to the development of materials explaining the nature of specific program relationships with Tribal governments as part of the implementation of this policy.

Comment: Add the following: ''All entities residing on, traveling through, or doing business on Indian Lands are hereby put on notice and this information will be sent to the appropriate groups that Indian Lands are not public lands and that the various Indian Nations by virtue of the long standing relationships that have been established among the various Indian Nations and the Federal government interstate commerce that any ingress and egress on Indian Lands even on public highways, railroad lines, air transportation routes, etc. will recognize the sovereign right of the various Indian Nations to regulate and or restrict the use of, and or transportation of hazardous materials and or substances across Indian Lands which could seriously jeopardize the safety and welfare of Native Peoples and others residing throughout the various Indian reservations in Indian country legally termed 'Indian Lands.' This is done in conformance with and in accordance with and in support of previous Federal EPA Laws and regulations which supports and emphasizes Indian rights' to regulate environmental activities and transportation of hazardous substances across and on Indian Lands.'' (Crow Tribal Council)

Response: We believe this comment by the Crow Tribal Council is outside the purview of the policy and we have elected not to include this statement in the final policy.

B. Introduction Section

Comment: ''Although the preamble to this policy mentions people coming together in times of disaster, it is important to note that Indian tribes are not just interested in disaster recovery assistance, but also assistance in preparing for, planning for, and training for disasters.'' (Prairie Island Indian Community)

Response: We agree and have revised the preamble to reflect the full range of tile Agency's interests and mission.

Comment: ''Although some very good principles are cited, they could be stronger and more specific, possibly referring to some of the policy items which should be cited later in the document.'' (National Congress of American Indians)

Response: We agree. We revised the Introduction to include the policy principles.

Comment: ''The American Indian and Alaska Native tribal governments hold a unique status in the United States with the rights and benefits of [recommend language be inserted:] domestic dependent nations, with governmental authority over both their members and their territory.'' (Douglas Indian Association Tribal Government)

Response: Although we elected to retain the original language, we believe that other modifications in the introductory section of the final policy address the Association's issue.

Comment: ''This policy pertains to Federally recognized tribes and provides guidance to employees of the Federal Emergency Management Agency for issues affecting American Indians and Alaska Natives, [recommend language be inserted:] who are members of Federally recognized tribes. Strike next sentence.'' (Douglas Indian Association Tribal Government)

Response: We changed this sentence to be consistent with the scope of the policy document, which is to address the Agency's relationship with American Indian and Alaska Native Tribal governments rather than to focus on individual Tribal members. We believe it is important to emphasize that this policy does not extend to State-recognized Tribes, and therefore we are retaining this statement in the final policy.

Comment: ''Within the Introduction, a sentence in the fourth paragraph regarding working relationships between FEMA and Tribal governments contains the statement, ''they will vary according to the legal basis and management requirements for each relationship.'' We have no idea what is meant by that statement. If FEMA intends to work with federally recognized tribes on a government-to-government basis, there is no need to vary that basis and therefore the statement should be removed from the sentence.'' (Prairie Island Indian Community) and *''With regard to working relationships with tribal governments, FEMA states in the Introduction that those relationships ''will vary according to the legal basis and management requirements for each relationship.'' This statement needs to be clarified since all federally recognized tribes should be treated equally, while keeping in mind the unique needs of each government.'' (National Congress of American Indians)*

Response: (To both comments) We agree with the concerns. We deleted the original sentence and developed a statement that indicates the Agency's desire for consistent relationships with Tribal governments within the existing authorities and resources of the Agency.

*Comment: ''This policy is adopted [recommend language insert:] to support tribal self-government pursuant to and consistent with existing law and does not pre-empt or modify * * * [recommend language insert:] This policy does not diminish or modify existing tribal government authority in any way. The Federal Emergency Management Agency has the authority to work with tribal governments concerning emergency management programs under existing law.'' (Douglas Indian Association Tribal Government)*

Response: We modified this language in the final policy in response to this comment.

Comment: ''Currently, there exists in the courts, when interpreting Indian Treaties, canons of constructions. The canons of construction provide the courts with a way to interpret Treaties and statutes which provide some certainty in the interpretations. I would recommend that FEMA adopt these canons of construction be used as guidelines for the Agency. By adoption of the canons of construction adopted

by the courts in the FEMA policy no rights will be granted or waived. The cases which developed the canons include the following: Choctaw Nation v. *United States, 318 U.S. 423,431–432 (1943); Choate* v. *Trapp, 224 U.S. 665,675 (1912); United States* v. *Walker River Irrigation District, 104 F. 2d 334, 337 (9th Cir. 1939); McClanahan* v. *Arizona State Tax Commission, 411 U.S. 164, 174 (1973); Carpenter* v. *Shaw, 280 U.S. 363,367 (1930); Winters* v. *United States, 207 U.S. 564, 576–77 (1908); Choctaw Nation* v. *United States, 397 U.S. 620, 631 (1970); United States* v. *Shoshone Tribe, 304 U.S. 111, 116 (1938); Jones* v. *Meehan, 175 U.S. 1, 11 (1899); Worcester* v. *Georgia, 31 U.S. (6 Pet.) 515, 551–54, 582 (1832).'' (Northern Idaho Agency, Bureau of Indian Affairs, U.S. Department of the Interior)* and *''These are very positive comments, yet, such an important policy statement merits further explanation and supporting law. From the earliest days of this republic, the United States has recognized the unique sovereign status of Indian tribes (Cherokee Nation* v. *Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The Constitution recognizes tribal sovereignty by classifying Indian treaties among the supreme Law of the land'' (Article VI, U.S. Constitution) * * * The citing and inclusion of specific supporting legal principles, such as those cited above, would clarify and emphasize FEMA's fiduciary role in the government-to-government relationship with American Indian and Alaska Native governments.'' (National Congress of American Indians)*

Response: (To both comments) We elected not to include these specific citations in the Agency's final policy. We chose instead to acknowledge generally the body of legal precedents that exist to govern the Federal government's relationship with Tribal governments.

*Comment: ''We prefer wording that acknowledges the authority of the Ho-Chunk Nation to govern and administer its own affairs * * * Nor does the policy suggest recognition of tribal authority that does not currently exist beyond the inherent attributes of sovereign tribal authority (and/or any Federal law authority) which permit the exercise of power to protect Tribal interests and advance the general welfare.'' (Ho-Chunk Nation Legislature)*

Response: We agree with the intent of the proposed language. The final policy reflects this recommendation.

Comment: ''Add language pertaining to the cultural differences and sensitivities of American Indian and Alaska Native tribal governments in reference to the interconnectedness of tribal communities, their customs and religions, and how they view their environment, natural hazards, and tribal lands.'' (International City/County Management Association)

Response: We included language in the final policy that is consistent with statements in the President's policy and addresses the issues that the Association raised.

Comment: ''I would also recommend a statement which would repudiate past practices of the Agency, if any, which would run counter to the spirit of this policy.'' (Northern Idaho Agency, Bureau of Indian Affairs, U.S. Department of the Interior)

Response: None.

C. Definition Section

Comment: ''These definitions are consistent with current policy documents, federal programs, and congressional legislation. Broader definitions are found in other federal initiatives, such as those federal programs which provide services to State recognized tribes; however, FEMA has restricted this policy to federally recognized tribes.'' (National Congress of American Indians)

Response: None.

Comment: ''Add language explicitly referring to various forms of local government including cities, counties, regional council of governments, townships, [and] special districts.'' (International City/County Management Association)

Response: We have incorporated this recommendation in the final policy.

*Comment: ''Something that is under your definitions * * * We deal with the Bureau of Indian Affairs and Indian Health Services. We have a category * * * which is programs, functions, services, activities and other relationships * * * trying to get consistent terms throughout the government.'' (United South and Eastern Tribes)*

Response: We agree. We incorporated this language in the definition of ''Indian Tribe'' in the final policy.

D. Principle on Government-to-Government Relations

*Comment: ''The Ho-Chunk Nation actively exercises its rights in this regard while at the same time keeping in mind the effect that such exercise has upon its non-tribal residents, relatives, employees, and its neighbors. We propose * * * The Federal Emergency Management Agency further recognizes that each tribal government has the right to set its own priorities and goals for the welfare of its membership, which includes the considerations tribal governments make to fulfill their responsibilities to their non-tribal residents, relatives, employees, and neighbors, and that the Federal Emergency Management Agency will deal with each tribal government, when appropriate as determined by FEMA, to meet that tribe's needs.'' (Ho-Chunk Nation Legislature)*

Response: We agree with much of the recommended language. We made changes in the final policy, remaining mindful of other respondents, concerns about the ''when appropriate'' phrase.

E. Principle on Acknowledging Policy Precedents

Comment: ''FEMA could improve this statement by referring directly to the April 29, 1994 Memorandum which reaffirmed the United States' 'unique legal relationship with Native American tribal governments', directing all executive departments and agencies of the Federal Government that: 'As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.' '' (National Congress of American Indians)

Response: We agree. We revised the policy to reflect these recommendations.

Comment: ''Add the word ''and'' following Iroquois Confederacy of Nations.'' (St. Regis Mohawk Tribe)

Response: We agree and made the change.

F. Principle Acknowledging the Trust Relationship

Comment: ''The State of Connecticut would be concerned that issues which might affect areas addressed in the Tribal-State Compacts with the Mashantucket Pequot and Mohegan Tribes may not be considered prior to implementing policies that not only affect the Tribal governments but may also have an impact on the State of Connecticut. Consultatiou with the State of Connecticut should be provided for within the draft policy should areas affecting the State's relationship with the Tribe be impacted.'' (Division of Special Revenue, Department of Revenue Services, State of Connecticut)

Response: We understand the State's concerns but believe that the consultation we undertake with States is clearly articulated in other Agency policies and regulations and we elected not to modify the final policy.

Comment: Insert following ''trust responsibility'', ''for American Indian

and Alaska Native tribes.'' (St. Regis Mohawk Tribe)

Response: We agree and we changed the language in the final policy.

G. Principle on Consultation with Tribal Governments

*Comment: ''The Ho-Chunk Nation recognizes the rights of a large number of people in addition to its membership. We take into account the effects of Tribal action when such exercise of Tribal authority results in direct and indirect consequences on our non-tribal residents, relatives, employees, and neighbors. We propose * * * The Federal Emergency Management Agency recognizes that, as a sovereign government, the tribe is responsible for the welfare and rights of its membership and also has responsibilities that extend to its non-tribal residents, relatives, employees, and neighbors.'' (Ho-Chunk Nation Legislature)*

Comment: Reword as follows: ''The Federal Emergency Management Agency recognizes that, as sovereign governments, American Indian tribes and Alaska Native governments are responsible for the welfare and rights of their membership.'' (St. Regis Mohawk Tribe)

Response: We agreed that the policy language needed to be revised. The final policy includes these recommendations.

Comment: ''The State should seek a clear understanding of whether or not the entire draft policy is limited to emergency management issues.'' (Division of Special Revenue, Department of Revenue Services, State of Connecticut)

Response: We want to reassure the Department of Revenue Services that this policy only applies to the interactions of the Agency with American Indian and Alaska Native Tribal governments on emergency management programs.

H. Principle on Partnership Among All Levels of Government

Comment: ''We believe such statement sets forth a very laudable goal; cooperation and coordination is a principle which should be supported, and can be attained, once tribes have access to an equal playing field.'' (National Congress of American Indians)

Response: We agree and believe that this is policy is an important first step.

*Comment: ''While we fully support this Policy Principle, FEMA must proceed very cautiously. FEMA must always consult with the involved Tribe first. That is, FEMA must not assume that the tribe would want to work with the State or local governments * * * If a tribe requests a meeting with FEMA or assistance from FEMA it is expected that just FEMA will be involved, unless the Tribe specifically includes other parties.'' (Prairie Island Indian Community)*

Response: We understand the concerns expressed by the community and will be sensitive to these issues.

Comment: Add this sentence at the end of the first paragraph: ''Respecting the government-to-government relationship and acknowledging that in some instances it will not be possible to get a full measure of cooperation FEMA is committed to providing the full spectrum of emergency services to Tribes.'' (Mandan, Hidatsa, and Arikara Nation—Three Affiliated Tribes)

Response: We believe that our stated commitment to a government-to-government relationship suffices, and that the purpose of this principle is to reflect our desire for partnership and cooperation.

Comment: ''Are there provisions in any of the regulations or even the Stafford Act to stop funding to States, especially in the State of Arizona where they're discriminating against the Tribe, so FEMA at that point could stop funding to the emergency services office?'' (Southern Ute Agency, Bureau of Indian Affairs, U.S. Department of the Interior)

Response: We also are concerned about this issue and will explore the underlying concern for cooperation between and among governments.

Comment: ''Delete both occurrences of 'or Indian nations', and 'and Indian Nations.' (St. Regis Mohawk Tribe)

Response: We agree. We made the change in the final policy.

Comment: ''So when you develop these partnership, you need to recognize that this partnership needs to be truly equal and not just for appearance.'' (Passamaquoddy Tribe)

Response: We acknowledge this comment.

I. Principle on Diminishing Impediments

Comment: ''Would State laws or compact provisions be affected under this provision?'' (Division of Special Revenue, Department of Revenue Services, State of Connecticut)

Response: We do not intend that this policy affect existing State laws or compact provisions. The final policy incorporates language to address this concern.

Comment: [With regard to Executive Order 12875, entitled 'Enhancing Intergovernmental Partnership, and incorporated by reference in this policy principle, the Executive Order states the intent to] '' * * increase the availability of waivers to State, local, and tribal governments; and to establish regular and meaningful consultation and collaboration with State, local, and tribal governments * * * Would this apply to funds available to remap the FEMA rate maps (zones) for the NFIP so people can purchase flood insurance?'' (Colorado River Indian Tribes)*

Response: This is certainly an issue that we need to explore further.

Comment: ''It has been our experience that most of the impediments exist at the Regional level.'' (Prairie Island Indian Community)

Response: All FEMA employees will be familiar with the commitments outlined in the Agency policy.

J. Principle on Working with Other Federal Agencies

Comment: ''There are some overlapping sister agencies with existing programs which can assist FEMA in the responsibilities of implementing tribal emergency preparedness programs by providing emergency response training, exercises, and planning. These programs should be identified by FEMA and the agencies contacted by FEMA to provide assistance.'' (National Congress of American Indians)

Response: We agree. To the extent possible we will work closely with other Federal agencies and departments to identify program areas of mutual interest.

Comment: ''We also encourage FEMA to work with other federal departments to resolve the shortcomings related to flood plain delineation. We have concluded that at the border of a reservation existing delineations stop. Without flood plain delineation, building continues in areas that could be flooded out.'' (Billings Area Office, Bureau of Indian Affairs, U.S. Department of the Interior)

Response: We acknowledge the concerns related to development in flood hazard areas.

Comment: ''Presently, the BIA is perceived as responsible for providing assistance to the tribes during urgent situations but uses annual operating funds to provide that assistance. These situations deprive the intended use of those funds from occurring. The Federal government should consider setting up a disaster fund so that money could be made available for disaster preparedness, response, and recovery.'' (Wind River Agency, Bureau of Indian Affairs, U.S. Department of the Interior)

Response: The Stafford Act is the nation's program for Presidentially authorized disaster assistance with one

Disaster Relief Fund. We will work with BIA on this issue.

K. Principle on Internalizing this Policy

*Comment: ''With regard to FEMA's identification of a liaison for Tribal governments], the office or individual selected must be familiar with all elements of FEMA * * * all aspects of emergency management—hazard mitigation, planning, preparedness, recovery, training, exercises, the REP program, and financial.'' (Prairie Island Indian Community)* and *''The Ho-Chunk Nation feels that effective coordination is best realized when policy oversight is charged to the Agency that implements policy. Communication between FEMA and the various Tribes will flow more freely if the office or individual coordinating this policy is within FEMA and has access to the operations of the Agency.'' (Ho-Chunk Nation Legislature)*

Response: (To both comments) FEMA Director Witt asked each of the Agency's ten Regional Directors to appoint a Tribal point of contact to serve as liaison to Tribal governments and to pursue the implementation of this policy. Within the Headquarters, Director Witt charged the Preparedness, Training and Exercises Directorate with coordinating national level liaison and policy implementation efforts. All Agency points of contact are well versed in the scope of FEMA's programs.

Comment: ''I would also recommend that the FEMA pursue an aggressive education and training effort for its employees to raise the level of awareness and understanding of the political relationship between the Tribes and the United States . . . The education which too often occurs in on-the-job training when Agency personnel are faced with an issue requiring immediate attention. This method is ineffective and inefficient.'' (Northern Idaho Agency, Bureau of Indian Affairs, U.S. Department of the Interior)

Response: We agree that additional employee training may be helpful.

Comment: ''FEMA may want to consider developing a protocol for working with tribal officials. Other agencies, such as the Environmental Protection Agency have developed protocols for responding to letters from tribal officials (no more than ten days to respond), visits to the reservation (appropriate program people must be notified), and visits to the regional office (the regional administrator is always available to meet with a tribal chairperson.'' (Prairie Island Indian Community)

Response: We appreciate these recommendations and promise to explore these suggestions.

L. Principle on the Effective Date of the Policy

Comment: Several respondents suggested that FEMA include tribal representatives on the Agency's working group and/or develop an advisory group of some sort that included tribal members.

Response: We appreciate this recommendation. Consistent with our commitment to consultation on issues that impact Tribal governments, we will pursue all avenues for input and comment on policy development and implementation efforts.

Comment: ''Confederated Salish and Kootenai Tribes would like to see in place a plan of action on how a meaningful Indian Policy would be implemented should the policy become reality.'' (The Confederated Salish and Kootenai Tribes of the Flathead Nation)

Response: We will work to develop a long-term plan within a reasonable amount of time after we make this policy final.

Comment: ''I would further recommend development of an internal mechanism which would allow for the policy to find its way into the infrastructure of the Agency by rule and regulation and still provide the flexibility required for offices and staff to refine the policy to meet local and regional needs.'' (Northern Idaho Agency, Bureau of Indian Affairs, U.S. Department of the Interior).

Response: We agree and believe the process we used to make this policy final meets the need that the Northern Idaho Agency (NIA) identified. The final policy does not include specific discussion of the range of FEMA programs to allow precisely the flexibility that the NIA recommends.

Comment: ''As this policy is implemented, the Federal Emergency Management Agency will consider tribal requests for any amendments or revisions necessary to support tribal self-government consistent with the President's Memorandum on Government-to-Government Relations with Native American Tribal Governments.'' (Douglas Indian Association Tribal Government) and *''I would suggest the policy be reviewed on an annual basis to measure the success of its implementation.'' (Northern Idaho Agency, Bureau of Indian Affairs, U.S. Department of the Interior)*

Response: (To both comments) We agree that the periodic review of this policy will assure it flexibility to meet the needs of American Indian and Alaska Native Tribal governments. We included a statement to this effect in the final policy.

Dated: September 25, 1998.

James L.Witt,

Director.

[FR Doc. 99–643 Filed 1–11–99; 8:45 am]

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Federal Register

Tuesday
January 12, 1999

Part VIII

Department of Education

Magnet Schools Assistance—Innovative Programs; Notice

DEPARTMENT OF EDUCATION

[CFDA No.: 84.165B]

Magnet Schools Assistance—Innovative Programs

AGENCY: Department of Education.

ACTION: Notice inviting applications for new awards for fiscal year (FY) 1999.

Purpose of Programs: To award grants to local educational agencies (LEAs) or consortia of LEAs to enable them to conduct innovative programs that will assist in the desegregation of schools served by the LEA or LEAs.

Eligible Applicants: An LEA or consortium of LEAs that (1) is implementing a plan undertaken pursuant to a final order issued by a court of the United States, a court of any State, or any other State agency or official of competent jurisdiction that requires the desegregation of minority-group segregated children or faculty in elementary and secondary schools of that agency; or (2) has voluntarily adopted and is implementing, or, if assistance is made available under the Innovative Programs section of the Magnet Schools Assistance (MSA) statute, will voluntarily implement the plan that has been approved by the Secretary of Education as adequate under Title VI of the Civil Rights Act of 1964.

Deadline Date for Transmittal of Applications: February 26, 1999.

Deadline Date for Intergovernmental Review: April 28, 1999.

Applications Available: January 12, 1998.

Available Funds: $5,100,000.

Estimated Range of Awards: $250,000–$500,000.

Estimated Average Size of Awards: $360,000.

Estimated Number of Awards: 14.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 75, 77, 79, 80, 81, 82, 85, and 86.

Priority

While applicants may propose any project within the scope of section 5111 of the (MSA) statute, pursuant to 34 CFR 75.105(c)(1) the Secretary is particularly interested in applications that meet one or more of the following invitational priorities. However, an application that meets one or more of the invitational priorities does not receive competitive or absolute preference over other applications.

Invitational Priority 1

Elementary school projects that foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of the students' education, through the use of strategies such as work-site schools, interdistrict programs, partnerships with community-based organizations, or other strategies (other than magnet schools).

Invitational Priority 2

Secondary school projects that ensure that all students have equitable access to quality education that will prepare them to function well in a culturally diverse, technologically oriented and highly competitive global community, through the use of strategies such as interdistrict programs, partnerships with businesses, institutions of higher education or community-based organizations, innovative urban secondary school programs, or other strategies (other than magnet schools).

General Requirements

Innovative Programs are authorized under the MSA statute. However, while these programs must carry out the purpose of the MSA statute, (*e.g.*, assist in the reduction, elimination or prevention of minority group isolation), Innovative Programs must involve strategies other than magnet schools, such as neighborhood or community model schools. In addition, they must be organized around a special emphasis, theme, or concept and involve extensive parent and community involvement.

In order to be eligible for an Innovative Programs grant, an LEA or consortium of LEAs must be implementing a required desegregation plan or have adopted and implemented (or agreed to implement if assistance is made available under the MSA statute) a voluntary desegregation plan. In addition to the particular data and other items for required and voluntary plans, described separately in the information that follows, an application must include:

Signed assurances (included in the application package);

A copy of the applicant's plan; and

An assurance that the plan is being implemented or will be implemented if the application is funded.

Required Plans

1. Plans Required by a Court Order:

An applicant that submits a plan required by a court must submit complete and signed copies of the plan.

2. Plans Required by a State Agency or Official of Competent Jurisdiction:

An applicant submitting a plan ordered by a State agency or official of competent jurisdiction must provide documentation that shows that the plan was ordered based upon a determination that State law was violated. In the absence of this documentation, the applicant should consider its plan to be a voluntary plan and submit the data and information necessary for voluntary plans.

3. Title VI Required Plans:

An applicant that submits a plan required by the Office of Civil Rights under Title VI must submit a complete copy of the plan.

Voluntary Plans

A voluntary plan must be approved each time an application is submitted for funding. Even if ED has approved a voluntary plan in an LEA in the past, the plan must be resubmitted to ED for approval as part of the application.

An applicant submitting a voluntary plan must include in its application a copy of a school board resolution or other evidence of final official action adopting and implementing the plan, or agreeing to adopt and implement the plan upon the award of assistance.

Narrow Tailoring

The purposes of the Magnet Schools Assistance Program include the reduction, elimination or prevention of minority group isolation. In many instances, in order to carry out these purposes, districts take race into account in assigning students to schools. In order to meet the requirements of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the United States Constitution, applicants submitting voluntary plans that involve the use of race in decision making must ensure that the use of race satisfies strict scrutiny. That is, the use of race must be narrowly tailored to achieve the compelling interest in reducing, eliminating, or preventing minority group isolation.

In order for the Department to make a determination that a voluntary plan involving a racial classification is adequate under Title VI the plan must be narrowly tailored. Among the considerations that affect a determination of whether the use of race in a voluntary plan is narrowly tailored are (1) whether the district tried or seriously considered race-neutral alternatives and determined that the measures have not been or would not be similarly effective, before resorting to race-conscious action; (2) the scope and flexibility of the use of race, including

whether it is subject to a waiver; (3) the manner in which race is used, that is, whether race determines eligibility for a program or whether race is just one factor in the decision making process; (4) the duration of the use of race and whether it is subject to periodic review; and (5) the degree and type of burden imposed on students of other races.

Each of the considerations set out above should be specifically considered in framing a district's strategy. Some examples follow, although it must be recognized that the legal standards in this area are developing.

Race-neutral

Before resorting to race-conscious action, school districts must try or seriously consider race-neutral alternatives and determine that they have not been or would not be similarly effective. For example, it may be possible to broaden the appeal of a given school by aggressively publicizing it, making application to it as easy as possible, and broadening the geographic area from which the school is intended to draw.

Use of Racial Criteria in Admissions

It may be permissible to establish a procedure whereby race is taken into account in admissions only if race-neutral steps are considered and a determination is made that they would not prove similarly effective. Racial caps are the most difficult use of race to justify under a narrow tailoring analysis.

The decision to consider race in admission decisions should be made on a school-by-school basis.

Scope and Flexibility

Over time, the enrollment at a school may become stable and the school may attract a diverse group of students. At this point, use of race as a factor in admissions may no longer be necessary.

In some instances, exceptions to the use of race in admissions—where a relatively small number of students are adversely affected and their admission will not substantially affect the racial composition of the program—should be available.

Duration of the Program and Reexamination of the Use of Criteria

The school or school district should formally review the steps it has taken which involve the use of race on a regular basis, such as on an annual basis, to determine whether the use of race is still needed, or should be modified.

Effect on Students of Other Races

Where there are a number of schools involved in the voluntary plan, it may also be possible to assign students to a comparable school, if they are unable to gain admission to their first preference.

Innovative Programs are exempt from certain provisions of the MSA statute, including section 5103 (Program Authorized), section 5106 (Applications and Requirements), section 5107 (Priority), and section 5108 (Use of Funds). Other MSA statute requirements apply to applications submitted under Innovative Programs. For example, under section 5109, grants may not be used for transportation or any activity that does not augment academic improvement and under section 5110, a grantee may not expend more than 50 percent of the funds received for the first year of the project for planning, not more than 15 percent of grant funds for the second year, and not more than 10 percent of the grant funds for the third year.

Selection Criteria:

The selection criteria are included in full in the application package for this competition. These selection criteria were established based on the regulations for evaluating discretionary grants found in 34 CFR 75.200 through 75.210.

FOR APPLICATIONS OR INFORMATION CONTACT: Steven L. Brockhouse, U.S. Department of Education, 400 Maryland Avenue, SW, Room 3E112, Washington, DC 20202–6140. Telephone (202) 260–2476. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

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Individuals with disabilities may obtain a copy of the application package in an alternate format, also, by contacting that person. However, the Department is not able to reproduce in an alternate format the standard forms included in the application package.

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Note: The official version of this document is the document published in the **Federal Register**.

Program Authority: 20 U.S.C.7211.

Dated: January 7, 1999.

Gerald N. Tirozzi,

Assistant Secretary, Elementary and Secondary Education.

[FR Doc. 99–662 Filed 1–11–99; 8:45 am]

BILLING CODE 4000–01–P

federal register

Tuesday
January 12, 1999

Part IX

United States Information Agency

Notice of Conference for Bidders on Fulbright Senior Scholar Program

UNITED STATES INFORMATION AGENCY

Notice of Conference for Bidders on Fulbright Senior Scholar Program

Editorial Note: This document was received at the Office of the Federal Register on December 30, 1998, and due to an administrative error was not published on the regular schedule.

SUMMARY: The United States Information Agency announces a conference for bidders on the RFP for administration of the Fulbright Senior Scholar Program. The bidders conference will take place on Tuesday, January 12, 1999, at 2:00 p.m. at 301 4th St. SW, Washington, D.C., room 231.

SUPPLEMENTARY INFORMATION: Proposals received in response to this RFP will undergo review by advisory external consultants as well as by representatives of overseas bilateral Fulbright Commissions and a USIA officer representing the Sub-Saharan Area. Applicants will have the opportunity to meet with the advisory external consultants during the review process.

The Fulbright Senior Scholars Program was announced in the **Federal Register** on October 22, 1998 (63 FR 56698).

Dated: December 29, 1998.

Judith Siegel,

Deputy Associate Director for Educational and Cultural Affairs.

[FR Doc. 99–146 Filed 1–11–99; 11:35 am]

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